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; and LARRY HARMON

Plaintiffs-Appellants

v.

JON HUSTED, Secretary of State of Ohio

Defendant-Appellee

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

REPLY OF APPELLANTS OHIO A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON

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INTRODUCTION

In violation of the National Voter Registration Act of 1993 ("NVRA"), Ohio's Supplemental Process has arbitrarily removed countless eligible voters from the state's voter rolls—violating their fundamental right to vote and undermining participation in the democratic process—merely because they have not voted with what Secretary of State Jon Husted (the "Secretary") considers sufficient frequency. Appellant Larry Harmon is one such voter. In 2015, when he went to the polls to exercise his right to vote, Mr. Harmon learned for the first time that, because he had sat out several recent elections, he was no longer on the rolls and would not be able to cast a ballot. The frustration Mr. Harmon experienced at being deprived of the opportunity to vote was shared that day—and again in the March 2016 Presidential Primary Election—by many other infrequent but eligible Ohio voters who had not changed residence but were nevertheless turned away from the polls or forced to cast meaningless provisional ballots.

In defense of this wholesale disenfranchisement of Ohio voters, the Secretary offers a tortured reading of the NVRA that renders several of its central provisions superfluous, including the prohibition on removing voters from the voter rolls for failure to vote found in Section 8(b). States may remove voters only when they have become ineligible for one of the reasons specifically enumerated in the NVRA. Contrary to the Secretary's argument, failure to vote is not among

those reasons because a voter does not become ineligible by reason of failing to vote. When Section 8 is construed holistically so as to give effect to all of its provisions it is clear that failure to vote can only be used to confirm reliable and independent evidence that a voter has changed residence. The Supplemental Process targets voters for removal not based on such reliable evidence but solely based on the voter's failure to vote. The Supplemental Process violates the NVRA and results in the unlawful removal of countless eligible Ohioans from the state's voter rolls.

As did the District Court, the Secretary fails to engage with the overwhelming evidence that the Supplemental Process is disenfranchising eligible Ohioans and requiring them to needlessly and repeatedly re-register. Instead, he attempts to divert attention from the widespread disenfranchisement that will occur this November by asserting that no voters will be "removed from the registration list in 2016." Appellee Br. PAGE#29. But this irrelevant fact ignores the harsh reality: there are hundreds of thousands of voters who were removed in 2015—and countless more who were removed in prior years—substantial numbers of whom will return to the polls this November only to find that they are unable to participate in the electoral process. Without intervention by this Court, these Ohioans and the many thousands more who will be purged in coming years, will be

deprived of their right to vote simply because they have not voted in every election.

ARGUMENT

The NVRA was enacted to "increase the number of eligible citizens who register to vote" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). The Secretary erroneously contends that these two statutory purposes are in conflict. Appellee Br. PAGE#33-34. The only conflict is one of the Secretary's own making: By adopting a roll-maintenance procedure that inevitably (and unlawfully) leads to the removal of numerous eligible voters, the Secretary has guaranteed that the number of eligible voters in the state will decrease (as indeed it has since 2008). *See* EAC Report, RE38-9, PageID#936. When the NVRA is implemented in accordance with its terms, these statutory purposes are complementary. Increasing the number of eligible voters who are registered and can participate in the electoral process enhances the integrity of elections. Ensuring that voter rolls are accurate and current requires keeping eligible registered voters on the rolls as well as removing ineligible voters. The list-maintenance provisions of Section 8 of the NVRA, including the prohibition on removing voters for failure to vote, are designed to accomplish these complementary purposes.

I. THE SUPPLEMENTAL PROCESS VIOLATES THE NVRA.

Section 8 of the NVRA permits states to remove voters from the voter rolls if and only if (i) the voter so requests or (ii) the voter has become ineligible by reason of (a) criminal conviction; (b) mental incompetence; (c) death; or (d) change of residence. 52 U.S.C. § 20507(a)(3)–(4). **Notably, failure to vote is not among the permissible reasons for which a state may cancel a voter's registration.**

The Secretary proffers a construction of Section 8 that permits states to remove voters for any reason at all—or even for no reason—merely by mailing the voter a notice that will lead to cancellation if the voter does not respond or vote during the next two federal election cycles. *See* Appellee Br. PAGE#51 ("States *do* have [limitless] discretion" to "decide to whom it [*sic*] mails confirmation cards." (emphasis added)). As explained below, this interpretation of Section 8 is utterly inconsistent with the NVRA's text as well as its purposes.

A. The Secretary's Construction of Section 8 Fails to Give Effect to Many of the Statute's Provisions.

The construction of Section 8 put forth by the Secretary renders many of the section's provisions superfluous. Section 8(b)(2) of the NVRA provides that any state program adopted to identify and remove voters who have changed residence "shall not result in the removal of [any registered voter] 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 list of eligible voters." 52 U.S.C. § 20507(b)(2). Subsection (c) establishes a safe-harbor for voter removal programs that use information provided by the U.S. Postal Service's National Change of Address ("NCOA") system to identify voters who may have moved. *Id.* § 20507(c)(1). Subsection (d) prohibits removals based on information showing a voter may have changed their address unless that address change is first confirmed by sending the voter a notice and then waiting for the voter to respond or fail to vote in the next two federal election cycles. *Id.* § 20507(d). The Secretary reads Section 8(b)(2) as merely prohibiting the removal of voters who fail to vote without first providing notice and waiting the required two federal election cycles. Appellee Br. PAGE#36. In other words, the Secretary reads Section 8(b)(2) as prohibiting exactly the same thing that Section 8(d) prohibits. *Compare* Appellee Br. PAGE#36 (Section 8(b)(2) permits states to remove a voter from the rolls "if the registrant both fails to respond to an address-confirmation notice and fails to vote in two consecutive federal elections following that notice." (citing 52 U.S.C. § 20507(b)(2))), *with* Appellee Br. PAGE#37 (Section 8(d) "authorizes" removal of voters "if the registrant has 'failed to respond' to a change-of-address confirmation and failed to vote for four years following the notice." (citing 52 U.S.C. § 20507(d))). In this reading, no independent meaning is given to Section 8(b)(2)'s restriction on removing voters

by reason of their failure to vote. Section 8(b)(2) is superfluous, doing no work that is not also done by Section 8(d). *In re Arnett*, 731 F.2d 358, 361 (6th Cir. 1984) ("[A] construction of one part or provision of a statute which renders another part redundant or superfluous should be rejected[.]").[1] But neither provision is surplusage. Section 8(b)(2) creates a general requirement that failure to vote "shall not result in… removal," while 8(d) is a specific exception allowing failure to vote to be used in the limited instance of confirming ineligibility "on the ground that the registrant has changed address."

Similarly, notwithstanding Section 8(d)'s wording, the Secretary construes Section 8(d) not as a restriction on list-maintenance programs that remove voters

[1] In an effort to support this strained reading of Section 8(b)(2), the Secretary imports the word "solely," which only appears in a provision of the Help America Vote Act ("HAVA") referencing Section 8 of the NVRA. *See* Appellee Br. PAGE#43 (citing 52 U.S.C. § 51083(a)(4)(A)). This effort fails for a number of reasons. First, Section 8(b) does not itself prohibit only programs that remove voters "solely" by reason of their failure to vote. It is drafted in expansive terms to prohibit any program that "results in" the removal of a voter "by reason of the person's failure to vote." Second, because the Supplemental Process is triggered solely by a voter's failure to vote and not by any other information showing the voter may had moved, it in fact *is* a program that results in the removal of voters "solely" by reason of their failure to vote. Third, as the Department of Justice has explained, in construing Section 303(a)(4)(A) of HAVA, the Secretary commits the same error of statutory construction that he commits in his proffered interpretation of the NVRA—he renders half of the provision redundant. *See* DOJ Amicus Br. PAGE#27-29. Only by construing the NVRA and HAVA to prohibit list-maintenance provisions triggered solely by a failure to vote are all the terms of the statute given effect.

"on the ground that the registrant has changed residence," but as a standalone authorization to purge voters based solely on their failure to respond to a notice and failure to vote for two federal election cycles, regardless of whether the voter is ineligible. Indeed, according to the Secretary, states have "limitless discretion" to determine to whom and on what basis confirmation notices are sent. By the logic of the Secretary's reading, such notices may be sent to voters with odd-numbered street addresses or to all voters in a jurisdiction—including those who may just have voted or may just have registered to vote—without any evidence that the voter has moved. *See* Appellee Br. PAGE#51 ("Nothing in the Act prohibits an *all-registrant* mailing every two years." (emphasis in original)). Yet if Congress had intended Section 8(d) to create a giant safe harbor for *any* program that uses the notice-and-waiting-period procedure, whether or not the state has independent evidence the voter has moved before sending the notice, there would have been no need to include the safe-harbor it did provide for programs based on the NCOA system. The Secretary's reading would thus also render Section 8(c)'s safe-harbor provision superfluous.

The Secretary contends that an interpretation of the NVRA that renders some of its provisions redundant is acceptable under what he calls "a common statutory belt-and-suspenders approach" to statutory drafting. Appellee Br. PAGE#60. This argument fails for at least two reasons. First, the cases the

Secretary relies on involve different but overlapping statutory provisions—for example, where one provision is general and the other specific—not provisions that would, as the Secretary would have it, entirely duplicate one another at the same level of generality. *See McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 677 (7th Cir. 2010) (holding that a specific provision and catch-all "may overlap to a degree" without rendering the specific provision superfluous). Second, courts do not read statutes in a way that renders statutory terms or provisions superfluous when there is an equally plausible interpretation that does not. *E.g.*, *Riley v. Kurtz*, 361 F.3d 906, 913 (6th Cir. 2004). The more reasonable construction of Section 8 advanced by Appellants does not render any of its statutory terms superfluous.

Contrary to the Secretary's argument, Appellants do not claim that use of failure to vote is prohibited as part of the Section 8(d) confirmation process. *See* Appellee Br. PAGE#51 ("Plaintiffs' argument seeks to prohibit" "cancellations for both failing to vote and failing to respond."). Properly construed, Section 8 does permit such cancellations, but only when the confirmation notice that leads to them is not triggered by a failure to vote, thereby giving effect to Section 8(b)(2), and is based on reliable evidence that a voter has moved, thereby giving effect to Section 8(c). Likewise, Appellants agree that even the "safe-harbor" program in Section 8(c) can result in a registration being cancelled by reason of failure to vote. *See* Appellee Br. PAGE#50. However, as noted above, that program is *expressly*

carved out of the general prohibition on programs that result in the removal of voters by reason of their failure to vote, as are other programs that make a reasonable effort to identify and remove voters who have changed residence and that limit consideration of failure to vote to the *confirmation process*. The Supplemental Process uses failure to vote as the *trigger* for the removal process, and is therefore not carved out. Consequently, it is prohibited by Section 8(b)(2).

B. The Supplemental Process Does Not Constitute a "Reasonable Effort" to Remove Ineligible Voters from Ohio's Voter Rolls.

The NVRA requires that states "conduct a general program that makes a *reasonable effort* to remove the names of *ineligible* voters from the official lists of eligible voters," when such voters have become ineligible "by reason of a change in residence[.]" 52 U.S.C. § 20507(a)(4) (emphasis added). A process that, like the Supplemental Process, inevitably results in the removal of large numbers of *eligible* voters does not constitute a reasonable effort to remove *ineligible* voters.

The Secretary asserts that "[t]he only reasonableness requirement in the statute is to take reasonable steps to *remove* registrations from the rolls," completely ignoring that this effort must target *ineligible voters*. Appellee Br. PAGE#55 (emphasis in original). The Secretary thus reads the word "ineligible" out of the statute, effectively arguing that so long as he is removing voters from the rolls—whether eligible or ineligible—he is acting reasonably and is satisfying his list-maintenance obligations. Such a construction renders the statute nonsense, but

this nonsense construction is the only one with which the Supplemental Process would be consistent.

Ohio's disregard for the Supplemental Process' impact on eligible voters is evident when one considers that, since well before this litigation began, the Secretary has had evidence that eligible but infrequent voters across the state have had their registrations erroneously cancelled under the Supplemental Process. Such voters, alarmed at having discovered they were no longer on the rolls, have routinely contacted the Secretary's office. Although such complaints occur so frequently that the Secretary has a canned email response it sends to such voters—the Secretary has never made any effort whatsoever to determine how many voters were being inaccurately identified as having moved by the Supplemental Process, Appellant Br. PAGE#15, or to explore alternatives to the Supplemental Process that would not purge so many eligible voters.

Indeed, the Secretary has many reliable sources of change-of-address information at his disposal, many of which he currently fails to avail himself of. Not only does Ohio already automatically update the registrations of voters who change their address with the state Bureau of Motor Vehicles ("BMV"), Damschroder Depo. 29:3-24, RE42-1, PageID#1539, but the BMV and the Ohio Department of Job and Family Services, among other state agencies, regularly provide information about their customers to the Secretary, which could be used to

update or confirm voters' addresses. Ohio Rev. Code § 3503.15(A). Further, the Secretary points to two other more accurate alternatives to the Supplemental Process to identify voters who have moved: First, the state could use returned mail to trigger the sending of a confirmation notice. Appellee Br. PAGE#24-25. Second, the state could use the Electronic Registration Information Center ("ERIC"), of which it is already a member, to identify voters who have likely changed their address as well as those who have not. Appellee Br. at PAGE#69-70. These alternative sources of information would allow Ohio and its counties to more accurately identify voters who actually *may* have moved, increasing the accuracy of its rolls without also decreasing the number of eligible voters who are registered.

C. Settlement Agreements and the Unlawful Practices of Other States Have No Bearing on the Meaning of the NVRA.

Lacking any textual basis for his position, the Secretary points to consent decrees entered in three Mississippi cases and the list-maintenance practices of other states, urging the court to ignore the statute and let Ohio off the hook simply because it is doing what other states and localities have done.

The Secretary first points to three consent decrees entered into by counties in Mississippi, asserting, erroneously, that other "jurisdictions [have been] ordered to use voter inactivity to satisfy the" NVRA's requirements. Appellee Br. PAGE#46. Consent decrees do not reflect a judicial interpretation of the law and have no

precedential value. They merely represent a bargained-for agreement between parties. *See, e.g.*, *Vogel v. Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992) ("A consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties.").

Likewise, the practices of other states have no bearing on whether the Supplemental Process is permissible under the NVRA.[2] *See* Appellee Br. PAGE#45. At the time the Supreme Court struck down Virginia's anti-miscegenation laws, it was one of sixteen states with such laws. *Loving v. Virginia*, 388 U.S. 1, 6 (1967). That Ohio is one of a handful of states that unlawfully use voter inactivity to remove individuals from their voter rolls in no way demonstrates that such practices are in compliance with federal law.

If anything outside of the NVRA itself provides persuasive authority for how Section 8 should be interpreted, it is the consistent view held and established by the Department of Justice ("DOJ")—the agency tasked with enforcing the NVRA—that Section 8(b) prohibits using failure to vote as a basis for initiating the voter removal process under Section 8(d). *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S.

[2] The Secretary points to five states: Indiana, Missouri, Tennessee, Georgia, and Montana. It bears mentioning that neither Indiana nor Missouri actually target voters based on inactivity or use practices that Appellants would argue violate the NVRA. Montana's practice, while likely unlawful, is substantially different from Ohio's. Only two of the states identified by the Secretary have practices similar to Ohio's: Tennessee and Georgia. And like Ohio, Georgia is currently defending its process in federal court.

244, 276 (1991) ("In this case, moreover, the [plaintiff] EEOC's interpretation is reinforced by the long-standing interpretation of the Department of Justice, the agency with secondary enforcement responsibility under Title VII."); *accord Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1351-52 (2015) (The opinions of agencies charged with enforcing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). The DOJ's stance that Ohio's Supplemental Process violates Section 8 is consistent with the agency's other enforcement actions, the guidance it issued describing proper roll-maintenance procedures, and the statement of interest it filed in *Georgia State Conference of the NAACP v. Kemp*, 841 F.Supp.2d 1320 (N.D. Ga. 2012).[3]

D. The Canon of Constitutional Avoidance Does Not Compel a Construction of Section 8 that Permits the Supplemental Process.

Congress enacted the NVRA, including the provisions governing voter-roll maintenance contained in Section 8, pursuant to its Elections Clause powers. *Ass'n of Cmty. Orgs for Reform Now v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995); *see also Arizona v. Inter Tribal Council of Arizona Inc. ("ITCA")*, 133 S. Ct. 2247, 2256-

[3] The Department of Justice's settlement agreement with the City of Philadelphia, the only such agreement that permitted voters to be targeted based on inactivity, does not render the Department's position on the meaning of Section 8(b)(2) inconsistent. A settlement agreement by definition entails compromise. It is not and cannot be a statement of both parties' positions. *See* DOJ Amicus Br. PAGE#30-31.

57 (2013). The Elections Clause of the U.S. Constitution "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *ITCA*, 133 S. Ct. at 2253, 2256-57. The "substantive scope" of the Elections Clause "is broad" and the words "Times, Places and Manner … are comprehensive[,] embrac[ing Congress's] authority to provide a complete code for congressional elections, including … regulations relating to registration." *Id.* at 2253 (internal quotations omitted). Courts have held that the list-maintenance provisions of Section 8 of the NVRA are within Congress's Elections Clause authority. *See, e.g.*, *Edgar*, 56 F.3d at 793. Thus, contrary to the Secretary's argument, there is no constitutional doubt as to the validity of Section 8 and no constitutional question to avoid through a tortured reading of the statute. The canon of constitutional avoidance does not apply here.

While the Secretary may be correct that states retain the authority to establish and enforce voter qualifications, his argument that Section 8's bar on cancelling infrequent voters infringes this authority is unpersuasive. Appellee Br. PAGE#46-47; *see also ITCA*, 133 S. Ct. at 2257-58 (discussing Art. 1, § 2, cl. 1). Ohio law establishes specific requirements an individual must meet in order to be eligible to vote:

> Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen

> offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides.

Ohio Rev. Code § 3503.01(A); *see also* OHIO CONST. art. V, § 1. Frequent voting is not a qualification in Ohio. Moreover, Ohio's stated purpose in establishing the Supplemental Process has been to enforce its residency qualification, which it has many alternative ways of doing that do not also result in the removal of so many voters who are indisputably qualified. Most of these alternatives would be less costly than the Supplemental Process, which currently requires counties to send millions of confirmation notices every year, but even if they were more costly or burdensome, prohibiting Ohio from using infrequent voting to maintain its rolls would be within Congress's Elections Clause powers. As the Seventh Circuit has noted, complying with Section 8's roll-maintenance provisions "may make it more difficult to strike non-residents from the rolls. But the existence of such effects cannot by itself invalidate the law." *Edgar*, 56 F.3d at 793.

The Secretary argues that the state's constitution requires it to purge voters who do not vote for four years, and that it must be able to use the Supplemental Process to comply with that constitutional provision. *See* Appellee Br. PAGE#15 (citing OHIO CONST. art. V, § 1). The Secretary appears to be arguing that what by its terms was a voter-registration procedure (before it was pre-empted by the

NVRA[4]) is in fact a qualification requiring that voters must have voted in the prior four years to be eligible in the next election. However, even were the relevant portion of this constitutional provision still in effect, it would not prevent a voter who had not voted recently from re-registering and voting in the very next election after being purged. The provision is manifestly a voter-registration provision, not a qualification, and as such, it is subject to displacement by Congress pursuant to the Elections Clause. *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-84 (6th Cir. 2008) (rejecting a similar attempt to turn a voter-registration procedure into a qualification).

II. APPELLANTS' SECOND CAUSE OF ACTION IS NOT MOOT AND APPELLANTS HAVE STANDING TO CHALLENGE THE REVISED NOTICE.

A. The Secretary's Voluntary Change to the Confirmation Notice is Insufficient to Moot Appellants' Challenge.

The voluntary changes made by the Secretary to the confirmation notice during the pendency of this litigation do not moot Appellants' Second Cause of Action. Voluntary cessation of a challenged practice does not moot a claim unless

[4] Ohio recognizes that this provision of the state constitution was pre-empted by the NVRA. Since 1994, it has not cancelled voters who do not vote for four years without notice. Damschroder Depo. 64:1-21, RE42-1, PageID#1547. Under the unlawful Supplemental Process, it waits six years and gives four years' notice. The Secretary's argument that the NVRA must be construed so as to allow Ohio to comply with this state constitutional provision as much as possible finds no support in any law or canon of construction. The Ohio Constitution presents no "separate constitutional problem" the court must avoid in the present case. Appellee Br. PAGE#48.

there is "no reasonable expectation" that the conduct will recur and there are no remaining effects of the violation. *Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). While government officials may be provided "more solicitude" in assessing their voluntary conduct, such solicitude is not boundless. *See Mosely v. Hairston*, 920 F.2d 409 (6th Cir. 1990). Moreover, the burden to show that "the allegedly wrongful behavior could not reasonably be expected to recur" falls on the defendant arguing mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Here, the Secretary has not and cannot satisfy his burden to show either that he will not revise the notice in the future in a way that does not comply with the NVRA or that there are no remaining effects from the use of the prior, non-compliant notice.

Cases in which voluntary changes by government officials have mooted a claim involve a much stronger showing that the conduct will not recur than that made by the Secretary here. For example, in *Mosely v. Hairston*, this Court found such a showing was made when the voluntary conduct reflected a change in federal law and adoption of new state and federal regulations. 920 F.2d at 415. Here, the Secretary issued a new confirmation form on the day he filed his final brief, and—unlike cases where the voluntary compliance has been reflected in statutes or

regulations, which cannot be so easily changed[5]—he has the power to revise that form at any time, as he has on many occasions in the past. *See* 2015 Conf. Not., RE42-13, PageID#1702; 2013 Conf. Not., RE42-14, PageID#1704; 2011 Conf. Not., RE42-15, PageID#1706-1707; 2007 Conf. Not., RE42-16, PageID#1709-1710.

Furthermore, a claim will not be mooted unless the effects of the violation have been "completely and irrevocably eradicated." *Davis*, 440 U.S. at 631. Ohio has been mailing non-compliant notices to voters for many years. Even if the current notice is compliant, which it is not, the hundreds of thousands of voters who were sent those notices in or after 2013 and have not responded are at risk of having their registrations cancelled as soon as summer 2017 on the basis of a non-compliant notice.[6] *See, e.g.*, Bell Decl. ¶ 11, RE45, PageID#1821 (stating 178,078 voters in Cuyahoga County alone were sent confirmation notices under the

[5] *See, e.g.*, *Bench Billboard Co. v. Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012) (holding that the passing of a city ordinance that was "years in the making" sufficed to moot a claim).

[6] The Secretary notes that he "plans to issue a directive on July 29, 2016, instructing county boards to send out notifications pursuant to the Supplemental Process[,]" and the confirmation notices issued this year will be "for disposition in 2020." Appellee Br. PAGE#29. This statement implies that the next time that voters will be purged pursuant to the Supplemental Process will be in 2020, when, in fact, voters who were sent the previous notice will be removed from the rolls pursuant to the Process in 2017, 2018, and 2019 on the basis of directives issued in 2013, 2014, and 2015, respectively. *See* 2013 Directive, RE42-4, PageID#1607; 2014 Directive, RE42-3, PageID#1599; 2015 Directive, RE42-2, PageID#1592.

Supplemental Process in 2015). The effects of the violation have certainly not been eradicated.

The Secretary contends that the District Court "found" that there was no evidence that he does not plan to use the revised notice in 2016 or in the future. Appellee Br. PAGE#63. First, even were it proper for the District Court to have made such a finding in the absence of a trial, which it was not, requiring Appellants to adduce evidence that the challenged conduct will not recur places the burden on the wrong party. *See Laidlaw*, 528 U.S. at 190. A factual finding predicated on a misplaced burden of proof is grounds for reversal. *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 546 (6th Cir. 1989) (reversing district court because its findings resulted from an incorrect burden of proof). Moreover, although the Secretary has not argued that the old notice complied with the NVRA, he also has not expressly conceded that it did not, and the mere fact that he changed the notice while this litigation was pending—the only evidence the Secretary offers that he will not revert to a non-compliant notice form—is insufficient to satisfy his burden. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (holding defendant did not satisfy burden of showing mootness where defendant "vigorously defend[ed]" the challenged practice and made no showing that the behavior would not resume).

The Secretary makes the disingenuous argument that his practice of regularly issuing new confirmation notices is a "virtue" rather than a "vice," and that Appellants have criticized him "for past efforts to improve voting in Ohio." Appellee Br. PAGE#67. First, it must be noted that many of the legal deficiencies in the prior form that Appellants objected to, such as the requirement that a voter who had not moved complete the form in its entirety, were added as part of what the Secretary calls "improvements." *Compare* 2015 Conf. Not., RE42-13, PageID#1702; 2013 Conf. Not., RE42-14, PageID#1704; 2011 Conf. Not., RE42-15, PageID#1706-1707; 2007 Conf. Not.,RE42-16, PageID#1709-1710. The Secretary's past changes to the form, if they suggest anything, suggest that there is a likelihood of recurrence in the future. More important, the injunction Appellants seek will not prevent the Secretary from making changes or improvements to the form in the future. It will simply require that any changes he makes to the form not render the specific elements at issue in this case non-compliant with Section 8 of the NVRA.

B. Appellants Have Standing to Challenge the New Notice.

Appellants brought their Second Cause of Action to challenge the form of confirmation notice Ohio used at the time this case was filed. Complaint, RE1, PageID#14-15. That notice had numerous defects rendering it non-compliant with Section 8 of the NVRA. *See, e.g.*, Mot. for Summ. J., RE39, PageID#1407-1408.

The Secretary now contends, for the first time, that Appellants lack standing to continue challenging the notice because they have not identified a harm arising from one of its several defects. Appellee Br. PAGE#63. However, in the District Court, the Appellants presented more than sufficient evidence of their standing to challenge to Ohio's confirmation notice.[7] The Secretary's standing challenge must be rejected.

C. Ohio's Confirmation Notice Violates the NVRA by Failing to Notify Voters How to Remain Eligible to Vote When They Leave the State.

When a registrant has changed residence to "a place outside the registrar's jurisdiction," Section 8 requires the registrar to send the registrant a confirmation notice that includes "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). There is no in-state limitation to the term "a place outside the registrar's jurisdiction."

With no textual support, the Secretary asserts that only another Ohio jurisdiction, and not a jurisdiction in another state, is "a place outside the registrar's jurisdiction." Appellee Br. PAGE#64-65. To support this language-defying proposition, the Secretary parses the phrase "continue to be eligible." He

[7] Should this Court deem it necessary, Appellants are prepared to present evidence that Appellant Northeast Ohio Coalition for the Homeless has at least one member harmed by the notice's failure to inform voters who moved out of state of how to maintain their eligibility to vote.

draws an artificial distinction between moving to a new jurisdiction within Ohio, in which case the voter can "continue to be eligible," and moving to a new jurisdiction in another state, in which case the voter is "newly registered" and thus outside the scope of the statute. Appellee. Br. PAGE#65-66. Whatever the case may be in Ohio, many states require voters to re-register when moving between jurisdictions within the state. *See*, *e.g.*, N.J. Stat. § 19:31-11(c) (requiring a voter moving to a new county to re-register in that county); Okla. Stat. tit. 26, 4-118 (requiring a voter moving to a new county to apply as an initial registrant in that county). Section 8(d)'s use of "continue to be eligible" thus must be read to include both states where, when moving to a new jurisdiction, a voter "continues to be eligible to vote" by updating her address and states where the voter "continues to be eligible to vote" by re-registering. Contrary to the Secretary's argument, there is nothing about the use of the word "continue" that precludes the application of the requirement to a change of address to a jurisdiction that requires re-registration. Any other reading would mean that some states had to provide information to voters on how to remain eligible to vote when they move while others would not.

Such a result could not have been what Congress intended. When the NVRA was drafted, fewer than half of states administered their voter registration systems at the statewide level. H.R. REP. NO. 103-9, at 133 (1993). Indeed, Ohio required re-registration when moving between counties at least through 2007. 2007 Conf.

Notice, RE42-16, PageID#1709 (instructing voters who have moved to a new county that "in order to vote, you will have to register with the board of elections . . . in your new location"). It must be assumed that Congress was aware of the statutory landscape in which it was working when drafting the statute. *Mississippi* ex rel. *Hood v. AU Optronics Corp*., 134 S. Ct. 736, 742 (2014); *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) ("We are to presume that when Congress passes legislation, it is fully aware of the existing law."). It would not be reasonable for Congress to have used the phrase "continue to be eligible" knowing that doing so would render the provision virtually inapplicable across much of the country. Appellants' reading—that "outside the registrar's jurisdiction" means precisely that—is the only reasonable reading of the text.

Finally, there is no practical bar to providing information on how to remain eligible to vote when moving to a new state. The Secretary creates a straw man—that Appellants are demanding that he include the 18 pages of detailed instructions found on the Federal Form—that he then knocks down by claiming it is impracticable. Appellee Br. PAGE#66. As Appellants have previously explained, referring voters to the Election Assistance Commission's (EAC's) Federal Form, which already contains multistate voter registration instructions, would suffice. Appellant Br. PAGE#51. The Secretary's quibbling over whether a link to the EAC's website constitutes "information" is of no moment. Appellee. Br.

PAGE#68. The Secretary has practical and feasible ways of complying with Section 8's requirement of providing *all* voters who leave a registrar's jurisdiction with information on how they may remain eligible vote.

This Court should vacate the judgment of the District Court and remand this case with instructions to enter judgment for Appellants.

III. APPELLANTS' REQUESTED RELIEF IS FEASIBLE AND REQUIRED TO REMEDY THE SECRETARY'S NVRA VIOLATIONS.

The relief Appellants seek from the Secretary in this matter is straightforward: He must ensure that eligible voters who have been unlawfully purged pursuant to the Supplemental Process are able to participate in future elections. Appellants have proposed two alternative remedies, either of which will accomplish this object. First, Appellants seek an injunction requiring the Secretary to restore to the rolls only those voters purged under the Supplemental Process who remain eligible to vote at the address at which they were previously registered. In the alternative, Appellants seek an injunction requiring the Secretary to count provisional ballots cast by voters who were unlawfully purged and who provide an address on the provisional ballot affidavit that matches the address at which the voter was last registered. Because this relief consists of either the reinstatement of, or counting the ballots of, only *eligible* voters who have not changed residence,

neither remedy would "guarantee more inaccuracies in Ohio's voter-registration lists" as the Secretary contends. Appellee Br. PAGE#70.

The Secretary argues that the first remedy is "an impossibility" because he has no record of "all" registrations cancelled pursuant to the Supplemental Process. Appellee Br. PAGE#68. This assertion is belied by the record, however. According to deposition testimony, Ohio and its counties keep records not only of currently registered voters, but also of voters who have been removed from the rolls. Damschroder Depo. at 46:8-11, RE42-1, PageID#1543 (a voter's registration record is never permanently removed, even when the registration has been cancelled). These records show when the voter was removed from the rolls as well as the address at which the voter was last registered. *See,* Damschroder Depo. At 25:8-29:24, RE42-1, PageID#1538-1539. While the Statewide Voter Registration Database may have no way of distinguishing which of those voters were purged under the NCOA Process and which under the Supplemental Process, many, if not all, of Ohio's counties can do so. Damschroder Depo. at 94:16-96:22, RE42-1, PageID#1555. Moreover, as the Secretary points out, ERIC provides the names and addresses of unregistered Ohio voters, Appellee Br. PAGE#70, which could be used to verify which voters purged pursuant to the Supplemental Process continue to reside at the same address. Thus, while it will require the mechanical

comparison of some databases, there is nothing at all "impossible" about restoring the eligible but unlawfully purged voters to the rolls.

The alternative relief Appellants seek is even more narrowly tailored and easily administered. It merely requires special handling of the provisional ballots cast by voters who are not on the voter rolls. Specifically, when determining whether such a ballot will be counted, an election official would first determine whether the voter had previously been registered. For any such voter, the official would then compare the address the voter provided on the provisional ballot envelope to the address at which the voter had last been registered. If the addresses match, and the voter has provided the other information on the provisional ballot affidavit necessary to determine the voter's eligibility, the provisional ballot would be counted. In Ohio, a provisional ballot cast by an unregistered voter *already* serves as a voter registration application (though the ballot itself is not counted), *see* Damschroder Depo. 113:18-22, RE42-1, PageID#1561, so officials are *already* making this very same eligibility determination when they review the provisional ballot. This remedy would thus only add the one simple step of comparing the addresses. Under current Ohio law, poll workers are already required to offer provisional ballots to voters who appear at the polls but are not on the rolls, and thus, this remedy would require no change at all to Election Day procedures; the only impact would be on the post-election procedure for counting provisional

ballots. *See* Ohio Election Summit and Conference Report, RE38-11, PageID#548. Moreover, because it would only require the counting of ballots cast by voters who county officials had determined were eligible Ohio voters, this alternative would guarantee that no ineligible voters were able to vote or were added to the rolls.

The Secretary contends that counting these provisional ballots would somehow be inconsistent with an injunction entered in another case. Appellee Br. 58 (citing *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251 (S.D. Ohio June 7, 2016)). But the ballot-treatment processes are completely compatible: Each deal with a different category of provisional ballot. The injunction in the other case requires counties to count provisional ballots cast by certain *registered* voters even if the voter does not provide a current address. In the present case, Appellants seek to require counties to count provisional ballots of certain *unregistered* voters. There is no possibility that any ballot could be subject to both sets of requirements, much less to any conflicting requirements.

The Secretary argues that a remedy for the harm caused by the Supplemental Process is unnecessary because unlawfully purged voters can cure that harm themselves by re-registering. Appellee Br. PAGE#69-70. The Secretary further contends that an injunction is not necessary because he "*expects* to provide registration notices" to unregistered Ohio voters identified through ERIC before the 2016 Presidential Election. Appellee Br. PAGE#70 (emphasis added). Leaving

aside the uncertainty with which this assertion is made, mailing voter registration forms to voters purged under the Supplemental Process—voters (1) who should not have been purged and should not be required to re-register, (2) who often do not realize that they have been purged and so will not re-register, and (3) who by definition have already failed to act on a prior mailing—is insufficient to remedy the harm cause by the Supplemental Process.

According to the Secretary, "registering to vote (and remaining registered) cannot be costless." Appellee Br. PAGE#34. That facile assertion, however, does not permit the Secretary to impose costs on the right to vote that violate federal law, even if an Ohio voter can find ways to overcome the harm caused by that violation. Moreover, before a voter can take even the most undemanding of steps, the voter needs to know that she has been purged, and the evidence in the record shows that many if not most infrequent voters affected by the Supplemental Process do not, and are therefore at risk of finding out they cannot vote only when they appear at the polls and learn too late that the Secretary's unlawful actions have "cost" them their right to vote. *See, e.g.*, Harmon Decl., RE9-4, PageID#89-90. An injunction to cure the Secretary's violations of the NVRA is both necessary and appropriate.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be vacated and the case remanded with instructions to enter judgment for Appellants.

Dated: July 22, 2016

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2016.

Dated: July 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Appellants was filed this 22nd 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.

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DESIGNATION OF DISTRICT COURT RECORD

Plaintiff-Appellants hereby designate the following items from the District Court record:

Ohio A. Philip Randolph Institute et al v. Husted
District Court Case No. 2:16-cv-00303-GCS-EPD

Docket Entry No.	Date	Page ID No.	Document Descriptions
38-9	05/24/16	410-494	The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012 ("EAC Report")
38-11	05/24/16	507-615	Ohio Election Summit and Conference Report
42-3	05/24/16	1594-1601	Directive 2014-14
42-4	05/24/16	1602-1609	Directive 2013-10