

**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' OPPOSITION TO DEFENDANT HUSTED'S
MOTION TO IMPLEMENT REMEDY**

I. INTRODUCTION

The U.S. Court of Appeals for the Sixth Circuit ruled that Defendant Husted's Supplemental Process for maintaining Ohio's voter rolls is unlawful and remanded the case to this Court for a remedy. Defendant Husted has filed a motion with this Court seeking to limit the remedy to only a fraction of the voters whose statutory voting rights have been violated. All but the most recently purged voters would have their votes rejected under the Secretary's proposed process. The Secretary offers no justification, legal or practical, for continuing to deny the votes of all those who—but for his violations

of federal law—would be registered voters able to participate in this November’s election.

Although the Secretary concedes that “a reasonable process can be put in place to allow individuals removed through the Supplemental Process” to exercise their right to vote in November, Mot. to Implement Remedy, Doc. 72, PAGEID# 23065, the process he proposes will leave out large numbers of voters whose registrations were cancelled in violation of the National Voter Registration Act of 1993 (“NVRA”). Accordingly, Plaintiffs Ohio A. Philip Randolph Institute (“APRI”), the Northeast Ohio Coalition for the Homeless (“NEOCH”) and Larry Harmon submit this opposition to Defendant Husted’s Motion to Implement Remedy, Doc. 72, and request that this Court order the more robust remedy sought in their Motion for Temporary Restraining Order. *See* Doc. 74.

II. ARGUMENT

Defendant’s proposed remedy will not protect the right to participate in the November 2016 General Election for thousands of the voters he unlawfully purged. In fashioning a remedy for the Secretary’s unlawful conduct, this Court must attempt to address as much of the harm that conduct caused as possible. *See Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) (reversing as an abuse of discretion an injunctive remedy which did not adequately redress plaintiff’s First Amendment rights). The Defendant’s proposed remedy would exclude a significant proportion of the voters he harmed, depriving them of the right to participate in the democratic process this fall. This Court should deny the Defendant’s Motion to Implement Remedy and instead order the

more comprehensive and equally practicable remedy requested by Plaintiffs by granting their Motion for a Temporary Restraining Order. Moreover, now that Defendant has had the opportunity to respond to Plaintiffs' Motion, this Court should additionally issue the preliminary injunction sought by Plaintiffs in their Motion.

A. Defendant's Proposed Remedy Excludes Many Eligible Voters.

The Secretary has proposed, with no justification, to permit only a small subset of the voters he unlawfully purged to participate in the 2016 General Election. The Sixth Circuit has held that the Supplemental Process violates the NVRA, which means that none of these voters were validly removed from the rolls. It follows that all should still be on the rolls—and would be in the absence of the Secretary's violation of federal law.

The Secretary's proposed remedy has arbitrary and unnecessary limitations: First, the relief proposed by the Defendant is limited to voters purged in 2015, despite the fact that voters have been unlawfully purged under the Supplemental Process continuously since its inception in 1995, and despite the fact that he can easily and accurately identify the voters who were unlawfully purged at least as far back as 2011. Voters who were purged this far back in time will likely attempt to vote in the upcoming election: In the 2015 statewide election and the 2016 Presidential Primary Election, voters who were removed from the registration rolls under the Supplemental Process at least as far back as 2013 turned up and attempted to vote.¹ *See, e.g.*, Doc. 74, PAGEID# 23083. Although

¹ Voters removed pursuant to the Supplemental Process in earlier years may also have been disenfranchised in these elections, but Plaintiffs did not have access to the information necessary to identify them. *See, e.g.*, Doc. 74, PAGEID# 23083 n. 2.

many more eligible voters who were removed from the registration rolls under the Supplemental Process prior to 2015 will undoubtedly attempt to vote in this November's election, the Defendant would prevent them from voting.

Second, the Secretary proposes to exclude voters who have moved within the State of Ohio, despite the fact that such voters would be eligible to cast a provisional ballot and have it counted if they had not been unlawfully purged under the Supplemental Process. In Ohio, a registered voter who has moved but has not updated his or her voter registration with the new address is permitted to vote a provisional ballot, and that provisional ballot will be counted. O.R.C. § 3505.181; *id.* § 3503.16; *see also* Ohio Secretary of State, Election Official Manual ("EOM"), Ch. 6, at 6-14. Under the relief proposed by Defendant, however, provisional ballots cast by an illegally purged voter who has moved will not be counted, even if the move was in-state. Thus, the Defendant would treat voters who, but for his unlawful conduct, would still be on the rolls differently from voters who *are* still on the rolls. In so doing, he would prevent many eligible voters whose votes would otherwise count from participating in this November's election. For example, because low-income voters and voters of color tend to move more frequently than the population as a whole, many of the homeless and housing-insecure voters represented by NEOCH and the African American voters who are the focus of APRI's voter registration and engagement efforts are likely to be left out of the Secretary's proposed remedy. *See, e.g.,* Ohio State Conf. of NAACP v. Husted, 768 F.3d 524, 539 (6th Cir. 2014), vacated on other grounds, 2014 WL 10384647 (No. 14-3877, 6th Cir., Oct. 1, 2014).

Third, the Secretary’s proposed relief applies only to purged voters who cast a “provisional ballot . . . during the in-person absentee voting period or on Election day,” wholly excluding voters who wish to, or need to, vote by mail, even though they can be identified and their eligibility verified by the same process proposed for in-person voters. Hundreds of thousands of Ohioans, including many disabled voters who are unable to travel to a polling place or to receive sufficient assistance there, vote by mail in Presidential Elections, but the Secretary would deny those whom he unlawfully purged the opportunity to use this popular—and for some, necessary—means of voting. *See* Peter Miller & Sierra Powell, “Overcoming Voting Obstacles: The Use of Convenience Voting by Voters with Disabilities,” 44 *Am. Pol. Res.* 28, 31-32 (2016) (citing studies and finding turnout among people with disabilities is lower when vote by mail opportunities are limited or unavailable).

Finally, unlike the relief proposed by Plaintiffs, the Secretary’s plan would do nothing to notify voters who were unlawfully removed that they are eligible to vote even if their name does not appear on the rolls. While many of the unlawfully purged voters will only learn they are no longer registered when they arrive at the polls, others may be discouraged from even going to the polls if they check their registration status in advance. *See, e.g.*, Declaration of Stephen Tayala, October 17, 2016, ¶¶ 16-17 (explaining that if he had not been told by Plaintiffs’ counsel that he could cast a provisional ballot, Mr. Tayala would not have voted at all after learning he had been purged under the Supplemental Process). Because the Secretary’s proposed remedy

contains no provision notifying unlawfully purged voters of their rights, many of the voters it purportedly covers could effectively be disenfranchised.

B. There Is No Practical Justification for the Limitations of Defendant's Remedy.

There are no practical barriers to the relief sought by Plaintiffs that would not also be faced in implementing the directive put forward by the Secretary. The Secretary has set forth a process to identify voters removed from the rolls pursuant to the Supplemental Process in 2015. Under that process, a county with records permitting it to differentiate voters purged pursuant to the National Change of Address ("NCOA") Process from those purged pursuant to the Supplemental Process would use those records to determine whether to count a provisional ballot, while counties that cannot differentiate between those groups of voters would use a list of voters who had forwarding addresses on file with the NCOA system in 2011. According to the Secretary, that list was used by the counties to trigger the NCOA mailings that lead to the 2015 NCOA purge. Any voter not on that list who was purged in 2015 would be presumed to have been purged under the Supplemental Process and would be eligible to have his or her provisional ballot counted, unless the county has evidence that the voter subsequently died, was convicted of a felony, or was declared incompetent. *See* Proposed Directive, Doc. 72-1, at 2-3. Plaintiffs merely ask that this same process be followed for voters purged in 2013 and 2011, who had addresses on file with the NCOA in 2009 and 2007 respectively. The Secretary has the NCOA lists used in those two years as well as the list used in 2011. There is thus no practical bar to extending this exact same remedy to voters purged in 2011 and 2013.

There is likewise no practical barrier to including voters who have moved within a single county in the remedy. Under existing law and directives, counties currently must attempt to verify the registration of any voter who casts a provisional ballot because the voter's name was not on the rolls. The Secretary's directive on provisional ballots specifies the type of database searches that must be run in attempting to verify the voter, including "at least one 'wildcard' search of the county's local voter registration database" and a search by driver license number and name in the Statewide Voter Registration Database. *See* EOM, Ch. 6, at 6-13–6-14. If the county verifies that the voter is currently registered somewhere in Ohio, the voter's provisional ballot will be counted regardless of whether the voter's address has changed. *Id.* Under the Secretary's proposed remedy, a county would have to conduct these very same searches for voters purged under the Supplemental Process, but the county would have to take the additional step of comparing the address contained in the list of cancelled voters with the address on the provisional ballot. If the address a voter lists on their provisional ballot does not match their "most recent address of registration in the Statewide Voter File," the ballot will be rejected. Plaintiffs merely ask that this final additional step be eliminated, and that the same process be followed for voters who were unlawfully purged as is followed for voters who were not. Not only will this reach additional voters, it will *reduce* the burden on counties in verifying provisional ballots, and it will alleviate the potential confusion on the part of local election officials that might be caused by having to follow a different process for provisional ballots cast by voters purged under the Supplemental Process than it follows for all other provisional ballots.

Finally, there is no practical barrier to allowing unlawfully purged voters to vote by mail. The same process can be followed in determining whether a mail-in ballot should be counted as is followed for ballots cast in person. The same lists can be consulted and the same searches run. Mail-in ballot applications are accepted until the Saturday before Election Day, *see* ORC § 3509.03, so there is no time barrier to implementing this remedy prospectively with respect to mail-in ballot applications yet to come in. Indeed, in response to this Court's order of October 14, 2016 (Doc. 76), the Defendant has already implicitly conceded that he will be able to mail provisional ballots to voters whose registrations were cancelled under the Supplemental Process should this Court so order and he is already providing such ballots to voters who apply in person to vote by mail. *See* Directive 2016-37 (Doc. 77-1).

Indeed, the only justification the Secretary offers for the limited nature of the relief he proposes is the inaccurate assertion that it is the relief Plaintiffs requested in their Motion for Summary Judgment and Permanent Injunction (Doc. 39). As an initial matter, Plaintiffs have never sought or suggested it would be proper to provide a remedy only to voters purged in 2015. Voters purged under the Supplemental Process at any time were purged in contravention of the NVRA. More importantly, in their Motion for Summary Judgment, Plaintiffs sought reinstatement of all of the unlawfully purged voters, and only proposed counting provisional ballots cast by such voters as an alternative. That alternative remedy was limited to voters whose address had not changed based on the representation made by the Secretary on multiple occasions over the course of this litigation—including in sworn testimony by his 30(b)(6) deponent, in his briefs in this

Court and the Court of Appeals, and at oral argument—that he had no way to determine which voters had been removed from Ohio’s registration rolls pursuant to the Supplemental Process and that Plaintiffs were asking for the “impossible.” *See, e.g.*, Deposition of Matthew M. Damschroder, Exh. A to Declaration of Cameron Bell (“Bell Decl.”), Doc. 42-1, PAGEID# 1555, at 94:7-19; Def. Secretary of State Jon Husted’s Initial Merits Br., Doc. 38, PAGEID# 283; Def. Secretary of State Jon Husted’s Third Merits Br., Doc. 56, PAGEID# 22749-22750; Br. Of Appellee Secretary of State Jon Husted, 6th Cir. Doc. 31, PAGE# 69 (“[T]here are not records of ‘all’ registrations cancelled by reason of the supplemental process.”). Believing this to be the case, Plaintiffs suggested that requiring a matching address would provide a proxy to identify such voters, which, while underinclusive, would ensure that every ballot counted had been cast by someone who was unquestionably eligible. Now, however, the Secretary has conceded that he does in fact have records that allow him to identify precisely which voters were purged under the Supplemental Process—so there is therefore no reason to impose the “same address” limitation, which would unnecessarily deprive many eligible voters of their right to vote.

C. Defendant’s Proposed Remedy Is Contrary to the Sixth Circuit’s Holding.

In reversing the judgment in favor of the Secretary, the Sixth Circuit stated that the Supplemental Process “constitutes perhaps the plainest possible example of a process that ‘result[s] in’ removal of a voter from the rolls by reason of his or her failure to vote,” and accordingly held that “Ohio’s Supplemental Process violates Section 8, subsection (b)(2) of the NVRA.” *Ohio A. Philip Randolph Inst., et al. v. Husted*, No. 16-3746, slip op. at

16 (6th Cir. Sept. 23, 2016). Over the last several years, Ohio has removed hundreds of thousands of voters from the state's voter rolls pursuant to this unlawful process. Nothing about the Sixth Circuit's ruling limits it to voters purged in 2015 or excludes any group of eligible voters whose names would still appear on the registration rolls but for the Supplemental Process, such as those who have moved locally or those who wish to vote by mail. Defendant offers no authority that would justify ignoring the decision of the Court of Appeals, nor does he point to any countervailing legal principle that would permit him to implement such arbitrary, narrow, and inadequate relief.

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny the Defendant's Motion to Implement Remedy and grant Plaintiffs' Emergency Motion for a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue. Doc. 74; *see also* 74-1 ([Proposed] Order). In addition, because Defendant has had the opportunity and has failed to show cause why a preliminary injunction should not issue, the Court should issue the preliminary injunction sought by Plaintiffs in their Motion. *Id.* Because early voting in Ohio has already begun and Election Day is rapidly approaching, Plaintiffs further respectfully request that this Court act immediately.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT HUSTED'S MOTION TO IMPLEMENT REMEDY was filed this October 17, 2016 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: October 17, 2016

/s/ Naila Awan
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DECLARATION OF STEPHEN TAYALA
(pursuant to 28 U.S.C. § 1746)

I, Stephen Tayala, hereby declare as follows:

Personal Background

1. I am over the age of 18, and I make this declaration based on my personal knowledge.
2. I was born in Warren, Ohio in 1961. I was raised in Ohio and have lived in the state all my life except when I was stationed in Germany while serving in the U.S. Army.
3. I currently work as a truck driver for Bottcher America, where I have been employed for about ten years.
4. I have lived continuously at my current address in Trumbull County for about 15 or 16 years.

Voting History

5. I do not remember exactly when I registered to vote, but I believe it was in the early 1980s, when I returned to the United States from Germany.
6. I believed that once I was registered to vote, I would continue to be registered to vote; I did not realize that my registration could be cancelled.
7. I believe in voting my conscience, and I believe it is important to be educated on the issues that I vote about. If I am not feeling inspired by the candidates or the issues, I may not vote in a particular election.
8. I voted in the 2008 General Election.
9. Shortly after the 2008 Election, my family began experiencing some hardships, and I was not focused on politics. I do not recall voting in the 2012 Presidential Election or in any midterm or local elections; my family was my priority at that time.

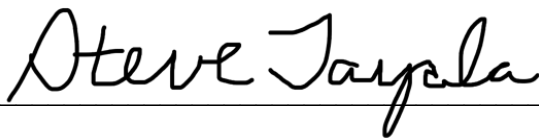
2016 Election

10. On Thursday, October 13, 2016, I was talking with a few people that I work with, and they mentioned that they had seen a news article about Ohio's longstanding practice of removing infrequent voters from the registration rolls.
11. I had been planning to vote in the 2016 Election and was concerned that I may have been impacted by this practice. I immediately checked my voter registration to see if I was registered to vote.
12. I checked the Trumbull County Board of Elections website, which has a web page for checking voter registration status. I entered my name and the other required information on the web page, but there was no record of my registration. I searched under different variations of my name, including "Stephen Tayala" and "Steve Tayala"; none of these searches produced results.
13. I was completely blindsided by the news that I was not registered to vote. I pay Trumbull County property taxes, and I am frustrated that the state would take away my right to vote just because I had missed a few elections.
14. I contacted the Trumbull County Board of Elections by email to see what happened and how I could get registered to vote. An official at the Board of Elections told me that I was not registered but that the voter registration deadline was October 11, 2016—just two days earlier—and that I therefore would not be able to register to vote in advance of the 2016 Election. The Trumbull County Board of Elections directed me to contact Secretary of State Jon Husted. A true and correct copy of the email correspondence between the Trumbull County Board of Elections and me is attached hereto as Exhibit A.

15. I did some research on the Internet and learned about the National Voter Registration Act and the recent lawsuit against the state over its voter purges. I called the Secretary of State's office, but I was told there was nothing they could do for me.
16. Finally, I contacted lawyers from Demos and the ACLU of Ohio. They encouraged me to go to the polls and cast a provisional ballot, but told me that, unless a court orders otherwise, the ballot will not count.
17. If I had not talked to the Demos and ACLU attorneys after learning that I was no longer registered, I would have assumed I could not vote at all in the November 2016 Election and would not go to the polls or cast a provisional ballot.
18. I estimate that the entire process of searching for my registration, calling the Board of Elections, and calling the Secretary of State's office took about one to two hours.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2016



Stephen Tayla

EXHIBIT A

Fwd: registration

Marianne <gerfins4@aol.com>

Sun 10/16/2016 7:14 PM

To: Cameron Bell <Cbell@demos.org>;

Here you go

Sent from my iPad

Begin forwarded message:

From: Marianne <gerfins4@aol.com>
Date: October 13, 2016, 1:58:46 PM EDT
To: Stephanie Penrose <bepenros@co.trumbull.oh.us>
Subject: Re: registration

I will do so but I have been at my current residence for 15 years, I get a background check & fingerprints taken every 2 years(CDL w/hazmat), I still pay state, local & federal taxes, I was born in the state of ohio and I am a US Citizen! Can somebody please purge my name from state, local & federal taxes and we'll call us square!

Sent from my iPad

On Oct 13, 2016, at 1:05 PM, Stephanie Penrose <bepenros@co.trumbull.oh.us> wrote:

Please feel free to contact the office of Ohio Secretary of State Jon Husted at (877-767-6446) x2 if you feel this is incorrect. You were purged according to a directive from the Secretary of State in 2015 for Failure to Vote. You have had no activity since 11-2008.

From: Marianne [<mailto:gerfins4@aol.com>]
Sent: Thursday, October 13, 2016 12:58 PM
To: Stephanie Penrose
Subject: Re: registration

Stephanie, Is this not a violation of the 1993 NVRA? Who do I contact to have my right to vote reinstated in time for Nov 8

Sent from my iPad

On Oct 13, 2016, at 7:59 AM, Stephanie Penrose <bepenros@co.trumbull.oh.us> wrote:

Stephen,

No, you are not currently registered to vote and the deadline to do so was Tuesday, October 11th at 9:00 p.m.

Stephanie N. Penrose, Director
Trumbull County Board of Elections
Bepenros@co.trumbull.oh.us
330-369-4050