IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.*	:	
	:	
Plaintiffs,	:	**Case No. 2:16-cv-00303**
	:	
v.	:	**JUDGE GEORGE C. SMITH**
	:	
SECRETARY OF STATE, JON HUSTED	:	**Magistrate Judge Deavers**
	:	
Defendant.	:	

MEMORANDUM IN OPPOSITION TO THE OHIO DEMOCRATIC PARTY'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Secretary opposes the motion of the Ohio Democratic Party ("ODP" or "Amicus") for leave to file an amicus curiae brief. The brief should not be considered because ODP's proposed remedy is not a remedy currently sought by any Plaintiff in this litigation; existing Counsel is more than capable of making any arguments raised by ODP; and ODP's proposed submission unnecessarily politicizes this issue. In any event, ODP's argument, if considered, should be rejected because such relief would violate Ohio law and the Ohio Constitution, runs afoul of the Eleventh Amendment, and is burdensome and impracticable.

Non-party amicus ODP asks the Court to require the State to unilaterally put names back onto the registration roll. This request is different than the request currently sought by Plaintiffs in this litigation. The Amicus is not a party to this matter and therefore the Amicus has no standing to propose remedies. It is well-settled that it is the petitioner who "controls the scope of the question presented." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). For that reason alone, the brief should not be considered.

Furthermore, existing Counsel is more than capable of making any arguments raised by ODP. Plaintiffs in this case are represented by multiple attorneys, including experienced attorneys from Demos and the ACLU, and three professors of law with litigation experience. ODP has never sought to participate in this case as a party. Finally, ODP's proposed submission unnecessarily politicizes this issue. Indeed, in the Secretary's opposition to Plaintiffs' motion for a Temporary Restraining Order, the Secretary attached declarations executed by both Republican and Democratic directors of boards of elections in support of the Secretary's proposed directive. This litigation is simply a question of what is required by federal law and should remain non-partisan. For all these reasons, ODP's request should not be considered.

Were ODP's brief considered, however, the requested relief therein should be denied because it (1) exceeds what is legally required, (2) would violate Ohio law and the Ohio Constitution, (3) runs afoul of the Eleventh Amendment, and (4) is, at best, impracticable.

First, as set forth in the Secretary's Opposition to the Motion for a Temporary Restraining Order, the only legally-compelled remedy is ending the Supplemental Process, which the Secretary has already done (subject to preserving the option to seek certiorari with the United States Supreme Court).

Any litigation remedy in an election context must be narrowly tailored to the precise violation, with deference to the state officials who administer the election process. Broad injunctions fail where they go beyond the violation they purport to remedy. As recently as August, the Sixth Circuit reversed an injunction of Ohio's early voting statutes and cautioned against "asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Democratic Party v. Husted*, No. 16-3561, slip op. at 2 (6th Cir. Aug. 23, 2016). Similarly, the Supreme Court has cautioned against federal courts

getting "enmeshed in the minutiae" of state operations without giving "adequate consideration to the views" of state officials. *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 818 (1977) (approving a district court's decision to request a proposal from the State rather than "dictate precisely what course the State should follow")).

Moreover, the Eleventh Amendment bars claims against States for "retrospective" relief. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Cmty. Mental Health v. Mental Health & Recovery*, 395 F.Supp.2d 644, 651 (S.D. Ohio 2004). The Eleventh Amendment precludes a "declaration that *past* acts" of a State "violated federal law." *Deuel v. Dalton*, No. 3:11-cv-466, 2012 WL 1155208, *5 (M.D. Tenn. Apr. 4, 2012). Likewise, the Amendment bars an injunction against a State where there is no allegation of "an ongoing violation of federal law." *Id*. at *6; *see also S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 509 (6th Cir. 2008) (barring a claim based on a past decision that involved interpretation of a state statute). Thus, non-party ODP (even if it was part of this litigation) cannot compel the State to implement past-looking remedies.

Applying these legal principles here, the only remedy that can appropriately be compelled is ending the Supplemental Process.

Second, unilaterally putting names back onto the registration roll would violate the Ohio Constitution. As of the date of today's filing, there are only 22 days until the general election on November 8, 2016. The Ohio Constitution establishes a registration cut-off of 30 days prior to the election. More specifically, Article V, Section 1 of the Constitution states:

> Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, *and has been registered to vote for thirty days*, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector.

Ohio Constitution, Article V, Sec. 1 (emphasis added). This restriction is reiterated in the Ohio Revised Code: "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 . . . and *has been registered to vote for thirty days*, has the qualifications of an elector and may vote . . . ." Ohio Rev. Code § 3503.01(A) (emphasis added).

Notably, the NVRA states that a 30-day cut-off for registrations is acceptable. The NVRA only requires States to ensure that any eligible applicant is registered to vote in an election "if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election." 52 U.S.C.A. § 20507(a)(1). Congress thus explicitly endorsed the 30-day restriction.

In addition, boards of elections must ensure that precincts do not have more than 1,400 registered voters, and at the same time no changes to precinct boundaries may be made within 25 days of the election, which has already passed. Ohio Rev. Code § 3501.18. Retrospectively reinstating an unknown number of names cancelled under the Supplemental Process will result in boards having to choose between having more registered voters in a precinct than permitted by law or violating the law to change precinct boundaries. Either outcome is untenable.

Beyond that, the allocation of ballots and voting machines is tied to the number of registered voters in a precinct. *See, generally,* Ohio Secretary of State Directive 2016-35 at http://www.sos.state.oh.us/SOS/Upload/elections/directives/2016/Dir2016-35.pdf. Pre-printed ballots provided by a board of elections ". . . shall contain at least one per cent more ballots than the total registration in the precinct . . . ." Ohio Rev. Code § 3505.11(A). And, boards of elections using Direct Recording Electronic ("DRE") voting machines as their primary voting

system on Election Day must have at least one DRE voting machine for every 175 registered voters in a precinct or voting location based on a statutory formula. Ohio Rev. Code § 3506.22. Allocation decisions must be made by the board of elections during a properly noticed, public meeting. Ohio Rev. Code § 3501.11(I).

A *third* reason to deny reinstatement is that it is, at best, impracticable given that only 22 days remain before Election Day. Even if it were possible to actually ascertain any individuals removed by the Supplemental Process who remain eligible to vote (*i.e.*, is not deceased, not an incarcerated felon, has not moved out of State, *et cet*.), the time, manpower, and resources required to accomplish such a massive undertaking before November 8, 2016 during a busy election season is simply not realistic.

In *Colon-Marrero*, the First Circuit held that the plaintiff failed to meet her burden to demonstrate that unilaterally restoring 300,000 names to the voter roll "only weeks before the election" would not cause "uncertainty and confusion." 703 F.3d at 136. The plaintiff put forward only "scant evidence" about the "feasibility of reinstating" voters. *Id*. at 138. The court expressed concern that restoration of names onto the roll would result in errors. "It is therefore safe to assume that at least some of them now reside in different precincts than they did in 2008, while others may no longer be residents of Puerto Rico at all." *Id*. at 139. Amicus has presented *no case* holding that restoring names to the roll is required.

These concerns apply here. For instance, boards of elections must publish their final list of registered voters by precinct by the 14th day before the election, in this case October 25, 2016. Ohio Rev. Code § 3503.23. Even assuming the Court issued its order today, boards would have only one week to compile the lists of voters cancelled under the Supplemental Process and prepare the lists, including programming electronic poll books and printing paper signature poll

books. In addition, the amicus has presented *no evidence* that restoring names to the roll is feasible.

For the reasons explained herein, the remedy sought by the non-party Amicus should not be considered or otherwise should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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