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 RESPONSE TO THE UNITED STATES OF AMERICA'S STATEMENT OF INTEREST

The Secretary files this Memorandum in response to the Statement of Interest filed by the United States of America Department of Justice ("DOJ"). DOJ Br., Doc. 84.

As a threshold matter, the DOJ's opinion should be given no weight. Importantly, the DOJ's purported position in this matter stands contrary to other positions the DOJ has taken with respect to the NVRA. Where an agency's position has shifted over time, the agency's viewpoint is not persuasive and has no weight. *Young v. UPS*, 135 S.Ct. 1338, 1352 (2015) (holding that the weight of an agency's guideline depends on "its consistency with earlier and later pronouncements"). In 2007, the DOJ entered into a settlement agreement with the City of Philadelphia related in part to the city's failure to properly maintain its voter rolls. The settlement agreement obligated the city to implement a clean-up process that included voter

inactivity. Specifically, it required a supplemental process that is triggered by a registrant "not vot[ing] nor appear[ing] to vote." Settlement Agreement in *U.S. v. City of Philadelphia and Philadelphia City Commission*, C.A. No. 06-4592 (E.D.Pa 2007). In 2006, the DOJ entered into a consent decree with Indiana requiring Indiana to canvass *all* voters — a more extensive, stricter clean-up process than the Supplemental Process. Consent Decree in *U.S. v. Indiana*, 1:06-cv-1000-RLY-TAB (S.D.Ind. 2006). The Philadelphia settlement agreement and the Indiana consent decree demonstrate that the DOJ has supported list maintenance procedures that are more stringent than in Ohio and that take into consideration voter inactivity.

The position that the DOJ is taking in this litigation is contrary to its prior positions and should be disregarded.

The DOJ's shifting position notwithstanding, the DOJ's brief adds little to this case. The DOJ recognizes, at least with respect to this election, that feasibility may dictate what is possible.

This common-sense observation in the DOJ brief is exactly why the Secretary proposed the remedy embodied in his proposed Directive. ECF No. 72-1. The Secretary's proposal accounts for the time, resource, and logistical constraints facing local boards of elections in the final three weeks ahead of the November election. It is feasible to ask the boards to follow the Secretary's proposed Directive for counting provisional ballots cast by those removed from the rolls in 2015, subject to the prudent safeguards in the Directive. In contrast, the procedural overhaul envisioned by Plaintiffs and the DOJ is not reasonable.

Another aspect of reasonableness also favors the Secretary's remedy. Even before the Circuit Court ruled, the Secretary joined the Electronic Registration Information Center

("ERIC"), which allowed him to identify and reach out to about 1.6 million Ohioans who were not registered to vote. *See* Damschroder Dec., Doc. 80-1 at ¶ 35. Through that effort, the Secretary contacted non-registered Ohioans and encouraged them to register and vote. *Id*; *see Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 138 (1st Cir. 2012) (affirming denial of injunction to return voters to registration roll, in part, because election officials had "published notices in local newspapers urging qualified voters to reactivate").

Not every remedy is plausible, particularly during the three weeks before a presidential general election. The Supreme Court's cases make the point. In one case, the Court refused to "require Ohio" to put a candidate on the ballot because the election was too close. *Williams v. Rhodes*, 393 U.S. 23, 35 (1968). In another, it praised the restraint of a district court "in declining to stay the impending primary election" to afford time for a considered remedy. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Circuit cases are similar. This past August, the Sixth Circuit cautioned against "asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." *See Ohio Democratic Party v. Husted*, No. 16-3561, slip op. at 2 (6th Cir. Aug. 23, 2016) (reversing injunction). And in the last election cycle, the First Circuit affirmed a district court's refusal to unilaterally restore 300,000 names to the voter roll "only weeks before the election" because it felt "ill equipped" to impose that remedy so close to the election. *Colon-Marrero*, 703 F.3d at 136, 139.

The DOJ offers no reasons to depart from the Secretary-proposed remedy that both practical concerns and precedent dictate. The DOJ highlights *Land*, but elides the procedural and factual differences between that case and this one. Procedurally, *Land* was an emergency

motion to stay a district court's order, not an on-the-ground evaluation of what kind of relief would be workable. The motion before the court there asked whether to stop the district court's injunction. Factually, the voting officials in *Land* agreed that it was "both 'possible' and 'feasible' for them to comply" with the injunction. *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 386 (6th Cir. 2008). Even more, the *Land* defendants had "already . . . identified the voters whose voter status must be changed based on the preliminary injunction." *Id*. at 387. Also, the *Land* defendants *admitted* that any "administrative burden" in complying with the injunction would be "manageable." *Id*. Not so here. Finally, the remedy in *Land* restored voter registrations cancelled over the preceding 33 months. *See id*. at 375. That is on par with the Secretary's proposed remedy here.

The DOJ also points to various settlements it has structured in NVRA cases, but those documents support the Secretary's proposed remedy here. In *United States* v. *Cibola Cty.*, No. 93-1134 (D. N.M. Mar. 19, 2007), for instance, the county was allowed sixty days to correct registrations that had been cancelled over the previous two years. Doc. 84-1 at 10. The two-year lookback is exactly what the Secretary has proposed here for the three-week window that remains before the elections. And in *United States v. City of St. Louis*, No. 4:02-cv-1235 (E.D. Mo. Aug. 14, 2002), the DOJ-approved consent order reached only those who showed up to vote, but were not "listed on the precinct roster of eligible active voters." Doc. 84-3 at 14-16. Likewise, the Secretary's proposed remedy does not require boards of elections to search out every name who was previously removed subject to the Supplemental Process during the past 22 years, but may have died, been incarcerated for a felony, or become ineligible to cast a ballot for other reasons. *See* Damschroder Dec. at ¶¶19, 23.

The DOJ is right to observe that feasibility is a primary consideration. And the Secretary's proposed Directive meets that test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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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