

**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 Secretary of State of Ohio)

Defendant.)

Civil Action No. 2:16-cv-303 GCS/EPD

**BRIEF OF AMICUS CURIAE PUBLIC INTEREST LEGAL FOUNDATION
IN SUPPORT OF JUDGMENT IN FAVOR OF DEFENDANT JON HUSTED**

Plaintiffs in the above-captioned case challenge the State of Ohio’s “Supplemental Process,” which is used to identify and remove ineligible voters from county voter rolls as required by the National Voter Registration Act of 1993 (“NVRA”). Plaintiffs allege that the Supplemental Process violates the NVRA because it uses a voter’s inactivity as part of the State’s program for removing ineligible voters. (Dkt. 39 at 2.)

The State of Ohio’s reliance on dates pertaining to a registrant’s inactivity is not only consistent with the plain language of the NVRA, it is also consistent with list maintenance programs authorized via consent decrees by other federal courts interpreting the NVRA’s provisions. *American Civil Rights Union v. Clarke County, Mississippi Election Commission*, No. 2:15-cv-101-KS-MTP, Dkt. 5 (filed Nov. 25, 2015); *American Civil Rights Union v. Sheriff/Tax Assessor-Collector William “Clint” McDonald*, No. 2:14-cv-12-AM-CW, Dkt. 13 (filed March 17, 2015); *American Civil Rights Union v. Jefferson Davis County, Elections*

Commission, No. 2:13-cv-87-KS-MTP, Dkt. 20 (filed October 18, 2013); *American Civil Rights Union v. Walthall County, Mississippi Election Commission*, No. 2:13-cv-86-KS-MTP, Dkt. 14 (filed Sept. 4, 2013). For these reasons, Plaintiffs’ claims are meritless and judgment should be entered in favor of the Defendant.

I. The NVRA Expressly Allows Election Officials to Consider Voter Inactivity as Part of List Maintenance Programs.

The NVRA requires election officials to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters...” 52 U.S.C. § 20507(a)(4)(B). Congress did not include a detailed checklist of steps within the NVRA for election officials to follow. Rather, Congress provided election officials wide flexibility to implement a generalized program to keep voter rolls clean. 52 U.S.C. § 20501(b) (Congress enacted the NVRA “to protect the integrity of the electoral process . . . and to ensure that accurate and current voter registration rolls are maintained.”).

Contrary to Plaintiffs’ argument (Dkt. 37 at ¶ 3), the NVRA does not categorically prohibit reliance on a voter’s inactivity as part of each State’s list maintenance program. In fact, the NVRA expressly allows for Ohio’s Supplemental Process. Title 52, U.S.C. § 20507(b)(2) provides,

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office 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) of this section to remove an individual from the official list of eligible voters if the individual— (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and

then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

52 U.S.C. § 20507(b)(2).

Plaintiffs rest their entire argument on the NVRA's prohibition on "removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." (Dkt. 39 at 22-23 (citing 52 U.S.C. § 20507(b)(2))).

Plaintiffs ignore that in 2002, Congress clarified that prohibition in the Help America Vote Act ("HAVA"). Congress explained,

[C]onsistent with the National Voter Registration Act of 1993 . . . , 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, except that no registrant may be removed *solely* by reason of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added).

As Plaintiffs concede, Ohio is not removing any voters "solely by reason of a failure to vote." Rather, a voter is only removed if she "fails to respond to the Confirmation Notice sent by forwardable mail with a pre-paid return envelope, and then continues to be inactive for an additional period of four consecutive years, including two federal general elections, from the date that the Confirmation Notice is mailed." (Joint Proposed Stipulation of Facts and Stipulations of Authenticity, Admissibility, and Preserved Objections, Dkt. 41 at ¶ 16.) In other words, Ohio's Supplemental Process expressly tracks what is permissible under the NVRA. 52 U.S.C. § 20507(b)(2).

The plain language of the NVRA and HAVA authorize removal of voters using the procedures provided by the Supplemental Process. Plaintiffs' claims must therefore fail.

II. Other Federal Courts Confirm that Ohio’s Supplemental Process is Lawful Under the NVRA.

Plaintiffs also argue that Ohio may not use a voter’s inactivity as the basis to send that voter a confirmation-of-address notice under the NVRA. (Dkt. 39 at 25.) This argument also fails. At least three other federal court cases interpreting the NVRA’s list maintenance provisions have not just authorized, but required, the use of inactivity in determining which voters must receive a Confirmation Notice. Another case has authorized a county-wide mailing to *all* registered voters regardless of their election activity.

ACRU v. Jefferson Davis County Elections Commission

In 2013, Jefferson Davis County, Mississippi was sued under the NVRA for failing to use “reasonable efforts” to remove ineligible voters from its voter rolls. *American Civil Rights Union v. Jefferson Davis County, Elections Commission*, No. 2:13-cv-87-KS-MTP (filed April 26, 2013). The United States District Court for the Southern District of Mississippi approved a consent decree between the parties that outlines what location election officials must do to comply with their list maintenance obligations under the NVRA. Under the terms of the consent decree, election officials are required to initiate voter removal procedures based on a voter’s inactivity.

B. “Inactive” - Voters Who Have Not Voted For Two Federal Cycles

To any voter who may be currently classified as inactive by virtue of not voting in two consecutive federal election cycles, Defendants shall . . . mail a notice. . . that contains a postage prepaid and pre-addressed return card sent by forwardable mail, on which the registrant may state their current address. . . .

. . . Defendants shall remove from the rolls all registrants who have failed to respond to the notice described above . . . and have not voted or appeared to vote in two federal general elections after the notice was sent

Exhibit 1 at 6 (emphasis added).

ACRU v. Walthall County, Mississippi Election Commission

Like Jefferson Davis County, Walthall County, Mississippi was also sued in 2013 under the NVRA for failing to use “reasonable efforts” to remove ineligible voters from its voter rolls. *American Civil Rights Union v. Walthall County, Mississippi Election Commission*, No. 2:13-cv-86-KS-MTP (filed April 26, 2013).

The Southern District of Mississippi approved a consent decree that requires election officials to send confirmation-of-address notifications to *all* registered voters regardless of their election activity. Exhibit 2 at 4. Under the terms of the decree, any “inactive” voter who “[did] not vote during two Federal general election cycles (*i.e.* every two years, after one federal Presidential election and one federal mid-term election) following the date the confirmation notice [was] sent” was removed from the voter registration rolls. Exhibit 2 at 7.

ACRU v. Clarke County, Mississippi Election Commission

A third Mississippi County—Clarke County—was sued in 2015 for failing to maintain accurate and current voter rolls as required by the NVRA. *American Civil Rights Union v. Clarke County, Mississippi Election Commission*, No. 2:15-cv-101-KS-MTP, Dkt. 5 (filed Nov. 25, 2015). The court imposed the same remedial plan as was imposed on Jefferson Davis County, Mississippi. Under the terms of the decree, Clarke County is required to initiate voter removal procedures based on a voter’s inactivity.

B. “Inactive” - Voters Who Have Not Voted For Two Federal Cycles

To any voter who may be currently classified as inactive by virtue of not voting in two consecutive federal election cycles, Defendants shall . . . mail a notice. . . that contains a postage prepaid and pre-addressed return card sent by forwardable mail, on which the registrant may state their current address. . . .

. . . Defendants shall remove from the rolls all registrants who have failed to respond to the notice described above . . . and have not voted or appeared to vote in two federal general elections after the notice was sent

Exhibit 3 at 3-4 (emphasis added).

ACRU v. Sheriff/Tax Assessor-Collector William “Clint” McDonald

The Southern District of Mississippi is not alone in its approval of the Supplemental Process. In March 2015, the Western District of Texas approved list maintenance terms via consent decree that require election officials to administer Confirmation Notices to registered voters based on the voter’s inactivity. *American Civil Rights Union v. Sheriff/Tax Assessor-Collector William “Clint” McDonald*, No. 2:14-cv-12-AM-CW, Dkt. 13 (filed March 17, 2015).

Again, the terms of the consent decree mirrored the Supplemental Process used by Ohio.

B. “Inactive” - Voters Who Have Not Voted For Two Federal Cycles

To any voter who may be currently classified as inactive by virtue of not voting in two consecutive federal election cycles, Defendants shall . . . mail a notice. . . that contains a postage prepaid and pre-addressed return card sent by forwardable mail, on which the registrant may state their current address. . . .

. . . Defendants shall remove from the rolls all registrants who have failed to respond to the notice described above . . . and have not voted or appeared to vote in two federal general elections after the notice was sent

Exhibit 4 at 6 (emphasis added).

Ohio relies on a voter’s inactivity for two years as the basis for identifying voters who will receive a Confirmation Notice, the precise process authorized by the Southern District of Mississippi and Western District of Texas. As required by the NVRA, a voter’s registration is canceled only *after* she fails to respond to the confirmation notice *and* fails to engage in any voter activity for a period of four years.

Conclusion

Both the NVRA and other federal courts confirm that Ohio may use a voter's inactivity as part of its "reasonable efforts" to remove ineligible voters from Ohio's voter rolls. For these reasons, Defendant Jon Husted's request for judgment in his favor should be granted.

Dated: June 10, 2016

Respectfully submitted,

s/Thomas W. Kidd Jr.

Thomas W. Kidd Jr. (Ohio Bar 0066359)
Thomas W. Kidd Jr. LLC.
8913 Cincinnati Dayton Rd
West Chester, OH 45069
Phone: (513)733-3080
Fax: (513)577-7383
tkidd@thomaskiddlaw.com

J. Christian Adams (VA Bar #42543)
PUBLIC INTEREST LEGAL FOUNDATION
300 N. Washington St., Suite 405
Alexandria, VA 22314
Tel: 703-963-8611
Email: adams@publicinterestlegal.org
Pro Hac Vice application to be filed

Noel H. Johnson (Wis. Bar #1068004)
PUBLIC INTEREST LEGAL FOUNDATION
209 W. Main Street
Plainfield, IN 46168
Tel: (317) 203-5599
Email: njohnson@PublicInterestLegal.org
Pro Hac Vice application to be filed

Attorneys for Amici Curiae