**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.	)	Civil Action No. 2:16-cv-303 GCS/EPD
JON HUSTED, in his official capacity as Secretary of State of Ohio	)	
Defendant.	)	

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

On June 11, 2018, the Supreme Court of the United States held that Ohio's process to identify and remove ineligible voters—the Supplemental Process—is lawful under the National Voter Registration Act of 1993 (NVRA). *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018). Plaintiffs have returned to this Court seeking to escape the Supreme Court's sound decision using Count II of their Amended Complaint. (Doc. 132.) Plaintiffs are not entitled to a second bite at the apple.

Plaintiffs seek extraordinary relief: the reinstatement of at least hundreds of thousands of cancelled registrants on the eve of a federal election. The requested relief should be denied for at least two reasons. First, at least one plaintiff, Larry Harmon, lacks standing to seek, and this court lacks subject matter jurisdiction to grant, relief due to his failure to give pre-suit notice as required by the NVRA. Second, Plaintiffs are barred by laches after inexcusably waiting over

two years to seek reinstatement of cancelled registrants under Count II, and their request now threatens to disrupt an orderly election.

I. Plaintiff Larry Harmon Lacks Standing Because He Failed to Give Pre-Suit Notice As Required By The NVRA.

Plaintiff Larry Harmon did not provide pre-suit notice of Defendant's alleged NVRA violations and that failure is "fatal" to his standing and this court's subject matter jurisdiction to hear his claim. *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014). Accordingly, his claims must be dismissed.

The NVRA creates a private right of action for individuals whose rights under the statute are violated. 52 U.S.C. § 20510(b). Before a person may file any claim under the NVRA, however, he must first provide written notice of the violation to the state's chief election official. 52 U.S.C. § 20510(b)(1). The NVRA's notice requirement is not simply a formality. Rather, it is jurisdictional. Congress intended pre-suit notice to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Condon v. Reno*, 913 F. Supp. 946, 960 (D.S.C. 1995) (notice provision "is intended to give the state the opportunity to cure violations that are called to its attention.").

For that reason, the NVRA's notice provision "is mandatory," *Scott*, 771 F.3d at 835, and "[i]n the context of standing to bring a private action pursuant to [the NVRA], 'failure to provide notice is fatal.'" *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1362 (S.D. Fla. 2016) (quoting *Scott*, 771 F.3d at 836); *see also Ga. State Conference of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012) ("No standing is . . . conferred if no proper notice is given.").

Mr. Harmon does not even allege that he provided the NVRA's required notice to Ohio's chief election official—the Ohio Secretary of State—before filing this action. Instead, Mr.

Harmon's claims were simply added on when Plaintiffs filed their Amended Complaint on May 17, 2016 (Doc. 37). According to that filing, the only parties who provided the required notice were plaintiffs APRI and NEOCH. (Doc. 37 at 15, ¶ 53 ("The December 2015 and February 2016 letters both stated that *APRI and NEOCH were providing notice* of their intent to sue for the violations of Section 8 of the NVRA . . . .").) The Amended Complaint plainly fails to include allegations that would grant this court subject matter jurisdiction to hear Mr. Harmon's claims under the NVRA.

Courts that have encountered the standing inquiry presented by Mr. Harmon have held that one plaintiff "cannot piggyback on [the] notice" provided by other plaintiffs. *Scott*, 771 F.3d at 836; *see also Bellitto*, 221 F. Supp. 3d at 1363; *Kemp*, 841 F. Supp. 2d at 1335-36. For example, in *Bellitto v. Snipes*, the Southern District of Florida held that an individual member of the organizational plaintiff lacked standing to pursue a remedy under the NVRA because she personally failed to provide the pre-suit notice required by the statute. *Id*. at 1363. The court rejected her attempt to "piggyback" on the notice provided by the organization to which she belonged:

> Like the notice in *Scott*, the ACRU's letter did not mention Bellitto "by name" or even refer to ACRU members, and thus, the Court finds the "notice letter . . . too vague to provide . . . an opportunity to attempt compliance as to [Bellitto] before facing litigation." *Scott*, 771 F.3d at 836 (internal quotations omitted) . . . . Bellitto has failed to meet her burden to establish standing to bring suit. Thus, Defendant's Motion is granted as to Plaintiff Bellitto's claims.

Id. at 836. The same circumstances are present here. APRI and NEOCH do not allege that they provided notice on behalf of Mr. Harmon or that Mr. Harmon is a member of their organizations. In fact, the Amended Complaint alleges only that "APRI and NEOCH were providing notice of *their* intent to sue…." (Doc. 37, ¶ 53 (emphasis added).) As in *Bellitto*, such statements are "'too

vague to provide . . . an opportunity to attempt compliance as to [Mr. Harmon] before facing litigation.'" *Bellitto*, 221 F. Supp. 3d at 1363 (quoting *Scott*, 771 F.3d at 836).

Ass'n of Cmty. Orgs. for Reform Now v. Miller ("*ACORN*"), is not to the contrary. In *ACORN*, the Sixth Circuit excused an individual plaintiff's failure to provide the NVRA's required pre-suit notice because the defendant—the State of Michigan—"made clear" that it would refuse to comply with the NVRA "until forced to do so by judicial intervention." 129 F.3d at 838. The claim ripened because Michigan said it would not take any actions. Under those unique facts, the court explained, "[r]equiring [the individual] plaintiffs to give actual notice would have been unnecessary with regard to the purpose of the notice requirement." *Id*. In other words, because there was no possibility Michigan would have cured the alleged violation prior to litigation, giving notice would have been a "futile act[]." *Id*. The same cannot be said under the facts of this case.

Mr. Harmon complains that he was removed from Ohio's list of eligible voters and alleges that he did not receive a confirmation notice in the mail that would have allowed him to remain eligible to vote. (*See* Doc. 37 at 12-13, ¶¶ 42-44.) These complaints are "unique to [Mr. Harmon] himself." *Kemp*, 841 F. Supp. 2d at 1335. As in *Kemp*, "the other plaintiffs . . . have appropriately alleged standing (by diverting resources, etc.)," while Mr. Harmon "has alleged no separate basis for statutory standing other than these alleged injuries." *Id*. Mr. Harmon is not "situated similarly to [APRI and NEOCH] so that the notice letter might have been sent on his behalf." *Id*.

Nor has the Defendant positioned himself similarly to the State of Michigan. Whereas the State of Michigan unequivocally refused to comply with the NVRA absent court intervention,

there are no allegations that the Defendant was unwilling to re-register individual voters who could demonstrate their eligibility for voter registration.

Under these facts, pre-suit notice was therefore hardly "unnecessary with regard to the purpose of the notice requirement." *ACORN*, 129 F.3d 838. Had Mr. Harmon alerted the Defendant that his removal was in violation of the NVRA,[1] it would have given the Defendant an opportunity to "cure" the alleged violations by either sending the necessary confirmation notice or reinstating Mr. Harmon's registration. *Condon*, 913 F. Supp. at 960. "The pre-litigation notice was meant to encourage exactly this sort of compliance attempt." *Kemp*, 841 F. Supp. 2d at 1336 (dismissing plaintiff who failed to provide NVRA's pre-suit notice). For these reasons, Mr. Harmon lacks standing to seek relief and he should be accordingly dismissed from this action.

II. Plaintiff's Request for Reinstatement of Cancelled Registrants is Barred By the Doctrine of Laches.

Although APRI and NEOCH's challenge to Ohio's confirmation notice is not itself untimely, the relief requested is. In their September 14, 2018 motion, Plaintiffs request, *for the first time*, an order requiring reinstatement of any cancelled registrant who received "a deficient confirmation notice." (Doc. 132 at 2, ¶ 3.) Prior to that filing, Plaintiffs' requested relief was limited to an order requiring the Defendant to simply "revise" the confirmation notice. (Doc. 39 at 3, ¶ 6.) Any requested reinstatement concerned the Supplemental Process (Count I) upheld by the Supreme Court, not the confirmation notice (Count II). (*Id*. at 3, ¶ 5 (requesting reinstatement for all voters cancelled "by operation of the Supplemental Process").)

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[1] Mr. Harmon alleges that he notified the Defendant that his name had been removed from the voter registration rolls (Doc. 37 at 13, ¶ 45), but does not allege that he provided notice of an NVRA violation, as the statute's pre-suit notice provision requires. 52 U.S.C. § 20510(b)(1).

"Laches is a negligent and unintentional failure to protect one's rights…." *Elvis Presley Enters. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). "[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced.'" *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). Waiting over two years to bring this claim and requested relief certainly justifies this Court refusing to grant the requested relief.

Plaintiffs' delay is especially concerning in an election case on the eve of an election. Plaintiffs ask election officials to pursue a mammoth undertaking as they are preparing for the 2018 midterm election. Courts have rejected far less burdensome requests because of laches. In *Perry v. Judd*, four candidates for the office of the President of the United States requested an order requiring that their names appear on the ballot for the Republican primary for the Commonwealth of Virginia. *Perry v. Judd*, 840 F. Supp. 2d 945, 949 (E.D. Va. 2012). The plaintiffs made the request 25 days prior to the deadline for mailing of absentee ballots to military and overseas voters. *Id*. at 949, 953. Despite the time-sensitive nature of the proceedings, the lower court did not rush to a determination, but "heard oral argument and conducted an evidentiary hearing," and the parties agreed that "the Court should consider the affidavits and exhibits filed with the Court." *Id*. at 951. At the conclusion of the proceedings, the court held the plaintiffs' delay in seeking relief—a period of four months, *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) —and the corresponding prejudice to the administration of Virginia's elections was fatal to plaintiffs' claim under the doctrine of laches, *Perry*, 840 F. Supp. 2d at 953-55; *see also Perry*, 471 F. App'x at 224-28. Granting the requested relief, the Fourth Circuit explained, would "contravene[] repeated Supreme Court admonitions that federal

judicial bodies not upend the orderly progression of state electoral processes at the eleventh hour." *Perry*, 471 F. App'x at 220-21.

As in *Perry*, Plaintiffs' extraordinary request for relief should not be resolved without the taking and hearing of evidence. *Perry*, 840 F. Supp. 2d at 951. With the benefit of such evidence, this Court may consider any justification for Plaintiffs' delay and the resulting prejudice to Ohio's election officials if relief is granted. Here, Plaintiffs ask for far more than the plaintiffs in *Perry*—the reinstatement of at least hundreds of thousands of cancelled voters whose current residencies remain in doubt. Similar to *Perry*, the request comes on eve of an election for federal office. Plaintiffs made their request just 8 days prior to the start of the voting period for military and overseas voters, and just 26 days prior to the start of the period for absentee voting by mail and early in-person voting. *See* Ohio Secretary of State, Voting Schedule, https://www.sos.state.oh.us/elections/voters/voting-schedule/#gref (last accessed Sept. 27, 2018). Plaintiffs have delayed much longer than the plaintiffs in *Perry* in seeking relief, waiting over two years to seek reinstatement of hundreds of thousands of cancelled voters under Count II. Their delay now "threaten[s] to disrupt an orderly election." *Perry*, 471 F. App'x at 227. As in *Perry*, these circumstances justify denial of Plaintiffs' request under the doctrine of laches.

Finally, it is well established that courts should not venture into the election administration process so close to an election because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) In *Purcell v. Gonzalez*, the Supreme Court warned against judicial intervention in disputes occurring close to an election and injecting the judiciary into the political process. Where an election is "imminen[t]" and there is "inadequate time to resolve the factual disputes," it is a "*necessity*" to "allow the election to proceed without an injunction suspending the

[challenged law].” *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (emphasis added). As the Sixth Circuit explains, this principle of judicial restraint “is especially true when a plaintiff has unreasonably delayed bringing his claim, as [Plaintiffs] most assuredly ha[ve].” *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

The reinstatement of hundreds of thousands of cancelled registrants on the eve of an election for federal office threatens to disrupt the administration of Ohio’s established election procedures. Plaintiffs’ delay in seeking reinstatement of registrants under Count II is inexcusable under these facts and their request for relief should be accordingly barred under the doctrine of laches.

Dated: September 28, 2018

Respectfully submitted,

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