Case No. 18-3984

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE; NORTHEAST OHIO COALITION FOR THE HOMELESS; and LARRY HARMON,

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State of Ohio

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
Eastern Division

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

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INTEREST OF *AMICUS CURIAE*

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization headquartered in Indianapolis, Indiana. Founded in 2012, the Foundation seeks to promote the integrity of elections nationwide and preserve the constitutional balance giving states control over their own elections. The Foundation files *amicus curiae* briefs as a means to advance its purpose and preserve election integrity. The Foundation has appeared as *amicus curiae* in federal courts on multiple occasions. The Foundation was granted leave to file an *amicus curiae* brief in this action on two occasions before the district court.

Counsel for the Foundation contacted counsel for the parties via email on October 17, 2018, seeking their consent for this brief. The Foundation is authorized to state that Appellants and Appellee consent to the filing of this brief.

No counsel for any party authored any part of this brief or contributed money toward its preparation.

CORPORATE DISCLOSURE STATEMENT

The Public Interest Legal Foundation is a non-profit 501(c)(3) organization incorporated under the laws of Indiana. The organization is not publicly held and issues no stock. Therefore, no person or corporation owns 10 percent or more of its stock.

INTRODUCTION

Appellants' extraordinary request for relief should be denied for at least three reasons. First, Appellants failed to give the required pre-litigation notice required by the National Voter Registration Act ("NVRA"). Failure to give notice means no subject-matter jurisdiction exists. This Court cannot exercise the constitutional jurisdiction to afford the relief Appellants seek on the eve of a federal election. Second, Appellants' request is barred by laches because they inexcusably waited over two years to seek reinstatement and provisional-voting privileges for cancelled registrants under Count II of their Amended Complaint. Lastly, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), counsels strongly against judicial intervention on the eve of an election.

ARGUMENT

I. This Court Lacks Jurisdiction Because Appellants Failed to Give Adequate Pre-Litigation Notice as Required by the NVRA.

"[A] plaintiff must possess both constitutional and statutory standing in order for a federal court to have jurisdiction." *Loren v. Blue Cross & Blue Shield*, 505 F.3d 598, 606 (6th Cir. 2007) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Appellants do not have standing—and this Court does not have jurisdiction—because Appellants failed to give adequate notice of the alleged violations as required by the NVRA.

To have standing to sue under the NVRA, an aggrieved party 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-litigation 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 v. Schedler*, 771 F.3d 831, 835 (5th Cir. 2014), 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.").

The district court held, "There is no question that Mr. Harmon failed to comply with the notice requirement" of the NVRA. RE140 (Opinion and Order), PAGEID #: 25738. Mr. Harmon's failure to provide notice "depriv[ed] Defendant

of the opportunity to remedy the alleged violations before facing litigation." *Id*. This finding settles the question of subject matter jurisdiction.

The district court further found that the organizational Appellants "fail[ed] to provide adequate and detailed requests to remedy the confirmation notice in a timely manner." RE140 (Opinion and Order), PAGEID #: 25738. What notice the organizational Appellants did send was of such a "vague nature" that it "potentially deprived Defendant of any meaningful notice of Plaintiff's specific alleged violations, and thus, the opportunity to attempt compliance prior to litigation." *Id*.

Appellants' failure to provide the required pre-litigation notice is "fatal" to their standing and this Court's subject matter jurisdiction to hear their claims. *Scott*, 771 F.3d at 836. Upon finding that Appellants did not provide the required pre-litigation notice, the district court should have dismissed Appellants' action. Instead, the district court erroneously proceeded to address the merits of Appellants' complaint because Appellee allegedly "failed to raise this standing issue prior to this stage of litigation." RE140 (Opinion and Order), PAGEID #: 25738.

Because standing implicates subject-matter jurisdiction, "it can be raised *sua sponte*," *Loren*, 505 F.3d at 606, at any point in the proceedings, *see Hollingsworth v. Perry*, 570 U.S. 693 (2013) (holding petitioners-intervenors lacked standing over four years after initiation of action). Where subject-matter jurisdiction is lacking,

the inquiry is over, no matter the stage of the proceedings. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Without proper notice, there is no jurisdiction, and Appellants' action must be dismissed.

II. Appellants' Request for Reinstatement of Cancelled Registrants Is Barred by the Doctrine of Laches.

Appellants' request for an order directing election officials to count ballots cast by cancelled registrants is untimely and barred by the doctrine of laches. In their September 14, 2018 motion, Appellants requested, *for the first time*, an order requiring reinstatement and provisional-voting privileges for any cancelled registrant who received "a deficient confirmation notice." RE132 (Plaintiffs' Motion for Summary Judgment and Permanent Injunction), PAGEID #: 24004, ¶ 3. Prior to that filing, Appellants' requested relief was limited to an order requiring the Defendant simply to "revise" the confirmation notice. RE39 (Plaintiffs' Motion for Summary Judgment at Preliminary Injunction), PAGEID #: 1368, ¶ 6. As the district court acknowledged, the presently requested relief concerned the Supplemental Process (Count I) upheld by the Supreme Court, not the confirmation notice (Count II):

> The Court agrees that Plaintiffs' primary relief sought on the second cause of action was a revised confirmation notice and the current broad relief sought was primarily tied to the first claim, that the supplemental process violated the NVRA.

RE140 (Opinion and Order), PAGEID #: 24741.

"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 seek election-altering relief certainly justifies this Court refusing to grant Appellants' emergency motion.

Appellants' delay is especially problematic under these circumstances. Appellants are demanding that officials alter the administration of their election in the midst of Ohio's early voting period. 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 twenty-five 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.

Here, Appellants ask for far more than the plaintiffs did in *Perry*—reinstatement or provisional-voting privileges for at least hundreds of thousands of cancelled voters whose current residencies remain in doubt. Similar to *Perry*, the request comes on the eve of an election for federal office. Appellants made their request just eight days prior to the start of the voting period for military and overseas voters, and just twenty-six 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 Oct. 18, 2018). Appellants have delayed much longer than the plaintiffs did in *Perry* in seeking relief. 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 Appellants' request under the doctrine of laches.

III. The Supreme Court Warns Against Judicial Intervention in Disputes Occurring Close to an Election.

It is well established that courts should not disrupt 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*, 549 U.S. at 5-6 (emphasis added).

Indeed, it is this Circuit's "general rule" that "last-minute injunctions changing election procedures are strongly disfavored." *SEIU Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012) (citing *Purcell*, 549 U.S. at 4-5). "Election procedures are matters of state law, and federal courts should hesitate to interfere, particularly when operating on limited information in the weeks preceding an election." *Ohio Republican Party v. Brunner*, 544 F.3d 711, 732-33 (6th Cir. 2008). This principle of judicial restraint "is especially true when a plaintiff has unreasonably delayed bringing his claim, as [Appellants] most assuredly ha[ve]." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

Accordingly, this Court should decline to intervene in the on-going administration of Ohio's election process.

Dated: October 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and because it contains 1,619 words, exclusive of the portions exempted by Federal Rule of Appellate Procedure.

This brief also complies with the typeface and requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it is printed in proportionally spaced, serif typeface using 14-point Times New Roman font produced by Microsoft Word 2016 software.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically this 18th day of October, 2018. Notice of this filing will be sent by operation of the Court's electronic filing system to counsel of record for all parties as indicated on the electronic filing receipt. Parties and their counsel may access this filing through the Court's system.

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