

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

OHIO A. PHILLIP RANDOLPH	)	
INSTITUTE., <i>et al.</i> ,	)	
<i>Plaintiffs,</i>	)	Case No. 2:16-cv-00303
<i>v.</i>	)	JUDGE GEORGE C. SMITH
JON HUSTED, OHIO SECRETARY	)	Magistrate Judge Elizabeth Preston Deavers
OF STATE,	)	
<i>Defendant.</i>	)	

**UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN  
SUPPORT OF DEFENDANT AND CORPORATE DISCLOSURE STATEMENT**

Judicial Watch, Inc., by and through undersigned counsel, respectfully move for leave to file the attached *amicus curiae* brief in support of Defendant Jon Husted. Counsel for Judicial Watch contacted counsel for Plaintiffs and Defendant seeking their consent to the instant motion, and both have given their consent. In support of this motion, Judicial Watch’s proposed *amicus* brief is attached hereto as Exhibit 1. In further support of this motion, proposed *amicus* states as follows:

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance. Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Proposed *amicus* Judicial Watch has both an interest in – and unique knowledge of – the issues at stake in this litigation, and therefore believes its submission will aid this Court. Judicial Watch’s interest and knowledge comes in part from its prior NVRA litigation against Ohio. Specifically, Judicial Watch filed a federal lawsuit under Section 8 of the National Voter Registration Act (“NVRA”), 52 U.S.C. § 20507, in 2012 against Ohio Secretary of State Jon Husted.<sup>1</sup> In that complaint, Judicial Watch alleged that Ohio had been failing to make a reasonable effort to maintain the accuracy and currency of its voter rolls in violation of the NVRA. 2012 Compl., ¶¶ 1, 7. As Judicial Watch explained, the most recent data available in 2012 showed that three Ohio counties had more registered voters than eligible voters living there, and an additional 31 Ohio counties had almost as many registered voters as eligible voting-age adults. 2012 Compl., ¶¶ 9-11. Although Ohio disagreed, Plaintiff believed that this evidence demonstrated Ohio was in violation of its NVRA obligation to maintain accurate voter rolls. 2012 Compl., ¶¶ 12, 39.

Judicial Watch brought the 2012 lawsuit against Ohio in its associational capacity on behalf of its members registered to vote in Ohio. 2012 Compl., ¶¶ 4, 25. Prior to filing the lawsuit, Judicial Watch solicited the views of its Ohio members, over 100 of whom specifically asked Judicial Watch to sue Ohio over its list maintenance practices. 2012 Compl., ¶¶ 22-25. Judicial Watch’s members were injured due to Ohio’s alleged failure to maintain accurate voter rolls. Specifically, Judicial Watch alleged Ohio’s violations undermined Judicial Watch members’ confidence in the legitimacy of Ohio elections, causing them doubt whether their votes

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<sup>1</sup> Complaint, *Judicial Watch v. Husted*, Case No. 12-792, S.D. Ohio (filed Aug. 30, 2012), available at <https://www.scribd.com/doc/104449069/Complaint-Ohio-NVRA> (hereinafter, “2012 Compl.”).

would be cancelled out by votes cast in the name of outdated registrations, thereby discouraging them from voting to begin with. 2012 Compl., ¶¶ 28-29.

Judicial Watch litigated its case against Ohio for over sixteen months. During this time, Judicial Watch propounded multiple interrogatories and requests for production against Ohio. Judicial Watch also took depositions of multiple Ohio state and county election officials, and retained a former Georgia Secretary of State to prepare an expert witness report. Judicial Watch litigators spent over 400 hours trying the case, amounting to unrecovered legal fees of over \$180,000. In addition, Judicial Watch spent over \$50,000 in out-of-pocket in litigation expenses, including expert fees, local counsel fees, court costs, deposition costs, and travel costs.

In January of 2014 the parties settled the lawsuit, agreeing to terms for Ohio to perform certain NVRA Section 8 list maintenance practices through November of 2018.<sup>2</sup> A key provision of this *Settlement Agreement* was Ohio's agreement to continue to perform an annual list maintenance "Supplemental Mailing" to voters who had no contact with Ohio's election offices in two years.<sup>3</sup> The *Settlement Agreement* required Ohio to send the Supplemental Mailing every year, whereas Ohio had previously been sending the mailing every *two* years. The Supplemental Mailing portion of the *Settlement Agreement* was so important to the parties that they even subsequently negotiated an amendment solely to give Ohio greater flexibility over which month of the year to initiate the Supplemental Mailing.

Judicial Watch never would have entered the *Settlement Agreement* with Ohio and dismissed its lawsuit if it believed the Supplemental Mailing was unlawful. Plaintiffs in the present case claim that the Supplemental Mailing violates the NVRA. *See* Doc. 1, ¶ 5. If

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<sup>2</sup> January 10, 2014 Settlement Agreement ("*Settlement Agreement*"), available at <https://www.judicialwatch.org/wp-content/uploads/2014/01/01-14-Ohio-Voter-Rolls-Settlement.pdf>.

<sup>3</sup> *Settlement Agreement*, p. 3, Section 2.i.

Plaintiffs prevail in their claim against Ohio in this case, one of the key provisions of Judicial Watch's *Settlement Agreement* could be voided. This would undermine Judicial Watch's efforts to protect the integrity of elections for its Ohio members, rendering its sixteen months and \$230,000 of litigation fees and costs on behalf of its members a significantly wasted effort. Judicial Watch therefore has a legally protected interest in the subject matter of this litigation, and a genuine organizational interest in protecting its members' voting rights and ensuring its past efforts were not in vain.<sup>4</sup>

Even beyond protecting its settlement, Judicial Watch is concerned that the relief requested by Plaintiffs in this case would disenfranchise Ohio voters, including Judicial Watch members. If Ohio's voter rolls are not maintained in a current and accurate condition consistent with the NVRA, Ohio citizens could have their votes diluted or cancelled out by unlawful ballots cast in the names of outdated or duplicate registrations. As the Supreme Court has explained, public confidence in the integrity of the electoral process is an important interest because it encourages citizen participation in the democratic process. *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008). Conversely, a lack of perceived integrity undermines citizens' confidence in the legitimacy of their government and discourages citizen participation in elections. *Id.* Proposed *amicus* therefore believes Plaintiffs' requested relief will undermine citizen confidence in the integrity of elections among citizens in Ohio, potentially causing injury. *See Judicial Watch v. King*, 993 F. Supp. 2d 919, 925 (S.D. Ind. 2013) ("Judicial Watch alleges that the confidence of its members who are registered to vote in Indiana in the integrity of the electoral process has been undermined by the Defendants' failure to comply with the list

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<sup>4</sup> Judicial Watch considered moving to intervene in this case given its "legally protected interest," but ultimately decided not to do so even though it had sufficient grounds for mandatory intervention. *United States v. City of Detroit*, 712 F.3d 925, 946 (6th Cir. 2013).

maintenance requirements of the NVRA. If the state has a legitimate interest in preventing that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm.”).

A court’s decision to permit *amicus curiae* to participate in a pending case is “solely within the broad discretion of the district court.” *Tafas v. Dudas, et al.*, 511 F.Supp.2d 652 (E.D. VA 2007) (overruled on other grounds); citing *Waste Mgmt., Inc. v. City of York*, 162 F.2R.D.34, 36 (M.D. Pa. 1995); see e.g. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). While there is no rule governing the appearance of *amici* in a district court, the courts have recognized they have broad discretion whether to permit a non-party to participate as an *amicus curiae*. As explained by then-Judge Alito, “[e]ven when a party is well represented, an amicus may provide important assistance to the court.” *Neonatology Assocs., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002). Indeed, the federal courts regularly permit parties with various interests to appear as *amici*, reasoning that a “restrictive policy with respect to granting leave to file may [] create at least the perception of viewpoint discrimination.” *Neonatology Assocs., P.A.*, 293 F.3d at 133. See also *United States v. Alkaabi*, 223 F. Supp. 2d. 583, 592 (D.N.J. 2002).

For the foregoing reasons, Judicial Watch respectfully requests this Court grant leave to allow its appearance and to accept its *amicus curiae* brief.

**CORPORATE AFFILIATION AND FINANCIAL INTEREST  
DISCLOSURE STATEMENT**

Pursuant to Fed. R. Civ. P. 7.1, Local Rule 7.1, and 6th Cir. R. 26.1, Judicial Watch is not a subsidiary or affiliate of a publicly owned corporation. Judicial Watch is a corporation organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in Judicial Watch.

Dated: June 17, 2016

Respectfully submitted,

s/ David R. Langdon

David R. Langdon (OH Bar No. 0067046)

*Trial Attorney*

LANGDON LAW, LLC

8913 Cincinnati-Dayton Rd.

West Chester, Ohio 45069

(513) 577-7380

(513) 577-7383 fax

dlangdon@langdonlaw.com

s/ Chris Fedeli

Robert D. Popper

Chris Fedeli

JUDICIAL WATCH, INC.

425 Third Street, SW

Washington, DC 20024

(202) 646-5172

rpopper@judicialwatch.org

cfedeli@judicialwatch.org

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of June, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*s/ David R. Langdon*

David R. Langdon

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<i>Plaintiffs,</i>	)	Case No. 2:16-cv-00303
<i>v.</i>	)	JUDGE GEORGE C. SMITH
JON HUSTED, OHIO SECRETARY	)	Magistrate Judge Elizabeth Preston Deavers
OF STATE,	)	
<i>Defendant.</i>	)	

**BRIEF OF AMICUS CURIAE JUDICIAL WATCH, INC. IN SUPPORT OF  
DEFENDANT JON HUSTED, OHIO SECRETARY OF STATE**

Judicial Watch, Inc. files this *amicus curiae* brief in support of Defendant Jon Husted, Ohio Secretary of State. Plaintiffs claim that Ohio’s voter list maintenance practices violate the National Voter Registration Act of 1993, 52 U.S.C.A. § 20501, *et seq.* (“NVRA”). Specifically, the plaintiffs complain that Ohio’s “Supplemental Process” – in which confirmation notices are mailed to persons who have not engaged in any voter activity for two years, and those voters are asked to confirm their registration status – is illegal. Plaintiffs’ assertions that Ohio is in violation of the NVRA mischaracterize the statute to include non-existent requirements, and they ask this Court to do the same. The plaintiffs may believe that the NVRA *should* contain those requirements, but it does not. They are essentially asking the Court to force Ohio to comply with the statute they want the NVRA to be, not the statute that it is. This Court is not permitted to read requirements and language into the NVRA that Congress declined to include. The statute is clear, and there is no reason for the Court to look beyond its plain text to determine its meaning.

If successful, Plaintiffs' claims would invalidate part of Ohio's system for maintaining accurate voter registration lists, and force Ohio to violate the terms of its settlement agreement with Judicial Watch. Judicial Watch files this *amicus* brief to express support for Secretary of State Husted's positions in this action, and to argue specifically that Ohio's Supplemental Process is legal and complies with the plain language of the NVRA.<sup>1</sup> The Court should deny plaintiffs' requests for declaratory and injunctive relief.

### **Interest of *Amicus Curiae* Judicial Watch**

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. One way that Judicial Watch accomplishes its mission is by bringing lawsuits and filing *amicus* briefs to ensure that states comply with federal election law. As set forth in the Motion for Leave to File an *Amicus Curiae* Brief, Judicial Watch has a particular interest in the issues at stake here because it filed a federal lawsuit under Section 8 of the NVRA in 2012 against Ohio Secretary of State Jon Husted, in which it alleged that Ohio had failed to make a reasonable effort to maintain the accuracy and currency of its voter rolls in violation of the NVRA. *See Judicial Watch v. Husted*, Civil Action No. 12-792 (S.D. Ohio 2012) (Complaint attached hereto as Exhibit A). The parties settled the lawsuit, and agreed that Ohio would perform certain NVRA Section 8 list maintenance practices through November 2018. *See Settlement Agreement and Amendment* (attached hereto as Exhibit B). A key provision of the Settlement Agreement is that Ohio will continue to perform an annual list maintenance "Supplemental Mailing" to voters who have had no contact with Ohio's election offices for two

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<sup>1</sup> Ohio also uses an additional procedure to maintain accurate rolls, which cross-references the United States Postal Service's national change of address database for voters who may have changed residence (the "NCOA" process). The details of this process are set forth in the briefs submitted by the parties. Plaintiffs do not challenge this aspect of Ohio's list maintenance system, and therefore there is no need for Judicial Watch to address it.

years. *See* Exh. B at 3, Section 2.i. Thus, if Plaintiffs prevail in their claim against Ohio in this case, this key provision of Judicial Watch's Settlement Agreement could be voided.

### **Argument**

The NVRA requires all states to conduct a program to remove from their registration lists the names of voters who become ineligible due to death or a change of residence. 52 U.S.C. § 20507(a)(4). The issue Plaintiffs have put before this Court is: Under the NVRA, may Ohio's boards of elections send a confirmation notice, by forwardable mail, to the last known address of a person who has not participated in any voter activity for two years, and ask the person to confirm, either online or by pre-paid postage, that he or she should still be listed on the voter rolls? Under Ohio's list maintenance procedures, it is only when that person *both* (1) fails to respond to the confirmation notice, *and* (2) subsequently fails to vote in the following two general federal elections that he or she is removed from the rolls pursuant to Section 8 of the NVRA. *See* 52 U.S.C. § 20507(d). In total, this process takes six years. Judicial Watch submits that such a process is lawful under the plain language of the NVRA.

Despite the plaintiffs' assertions, Ohio's list maintenance process complies with the plain language of the NVRA. Nothing in the statute prohibits Ohio from maintaining the accuracy of its voter rolls in the manner described above. To the contrary, Ohio's process is based on the *mandate* in the NVRA that all states undertake efforts to remove ineligible voters from their registration lists. The NVRA explicitly provides that one way of maintaining accurate rolls is to remove voters who fail to respond to a confirmation notice and do not vote in two consecutive federal general elections. 52 U.S.C. § 20507(d). That is exactly what the Ohio process does.

Plaintiffs' arguments that Ohio's process violates the NVRA are not based on the text of the statute, but instead are rooted in the plaintiffs' ideas about what the NVRA *should* require.

They ask this Court to determine judicially that the NVRA contains obligations that are found nowhere in text of the statute. This Court’s task is “to construe what Congress has enacted,” not what the plaintiffs—or any party—believe the statute should say. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001) (“Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute,” *citing Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 175 (1989); *Watt v. Energy Action Ed. Foundation*, 454 U.S. 151, 162 (1981)). This Court should decline to engage in such legislation from the bench. As set forth below, Ohio’s Supplemental Process complies with the plain language of the NVRA, and that should end this inquiry.

**I. Federal Law Requires That States Maintain Accurate Voter Rolls to Protect the Integrity of the Electoral Process.**

Ohio is complying with the NVRA’s mandate that the states “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists.” 52 U.S.C. § 20507(a)(4). All states are *required* to conduct such a program to remove the names of registered voters who have become ineligible by reason of death or a change in residence. 52 U.S.C. § 20507(a)(4)(A)-(B). The NVRA, as well as the Help America Vote Act of 2002, 52 U.S.C. § 21083 *et seq.*, mandate these programs “to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll.” 52 U.S.C. § 20507(b); *see also* 52 U.S.C. § 21083(a)(4) (providing that a state election system shall, at a minimum, include provisions to ensure that voter registration records are accurate and updated regularly).

The purpose of these provisions is to prevent voter fraud. *See* S. Rep. 103-6 at 17-18, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (“The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud”); 147 Cong. Rec. H9290 (daily ed.

Dec. 12, 2001) (statement of Rep. Terry) (stating that HAVA’s reforms would help states “clean up voter rolls, and thus clean-up elections”). There is no doubt that voter fraud occurs. *See* REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, Jimmy Carter and James A. Baker, III (Co-Chairs), “Building Confidence in U.S. Elections,” American University’s Center for Democracy and Election Management, p. 18 (Sept. 2005) (“While the Commission is divided on the magnitude of voter fraud . . . there is no doubt that it occurs”).<sup>2</sup> As the Carter-Baker Report found, “[i]n close or disputed elections, and there are many, a small amount of fraud could make the margin of difference.” *Id.* Indeed, just recently in the state of Ohio, numerous elections have been decided by *one* vote.<sup>3</sup> Thus, even a small amount of voter fraud – for example, just one ballot cast by an ineligible voter – could change the outcome of an election. Such a risk is unacceptable in a democracy, which is upheld and maintained by elections and the voters who participate in them. Ohio must comply with the list maintenance procedures in the NVRA because the statute compels it, but also because the integrity of Ohio’s elections—and therefore, its government – could be compromised if it fails to ensure that only eligible voters are casting ballots.

## **II. Ohio’s Supplemental Process Complies with the Text of the NVRA.**

Ohio’s Supplemental Process is conducted pursuant to subsections (b) and (d) of Section 8 of the NVRA. Subsection (b) provides in relevant part:

(b) Confirmation of voter registration

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<sup>2</sup> The Carter-Baker Report is available at: <http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF>.

<sup>3</sup> Secretary of State Husted has released statistics showing that, in 2013, 35 local races and eight local ballot issues in Ohio were decided either by *one* vote, or by a coin toss following an electoral *tie*. See Press Release, “Secretary of State Husted Reminds Ohioans: One Vote Matters,” Ohio Secretary of State’s Office (Jan. 13, 2013), available at <http://www.sos.state.oh.us/sos/mediaCenter/2014/2014-01-13.aspx>.

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 . . .

(2) 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) 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) (emphasis added). Subsection (d), referenced in subsection (b)(2) as an exception to that provision, provides as follows:

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant –

[...]

(B)(i) has failed to respond to a notice described in paragraph (2); and (ii) has not voted or appeared to vote . . . in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

52 U.S.C. § 20507(d).

The plaintiffs claim that Ohio's Supplemental Process violates the NVRA, but they are incorrect. Specifically, they argue that because Ohio makes "the failure to vote a trigger for the confirmation notice," the process "results in the removal of voters from the list of registered voters for their failure to vote" in violation of subsection (b). Pls.' Mot. for Summ. J. at 25 (ECF No. 39); 52 U.S.C. § 20507(b)(2). The plaintiffs' argument fails because the NVRA specifically

excepts the process set forth in subsection (d), which is what Ohio is doing, from the language in subsection (b) that prohibits “the removal of the name of any person from the official list of voters . . . by reason of the person’s failure to vote.” *See* § 20507(b)(2) (“nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsection[] . . . (d)”). Ohio’s process falls squarely within the plain language of subsection (d), and complies with the requirements of that provision. Because Ohio’s process is permissible on the face of the statute, the plaintiffs’ claims should be dismissed.

A. Ohio’s List Maintenance Program Does Not Remove Voters from the Registration List Based on Their Failure to Vote.

As Secretary of State Husted has explained, under Ohio’s Supplemental Process, the county boards send a confirmation notice to persons who are on the state’s voter rolls but have demonstrated voter inactivity for two years. The confirmation notices are sent by forwardable mail and include a postage pre-paid response. Those voters who do not respond to the confirmation notice are placed on an inactive list, but their ability to vote does not change at that time. If those voters who did not respond to the confirmation notice *then* fail to vote in the next two general federal elections, one of which is necessarily a presidential election, those voters are dropped from the rolls. *See* Def.’s Initial Merits Brief at pp.7-8 (ECF No. 38).

There is no dispute that the NVRA precludes the removal of voters from the rolls on the sole basis of their failure to vote. But Ohio’s Supplemental Process does not remove a person’s name from its lists because the person failed to vote. As set forth above, registrants are removed *because they failed to respond to the confirmation notice*, coupled with the fact that they did not participate in the two federal general elections following the confirmation notice. In other words, registrants are *queried* on the basis of their failure to vote, but not *removed* on that basis.

This does not amount to removing voters from the rolls for a failure to vote. This process is set forth specifically in the statute at subsection (d), and does not violate subsection (b)(2).

B. The NVRA Permits States to Send Confirmation Notices to Registrants Who Have Not Voted in Recent Elections.

Nothing in the NVRA prohibits a state from sending a confirmation notice to registrants who have not participated in voting activity for some period of time. Ohio's program does not target voters for removal on any impermissible basis, as the plaintiffs' arguments imply. Rather, it contacts voters who have not participated in elections in the last two years and simply asks them to confirm their registration status. The NVRA does not place any preconditions on the mailing of a confirmation notice, and it does not prohibit sending such a notice to registrants who have failed to engage in voter activity in recent years.

Moreover, the confirmation notice is sent by forwardable mail; therefore, even if a voter has moved, he or she should still receive it and be able to act upon it. Even if the voters do not respond to the confirmation notice, they remain eligible to vote without restriction *for another four years*. They are not turned away from the polls or asked to cast a provisional ballot. The confirmation notice only affects the recipient's ability to vote if that person fails to respond *and* fails to vote in the next two federal general elections, one of which is a presidential election. Despite the plaintiffs' arguments to the contrary, nothing in the NVRA prohibits Ohio complying with its obligations under the NVRA through this process.

C. The NVRA Does *Not* Require Independent or Reliable Evidence That a Voter Has Changed Residency Before a State May Send That Voter a Confirmation Notice. The Court Should Decline to Read This Non-Existent Requirement into the Statute.

Plaintiffs maintain that a state may only send a confirmation notice to a voter where the state has "independent" and "reliable" evidence that the voter has changed his or her residence. Pls.' Mot. for Summ. J. at 26 (ECF No. 39). They also assert that Ohio's program violates the

text of the NVRA because it does not limit the use of a confirmation notice to “the sole permissible purpose of confirming an already independently identified change of residence.” (*Id.* at 29). However, nowhere does the NVRA actually require that a state must have “independent” or “reliable” evidence that a voter has changed residence before it may mail a confirmation notice to that voter. The words “reliable” and “independently identified” do not even appear in the text of the statute, with respect to a voter’s change of residence or otherwise. Likewise, the NVRA does *not* state that the confirmation notice has the “sole” purpose of confirming an “independently identified” change of address.

The plaintiffs may believe that the NVRA *should* contain these requirements, but it does not. The United States Supreme Court has repeatedly emphasized that analysis of a statute begins with the text of that statute. *United States v. Gonzales*, 520 U.S. 1, 4 (1997) (“Our analysis begins, as always, with the statutory text.”); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (“The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself,” *citing Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). “In this case it is also where the inquiry should end, for where, as here, the statute’s language is plain, ‘the sole function of the courts is to **enforce it according to its terms.**’” *Ron Pair Enterprises*, 489 U.S. at 241, *quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917) (emphasis added). If the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that is the end of the Court’s analysis. In this case, Ohio’s Supplemental Process falls within the plain language of the statute; there is no need to stretch its words or draw inferences from the text to determine whether the process is legal. The statute is clear, and there is no reason for the Court to look beyond the plain text to determine its meaning.

D. The Court Should Not Rely on DOJ's Current Interpretation of the NVRA as Set Forth in Litigation in Georgia.

Plaintiffs cite the Statement of Interest filed by the United States Department of Justice, Civil Rights Division, in *Common Cause v. Kemp*, Civil Action No. 1:16-cv-452-TCB (N.D. Ga. 2016), an action that challenges Georgia's list maintenance procedures. In its Statement of Interest, the DOJ falls into the same misreading and mischaracterization of the NVRA as the Plaintiffs do here. DOJ asserts that a state's program to remove ineligible voters must "follow specific NVRA procedures," one of which DOJ claims is: "First, the state must gather reliable evidence that the voter has become ineligible based on a change of residence." DOJ Stmt. of Interest at 7, Civil Action No. 1:16-cv-452-TCB, ECF No. 19 (N.D. Ga. 2016). Notably absent from this statement is any citation to the text of the NVRA, or any other legal authority. Again, **no such requirement is found in the text of the NVRA.** Later in its Statement, DOJ attempts to justify this position, but ultimately just makes its own assumptions about "Congress's intent." DOJ's justification is as follows:

Congress's explicit endorsement in Section 8(c) of the NCOA process as a safe harbor for identifying changes of residence, paired with the ban on purging based on non-voting in Section 8(b), signals Congress' intent to ensure that any method states use to trigger the Section 8(d) notice and cancellation process must be based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history.

*Id.* at 12.

This convoluted and overly-complicated assertion basically says: Neither the plain text of the statute nor the congressional record directly supports this position, but if one makes several inferences and draws conclusions based on our view of the statute, these "requirements"

can be presumed to exist. It contains one qualifier after another (“*must be . . . objective and reliable . . . independent of . . .*”), none of which are found in the text of the NVRA.

All of these “requirements,” as DOJ would make them, are manufactured based on its interpretation of what the statute “signals” was “Congress’s intent.” There is no need for the Court to engage in such a strained exercise of statutory interpretation. The only authority DOJ cites in support of this statement is *dicta* in a Third Circuit case decided in 2001 (prior to the passage of HAVA), in which the plaintiff did not even state a claim under the NVRA.<sup>4</sup> Again, nothing in the NVRA requires that a state have “reliable” evidence that a voter’s residence has changed prior to sending a confirmation notice; nor does the NVRA state that there must be “objective” information that is “independent of the registrant’s voting history.” The requirements that DOJ seeks to impose on the State of Georgia – and the Plaintiffs now hope to impose on Ohio – do not exist in the text of the statute.

Moreover, the DOJ’s position in the Georgia case is inconsistent with its positions in other NVRA litigation. For example, in 2007, DOJ settled a lawsuit it had filed against the City of Philadelphia under the NVRA as well as other statutes. *See United States v. City of Philadelphia, et al.*, Civil Action No. 06-4592 (E.D. Penn. 2007). In the settlement agreement resolving that case, the DOJ *required* Philadelphia to “send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner . . .” and that it “place voters who do not respond to the confirmation notice in an inactive status.” *See DOJ Settlement Agreement with Philadelphia at 10-11 ¶16*,

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<sup>4</sup> The DOJ cites *Welker v. Clarke*, 239 F.3d 596, 599 (3<sup>rd</sup> Cir. 2001). In that case, the plaintiff alleged claims under the Voting Rights Act, 42 U.S.C. § 1983, and the Fourteenth Amendment, but not the NVRA. The Court’s *dicta* on which DOJ relies is found in the Court’s discussion of the legislative history of *Pennsylvania’s* Voter Registration Act (the PVRA), which, the Court explained, was passed in response to the NVRA. 239 F.3d at 598-99. The Third Circuit’s description of the NVRA in *Welker* was arguably not even relevant to the decision in that case, much less this one. *Welker* carries no precedential weight here, and has no bearing on this action.

attached as Exhibit B to Defendant Secretary of State Jon Husted's Second Merits Brief (ECF No. 49-2). If those voters failed to vote in the subsequent two federal general elections, Philadelphia was to remove them from the registration list. *Id.* In other words, DOJ then *required* Philadelphia to do what it now says Georgia may *not* do. Indeed, the DOJ's "trigger" for a confirmation notice in Philadelphia was a failure to vote in *any* election, which is a stricter standard than Ohio's two-year period.

DOJ's vacillating positions on Section 8 of the NVRA should call into question the weight given to its Statement of Interest in the Georgia case, as well as any position it may take on Ohio's program. *See Young v. United Parcel Service*, 135 S. Ct. 1338, 1352 (2015) (holding that the Court could not rely significantly on the agency's determination because its position was contrary to or inconsistent with previous government statements on the issue).<sup>5</sup> Likewise, this Court should not depend upon DOJ's interpretation of the NVRA. Rather, the Court, as well as the states, should take the only approach that will result in a consistent application of the NVRA's requirements: *apply the plain language of the NVRA as it is written*. Under the plain language of the NVRA, there is no requirement that the state have "independent" or "reliable" evidence that the voter has changed residence prior to sending that voter a confirmation notice. This Court should decline to read such a requirement into the NVRA where it does not exist, and should not invalidate Ohio's list maintenance program based on this nonexistent obligation.

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<sup>5</sup> Moreover, as Secretary of State Husted's Second Merits Brief points out, DOJ is not entitled to deference under *Chevron v. Natural Resources Defense Council* 467 U.S. 837 (1984) in this context. *See* Def.'s Second Merits Brief at 13-14 (ECF No. 49). The United States Supreme Court has held that the amount of weight given to an agency's statutory interpretation depends upon, amongst other things, "its consistency with earlier and later pronouncements[.]" *Young*, 135 S.Ct. at 1351-52 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See also United States v. Mead Corp.*, 121 S.Ct. 2164, 2171-74 (2001).

### **III. The Legislative History Supports Ohio's Interpretation of the NVRA.**

The text of the NVRA is straightforward, and the Court need inquire no further to determine whether Ohio's process complies with the statute. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997), citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). However, should the Court determine that the legislative history is relevant, that history supports a finding that the Supplemental Process is legal. As Secretary of State Husted's briefing fully explains, the legislative history of what eventually became the NVRA shows that Congress intended to prohibit the practice, then used by several states, of dropping voters' names from the rolls for non-voting without sending them a notice. See 138 Cong. Rec. S11689 (daily ed. May 19, 1992).

The plaintiffs argue that the legislative history demonstrates that Ohio's process violates the NVRA because the statute abolished "the practice . . . of periodically canceling the registrations of inactive voters." Pls.' Mot. for Summ. J. at 27 (ECF No 39). Judicial Watch does not dispute that cancelling voters' registrations merely for a failure to vote is not permitted under the NVRA; such a practice would be illegal on the face of the statute. However, Ohio is not cancelling voters' registrations because they failed to vote in a recent election. Ohio is following the process set forth explicitly in the NVRA to remove voters legally from the rolls. Plaintiffs may insist that Ohio's program violates the NVRA because it "initiates" the process of *sending a confirmation notice* based on voter inactivity, but that is not the same thing as simply *cancelling a voter's registration* because he or she failed to vote in a recent election.

**IV. Ohio’s Supplemental Process is Similar to Programs in Other States, and Those States’ List Maintenance Programs Will Be Put in Peril if this Court Determines that Ohio’s Process Violates the NVRA.**

As Secretary of State Husted’s brief points out, a number of other states have list maintenance programs that are similar to Ohio’s Supplemental Process. Should this Court grant the relief sought by the plaintiffs in this action, its decision will impact those states’ programs.

For example:

- Tennessee law requires that, where a voter fails to vote or update his or registration over a period of two consecutive November elections, the county must mail “a forwardable confirmation notice to the registrant at the address of registration with a postage prepaid, pre-addressed return form on which the voter may verify or correct the new address information.” Tenn. Code Ann. § 2-2-106(c). The voter is placed into inactive status, and if he or she fails to vote in the following two federal general election cycles, the voter is purged from the rolls. § 2-2-106(d)-(e).
- In Georgia, in every odd-numbered year, the Secretary of State is required to “identify all electors whose names appear on the list of electors with whom there has been no contact during the preceding three calendar years and who were not identified as changing addresses.” O.C.G.A. § 21-2-234(a)(2) (2015). Confirmation notices are sent to those voters, and if the voter fails to return the card within 30 days after the date of the notice, the voter is transferred to the inactive list. *Id.* If the voter fails to participate in the following two federal general elections, he or she is purged from the rolls. O.C.G.A. § 21-2-235 (2015).
- West Virginia law provides that in addition to the NCOA procedure, all counties using the NCOA information from the U.S. Postal Service “shall also, once each four years . . . conduct the same procedure by mailing a confirmation notice to those persons . . . who have not updated their voter registration records and have not voted in any election during the preceding four calendar years.” W.Va. Code § 3-2-25(j) (2016). The West Virginia statute explicitly states that the “purpose of this additional systematic confirmation procedure shall be to identify those voters who may have moved without filing a forwarding address, moved with a forwarding address under another name,” or those who may have died in another county or state, or “otherwise have become ineligible.” W.Va. Code § 3-2-25(j) (2016). Those voters who do not respond to the confirmation notice are purged if they fail to vote in the two subsequent federal general election cycles. *See* W.Va. Code § 3-2-27.

Additionally, in Montana, election administrators are required to conduct list maintenance procedures every other year, and one of their options is “a targeted mailing,” which

may be a forwardable confirmation notice, to voters who failed to vote in the preceding federal general election. *See* 13-2-220(1)(c), MCA (2015). In Missouri, election officials conduct canvasses every two years, and may canvass all voters, or “only those voters who did not vote in the last general election.” *See* § 115.181 R.S. Mo. (2016).

Ohio’s efforts to confirm the eligibility of voters who have not engaged in voter activity for a period of two years are similar to those undertaken by other states, and there is no reason to determine that this is not a legal method of maintaining accurate voter rolls. Should this Court determine that Ohio’s process violates the NVRA, the list maintenance programs in these other states would be called into question, and subject to similar challenges.

**V. The NVRA List Maintenance Provisions Protect Citizens’ Confidence in Elections, and Ohio’s Program is Supporting That Goal.**

In addition to ensuring the voter registration lists are accurate to protect against voter fraud, the list maintenance provisions of the NVRA also protect citizens’ *confidence* that elections are conducted fairly and honestly. Citizens’ confidence in the electoral process is of “independent significance.” *Crawford v. Marion County Election Bd.*, 553, U.S. 181, 197 (2008) (“public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process”). A federal district court in Indiana recently explained that voters in Indiana were injured by the state’s failure to comply with the list maintenance provisions of the NVRA “because that failure undermin[es] their confidence in the legitimacy of elections . . . and thereby burden[s] their right to vote.” *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012). The Carter-Baker Commission also found that “the perception of possible fraud contributes to low confidence in the system.” *See* Carter-Baker Report at 18-19.

Ohio is making laudable efforts to comply with the list maintenance provisions of the NVRA at a time when inaccurate voter rolls are becoming a national, nonpartisan issue, and confidence in our election system is waning. Notwithstanding the requirements of the NVRA and HAVA, states have been inconsistent in meeting their mandates, and many have routinely failed to comply with their voter list maintenance obligations. As a result, many state voter rolls are in poor condition. The Pew Research Center on the States released an astonishing report in 2012 noting that “[a]pproximately 2.75 million people have active registrations in more than one state.” *Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade*, PEW RESEARCH CENTER ON THE STATES, Feb. 14, 2012, at 1.<sup>6</sup> That same report observed that “24 million – one of every eight – active voter registrations in the United States are no longer valid or are significantly inaccurate,” and that “[m]ore than 1.8 million deceased individuals are listed as active voters.” *Id.* There can be no doubt that “a system in which 1 in 8 records has serious errors raises the prospect of fraud and manipulation.” Jonathan Brater, *Presidential Voting Commission Can Modernize Elections: Testimony to the Presidential Commission on Election Administration*, THE BRENNAN CENTER, Sept. 4, 2013.<sup>7</sup>

It is necessary for Ohio and other states to restore the American public’s confidence in the basic honesty of elections by enforcing election integrity laws. Large segments of the American public have expressed their dismay with various aspects of our electoral system. A poll from August of 2013 reported that only 39% of Americans believe that elections are fair.<sup>8</sup>

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<sup>6</sup> The Pew report is available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2012/pewupgradingvoterregistrationpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf).

<sup>7</sup> Jonathan Brater’s testimony is available at <http://www.brennancenter.org/analysis/testimony-presidential-voting-commission-can-modernize-elections>.

<sup>8</sup> Rasmussen Reports, “New Low: 39% Think U.S. Elections Are Fair” (Aug. 16, 2013), available at [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2013/new\\_low\\_39\\_think\\_u\\_s\\_elections\\_are\\_fair](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair).

In 2012, another poll reported that more than two-thirds of registered voters thought voter fraud was a problem.<sup>9</sup> In 2008, when a poll asked respondents around the world whether they had “confidence in the honesty of elections,” 53% of Americans said that they did not.<sup>10</sup> These surveys reveal a startling lack of confidence in our own electoral institutions.

Ohio should be conducting regular list maintenance review and ensuring the accuracy of its voter rolls through programs like its Supplemental Process. Federal law requires it, and the integrity of our electoral system depends on it. As explained above, Judicial Watch engages in efforts across the country to encourage states to comply with the NVRA and other voting statutes. It has been Judicial Watch’s experience that states often do not voluntarily conduct these types of list maintenance programs without prompting and, in some cases, must be forced to do so through the threat of litigation. These list maintenance programs cost money and demand resources, both of which are in short supply in many states. In general, it is easier for a state *not* to maintain accurate voting rolls, because updating the rolls is burdensome and expensive. However, the cost of not doing so could be an election decided by fraud, or a loss of voters’ confidence in the very electoral system that is the lifeblood of our democracy.

Ohio’s Supplemental Process is one method through which the State is complying with its obligation under federal law to maintain accurate voter registration lists. The plaintiffs have put forth no supportable basis on which to invalidate that process, which falls squarely within the text of the NVRA. The Court should find that Ohio’s Supplemental Process complies with the NVRA.

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<sup>9</sup> Kevin Robillard, “Poll: 36% say voter fraud major issue,” Politico (Oct. 26, 2012), available at <http://www.politico.com/news/stories/1012/82936.html>.

<sup>10</sup> Magali Rheault and Brett Pelham, “Worldwide, Views Diverge About Honesty of Elections” (Nov. 3, 2008), available at <http://www.gallup.com/poll/111691/worldwide-views-diverge-about-honesty-elections.aspx>.

### Conclusion

Plaintiffs ask this Court to declare Ohio's Supplemental Process to be in violation of the NVRA on the grounds that Ohio has not met a set of manufactured requirements that do not exist in that statute. If successful, Plaintiffs' claims would invalidate part of Ohio's system for maintaining accurate voter registration lists, and force Ohio to violate the terms of its settlement agreement with Judicial Watch. Ohio's Supplemental Process is legal and complies with the plain language of the NVRA. The Court should deny plaintiffs' requests for declaratory and injunctive relief.

Dated: June 17, 2016

Respectfully submitted,

s/ David R. Langdon

David R. Langdon (OH Bar No. 0067046)

*Trial Attorney*

LANGDON LAW, LLC

8913 Cincinnati-Dayton Rd.

West Chester, Ohio 45069

(513) 577-7380

(513) 577-7383 fax

dlangdon@langdonlaw.com

s/ Chris Fedeli

Robert D. Popper

Chris Fedeli

JUDICIAL WATCH, INC.

425 Third Street, SW

Washington, DC 20024

(202) 646-5172

rpopper@judicialwatch.org

cfedeli@judicialwatch.org

# Exh. A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JUDICIAL WATCH, INC., on behalf	:	
of certain of its members; and	:	Case No.: 2:12-cv-792
TRUE THE VOTE, in its corporate	:	
capacity,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
OHIO SECRETARY OF STATE	:	
JON HUSTED, in his official capacity,	:	
	:	
Defendant.	:	

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**COMPLAINT**

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Plaintiffs Judicial Watch, Inc. and True the Vote, by their attorneys, bring this action for declaratory and injunctive relief and allege as follows:

**INTRODUCTION**

1. Plaintiffs Judicial Watch, Inc. and True the Vote seek declaratory and injunctive relief to compel the State of Ohio to comply with its voter list maintenance obligations under Section 8 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-6.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as the action arises under the laws of the United States, and under 42 U.S.C. § 1973gg-9(b)(2), as the action seeks injunctive and declaratory relief under the NVRA.

3. Venue in this Court is proper under 28 U.S.C. § 1391(b), because a substantial part of the events or omissions giving rise to the claim occurred in this district.

### **PARTIES**

4. Plaintiff Judicial Watch, Inc. (“Judicial Watch”) is a non-profit organization that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. Judicial Watch brings this action on behalf of its members who are registered to vote in the State of Ohio.

5. Plaintiff True the Vote (“True the Vote”) is a non-profit organization that seeks to restore truth, faith, and integrity to local, state, and federal elections. True the Vote brings this action in its corporate capacity.

6. Defendant Jon Husted is the Secretary of State of the State of Ohio (“the Secretary”) and has served in this capacity since January 9, 2011. Because the State of Ohio has designated the Secretary as the “chief State election official” responsible for coordination of its responsibilities under the NVRA (*see* 42 U.S.C. § 1973gg-8, Plaintiffs Judicial Watch, Inc. and True the Vote bring this action against the Secretary in his official capacity.

### **FACTUAL BACKGROUND**

7. Section 8 of the NVRA requires that “[i]n the administration of voter registration for elections for Federal office, each State shall ... conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant ...” 42 U.S.C. § 1973gg-6(a)(4). Section 8 of the NVRA also mandates that any such voter list maintenance programs or activities “shall be uniform, nondiscriminatory, and in compliance with

the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*),” among other important protections. 42 U.S.C. § 1973gg-6(b)(1).

8. Section 8 of the NVRA also requires that “[e]ach State shall maintain for at least 2 years and shall make available for public inspection ... all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. ...” 42 U.S.C. § 1973gg-6(i).

9. The most recent and reliable, publicly-available data regarding voting age population and voting registration, by county, for the State of Ohio is the 2010 Decennial U.S. Census (“2010 U.S. Census”), released by the U.S. Government beginning in February of 2011, and the voter registration data provided by the State of Ohio to the U.S. Election Assistance Commission (“EAC Report”) for the general election held in November of 2010, published on June 30, 2011. The 2010 U.S. Census contains data on voting age population in 2010, by county, for the State of Ohio. The EAC report contains data on the number of persons on the voter registration rolls in 2010, by county, in the State of Ohio.

10. Based on an examination of the data in the 2010 U.S. Census and the EAC Report, the number of individuals listed on voter registration rolls in the following three counties in the State of Ohio exceeds 100% of the total voting age population in these counties: Auglaize, Wood, and Morrow. (And in both Auglaize and Wood, the voter registration rolls exceed 105% of total voting age population.) This data demonstrating the discrepancy in voter registration rolls to total voting age population in each of these counties constitutes *prima facie* evidence that the State of Ohio has failed to comply with its voter list maintenance obligations under Section 8 of the NVRA.

11. The data in the 2010 U.S. Census and the EAC Report also shows that the following thirty-one counties in the State of Ohio (in order of highest to lowest percentage) have voter registration rolls that contain between 90% and 100% of total voting age population: Lawrence, Cuyahoga, Henry, Medina, Mahoning, Delaware, Putnam, Hancock, Fairfield, Geauga, Van Wert, Lucas, Montgomery, Jackson, Ottawa, Stark, Hamilton, Miami, Franklin, Gallia, Greene, Jefferson, Trumbull, Lorain, Wyandot, Athens, Harrison, Clermont, Licking, Logan, and Erie Counties. This data further demonstrates that the State of Ohio has failed to satisfy its voter list maintenance obligations under Section 8 of the NVRA.

12. According to the U.S. Census Bureau, the average rate of voter registration to total voting age population during the presidential election year of 2008 was 71%, yet in Ohio, 34 of its 88 counties have a rate that exceeds 90%.

13. The failure of the State of Ohio to satisfy its voter list maintenance obligations is contributing to a larger, nationwide problem. According to a February 2012 study published by the non-partisan Pew Center for the States entitled “Inaccurate, Costly, and Inefficient,” inaccurate voter registration lists are rampant across the United States. The Pew study found that approximately 24 million active voter registrations throughout the United States—or one out of every eight registrations—are either no longer valid or are significantly inaccurate. The Pew study also found that more than 1.8 million deceased individuals are listed as active voters nationwide, and that approximately 2.75 million people have active registrations in more than one state.

14. On February 6, 2012, Judicial Watch sent a letter to the Secretary notifying him that the State of Ohio was in violation of Section 8 of the NVRA and that, as the chief State election official in the State of Ohio, he is responsible for compliance with Section 8 of the

NVRA. The letter explained that, according to 2010 U.S. Census data and publicly available voter registration data, the number of individuals registered to vote in three counties in the State of Ohio exceeds those counties' total voting age population. The letter identified each of the three counties by name and informed the Secretary that a lawsuit may be brought against him if the State of Ohio did not comply with its voter list maintenance obligations under Section 8 of the NVRA.

15. The letter also requested that the Secretary make available for public inspection all records concerning "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency" of official lists of eligible voters in the State of Ohio during the past two years, explaining that Section 8 of the NVRA required such records to be made available.

16. The Secretary, through his Chief Legal Counsel, responded in writing to Judicial Watch's letter on March 2, 2012, stating "We share your concerns about the accuracy of our voting lists" and identifying a Directive, issued on April 18, 2011, instructing the county boards of elections on procedures for conducting programs to remove ineligible voters from the voter rolls due to changes in a registrant's residence. The Secretary's letter did not identify any efforts by the State of Ohio to ensure that the county boards of election were following the procedures described in the nearly one-year old directive. Nor did it identify any other programs or activities undertaken by the State of Ohio to remove ineligible voters from the voter rolls due to changes in a registrant's residence. A copy of the Directive was included with the letter.

17. The Secretary's letter also did not identify any programs and activities undertaken by the State of Ohio to remove ineligible voters from the voter rolls due to the death of the registrant, or any efforts to instruct county boards of election on procedures for removing

deceased registrants from the voter rolls. Nor did it identify any other voter list maintenance programs or activities undertaken by the State of Ohio.

18. In the letter, the Secretary asserted that the State of Ohio's efforts to maintain accurate voter rolls "have been hampered ... by the restrictions and seemingly inconsistent provisions of the NVRA" and noted that he had written a letter to U.S. Attorney General Eric Holder "to discuss possible solutions," but had not received a response.

19. The only other document produced by the Secretary with his letter was a copy of the letter he had sent to Attorney General Holder, dated February 10, 2012. In this letter to Attorney General Holder, the Secretary admitted that the State of Ohio has not fulfilled its duty under Section 8 of the NVRA to make a reasonable effort to remove ineligible voters from its voter rolls. The letter from the Secretary also acknowledged that the voter rolls for two counties in the State of Ohio contained more registered voters than the total voting age population in those counties.

20. As of the date of this Complaint, no further response from the Secretary or his office has been received by the Plaintiffs. Nor has the Secretary produced any additional documents regarding any other voter list maintenance programs or activities undertaken by the State of Ohio.

21. In light of the Secretary's letter and the lack of any further response from the Secretary, any further efforts to secure compliance with Section 8 of the NVRA would be futile.

#### **PLAINTIFF JUDICIAL WATCH**

22. Judicial Watch has approximately 9,480 members in the State of Ohio. As a membership organization, Judicial Watch represents the interests of these members, at least some

of whom are lawfully registered to vote and have the right to vote in the State of Ohio, including the right to vote in elections for federal office.

23. A person becomes a member of Judicial Watch by making a financial contribution, in any amount, to the organization. The financial contributions of members are by far the single most important source of income to Judicial Watch and provide the means by which the organization finances its activities in support of its mission. Each of Judicial Watch's 9,480 members in the State of Ohio has made at least one financial contribution to Judicial Watch over the past two years and thus helped to finance the activities of the organization during this time period.

24. Judicial Watch also solicits the views of its members in carrying out its activities in support of its mission, including the views of its members in the State of Ohio. The views of Judicial Watch's members exert a significant influence over how Judicial Watch chooses the activities in which it engages in support of its mission.

25. Over 100 members of Judicial Watch who are lawfully registered to vote in the State of Ohio have informed Judicial Watch that they are concerned about the State of Ohio's failure to satisfy its voter list maintenance obligations under Section 8 of the NVRA and wish Judicial Watch to take action on their behalf to protect their right to vote. The views of these members were a substantial factor weighing in favor of the initiation of this lawsuit.

26. Protecting the rights of members of Judicial Watch who are lawfully registered to vote in the State of Ohio is directly germane to Judicial Watch's mission of promoting integrity, transparency, and accountability in government and fidelity to the rule of law, as is ensuring compliance with the voter list maintenance obligations of Section 8 of the NVRA and protecting

the integrity of the election process in general. It also is well within the scope of the reasons why members of Judicial Watch join the organization and continue to support its mission.

27. Members of Judicial Watch who are lawfully registered to vote in the State of Ohio not only have the constitutional right to vote in elections held in the State of Ohio, including elections for federal office, but they also have a statutory right to the safeguards and protections set forth in the NVRA, including the voter list maintenance obligations of Section 8 of the NVRA.

28. The failure of the State of Ohio to satisfy its voter list maintenance obligations under Section 8 of the NVRA is injuring the right to vote of members of Judicial Watch who are lawfully registered to vote in the State of Ohio. More specifically, it is burdening members' constitutional right to vote by undermining their confidence in the integrity of the electoral process and discouraging them from voting. Because the State of Ohio has failed and is failing to satisfy its list maintenance obligations under Section 8 of the NVRA, lawfully registered voters, including members of Judicial Watch, are being deprived of any certainty that their votes will be given due weight and will not be cancelled out by the votes of persons who are not entitled to vote and therefore are being injured.

29. The failure of the State of Ohio to satisfy its voter list maintenance obligations under Section 8 of the NVRA also is harming the statutory rights of members of Judicial Watch who are lawfully registered to vote in the State of Ohio. Specifically, because these members have registered to vote in the State of Ohio, they have a statutory right to vote in elections for federal office that comply with the procedures and protections required by the NVRA, including the voter list maintenance obligations set forth in Section 8 of the NVRA. The State of Ohio's failure to satisfy its voter list maintenance obligations under Section 8 of the NVRA therefore is

injuring the statutory rights of members of Judicial Watch who are lawfully registered to vote in the State of Ohio.

30. Absent action by Judicial Watch, it is unlikely that any individual member of Judicial Watch who is lawfully registered to vote in the State of Ohio would have the ability or the resources to take action to protect his or her rights or redress his or her injuries with respect to the State of Ohio's failure to satisfy its voter list maintenance obligations under Section 8 of the NVRA.

### **PLAINTIFF TRUE THE VOTE**

31. True the Vote regularly obtains official lists of registered voters from States across the nation, including the State of Ohio, and uses these lists to conduct programs in furtherance of True the Vote's mission of restoring truth, faith, and integrity to local, state, and federal elections. Because True the Vote makes use of these lists in conducting its various programs, it relies on States, including the State of Ohio, to provide lists that are reasonably accurate and current and reasonably maintained.

32. One such program of True the Vote seeks to analyze and verify official lists of registered voters and detect errors in those lists. More specifically, True the Vote trains volunteers to review voter lists and to compare those lists to other publically available data. When a volunteer identifies registrations that appear to be duplicates or registrations of persons who are deceased, have relocated, or otherwise are ineligible to vote in a particular jurisdiction, those registrations are flagged and complaints are filed with appropriate elections officials. The goal of this particular program is to improve the accuracy and currency of voter lists above and beyond the minimum requirements of the law. This program is among the largest, if not the

largest, of all of True the Vote's various programs and is an essential, integral part of True the Vote's mission.

33. As part of its voter list verification program, True the Vote obtained voter lists from the State of Ohio, recruited and trained volunteers to analyze and verify these lists, and began the process of analyzing and verifying them.

34. The failure of the State of Ohio to satisfy its voter list maintenance obligations under Section 8 of the NVRA has injured and is injuring True the Vote. Because the State of Ohio has failed to satisfy its voter list maintenance obligations, the voter lists that True the Vote obtained from the State of Ohio are inaccurate and out of date, making it more difficult for True the Vote to use these lists in furtherance of its mission than it would have been if the State of Ohio had satisfied its voter list maintenance obligations under Section 8 of the NVRA. True the Vote has suffered an injury as a result.

35. In addition, the failure of the State of Ohio to satisfy its voter list maintenance obligations under Section 8 of the NVRA has injured and is injuring True the Vote by impairing True the Vote's ability to achieve an essential, integral part of its mission, namely, its voter list verification program. True the Vote's voter list verification program relies on the States to conduct the reasonable voter list maintenance programs and activities required by Section 8 of the NVRA. The goal of True the Vote's voter list verification program is to improve the accuracy and currency of voter lists above and beyond the minimum requirements of the law. True the Vote's non-for-profit, volunteer efforts supplement the voter list maintenance programs and activities required of the States under Section 8 of the NVRA, but cannot duplicate or replace the States' taxpayer-funded voter list maintenance programs and activities. Because the State of Ohio has failed to satisfy its voter list maintenance obligations under Section 8 of the

NVRA, True the Vote is impaired in its ability to carry out its voter list verification program successfully in the State of Ohio and is injured as a result.

36. Moreover, the State of Ohio's failure to satisfy its voter list maintenance obligations under Section 8 of the NVRA also has injured and is injuring True the Vote by causing it to divert resources away from other programs in order to devote those same resources to its voter list verification program. For example, among its various programs to restore election integrity, True the Vote trains and mobilizes volunteers to work as election monitors. As part of this program, True the Vote creates instructional videos to recruit election monitors, holds training sessions and produces reference guides to educate election monitors, and directs volunteers who wish to serve as election monitors to appropriate channels. Because the State of Ohio failed to satisfy its voter list maintenance obligations under Section 8 of the NVRA, True the Vote has had to expend less of its scarce resources on programs such as its election monitoring program in order to expend more resources on its voter list verification program.

37. As of August 10, 2012, True the Vote has expended over 150 hours of organizational time training volunteers to analyze and verify the voter lists that True the Vote obtained from the State of Ohio for True the Vote's voter list verification program. As of this same date, True the Vote has only expended approximately 50 hours in support of its election monitoring program in the State of Ohio. True the Vote estimates that, due to the failure of the State of Ohio to satisfy its voter list maintenance obligations under Section 8 of the NVRA, it has diverted approximately 100 hours of organizational time away from its election monitoring program in order to devote those same scarce resources to its voter list verification program, causing injury to True the Vote as a result.

**CLAIM FOR RELIEF**

**(Violation of the NVRA: Failure to Conduct List Maintenance)**

38. Plaintiffs reallege paragraphs 1 through 37 as if fully stated herein.

39. Defendant has failed to fulfill the State's obligation to make reasonable efforts to remove the names of ineligible voters from Ohio's voter registration rolls, in violation of Section 8 of NVRA (42 U.S.C. § 1973gg-6).

40. Plaintiff True the Vote and members of Plaintiff Judicial Watch have suffered irreparable injury as a direct result of Defendant's failure to fulfill the State of Ohio's obligation to make reasonable efforts to remove the names of ineligible voters from Ohio's voter registration rolls in violation of Section 8 of the NVRA.

41. Plaintiff True the Vote and members of Plaintiff Judicial Watch will continue to suffer irreparable injury by Defendant's failure to fulfill the State of Ohio's obligation to make reasonable efforts to remove the names of ineligible voters from Ohio's voter registration rolls in violation of Section 8 of the NVRA unless and until Defendant is enjoined from continuing to violate the law.

42. Plaintiff True the Vote and members of Plaintiff Judicial Watch have no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for entry of a judgment:

1. Declaring Defendant to be in violation of Section 8 of the NVRA;
2. Enjoining Defendant from failing or refusing to comply with the voter list maintenance obligations of Section 8 of the NVRA in the future;
3. Ordering Defendant to pay Plaintiffs' reasonable attorney's fees, including litigation expenses and costs, pursuant to 42 U.S.C. § 1973gg-9(c); and
4. Granting Plaintiffs any and all further relief that this Court deems just and proper.

Dated: August 30, 2012

Respectfully submitted,

Paul J. Orfanedes\*  
Chris Fedeli\*  
JUDICIAL WATCH, INC.  
425 Third Street S.W., Ste. 800  
Washington, DC 20024  
Tel: (202) 646-5172  
Fax: (202) 646-5199  
Email: porfanedes@judicialwatch.org  
cfedeli@judicialwatch.org

/s/ David R. Langdon  
David R. Langdon (OH Bar No. 0067046)  
*Trial Attorney*

Joshua B. Bolinger (OH Bar No. 0079594)  
LANGDON LAW LLC  
8913 Cincinnati-Dayton Rd.  
West Chester, Ohio 45069  
Tel: (513) 577-7380  
Fax: (513) 577-7383

Email: dlangdon@langdonlaw.com  
jbolinger@langdonlaw.com

*Attorneys for Plaintiffs*

*Of Counsel:*  
J. Christian Adams  
ELECTION LAW CENTER, PLLC  
300 N. Washington Street, Ste. 405  
Alexandria, VA 22314

\*pending admission *pro vac vice*

# Exh. B

## SETTLEMENT AGREEMENT

This settlement agreement (the "Agreement") is entered into as of January 10, 2014 (the "Effective Date") by and between Judicial Watch, Inc. and True the Vote (collectively, "Plaintiffs") and Ohio Secretary of State Jon Husted, in his official capacity ("Defendant"). Plaintiffs and Defendant (together, the "Parties") are parties to a litigation captioned *Judicial Watch, Inc. and True the Vote v. Husted*, Case 2:12-cv-00792, which was filed in the United States District Court for the Southern District of Ohio on August 30, 2012 (the "Litigation").

### RECITALS

WHEREAS, the claims in the Litigation arise under the National Voter Registration Act of 1993 (the "NVRA");

WHEREAS, Ohio Secretary of State Jon Husted, in his official capacity, is designated the "chief State election official," pursuant to 42 U.S.C. § 1973gg-8, and is responsible for coordination of the State's responsibilities under the NVRA;

WHEREAS, Plaintiffs maintain that a judgment in their favor, including the items contained in the complaint's Prayer for Relief, is appropriate;

WHEREAS, Defendant disputes the allegations contained in the complaint and denies any and all liability thereunder;

WHEREAS, notwithstanding the foregoing, both Parties desire to settle the Litigation;

NOW THEREFORE, in the spirit of cooperation and comity and to avoid the expense and time and the inherent risks associated with further proceedings related to the Litigation, both the Plaintiffs and the Defendant, by and through the undersigned counsel, hereby agree, in consideration of the mutual promises contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, to abide by the following terms and conditions.

1. Within 30 days of the execution of the Agreement, the Parties shall execute and file a stipulation of dismissal containing the following substantive language:

"Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, plaintiffs Judicial Watch, Inc. and True the Vote and defendant Jon Husted, in his official capacity as Secretary of State of Ohio, hereby stipulate to the dismissal of this action with prejudice, and without costs or fees to either party."

In the event that the Court (including the Clerk) rejects such filing for any reason, the Parties shall both use their best efforts to accomplish the same result by another stipulation amending that language as little as possible, or by filing an unopposed motion for voluntary dismissal upon the same terms, or by taking such other steps as may be reasonably necessary. If a filing seeking dismissal on the terms set forth above is not executed by the Parties and filed with the Court within 30 days of the Effective Date, or if such dismissal is not granted by the Court within 6 months, this agreement shall be cancelled.

- a. During the pendency of the filing or granting of such stipulation or other comparable motion, neither party shall file any other motion or seek any other court relief, or fulfill, or seek to have fulfilled, any discovery or other obligation related to the Litigation, except as set forth in paragraph 1.b.
  - b. In the event that the Court, prior to the dismissal of this action, requests any action by Plaintiffs or Defendant, the Parties agree to notify the Court that a settlement has been reached and to jointly request that such action be cancelled. The Parties agree to file any ancillary stipulations or motions required by the Court or by circumstances in order to ensure that no further obligations related to the Litigation are imposed on the Parties.
2. Defendant agrees, for the duration of the term of the Agreement, to undertake, or, where appropriate, to continue to undertake, the following actions:
- a. To participate in the State and Territorial Exchange of Vital Events (STEVE) administered by the National Association for Public Health Statistics and Information Systems (NAPHSIS) to obtain out-of-state death information for list maintenance purposes under the NVRA, with monthly updates to local officials for death removals in the Statewide Voter Registration Database (SWVRD).
  - b. To participate in the Interstate Voter Registration Cross-Check program administered by the Kansas Secretary of State to identify registered voters who move out-of-state for list maintenance purposes under the NVRA.
  - c. To use Ohio Bureau of Motor Vehicles data to identify registered voters who move within Ohio for list maintenance purposes in compliance with Section 5 of the NVRA, with updates to local officials for removals or address-changes in the SWVRD no less frequently than permitted by state law.
  - d. To use online voter registration change of address to encourage voters to keep their registration information current.
  - e. To conduct its monthly duplicate registration elimination program using SWVRD, including minimal monthly duplicate thresholds of no greater than .030% for all Ohio County Boards of Election voter lists.
  - f. To keep online, and available for public access, a current voter registration list.
  - g. To require the county boards of election to send accurate survey information to the Secretary of State's Office to be compiled and forwarded to the Election Assistance Commission for its NVRA-related surveys.
  - h. To use reasonable efforts to promote the expanded use of Ohio's voter registration online change of address system to recent college graduates, including education

to remind recent college graduates to keep their voter registration address and information current and to request necessary updates, and to endeavor to coordinate these activities in conjunction with Ohio colleges and universities.

- i. To direct boards of elections to send confirmation notices annually to voters who: (a) did not vote in an election during a two year period beginning and ending May 1 and (b) did not engage in any other voter-initiated activity (e.g., filing a voter registration form) during that same time period; and also to query boards of elections on a reasonably regular basis as to whether this direction is being followed.
3. Plaintiffs may ask Defendant for reasonable, non-burdensome assurances that any one or more of the terms of the Agreement are being performed, by means of a letter, sent by email or fax. Defendant shall not unreasonably refuse to provide such assurances. Plaintiffs shall not send more than one such letter in any three-month period of the Agreement. Ongoing negotiations concerning how a particular request for an assurance shall be provided, or whether it has been provided, shall not count as separate requests for assurances.
4. In the event that either party believes that the Agreement has been breached by the other party, the party asserting breach shall send a letter, by email or fax, to the other party describing the alleged breach. Neither party shall commence a lawsuit alleging breach of this Agreement until 30 days has elapsed from the time that the party seeking to commence such a lawsuit has sent such a letter.
5. This agreement shall expire on November 10, 2018.
6. Both the Plaintiffs and Defendant, including any successor to the office of Secretary of State, or any successor as chief State election official under the NVRA and State law, shall be bound by the terms of this agreement during that time.
7. The Agreement shall contain the entire agreement between the parties and shall supersede all prior written and oral agreements, representations, negotiations, promises, and understandings between them.
8. The Agreement may be amended only by a writing signed by both of the Parties. The Parties agree to receive and discuss all possible amendments to the Agreement proposed in good faith by either party, and to negotiate concerning such possible amendments in good faith. The Parties further agree not to unreasonably withhold their consent to a proposed amendment addressing an unanticipated change in circumstances that has rendered one or more of the terms of the Agreement unduly burdensome.
9. The Parties each agree not to publicly disparage the other with respect to the Parties' conduct or decisions regarding the commencement of the Litigation, the prosecution or defense of the Litigation, or the termination and settlement of the Litigation.

10. The Agreement may be executed in counterparts, and a faxed or emailed signature shall be deemed as valid as an original.
11. Nothing in this Agreement shall be deemed an admission regarding the merits of the Litigation.

BY:



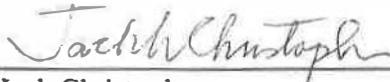
Paul J. Orfanedes  
Robert Popper  
Chris Fedeli  
JUDICIAL WATCH, INC.  
425 Third Street S.W., Ste. 800  
Washington, DC 20024

J. Christian Adams  
ELECTION LAW CENTER, PLLC  
300 N. Washington Street, Ste. 405  
Alexandria, VA 22314

David R. Langdon  
Joshua B. Bolinger  
LANGDON LAW LLC  
8913 Cincinnati-Dayton Rd.  
West Chester, Ohio 45069

*On Behalf of Plaintiffs Judicial Watch, Inc.,  
and True the Vote*

OHIO SECRETARY OF STATE JON  
HUSTED

By: 

Jack Christopher  
Deputy Secretary of State and  
Chief Legal Counsel  
180 E. Broad Street, 15th Floor  
Columbus, Ohio 43215

*On behalf of Defendant Ohio Secretary of  
State Jon Husted*

**FIRST AMENDMENT TO SETTLEMENT AGREEMENT**

This agreement (the “First Amendment”) amends the settlement agreement (the “Settlement Agreement”) of January 10, 2014 by and between Judicial Watch, Inc. and True the Vote (collectively, “Plaintiffs”) and Ohio Secretary of State Jon Husted, in his official capacity (“Defendant”), which resolved the litigation captioned *Judicial Watch, Inc. and True the Vote v. Husted*, United States District Court for the Southern District of Ohio Case 2:12-cv-00792.

**AGREEMENT**

Pursuant to Section 8 of the Settlement Agreement, by mutual agreement and for good and valuable consideration, the parties to the Settlement Agreement hereby agree that:

- A. Section 2(i) of the Settlement Agreement is stricken in its entirety and replaced with the following provision:

To direct boards of elections to send confirmation notices annually to voters who: (a) did not vote in an election during the period beginning with the regular primary election held in the second calendar year preceding the current calendar year and ending with the regular primary election held in the current calendar year, and (b) did not engage in any other voter-initiated activity (e.g., filing a voter registration form) during that same time period; and also to query boards of elections on a reasonably regular basis as to whether this direction is being followed. For purposes of this section, “regular primary election” means the primary election held pursuant to R.C. 3501.01(E)(1) and/or (2), or any successor section, or the date said primary would have been held pursuant to that section if no primary is actually held.

- B. This First Amendment shall be effective upon the date it is executed by the Plaintiffs.
- C. This First Amendment is incorporated into the Settlement Agreement and they are made one and the same document, subject to all remaining terms of the Settlement Agreement.
- D. This First Amendment may be executed in multiple counterparts, and a faxed or emailed signature shall be deemed as valid as an original.

AGREED TO AND ACCEPTED:

 - 4/28/2014  
Paul J. Orfanedes  
Robert Popper  
Chris Fedeli  
JUDICIAL WATCH, INC.  
425 Third Street S.W., Ste. 800  
Washington, DC 20024

[signatures continue on following page]

J. Christian Adams  
ELECTION LAW CENTER, PLLC  
300 N. Washington Street, Ste. 405  
Alexandria, VA 22314

David R. Langdon  
Joshua B. Bolinger  
LANGDON LAW LLC  
8913 Cincinnati-Dayton Rd.  
West Chester, Ohio 45069

*On Behalf of Plaintiffs Judicial Watch, Inc.,  
and True the Vote*

OHIO SECRETARY OF STATE JON  
HUSTED

By: Jack Christopher 4.28.14  
Jack Christopher  
Deputy Secretary of State and  
Chief Legal Counsel  
180 E. Broad Street, 15th Floor  
Columbus, Ohio 43215

*On behalf of Defendant Ohio Secretary of  
State Jon Husted*