No. 16-___

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case considers the steps that States may take to maintain accurate voter-registration lists under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). These laws bar States from removing "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," but clarify that a State must remove a voter if the voter does not respond to a confirmation notice sent by the State and does not vote in the next two general federal elections. 52 U.S.C. §§ 20507(b)(2), 21083(a)(4)(A).

Since 1994, as part of its general list-maintenance program, Ohio has sent voters who lack voter activity over a two-year period the confirmation notice that the NVRA and HAVA both reference. If these voters do not respond to that notice and do not engage in any additional voter activity over the next four years (including two more federal elections), Ohio removes them from the list of registered voters and requires them to reregister if they otherwise remain eligible to vote. The Sixth Circuit held that this decades-old process violates § 20507(b)(2) because Ohio uses a voter's failure to vote as the "trigger" for sending a confirmation notice to that voter.

The question presented is:

Does 52 U.S.C. § 20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below (and Respondents here) are Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon.

Defendant-Appellee below (and Petitioner here) is Ohio Secretary of State Jon Husted.

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The Sixth Circuit's decision, Pet. App. 1a-37a, is reported at 838 F.3d 699. The district court's decision, Pet. App. 39a-70a, is unreported, but available at 2016 WL 3542450. Its decision on remand, Pet. App. 71a-100a, is also unreported, but available at 2016 WL 6093371.

JURISDICTION

On September 23, 2016, the Sixth Circuit issued its decision. Justice Kagan granted a 45-day extension to file this petition until February 6, 2017. The petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The National Voter Registration Act of 1993 (NVRA) was codified at 42 U.S.C. §§ 1973gg to 1973gg-10, but is now codified at 52 U.S.C. §§ 20501-20511. The Help America Vote Act of 2002 (HAVA) was codified at 42 U.S.C. §§ 15301-15545, but is now codified at 52 U.S.C. §§ 20901-21145. This petition's appendix includes 52 U.S.C. §§ 20507 and 21083.

STATEMENT OF THE CASE

A. Historically, Most States Relied On Voter Inactivity To Help Maintain Accurate Voter-Registration Lists

1. At the founding, States did not require voters to register. "In the early days, when the bulk of the population lived in rural communities, when almost every voter was personally known to his neighbors, and when there was comparatively little movement of population from one locality to another, the problem of determining those who were entitled to vote in

a given election district was comparatively simple." Joseph P. Harris, *Registration of Voters in the United States* 4-5 (1929) ("Harris"). Registration was "a more modern innovation, adopted in most states as a good government reform, especially for the growing cities, in the years after the Civil War." Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001), *available at* goo.gl/CjONlS.

Early registration laws shared common traits. They often did not apply throughout the State, instead centering on populated cities. Joseph P. Harris, Nat'l Mun. League, *A Model Registration System* 11 (2d ed. 1931) ("Nat'l Mun. League"). They often did not create permanent lists, instead requiring voters to *reregister* regularly. Nat'l Comm'n on Fed. Election Reform, *supra*, at 28. And they often were challenged as improperly adding a "registration" qualification to the exclusive list of voting qualifications in state constitutions. Courts split over that constitutional question. *Compare Morris v. Powell*, 25 N.E. 221 (Ind. 1890), *with State v. Butts*, 2 P. 618 (Kan. 1884). But many States ultimately passed amendments allowing registration, Harris, *supra*, at 305, and this constitutional debate "largely closed" by the 1930s, Nat'l Mun. League, *supra*, at 9.

About that time, "[t]he next wave of reform in voter registration concentrated on replacing periodic registration with permanent registration, to reduce costs and the opportunity for fraud." Nat'l Comm'n on Fed. Election Reform, *supra*, at 28. When switching to *permanent* registration, States simultaneously passed laws requiring the removal of voters who had not voted over a certain time in order to help main-

tain accurate voter lists. Harris, *supra*, at 224-27. The National Municipal League also recommended using nonvoting as part of its model system. Nat'l Mun. League, *supra*, at 38-39.

By the time Congress passed the NVRA, most States required or permitted officials to remove voters if they had not voted over a certain time. S. Rep. No. 103-6, at 46 (1993).[1] A few removed voters for

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[1] Alaska Stat. § 15.07.130 (1993); Ark. Const. amend. 51 § 11(a)(1) (1991); Colo. Rev. Stat. Ann. § 1-2-224 (Westlaw through 1993 First Regular Sess.); Del. Code Ann. tit. 15, § 1704 (1990); Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.); Ga. Code Ann. § 21-2-231 (1993); Haw. Rev. Stat. § 11-17 (1993); Idaho Code Ann. § 34-435 (1993); 10 Ill. Comp. Stat. Ann. 5/4-17, 5/5-24, 5/6-58 (Westlaw through 1993 Regular Sess.); Ind. Code Ann. §§ 3-7-9-1, 3-7-9-2, 3-7-9-3, 3-7-9-5 (Westlaw through 1993 First Regular and First Special Sess.); Iowa Code Ann. § 48.31 (Westlaw through 1992 Regular Sess. and First and Second Special Sess.); Md. Code Ann., Elec. § 3-20 (1993); Mich. Comp. Laws Ann. §§ 168.509, 168.513 (Westlaw through 1992 Regular Sess.); Minn. Stat. Ann. § 201.171 (Westlaw through 1992 Regular Sess.); Miss. Code Ann. § 23-15-159 (Westlaw through 1993 Regular Sess.); Mont. Code Ann. § 13-2-401 (Westlaw through 1993 Regular Sess.); Nev. Rev. Stat. Ann. § 293.540 (Westlaw through 1993 Regular Sess.); N.J. Stat. Ann. § 19:31-5 (Westlaw through 1992 First Annual Sess.); N.M. Stat. Ann. § 1-4-28 (1993); N.Y. Elec. Law § 5-406 (Westlaw through 1992 ch. 848); N.C. Gen. Stat. § 163-69 (1993); Ohio Rev. Code Ann. § 3503.21 (Westlaw through Jan. 1, 1993); Okla. Stat. Ann. tit. 26, § 4-120.2 (Westlaw through 1992 Second Regular Sess.); 25 Pa. Stat. Ann. §§ 623-40, 951-38 (Westlaw through 1993 Regular Sess.); R.I. Gen. Laws § 17-10-1 (1993); S.C. Code Ann. § 7-3-20 (Westlaw through 1993 Regular Sess.); S.D. Codified Laws § 12-4-19 (1993); Tenn. Code Ann. § 2-2-106 (1993); Utah Code Ann. § 20-2-24 (1987); Vt. Stat. Ann. tit. 17, § 2150 (Westlaw through 1993 Sess.); Va. Code Ann. § 24.1-59 (1990); Wash. Rev. Code Ann. § 29.10.080 (Westlaw through 1992 Sess.); W. Va. Code

nonvoting *alone*. *E.g.*, N.J. Stat. Ann. § 19:31-5 (Westlaw through 1992 First Annual Sess.). Most required officials to *notify* voters and give them a chance to remain registered. *E.g.*, Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.).

These failure-to-vote laws, too, were challenged as adding a "voting" qualification to the list of constitutional qualifications. Courts divided on that question as well. *Compare Duprey v. Anderson*, 518 P.2d 807 (Colo. 1974); *Simms v. Cnty. Ct. of Kanawha Cty.*, 61 S.E.2d 849 (W. Va. 1950), *with Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214 (Md. 2003); *Mich. State UAW Cmty. Action Program Council v. Austin*, 198 N.W.2d 385 (Mich. 1972).

2. Ohio's history followed these trends. An 1885 law required *all voters* in *certain cities* to register before *every* election, with registration open seven days. 82 Ohio Laws 232, 232-34 (1885). Challengers attacked the law as violating Article V, Section 1 of the Ohio Constitution, which sets voting qualifications. *Daggett v. Hudson*, 3 N.E. 538, 539 (Ohio 1885). The Ohio Supreme Court upheld the legislature's power to pass registration laws, recognizing registration as "efficacious to prevent fraud." *Id.* at 540-41. But the court concluded that the narrow registration window violated Article V, Section 1. *Id.* at 545-46. After expanding registration options, 83 Ohio Laws 209, 216 (1886), Ohio later required voters in large cities to register annually, and voters in small cities to register every four years, Ohio Gen. Code §§ 4871-72 (1926).

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§ 3-2-3 (1989); Wis. Stat. Ann. § 6.50 (Westlaw through 1993 Wis. Act 15); Wyo. Stat. Ann. § 22-3-115 (1991).

In 1929, Ohio adopted its first *permanent* registration system for cities. 113 Ohio Laws 307, 322 (1929). This law cancelled the registration of voters who did not vote during any two-year period. *Id.* at 332. Boards of elections would send voters "a printed postcard notice of that fact," instructing them that they must reregister. *Id.* By 1977, Ohio mandated this permanent system statewide. 137 Ohio Laws 305, 314 (1977).

That year, Ohio's legislature eliminated the rule removing voters for nonvoting. *Id.* at 305. In response, Ohio's citizens amended their constitution to require that "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Ohio Const. art. V, § 1. Before the NVRA, therefore, boards would "cancel the registration" of voters who had neither "voted at least once in the four" prior years nor updated their registration during that time. 144 Ohio Laws 5517, 5526 (1992). Thirty days before, they sent notices to voters about the impending cancellation. *Id.*

B. Congress Passed The NVRA And HAVA To Increase Total Registration But Decrease Inaccuracies In The Rolls

In recent decades, Congress has regulated elections under two constitutional provisions—the first applicable to all elections, the second to federal ones.

The first provision, the Fifteenth Amendment, permits Congress to enforce its command against racial voting discrimination. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013). It is a tragic fact of history that, before 1965, some States enacted registra-

tion rules to "deny registration" to African Americans rather than ensure fair elections. Harris, *supra*, at 157. Congress passed the Voting Rights Act to remedy this "extraordinary" problem. *Shelby Cnty.*, 133 S. Ct. at 2618. Section 2 bars States from using any practice in any election that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

The second provision, the "Elections Clause," directs state "Legislature[s]" to set the "Times, Places and Manner of holding" *federal* congressional elections, but allows Congress to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Historically, Congress left these regulations to States. *United States v. Gradwell*, 243 U.S. 476, 485 (1917). With the NVRA and HAVA, however, it "erected a complex superstructure of federal regulation atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013).

1. *NVRA*. The NVRA served competing goals. It sought to "increase the number of eligible citizens who register to vote" in federal elections. 52 U.S.C. § 20501(b)(1). But it also sought to "protect the integrity of the electoral process" by ensuring "accurate" registration lists. *Id.* § 20501(b)(3)-(4).

To advance its first purpose, the NVRA required "States to provide simplified systems for registering" in federal elections. *Young v. Fordice*, 520 U.S. 273, 275 (1997). It compelled States to allow registration through motor-vehicle departments, the mail, and various public offices. 52 U.S.C. §§ 20504-20506. It also required States to leave registration open up to 30 days before federal elections, *id.* § 20507(a)(1),

and limited their ability to remove names from the registration lists for those elections, *id.* § 20507(a)(3).

To advance its second purpose, the NVRA required States to keep accurate voter lists. Four provisions are especially relevant. *First*, § 20507(a)(4)—the "Maintenance Duty"—directed States to "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 voter's death or change of residence.

Second, § 20507(b) imposed two limits on maintenance efforts. Section 20507(b)(1) required a program to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act." Section 20507(b)(2)—the "Failure-To-Vote Clause"—limited the removal of individuals for nonvoting. It originally indicated that a program could "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." National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 83.

Third, § 20507(d)—the "Confirmation Procedure"—outlined a process by which States could cancel a registration because a voter may have moved. It provided: "A State shall not remove the name of a registrant" from a registration list "on the ground that the registrant has changed residence unless the registrant" *both* (1) "has failed to respond to a notice" sent by the State, *and* (2) has not thereafter "voted or appeared to vote" in two general federal elections. 52 U.S.C. § 20507(d)(1). The notice must be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his

or her current address." *Id.* § 20507(d)(2). It also must include certain information. *Id.*

Fourth, the NVRA neither expressly required nor expressly barred States from sending these notices to particular voters. Yet § 20507(c)(1)—the "Safe-Harbor Provision"—identified a group to whom States could send the notices to meet their Maintenance Duty. This provision noted that a State "may meet" its Maintenance Duty by using "change-of-address information supplied by the Postal Service" to identify voters who have moved. *Id.* § 20507(c)(1)(A). The State should send notices to these voters and remove them through the Confirmation Procedure. *Id.* § 20507(c)(1)(B)(ii).

2. *HAVA*. After the NVRA, some States sent notices, under the Confirmation Procedure, to those lacking voter activity. *E.g.*, Colo. Rev. Stat. § 1-2-605 (1997). In the 1990s, the United States asserted that this process violated the Failure-To-Vote Clause, but conceded that "[t]he issue of whether or not election officials may target the forwardable confirmation notices *solely* for failure to vote . . . remains a question of the legal interpretation of NVRA provisions." Office of Election Admin., FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, 5-22 (Mar. 1998). HAVA made two changes affecting that legal question.

Change One: HAVA required States to keep a "single, uniform, official, centralized, interactive computerized statewide voter registration list." 52 U.S.C. § 21083(a)(1)(A). It *mandated* that voters "who have not responded to a notice *and* who have not voted in 2 consecutive general elections for Fed-

eral office" be removed from this list. *Id.* § 21083(a)(4)(A) (emphasis added). But it clarified that "no registrant may be removed *solely* by reason of a failure to vote." *Id.* (emphasis added).

Change Two: HAVA included a section entitled "clarification of ability of election officials to remove registrations from official list of voters on grounds of change of residence." Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728 (capitalizations omitted). This provision added a disclaimer to the Failure-To-Vote Clause, 52 U.S.C. § 20507(b)(2):

> 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.

116 Stat. at 1728.

C. Since 1994, Ohio Has Conducted Two General List-Maintenance Processes

In 1994, Ohio's legislature directed the Secretary of State to "prescribe a general program to remove ineligible voters." 145 Ohio Laws 2516, 2521 (1994) (amending Ohio Rev. Code § 3501.05(Q)). The Secretary adopted two processes that have been in place ever since, spanning Secretaries from both political

parties. Damschroder Decl., R.38-2, PageID#294; Taft Directive 94-36, R.38-1, PageID#286.

The first process, contemplated by the Safe-Harbor Provision, uses the postal service's change-of-address data. The postal service's database "contains the names and addresses of individuals who have filed changes of address with the United States Postal Service." Damschroder Decl., R. 38-2, PageID#294. The Secretary compares that database with Ohio's registration database to identify individuals who may have moved. It sends matches to boards of elections so that they may mail confirmation notices to these voters. *Id.* If a voter does not respond to this notice or engage in voter activity for four years from the date the board mails it, the board cancels the registration. Yet this process misses voters who move *without* telling the postal service. *Id.*

Ohio thus uses a "Supplemental Process." *Id.* It "seeks to identify electors whose *lack of voter activity* indicates they may have moved, even though their names did not appear" in the change-of-address database. Brunner Directive 2009-05, R.38-7, PageID#401. Boards send confirmation notices to voters who have not engaged in voter activity for two years. Damschroder Decl., R.38-2, PageID#295. If a voter returns the notice through prepaid mail or responds through the internet, a board updates the voter's information. *Id.*, PageID#295-96. If a voter ignores the notice and then fails to vote or update a registration over the next four years, the board cancels the registration. *Id.* All told, this process removes individuals who *both* fail to respond to a notice *and* fail to engage in voter activity for six years.

Until 2014, Ohio conducted these processes biennially. It now conducts them annually after a legislative change and a lawsuit challenging Ohio's maintenance efforts. Ohio Rev. Code § 3503.21(D); Settlement Agreement in *Judicial Watch v. Husted*, No. 2:12-cv-792 (S.D. Ohio), R.38-4, PageID#370.

D. A District Court Dismissed Plaintiffs' Suit Against The Supplemental Process, But The Sixth Circuit Reversed

1. In 2016, Ohio A. Philip Randolph Institute, the Northeast Ohio Coalition for the Homeless, and Larry Harmon ("Plaintiffs") sued the Secretary under 28 U.S.C. § 1331. They asserted that: (1) Ohio's Supplemental Process violated the NVRA, and (2) Ohio's confirmation notices lacked required information. Am. Compl., R.37, PageID#236-38. In an effort to compromise, the Secretary updated the contents of the notices and the website allowing registrants to confirm addresses. Confirmation Notice, R.56-2, PageID#22821-24.

The district court thereafter entered final judgment for the Secretary. Pet. App. 39-40a n.1. On Count 1, it held that the Failure-To-Vote Clause's "unambiguous text" (when read with HAVA's amendment) "specifically permits" the Supplemental Process. Pet. App. 59a. The district court also rebuffed Plaintiffs' other arguments why the process violated the NVRA. Pet. App. 59a-64a.

On Count 2, the court ruled that Plaintiffs' claim was largely mooted by the Secretary's changes to the notice. Pet. App. 66a-67a. As to Plaintiffs' sole contention that was not moot—that a notice must contain information about how to register in other

States—the court held that the NVRA did not include such a mandate. Pet. App. 68a.

2. A divided Sixth Circuit reversed.

Supplemental Process. The majority held that Ohio's Supplemental Process violated the Failure-To-Vote Clause. Pet. App. 10a-24a. It divided its analysis into two questions: Did HAVA's amendment to that clause expressly permit that process? If not, did the clause otherwise prohibit it? Pet. App. 14a.

On the first question, the court ruled that HAVA did not insulate the Supplemental Process. Pet. App. 14a-20a. While HAVA authorized Ohio to remove voters who neither responded to a notice nor voted in two elections, the court reasoned, the Supplemental Process tied the *initial* sending of that notice to failure to vote. Pet. App. 15a. Nothing in HAVA, the court suggested, permitted Ohio to use nonvoting as such a "trigger." Pet. App. 15a-20a. The court also read HAVA strictly based on the principle that "exceptions to a statute's general rules be construed narrowly." Pet. App. 16a.

On the second question, the court held that using voter inactivity as a "trigger" to send notices violated the Failure-To-Vote Clause because it "'*result*[*ed*]' in removal by reason of failure to vote." Pet. App. 21a-24a. "Under the ordinary meaning of 'result,'" the court stated, "the Supplemental Process would violate [this] clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." Pet. App. 21a (citation omitted). And while HAVA clarified that States were barred only from removing voters "solely" for nonvoting, the court

held that the Supplemental Process did so. Pet. App. 22a.

Notice. The majority next held that the Secretary failed to prove that the challenge to Ohio's old notice was moot. Pet. App. 25a-28a. And it held that Ohio's new notice violated a provision requiring notices to include "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). The majority read this provision as requiring a notice to contain some information about out-of-state registration. Pet. App. 29a-31a.

Dissent. Judge Siler determined that "Ohio ha[d] developed a lawful procedure." Pet. App. 32a. But he wrote a "condensed" dissent, which did "not reflect the extent to which [he] disagree[d] with the majority," to give this Court time before the 2016 election to consider this case. *Id.* He concluded that the Supplemental Process comported with the Failure-To-Vote Clause because Ohio did not remove voters *solely* for nonvoting. Pet. App. 32a-35a.

3. Despite Judge Siler's invitation to seek emergency relief, the Secretary believed that, in this case, setting the "rules about the administration of the impending election [was] more important than further emergency litigation." Response Br., 6th Cir. R.41, at 2 (Sept. 30, 2016). The Secretary thus opted not to seek en banc review, *id.*, and agreed to a preliminary injunction for 2016 requiring boards generally to count the provisional ballots of voters whose registrations were cancelled under the Supplemental Process in 2011, 2013, or 2015. Pet. App. 95a.

Before the 2016 election, a Plaintiff suggested that "hundreds of thousands" of voters had been re-

moved under the Supplemental Process in 2015 and that "1.2 million" may have been removed since 2011. *Amicus* Br. of Ohio A. Philip Randolph Inst. at 7, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 14 (2016) (No. 16A405). Yet about 7,515 ballots were cast during this election under the district court's provisional remedy (out of more than 150,000 provisional ballots cast statewide). Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, *available at* https://goo.gl/KSZnCS.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED RAISES AN IMPORTANT ISSUE THAT REQUIRES THE COURT'S IMMEDIATE ATTENTION

The Court should grant certiorari because the question presented raises an important election-integrity issue that could affect many States. This petition also gives the Court a good vehicle to answer the question outside the context of emergency litigation before an election.

A. The Question Presented Addresses An Important Election-Integrity Matter

The Sixth Circuit's decision makes it harder for States to conduct what all can agree is a critical activity—removing ineligible voters from registration lists—by eliminating one method for doing so.

1. States have "important interest[s] in accurate voter lists." *Marston v. Lewis*, 410 U.S. 679, 681 (1973). For over a century, "[t]he requirement that all voters shall be registered prior to the day of the election" has been seen as "one of the most important safeguards of the purity of the ballot box." Harris, *supra*, at 4. Before Philadelphia required registra-

tion in 1906, for example, "it was a common saying that all of the signers of the Declaration of Independence . . . still regularly voted in that city." *Id.* at 6. Today, the "maintenance of accurate and up-to-date voter registration lists" remains "the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18; Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 10 (Sept. 2005) ("*Building Confidence*"), *available at* https://goo.gl/KFsw1N.

A commission co-chaired by Presidents Ford and Carter explained the concerns with inaccurate rolls. "[I]naccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit 'repeaters' to use such available names." Nat'l Comm'n on Fed. Election Reform, *supra*, at 27. "For generations these practices have been among the oldest and most frequently practiced forms of vote fraud." *Id.* When rejecting challenges to laws permitting the removal of voters for nonvoting, courts have likewise found it "well established" that the laws are "a legitimate means by which the State can attempt to prevent voter fraud." *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994). "Without removing names, there exists the very real danger that impostors will claim to be someone on the list and vote in their places." *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991); *Williams v. Osser*, 350 F. Supp. 646, 652-53 (E.D. Pa. 1972).

Relatedly, bloated rolls filled with ineligible voters undermine public faith in the outcome of elections. "[P]ublic confidence in the integrity of the electoral process has independent significance, be-

cause it encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J., op.). Yet inaccurate lists could breed a *perception* of fraud, and "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Thus, a State's concerns with voter perception and confidence justify list-maintenance efforts even if fraud is rare.

2. Despite the importance of maintaining accurate lists, States have long struggled to do so. When permanent lists became common in the 1900s, the National Municipal League recognized that maintenance efforts were "the weakest part of existing systems," so it recommended using nonvoting as one component for removing so-called "dead wood." Nat'l Mun. League, *supra*, at 18, 37-38. By the early 1990s, Congress likewise imposed the Maintenance Duty to cure the ongoing problem of outdated registrations "accumulat[ing] on the rolls." S. Rep. 103-6, at 46; *cf. The Need for Further Federal Action in the Area of Criminal Vote Fraud: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 6 (1983) (Statement of Daniel Webb, U.S. Attorney for the Northern District of Illinois) (estimating, after an investigation of a Chicago election, that voter fraud amounted to about "10 percent or 100,000 [fraudulent] votes").

If anything, however, the NVRA's strict removal limits exacerbated the difficulties in maintaining the rolls. By 2002, HAVA's authors "found that voter rolls across the country [were] inaccurate or in very poor order." 148 Cong. Rec. 20,834 (2002). "[T]he

condition in many jurisdictions, particularly the large jurisdictions, [was] in a state of crisis. Voter lists [were] swollen with the names of people who [were] no longer eligible to vote in that jurisdiction, [were] deceased or [were] disqualified from voting for another reason." *Id.* Even after HAVA, "the number of registered voters [continued to be] greater than the number of voting-aged citizens" in many places. *Building Confidence*, *supra*, at 22.

This remains an issue. In 2012, one study estimated that about 24 million registrations were "no longer valid" or "significantly inaccurate." The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade* (Feb. 2012), R.38-10, PageID#495. The study added that more than 1.8 million deceased voters were registered, and about 2.76 million people had registrations in more than one State. *Id.* Similarly, the United States has sued over inaccurate lists. It sued Missouri, for example, because "the registered voters in numerous Missouri counties exceeded the number of eligible voters." *United States v. Missouri*, 535 F.3d 844, 847 (8th Cir. 2008); *see also Crawford*, 553 U.S. at 196 (Stevens, J., op.) (describing suit against Indiana).

B. The Question Presented Affects Many States

As the district court found, Ohio is not alone in using voter inactivity as part of its maintenance program. Pet. App. 58a n.5. Many state laws *expressly* permit or require officials to send notices to voters who have not voted over a certain time. Ga. Code Ann. §§ 21-2-234, 21-2-235; 10 Ill. Comp. Stat. 5/4-17, 5/5-24, 5/6-58; Iowa Code § 48A.28(2)(b); Mont.

Code Ann. §§ 13-2-220(1)(c)(iii), 13-2-402(7); Okla. Stat. Ann. tit. 26, § 4-120.2(A)(6), (B); 25 Pa. Cons. Stat. Ann. § 1901(b)(3), (d); Tenn. Code Ann. § 2-2-106(c); W. Va. Code Ann. § 3-2-25(j); *cf.* Cal. Elec. Code §§ 2224-2226; Haw. Rev. Stat. Ann. § 11-17.

In addition, the Sixth Circuit's logic—which prohibits a voter's failure to vote from being a but-for cause of the voter's removal—implicates States that use voter inactivity in related ways. Under some state laws, officials are allowed or required to send voters who have not voted a *nonforwardable* mailing, and to follow up with a confirmation notice for those voters whose nonforwardable mailing is returned as undeliverable. Alaska Stat. Ann. § 15.07.130(a)-(b); Fla. Stat. Ann. § 98.065(2)(c); Mo. Stat. §§ 115.181(2), 115.193; 17 R.I. Gen. Laws Ann. § 17-9.1-27(b); S.D. Codified Laws § 12-4-19; *cf.* Kan. Stat. Ann. § 25-2354(a) (permitting targeted mailings). A voter removed through this process would not have received a mailing *but for* the failure to vote, so the voter's removal could be viewed as "'proceed[ing] or [arising] as a consequence'" of nonvoting under the Sixth Circuit's reasoning. Pet. App. 21a (citation omitted).

Finally, like Ohio Rev. Code § 3501.05(Q), other state laws delegate to officials the task of determining who should receive notices. Some direct officials to determine the list-maintenance "methods." *E.g.*, N.C. Gen. Stat. Ann. § 163-82.14(a); Nev. Rev. Stat. Ann. § 293.530(1). Others allow officials to send notices to those that they have "reason to believe" have moved. *E.g.*, Ark. Const. amend. 51, §§ 10(d)-(e), 11(a)(1); Ky. Stat. § 116.112(3); La. Rev. Stat. 18:193(A); Tex. Elec. Code Ann. § 15.051(a). Still others merely direct officials to follow the Confirma-

tion Procedure *without* listing any triggers for sending confirmation notices. *E.g.*, Miss. Code Ann. § 23-15-153(1); S.C. Code Ann. § 7-5-330(F)(1). In some of these States, officials may have previously relied on nonvoting to send notices. *E.g.*, S.C. State Elections Comm'n, *SEC Sends Notice to Inactive Voters* (May 6, 2009), https://www.scvotes.org/node/181; Nev. Sec'y of State, Election Frequently Asked Questions, http://nvsos.gov/sos/elections/election-resources/faqs#453. If this Court upholds Ohio's process, these States could do so in the future.

All told, the Sixth Circuit's logic either directly affects or has the potential to affect many States.

C. The Question Presented Requires The Court's Attention Now, And This Case Offers A Good Vehicle To Answer It

1. The Court should grant certiorari now because conflicting litigation has left the States with little margin for error. The NVRA permits private parties to sue (and seek attorney's fees) for alleged violations. 52 U.S.C. § 20510(b)-(c). Yet the NVRA's dueling purposes have generated contradictory suits tugging the States at both ends. This Court's answer to the question presented would offer important guidance on the steps that States may take to avoid the competing legal pitfalls (and their associated costs).

On one hand, States (or local governments) have been sued by parties claiming that they have violated their Maintenance Duty by insufficiently maintaining registration lists. Another Ohio suit illustrates this point. In 2012, parties challenged Ohio's maintenance efforts by identifying, among other things, three counties in which the number of regis-

tered voters exceeded the voting-age population. Ohio settled that suit by agreeing to conduct its now-challenged Supplemental Process *annually*. Settlement Agreement in *Judicial Watch v. Husted*, No. 2:12-cv-792 (S.D. Ohio), R.38-4, PageID#370.

Ohio is not alone in this regard. As noted, the United States has sued governments that have insufficiently maintained registration lists. Most relevant here, in 2007, the United States entered into a settlement with Philadelphia that required that city to do what the United States claimed below is illegal: "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 . . . ." Settlement Agreement at 10, in *United States v. City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa.) (available at U.S. Br., 6th Cir. R.29, Attach. 11). Counties in Texas and Mississippi, too, have entered into consent decrees with private parties that required them to send notices based on voter inactivity. One such decree required a county to send notices "[t]o any voter who may be currently classified as inactive by virtue of not voting in two consecutive federal election cycles." Consent Decree at 6, in *ACLU v. McDonald*, No. 2:14-cv-12 (W.D. Tex.) (available at Ex. 4 to *Amicus* Br. of Public Interest Legal Foundation, R.50-5, PageID#22596).

On the other hand, States have been sued by those arguing that these efforts themselves violate the NVRA. This suit is Exhibit A. It claims that the settlement that Ohio entered into to meet its Maintenance Duty itself violates the Failure-To-Vote Clause. Other States have also been sued regarding their use of nonvoting. *E.g.*, *Common Cause v.*

Kemp, No. 1:16-cv-452 (N.D. Ga.); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1223-24 (N.D. Ill. 1995); Office of Election Admin., *supra*, at 5-22 to 5-23. And similar suits may only increase if the Court allows the decision below to stand. *E.g.*, Letter from Stuart C. Naifeh, Senior Counsel, Demos, to Hon. Tre Hargett, Tenn. Sec'y of State (Oct. 20, 2016), *available at* http://www.demos.org/publication/tn-notice-letter-compliance-nvra-section-8.

In short, suits brought against States (including a suit by the United States) have *required* what the Sixth Circuit (and the United States) said below was *prohibited*. The Court should not leave the States with this diametrically conflicting guidance.

2. This case provides a good vehicle to resolve the question. All too many elections cases arise in an emergency posture that requires quick decisionmaking ill-suited for general guidance. *Purcell*, 549 U.S. at 4-5. Here, however, Ohio purposely declined to seek emergency relief before the 2016 election. As a result, the Court may decide this important question outside the shadow of an election. That timing is ideal. On an election's eve, by contrast, "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.*

If anything, timing is more important for this question than it is for others given the complicated remedy. The district court's order on remand illustrates as much. Finding "itself in a difficult position," the court recognized the conundrum of crafting a remedy that registers as many individuals as possible "without placing an undue burden on election

officials, fundamentally changing the State's voting processes, or making room for abuse of those same processes." Pet. App. 75a. All are better off with an answer now, so other States do not find themselves in the same predicament near an election.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASES

The Court should grant certiorari because the decision below conflicts with this Court's cases.

A. The Sixth Circuit's Textual Analysis Violated Two Interpretive Principles

The Sixth Circuit reasoned that the word "'result'" in the Failure-To-Vote Clause means "'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (citation omitted). Under that definition, it continued, "the Supplemental Process would violate [this] clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.* (citation omitted). This reading conflicts with the Court's cases in two ways: (1) it interprets the clause as adopting a boundless causation test, and (2) it renders HAVA's amendments meaningless.

1. The Court has held that "by reason of" or similar statutory phrases delineating a causal relationship create two requirements. They initially require *but-for* or *factual* causation—"an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'" *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citation omitted). Yet "[l]ife is too short to pursue every event to its most remote, 'but-for,' consequences." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment). So these

statutes incorporate *proximate* causation as well. *Paroline*, 134 S. Ct. at 1719-21; *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-35 (1983). And proximate causation includes "generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

Holmes offers a good example. The Racketeer Influenced and Corrupt Organizations Act (RICO) allows parties to sue for injuries arising *by reason of* RICO violations. *Id.* at 265. The year before the NVRA was enacted, this Court read "by reason of" to incorporate proximate causation. *Id.* at 266-67. The Court added that a "direct relation" must exist between the "injury asserted" and the "conduct" alleged. *Id.* at 268. "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]'" does not suffice. *Hemi*, 559 U.S. at 9 (citation omitted).

The Sixth Circuit disregarded these principles. It asked *only* whether failure to vote was a *factual* cause of removal. Pet. App. 21a. The court nowhere placed other limits on the connection between failure to vote and removal. Yet it should have incorporated proximate-causation principles. Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes*, 503 U.S. at 268.

Under the Supplemental Process, moreover, no "direct relation" exists between nonvoting and removal because of an intermediate step—a voter's own failure to respond to a notice. That makes any link between failure to vote and removal "indirect,"

as it is "purely contingent" on the voter's inaction. Put another way, the Supplemental Process does not remove voters "by reason of" their *failure to vote*; it removes voters "by reason of" their *failure to respond to a notice*.

The Confirmation Procedure compels this reading. It *requires* States to use failure to vote. If a voter does not respond to a notice, the State may remove the voter only if the voter does not vote in the next two elections. 52 U.S.C. § 20507(d)(1)(B)(ii). Thus, a voter's removal will—by definition—always "'proceed[] or arise[] as a consequence' of his or her failure to vote." Pet. App. 21a (citation omitted). If the Sixth Circuit correctly interpreted the Failure-To-Vote Clause, that clause *bars* what the Confirmation Procedure *allows*.

2. When "'Congress acts to amend a statute,'" this Court also "'presume[s] it intends its amendment to have real and substantial effect.'" *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) (citation omitted). That is, the Court will not read amendments in a way that renders them "a largely meaningless exercise." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 57-58 (2006).

The Sixth Circuit disregarded these principles by rendering HAVA's amendments meaningless. In the 1990s, the United States claimed that the Failure-To-Vote Clause barred States from sending notices for nonvoting, but conceded that the issue "remain[ed] a question of the legal interpretation of NVRA provisions." Office of Election Admin., *supra*, at 5-22. In 2002, HAVA clarified the NVRA by siding with *the States* in that then-existing legal debate.

To begin with, HAVA amended the Failure-To-Vote Clause by inserting a rule of construction: "nothing in this paragraph may be construed to prohibit a State from using the" Confirmation Procedure to remove individuals. 52 U.S.C. § 20507(b)(2). This change "clarif[ied] the ability of election officials to remove from the voter registration list the name of an individual who has not responded to a notice from the registrar of voters and who has not voted in two or more consecutive general elections for Federal office." H.R. Rep. No. 107-730, pt. 1, at 81 (2002). But the Sixth Circuit interpreted this amendment to serve no purpose whatsoever.

In addition, HAVA *commanded* States to remove "registrants who have not responded to a notice *and* who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). But HAVA added that States could not remove voters "*solely* by reason of a failure to vote." *Id.* (emphasis added). The Sixth Circuit's holding cannot be squared with this "solely" text. When a State removes a voter *both* because the voter has failed to respond to a notice *and* because the voter has failed to vote, that State has not removed the voter *solely* because the voter has failed to vote.

In response to that point, the Sixth Circuit suggested that the Supplemental Process is illegal because it makes nonvoting the *sole* "trigger" for sending notices. Pet. App. 22a. This rewrites the Failure-To-Vote Clause. It bars *removing* voters for nonvoting; it says nothing about *sending notices* to voters for nonvoting. The Sixth Circuit also asserted that the Failure-To-Vote Clause must require States to do more than follow the Confirmation Procedure be-

cause otherwise the clause "would serve no purpose." Pet. App. 17a. That is so, according to the Sixth Circuit, because § 20507(d)(1) also requires States to follow the Confirmation Procedure to remove voters. *Id.* Yet § 20507(d)(1) requires States to follow the Confirmation Procedure *only* if they are removing voters for moving. Without the Failure-To-Vote Clause, States could use nonvoting alone to conclude that voters had become ineligible for other reasons (e.g., because they have died).

B. The Sixth Circuit Wrongly Favored An Oft-Criticized Canon Over The Canon Of Constitutional Avoidance

The Sixth Circuit read the Failure-To-Vote Clause to bar Ohio's Supplemental Process by expanding a rarely invoked canon at the expense of a commonly invoked one. Pet. App. 16a. This, too, warrants review.

1. *Narrow Reading Of Exemptions*. The Sixth Circuit strictly interpreted HAVA's amendment to the Failure-To-Vote Clause based on the canon that courts construe "exceptions to a statute's general rules" narrowly. *Id.* This canon does not apply here, and is of dubious validity in any event.

The canon does not apply for two reasons. For one, HAVA did not add an *exception* to the Failure-To-Vote Clause; it added an *explanation* to it. The amendment clarifies that "nothing in this paragraph may be *construed* to prohibit a State from" removing voters through the Confirmation Procedure. 52 U.S.C. § 20507(b)(2) (emphasis added). The Court has never applied this canon to such a clarification; the canon applies when a statute sets a general rule

(such as a ban on disclosing personal information) and then lists exceptions to that rule (such as circumstances when disclosure is allowed). *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013).

For another, the Court has never applied this canon to statutes that *expressly* serve competing purposes. Instead, the canon applies when a statute's general rule (like the Freedom of Information Act's disclosure requirement) furthers a central purpose, and an exception cuts against that purpose. *Milner v. Dep't of Navy*, 562 U.S. 562, 571-72 (2011). The NVRA, however, serves *dueling* purposes—to increase the rolls and to remove ineligible voters. 52 U.S.C. § 20501(b). To put a judicial thumb on the scale in favor of a provision serving one purpose at the expense of a provision serving the other upends the compromise that Congress reached.

Even if the canon did apply, the Court should consider this case to reassess it. The canon all too often stems from "inappropriate judicial antagonism to limitations on favored legislation." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 363 (2012). "Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation." *Id.* Perhaps for that reason, the Court has "declined to apply [the] canon on two recent occasions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting).

Indeed, this canon rose into prominence with, and shares all the defects of, the Court's now-entombed practice of implying private rights of action. *Compare Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392

(1960), *with J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). The same can be said for reading exceptions narrowly to further what courts believe to be good policy. Courts should not liberally construe remedies or strictly construe exceptions—"no matter how desirable that might be as a policy matter." *Id.* And having "sworn off the habit of venturing beyond Congress's intent" in the former context, the Court should reject the Sixth Circuit's attempt "to have one last drink" in the latter one. *Id.*

2. *Canon Of Constitutional Avoidance*. The Sixth Circuit also ignored a venerable canon—the canon of constitutional avoidance. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (citation omitted). The canon of constitutional avoidance thus instructs that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). If one reading "give[s] rise to serious constitutional questions," the Court chooses the other. *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 501 (1979).

The Sixth Circuit failed to heed this warning, even though its reading raised serious constitutional questions under the Elections Clause. That clause, while authorizing Congress to regulate the *manner* of

holding federal elections, leaves the States with the exclusive authority to determine voting *qualifications*. "Prescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'" *Inter Tribal*, 133 S. Ct. at 2258 (quoting The Federalist No. 60, at 371 (A. Hamilton)).

At the same time, a murky line often divides a constitutional "manner" regulation from an unconstitutional "qualification" regulation. Take registration. State courts initially debated whether it imposed an unlawful "qualification" that was in conflict with what could be seen as a state constitution's exclusive list of qualifications. *Morris*, 25 N.E. at 223-24 ("[S]ome courts hold[] registration to be a mere regulation as to the mode of exercising the right of suffrage, while other courts, and we think the better reasoned opinions, hold it to be adding a qualification."); *Inter Tribal*, 133 S. Ct. at 2259 n.9 (reserving question). State courts likewise split over whether failure-to-vote laws established additional qualifications. *Compare Duprey*, 518 P.2d at 808-09, *with Md. Green Party*, 832 A.2d at 222-23.

Heightening the seriousness of this constitutional question, the Court's guidance suggests that it will resolve ambiguities in the Elections Clause in favor of the States. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673-74 (2015). It "is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Id.* at 2673. Thus, the Court interpreted the word "Legislature" in the Elections

Clause expansively—allowing election regulations to be passed not just by a State's *legislative body* but also by its *citizens* acting through an initiative. *Id.* at 2673-74. Just as the word "Legislature" can be broadly read to protect state processes, *id.*, so too the word "Manner" can be narrowly read to do the same. Indeed, the founders adopted the clause for a narrow purpose—so that States could not destroy the federal government by refusing to hold elections. *Inter Tribal*, 133 S. Ct. at 2267 (Thomas, J., dissenting).

The Sixth Circuit's interpretation, however, charges headlong into this thorny constitutional issue. If registration and failure-to-vote provisions are *qualification* regulations (rather than *manner* regulations), the NVRA exceeds Congress's power under the Elections Clause. *Cf. id.* at 2263-69 (Thomas, J., dissenting). Thankfully, the canon allows the Court "to *avoid* [a] decision [on this] constitutional question[]." *Clark*, 543 U.S. at 381. The Court need only read the Failure-To-Vote Clause as permitting Ohio's Supplemental Process. *Cf. Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). At the least, unlike the Sixth Circuit, the Court should not ignore this canon.

C. The Sixth Circuit's Reading Conflicts With The Presumption That Congress Does Not "Hide Elephants In Mouseholes"

The Sixth Circuit interpreted the Failure-To-Vote Clause with blinders on as to the background against which Congress passed the NVRA. This oversight, too, conflicts with this Court's cases.

1. "[R]easonable statutory interpretation must account for . . . 'the broader context of the statute as

a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). In that respect, this Court presumes that Congress does not conceal far-reaching changes in vague phrases. *Gonzalez v. Oregon*, 546 U.S. 243, 267-68 (2006). Congress, that is, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Sixth Circuit's decision conflicts with this presumption because it interpreted the Failure-To-Vote Clause as enacting sweeping national reform. In 1993, most States used voter inactivity *in some way* when deciding whether to remove individuals from the rolls. *Supra*, at 3-4 & n.1. Of that large group, only a "handful" removed voters *solely* for failing to vote. S. Rep. No. 103-6, at 46. In the 30 or so other States, officials also sent voters a notice that provided them "with a way to update or prevent removal from the registration list." 138 Cong. Rec. 11,689 (1992) (Congressional Budget Office report on earlier bill). Under the Sixth Circuit's view, Congress meant to drastically depart from a common state practice, rather than narrowly bring a few States into line with their neighbors. Yet if Congress intended such a "broad" change, it would have *expressly* indicated that States could not send notices based on voter inactivity. *Gonzalez*, 546 U.S. at 267.

The NVRA did not do so. Instead, its Failure-To-Vote Clause and Confirmation Procedure struck a compromise. The Failure-To-Vote Clause meant that the "handful" of States that removed voters solely for inactivity "could not continue this practice." S. Rep. No. 103-6, at 46; 138 Cong. Rec. at 11,689. Most other States needed only to adjust their existing notice

practices to meet the Confirmation Procedure. Indeed, some States suggested this very compromise. When criticizing States that *automatically* removed nonvoters, Florida's Secretary of State praised Florida's procedures: sending a notice to voters who had not voted for two years, and removing them only if they failed to respond or vote for several more years. *Voter Registration: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 103d Cong. 173 (Jan. 26, 1993) (Statement of Jim Smith, Fla. Sec'y of State); Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.).

2. This presumption has even more force here, given the context in which it arises. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991). The Sixth Circuit's logic undercuts two aspects of that system.

Government Structure. "Among [its] background principles" of interpretation, the Court has recognized many that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond*, 134 S. Ct. at 2088. The Court, for example, has established a rule against the abrogation of a State's sovereign immunity, a requirement that conditions imposed on States under the federal spending power be clear, and a presumption against preemption. *Id.* at 2088-89. "Closely related" to these principles is a clear-statement rule requiring the Court to resolve ambiguities in favor of the States when legislation affects the federal-state balance. *Id.* at 2089; *see, e.g.*, *Sheriff v. Gillie*, 136

S. Ct. 1594, 1602 (2016). The Sixth Circuit's reading of the Failure-To-Vote Clause ignored this rule.

To be sure, this Court has stated that no "presumption against pre-emption" exists for federal laws passed under the Elections Clause. *Inter Tribal*, 133 S. Ct. at 2256. As a result, the Court will not protect state interests by choosing a *plausible* reading of those laws at the expense of the "*fairest* reading." *Id.* (emphasis added). The Sixth Circuit's decision, however, significantly expands on these statements by leaving no room for federalism whatsoever. Yet when a reading in favor of state authority is just as plausible as a reading against it, the clear-statement rule points to the former interpretation. If the clear-statement rule is broad enough to reach the Court's interpretation of the Elections Clause *itself*, *Ariz. State Legislature*, 135 S. Ct. at 2673-74, it is broad enough to reach the Court's interpretation of *federal legislation* passed under that clause.

Laboratories of Democracy. "This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Ariz. State Legislature*, 135 S. Ct. at 2673 (citation omitted). Election regulations provide a case in point, because it is "far from clear" which of the combinations of programs for maintaining the rolls best balances accuracy against cost. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Infinite tradeoffs exist. To save money, States might rely solely on the Safe-Harbor Provision and change-of-address data. *Cf.* N.J. Stat. Ann. § 19:31-15(b). But that could miss many ineligible voters. In 2006, a study found that "40 percent" of "undeliverable as addressed" mail was caused by "customers [who did]

not notify the Postal Service of address changes." U.S. Postal Serv., Office of the Inspector Gen., *Strategies for Reducing Undeliverable as Addressed Mail* 1 (2015), R.38-6, PageID#381.

To remedy that problem, States might send *mass* mailings to *all* voters, and follow up with notices for voters whose mailings are returned as undeliverable. *E.g.*, Ala. Code § 17-4-30(a). But that might entail significant costs, costs that States might believe are better spent elsewhere. In 2016, for example, Ohio spent roughly $1.25 million to mail absentee-ballot applications to most registered voters. Damschroder Decl., R.38-2, PageID#296. It also paid to join the Electronic Registration Information Center ("ERIC"), a non-profit corporation that requires members to send unregistered individuals information about registering. Electronic Registration Information Center, Inc., *ERIC: Summary of Membership Guidelines and Procedures*, R.49-11, PageID#22546. Ohio sent those notices to over 1.5-million eligible, yet unregistered, Ohioans before the 2016 registration deadline.

Further, the best maintenance programs for a particular State might turn on the ease with which individuals can register in that State. In that respect, registration has only gotten easier since the NVRA. Ohio, for instance, recently approved *online* registration. Ohio Rev. Code § 3503.20. Laws making it easier to register enhance the need for maintaining accurate lists (as the NVRA itself did).

In short, the Sixth Circuit's view—that Congress hid far-reaching, one-size-fits-all reform in what is, at the least, an ambiguous clause—ignored basic federalism principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

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