No. 16-980

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

BRIEF FOR THE PETITIONER

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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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OPINIONS BELOW

The Sixth Circuit's decision, Pet. App. 1a-37a, is reported at 838 F.3d 699. The district court's unreported decision granting judgment to Ohio Secretary of State Jon Husted, Pet. App. 39a-70a, is available at 2016 WL 3542450. Its unreported decision on remand, Pet. App. 71a-100a, is 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 a petition for writ of certiorari. Secretary Husted filed a timely petition on February 3, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The National Voter Registration Act of 1993 (NVRA), Pub. L. 103-31, 107 Stat. 77, 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), Pub. L. 107-252, 116 Stat. 1666, was codified at 42 U.S.C. §§ 15301-15545, but is now codified at 52 U.S.C. §§ 20901-21145. This brief's appendix includes 52 U.S.C. §§ 20507 and 21083.

STATEMENT OF THE CASE

The "Elections Clause" provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Historically, Congress left these regulations to the States. *United States v.*

Gradwell, 243 U.S. 476, 483-85 (1917). The NVRA and HAVA, however, "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). This case considers the extent to which these statutes departed from a longstanding state practice: using a registrant's failure to vote as part of a program to maintain accurate registration lists.

A. Most States Traditionally Relied On The Failure To Vote To Maintain The Rolls

1. At the founding, States did not require electors 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"). Voters simply "showed up at the polls with whatever documentary proofs (or witnesses) that might be necessary" to prove their qualifications to officials. Alexander Keyssar, *The Right to Vote* 151 (2000).

Most States shifted to registration in the second half of the 1800s after "the exposure of widespread election frauds, such as the voting of the graveyard, of persons who had moved away or died, of persons not qualified to vote, of fictitious names, sometime from fictitious addresses, and the voting of 'repeaters' under the names of qualified electors." Harris, *supra*, at 5-6. 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, *Model Registration System* 11 (2d ed. 1931) ("Nat'l Mun. League 2d ed."); 1871 N.J. Laws 53, 53. And they often did not create permanent lists, instead requiring *all* electors to re-register regularly. 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; 1915 Neb. Laws 382, 384-85.

These early laws were "attacked in the courts of almost every State" as unconstitutionally adding a registration qualification to the list of constitutional voting qualifications. Nat'l Mun. League 2d ed., *supra*, at 9. Courts split over that issue. *See Morris v. Powell*, 25 N.E. 221, 223-24 (Ind. 1890). Yet most States mooted it by passing constitutional amendments authorizing registration. Joseph P. Harris, Nat'l Mun. League, *Model Registration System* 51-52 (4th ed. 1954) ("Nat'l Mun. League 4th ed.").

Around the 1930s, "[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* lists, States confronted a practical problem: how to keep the lists up to date to ensure that registration served its antifraud purposes. To do so, States adopted list-maintenance programs tied to the failure to vote. Harris, *supra*, at 224-27. In the 1930s, the National Municipal League recommended using nonvoting to remove registrants as long as they received notice and an opportunity to remain registered. Nat'l Mun. League, *supra*, at 38-39. By the 1950s, "[c]ancellation for failure to vote

[had become] the principal means used in most permanent registration jurisdictions to purge the lists." Nat'l Mun. League 4th ed., *supra*, at 44.

In 1993, most States continued to use nonvoting in their list-maintenance efforts. S. Rep. No. 103-6, at 46 (1993). A few allowed officials to remove registrants solely for failing to vote without any notice.[1] The rest of these States required officials to send notices to nonvoters to give them a chance to stay on the voter rolls (or to reregister).[2]

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[1] Haw. Rev. Stat. § 11-17(a) (Lexis 1993); Idaho Code Ann. § 34-435 (Lexis 1993); Minn. Stat. Ann. § 201.171 (Lexis 1993); Mont. Code Ann. § 13-2-401 (Lexis 1993); N.J. Stat. Ann. §§ 19:31-5, 19:31-15 (Lexis 1993); Okla. Stat. Ann. tit. 26, § 4-120.2 (Lexis 1993); Utah Code Ann. § 20-2-24(1)(b) (Lexis 1992).

[2] Alaska Stat. § 15.07.130(b) (Lexis 1993); Ark. Const. amend. 51 § 11(a)(1) (Lexis 1991); Colo. Rev. Stat. § 1-2-224(3), (6) (Lexis 1993); Del. Code Ann. tit. 15, § 1704 (1991); Fla. Stat. Ann. § 98.081(1)-(2) (Lexis 1993); Ga. Code Ann. § 21-2-231(b) (Lexis 1993); 10 Ill. Comp. Stat. Ann. 5/4-17, 5/5-24, 5/6-58 (Lexis 1993); Ind. Code Ann. §§ 3-7-9-1, 3-7-9-2, 3-7-9-3, 3-7-9-5 (Lexis 1993); Iowa Code Ann. § 48.31 (Lexis 1993); Md. Code Ann. Art. 33 § 3-20(a) (Lexis 1993); Mich. Comp. Laws Serv. §§ 168.509, 168.513 (Lexis 1993); Miss. Code Ann. § 23-15-159 (Lexis 1993); Nev. Rev. Stat. Ann. §§ 293.540, 293.545 (Lexis 1993); N.M. Stat. Ann. § 1-4-28 (Lexis 1993); N.Y. Elec. Law § 5-406 (Consol. 1993); N.C. Gen. Stat. § 163-69 (Lexis 1993); Ohio Rev. Code § 3503.21 (1993); 25 Pa. Stat. Ann. §§ 623-40, 951-38 (Lexis 1993); R.I. Gen. Laws § 17-10-1(b) (Lexis 1993); S.C. Code Ann. §§ 7-3-20, 7-3-30 (Westlaw 1993); S.D. Codified Laws §§ 12-4-19, 12-4-19.1 (Lexis 1993); Tenn. Code Ann. § 2-2-106(a)(3), (b) (Lexis 1993); Vt. Stat. Ann. tit. 17, § 2150(d)(3)-(4) (Lexis 1993); Va. Code Ann. § 24.1-59 (Lexis 1992); Wash. Rev. Code Ann. § 29.10.080 (Lexis 1993); W. Va. Code § 3-2-3 (Lexis 1993); Wis. Stat. Ann. § 6.50(1) (Lexis 1993); Wyo. Stat. Ann. §§ 22-3-115(a)(1), 22-3-116 (Lexis 1993).

2. Ohio's history exemplifies these trends. An 1885 registration law required all voters in certain cities to register before every election, with registration open seven days. 82 Ohio Laws 232, 232-34 (1885). Litigants attacked the law as violating a constitutional provision setting qualifications. *Daggett v. Hudson*, 3 N.E. 538, 539 (Ohio 1885). The Ohio Supreme Court upheld the legislature's power to require registration, recognizing it as "efficacious to prevent fraud." *Id.* at 540-41. But the court invalidated the narrow registration window. *Id.* at 545-46.

In 1929, Ohio adopted its first *permanent* registration system for certain cities. 113 Ohio Laws 307, 321-22 (1929). This system required boards of election to cancel the registrations of those who had not voted for two years. *Id.* at 332. Boards sent individuals "a printed postcard notice of that fact." *Id.* In 1977, Ohio's legislature mandated permanent registration statewide. 137 Ohio Laws 305, 314 (1977). It also eliminated the rule removing individuals for nonvoting. *Id.* at 305. Ohio's citizens responded to the latter change with a constitutional amendment providing: "Any 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. Through 1993, therefore, boards continued to "cancel the registration" of those 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 cancellation, boards sent notices about the impending cancellation directing individuals to update their registrations. *Id.*

B. Congress Passed The NVRA And HAVA To Increase Registrations, But Decrease The Number Of Ineligible Registrants

1. In 1993, Congress passed the NVRA to serve competing goals. Congress sought to "increase the number of eligible citizens who register to vote" in federal elections. 52 U.S.C. § 20501(b)(1). It indicated that "[d]iscriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 20501(a)(3). At the same time, Congress sought to "protect the integrity of the electoral process," and ensure "accurate and current" registration lists. *Id.* § 20501(b)(3)-(4); H.R. Rep. No. 103-9, at 5 (1993) ("The Committee felt strongly that no legislative provision should be considered that did not at least maintain the current level of fraud prevention.").

Increasing Registration. To advance its first goal, the NVRA required "States to provide simplified systems for registering." *Young v. Fordice*, 520 U.S. 273, 275 (1997). It compelled States to allow registration through motor-vehicle departments, the mail, and public offices. 52 U.S.C. §§ 20504-20506. It required States to leave registration open until 30 days before elections. *Id.* § 20507(a)(1). And it barred States from removing "registrants" from their rolls except for certain reasons—"at the request of the registrant"; "as provided by State law, by reason of criminal conviction or mental incapacity"; for "the death of the registrant"; or for "a change in the residence of the registrant." *Id.* § 20507(a)(3)-(4).

Removing Ineligible Registrants. To advance its second goal, the NVRA required States to maintain accurate registration lists. Four provisions are particularly relevant here.

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 registrant's death or changed residence. *Id.*

Second, § 20507(b) imposed limits on "State program[s] or activit[ies] 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." Section 20507(b)(1) required maintenance efforts to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Section 20507(b)(2) (the "Failure-To-Vote Clause") originally provided that state programs or activities "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." 107 Stat. at 83.

Third, § 20507(d) outlined ways that States could remove registrants for *changed residence*. It stated: "A State shall not remove the name of a registrant . . . on the ground that the registrant has changed residence unless": (1) the registrant confirms the move in writing or (2) the State follows a two-step process (the "Confirmation Procedure"). 52 U.S.C. § 20507(d)(1)(A)-(B). The Confirmation Procedure authorized States to remove registrants who *both* "failed to respond to a notice" sent by the State asking them to confirm their eligibility, *and* then did not

"vote[] or appear[] to vote" in two general federal elections. *Id.* § 20507(d)(1)(B)(i)-(ii). The notice had to 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 needed to indicate, among other things, that the registrant would be removed if the registrant did not respond to the notice and vote in two federal elections. *Id.* § 20507(d)(2)(A).

Fourth, the NVRA neither required nor barred States from sending the notice identified in the Confirmation Procedure to any group of registrants. Yet § 20507(c)(1) (the "Safe-Harbor Provision") identified one group to whom States may send notices, as a safe harbor for satisfying their general Maintenance Duty. It noted that a State "may meet the requirements of subsection (a)(4)" by using "change-of-address information supplied by the Postal Service" to identify registrants who have moved. *Id.* § 20507(c)(1)(A). It directed States to send notices to registrants who have moved outside the jurisdiction and to remove them under the Confirmation Procedure. *Id.* § 20507(c)(1)(B)(ii).

2. As they had done before the NVRA, some States proposed sending notices under the Confirmation Procedure to nonvoters. 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). In the 1990s, the Department of Justice (DOJ) argued that this process violated the Failure-To-Vote Clause (§ 20507(b)(2)). *Id.*

HAVA made two changes affecting that debate.

Change One: HAVA included a section (the "Clarifying Amendment") that was entitled "clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence." 116 Stat. at 1728 (capitalizations omitted). This amendment added a disclaimer to the Failure-To-Vote Clause:

> 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.

Id.

Change Two: Another HAVA section directed States to keep a "single, uniform, official, centralized, interactive computerized statewide voter registration list." 52 U.S.C. § 21083(a)(1)(A). One subsection required States to maintain a "system of file maintenance that makes a reasonable effort to remove registrations who are ineligible to vote from" that list. *Id.* § 21083(a)(4)(A). This subsection then stated: "Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office *shall* be removed from the official list of eligible voters, except that no registrant may

be removed *solely* by reason of a failure to vote." *Id.* (emphases added).

C. Ohio Has Long Conducted Two List-Maintenance Processes

After the NVRA, Ohio's legislature changed its registration laws. 145 Ohio Laws 2516, 2543-44, 2565 (1994); Ohio Rev. Code §§ 3501.05(Q), 3503.21(A)(7), (B)(1). It directed the Secretary of State to "prescribe procedures to identify and cancel the registration" of registrants who have moved. 145 Ohio Laws at 2543. Ohio's then-Secretary adopted two processes that have been in place ever since, spanning Secretaries of State from both political parties. Joint Stipulation, R.41, PageID#1506.

Following the Safe-Harbor Provision, the first process 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." *Id.* The Secretary compares that database with Ohio's registration database to identify registrants who might have moved. Boards of elections mail notices to these registrants. *Id.*, PageID#1506-07. If a registrant does not respond to a notice and does not engage in voter activity for four more years, the board cancels the registration. *Id.*, PageID#1508. This process misses any registrant who moves *without* notifying the postal service. *Id.*, PageID#1507.

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, Page-

ID#401. Boards send notices to registrants who have not engaged in voter activity for two years, asking them to confirm their eligibility. Joint Stipulation, R.41, PageID#1507. If registrants return the notice or respond through the internet, boards update their information. Damschroder Decl., R.38-2, PageID#295-96. If registrants ignore the notice and fail to vote or update their registration over the next four years, boards cancel the registration. *Id.* This process removes individuals who *both* fail to respond to the 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 its 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, 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. Am. Compl., R.37, PageID#222-41. They alleged: (1) Ohio's Supplemental Process violated the NVRA, and (2) Ohio's notices lacked required information. *Id.*, PageID#236-38. In a spirt of compromise, the Secretary updated the notices. Notice, R.38-19, PageID#1365.

The district court entered judgment for the Secretary. Pet. App. 39a-40a & n.1. On Count 1, it held that the Failure-To-Vote Clause's "unambiguous text" (as clarified by HAVA's Clarifying Amendment)

"specifically permits" the Supplemental Process. Pet. App. 59a. The court also rejected Plaintiffs' argument that the Supplemental Process was "unreasonable" or "non-uniform." Pet. App. 59a-64a.

On Count 2, the court ruled that Plaintiffs' claim was largely mooted by the notice changes. Pet. App. 66a-67a. As to the sole contention that was not moot—that the NVRA required Ohio's notices to instruct registrants about registering in other States—the court held that the NVRA did not place this duty on States. Pet. App. 68a.

2. A split Sixth Circuit reversed. The court held that Ohio's Supplemental Process violated the Failure-To-Vote Clause (§ 20507(b)(2)). Pet. App. 10a-24a. It divided its analysis into two questions: Did the Clarifying Amendment permit the process? If not, did the Failure-To-Vote Clause prohibit it? Pet. App. 14a.

On the first question, the court ruled that the Clarifying Amendment did not insulate the Supplemental Process. Pet. App. 14a-20a. While the Confirmation Procedure authorized Ohio to remove voters who neither responded to a notice nor voted in two elections, the Supplemental Process tied the *initial* notice to nonvoting. Pet. App. 15a. Nothing in the Clarifying Amendment, the court suggested, permitted Ohio to use nonvoting as a notice "trigger." Pet. App. 15a-20a. To bolster its narrow reading of this amendment, the court also invoked the rule against superfluity and the principle that "exceptions to a statute's general rules be construed narrowly." Pet. App. 16a-18a.

On the second question, the court held that using voter inactivity as a "trigger" to send notices violated the Failure-To-Vote Clause. Pet. App. 20a-24a. "Under the ordinary meaning of 'result,'" the court reasoned, "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 barred States from *removing* voters "solely" for nonvoting, the court held that the Supplemental Process did so because Ohio *sent notices* to registrants solely for nonvoting. Pet. App. 22a.

(Separately, the court reversed the district court on Plaintiffs' claims regarding the contents of Ohio's notices. Pet. App. 25a-31a. Secretary Husted did not appeal that aspect of the opinion.)

Dissenting, Judge Siler found that Ohio's procedure was lawful. Pet. App. 35a. He reasoned that the Supplemental Process comported with the Failure-To-Vote Clause because it did not remove voters *solely* for nonvoting. Pet. App. 32a-35a.

3. With the 2016 election pending, Secretary Husted opted not to seek en banc review, and agreed to a preliminary injunction requiring boards generally to count the ballots of voters whose registrations were cancelled under the Supplemental Process in 2011, 2013, or 2015. Pet. App. 95a.

Before the election, a Plaintiff suggested that "hundreds of thousands" of voters had been removed 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 7-8, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct.

14 (2016) (No. 16A405). Yet about 7,515 ballots were cast during the election under this suit's provisional remedy (out of more than 150,000 provisional ballots and 5.6 million total ballots cast statewide). Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, *available at* https://goo.gl/KSZnCS.

SUMMARY OF ARGUMENT

The original NVRA, HAVA's amendments, and substantive canons of construction all establish that the NVRA permits Ohio's Supplemental Process.

I. As originally enacted, the NVRA's Failure-To-Vote Clause (§ 20507(b)(2)) permitted processes, like Ohio's process, that use the Confirmation Procedure to remove registrants.

A. The Failure-To-Vote Clause bars programs that "result in" the "removal" of individuals "by reason of" their failure to vote. To "result in" removal, a program must cause it. And, as this Court's cases suggest, the "by reason of" language clarifies that nonvoting must be the *proximate cause* of removal.

For two reasons, a failure to respond to a notice—not a failure to vote—is the sole proximate cause of removal under Ohio's Supplemental Process. *First*, the Court must read the NVRA as a harmonious whole. While the Failure-To-Vote Clause *bars* States from removing persons "by reason of" nonvoting, the Confirmation Procedure *requires* States to rely on nonvoting in order to remove them. Treating a failure to respond to the notice as the "sole proximate cause" of removal reconciles these provisions in a way that comports with background principles.

Second, the Court should not read the NVRA to "hide elephants in mouseholes." In 1993, most States sent notices to nonvoters requiring them to confirm their eligibility. If Congress meant to depart from that common practice, it would have done so expressly, not through implications. Yet the NVRA does not expressly regulate *who* may receive notices. The Court should read this silence as a delegation of authority to the States (not the federal judiciary).

B. The Sixth Circuit's reading of the Failure-To-Vote Clause lacks merit. It mistakenly adopted a broad test barring not just programs that make nonvoting a *proximate cause* of removal, but also programs that make nonvoting a *but-for cause* of removal. To do so, it ignored the clause's "by reason of" language. It also put the NVRA on a collision course with itself because removals authorized by the Confirmation Procedure would flunk this test.

In addition, the Sixth Circuit wrongly interpreted the Failure-To-Vote Clause as governing the *trigger* for notices, rather than the *removal* of registrants. The clause says nothing about notice "triggers." And the court's need to rewrite clear statutory text should have led it to reassess its broad causation test.

Finally, the Sixth Circuit claimed that its reading was necessary to avoid turning the Failure-To-Vote Clause into surplusage. It reasoned that the clause must govern notice "triggers" because the Confirmation Procedure *already* requires States to follow its two steps. That analysis ignored the different scopes of these provisions, which have independent force no matter how the Court rules here. The Confirmation Procedure governs removals only for *change of address*. The Failure-To-Vote Clause restricts removals

for failing to vote, and bars States from using nonvoting as the sole proxy to conclude that a registrant is ineligible for *other reasons* (e.g., death).

II.A. HAVA confirmed that States may send notices to nonvoters. *First*, its Clarifying Amendment states that "nothing in th[e] [Failure-To-Vote Clause] may be construed to prohibit States" from using the Confirmation Procedure to remove registrants. This text clarifies that the clause does not regulate notices *as long as* States follow the Confirmation Procedure. The amendment also had only one plausible purpose—to side with the States, not the DOJ, over whether they could send notices to nonvoters.

Second, another HAVA section *commanded* States to remove registrants if they did not respond to a notice and vote for two elections. Ohio's Supplemental Process would violate this section if it did *not* remove these registrants. This section also clarified that the NVRA bars States from removing registrants "solely" for nonvoting. Ohio does not remove registrants *solely* for nonvoting because they *additionally* must fail to respond to a notice.

B. The Sixth Circuit mistakenly interpreted HAVA. The Clarifying Amendment, said the court, clarified that the Failure-To-Vote Clause governs all parts of a program that the Confirmation Procedure does not expressly permit. This reads an amendment clarifying the clause's *limited* scope as *expanding* its scope. Further, the court read the clause to serve an implausible purpose—clarifying that the NVRA's Failure-To-Vote Clause does not outlaw the NVRA's Confirmation Procedure. Finally, the court mistakenly invoked the canon that exceptions to a statute's general rules be construed narrowly. The

Clarifying Amendment is not an "exception" to the Failure-To-Vote Clause, and, regardless, the Court should reject this canon.

Responding to HAVA's other section, the Sixth Circuit next held that Ohio *removes* registrants "solely" for nonvoting because it *sends notices* to nonvoting registrants. This wrongly treats a sending of a confirmation notice as a removal.

III. Two substantive canons of construction—canons that the Sixth Circuit overlooked—confirm that the NVRA should be interpreted to permit Ohio's Supplemental Process.

A. The canon of constitutional avoidance directs the Court to adopt a narrow reading of the Failure-To-Vote Clause. While the Elections Clause permits Congress to regulate the *times, places, and manner* of holding congressional elections, the Constitution generally leaves to the States the power to set *voting qualifications*. Some laws—such as a federal requirement to have one Election Day or a state citizenship requirement for voting—fall clearly within one or the other power. Yet the authority for other laws will not be so clear, because the States' power to prescribe qualifications broadly includes the power to enforce them, whereas Congress's power over the manner of elections serves a limited function.

The NVRA raises serious constitutional questions under this framework. *First*, Ohio's Supplemental Process at least *enforces* its residency qualification. Reading the NVRA to bar that process would amplify a significant constitutional issue: How far may Congress intrude on the States' enforcement power when ostensibly passing "manner" regulations? Indeed,

Ohio's process requires registrants merely to confirm their eligibility, something States have required of challenged electors since the founding.

Second, this Court has never authoritatively answered whether registration laws—including laws requiring registrants to register if they fail to vote over a certain time—amount to qualifications within the States' exclusive domain. That question, too, is a serious one, considering the historical debate over whether these laws qualify as qualifications.

Third, the NVRA governs presidential elections. The Elections Clause does not give Congress the authority to regulate those elections, and the Constitution leaves the manner of appointing the electors that choose the President to the States.

B. The clear-statement rule also directs the Court to uphold Ohio's Supplemental Process. To be sure, the Court does not start with a presumption against preemption in the Elections Clause context. Yet the Court should rely on federalism concerns to resolve any ambiguity in federal law that remains *after* it has applied the traditional tools of statutory interpretation. The Court presumes that Congress does not unnecessarily interfere with state election operations, and it has even interpreted the Elections Clause itself to protect state authority. Elections, moreover, are an area of traditional state concern. They also illustrate why the Court treats the States as laboratories of democracy. States have adopted an array of regimes to best balance the competing demands in this delicate area.

ARGUMENT

I. THE NVRA AUTHORIZES OHIO'S SUPPLEMENTAL PROCESS

Even in 1993, the NVRA allowed States to send notices to nonvoters, and to remove them if they failed to respond and to vote in two more elections. To reach the opposite result, the Sixth Circuit rewrote the NVRA's Failure-To-Vote Clause and created a conflict with its Confirmation Procedure.

A. The Failure-To-Vote Clause And Confirmation Procedure Permit States To Send Notices To Nonvoters

The Failure-To-Vote Clause prohibits only programs that make nonvoting a proximate cause of removal. The Confirmation Procedure shows that a failure to respond to a notice breaks this required causal connection between nonvoting and removal.

1. Nonvoting must be a proximate cause of removal under the Failure-To-Vote Clause

The Failure-To-Vote Clause states that a "program or activity" (a subject) shall not "result in" (a phrasal verb) the "removal" (an object) of a person from the rolls "by reason of the person's failure to vote" (a prepositional phrase). 52 U.S.C. § 20507(b)(2). This text mandates a proximate-cause connection between nonvoting and removal.

Program Or Activity. The clause's subject shows that the clause governs "[a]ny 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." *Id.* This text covers systematic "programs" and one-time "activities." A program commonly means "[a]n ordered list of events to take place or procedures to be followed." *Am. Heritage Dictionary of the English Language* 1401 (4th ed. 2000); *cf. New Oxford Am. Dictionary* 1361 (2001). Section 20507 references these "programs." The Maintenance Duty in § 20507(a)(4) requires States to maintain a general "program" to remove ineligible registrants. Section 20507(c)(2)(A) sets time limits before elections for "program[s]" to remove registrants. Unlike these provisions, the Failure-To-Vote Clause also covers an "activity"—"a specified pursuit in which a person partakes"—and reaches removals occurring outside systematic processes. *Am. Heritage Dictionary*, *supra*, at 17-18.

Result In. The clause's verb shows that the applicable program must "result in" a consequence. That text is a "phrasal verb"—"a verb plus a preposition (or particle)." *Chicago Manual of Style* § 5.102, at 174 (15th ed. 2003). This verb choice requires the state program to "bring about something" or "cause something to happen." *McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs* 560 (2005); *Chambers Dictionary of Phrasal Verbs* 304 (1996).

Removal. The clause's object identifies the consequence that the program must (not) cause—"the removal of the name of any person from the official list of voters registered to vote in an election for Federal office." 52 U.S.C. § 20507(b)(2). Removal, a buried verb used as an object, commonly means the "fact of being removed," and "remove," in turn, commonly means "to do away with," "get rid of," or "eliminate." *Am. Heritage Dictionary*, *supra*, at 1476; *New Oxford*

Am. Dictionary, *supra*, at 1441. This object thus shows that the clause regulates only one *specific* thing—the elimination of a person from the rolls.

By Reason Of. A prepositional phrase further limits the clause's scope to a subset of removals—those that are "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This phrase triggers the canon that "Congress legislates against the background of general common-law principles." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017). A general background principle and a specific one both illustrate that "by reason of" requires a proximate-causation connection between nonvoting and removal.

As a general matter, "[t]he law has long considered causation a hybrid concept, consisting of two constituent parts"—"actual" (or but-for) cause and "legal" (or proximate) cause. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014). And "[g]iven proximate cause's traditional role in causation analysis," the Court "has more than once found a proximate-cause requirement built into a statute that did not expressly impose one." *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9-10 (2010); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-35 (1983).

To be sure, the Court usually confronts causation questions when interpreting statutory causes of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). But it has applied proximate causation more generally. It has held, for example, that the National Environmental Policy Act should "be read to include a requirement

of a reasonably close causal relationship . . . like the familiar doctrine of proximate cause from tort law." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 696 n.9, 700 n.13 (1995) (indicating that the Endangered Species Act incorporated "proximate causation").

As a specific matter, the Court has already found a proximate-cause element in the "by reason of" phrase. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). *Holmes* addressed the cause of action in the Racketeer Influenced and Corrupt Organizations Act (RICO), which allows parties to sue for injuries arising "by reason of" RICO violations. 18 U.S.C. § 1964(c). The Court reasoned that courts had interpreted "by reason of" in antitrust laws to require proximate cause, and that Congress would have known of that reading when using the same phrase in RICO. *Holmes*, 503 U.S. at 267-68.

Other courts have read statutes passed near the time of the NVRA similarly. One found this "'by reason of' language" to have a "well-understood meaning" that "historically" requires "proximate cause." *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013). Another relied on the fact that "'by reason of' has been interpreted to incorporate a proximate cause requirement in several other federal statutes." *Breeden v. Novartis Pharm. Corp.*, 714 F. Supp. 2d 33, 36 (D.D.C. 2010), *aff'd* 646 F.3d 43 (D.C. Cir. 2011). In short, "'[t]he causal connection implied by the phrase "by reason of" is normally that of proximate causation.'" *Cruz-Mendez v. Isu/Ins. Servs.*, 722 A.2d 515, 525 (N.J. 1999) (citation omitted).

The Court's reading of "by reason of" here should be no different from its reading in *Holmes*. Congress "used the same words, and [the Court] can only assume it intended them to have the same meaning that courts had already given them." 503 U.S. at 268. Indeed, as detailed below, the Failure-To-Vote Clause can be reconciled with other NVRA provisions *only if* it contains a proximate-causation limitation.

2. A failure to respond to a notice under Ohio's Supplemental Process breaks any proximate-cause connection between nonvoting and removal

Proximate causation "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (internal quotation marks omitted). The concept depends on context. Courts thus "'look to the underlying policies or legislative intent'" for a particular statute "'in order to draw a manageable line between those causal changes that may make an [action] responsible for an effect and those that do not.'" *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted).

Here, two canons of construction show that Ohio's Supplemental Process does not make nonvoting a proximate cause of removal under the Failure-To-Vote Clause. *First*, the clause must be read harmoniously with the Confirmation Procedure. *Second*, the backdrop against which Congress passed the NVRA shows that it would not have impliedly barred States from sending notices to nonvoters.

a. The Failure-To-Vote Clause fits with the Confirmation Procedure because the failure to respond to a notice is the sole proximate cause of removal

The Court interprets laws so as to "'fit, if possible, all parts into a[] harmonious whole.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citation omitted). A specific clause must be read in light of the "larger statutory landscape." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). All provisions "should be interpreted in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

This canon applies here. The Failure-To-Vote Clause *prohibits* States from removing persons "by reason of" the failure to vote. The Confirmation Procedure *requires* States to rely on the failure to vote to remove registrants. 52 U.S.C. § 20507(d)(1)(B)(ii). Whenever a State uses the Confirmation Procedure, failure to vote will—by definition—be an actual cause of removal. Thus, the Court must read "by reason of" in such a way that the Confirmation Procedure's *required* use of nonvoting is not a proximate cause of removal *prohibited* by the Failure-To-Vote Clause. To do otherwise would "subvert the statutory plan" by treating the Failure-To-Vote Clause as prohibiting what the Confirmation Procedure was "designed to allow." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994).

A well-known test—one as old as the famed decision barring recovery for a patron who galloped "violently" away from a pub and crashed into a pole left in the road, *Butterfield v. Forrester*, 103 Eng. Rep.

926, 927 (K.B. 1809)—reconciles these provisions. That is because the Confirmation Procedure also requires registrants to "fail[] to respond" to a notice before they can be removed. 52 U.S.C. § 20507(d)(1)(B)(i). The notice must include a "postage prepaid" "pre-addressed return card." *Id.* § 20507(d)(2). Registrants need only confirm that they remain at the same address, and the notice warns that removal could occur if they do not. *Id.* § 20507(d)(2)(A). Because the Confirmation Procedure places this modest duty on registrants, the Failure-To-Vote Clause is best read as treating the failure to respond to this notice—not the earlier failure to vote—as the "*sole* proximate cause" of removal. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011) (departing from traditional proximate-cause test because of a statute's broad causation language).

Reconciling the provisions in this way comports with proximate cause in the contributory-negligence context. At common law, it was "generally accepted" that an action could not "be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the" plaintiff. *Grand T. R. Co. v. Ives*, 144 U.S. 408, 429 (1892); Thomas M. Cooley, *Law of Torts* 812-17 (2d ed. 1888); 57B Am. Jur. 2d Negligence § 881 (noting that if a plaintiff's "actions or omissions are unreasonable and contribute to the injury, then they are deemed by the law to be the proximate cause of the injury"). That principle survived, in modified form, the transition to comparative fault. *E.g.*, *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1314 (Mass. 1988). In admiralty, for example, a plaintiff that is "the *sole proximate cause* of its own injury" cannot recover "from tortfeasors or contracting partners

whose blameworthy actions or breaches were causes in fact of the plaintiff's injury." *Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996).

Furthermore, because the Failure-To-Vote Clause treats the failure to respond to a notice as the "sole proximate cause" of removal, *CSX*, 564 U.S. at 693, it does not bar States from relying on nonvoting to identify the registrants who are sent notices. The clause says nothing about who may receive notices under the Confirmation Procedure. Its text regulates removals, not notices. And any connection between the initial failure to vote that triggers a *notice* and the final *removal* is "'indirect'" and "'purely contingent'" on the registrant's failure to respond. *Hemi*, 559 U.S. at 9 (citation omitted).

Indeed, reading the Failure-To-Vote Clause to bar States from sending notices to nonvoters creates an "'[in]coherent regulatory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). The clause does not bar States from sending notices to the *entire electorate*, because that statewide canvass would not tie notices to nonvoting. But the canvass would be less reliable in identifying ineligible registrants than Ohio's process because it would use the failure to respond to the notice plus only the Confirmation Procedure's *four* years of nonvoting to conclude that a registrant had become ineligible. It would be odd to read the clause as allowing States to base removals on a failure to respond to a notice and *four* years of nonvoting, but barring States to base removals on a failure to respond to a notice and *six* years of nonvoting.

b. Congress would not have used hidden implications to restrict the States' authority over confirmation notices

The Court presumes that Congress does not conceal sweeping reform in between the lines of a regulatory scheme. *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Instead, it makes prominent changes in a "prominent manner." *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

This canon applies to the NVRA, given the backdrop against which Congress enacted it. By 1993, a majority of States had long used the failure to vote—in some fashion—to maintain their rolls. *See supra*, at 4 & nn.1-2. Most States sent notices to registrants when removing them. Many "provide[d] voters with a way to update or prevent removal from the registration list." H.R. Rep. No. 103-9, at 30. Only a minority removed voters solely for nonvoting without accounting for the failure to respond to a notice. *Id.*

In light of this tradition, any broad ban on sending notices to nonvoters would rise to the level of a "fundamental detail[]" that Congress would adopt with an express command, not a string of inferences. *Whitman*, 531 U.S. at 468. Yet what does the Confirmation Procedure say about the registrants who may be sent notices? Utter silence. This "statutory silence" is "[e]qually illuminating here," as the Court has found it elsewhere. *Tapia v. United States*, 564 U.S. 319, 330 (2011). Indeed, Congress's silence about *who* may receive such notices stands in sharp

contrast to its details about *what* notices must contain. 52 U.S.C. § 20507(d)(2). And the Safe-Harbor Provision makes the only specific reference to recipients, but it identifies an *option*, not a *command*. *Id.* § 20507(c)(1). Thus, the NVRA is best read as modestly making a few outlier States send notices, not drastically departing from a common state practice.

The NVRA's balanced purposes confirm that the Failure-To-Vote Clause would not *impliedly* restrict state authority over notices. By juggling the sometimes competing goals of increasing registration but decreasing ineligible registrants, 52 U.S.C. § 20501(b), the NVRA proves that laws are "the art of compromise," *Henson*, 137 S. Ct. at 1725. "[A]nd the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 540 (1983). This describes the NVRA's treatment of notices to a T. Its silence about the registrants who may receive them—in a statute with a "trail of detailed provisions," *id.* at 547—should not be deemed a delegation *to the federal courts* to adopt, in common-law fashion, the notice rules that they believe "best." After all, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Instead, the NVRA's silence should be deemed a delegation *to the States* to use their judgment on the issue—as they had done long before the NVRA.

The NVRA's legislative history also confirms this point. Committee reports noted that most "states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might

have moved)." S. Rep. No. 103-6, at 46. "Of these," the reports continued, "only a handful of states simply drop the nonvoters from the list without notice. These states could not continue this practice under the bill." *Id.* The next sentence added: "Whether states canvass all those on the list or just the nonvoters, most send a notice to assess whether the person has moved." *Id.*; H.R. Rep. No. 103-9, at 30 (same). These statements reiterate the statutory text, reflecting an intent to bar only non-notice programs. *Cf.* H.R. Rep. No. 103-9, at 30-31 (noting that the Act "suggests, but does not require," the Safe-Harbor Provision's process, and that States could "choose their *current* or other method for list cleaning (as long as it is uniform, nondiscriminatory, and does not drop for nonvoting)" (emphasis added)).

Indeed, one State suggested the NVRA's ultimate compromise. When criticizing those that automatically removed nonvoters, Florida's Secretary of State praised his State's own procedures—sending a notice to registrants who had not voted for two years, and removing them if they failed to respond and to 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).

B. The Sixth Circuit's Reading Conflicts With The Failure-To-Vote Clause And The NVRA As A Whole

To invalidate Ohio's Supplemental Process, the Sixth Circuit made three mistakes: (1) it read the Failure-To-Vote Clause as barring all programs that make nonvoting a *but-for cause*—not a *proximate cause*—of removal; (2) it read the clause to regulate

the *notices* that States send to registrants rather than the *removal* of registrants; and (3) it misread the relationship between the *Failure-To-Vote Clause* and *the Confirmation Procedure*.

1. *But-For v. Proximate Causation*. Discussing one word in the Failure-To-Vote Clause, the Sixth Circuit noted that "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (quoting *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002)). The court held that Ohio's Supplemental Process violates the clause because it uses nonvoting "as the 'trigger' for sending a confirmation notice," so "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.* (citation omitted). This but-for test conflicts with the Failure-To-Vote Clause's text and with the NVRA as a whole.

Start with the Failure-To-Vote Clause's text. The Sixth Circuit misread the clause in two ways, allowing it to ignore the sentence's key phrase. For starters, the court picked the wrong definition of "result." It mistakenly chose a definition of result (to arise as a consequence) that makes the sentence's subject the *effect* (removal) of a causal agent. But the Failure-To-Vote Clause invokes a different definition of result (to cause) in which the sentence's subject is the *causal agent* itself (program or activity). Next, the court changed the clause's subject. It said that removal (the effect) must not arise as a consequence of the failure to vote (i.e., that the *failure to vote* must not "result in" removal). Pet. App. 21a. Yet the Failure-To-Vote Clause actually states that it is the *program or activity* that must not "result in" remov-

al. The connection between failure to vote and removal springs from the phrase "by reason of." All told, the court rewrote the clause to say: "A person's removal shall not result from the failure to vote." It thus excised the phrase "by reason of," and this improper omission allowed it to avoid the cases holding that this phrase incorporates proximate cause. *E.g.*, *Holmes*, 503 U.S. at 268.

Turn to the NVRA as a whole. The Sixth Circuit's test conflicts with the NVRA's Confirmation Procedure and Safe-Harbor Provision. Both bar States from removing registrants unless they fail to vote for two elections. Removal under these processes *always* "arises as a consequence" of nonvoting. The Sixth Circuit thus read the Failure-To-Vote Clause to *prohibit* what those processes *require*. That "subvert[s] the statutory plan." *ACF Indus.*, 510 U.S. at 340.

2. *Notice v. Removal*. The Sixth Circuit recognized that the Confirmation Procedure "involves consideration of a registrant's failure to vote." Pet. App. 15a. To reconcile its broad causation test with that procedure, the court shifted the Failure-To-Vote Clause's focus from asking whether a program *removes* registrants for nonvoting to whether it *sends notices* to registrants for nonvoting. Under the Supplemental Process, the court reasoned, "the confirmation notice procedure is 'triggered' by" nonvoting. Pet. App. 15a. So the court asked "whether that trigger provision should be analyzed *separately* from the confirmation notice procedure, such that the *trigger* is subject to the [Failure-To-Vote Clause]" independently of the notice. *Id.* (emphases added). Answering "yes" to that question, the court held that the Supplemental Process violated the clause be-

cause it uses nonvoting "as the 'trigger' for sending a confirmation notice." Pet. App. 21a.

That holding rewrote the Failure-To-Vote Clause in a different way. The clause says nothing about "sending a confirmation notice" to voters for failing to vote. Pet. App. 21a. It also says nothing about what can "trigger" the Confirmation Procedure. Pet. App. 15a. Instead, the clause regulates one specific object—the "removal" from the rolls. *Removing* individuals differs from *sending notices* to them. In addition, the clause identifies a "program or activity" as its subject, which directs courts to consider whether the *entire* "program" removes individuals for nonvoting. Courts should not "separately" divide a program into its component parts, and "subject" each part to a discrete ban on any use of nonvoting. *Id.*

The Sixth Circuit interpreted the Failure-To-Vote Clause as "separately" applying to a notice's "trigger" in order to reconcile the court's broad understanding of that clause with the Confirmation Procedure. *Id.* Yet the text simply does not permit its proposed reconciliation. And the Sixth Circuit's "need to rewrite clear provisions of the statute should have alerted [the court] that it had taken a wrong interpretive turn" with its expansive causation test. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Courts, like agencies, cannot adopt "'unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'" *Id.* (citation omitted).

3. *Failure-To-Vote Clause v. Confirmation Procedure.* The Sixth Circuit suggested that its reading was necessary so as not to render the Failure-To-Vote Clause "surplusage." Pet. App. 17a-18a. That

is so, the court said, because § 20507(d)(1)—the provision introducing the Confirmation Procedure—already bars States from removing registrants "unless" they follow that procedure. Pet. App. 18a. If the Failure-To-Vote Clause applied to a notice's "trigger," the court reasoned, it would contain a limitation distinct from the one found in § 20507(d)(1). *Id.* Yet the court's atextual reading of the clause was unnecessary to give it independent force. Under the clause's plain text, a "meaningful difference" already exists between these two provisions. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1588 (2016); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (rejecting superfluity argument despite "overlap" because the Court's reading did not render any provision "wholly superfluous").

To begin with, § 20507(d)(1) sets limits for *one type* of removal; the Failure-To-Vote Clause sets limits for *any type* of removal. Section 20507(d)(1) requires States to follow the Confirmation Procedure if they are removing registrants on the ground of "*changed residence*." 52 U.S.C. § 20507(d)(1) (emphasis added). Section 20507(d)(1) thus provides no limit whatsoever on removing registrants for *failure to vote*. The Failure-To-Vote Clause, of course, does so. It directly bars removal for nonvoting (whether or not a person has become ineligible for another reason), and indirectly bars States from using nonvoting as the sole proxy for concluding that a person has become ineligible for *any other reason*.

To be sure, another provision—§ 20507(a)(3)—limits the States' ability to remove "registrants" other than for specified reasons: "at the registrant's request"; "as provided by State law, by reason of crimi-

nal conviction or mental incapacity"; as a result of the registrant's "death" or as a result of "a change in the residence." 52 U.S.C. § 20507(a)(3)-(4). Even if this subsection identified the *exclusive* reasons that States could remove individuals from the rolls, the Failure-To-Vote Clause reaches further than § 20507(d)(1). Without that clause, States could rely on failure to vote—without notice—to conclude that voters had become ineligible for reasons other than changed residence (e.g., because they had died).

There is also good reason not to read § 20507(a)(3) as containing the *exclusive* justifications for removal. It does not identify all qualifications for voting. States generally limit voting to citizens who are 18 or older. Ohio Const. art. V, § 1; Elections Assistance Comm'n, *Nat'l Mail Voter Registration Form*, https://www.eac.gov/assets/1/6/Federal_Voter_Registration_6-25-14_ENG.pdf. For reasons explained below, Part III.A, this subsection would be unconstitutional if it barred States from removing "minors, fictitious individuals, individuals who in fact misrepresent their residence in the state, and non-citizens." *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1282 (S.D. Fla. 2012), *rev'd on other grounds by Arcia v. Fla. Sec'y of State*, 746 F.3d 1273 (11th Cir. 2014). The Court need not read it that way. Applying to "registrants," it can be interpreted to cover only those who were lawfully included on the rolls *at the time* they registered. *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004); *cf. Webster's New World Dictionary of the Am. Language* 1196 (2d coll. ed. 1986) (defining "registrant" as "a person who registers," and "register" as "to have one's name placed on the list of those eligible to vote in an election, by making application *in the prescribed way*" (emphasis added)).

The Failure-To-Vote Clause, by contrast, governs the removal of "any person." 52 U.S.C. § 20507(b)(2). It thus extends more broadly than § 20507(a)(3)'s regulations for "registrants." "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Unlike § 20507(d)(1), the Failure-To-Vote Clause applies even to state programs or activities designed to uncover persons who were wrongly added to the rolls as an initial matter. *Cf.* Ohio Rev. Code § 3503.15(H) (program for identifying noncitizen registrants).

II. HAVA CONFIRMS THAT THE NVRA PERMITS OHIO'S SUPPLEMENTAL PROCESS

Even if the NVRA was originally ambiguous as to whether the Failure-To-Vote Clause permitted States to send notices to nonvoters, HAVA removed all doubt that they may. It clarified that the Failure-To-Vote Clause barred States only from removing voters "solely" for nonvoting, and did not affect programs otherwise incorporating the Confirmation Procedure. To reach a contrary result, the Sixth Circuit departed from HAVA's text and read its amendments to serve an implausible purpose.

A. HAVA Clarified That States May Send Notices To Nonvoters Under The Confirmation Procedure

When "'Congress acts to amend a statute,'" this Court "'presume[s] it intends its amendment to have real and substantial effect.'" *Husky*, 136 S. Ct. at 1586 (citation omitted). That is, the Court refuses to read amendments in a way that renders them "a

largely meaningless exercise." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Indeed, "*statutory* history" (as compared with legislative history) "form[s] part of the context of the statute" as it exists today. Scalia & Garner, *supra*, at 256; *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014).

This principle supports Ohio's Supplemental Process. In the 1990s, the DOJ argued that the Failure-To-Vote Clause barred programs sending notices to nonvoters. It took this position in letters to Alaska, Georgia, and South Dakota, and suits against California and Pennsylvania. U.S. Br., 6th Cir. App. R.29, at PageID#6-7 & Attachs. 1-6, PageID#65-172. Some States proposed using this process despite the DOJ's arguments, and federal guidance noted that the issue "remain[ed] a question of the legal interpretation of NVRA provisions." FEC, *Report to State and Local Election Officials*, *supra*, at 5-22 & n.13.

HAVA then clarified the Failure-To-Vote Clause. Two amendments show that Congress sided with *the States* in this debate. After HAVA, the DOJ even entered into an agreement with Philadelphia that *required* the city to use a process like Ohio's. U.S. Br., 6th Cir. App. R.29, Attach. 11, PageID#258-59.

1. *Clarifying Amendment.* HAVA amended the Failure-To-Vote Clause by inserting a rule of construction: "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" has not responded to a notice and has not voted in two federal elections. 52 U.S.C. § 20507(b)(2). In the section's title, HAVA referred to

this change as a "clarification." 116 Stat. at 1728; *cf.* H.R. Rep. No. 107-730, at 81 (2002) (noting that this amendment "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").

This amendment's text and purpose confirm the legality of Ohio's process. The text states that "nothing in this paragraph" can be "construed" to "prohibit a State" from removing an individual under "the procedures described" in § 20507(c) and (d) if the individual fails to respond to a notice and to vote for two elections. 52 U.S.C. § 20507(b)(2). This language shows that the Failure-To-Vote Clause does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure. That is, it confirms that the failure to respond to a notice breaks any causal link between nonvoting and removal. If, by contrast, the Court were to read the Failure-To-Vote Clause to bar States from removing individuals under § 20507(d) because those individuals were sent notices for nonvoting, the court *would be* construing the clause, in some circumstances, "to prohibit a State from using the procedure[] described in" § 20507(d).

The Clarifying Amendment also must permit programs like Ohio's because of the "lack of any other plausible purpose." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163 (2004). Before the amendment, the DOJ debated with States *specifically* about whether they could send notices to nonvoters. The FEC even told Congress that a State sug-

gested "clarifying the NVRA provisions to permit the use of failure to vote . . . as a trigger to generate fewer confirmation mailings." FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1997-1998, A Report to the 106th Congress*, at 19 (June 30, 1999); FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1999-2000, A Report to the 107th Congress*, at 26 (June 30, 2001) (noting that a State recommended "allowing confirmation notices to be sent based on the combination of not voting and no contact"). Thus, even if the Failure-To-Vote Clause might have been considered to bar States from sending notices to nonvoters before HAVA, the Clarifying Amendment "served the purpose of correcting the error" in interpretation by "clarifying" the clause's "original meaning." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988).

2. *Statewide List Requirements.* Another HAVA section supports this view. HAVA compelled States to keep statewide registration lists. 52 U.S.C. § 21083(a)(1)(A). A subsection required States to adopt "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* § 21083(a)(4)(A). The next sentence added two clarifications about "how 'such system'" must operate. *Colón-Marrero v. Vélez*, 813 F.3d 1, 11 (1st Cir. 2016). Unlike the NVRA (which *permitted* States to remove voters who failed to respond to a notice and vote over two elections), the sentence's first part *commanded* States to remove voters "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). The second part clarified: "except that no registrant may be removed *solely* by reason of a failure to vote." *Id.* (emphasis added).

These amendments further validate Ohio's process. To begin with, HAVA's command to remove all registrants who fail to respond to a notice and to vote in two elections shows that Ohio *must* remove registrants who meet these requirements and who are sent notices under the Supplemental Process. *Id.* If Ohio did not do so, it would violate § 21083(a)(4)(A)'s clear statutory mandate.

In addition, HAVA's use of the word "solely" clarifies the Failure-To-Vote Clause's narrow reach. When a State removes a registrant *both* because the registrant has failed to respond to a notice *and* because the registrant has failed to vote, the State has not removed the registrant *solely* because the registrant has failed to vote. *Colón-Marrero*, 813 F.3d at 11 (reading "solely" as confirming "the need for both notice and a voting gap"). One dictionary defines "solely" to mean "[a]lone" or "singly," listing "solely responsible" as an example. *Am. Heritage Dictionary*, *supra*, at 1654. A second defines the adverb to mean "without another" or "to the exclusion of all else." *Merriam-Webster's Collegiate Dictionary* 1187 (11th ed. 2003). Under ordinary English, a person's failure to vote is not "solely responsible" for removal "to the exclusion of all else" if that removal *also* arises because the person fails to respond to a notice.

B. The Sixth Circuit's Decision Obviated HAVA's Text And Purpose

The Sixth Circuit's interpretation of HAVA cannot stand.

1. *Clarifying Amendment*. The Sixth Circuit read HAVA's amendment to the Failure-To-Vote Clause as accomplishing the exact opposite of what it accomplished. According to the court, the amendment clarified that "any part of a state's roll maintenance process that does not mimic the expressly permitted procedures outlined in subsections (c) or (d)—in this case, the Supplemental Process' two-year 'trigger' provision—is *subject to*" the Failure-To-Vote Clause. Pet. App. 20a (emphasis added). This flips the amendment on its head.

a. The Sixth Circuit's interpretation conflicts with the amendment's text and purpose. The text directs courts not to "construe[]" the Failure-To-Vote Clause as barring States from removing voters under § 20507(d). 52 U.S.C. § 20507(b)(2). It is a rule of construction *limiting* the clause's scope. Yet the Sixth Circuit read the amendment as *broadening* that scope. Under the court's logic, the amendment expanded the Failure-To-Vote Clause from a narrow ban on using nonvoting for *removal* to a broad ban on using nonvoting in "*any part*" of a program. Pet. App. 20a (emphasis added). If, however, Congress meant to expand the Failure-To-Vote Clause beyond "removal," it would not have phrased the amendment as a limiting rule of construction to guard against overbroad interpretations of the clause.

The Sixth Circuit also interpreted the amendment to serve the most "[im]plausible" of purposes. *Cf. Empagran*, 542 U.S. at 163. According to the court, Congress felt the need to clarify that the NVRA's Failure-To-Vote Clause did not outlaw the NVRA's Confirmation Procedure. Pet. App. 15a. That makes little sense. The Sixth Circuit identified

no pre-HAVA authority—whether DOJ guidance, case law, or arguments from litigants—that advocated reading the NVRA paradoxically to prohibit what it permits. Nor would such a reading have comported with the bedrock principle to "'read statutes as a whole.'" *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). Thus, such an alleged clarification can only be characterized as a "meaningless exercise." *Rumsfeld*, 547 U.S. at 58. In short, the Sixth Circuit "acted as though the amendment . . . had not taken place." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016).

b. The Sixth Circuit bolstered its reading of the Clarifying Amendment with the alleged canon that courts construe "exceptions to a statute's general rules" narrowly. Pet. App. 16a. For three reasons, the Court should reject this canon here.

First, the Sixth Circuit wrongly treated the Clarifying Amendment "as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). But the amendment "has a different ring to it." *Id.* HAVA did not add an *exception* to the Failure-To-Vote Clause's ban; it added an *explanation* of that ban. It clarified that "nothing in this paragraph may be *construed*"—the key word—"to prohibit a State from" removing voters under the Confirmation Procedure. 52 U.S.C. § 20507(b)(2) (emphasis added). It thus instructs courts to adopt a construction of the clause that *permits* the Confirmation Procedure. The Sixth Circuit cited no case applying its chosen canon to such clarifications. The canon applies only when a statute sets a general rule

(such as a ban on disclosing personal information) and lists exceptions that would otherwise violate the rule (such as situations when disclosure is allowed). *Maracich v. Spears*, 133 S. Ct. 2191, 2195, 2200 (2013). Here, the amendment clarifies that the general rule does not reach specified conduct in the first instance.

Second, this canon applies *only* when a statute's general rule (like the Freedom of Information Act's disclosure requirement) furthers its central purpose, while an exception cuts against that purpose. *Milner v. Dep't of Navy*, 562 U.S. 562, 571-72 (2011). As the Sixth Circuit conceded, the NVRA and HAVA serve *dueling* purposes—to increase the rolls but also remove ineligible voters. Pet. App. 10a. To put a thumb on the scale in favor of a provision serving one purpose (expanding registration) at the expense of a provision serving the other (eliminating ineligible voters) upends Congress's compromise.

Third, the Sixth Circuit's extravagant use of this canon shows that it has reached its expiration date. The canon is the flipside of another that the Court has called the "last redoubt of losing causes": the notion that a remedial law "should be liberally construed to achieve its purposes." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995). Both canons stem from "inappropriate judicial antagonism to limitations on favored legislation." Scalia & Garner, *supra*, at 363; *id.* at 364-66. "Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation." *Id.* at 363; *see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014).

The manner in which this canon arose confirms that it should be retired. It took on prominence with, and shares the defects of, the 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 cause-of-action context, the Court should reject the Sixth Circuit's attempt "to have one last drink" in the exceptions context. *Id.*

Indeed, the Court has *already* rejected this canon in logic, if not in name. It now recognizes that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). So it is wrong "simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. Instead, "[f]inding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone)." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) (citation and quotation marks omitted). The canon that exceptions are strictly construed cannot coexist with this principle because it rests on the assumption the

principle rejects—that a strict reading of an exception always furthers a statute's purpose.

2. *Statewide List Requirements*. The Sixth Circuit conceded that the Failure-To-Vote Clause "appear[ed] to have been given a more narrow interpretation by" HAVA's section barring removal "solely by reason of a failure to vote." Pet. App. 21a-22a. But the court found this "solely" element satisfied because "operation of the Supplemental Process' trigger is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a. This rewrites the text. The text does not say no registrant may be *sent a notice* solely by reason of a failure to vote; it says "no registrant may be *removed* solely by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). Ohio's Supplemental Process *removes* voters only if they both fail to vote *and* fail to respond to a notice. "Had Congress wanted, as the [Sixth Circuit] contend[ed]," to bar the sending of notices to nonvoters, "it had an easy way to do so—differing by only [a few] words from the language it chose, but with an altogether different meaning." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). This Court must follow the statute that Congress wrote, not the one that the Sixth Circuit did.

The Sixth Circuit responded that reading "solely" to mean "solely" "would render the [Failure-To-Vote Clause] entirely superfluous because [§ 20507](d)(1) already requires states to use the confirmation notice procedure." Pet. App. 23a. That is wrong for the reasons explained. *Supra* Part I.B.3. To fix an imagined superfluity problem, moreover, the Sixth Circuit created a real one: It gave "solely" no meaning whatsoever. The court thus fell into an all-too-common

trap. "Sometimes lawyers will seek to have a crucially important word ignored—such as *only*, *solely*, or *exclusively*—and nontextualist judges will often oblige them." Scalia & Garner, *supra*, at 174. This Court should avoid the same mistake.

That said, the Sixth Circuit correctly ignored one argument about this "solely" clause that focused on how it begins—with "except that." 52 U.S.C. § 21083(a)(4)(A). That argument has major and minor premises. As its major premise, the argument asserts that the "except that" text shows that the clause contains an *exception* to the preceding clause requiring States to remove voters who fail to respond to a notice and vote over four years. As its minor premise, the argument asserts that a situation must exist in which someone who has failed to respond to a notice and to vote for four years has been removed "solely" for nonvoting; otherwise, the clause serves no purpose. This argument lacks merit because its major premise—that the solely clause is an exception to the preceding clause—is flawed. Together, both clauses are naturally read as restraining the "system of file maintenance" that the subsection requires. *Id.* That "system" *must* remove voters who fail to respond to a notice and fail to vote over four years, but *cannot* remove voters solely for nonvoting. *See Colón-Marrero*, 813 F.3d at 11. It is common for the item that a proviso clause restrains to be "found not immediately before but several clauses earlier." Scalia & Garner, *supra*, at 154. And that reading best respects the plain meaning of "solely."

III. SUBSTANTIVE CANONS OF CONSTRUCTION CONFIRM THAT THE NVRA PERMITS OHIO'S SUPPLEMENTAL PROCESS

Even if ambiguity remained after HAVA, two canons would clarify it in favor of Ohio. The canon of constitutional avoidance applies because reading the NVRA to bar Ohio's process heightens constitutional concerns with this statute. The clear-statement rule also directs the Court to resolve ambiguity in a way that protects state authority.

A. The Canon Of Constitutional Avoidance Applies To The NVRA

"[W]hen 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 picks a reading that lessens those concerns. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). The Court applies this canon even when one reading allows it only to delay review of, but not eliminate, constitutional issues. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009). The canon applies here because an expansive reading of the Failure-To-Vote Clause would exacerbate constitutional concerns with the NVRA.

1. The Constitution demarcates a hazy boundary between two constitutional powers. The Elections Clause gives Congress the power to "make or alter" regulations governing the "Times, Places and Manner of holding Elections" for Congress. U.S. Const. art. I, § 4, cl. 1. This clause sets a "default" rule that "invests the States with responsibility for the me-

chanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). The Court has suggested that the clause grants "'broad power' to prescribe the *procedural mechanisms* for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (emphasis added).

Yet the Elections Clause leaves the power to set *voting qualifications* for federal elections with the States. A State's qualifications for congressional elections need only be the same as its qualifications in elections for "the most numerous Branch of the State Legislature." U.S. Const., art. I, § 2, cl. 1; *id.* amend. XVII. The Constitution grants even more state authority over presidential elections, permitting a State to "appoint, in such Manner as the Legislature thereof may direct," presidential electors. U.S. Const. art. II, § 1, cl. 2. "Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Inter Tribal*, 133 S. Ct. at 2258 (citation omitted). (Elsewhere, of course, the Constitution prohibits voting discrimination, but those amendments are not at issue here. U.S. Const. amend. XV, XIX, XXIV, XXVI; *Inter Tribal*, 133 S. Ct. at 2256 (referring to NVRA as "Elections Clause legislation").)

Some laws will fall distinctly into the "qualifications" camp reserved to States or the "Times, Places, and Manner" camp shared with Congress. As noted, States require voters to be citizens. Ohio Const. art. V, § 1. Such a limit counts as a "qualification" under any definition. *Inter Tribal*, 133 S. Ct. at 2252. Congress, by contrast, has long limited the *times* for

holding congressional elections to one Election Day. 2 U.S.C. §§ 1, 7; *Foster*, 522 U.S. at 68-69. And it has long required States to hold elections for representatives using single-member districts. *Vieth v. Jubelirer*, 541 U.S. 267, 276-77 (2004) (plurality op.).

Given the overlap between these powers, however, laws falling in between the extremes will not be as easy to categorize. On one hand, the States' power obviously allows them to set requirements "that enable[] or empower[] a person to do that which otherwise he could not"—i.e., vote. Thomas Dyche & William Pardon, *A New General English Dictionary* (13th ed. 1768) (defining "qualification"); *cf.* 1 Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773). Yet this power to *prescribe* qualifications would be meaningless if it did not include a derivative power to *enforce* them. *Inter Tribal*, 133 S. Ct. at 2258-59. The power necessarily extends further: "In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 430, at 412-13 (1833); Scalia & Garner, *supra*, at 192-93.

On the other hand, Congress's power over the "manner of holding elections" speaks of the "mode" or "method" of *conducting elections*, not of *resolving who has proper qualifications*. Dyche & Pardon, *supra* (defining "manner"); Johnson, *supra* (same). A precise reading of *manner* "give[s] effect" to the clause's other words (*times* and *places*), which would be superfluous if manner had a broad scope. *Cf. Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) (*ejusdem generis*). That reading also comports with the founders' examples of "manner" regulations, such

as "[w]hether the electors should vote by ballot or vivâ voce." 2 *The Records of the Federal Convention of 1787*, at 240 (M. Farrand ed., 1911) (James Madison). And it comports with the Elections Clause's narrow purpose—to ensure that "the existence of the Union" was not left to the States, which could otherwise refuse to hold elections. *The Federalist* No. 59, at 361 (Alexander Hamilton) (C. Rossiter ed., 2003).

In sum, even Alexander Hamilton recognized that the States have a "broad power to set qualifications," and Congress has only "limited authority under the Elections Clause." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995).

2. Under this dichotomy, as President Bush noted when vetoing an earlier version of the law, the NVRA raises "serious constitutional question[s]." 138 Cong. Rec. 17,965-66 (1992). Here, the Sixth Circuit's reading of the Failure-To-Vote Clause implicates three such questions.

First, Ohio's Supplemental Process at least *enforces* its power to prescribe a residency qualification by requiring registrants to confirm their eligibility. If the Court reads the Failure-To-Vote Clause as barring this enforcement practice, it would exacerbate a serious constitutional question: How far may Congress restrict state power to *enforce* qualifications when regulating the *manner* of holding elections?

Inter Tribal interpreted the NVRA to avoid that question. There, Arizona sought to compel registration applicants to present proof of citizenship with the federal form that the NVRA required States to "accept and use" for registration. 133 S. Ct. at 2251-52. The Court held that the NVRA did not permit

States to require anything other than that form. *Id.* at 2254-56. But it read the NVRA as allowing Arizona to ask the Election Assistance Commission to alter the form to include its enforcement method, and seek judicial review of any refusal. *Id.* at 2259-60. The NVRA thus gave Arizona an "alternative means" of seeking to use its preferred method (and to assert its constitutional authority). *Id.* at 2259-60 & n.10.

Here, the NVRA provides no similar "alternative means" for Ohio to pursue its Supplemental Process. Thus, the only way to avoid the constitutional question is to read the Failure-To-Vote Clause as permitting that process. And *Inter Tribal* already found that a law that "precluded a State from obtaining information necessary to enforce its voter qualifications" "would raise serious constitutional doubts." *Id.* at 2258-59. If anything, this case raises greater concerns. Unlike Arizona's law, which required *documentary* proof, Ohio merely requires registrants to *confirm* their eligibility (on penalty of election falsification). Notice, R.38-19, PageID#1365.

The Court should not read the NVRA to mandate such aggressive encroachment on the States' power. While registration did not exist at the founding, States have always enforced qualifications by requiring voters to confirm their eligibility. Before ratification, poll officials would decide "whether individual electors were properly qualified." Robert J. Dinkin, *Voting in Provincial America* 132 (1977). A New York law, for example, directed inspectors to give oaths to potentially unqualified electors. 1787 N.Y. Laws 371, 374-75. After ratification, officials continued to give oaths to, and question, such electors. 1839 N.Y. Laws 363, 364; 1819 Ill. Laws 90, 93; *cf.*

Lincoln v. Hapgood, 11 Mass. 350, 353 (1814). In short, States required electors "to furnish such proof as [the States] deem[ed] requisite." *State ex rel. Cothren v. Lean*, 9 Wis. 279, 284 (1859).

Conversely, Congress has not traditionally exercised Elections Clause authority in a way that limited the States' enforcement power. *Cf. Printz v. United States*, 521 U.S. 898, 905-18 (1997). The founders recognized the "power over the manner of elections did not include that of saying who shall vote." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 71 (J. Elliot ed., 2d ed. 1836) (Steele statement at North Carolina ratifying convention). It was not until 1842 that Congress exercised Elections Clause power. *Gradwell*, 243 U.S. at 482. And while laws in the late 1800s allowed federal officials to monitor the polls and police violence and fraud, these laws *enhanced* enforcement; they did not *proscribe* it. *Ex parte Siebold*, 100 U.S. 371, 388 (1879) (noting that "Congress [did] not deem[] it necessary to interfere with the duties of the ordinary officers of election, but [was] content to leave them as prescribed by State laws"). The Sixth Circuit's reading thus "den[ies] the States their historic freedom to govern their own electoral processes" in a novel manner. 138 Cong. Rec. at 17,966.

Second, the Failure-To-Vote Clause might violate the States' qualifications power in a more fundamental way. Requirements that individuals register—including requirements that nonvoters register anew—might set "qualifications" within the meaning of the federal Constitution. Such provisions would then fall within the core, not the periphery, of the

States' qualifications power. While this Court has suggested, in dicta, that the Elections Clause grants power over "registration," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), it expressly reserved that question in *Inter Tribal*, 133 S. Ct. at 2259 n.9.

This issue, too, raises a serious question. The Court has offered little guidance on what counts as a "qualification" under the *federal* Constitution. When registration laws first arose, by comparison, state courts debated whether they were qualifications under *state* constitutions. *Morris*, 25 N.E. at 223-24; *cf. District of Columbia v. Heller*, 554 U.S. 570, 600-01 (2008). An early case upholding these laws considered them akin to procedural regulations governing "whether the votes shall be given personally or by proxy, *viva voce* or by ballot." *Capen v. Foster*, 29 Mass. 485, 490 (1832). Others reasoned that, while "voting *viva voce* or by ballot is a pure rule of procedure," a registration law set "a condition precedent to the right itself, and therefore a rule o[f] substantive law." *White v. Cty. Comm'rs Multnomah Cty.*, 10 P. 484, 486 (Or. 1886); *Dells v. Kennedy*, 49 Wis. 555, 558-60 (1880). This debate extended to laws removing nonvoters. *Compare Duprey v. Anderson*, 518 P.2d 807, 808-09 (Colo. 1974); *Simms v. Cty. Ct. of Kanawha Cty.*, 61 S.E.2d 849, 852 (W. Va. 1950), *with Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 229 (Md. 2003); *Mich. State UAW Cmty. Action Program Council v. Sec'y of State*, 198 N.W.2d 385, 387 (Mich. 1972).

Ultimately, many States amended their state constitutions to allow for registration, which removed constitutional concerns on *that* question. Yet those amendments, if anything, increased the concerns on

this one. As one court noted, "whatever may be the true rule where the Constitution is silent, we think there can be no doubt that under the Constitution of this State, registration under a proper law constitutes a qualification." *Morris*, 25 N.E. at 224. Today, many States identify registration requirements as constitutional commands. In Ohio, only individuals who have "been registered to vote for thirty days" have "the qualifications of an elector." Ohio Const. art. V, § 1; *see, e.g.*, Ark. Const. art. III, § 1; *id.* amend. 39; Del. Const. art. V, § 2; Fla. Const. art. VI, § 2; Or. Const. art. II, § 2(c); S.D. Const. art. VII, § 2.

Third, the NVRA governs the manner in which States conduct *presidential* elections. 52 U.S.C. § 20502(1)-(2). Yet Article II grants Congress only the authority to "determine the Time of chusing [those] Electors, and the Day on which they shall give their Votes." U.S. Const. art. II, § 1, cl. 4. And while *Burroughs v. United States*, 290 U.S. 534 (1934), said that Congress can regulate some aspects of these elections, the law there did *not* "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Id.* at 544. The NVRA thus raises another constitutional issue by "purport[ing] to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever." *Inter Tribal*, 133 S. Ct. at 2268 n.2 (Thomas, J., dissenting).

At day's end, the Court need not resolve these issues now. It may *avoid* them by reading the Failure-To-Vote Clause to permit Ohio's process—so long as that reading is "fairly possible." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). It is more than a *possible* reading. It is the *better* one.

B. The Clear-Statement Rule Supports The Validity Of Ohio's Supplemental Process

"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 Court has thus recognized several "background principles" of interpretation that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). The Court, for example, requires Congress to abrogate the States' sovereign immunity unambiguously, and it often starts with a presumption against preemption when interpreting federal laws. *Id.* at 2088-89. "Closely related" to these principles is a clear-statement rule that requires the Court to resolve ambiguities in favor of the States when federal legislation affects the federal-state balance. *Id.* at 2089. This clear-statement rule, too, resolves any remaining ambiguity in favor of Ohio's Supplemental Process.

To be sure, *Inter Tribal* stated that the "presumption against pre-emption" does not apply to federal laws passed under the Elections Clause. 133 S. Ct. at 2256. That holding followed from the Court's rule that the presumption against preemption does not apply to *express* preemption provisions, *e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), because laws under the Elections Clause always preempt some aspect of the State's preexisting regime, *Inter Tribal*, 133 S. Ct. at 2256. Thus, the Court refused to protect state interests by choosing a *plausible* reading of federal laws at the expense of the "*fairest* reading," after considering all of the

tools of statutory interpretation. *Id.* (emphasis added). Yet *Inter Tribal* should not be read broadly to eliminate any room for federalism whatsoever.

To the contrary, the Court should adopt a narrower view of the case. If, *after* exhausting traditional interpretive tools, a reading in favor of state authority is just as plausible as a reading against it, the clear-statement rule points to the former reading "to resolve [that] ambiguity." *Bond*, 134 S. Ct. at 2090. That reconciles *Inter Tribal* with the Court's broader principles. One of its first Elections Clause cases noted that the Court was "*bound to presume* that Congress," in using its Elections Clause power, had "done so in a *judicious* manner" that "guard[ed] as far as possible against any *unnecessary interference* with State laws and regulations." *Siebold*, 100 U.S. at 393 (emphases added). That is the very "'presupposition[]'" on which the clear-statement rule is based—that Congress does not cavalierly disrupt state operations. *Bond*, 134 S. Ct. at 2088 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Indeed, the Court has relied on a version of this clear-statement rule when interpreting the Elections Clause *itself*. *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 read 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 through an initiative. *Id.* at 2673-74. If federalism concerns are broad enough to reach the

Court's interpretation of the Elections Clause, they are broad enough to reach the Court's interpretation of federal legislation passed under it.

The States, moreover, have traditionally taken the lead role in conducting elections. *Gradwell*, 243 U.S. at 483-85. "The separate States have a continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials." *Inter Tribal*, 133 S. Ct. at 2261 (Kennedy, J., concurring in part and concurring in the judgment). And given the practical impossibility today of operating separate state and federal election regimes, federal legislation for congressional elections inevitably affects state and local elections as well. *Id.* at 2272 (Alito, J., dissenting). This case proves the point. The Failure-To-Vote Clause has effectively prevented Ohio from enforcing its constitutional provision requiring removal for nonvoting in all of its elections. Ohio Const. art. V, § 1.

Finally, elections prove that States are "'laboratories for devising solutions to difficult legal problems.'" *Ariz. State Legislature*, 135 S. Ct. at 2673 (citation omitted). 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. But that could miss many ineligible registrants. 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, using funds 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. Walsh Decl., R.49-9, PageID#22520; Damschroder Decl., R.38-2, PageID#296. It also paid to join the Electronic Registration Information Center ("ERIC"), a non-profit corporation that requires member States 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 1.6-million eligible, yet unregistered, Ohioans in 2016. Damschroder Decl., R.80-1, PageID#23221-22.

Further, the best maintenance programs for a State might turn on the ease with which individuals can reregister in the State. Ohio, for instance, recently approved *online* registration. Ohio Rev. Code § 3503.20. Laws making it easier to register both enhance the need for maintaining accurate lists, and reduce the burdens on those required to reregister.

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—wrongly ignored basic federalism principles.

CONCLUSION

The judgment of the court of appeals should be reversed.

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JULY 2017

APPENDIX

52 U.S.C. § 20507
(Formerly 42 U.S.C. § 1973gg-6)

§ 20507. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period pro-

vided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) 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, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(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.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is cur-

rently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)

(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(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--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)

(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) 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.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal 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, and if the registrant does not vote in an election during

that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)

(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirma-

tion by the registrant of the new address before an election official at that polling place; or

(ii)

(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place

that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney

may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, 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, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

(May 20, 1993, P.L. 103-31, § 8, 107 Stat. 82; Oct. 29, 2002, P.L. 107-252, Title IX, § 903, 116 Stat. 1728.)

52 U.S.C. § 21083
(Formerly 42 U.S.C. § 15483)

§ 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to

the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. § 20501 et seq.]), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6 [52 U.S.C.S. § 20507]).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B) [52 U.S.C.S. § 20507(a)(3)(B)]), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A) [52 U.S.C.S. § 20507(a)(4)(A)]), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b) [52 U.S.C.S. § 20503(b)]), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that--

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. §§ 20501 et seq.]), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal of-

fice shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will

serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of Title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c) [52 U.S.C.S. § 20505(c)]) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)

(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot

by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C.S. § 20505]) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)

(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C. § 20505]) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq. [52 U.S.C.S. §§ 20301 et seq.]);

(ii) provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C.S. § 20505]) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with

the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. §§ 20501 et seq.]) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003.

(Oct. 29, 2002, P.L. 107-252, Title III, Subtitle A, § 303, Oct. 29, 2002, 116 Stat. 1708.)