No. 16-1068

IN THE

Supreme Court of the United States

NORTHEAST OHIO COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND OHIO DEMOCRATIC PARTY,

Petitioners,

v.

JON HUSTED AND THE STATE OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The conflict among the circuits that respondents concede, BIO 20, is hardly "stale," *Id.* 1. To the contrary, the Sixth Circuit cemented the split by adhering to its underdeveloped position in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), after the Eleventh Circuit's intervening rejection of that position in *Schwier v. Cox*, 340 F.3d 1284, 1294-96 (11th Cir. 2003). The denial of rehearing en banc means this conflict cannot be resolved absent this Court's intervention.

Respondents are wrong to claim the question presented is "academic." BIO 26. The statutory prohibition in the Materiality Provision of the Voting Rights Act, 52 U.S.C. § 10101(a)(2)(B), does not merely "replicate other claims." *Id.* 15. Particularly in the face of a new generation of restrictions on the right to vote, the availability of that Provision is a pressing question of law.

Nor does this case pose a "procedural tangle." BIO 2. Respondents' suggestions about new guidance from the Ohio Secretary of State, standing, and preclusion are nothing more than distractions. This Court should clarify now, rather than waiting until the nation is again in the midst of an election cycle, that the Materiality Provision protects voters against disenfranchisement for technical errors or omissions and that private parties have the ability to enforce it.

I. The availability of relief under the Materiality Provision presents an important question.

Respondents' argument that the Materiality Provision is unimportant – either generally, BIO 15-17, or to the outcome of this case, *id.* 23-26 – misunderstands voting-rights law. The relative infrequency of suits under the Provision provides no basis for denying review given recent developments. Nor does the Provision simply "replicate other claims," *id.* 15.

1. While there have been relatively few suits, BIO 15-16, 20, respondents are wrong as to why.

The Materiality Provision is a powerful, but narrow, statute. It forbids only one kind of disenfranchisement: disenfranchisement due to errors or omissions in voting-related records or documents (such as ballots or applications).

The provisions of the Voting Rights Act of 1965 as amended swept away many existing restrictions that would have fit this category. *E.g.*, 52 U.S.C. § 10501 (banning literacy or understanding requirements nationwide); *id.* § 10508 (guaranteeing illiterate voters the right to assistance by a person of their choice); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 139-40 (2010). Moreover, until 2013, the preclearance requirement of Section 5, 52 U.S.C. § 10304, prevented many jurisdictions from adopting new ones. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2625 (2013).

But after several decades, jurisdictions have begun again to impose "the 'vague, arbitrary,

hypertechnical or unnecessarily difficult'" requirements, Pet. App. 29a (quoting H. Rep. No. 89-439, at 13 (1965)), to which the Materiality Provision responded and which provided "evidence of the urgent need" for federal legislation, *id. See also, e.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C.L. Rev. 689 (2006) (providing examples of new laws restricting the right to vote); Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 Sup. Ct. Rev. 55, 107, 106 (noting that while "few franchise restrictions were adopted between the [VRA's] enactment and the mid-2000s," restrictions "surged in popularity" more recently with nineteen states enacting provisions in the prior two years). When these new provisions flout the tailored prohibitions of the Materiality Provision, this Court should encourage courts to use that provision, rather than embarking on a more free-range constitutional inquiry.

The number of lawsuits is no measure of the Materiality Provision's importance. Rather, the rarity of suits is a product of the clarity of its prohibition and the ease of complying. But where, as here, a state denies voters the right to have their ballots counted because of technical errors, the denial strikes at the core of a fundamental right. Earlier this Term, the Court granted review in *Maslenjak v. United States*, No. 16-309, to determine whether naturalized citizens can be stripped of their citizenship because of immaterial false statements made during naturalization proceedings. Whether citizens can be stripped of their vote for making *inadvertent* immaterial errors warrants review as well.

2. The Materiality Provision duplicates neither Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, nor the equal protection clause.

a. Section 2 forbids denying the right to vote only "on account of race or color, or in contravention of the guarantees" protecting specified language minorities. 52 U.S.C. § 10301(a). The inquiry turns on whether minority voters have "less opportunity than other members of the electorate to participate," *id.* § 10301(b).

That inquiry is irrelevant to a Materiality Provision claim. The Provision's plain language protects "the right of any individual to vote," 52 U.S.C. § 10101(a)(2)(B), without regard to a voter's race. Nor does the Provision require comparing an aspiring voter's ability to vote to the opportunities enjoyed by others.

b. Standards under the equal protection clause and the Materiality Provision differ sharply. Respondents acknowledge that this Court's *Anderson-Burdick* test involves judicial "balancing." BIO 17. Under that test, "a *court* evaluating a constitutional challenge must weigh" the burdens imposed on voters against the interests proffered by the state "and then make the 'hard judgment'" whether the challenged statute satisfies equal protection. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008) (opinion of Stevens, J.) (emphasis added). If the law imposes only a minor burden on "most voters," it will not "pose a

constitutional problem unless it is wholly unjustified," *id.* at 198, 199.[1]

By contrast, in the Materiality Provision, *Congress* has struck quite a different balance. Whether a perfection requirement imposes a severe burden or only a "slight" one, *Crawford*, 553 at 191, is irrelevant: it cannot be used to deny an individual the right to vote for making errors that are immaterial to whether "such individual is qualified," 52 U.S.C. § 10101(a)(2)(B). Nor is it relevant that most voters do not make errors; the text expressly focuses on the right of the individual. Once "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck," it is for the "the courts to enforce" that balance "when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

Moreover, to the extent that the Materiality Provision complements prohibitions imposed by the equal protection clause, respondents get things backward. Rather than this cutting against entertaining Materiality Provision claims, the *Ashwander* doctrine directs courts to decide the statutory issue first and address constitutional claims only if necessary. *See Ashwander v. TVA,* 297

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[1] Justice Stevens's opinion was joined by the Chief Justice and Justice Kennedy. Justice Scalia's concurrence in the judgment, joined by Justices Thomas and Alito, would more categorically uphold "a generally applicable, nondiscriminatory voting regulation" against constitutional attack regardless of the "individual impacts." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).

U.S. 288, 347 (1936) (Brandeis, J., concurring); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (resolving a case under the Census Act and declining to address Census Clause claims).

c. This case shows why the Materiality Provision is not "duplicative" of Section 2 or the equal protection clause, BIO 1.

The Sixth Circuit agreed that the statute's "formal rigidity" causes voters to be "disenfranchised based only on a technicality." Pet. App. 35a. But it rejected petitioners' Section 2 challenge to the perfection requirement on the ground that petitioners "ha[d] not shown that the provision disproportionately affects minority voters." *Id*. 28a. As mentioned, that fact is irrelevant to petitioners' Materiality Provision claim, which does not turn on the race of the affected citizens.

Assessing petitioners' equal protection challenge to SB 216, the Sixth Circuit held that the State's "interests in provisional-voter registration and identification eclipse[d]" the burden of completing the form perfectly – "a burden that actually impacts just a few hundred voters each election, an impact wholly in their own control." Pet. App. 37a.

Had the Materiality Provision applied instead, those justifications would not have sufficed. The Provision forbids disenfranchisement even when the error is a voter's, and even if only a few voters have erred, so long as the error does not prevent the government from determining whether the particular individual – "such voter" – is qualified, 52 U.S.C. § 10101(a)(2)(B). While the Provision permits a state

to disregard a ballot when it is unable, due to an error or omission, to determine a voter's eligibility, it forbids jettisoning the ballot when the state can confirm the voter's qualifications. It does not permit disenfranchising a qualified voter in the current election on the grounds that requiring perfection aids in voter registration for future elections, Pet. App. 36a.

II. This case is the right vehicle for resolving whether the Materiality Provision can be enforced by private parties.

Respondents offer a barrage of reasons why this case is not the right vehicle for resolving the question presented. None is persuasive.

1. Both before the district court and in the Sixth Circuit, respondents vigorously defended the proposition that Ohio could reject voters' ballots for technical errors. Now, however, they have changed course. They claim that "[w]hether or not" officials "in the past" were required or permitted to reject those ballots, recent directives from the Ohio Secretary of State somehow "clarify" the perfection requirements "*unaffected* by the Sixth Circuit's decision" and thereby render any decision on petitioners' Materiality Provision claims "advisory," BIO 26 & 27 (emphasis in the original). Not so.

These directives, when they go beyond implementing the Sixth Circuit's invalidation of the address- and birthdate-perfection requirements for absentee ballots, constitute nothing more than a gratuitous abandonment of the position respondents maintained throughout this litigation. And it is black-letter law that this type of "voluntary

cessation" does not moot out a case, given the risk of "a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012).

That risk is quite real. It would be easy for respondents to revert to the more unforgiving approach they previously maintained. Ohio has no formal rescission process for Secretary of State Directives. And while the Secretary recently adopted Directive 2016-38, http://tinyurl.com/SSOh-2016-38 (BIO 27), which eases the perfection requirements related to date of birth, *id.* at 1, and address, *id.* at 2, an earlier directive interpreted the perfection requirements with utmost strictness. *See* Dir. No. 2014-20 at 2, http://tinyurl.com/SSOh-2014-20 (providing that if a provisional ballot "**does not contain both** the voter's printed name and valid signature, then the Board must **reject the provisional ballot**" outright) (various forms of emphasis in the original). Absent review by this Court, respondents are free to reimpose the most stringent reading of the still-extant statutory perfection requirements any time they choose.

The Directives, moreover, fail to address immaterial errors in other fields covered by petitioners' Materiality Provision claim. A qualified voter can still be disenfranchised for completing the name field in *legible* cursive, for example. *See* Pet. App. 155a.

2. Based on detailed factual findings, *see* Pet. App. 126a-132a, the district court found three bases for NEOCH and CCH's standing. They had organizational standing to assert their own injury, *see id.* 199a-202a; associational or representational

standing "to bring suit on behalf of their members," *id.* 203a; and "third-party standing" because of their "close relationships" as "advocates" for the homeless populations of Cuyahoga and Franklin Counties to vindicate those individuals' voting rights, *id.* 205a. And respondents acknowledge that the Sixth Circuit held that petitioner NEOCH has standing to challenge the perfection requirements of SB 205 and SB 216. BIO 28; *see* Pet. App. 16a-18a. Respondents suggest that NEOCH's organizational standing is "debatable," BIO 29, but stop short of actually maintaining that Article III poses an obstacle. Respondents' equivocation is telling. There is no such impediment here.

a. Respondents are silent regarding NEOCH's and CCH's representational or third-party standing, and each provides a basis for bringing Materiality Provision claims.

Groups like NEOCH and CCH have associational or representative standing to sue on behalf of their members when members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). NEOCH identified members who planned to vote in 2016, Pet. App. 129a, and thus risked having their votes discarded due to the perfection requirements. Respondents have not contested the existence of any of the factors for representative standing (beyond contesting whether individual voters can bring suit under the Materiality Provision in the first place).

b. So, too, NEOCH and CCH have third-party standing. This Court has explained that third-party standing is available when, first, "the party asserting the right has a 'close' relationship with the person who possesses the right" and, second, "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Here, too, respondents have not contested the district court's findings that NEOCH and CCH meet both criteria – that each has a close and ongoing relationship with homeless individuals who cannot themselves vindicate their rights to vote.

c. Even setting aside petitioners' unchallenged representational and third-party standing, respondents are wrong that the change-in-resources theory under which the Sixth Circuit found organizational standing, Pet. App. 16a-18a, does not apply to the provisional-ballot laws, BIO 29. For example, the voters NEOCH takes to the polls for either early or election-day voting risk being required to cast provisional ballots; the perfection requirements demand that NEOCH expend additional resources for each voter it assists to ensure the voter's provisional ballot will be counted.[2]

3. Finally, respondents' protest that the question presented was raised in a supplemental complaint, BIO 30-31, rings hollow. Whether to permit a

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[2] Because NEOCH and CCH have standing, this Court need not address respondents' standing and preclusion arguments with respect to ODP. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 330.

supplemental complaint under Fed. R. Civ. P. 15(d) is a matter of discretion. Pet. App. 19a. Respondents have pointed to no way in which the district court abused its discretion or in which they were prejudiced by its decision.

The 2010 Consent Decree, Dkt. No. 210 at 6 (Apr. 19, 2010), specifically provided for retained jurisdiction by the district court and required the State to provide notice if it changed relevant law – as respondents then did when the laws at issue here were enacted. The district court correctly concluded that "the 'focal points'" of the original and supplemental complaints were "the same": to ensure that provisional and absentee ballots "are not unfairly excluded and left uncounted," Pet. App. 19a (quoting the district court's decision). As with the supplemental complaint whose filing this Court affirmed in *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218 (1964), the supplemental complaint here was "well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Id.* at 227.[3]

III. The Materiality Provision creates individual rights that private parties can enforce.

Respondents' references to "implied" rights of action, BIO 31, 32, 35, ignore a critical fact: the

[3] Respondents are incorrect to suggest that Fed. R. Civ. P. 60(b), rather than Rule 15(d), governs this case. *See* BIO 31. Petitioners were not seeking relief from an adverse judgment against them; nor were they seeking to modify the decree.

Materiality Provision can be vindicated using the express cause of action supplied by 42 U.S.C. § 1983. Pet. 28-29; *see* Second Supp. Compl. at 30 (Oct. 30, 2014), Dkt. No. 453 (Count Two). As this Court explained in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Id.* at 284.

Respondents' citations of *Gonzaga* and *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam), BIO 31, tellingly omit the language of the relevant statutes. Neither section 1231g(b)(1) of the Family Educational Rights and Privacy Act (*Gonzaga*) nor section 303(a)(5)(B) of the Help America Vote Act (*Brunner*) ever mentions an individual right; rather, they simply impose obligations on government actors or federal-funds recipients, respectively. By contrast, the Materiality Provision expressly focuses on "the right of any individual to vote" regardless of immaterial errors or omissions, 52 U.S.C. § 10101(a)(2)(B). "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284; *see also* Pet. 29-30.

Respondents' argument that the provision authorizing enforcement by the Attorney General should be read to strip private parties of their entitlement to enforce the Materiality Provision is equally unpersuasive. As petitioners have explained – unanswered by respondents – the statute's

structure and Section 10101(c)'s legislative history undermine any such suggestion. Pet. 30-31, 37-41.

Finally, this Court has never retreated from its holdings that federal voting rights statutes expressly protecting "the right to vote" permit private parties to bring suit. *See* Pet. 32-36. The language in Sections 2, 5, and 10 of the Voting Rights Act mirrors the Materiality Provision's language. *See* 52 U.S.C. § 10301(a) ("the right of any citizen of the United States to vote"); *id.* § 10303(a) ("the right to vote"); *id.* § 10306(a) (same). If those provisions permit private enforcement although Congress has provided for suits by the Attorney General, *see* § 10306(b), 10308(d),(e) – and they do – the same should be true for the Materiality Provision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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