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 OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, Fl. 5
New York, NY 10006

THOMAS M. BONDY
Counsel of Record
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

Counsel for Amici Curiae
(Additional Counsel Listed on Inside Cover)

Additional Counsel for Amici Curiae

JOHN PAUL SCHNAPPER-CASTERAS
NAACP Legal Defense & Educational Fund, Inc.
1444 I Street, NW
Washington, DC 20005

KHAI LEQUANG
MELANIE D. PHILLIPS
EMILY K. BROWN
ETHAN M. SCAPELLATI
Orrick, Herrington & Sutcliffe LLP
2050 Main Street, Suite 1100
Irvine, CA 92614

KRISTINA PIEPER TRAUTMANN
DANIEL ROBERTSON
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019

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INTEREST OF AMICI CURIAE [1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan law organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color.

Because equality of political representation is foundational to our democracy, and the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for nearly a century to combat threats to equal political participation. Indeed, LDF has been involved in numerous precedent-setting cases relating to minority political representation and voting rights before federal and state courts. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S.

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[1] Pursuant to Supreme Court Rule 37.3, counsel for amici curiae certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Hous. Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014); *Kirksey v. Bd. of Supervisors of Hinds Cty.*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, and by helping to secure passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, it has participated as amicus in cases of great public importance that affect the interests of many individuals other than the parties before the Court and, in particular, the interests of constituencies in The Leadership Conference's coalition.

Consequently, amici have a significant interest in ensuring the full, proper, and continued enforcement of federal statutes guaranteeing full political participation, including the National Voter Registration Act of 1993 ("NVRA"), Pub. Law No. 103-31, 107 Stat. 77 (52 U.S.C. 20501 *et seq.* (Supp. III 2015)), and the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (52 U.S.C. 20901 *et seq.* (Supp. III 2015)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to vote is foundational to our system of government and essential to all other rights of citizenship. It is so foundational that it cannot be forfeited simply by a failure to exercise it. Indeed, citizens can choose not to vote without losing their right to vote again later. While this Court regularly examines questions about the affirmative exercise of the vote, this case involves the equally important issue of when a citizen does not or cannot vote for a certain period and whether such inactivity can justify purges of the voter rolls. In practice, non-voting can happen for any number of reasons, including, but not limited to: military service; workplace or family obligations on Election Day; the costs of obtaining voter identification; relocation; lack of confidence that existing voting systems provide an equal opportunity to participate in the political process and to elect candidates of one's choice; or dissatisfaction with the options on the ballot. Indeed, senior national security and intelligence officials regularly choose not to vote as an expression of non-partisanship.

Consistent with these principles, and with the plain text of the statutes, the United States Department of Justice ("Department" or "DOJ") has long recognized that HAVA and the NVRA prohibit laws that purge voter rolls based on the fact that a person has not voted. And, just fourteen months ago, in this very case, the Department of Justice represented to the Sixth Circuit that:

> Congress designed the NVRA to "ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction," recognizing that "while voting is a right, people have an equal right not to vote, for whatever reason."

Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants and Urging Reversal at 28, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016) (No. 16-3746) (hereinafter "U.S. Sixth Circuit Amicus Brief") (quoting S. Rep. No. 6, 103d Cong., 1st Sess., at 17 (1993) and H.R. Rep. No. 9, 103d Cong., 1st Sess., at 18 (1993)). Congress passed HAVA to further "improve our country's election system" by "assisting state and local government in modernizing their election systems." H.R. Rep. No. 107-329, 107th Cong., 1st Sess., at 32 (2001). The Department of Justice recognized that HAVA "does not alter the NVRA's basic requirements," and, more specifically, "HAVA provides that if an individual is to be removed from a State's voter registration list, the voter 'shall be removed in accordance with' the NVRA." U.S. Sixth Circuit Amicus Brief at 14 (quoting 52 U.S.C. 21083(a)(2)(A)(i)) and n.4 (noting one exception "not applicable here").

Accordingly, the Department explained that Ohio's Supplemental Process for inquiring into a voter's change in address, which is triggered by the person's voting inactivity, violates the NVRA and HAVA. Triggering the address confirmation process based "solely on voter inactivity," the Department stressed, "inevitably results in the removal of voters based on nonvoting, which violates the NVRA and HAVA." *Id.* at 8. This conclusion was compelled by the NVRA's "text, structure, purpose, and history." *Id. Infra* § I.A.

One year later, in a startling volte-face, the Department of Justice now argues in the same case that "the NVRA does not," in fact, "prohibit a State from using nonvoting" as the trigger for its voter removal process. Brief for the United States as Amicus Curiae Supporting Petitioner at 14, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (U.S. Aug. 7, 2017), 2017 WL 3485554, at *14 (hereinafter "U.S. Supreme Court Amicus Brief"). It now contends that this position, not the opposite one it espoused for more than two decades, including in this very case until August 7, 2017, is "supported by the NVRA's text, context, and history." *Id. Infra* § I.B.

The Court should give no weight to the Department's revisionist construction of the NVRA and HAVA. The Department offers no meaningful explanation for why it now reads the same words of those Acts to mean the converse of what it has said for more than twenty years. To be sure, there is nothing inherently improper about the Department changing its position on a given issue. It might appropriately do so when the law has changed or when, in the course of administering or enforcing the law, the Department

finds that its prior position is no longer feasible or justifiable. Or, in some cases, the Department may find it prudent to adapt to evolving societal understandings or respond to new scientific developments.

But here, the law has not changed. And the Department of Justice has not cited any findings or other data to justify the 180-degree reversal of its longstanding interpretation of the NVRA and HAVA, which it memorialized years ago in guidelines given to States, local governments, and the public to aid their understanding of the Acts' requirements. *See* U.S. Sixth Circuit Amicus Brief at 15-16 (describing the Department's 2010 guidelines).

Nor has the Department advanced any reasoned analysis, based on its enforcement of these laws, that would justify its change in position. The Department professes an abstract concern about "voter fraud," but that only highlights that there is no principled basis for the Department's change of position in this case. *See* U.S. Supreme Court Amicus Brief at 3, 32. The Department offers no evidence to suggest that voter inactivity is evidence of a change in residence, much less an indication of improper voting. And voter fraud is, by all reputable accounts, virtually nonexistent in this country. Nonetheless, it has unfortunately become a fashionable mantra in certain quarters, often invoked as a pretext to limit or contort voter protection laws, like the NVRA and HAVA. *Infra* § I.C.

Ultimately, this case is about more than Ohio's particular electoral processes, and it will have broad implications. It arises amidst a nationwide push to make it more difficult and costly to vote—including by regularly removing registered voters from the active

voter rolls. If Ohio's position, newly endorsed by this Administration, is embraced by this Court, it is likely to unleash a wave of new state and local laws that are aimed at or will result in unnecessarily purging and shrinking the voting rolls. The Court should foreclose the manipulation of such a critical aspect of voter registration and affirm the decision of the Sixth Circuit.

ARGUMENT

I. The Court Should Embrace The Department Of Justice's Longstanding Prior Position That Voter Inactivity Cannot Permissibly Trigger The Removal Of A Voter Under The NVRA And HAVA.

The United States has an enduring and substantial interest in protecting citizens' right to vote. Since the 1957 establishment of the Civil Rights Division of the Department of Justice, in particular, ensuring "full and fair access to the political process for all eligible Americans"[2] has been a paramount federal duty. Congress therefore gave the Attorney General broad authority to enforce the NVRA and HAVA on behalf of the United States. 52 U.S.C. §§ 20510, 21111.

For more than two decades, spanning the terms of Republican and Democratic presidents alike, the Department of Justice has consistently asserted to

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[2] U.S. Dep't of Justice, Civil Rights Division, *Summary of Selected Federal Protections for Eligible Voters* (updated Sept. 5, 2016), https://www.justice.gov/crt/summary-selected-federal-protections-eligible-voters; *see also* Establishment of the Civil Rights Division in the Department of Justice, 22 Fed. Reg. 10,310-02 (Dec. 9, 1957) (establishing and charging the Civil Rights Division with enforcing "all Federal statutes affecting civil rights").

States, courts, and the public that the NVRA and HAVA prohibit laws like Ohio's Supplemental Process that trigger the ultimate removal of a person from a voter registration list based solely on the person's voting inactivity. *Infra* n.3. This is the position that the Department took in its amicus brief below, and it is the position that the Court should adopt here.

The Department, however, now asks this Court to reach exactly the opposite conclusion, offering no explanation for its "legal U-turn" other than that the new Administration reconsidered the issue. This is by no means the only flip-flop that the Department has taken with respect to civil rights enforcement in the past eight months. *See, e.g.*, Josh Blackman, *Presidential Maladministration*, U. Ill. L. Rev. 2018 (forthcoming), *available at* https://ssrn.com/abstract=2888172 (describing the Administration's changes in position on numerous legal issues); *see also infra* 22-23. Where, as here, the Department's about-face is prompted solely by a change in Administration and is unaccompanied by any other change in circumstance, its "reconsideration" of an issue implies no more than a naked political decision. This Court should accord no weight to the Department's interpretation *du jour* and should remain mindful of the Department's long-held previous construction of the NVRA and HAVA.

A. The Department's Original Position In This Case Has Prevailed For More Than Two Decades And Comports With The Letter And Spirit Of The NVRA And HAVA.

For more than two decades, spanning administrations of both major political parties, the Department

of Justice explicitly rejected and consistently opposed the interpretation of the NVRA and HAVA that it now advances.[3] For example, in a case involving Georgia's proposed voter purge procedures, the Department previously explained that "[b]oth the NVRA and HAVA clearly state that once registered, an eligible voter's decision not to vote (*e.g.*, based on dissatisfaction with the candidates on offer in particular elections) cannot suffice to place his or her constitutional right to vote in jeopardy." Statement of Interest of the United States at 13, *Common Cause v. Kemp*, No. 1:16-cv-452-TCB, 2017 WL 2628543 (N.D. Ga. Mar. 17, 2017) (hereinafter *"Kemp* Statement of Interest");

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[3] *See, e.g.,* Letter from Deval Patrick, Asst. Att'y Gen. (USDOJ), to Dennis R. Dunn, Sr. Asst. Att'y Gen. (Ga.) (Oct. 24, 1994) (objecting to Georgia's proposed voter purge procedure because the "'no contact' rule for triggering the mailing of a registration confirmation notice" is "directly contrary to the language and purpose of the NVRA, and [] likely to have a disproportionate adverse effect on minority voters in the state"); Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Mark Barnett, Att'y Gen. (S.D.) (Feb. 11, 1997) (notifying South Dakota of intent to sue because "registered voters who fail to vote within a four year period are specifically targeted for inclusion in the state's voter removal program" and "these procedures violate the NVRA"); Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Bruce Botelho, Att'y Gen. (Alaska) (Feb. 11, 1997) (same); United States Motion for Summary Judgment at 14-18, *United States v. Pennsylvania*, Nos. CIV. A. 95-382, CIV. A. 94-7671, 1996 WL 729813 (E.D. Pa. Dec. 19, 1996) (litigation against Pennsylvania); Motion for Further Relief at 5-9, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Oct. 23, 1997) (litigation against California); and Amended Joint Stipulation at ¶ 13, *United States v. Cibola Cty.*, No. 93-1134 (D.N.M. Jan. 31, 2007) (litigation against Cibola County, New Mexico for violation of the NVRA, including removal of registrations based on failure to vote).

id. (contrasting "declining to participate [in a given election]" with "independent, objective, and reliable evidence of a changed residence").

Likewise, the Department took the same position just one year ago in this very case. It explained that the "NVRA permits States to remove voters only for a reason enumerated [in the statute]: 'at the registrant's request, due to criminal conviction or mental incapacity as provided by state law, the death of the registrant, or due to a change of the registrant's residence.'" U.S. Sixth Circuit Amicus Brief at 16 (quoting *U.S. Student Ass'n Found. v. Land,* 546 F.3d 373, 376 (6th Cir. 2008)).

To remove a person because of a change in address under Section 8(d) of the NVRA, a State must have evidence that the voter has moved. *See* U.S. Sixth Circuit Amicus Brief at 8. Furthermore, that evidence must be sufficiently reliable to trigger a process intended to "confirm" the change in address. *Id.* at 18. Examples of reliable evidence may be found in the statute itself (*e.g.*, the Postal Service's "change of address" program) and the Department's prior NVRA guidance document (describing an alternative "uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction" and then "us[ing] the information obtained from returned non-deliverable mail" to trigger the confirmation process). *Id.* at 19. Indeed, until the day it filed its amicus brief with this Court, the Department's official website displayed the Department's 2010 formal guidance on the NVRA "stress[ing]" the need for reliable second-hand information indicating a change in residence outside the jurisdiction. *See* United States Dep't of Justice, The

National Voter Registration Act of 1993 (NVRA): Questions and Answer (updated Sept. 1, 2016) (hereinafter "Department's 2010 formal guidance"), https://web.archive.org/web/20170704094837/https:/www.justice.gov/crt/national-voter-registration-act-1993-nvra.[4]

"It is unreasonable to infer that a voter may have changed residences solely because she has not voted in the last two years." U.S. Sixth Circuit Amicus Brief at 9. That is because "[a] voter's decision not to vote or otherwise interact with the political process or election officials says nothing reliable about whether a voter has become ineligible by having moved away." *Kemp* Statement of Interest at 17.

Applying these principles—and the plain language of the statute—the Department has, until very recently, maintained that Ohio's Supplemental Process violates the NVRA and HAVA because it improperly "assumes that voters who have not cast a ballot in two years have moved," U.S. Sixth Circuit Amicus Brief at 10, and therefore is "grossly overinclusive" and "cannot constitute a 'reasonable effort' to remove individuals who actually have moved." *Id.* at 19-20; *cf. Dunn v. Blumstein*, 405 U.S. 330, 346, 351 (1972) (rejecting Tennessee voting procedure where "the record is totally devoid of any evidence that durational residence

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[4] *See also Kemp* Statement of Interest at 15 n.7 ("The Department of Justice guidance stresses that a general program under Section 8 to purge voters who may have moved away should be triggered by reliable second-hand information indicating a change of address outside of the jurisdiction, from a source such as the NCOA program, or a general mailing to all voters.") (citing the Department's 2010 formal guidance).

requirements are in fact necessary to identify bona fide residents," and finding the State's practice over-inclusive and "all too imprecise").

This conclusion, the Department showed, is supported by the text, purpose, and legislative history of both the NVRA and HAVA, and by case law. *See Welker v. Clarke*, 239 F.3d 596, 598-599 (3d Cir. 2001); Order Granting in part and Denying in part Plaintiffs Voting Rights Coalition and United States' Motion for Further Relief, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Nov. 2, 1995). Indeed, Congress was keenly aware that purging the voter rolls had the effect, and in some cases the purpose, of reducing registration rates and, consequently, participation in federal elections. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (1993) (identifying "annual reregistration requirements" as among "the techniques developed to discourage participation" around the turn of the twentieth century); S. Rep. No. 103-6, at 3 (1993) (same).[5]

The Department's former interpretation is also entirely logical, since, as other amicus briefs in support

[5] *See also* S. Rep. No. 103-6, at 2 (1993) (NVRA aims to "assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction."); *id.* at 18 ("[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again."); H.R. Rep. No. 103-9, at 15 (expressing concern that state list-maintenance programs "may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing").

of Respondents detail, people sometimes cannot or do not vote for a panoply of legitimate reasons, including: service in the armed forces, outright barriers or burdens to voting like costly voter IDs, lack of transportation, and work-place and family obligations on Election Day; voting methods or redistricting plans that contribute to voters' belief that they lack an equal opportunity to participate in the political process and to elect candidates of their choice; or lack of compelling or competitive candidates that motivate voters to participate. *See also* M. L. Cavanaugh, *I Fight for Your Right to Vote. But I Won't Do It Myself*, N.Y. Times, Oct. 19, 2016 ("George C. Marshall, Dwight D. Eisenhower and Patton . . . didn't vote while in uniform, and those of the modern era [] tread the same path — [including General] David H. Petraeus [and former Chairman of the Joint Chiefs of Staff] Martin Dempsey.").

B. The Department Offers No Meaningful Basis For Its Reversal In Position.

This Court has recognized that there may be situations when a change in an agency's position is appropriate. *See, e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (observing that the Secretary of Health and Human Services is "not estopped from changing a view"). For example, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," requiring new analysis—and with it potentially new interpretations—of the law. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). Or, where "an enhanced understanding of the issue" emerges based on "referenda, legislative debates, and grassroots campaigns"—or

"studies, papers, books, and other popular and scholarly writing"—an agency may reasonably adapt to these emerging views and understandings. *Id.*

Here, however, the Department has not offered any new insights or understandings that inform its change in position. Nowhere in its new brief is there a reference to any recently gained "institutional knowledge" or much of "anything indeed" to explain its new position. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012); *see also id.* (describing as "crass" the account that after the change in Administration, the Department reconsidered a legal question).

Instead, without any principled explanation, the Department has markedly shifted its focus in construing the NVRA and HAVA. For more than two decades, it analyzed this issue with the NVRA's first two stated goals in mind—to "increase the number of eligible citizens who register to vote," and to "enhance[] the participation of eligible citizens as voters," 52 U.S.C. § 20501(b)(1) & (2). *See, e.g.,* United States Motion for Summary Judgment at 39, *United States v. Pennsylvania*, Nos. CIV. A. 95-382, CIV. A. 94-7671, 1996 WL 729813 (E.D. Pa. Dec. 19, 1996) ("Pennsylvania has not assumed its responsibility 'to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for federal office.'") (citation omitted). Today, however, it ignores those objectives and looks myopically at whether Ohio's Supplemental Process purportedly advances the latter two goals of the NVRA—to "'protect the integrity of the electoral process' and ensure that States maintain 'accurate and current' voter rolls," 52 U.S.C.

§ 20501(b)(3) & (4). *See* U.S. Supreme Court Amicus Brief at 3.

The Department's new emphasis on electoral integrity and maintaining accurate voter rolls, however, overlooks the fact that practices like Ohio's Supplemental Process thwart those goals as well. By purging eligible voters, Ohio's Supplemental Process produces inaccurate registration rolls and undermines the integrity of the electoral process. *See* U.S. Sixth Circuit Amicus Brief at 20 ("Without reliable evidence upfront to suggest that a voter may have moved, the Section 8(d) process by itself is not a reasonable way to identify persons who have changed residence because it will inevitably lead to the removal of individuals who are eligible to vote and who have not in fact changed residence.").

Instead, the Department conjures up the specter of "voter fraud" as the basis for its new perspective on the NVRA and HAVA. U.S. Supreme Court Amicus Brief at 3. As a threshold matter, the Department's newly posited interest in the illusory phenomenon of voter fraud cannot justify departing from the plain text of the NVRA and HAVA. And, as the Department has persuasively shown in the 2010 guidance and its numerous prior briefs on this subject, the plain text of those statutes does not permit voter inactivity to trigger voter purges. *See, e.g., Kemp* Statement of Interest at 16 n.8 ("[T]he NVRA's plain text prohibits using non-voting to trigger the purging process . . . ."); U.S. Sixth Circuit Amicus Brief at 8, 16 & n.8, 29-30. The text of the Acts remains fixed, as it has not been amended or superseded, and it is not susceptible to the Department's newfound "fluid construction."

Blackman, *supra*, at 1 ("[W]here an incoming administration reverses a previous administration's interpretation of a statute, simply because a new sheriff is in town, courts should verify if the statute bears such a fluid construction.").[6]

Moreover, nowhere does the Department provide any evidence of voter fraud—much less voter fraud specifically in Ohio.[7] Nor does it offer any data suggesting that voter inactivity, let alone voter inactivity for just two years, indicates either that fraudulent voting is occurring or that the Ohio Supplemental Process prevents or reduces voter fraud in any meaningful way. Indeed, the evidence could not be clearer that voter fraud, the rationale purportedly buttressing these efforts, is virtually nonexistent and, thus, an unreasonable basis for seeking to purge voters from voter rolls. An exhaustive study by an expert at Loyola Law School found only 31 credible incidents of voter fraud out of more than 1 billion votes cast from

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[6] Indeed, "[a]s time elapses, changes in the interpretation of a fixed statute are less likely to reflect the original understanding and intent of the drafters, and more likely to represent the vicissitudes of present-day politics." *Id.* at 10.

[7] Nor does the Department acknowledge that Ohio "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." *Dunn*, 405 U.S. at 351 (rejecting a state's durational residence requirements as over-inclusive and "all too imprecise," and pointing to state's criminal laws as more appropriately addressing voter fraud concerns).

2000 to 2014: a statistically insignificant figure to say the least.[8]

The Department's about-face here—which it admitted was prompted only by a change in Administration—should be seen for what it is: an attempt to hyperextend the limited provisions of the NVRA and HAVA to advance a broader agenda. That agenda is starkly illustrated by the Administration's creation of the President's Advisory Commission on Election Integrity, which appears to date to reflect a transparent effort to manufacture evidence supporting President Trump's false claims that widespread voter fraud cost him the popular vote in the 2016 Presidential election. *See generally* Complaint at 3, 15, *NAACP Legal Defense & Educational Fund, Inc. v. Trump*, No. 1:17-cv-5427, 2017 WL 3046985 (S.D.N.Y. July 18, 2017). The Vice-Chair of that Commission has made clear

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[8] Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Wash. Post, Aug. 6, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast; *see also Myth of Voter Fraud*, Brennan Center for Justice, *available at* https://www.brennancenter.org/issues/voter-fraud ("examination after examination of voter fraud claims reveal fraud is very rare, voter impersonation is nearly non-existent, and much of the problems associated with alleged fraud relates to unintentional mistakes by voters or election administrators"); David Becker, *Just the Facts on Fraud*, Center for Election Innovation and Research, May 1, 2017, *available at* https://www.electioninnovation.org/news/2017/5/1/just-the-facts-on-fraud (finding just 324 potential (unverified) fraud cases, out of more than 29 million ballots cast—a rate of one-thousandth of 1 percent in review of 2016 election in California, North Carolina, Ohio and Tennessee).

that it is animated by hostility to the NVRA, and one of its goals is "putting together information on legislation drafts for submission to Congress early in the [A]dministration . . . regarding amendments to the NVRA . . . ."[9]

Unable, as yet, to amend the NVRA, the Administration is instead misinterpreting it. Lest there be any doubt regarding the relevant sequence of events, the Court need only look at the timeline leading up to the reversal in position here:

> **July 18, 2016** – The Department of Justice submits an amicus brief to the Sixth Circuit in this case arguing the Ohio Supplemental Process "inevitably results in the removal of voters based on non-voting, which violates the NVRA and HAVA." U.S. Sixth Circuit Amicus Brief at 8.
>
> **186 Days Later** – The President assumes office on January 20, 2017.
>
> **385 Days Later** – The Department of Justice submits an amicus brief to this Court in this case on August 7, 2017, arguing that the Ohio Supplemental Process "does not violate the NVRA." U.S. Supreme Court Amicus Brief at 10. The Department simultaneously revises its 2010 formal guidance on the NVRA to reflect its new view. *See id.* at 14 n.4 ("The Department has updated its NVRA

[9] Mark Joseph Stern, *Kobach Email Confirms Trump Administration's Goal to Gut Vital Voting Rights Law*, Slate, July 18, 2017.

> guidance to reflect the interpretation set forth in this brief.").[10]

The capriciousness displayed by the Department must not and should not dictate this Court's interpretation and enforcement of fundamental federal laws seeking "uniform" and "nondiscriminatory" voter maintenance programs. The plain text, structure, and history of the NVRA and HAVA themselves should determine whether Ohio's Supplemental Process is lawful and properly achieves the Acts' goals.

C. The Department's New Ideologically Motivated Position Should Carry No Weight With This Court.

The Department of Justice often duly enjoys this Court's respect when it lends its voice to an issue involving laws it is charged with enforcing. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 231-32 (1996) (noting that in other litigation interpreting the Voting Rights Act, this Court "attached significance to the fact that the Attorney General [in an amicus brief] had urged [the Court] to find that private litigants may enforce the Act" and noting it had again taken that position in the current case) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 n.23 (1969) ("It is significant that the United States [in its amicus brief] has urged that private litigants have standing to seek declaratory and injunctive relief in these suits.")). In-

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[10] The Department's prior guidance was still available the day before it filed its amicus brief with this Court, based on internet archives. https://web.archive.org/web/20170806122814/https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last accessed Sept. 18, 2017).

deed, the government has an open invitation to submit amicus briefs, pursuant to Supreme Court Rule 37.4, because the Court assumes it "almost always will be better able to reflect the public interest." Eugene Gressman, *Supreme Court Practice*, at 737 (9th ed. 2007) (citing Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984) ("Governmental entities are uniquely situated to define and assert the 'public interest,' and their views as amicus will, therefore, carry substantial weight.")). Citizens, States, local governments, public interest organizations, and private businesses are all guided by the Department's position in determining the propriety of their own conduct.[11]

But such respect is not beyond question. It is based on the premise that the Department will represent the public interest, not simply parrot the ideological views of a new Administration. As such, the Department must provide a principled basis for any change in its prior interpretation of federal law. Otherwise, that position deserves no weight.

This Court has rejected the government's change in position where it was in conflict with an earlier position. In *Levin v. United States*, 568 U.S. 503 (2013), for example, this Court rejected the Department's "most unnatural" interpretation of a federal tort statute, which contradicted its historical position on the

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[11] *See* U.S. Dep't of Justice, Voting Rights Policy and Guidance, *available at* https://www.justice.gov/crt/voting-rights-policy-and-guidance ("The Voting Section has published a series of Questions and Answers to the National Voter Registration Act as [an] aid to guide jurisdictions and to inform interested members of the public about the Act's requirements.").

issue. 568 U.S. at 514. The Court observed that, in prior litigation, it "was . . . informed" by the Department's position at the time, and it adopted that position. *Id.* at 517 (citing *United States v. Smith*, 499 U.S. 160, 166 (1991)). Faced with the Department's awkward "disavow[al]" in *Levin* of its prior interpretation and its efforts "to inject ambiguity into [the statute] notwithstanding [the statute's] direction that '[the pertinent section] . . . shall not apply,'" the Court agreed with "the Government's earlier view," and rejected its "freshly minted revision." *Id.* at 518; *see also*, *e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (finding the Department's position "particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today").[12]

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[12] The Court has regularly expressed skepticism of the Department's change of position, across various Administrations, in other contexts as well. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 273 (1981) (rejecting as "wholly unpersuasive" a new agency interpretation at odds with a position the agency had taken for years, noting that "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (citation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"—the Department's change in position was "contrary to the narrow view of that provision advocated in past cases."); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

The Court should take the same approach here and decline to ratify the Department's casting aside of a previous longstanding position without at least some reasonable explanation. The Department, having "reconsidered" its position in light of nothing other than a change in presidential Administrations, brings nothing new to the table. U.S. Supreme Court Amicus Brief, at 14. All it has contributed, "though it is not quite nothing, is [to] let[] [the Court] know," *Sandifer*, 678 F.3d at 599, that it disagrees with the position taken *by the last three Administrations*. Indeed, "[t]his approach [of viewing departures from consistently held positions with skepticism] is faithful to the technocratic vision of agencies, and more importantly, it eliminates the perverse incentive of rewarding Presidents who read statutes in ways unthinkable to their drafters." Blackman, *supra,* at 19.

In fact, the Department's change of course here reflects its ongoing and active abandonment of what is supposed to be an essential mission regardless of who occupies the White House: protecting and enforcing the civil rights of *all* Americans. In just the last eight months, the Department has signaled retreats and reversals on issues ranging from Title VII employment discrimination, to transgender rights in schools, to class action and arbitration waivers in employment contracts.[13]

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[13] *See, e.g.*, Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), ECF No. 417 (Department of Justice taking the position that Title VII does not apply to discrimination based on sexual orientation and indicating that the EEOC was "not speaking for the United States" in taking a contrary position); Unopposed Motion for Voluntary Dismissal, *Texas v. United States*, No. 16-

The Department of Justice also recently has ended a major initiative to strengthen the reliability of forensic science,[14] reversed course regarding a prior mandate against the continued use of private prisons,[15] and ordered a review of consent decrees and reform agreements with local police departments.[16]

11534 (5th Cir. Mar. 2, 2017) (Department of Justice voluntarily dismissing a pending appeal and effectively ending a challenge to a district court's injunction against the federal guidance on transgender students); Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-1300 and Supporting Respondents in No. 16-1307, *NLRB v. Murphy Oil USA, Inc.,* Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017) (Department of Justice reversing position on class action waivers in arbitration agreements); Corrected Brief for Appellees at 2-3, *Chamber of Commerce of U.S. v. Dep't of Labor*, No. 17-10238 (5th Cir. July 3, 2017) (Department of Justice "no longer defending" prior position on arbitration waivers); Reply Brief for Appellants at 22-23, *Nevada v. U.S. Dep't of Labor*, No. 16-41606 (5th Cir. June 30, 2017) (Department of Justice declining to defend the position on Department of Labor overtime rules, as it had in the district court and its opening appellate brief).

[14] Notice of Public Comment Period on Advancing Forensic Science, 82 Fed. Reg. 17,879 (Apr. 13, 2017).

[15] Memorandum from Jefferson B. Session, III, Attorney General, Washington, D.C. on Rescission of Memorandum on the Use of Private Prisons (Feb. 21, 2017), *available at* https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf.

[16] Memorandum from Jefferson B. Sessions, III, Attorney General, Washington, D.C. on Supporting Federal, State, Local, and Tribal Law Enforcement (Mar. 31, 2017). This memorandum was issued shortly before lawyers for the Department of Justice moved a federal court to postpone a hearing on a potential consent decree with the Baltimore Police Department arising out of alleged civil rights abuses. *See* Exhibit 1 of Motion for Continuance of Public Fairness Hearing, *United States v. Police Dep't of Balt. City,* 1:17-cv-00099-JKB (D. Md. Apr. 3, 2017). The motion

Perhaps most relevant to the voting context here, the Department also withdrew its opposition to Texas's voter photo ID law,[17] which it previously and successfully challenged for more than six years as intentionally discriminatory. It did so even though the Fifth Circuit held en banc that the record "contained evidence that could support a finding of discriminatory intent," *Veasey v. Abbott*, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc), and the district court, on remand, recently found that the Texas law at issue was, in fact, enacted with a discriminatory intent, *see Veasey v. Abbott*, No. 2:13-cv-193, 2017 U.S. Dist. LEXIS 54253, at *7 (S.D. Tex. Apr. 10, 2017). While Texas has consistently argued that its voter photo ID law is necessary to combat voter fraud, the Fifth Circuit and the district court expressly rejected that rationale, observing that out of 20 million votes cast in the 10 years before the law was passed, Texas had convicted only two people for in-person voter fraud. *Id.* at *14; *Veasey*, 830 F.3d at 238-39.

Considering this apparent abandonment of civil rights enforcement together with the "most unnatural" reading of the NVRA and HAVA advanced here, this Court should give no weight to the Department's new interpretive approach and should reject it on its merits.

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was denied, Order, *Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 5, 2017), and the District Court later approved a consent decree, Consent Decree, *Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 7, 2017).

[17] United States Motion for Voluntary Dismissal, *Veasey v. Abbott*, No. 2:13-cv-193, 2017. U.S. Dist. LEXIS 54253 (S.D. Tex. Apr. 10, 2017).

* * *

In the end, the Court's decision here will reverberate well beyond the Ohio voters directly impacted by Ohio's Supplemental Process. A holding that States may initiate the removal of a person from a voter registration list because the individual did not vote in previous elections has the potential to spawn a host of new laws imposing burdens on voters to remain eligible to vote, contrary to a principal purpose of the NVRA and HAVA. These new provisions would likely launch a new round litigation to protect eligible voters from burdens imposed by federal, state, and local governments misguidedly aimed at wiping them from the voter rolls and the political process. Indeed, the Department of Justice,[18] the President's Advisory Commission on Election Integrity,[19] other States,[20] and

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[18] In late June 2017, the Department of Justice, outside of any customary practice, sent letters to state boards of elections officials seeking information about their list maintenance procedures under the NVRA. *See, e.g.*, Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep't of Justice to the Honorable Kim Westbrook Strach, Executive Director, State Board of Elections, North Carolina (June 28, 2017), https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html.

[19] The Commission has sent letters to all fifty States asking them to provide detailed information about voters. Michael Wines & Rachel Shorey, *Inside the Uproar Over a Government-Led Search for Voter Fraud*, N.Y. Times, July 8, 2017, at A4. The Commission has indicated that it intends to run this data against other available databases to determine "areas where voter rolls could be strengthened." *Id*.

[20] For example, Indiana recently enacted a voter removal provision that goes even further than Ohio's Supplemental Process at issue here and has already been challenged under the NVRA.

private organizations[21] are already systematically exploring new ways to purge voters from the rolls.

For these reasons, this Court should be especially careful in formulating its decision here, particularly in light of the Department of Justice's extraordinary one-hundred and eighty degree turn and the broader drive to purge the rolls and undermine the franchise.

CONCLUSION

For more than two decades, the Department of Justice has advocated that the NVRA and HAVA prohibit state laws that, like Ohio's Supplemental Process, trigger a voter removal process based solely on a voter's inactivity. The Department's sudden reversal in this case was prompted by nothing other than a change in Administration and arises amid broader efforts to disenfranchise millions of American voters, including in increasingly Black and Brown communities that have made historic strides in accessing the voting booth. The Department's new position, reflecting no justifiable change in law or fact, should be rejected by and carry no weight with this Court.

The Sixth Circuit correctly held, consistent with the Department's longstanding position, that Ohio's

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Complaint, *Ind. State Conf. of NAACP v. Lawson*, No. 1:17-cv-02897 (S.D. Ind. Aug. 23, 2017).

[21] Pema Levy, *These Three Lawyers Are Quietly Purging Voter Rolls Across the Country*, Mother Jones, July 7, 2014 (describing how an organization has initiated inquiries in at least 141 counties in 21 states questioning the accuracy of voter rolls, filing lawsuits in instances where counties have refused to accede to certain demands, and often targeting counties with significant Black communities and other communities of color, including in rural Mississippi and Texas).

Supplemental Process violates the NVRA and HAVA, and this Court should affirm that judgment.

Respectfully submitted,

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, Fl. 5
New York, NY 10006

JOHN PAUL SCHNAPPER-CASTERAS
NAACP Legal Defense & Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005

THOMAS M. BONDY
Counsel of Record
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

KHAI LEQUANG
MELANIE D. PHILLIPS
EMILY K. BROWN
ETHAN M. SCAPELLATI
Orrick, Herrington & Sutcliffe LLP
2050 Main Street, Suite 1100
Irvine, CA 92614

KRISTINA PIEPER TRAUTMANN
DANIEL ROBERTSON
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019

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