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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Ohio Secretaries of State from both political parties have long used a "Supplemental Process" to fulfill Ohio's list-maintenance duties under the National Voter Registration Act (NVRA), 52 U.S.C. § 20507(a)(4). This process sends confirmation notices to voters who lack voter activity over two years, and removes individuals from the rolls if they *both* fail to respond to the notice *and* fail to engage in voter activity for four more years. While the NVRA's "Confirmation Procedure" permits this process, *id.* § 20507(d), the Sixth Circuit held that using inactivity as a "trigger" for sending notices violates the NVRA's "Failure-To-Vote Clause," *id.* § 20507(b)(2).

Secretary of State Jon Husted's petition explained why the Court should grant review. *First*, the decision below resolved an important issue that requires immediate attention. States still struggle with their critical list-maintenance duties, and the Sixth Circuit's logic could have far-reaching effects. Review is appropriate now, moreover, because States must defend suits from both sides on this issue, and the Court can resolve the petition outside the context of an election. *Second*, the decision below conflicts with this Court's interpretive principles. The Sixth Circuit disregarded proximate causation; interpreted amendments in the Help America Vote Act (HAVA) to serve no purpose; relied on a rarely invoked canon at the expense of a ubiquitous one; and ignored the backdrop against which Congress passed the NVRA.

In response, Respondents overlook the reasons for immediate review while overstating the benefits of delay. Further, they must add words to the NVRA and remove words from HAVA to defend the Sixth Circuit's decision.

I. RESPONDENTS FAIL TO MINIMIZE THE NEED FOR IMMEDIATE REVIEW

The Secretary explained that the Court should grant review because the petition raises an important issue and provides an ideal vehicle for resolving it outside the context of an election. Pet. 14-22. Respondents' contrary arguments lack merit.

A. Respondents' Request For Further Percolation Ignores The Need For An Answer

Respondents ask the Court to wait for a circuit conflict. Opp. 17, 22-23. They overstate the upsides and ignore the downsides of more percolation.

Beginning with the purported *upsides*, this case is not one that should require a conflict. When a case affects the States or their elections, the Court regularly grants certiorari because of "the importance" of the issue. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (Stevens, J., op.). The Court granted review in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), for example, even though no other circuit had then addressed whether States could adopt "evidence-of-citizenship" registration requirements under the NVRA. *See, e.g.*, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cook v. Gralike*, 531 U.S. 510, 518 (2001).

Nor would delay serve a useful purpose. The petition presents a discrete statutory-interpretation question that does not turn on evidentiary issues best fleshed out over a range of cases. And several reasoned opinions have aired the competing viewpoints, so the main benefit of further percolation has been achieved. The panel decision was divided.

Compare Pet. App. 10a-24a, *with* Pet. App. 32a-35a (Siler, J., dissenting). And the majority overturned a thorough district-court opinion. Pet. App. 50a-62a. Since the Secretary filed this petition, moreover, another court has ruled for Georgia on this question. *Common Cause v. Kemp*, No. 1:16-cv-452, Doc.34, at 7-16 (N.D. Ga. Mar. 17, 2017), *on appeal*, No. 17-11315 (11th Cir.). Thus, a split of consequence has already developed; in fact, more judges now agree with the Secretary than with Respondents.

Respondents also ignore the *downsides* from delay. Most importantly, review now would avoid having to confront this question in an election-eve filing. Those filings are common. *E.g.*, *Ohio Democratic Party v. Husted*, 137 S. Ct. 28 (2016); *Husted v. Ohio State Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014); *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Yet the Court, the litigants, and the States would benefit if the Court could resolve this question on the usual timetable, rather than on the brief-a-day timetable that often accompanies emergency applications.

In addition, further percolation would extend the Catch-22 in which States find themselves. On one hand, lawsuits challenging a State's list-maintenance efforts as inadequate have led to settlements that *required* the process that the Sixth Circuit said was *barred*. Pet. 19-20. Indeed, former Justice Department lawyers say the Department "negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here." Br. of *Amici* Former Dep't of Justice Attorneys, at 4; *cf.* Br. of *Amicus* Judicial Watch, at 15-16. On the other, Respondents' counsel has already sent a letter to another State arguing that its similar process vio-

lates the NVRA. Pet. 21. Thus, concerns with continued litigation are not "unfounded," Opp. 23, and further percolation ignores this predicament.

B. As The Multistate *Amicus* Brief Shows, This Question Could Affect Many States

The Secretary identified many States that require or permit the use of nonvoting in their maintenance programs. Pet. 17-19. Respondents counter that "only five states" "might be implicated" by the decision below. Opp. 22. Yet the decision's potentially broad effects are illustrated by the *amicus* brief filed by *fifteen* States. Br. of *Amici* Georgia and 14 Other States, at 1 ("Multistate *Amicus* Br.").

To begin with, some eight States have laws that *expressly* permit or require officials to send notices based on nonvoting. Pet. 17-18. Respondents concede that five (Tennessee, Georgia, West Virginia, Oklahoma, and Pennsylvania) permit practices like the Supplemental Process. Opp. 22. They distinguish Montana as using returned mail to trigger a notice, Opp. 19 n.8, but its law grants its Secretary discretion to choose from four options, including "sending forwardable confirmation notices" to those "who failed to vote in the preceding federal general election." Mont. Code Ann. § 13-2-220(1)(c)(iii). And while agreeing that Iowa permits notices to be sent to nonvoters, Respondents claim that officials may not have "exercised that authority." Opp. 21-22. Since Iowa law permits the practice, however, the decision below could affect it.

In addition, other States target *nonvoters* with *nonforwardable* mailings, and send confirmation notices to individuals whose nonforwardable mailings

are returned as undeliverable. Pet. 18. Respondents say that the decision below will not affect these States because the returned mail provides "evidence that the voter has changed residence *independent of the failure to vote*." Opp. 19. Respondents fail to explain why this distinction matters under *either* the decision below *or* the NVRA. The decision below could hold that the Failure-To-Vote Clause barred the Supplemental Process only by reading the phrase "result in" as adopting a limitless causation test. Pet. App. 21a. Because statutes are not chameleons, *Clark v. Martinez*, 543 U.S. 371, 382 (2005), that test affects any State using nonvoting as a cause to start maintenance efforts (as these States do by targeting *nonvoters* with nonforwardable mailings). In fact, Respondents later suggest that the Failure-To-Vote Clause does not "allow failure to vote to *play a role* in the removal of a voter from the rolls apart from the" Confirmation Procedure. Opp. 33 (emphasis added). Furthermore, Respondents do not explain where the NVRA's text compels States to send notices based on (what Respondents believe to be) alleged "independent and reliable information." Opp. 18. Other than its Safe-Harbor Provision for Postal Service data, the statute is *silent* about what should trigger a notice. The NVRA leaves that decision to each State.

Respondents also note that Alaska, South Dakota, and California "abandoned" a practice like Ohio's in the face of federal actions in the 1990s. Opp. 20 n.9; *see also Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1224 (N.D. Ill. 1995). That some States have *already* been forced to change course because of an incorrect reading of the NVRA confirms the need for prompt review. Indeed, Congress through HAVA has since clarified the NVRA in

a way that sided with these States. Pet. 24-25. The Court should grant review before more States are compelled to change their practices as a result of a misreading of the NVRA (and now HAVA).

Finally, Respondents call it "rank speculation" for the Secretary to note that some States grant their officials discretion to determine who should receive notices, and so authorize practices like the Supplemental Process. Opp. 20-21; *see* Pet. 18-19. Yet several of these States—Louisiana, Nevada, South Carolina, and Texas—joined the multistate *amicus* brief that made the same point. Whether or not a particular State uses a procedure like the Supplemental Process today, States have an interest in this Court clarifying this issue sooner rather than later.

II. RESPONDENTS DO NOT RECONCILE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S CASES

The Secretary explained (at 22-34) that the decision below conflicted with this Court's cases. Respondents' arguments confirm the conflict.

A. Respondents Disavow The Sixth Circuit's Use Of A Criticized Canon, And Misapply The Applicable Canons

The Sixth Circuit enlarged a rare canon (that exceptions be read narrowly) at the expense of common canons (the avoidance canon and the rule that Congress does not hide elephants in mouseholes). Pet. 26-34. Respondents do not justify these errors.

Exceptions Canon. The Secretary showed that the Sixth Circuit wrongly invoked the canon that statutory exceptions be narrowly construed. Pet. 26-28. Respondents all but concede this error. They

now claim that this canon does not matter because, setting it aside, the Supplemental Process violates the Failure-To-Vote Clause. Opp. 33. Yet they *themselves* invoked this canon in the Sixth Circuit. Appellants' Br., 6th Cir. R.24, at 30. And the canon formed a key part of the Sixth Circuit's holding, which "err[ed] on the side of giving maximum effect" to the Failure-To-Vote Clause. Pet. App. 17a. Despite Respondents' current disavowal of the canon, this case presents a good vehicle for reassessing it.

Avoidance Canon. The Secretary noted that the canon of constitutional avoidance applies because the Sixth Circuit's reading raised a serious constitutional question: Do registration and failure-to-vote laws qualify as *manner* regulations subject to federal control or *qualification* regulations subject to state control? Pet. 28-30. In response, Respondents argue that the Failure-To-Vote Clause is "clearly" a constitutional manner regulation after *Inter Tribal*. Opp. 26-28. This argument misunderstands both *Inter Tribal* and the avoidance canon.

Respondents say that *Inter Tribal* "dismissed" constitutional concerns. Opp. 27. But the Court emphasized that the NVRA would raise "serious constitutional doubts" if it blocked a State from enforcing its qualifications. 133 S. Ct. at 2258. It also *reserved* the question whether registration laws qualify as "manner" or "qualification" regulations (and said nothing about failure-to-vote laws). *Id.* at 2259 n.9. Nor does it matter, as Respondents claim, whether Ohio treats these registration and failure-to-vote laws as qualifications under *state law*. Opp. 27-28; *cf.* Ohio Const. art. V, § 1. The Elections Clause means the same thing for all 50 States. That some

States historically treated registration and failure-to-vote laws as qualifications is good evidence that they could be treated in that way under the Elections Clause. Pet. 2-4; *District of Columbia v. Heller*, 554 U.S. 570, 584-85 (2008) (relying on state laws to interpret Second Amendment).

Regardless, Respondents misunderstand the avoidance canon by suggesting that the Secretary challenges the NVRA *in this case*. Opp. 27. The canon exists "to *avoid* the decision of constitutional questions." *Clark*, 543 U.S. at 381. The Court need not resolve any of these complex constitutional issues here. But the questions are sufficiently serious to trigger the canon, which conflicts with the Sixth Circuit's broad reading of the Failure-To-Vote Clause.

Elephants-In-Mouseholes Presumption. The Secretary noted that, when Congress passed the NVRA, most States used nonvoting *in some manner* to maintain the rolls. Thus, the rule that Congress does not "hide elephants in mouseholes" and the federalism "clear-statement rule" direct courts to interpret the Failure-To-Vote Clause as enacting modest, not radical, reform. Pet. 30-34. In response, Respondents do not dispute the backdrop against which Congress passed the NVRA; instead, they read *Inter Tribal* as eliminating these rules for laws passed under the Elections Clause. Opp. 26. Respondents are wrong.

Inter Tribal held only that no presumption against preemption applies for federal laws passed under the Elections Clause. 133 S. Ct. at 2256-57. The rule that Congress does not "hide elephants in mouseholes" is a different presumption that applies in many diverse areas, including those that do not implicate federalism. *E.g.*, *Czyzewski v. Jevic Hold-*

ing Corp., 137 S. Ct. 973, 984 (2017). *Inter Tribal* provides no basis for discarding this commonsense interpretive rule here.

In addition, Respondents read *Inter Tribal*'s discussion of the presumption against preemption expansively to leave no room for federalism concerns whatsoever. Opp. 26-27. That reading is in tension with *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which interpreted the Elections Clause to protect federalism. *Id.* at 2673-74. Regardless, this question is important: The Court should take this case to decide whether Respondents correctly extend *Inter Tribal*'s discussion of the presumption again preemption to this different context.

B. Respondents Interpret HAVA's Amendments To Serve No Purpose

The Secretary explained that the Sixth Circuit wrongly interpreted HAVA's clarifying amendments to serve no purpose. Pet. 24-26. A comparison of the Secretary's explanation for these clarifications with Respondents' explanation illustrates as much.

As the Secretary noted, a debate existed in the 1990s about whether the Failure-To-Vote Clause allowed States to use nonvoting as a reason for sending notices under the Confirmation Procedure. Pet. 8-9. HAVA's amendments—including the addition to the Failure-To-Vote Clause and the provision noting that voters could not be removed "solely" for nonvoting—clarified that the NVRA allowed States to do so. After HAVA, then, Justice Department lawyers "*required* states to adopt procedures that are indistin-

guishable from Ohio's Supplemental Process." Br. of *Amici* Former Dep't of Justice Attorneys, at 13.

Respondents, by comparison, uncover a different explanation for HAVA's clarifications: Congress passed them allegedly to clarify that the NVRA's Failure-To-Vote Clause did not *outlaw* the NVRA's Confirmation Procedure. Opp. 29-30. That makes little sense. Respondents identify no pre-HAVA authority—DOJ guidance, precedent, or the like—that adopted this schizophrenic reading of the NVRA to *prohibit* what it *permitted*. Nor would such a reading comport with the principle to "'read statutes as a whole.'" *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). Respondents' explanation of HAVA's clarifications thus is no explanation at all.

C. Respondents Wrongly Claim That The Sixth Circuit Adopted A Proximate-Cause Test, And That They Can Satisfy The Test

The Secretary showed that the Failure-To-Vote Clause uses language ("by reason of") that requires a proximate-cause connection between nonvoting and removal, and that an individual's failure to respond to a notice breaks that causal connection. Pet. 22-24. Respondents retort that the Sixth Circuit *did* use a proximate-cause test, and that the test invalidates the Supplemental Process. Opp. 30-33. They are wrong on both counts.

To begin with, Respondents mistakenly suggest that the Sixth Circuit adopted proximate-causation principles. Opp. 31. The court reasoned that the word "'result'" in the Failure-To-Vote Clause means "'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (citation omitted). The court

chose the wrong definition of "result." Multistate *Amicus* Br., at 9-11. Regardless, the Sixth Circuit's definition addresses factual cause, not proximate cause. *E.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266-68 & n.10 (1992). And, in other contexts, the Court has repeatedly read a different phrase in the Failure-To-Vote Clause ("by reason of") to incorporate proximate cause as well. *Id.* at 268.

In addition, Respondents wrongly suggest that if the Sixth Circuit *had* applied a proximate-causation element, the court *would* have found that the Supplemental Process makes nonvoting a proximate cause of removal. Opp. 31-32. That is so, according to Respondents, because there is more than a "'fortuitous'" connection between nonvoting and removal. Opp. 32. Yet proximate cause is a broad "label" that incorporates many different concepts. *Holmes*, 503 U.S. at 268. And HAVA clarified the demanding type of proximate causation that the NVRA requires—nonvoting must be "'the *sole* proximate cause'" of removal. Multistate *Amicus* Br., at 13 (quoting *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011)). The Supplemental Process does not remove individuals *solely* for nonvoting, as they must *additionally* fail to respond to a notice.

To meet this sole-cause test, Respondents rewrite the statute. They say that this test is met because the "Supplemental Process *expressly* relies on failure to vote—and failure to vote alone—to subject the voter to the Address-Confirmation Procedure." Opp. 31. But the Failure-To-Vote Clause bars *removing* voters based on nonvoting; it says nothing about *starting the Confirmation Procedure* based on nonvoting.

* * *

All told, the decision below conflicts with many of this Court's interpretive principles, and Respondents have said nothing to reconcile these conflicts.

III. DESPITE RESPONDENTS' "INTERLOCUTORY" CONCERNS, THE COURT WILL NOT FIND A BETTER VEHICLE TO RESOLVE THIS QUESTION

Respondents lastly argue that this case's "interlocutory" nature makes it a bad vehicle. Opp. 34-35. Not so. This case is interlocutory in only a technical sense, one that provides no reason for delay. The district court "enter[ed] final judgment," Pet. App. 40a n.1, recognizing that this question involves a purely legal issue. And while the Sixth Circuit reversed, it too recognized that the question could be decided *now* by holding that the Supplemental Process violates the NVRA. Pet. App. 24a. The court remanded only for "remedial proceedings." Opp. 34. Now or later, the question will be the same. And a decision now comes with an important benefit: The Court can resolve the question outside the context of an election. In short, "the interlocutory status of the case [is] no impediment to certiorari [because] the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention [would] serve to hasten or finally resolve the litigation." Stephen Shapiro et al., *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2017