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

BRIEF OF FORMER ATTORNEYS OF THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CAMERON T. NORRIS*
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com
*Licensed in Tennessee, but not Virginia. Practice supervised by members of the firm.

Counsel for Amici Curiae

March 9, 2017

271810

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Cited Authorities

IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are six former attorneys of the Civil Rights Division of the United States Department of Justice:

1. Colonel Karl S. "Butch" Bowers is the State Staff Judge Advocate for the Joint Force Headquarters, South Carolina Air National Guard, and a lawyer in private practice, focusing on governmental and legislative affairs, campaign finance and election law, and regulatory matters. In 2007-08, Col. Bowers was appointed by President George W. Bush as Special Counsel for Voting Matters at the U.S. Department of Justice. He also has served as the Staff Judge Advocate for the 169th Fighter Wing, as the Chairman of the South Carolina Election Commission, and as a JAG officer. Col. Bowers received a J.D. from Tulane Law School, an M.P.A. from the College of Charleston, and a B.A. from the University of South Carolina.

2. Christopher Coates is General Counsel for the American Civil Rights Union. He worked in the Voting Section of the Justice Department from 1996-2010. During ten of those years, he worked in a supervisory or management position, and during two of those years he was the Chief of the Voting Section. He earned the Walter W. Barnett Memorial Award in 2007, the Civil Rights Division's second highest award for excellence in advocacy. From 1985-96, Mr. Coates was an attorney with

1. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief, and the parties have provided written consent to its filing. No counsel for any party authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Voting Rights Project of the American Civil Liberties Union. In 1991, he was awarded the Thurgood Marshall Decade Award by the Georgia NAACP for his work in voting rights and civil rights law. He is a graduate of the University of North Carolina at Chapel Hill and the University of North Carolina School of Law.

3. Christy McCormick has worked in voting and elections for over twenty-five years, starting out as an assistant voter registrar in Connecticut in 1988. She is currently a Commissioner on and former Chair of the U.S. Election Assistance Commission (EAC). Prior to the EAC, she was a Senior Trial Attorney in the Voting Section of the Department of Justice's Civil Rights Division for eight years. During 2009-10, she was detailed by the Deputy Attorney General to the U.S. Embassy in Baghdad to work on the Iraqi national elections and rule-of-law matters. Previously, she clerked for Justice Elizabeth A. McClanahan on the Court of Appeals of Virginia. She also served as an Assistant Solicitor and Assistant Attorney General in Virginia. Commissioner McCormick received a B.A. from the University of Buffalo and a J.D. with honors from the George Mason University (now Antonin Scalia) Law School. She also has attended the William & Mary School of Law.

4. Robert D. Popper has been practicing law for twenty-six years. He has special knowledge and expertise in the area of voting law. Along with Professor Daniel D. Polsby, he is the co-creator of the "Polsby-Popper" compactness standard, used to measure racial and partisan gerrymandering. In 1995, he represented plaintiffs in a successful constitutional challenge alleging racial segregation in the design of New York's 12th

Congressional District. In 2005, Mr. Popper joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, and in 2008, he was promoted to Deputy Chief. In 2013, he joined Judicial Watch as Director of the Election Integrity Project, in which capacity he litigates voting rights cases. Mr. Popper is a graduate of the University of Pennsylvania and Northwestern Law School.

5. Bradley J. Schlozman served as a Deputy Assistant Attorney General (and Acting Assistant Attorney General) of the Civil Rights Division from 2003-06, where his responsibilities included supervision of the Voting Section. He also later served as U.S. Attorney for the Western District of Missouri from 2006-07. Mr. Schlozman now practices law at the Hinkle Law Firm and frequently represents states and municipalities on a variety of voting rights matters.

6. Hans A. von Spakovsky is a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation, where he concentrates on voting, elections, campaign finance, civil rights, immigration enforcement, and government reform. In 2006-07, he served as a Commissioner of the Federal Election Commission. From 2002-05, he served as Counsel to the Assistant Attorney General for Civil Rights, providing expertise and advice on voting and election issues. The Commission on Federal Election Reform organized by President Jimmy Carter and Secretary James Baker also sought his expertise. Mr. von Spakovsky has served as a member of the first Board of Advisers of the EAC, as Vice Chairman of the Fairfax County Electoral Board in Virginia, as a member

of the Fulton County Registration and Election Board in Georgia, and as a member of the Virginia Advisory Board to the U.S. Commission on Civil Rights. He is a graduate of Vanderbilt University Law School and the Massachusetts Institute of Technology.

During their tenures, *amici* were charged with enforcing the nation's election laws, including the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). *Amici* have a continued interest in the proper interpretation and enforcement of these laws. The Sixth Circuit adopted an interpretation of the NVRA that contradicts how *amici* enforced that statute. In fact, during *amici*'s tenures, the Justice Department negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here. The Sixth Circuit's interpretation of the NVRA squarely contradicts this history of enforcement and threatens to undermine the core purposes of the NVRA—ensuring the accuracy of state voter rolls and protecting the integrity of federal elections.

SUMMARY OF ARGUMENT

Amici were once tasked with enforcing the NVRA, part of the "complex superstructure of federal regulation" that "Congress has erected … atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). The NVRA requires the states to keep their voter rolls up to date. Each state must adopt a program that removes voters from the rolls when they move to a different jurisdiction. Although a voter cannot be removed solely because he failed to vote, a voter can be removed if the state sends him a notice and he neither

responds nor votes in two consecutive federal elections. There are no limits on when the states can send these notices or to whom they can send them; the NVRA says nothing about that.

Or at least that is how *amici* interpreted and enforced the NVRA when they served in the Civil Rights Division of the Justice Department. But the Sixth Circuit, in a 2-1 decision, rejected this settled interpretation. It struck down Ohio's Supplemental Process, which sends individuals an NVRA-compliant notice if they have not engaged in voter activity for two years. The Supplemental Process violates the NVRA, according to the Sixth Circuit, because the "trigger" for the notice is a person's failure to vote.

The Sixth Circuit erred, and its error warrants this Court's intervention. The text, structure, and history of the NVRA all point in the same direction: the NVRA requires the states to send notices before removing voters for changing residences. But it does not regulate the "triggers" for those notices. In fact, *amici* helped the Justice Department negotiate settlements with localities in Pennsylvania, Indiana, and Arkansas that required a notice procedure indistinguishable from Ohio's Supplemental Process. The decision below directly contradicts this history of federal enforcement. And it deprives the states of an important tool in combatting bloated voter rolls. "[A]ccurate and current voter registration lists," in turn, "are essential to the integrity of the election process and for the protection of the individual." H.R. Rep. No. 103-9, at 14 (1993); S. Rep. No. 103-6, at 31 (1993).

ARGUMENT

This Court should grant certiorari for two main reasons. First, the Sixth Circuit's interpretation of the NVRA conflicts with its text, structure, and history. *Amici* have long interpreted the statute oppositely, and they helped the Justice Department negotiate settlements that would be illegal under the Sixth Circuit's view. Second, the Sixth Circuit's decision deprives Ohio and other jurisdictions of an important means to combat bloated voter rolls, a real and pressing threat to the integrity of federal elections.

I. The Sixth Circuit's interpretation of the NVRA is incorrect and contradicts the Justice Department's longstanding enforcement policy.

A. The Sixth Circuit's interpretation of the NVRA conflicts with the law's text, structure, and history.

The NVRA has two main goals: maximizing the number of eligible citizens on the voter rolls and minimizing the number of ineligible citizens on the voter rolls. *See* 52 U.S.C. § 20501(b). To minimize the number of ineligible voters, the NVRA requires states to adopt a "program" that removes registered voters who become ineligible "by reason of … a change in the[ir] residence." *Id.* § 20507(a)(4)(B).

The NVRA limits how states can remove these now-ineligible voters—two of those limits are relevant here. First, under subsection (b)(2), states cannot adopt a program that "result[s] in the removal of the name of any

person … by reason of the person's failure to vote." *Id.* § 20507(b)(2). Second, under subsection (d), states cannot remove voters without confirming that they actually have changed residences. *See id.* § 20507(d). A state can conclude that a voter changed residences, however, if he "fail[s] to respond to a notice" sent by the state and "has not voted or appeared to vote" in two consecutive federal elections. *Id.* § 20507(d)(1)(B).

At first blush, these limits may seem contradictory. Subsection (b)(2) prohibits states from removing voters "by reason of [their] failure to vote." *Id.* § 20507(b)(2). Yet subsection (d)'s notice procedure allows states to remove voters precisely because they failed to vote in consecutive federal elections. But the NVRA resolves this tension by clarifying that subsection (d)'s notice procedure does *not* "result in the removal of the name of any person … by reason of the person's failure to vote" for purposes of subsection (b)(2):

> [A state program] 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 [subsection (d)'s notice procedure] 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. § 20507(b)(2) (emphases added).

The "except" clause of subsection (b)(2) was added by the HAVA in 2002. In using the word "construed," the except clause does not change the meaning of subsection (b)(2); it clarifies what subsection (b)(2) has always meant. *See Alden v. Maine*, 527 U.S. 706, 722-23 (1999) (explaining that the use of the word "construed" in the Eleventh Amendment means it was enacted "not to change" but to "address[] the proper interpretation of … the original"). The notice procedure in subsection (d) *never* "result[ed] in the removal of the name of any person … by reason of the person's failure to vote." Although the failure to vote (in two consecutive elections) is one requirement under the notice procedure, it is the voter's *failure to respond to the notice*—not his failure to vote—that ultimately leads to his removal from the voting rolls.

Another provision of the HAVA makes the same point. Section 21083 expressly incorporates the notice procedure of the NVRA. It explains the notice procedure this way: "[R]egistrants 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." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). The use of the word "solely" is

telling. It confirms that, under the NVRA, a person's failure to vote can be *a* factor in removing him from the voter rolls. It just cannot be the *sole* factor.

This distinction is precisely the one that Congress meant to draw. Both the House and the Senate reports surveyed the state voter-registration policies existing at the time and explained how the NVRA would affect them:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the 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). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. The "handful" of state programs that "remov[e] registrants from the list simply for not voting" were the ones the NVRA prohibited—not the majority of state programs that first "send a notice to assess whether the person has moved." H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46.

Ohio's Supplemental Process is not among the "handful" of programs the NVRA prohibited. Ohio sends a notice to anyone who fails to engage in any "voter activity"

for two years. If the voter does not respond to the notice and does not vote (or appear) in two consecutive federal elections—the two requirements in subsection (d) of the NVRA—Ohio cancels his registration. As Judge Siler recognized, "no voter is removed solely by reason of a failure to vote" under Ohio's Supplemental Process. Pet. App. 35a (Siler, J., dissenting). A voter is removed only if he fails to respond to the notice. And a voter can stay registered by engaging in any kind of voter activity during this four-year period. *See* Pet. 10.

The Sixth Circuit nevertheless held that Ohio's Supplemental Process violates subsection (b)(2) of the NVRA. The Sixth Circuit gave three reasons for reaching this conclusion. None is persuasive.

First, the Sixth Circuit noted that the "trigger" for the notices sent out under the Supplemental Process "is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a (majority opinion). But, as the district court explained, the word "'trigger'" is "nowhere to be found in the NVRA." *Id.* at 56a (district court opinion). The NVRA explains that subsection (d)'s notice procedure complies with subsection (b)(2), and it does not limit "the events that need or need not happen before a state may initiate" that notice procedure. *Id.* at 58a. No matter what trigger a state chooses, the removal of a voter under subsection (d)'s notice procedure is premised on the voter's failure to respond to the notice—not on his failure to vote.

Second, the Sixth Circuit reasoned that, if a state's use of subsection (d)'s notice procedure automatically satisfies subsection (b)(2), then subsection (b)(2) would be reduced to "mere surplusage." *Id.* at 17a (majority

opinion). After all, states are *required* to use subsection (d)'s notice procedure before they can remove a voter for changing his residence. *See id.* But this argument fails on multiple levels. For one, subsection (b)(2)'s prohibition on removing a voter solely for his failure to vote retains some "independent meaning" under Ohio's interpretation. *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 148-49 (1998). Unlike subsection (d), subsection (b)(2) is not confined to removal "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). No matter the meaning of subsection (d), then, subsection (b)(2) applies fully to the NVRA's other grounds for removal, including criminal conviction, mental incapacity, and death. *See id.* § 20507(a)(3)-(4).

Even in the context of changed residences, moreover, subsection (b)(2) is not superfluous. In the context of change-of-residence removals, subsection (d) and subsection (b)(2) are not two rules but one: together, they prohibit the practice of presuming that a non-voter has changed residences (and dropping him from the voter rolls) without first giving him notice. *See* H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. That Congress explained how this rule works in more than one provision is not surplusage; it is a helpful attempt to clarify how the statute operates. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007). Clarification was important because, as explained, it is not immediately obvious how subsection (b)(2) and subsection (d) coexist in the NVRA. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7 (1994) ("It is no superfluity for Congress to clarify what had been at best unclear ….").

Third, the Sixth Circuit invoked the "traditional rule" that a statute's exceptions should be "construed narrowly." Pet. App. 16a. But this "made-up canon" is illegitimate. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting). The Court has not invoked it consistently, *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 359-63 (2012), and it contradicts important principles of statutory construction, such as "'no legislation pursues its purposes at all costs'" and "[c]ongressional intent is discerned primarily from the statutory text," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

In any event, this canon cannot apply to the NVRA. The law serves *dual* purposes: increasing the registration of eligible voters and decreasing the registration of ineligible voters. *See* 52 U.S.C. § 20501(b). It is impossible to tell which purpose is the "general rule" and which purpose is the "exception." For example, the principle that a voter can be removed for failing to respond to a notice is framed as a rule, *see id.* §§ 20507(a)(4)(B); 21083(a)(4)(A), and as an exception, *see id.* § 20507(d)(1)(B). In subsection (b)(2), it is framed neither as a rule nor as an exception, but as a clarification. *Id.* § 20507(b)(2). Put simply, even if a canon that construes exceptions narrowly could ever be applied sensibly, it could not be applied sensibly here.

In sum, the Sixth Circuit's interpretation of the NVRA contradicts the law's text, structure, and history. The NVRA requires the states to remove individuals who change their residence from the voter rolls. To do so, the NVRA allows the states to remove any individual who does not respond to a notice and does not vote in two consecutive

federal elections; and it does not limit when the states can send those notices. Ohio's Supplemental Process follows this procedure. It complies with the NVRA.

B. The Sixth Circuit's decision contradicts the Justice Department's longstanding interpretation of the NVRA.

There is little support for the Sixth Circuit's interpretation of the NVRA. Indeed, *amici* have long taken the opposite view. When they were serving in the Civil Rights Division, the Justice Department *required* states to adopt procedures that are indistinguishable from Ohio's Supplemental Process. The Sixth Circuit's interpretation flouts this well-established history of enforcement.

For example, in 2007, the Justice Department sued the City of Philadelphia for violations of the NVRA, the HAVA, and the Voting Rights Act. *See* Am. Compl., *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2007 WL 1476781 (E.D. Pa. Apr. 26, 2007) [Dkt. No. 35]. With respect to the NVRA, the United States alleged that Philadelphia "fail[ed] to conduct a meaningful general program of voter registration list maintenance" and "d[id] not conduct a program that makes a reasonable effort to remove the names of ineligible voters." *Id.* ¶¶ 55-56. The parties ultimately settled. As part of that settlement, Philadelphia agreed to "send a forwardable confirmation notice to any registered elector who has not voted or appeared to vote during any election" and "remove inactive voters who fail to appear to vote during the period beginning with the date of the confirmation notice and ending after the second federal general election following the date of the

confirmation notice." Settlement Agreement ¶ 16, *United States v. Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007), *available at*, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/phila_settlement.pdf.

The settlement with Philadelphia was not an isolated agreement. During *amici*'s tenures, the Justice Department also negotiated similar agreements with the State of Indiana and Pulaski County, Arkansas. *See* Consent Decree and Order ¶ 4, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006) [Dkt. No. 4], *available at*, https://www.justice.gov/crt/consent-decree-and-order; Consent Order ¶¶ 4-8, *United States v. Pulaski County*, No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004) [Dkt. No. 9], *available at*, https://epic.org/privacy/voting/register/pulaski_cd.html.

All of these agreements required the defendants to adopt a program like Ohio's Supplemental Process. The defendants had to identify a list of nonvoters, send those nonvoters a notice asking them to confirm their address, and cancel the registration of voters who did not respond to the notice and did not vote in two consecutive federal elections. According to the Sixth Circuit, however, these agreements forced the defendants to violate federal law. *Amici* respectfully disagree. Because the Sixth Circuit's interpretation of the NVRA undermines these agreements and impugns this history of federal enforcement, it warrants this Court's review.

II. The Sixth Circuit's decision will undermine the states' efforts to maintain accurate voter rolls and to promote the integrity of elections.

Congress enacted the NVRA "to ensure that accurate and current voter registration rolls are maintained" and "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3)-(4). These objectives are complementary. "The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18. As this Court has recognized, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud," and "[a] good registration list will ensure that citizens are only registered in one place." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193-94 (2008) (opinion of Stevens, J.) (quoting Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005), goo.gl/6kCxRw). "[P]ublic confidence in the integrity of the electoral process," in turn, "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Programs like Ohio's Supplemental Process are an important tool in achieving these goals. Individuals who move to a new jurisdiction are no longer eligible to vote in their old jurisdiction and should not remain registered

there. Although states can track some of these voters through the Postal Service's change-of-address database, that data is underinclusive. Many people who change residences do not use this service. *See* Pet. 33-34. To maintain accurate voter rolls, states need to be able to use other reliable indicia of ineligibility—including a lack of voter activity.

Recent voter registration data justify Ohio's efforts. A 2012 Pew Study found major problems with the accuracy of voter rolls in the United States. According to the study, 24 million voter registrations (one out of every eight) are invalid or inaccurate. For example, 1.8 million deceased persons are listed as voters, and 2.75 million people are registered to vote in more than one state. *See* Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (2012), goo.gl/mQV8Ul. "Inflated voter lists are also caused by phony registrations and efforts to register individuals who are ineligible." Comm'n on Fed. Election Reform, *supra*. After the 2008 election, the Justice Department "sent letters to a dozen states inquiring about their list maintenance practices" because "there appeared to be significant imbalances between their numbers of registered voters and their citizen populations." U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* 38 (2009), goo.gl/xp7nhc (testimony of Christopher Coates, Acting Chief of the Voting Section).

As of 2016, thirty states participate in the Interstate Voter Registration Crosscheck Program (administered by the State of Kansas). This program analyzes the voter rolls of the participating states and identifies individuals who are registered in more than one state. As of February

2016, the Crosscheck Program revealed hundreds of thousands of voters who were potentially registered in multiple states. Of the twenty-five participating states analyzed in 2016, the following states had potential voter registration duplications with other participating states:

- Alabama – 220,247
- Arizona – 240,277
- Arkansas – 110,200
- Colorado – 257,413
- Georgia – 540,245
- Idaho – 20,834
- Illinois – 454,325
- Indiana – 452,577
- Iowa – 129,925
- Kansas – 123,502
- Kentucky – 311,126
- Louisiana – 119,207
- Massachusetts – 144,587
- Michigan – 406,268
- Mississippi – 162,288
- Missouri – 244,710
- Nebraska – 60,766
- Nevada – 85,968
- New York – 392,365
- North Carolina – 455,891
- Ohio – 386,092
- Oklahoma – 89,788
- South Dakota – 34,367
- Tennessee – 218,641
- Virginia – 284,618

Kan. Sec'y of State, *Grid of Potential Duplicate Registration Within States by DOB* (2016) (on file with counsel).

These efforts have led to numerous prosecutions. Using the Crosscheck data, in 2008 and 2010, Kansas referred fourteen instances of double voting for prosecution, and Colorado indicted or referred to the FBI ten instances of double voting. *See* Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013), goo.gl/FQwRvQ.

Similarly, the Heritage Foundation has identified 755 recent criminal convictions for voter fraud in the United States—many involving false registrations and double voting. *See* Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated Mar. 3, 2017), goo.gl/lIwvcM. Numerous convictions involve individuals who voted in more than one state. For example, Regina Beaupre pleaded guilty in 2015 to voting in the same election in both Arizona and in Michigan. *Id.* at 12. James and Karen Marshall voted in both Arizona and Kansas in 2008. *Id.* at 18. Michael Hannum pleaded guilty to voting in Nebraska and Kansas in 2012. *Id.* at 78. Ron Weems pleaded guilty to voting in both Colorado and Kansas in the 2012 and 2014 elections. *Id.* at 79. Steven Gaedtke was convicted of voting in both Arkansas and Kansas in 2010. *Id.* Wendy Rosen (a candidate for Congress in Maryland) pleaded guilty to voting in both Florida and Maryland in 2010. *Id.* at 92. Pasco Parker admitted to voting in Florida, North Carolina, and Tennessee in the 2012 general election. *Id.* at 183.

Other individuals were convicted of voting twice in different parts of the same state. In Arizona, eight individuals—David Culberson, Adam Hallin, John Hamrick, Gerald Sack, Steven Streeter, Jay Thompson,

Franklin Turner, and Jeffery Hitchcock—pleaded guilty to attempted double voting in the 2012 general election. *Id.* at 8-12. In New Hampshire, Derek Castonguay pleaded guilty to voting in Salem and Windham in the 2014 election. *Id.* at 169. In Wisconsin, Todd Murray was convicted of voting in both New Berlin and West Allis in the 2012 election. *Id.* at 229.

Still other individuals cast ballots on behalf of deceased relatives who were not removed from state voter rolls. In California, Mark Evans cast a ballot in the name of his deceased father-in-law. *Id.* at 21. In Oregon, Lafayette Keaton pleaded guilty to casting multiple ballots using his deceased son's and brother's identities. *Id.* at 195.

Accurate voter rolls are vital in the effort to combat voter fraud. Bloated rolls "create[] a potential for people to fraudulently vote under the names of these illegally registered individuals." U.S. Comm'n on Civil Rights, *supra*, at 12 (executive summary of Coates's testimony). Efforts like Ohio's Supplemental Process not only comply with the NVRA; they are essential to achieving its purposes.

CONCLUSION

For all these reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit.

Respectfully submitted,

William S. Consovoy
Counsel of Record
J. Michael Connolly
Cameron T. Norris*
Consovoy McCarthy Park PLLC
Antonin Scalia Law School
Supreme Court Clinic
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com
*Licensed in Tennessee, but not Virginia. Practice supervised by members of the firm.

Counsel for Amici Curiae

March 9, 2017