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 OF THE HOMELESS, AND LARRY HARMON,

Respondents.

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

BRIEF OF *AMICUS CURIAE* OF SENATOR SHERROD BROWN IN SUPPORT OF RESPONDENTS AND FOR AFFIRMANCE

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QUESTION PRESENTED

Does Ohio's "Supplemental Process"—a list-maintenance program that relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote"?

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INTEREST OF *AMICUS CURIAE*[1]

I am the senior United States Senator from the State of Ohio. Before my election to the Senate, I served as a member of the United States House of Representatives representing Ohio's 13th congressional district from 1993 to 2007. Before that I served as the Ohio Secretary of State from 1983–1991 and as a member of the Ohio House of Representatives.

I have long fought to ensure Ohioans' voting rights and to make voting easier and more accessible for all eligible voters. During my two terms as Ohio's Secretary of State, I oversaw eight elections. My focus was voter-registration outreach. We set up voter-registration sites in high schools and employment centers, food banks, and DMVs. I asked utility companies to include voter-registration forms in their monthly bills. I even asked McDonalds to print voter-registration forms on the back of their tray liners. As a result, some voters submitted registration cards with ketchup and mustard on them—and we accepted them.

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[1] Counsel for the parties have filed notices of blanket consent to the filing of *amicus curiae* briefs in support of either or of neither party. No counsel for a party authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared *pro bono publico*.

As Secretary of State, I also worked on S. 250, the National Voter Registration Act of 1991, which passed in both the Senate and the House but was vetoed by President Bush.

In 1993, as a freshman congressman, I was asked to help manage the floor debate on the National Voter Registration Act of 1993 (NVRA).[2] The bill passed in the House by a healthy margin and also passed in the Senate, becoming one of the first major bills signed by President Clinton. The NVRA is, of course, one of the two key federal statutes at issue in this case.

In the Presidential election of 2004, I observed a dysfunctional election marred by electronic voting machines improperly tallying votes and Ohioans' having to wait in line for hours in some cases. I observed the events of that day at Oberlin College, in my congressional district, where voters, many of them young, waited for six hours to vote. At Kenyon College, just over an hour south and not far from where I grew up, voters waited nine hours to vote.

As a Senator, I have continued to pay close attention to developments that affect the fundamental right to vote.

In March of 2009, I was one of 11 Senators to introduce S.258, the Caging Prohibition Act of 2009, which would have prohibited interference with regis-

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[2] 52 U.S.C. §§ 20501–20511 (formerly 42 U.S.C. §§ 1973gg–1973gg-10).

tration or voting based solely on unreliable information, such as a "caging list." Caging is a voter-suppression tactic in which a political party, campaign, or other entity sends mail marked "do not forward" to a targeted group of voters—often minorities or residents of minority neighborhoods. A list of those whose mail was returned "undelivered" is then used as the basis for challenges to the right of those citizens to vote, on the ground that the voter does not live at the address where he or she is registered. But there are many reasons that mail is returned undelivered. An eligible voter could be overseas on active military service or a student registered at a parent's address. The Caging Prohibition Act would have mandated that anyone who challenges another citizen's right to vote must set forth the specific grounds for that voter's alleged ineligibility and describe the evidence to support that conclusion, under penalty of perjury.

In June 2011, I raised concerns over highly restrictive photo identification voting laws that were under consideration or already signed into law in several states across the country. In a letter to the U.S. Department of Justice, I asked the agency to use its full powers under the Voting Rights Act to review these laws and their implementation.

In May 2012, along with then-Senate Majority Whip Dick Durbin (D-IL), I held an official hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights at the Carl B. Stokes United States Federal Courthouse in Cleveland. The hearing examined the impact of

Ohio's H.B. 194, a bad law that was only partially repealed while awaiting a referendum. The law would have reduced the number of early voting days from 35 to 17, eliminated voting on the weekend before an election, removed the requirement that poll workers direct voters to their proper precinct, and prohibited county boards of elections from mailing unsolicited absentee ballots.

In October of 2014, I cosponsored S.1945, entitled "The Voting Rights Amendment Act of 2014." This bill, and its bipartisan House counterpart, H.R.3899, sought to update the coverage formula used to determine which states are in violation of Section 5 of the Voting Rights Act of 1965 and to add more transparency to elections by requiring all states and counties to provide public notice of any changes shortly before an election that may affect voter turnout or alter polling places.

In December of 2015, Senator Durbin and I called on the Obama Administration to comply with the NVRA by giving Americans applying for health insurance through the Affordable Care Act's Federally Facilitated Marketplace (FFM) a meaningful opportunity to register to vote. Among other things, the NVRA ensured that all individuals who apply for public assistance are granted a meaningful opportunity to register to vote. Most states that were operating their own exchanges under the ACA already had taken steps to comply with the NVRA. But the FFM only included a link to a voter-registration form in its online application and was not in full compliance with the law. In a letter to

U.S. Secretary of Health and Human Services Sylvia Mathews Burwell and Attorney General Loretta Lynch, we argued that each time a person applies for health insurance through the FFM—whether by phone, by mail, or online—he or she should be provided with an opportunity to register to vote in compliance with the requirements of the NVRA.

SUMMARY OF ARGUMENT

There is no greater symbol of our democracy than our citizens' right to vote. The NVRA protects this fundamental right through two provisions that Ohio's Supplemental Process violates. First, the NVRA ensures that, once a citizen has properly registered to vote, a state cannot remove that person's name from the voting rolls unless he or she has become ineligible. More specifically, before deleting someone's name from the rolls by reason of a change of residence, a state must have reliable evidence that the voter has moved, and then confirm that he or she has moved through a process that the NVRA sets forth. Ohio's Supplemental Process subjects voters to this confirmation process without any reliable evidence that they have moved, and, if permitted, would wrongly cancel the registrations of thousands of eligible Ohio voters.

Second, the NVRA prohibits states from carrying out any program or activity that has the effect or outcome of removing voters from the rolls by reason of their failure to vote. Citizens have the right not to vote for any reason, and states cannot penalize them for doing so by canceling their registrations. Ohio's

Supplemental Program does exactly that because it uses registered voters' failure to vote as the trigger to subject them to the change-of-residence confirmation process.

The Help America Vote Act of 2002 (HAVA)[3] confirms that Ohio's Supplemental Process violates the NVRA. It reiterates that states must ensure that voters remain on the voting rolls unless they become ineligible, and that states cannot use the NVRA's change-of-residence confirmation process in a way that results in striking voters' names from the rolls for failure to vote.

ARGUMENT

I. Ohio's "Supplemental Process" violates the NVRA.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Finding this precious right jeopardized for many Americans, in 1993 Congress enacted the NVRA to enhance and protect access to the ballot box. It does so in two ways that are especially important here.

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[3] 52 U.S.C. §§ 20901–21145 (formerly 42 U.S.C. §§ 15301–15545).

First, the NVRA provides that, once someone has properly registered to vote, a state may not remove that person's name from the voter rolls unless he or she has become ineligible. "[O]ne of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19 (1993). The statute therefore prohibits states from striking a voter's name from the rolls for any reason other than the five that it enumerates: request by the voter; criminal conviction; mental incapacity; death; or change of residence. 52 U.S.C. § 20507(a)(3)-(4). And the statute also regulates how states may go about removing voters' names for those enumerated reasons. *Id.* at § 20507(b)-(d).

In the case of removal for change of residence, the state first must have reliable evidence indicating that a voter has changed residences and then must confirm that he or she has moved using a process that includes, at a minimum, certain steps that the statute sets forth. *Id.* at § 20507(a)(4), (c), and (d). The confirmation process is exactly that—a means to *confirm* a move that the state already has reason to believe occurred. It was never intended to be, and could not reasonably function as, a standalone procedure to identify voters who have changed residences. By treating it as one, and by deleting registered voters' names from the rolls without any reliable evidence that they have moved, Ohio's Supplemental Process violates the NVRA.

Second, the NVRA prohibits states from penalizing citizens for not voting. Congress recognized that, "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6 at 17 (1993). The NVRA therefore broadly prohibits states from carrying out any program or activity that "*result[s] 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[.]" 52 U.S.C. § 20507(b)(2) (emphasis added).[4]

Ohio's Supplemental Process violates this prohibition because it uses a registered voter's failure to vote as the trigger to subject that voter to the change-of-residence confirmation process. If the voter then fails to respond to a notice—which he or she may never receive, may mistake for junk mail, or may simply misplace—and then fails to vote in future elections, Ohio will strike that person's name from the voter rolls. The Supplemental Process therefore "result[s] in" the removal of thousands of eligible Ohio voters from the rolls by reason of their failure to vote.

As I explain further below, Ohio's Supplemental Process violates the NVRA for both these reasons. The Supplemental Process does exactly what these provisions are supposed to prevent: it improperly cancels Ohioans' voter registrations even though

[4] As I discuss below, HAVA added language to this provision and further confirms that Ohio's Supplemental Process is illegal.

they remain eligible to vote; and it penalizes Ohio voters for exercising their right not to vote in particular elections.

A. States must have reliable evidence that a voter has changed residences before subjecting that voter to the NVRA's procedure for confirming a change of residence.

The NVRA requires states to "provide that the name of a registrant may not be removed from the official list of eligible voters except" on the five bases that the statute sets forth. 52 U.S.C. § 20507(a)(3)-(4). The NVRA also regulates how states may go about removing voters' names on these bases, including how states may identify voters who have changed residences—a rationale that has been used to support abusive voter purges in the past. *Id.* at § 20507(b)-(d).

States may remove voters for change of residence only as part of a program that "makes a reasonable effort" to identify such voters. 52 U.S.C. § 20507(a)(3)(C) and (4). To clarify what such an effort entails, Congress provided an example in the NVRA. 52 U.S.C. § 20507(c). Under the statutory procedure, states may use change-of-address information from the U.S. Postal Service "to identify registrants whose addresses may have changed[.]" *Id.* at § 20507(c)(1)(A). If that information shows that the voter has moved outside the jurisdiction, states must then "use[] the notice procedure described in subsec-

tion (d)(2) *to confirm* the change of address." *Id.* at § 20507(c)(1)(B)(ii) (emphasis added).

In other words, a reasonable effort to identify voters who have changed residences requires, first, receiving reliable evidence that the voter has moved outside the jurisdiction, and then using the statutory notice procedure to *confirm* that the move occurred. This is how the Department of Justice, the agency charged with enforcing the NVRA, interpreted the statute for many years before the DOJ reversed course in this case and changed its interpretation. *See* Br. of the United States as Amicus Curiae before the Sixth Circuit at 8 ("[B]efore a State can start the confirmation process that leads to removal of voters from its voter registration rolls based on a change of residence, it must have reliable evidence that the voter has moved. Declining to vote does not provide such evidence.") The DOJ's original interpretation is correct and conforms to both the NVRA's language and Congress's intent. *See* S. Rep. No. 103-6 at 39 (1993) ("The bill would permit a state, *if it determines a voter has moved*, to remove the voter from the list only after sending a forwardable notice . . . .") (emphasis added).

The confirmation process, by itself, is not a reasonable effort to identify voters who have moved, nor was it ever intended to be. The NVRA provides that "[a] State shall not remove" a voter's name from the rolls by reason of a change of residence "unless" the voter has failed to respond to the required notice and then failed to vote, or to appear to vote, in two Federal elections. 52 U.S.C. § 20507(d)(1)(B). The NVRA

thus mandates the confirmation process as a necessary but not sufficient element of a program to identify voters who have changed residences. If the confirmation process alone were sufficient, then the exemplary program that Congress wrote into the NVRA—which requires states to receive information from the U.S. Postal Service that a voter has moved and then to confirm the move through the statutory notice procedure—would be meaningless verbiage, serving no purpose. *See* 52 U.S.C. § 20507(c). That is not what Congress intended. The language and structure of the NVRA foreclose such an interpretation. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting.") (internal quotation marks and citations omitted).

The elements of the confirmation process—failure to respond to a notice and failure to vote—cannot by themselves reliably indicate whether a voter has changed residences. Voters may fail to respond to a notice for many reasons that have nothing to do with moving outside the jurisdiction. Some will never receive it (or their response will never reach its destination) due to mailing irregularities. Others—such as active duty service members—will be called away from their homes for extended periods, preventing them from responding. Others will mistake the notice for junk mail, which often mimics official communications. Others will intend to respond but inadvertently misplace the mailing or discard it. Failure to respond to a notice may therefore help *confirm* a change of residence that the state already has reason to believe occurred, as the NVRA pro-

vides; but it cannot by itself reliably indicate that a voter has moved.

Likewise, failure to vote cannot by itself reliably indicate a change of residence. As I explain below, the NVRA protects citizens' right not to vote, which they may do for many reasons. Congress also recognized that failure to vote is empirically a poor indicator that a voter has become ineligible. S. Rep. No. 103-6, at 17 (1993) (noting that purging non-voters is "highly inefficient and costly" and results in removing many eligible voters' names from the rolls "merely for exercising their right not to vote.") Indeed, that inadequacy was vividly displayed here, where, without the Sixth Circuit's order, the votes of over 7,500 eligible Ohioans would have gone uncounted in the 2016 election because Ohio's Supplemental Process wrongly identified them as having moved out of the jurisdiction. Pet. Br. at 14.

In short, the NVRA prohibits states from striking voters from the rolls by reason of change of residence unless the state first receives reliable evidence that the voter has moved and then confirms that he or she has moved using the statutory process. Ohio's Supplemental Process subjects voters to the confirmation process without any reliable evidence that they have moved, and, if permitted, would delete thousands of eligible citizens' names from the voting rolls. The Supplemental Process thus violates the NVRA.

B. Ohio's Supplemental Process "result[s] in" the removal of numerous eligible voters by reason of their failure to vote.

When Congress enacted the NVRA, it recognized that, "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6 at 17 (1993). The NVRA therefore prohibits states from carrying out any program or activity that "*result[s] in*" cancellation of any person's voter registration by reason of his or her failure to vote. 52 U.S.C. § 20507(b)(2) (emphasis added).

By prohibiting programs or activities that "result in" removal by reason of failure to vote, the NVRA bars voter-purge programs that use change of residence as their stated rationale for removal if those programs have the effect or outcome of removing voters by reason of their failure to vote. Section 8(b)(2) of the NVRA[5] imposes an independent requirement that programs must meet, even if they comply with section 8(a)(3).[6]

That protection is necessary because, as Congress recognized, non-voters "may not have moved or died or committed a felony. Their only 'crime' was not to have voted in a recent election." S. Rep. No. 103-6 at 17 (1993). People do not cast a ballot for many reasons, including dissatisfaction with the current slate of candidates and circumstances be-

[5] 52 U.S.C. § 20507(b)(2).

[6] 52 U.S.C. § 20507(a)(3).

yond their control such as lack of transportation, multi-hour delays at polling places, illness or disability, and many others. Additionally, many of our service members fail to cast ballots due to the unique challenges of overseas voting for deployed military personnel. Congress therefore recognized that using failure to vote "as an inexpensive method for eliminating persons believed to have moved or died" inevitably results in deleting eligible voters from the rolls. *Id.* Some members also observed that this practice disproportionately harms lower income people and racial minorities. *Id.* at 18.

Ohio's Supplemental Process "result[s] in" purging these voters by reason of their failure to vote because it uses failure to vote as the trigger to subject them to the statutory confirmation process. 52 U.S.C. § 20507(b)(2). Under the Supplemental Process, voters who sit out a single election are compelled to take an affirmative step—responding to a notice or voting in an upcoming election—to remain registered. Whereas the NVRA imposes the burden on states to ensure that voters remain on the rolls unless they become ineligible, the Supplemental Process imposes the burden on citizens to remain on the rolls if they fail to vote even once. And whereas the NVRA protects voters' right not to vote, the Supplemental Process penalizes them for not voting and results in the cancellation of thousands of eligible voters' registrations by reason of their failure to vote. For this reason as well, the Supplemental Program violates the NVRA.

II. HAVA reaffirms that Ohio's Supplemental Process is illegal.

Congress enacted HAVA in the aftermath of widespread voting problems in the 2000 election. HAVA makes clear that it only reinforces—and in no way diminishes—the protections afforded to voters under the NVRA. It states that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a)(4).

HAVA reaffirms both provisions of the NVRA discussed above. First, it requires states to maintain their official computerized lists of registered voters "in a manner that ensures that . . . only voters who are not registered or who are not eligible to vote are removed from the computerized list[.]" 52 U.S.C. § 21083(a)(2)(B)(ii). States also must put in place "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." *Id.* at § 21083(a)(4)(B). HAVA therefore reaffirms that states must have reliable evidence that a voter has changed residences before striking his or her name from the voter rolls for that reason. Ohio's Supplemental Process fails this test because it deletes voters' names from the rolls without any reliable evidence that they have moved. If permitted, the Supplemental Process would wrongly cancel the registrations of thousands of eligible Ohio voters.

Second, consistent with the NVRA, HAVA states that "registrants who have not responded to a notice

and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote*." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). In other words, even when states use the statutory notice procedure, they must ensure that no voter's name is removed from the rolls solely by reason of his or her failure to vote. But that is precisely what Ohio's Supplemental Procedure does, because it uses failure to vote as the trigger to subject voters to the confirmation process. HAVA therefore reaffirms that Ohio's Supplemental Process violates the NVRA for both reasons discussed above.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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