No. 16-980

In The Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR ERIC H. HOLDER, JR., THOMAS E. PEREZ, BILL LANN LEE, DEVAL L. PATRICK, LORETTA KING, WILLIAM R. YEOMANS, JAMES P. TURNER, PAMELA S. KARLAN, MATTHEW COLANGELO, JULIE A. FERNANDES, SAMUEL R. BAGENSTOS, SPENCER A. OVERTON, ANITA S. EARLS, JOSEPH RICH, J. GERALD HEBERT, GILDA R. DANIELS, AND ROBERT KENGLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former attorneys for the United States Department of Justice, all of whom had responsibility for the Department's interpretation and enforcement of the National Voter Registration Act, 52 U.S.C. § 20501 *et seq*. ("NVRA"). *Amici* include individuals who served as career civil servants, as well as those who held politically appointed positions. *Amici* have served in both Republican and Democratic administrations.

In his brief, the Solicitor General has renounced the interpretation of the NVRA that the Department repeatedly endorsed since the statute's enactment in 1993 – an interpretation that the Department endorsed even in its brief in this very case in the Sixth Circuit. Unusually, the Solicitor General's brief was not signed by a single career attorney in the Civil Rights Division, the component of the Department that is responsible for enforcing the NVRA provisions at issue here. And the Solicitor General explicitly described "the change in Administrations" as having motivated his renunciation of the Department's prior interpretation. U.S. Br. 14. *Amici* submit this brief in their individual capacities to provide the Court with the Department's longstanding view of the Question

[1] Pursuant to S.Ct. R. 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case.

Presented, the view the current administration has abandoned.

Amici are:

Eric H. Holder, Jr. served as Attorney General of the United States from 2009 to 2015. From 1997 to 2001, he was Deputy Attorney General, and from 1993 to 1997 he was United States Attorney for the District of Columbia. From 1986 to 1988, he was an attorney in the Criminal Division.

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SUMMARY OF ARGUMENT

I. Under Ohio's "supplemental process," the failure to vote is both the reason the state initiates its voter-purge procedure and the most immediate cause of a registrant's removal from the rolls at the end of that procedure. That process violates the NVRA. It is not a "reasonable effort" to identify voters who changed their residence, 52 U.S.C. § 20507(a)(4)(B), and it "result[s] in the removal" of a registrant "by reason of the person's failure to vote," *id.* § 20507(b)(2).

When Congress adopted the NVRA, it declared the right to vote to be a fundamental right. As with other fundamental rights of expression and association, Congress recognized that the right to vote includes a right

not to vote. It accordingly sought to protect citizens against being penalized for nonvoting by being purged from the voter rolls. The NVRA provided that voters may be removed from the rolls for only four reasons: the registrant's request; criminal conviction or mental incapacity; death; or a change in residence. The statute specifically barred practices that result in the removal of a registrant due to the failure to vote.

Ohio defends its "supplemental process" as a means of identifying voters who have changed their residence. But the text and structure of the NVRA make clear that the failure to vote – even when followed by the mail-notice procedure required by the statute – is not a "reasonable" means of identifying those individuals who have become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). There are simply too many competing explanations for a voter's failure to cast a ballot at a particular election. Congress recognized these problems when it adopted the NVRA. Under the one means specifically listed in the statute for identifying voters who have moved, a state would begin the mail-notice voter-purge process only *after* it had obtained independent information – in the form of a listing on the Postal Service's change of address database – that the voter had in fact moved. Although the NVRA does not require a state to use the Postal Service's database, the "reasonableness" standard requires, at a minimum, that the state have some reliable, independent indication that a voter has moved before initiating the voter-purge process.

In addition to being an unreasonable means of identifying voters who have moved, Ohio's "supplemental process" violates the failure-to-vote clause in the NVRA and the parallel language in the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ("HAVA"). Under Ohio's process, the failure to vote is both the trigger that sets the purge process in motion and the final step that leads to the removal of a voter from the rolls. The state argues that the failure to vote is not the "sole proximate cause" of the removal, because the voter must also have failed to respond to a notice mailed by election officials. But that argument denies effect to the failure-to-vote clauses in the NVRA and HAVA. It also disregards ordinary principles of proximate causation. If the failure-to-vote clauses mean anything, they must mean that a state may not use nonvoting as a basis for initiating the mail-notice purge process. Although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from using nonvoting to *derive* its belief that a voter has changed her residence.

Ohio argues that its interpretation of the NVRA is supported by the canon of constitutional avoidance. But reading the NVRA to bar the "supplemental process" raises no serious constitutional question. To the contrary, it is Ohio's interpretation that would raise serious constitutional questions, by reading the NVRA to have empowered states to remove citizens from the

rolls simply for exercising their protected right not to vote.

II. In the Sixth Circuit, the United States contended that Ohio's "supplemental process" violates the NVRA. That argument was consistent with the Department of Justice's longstanding interpretation of the NVRA. From 1994 until the Solicitor General's brief in this case, the Department had repeatedly expressed its view that the statute prohibits states from initiating a voter-purge process based merely on the failure to vote.

The Department took that position in litigation and correspondence with states in the 1990s, shortly after the NVRA became law. After HAVA's 2002 enactment, the Department negotiated settlement agreements in Arkansas (in 2004), Indiana (in 2006), and New Mexico (in 2007), all of which barred the defendants from initiating a voter-purge process based on nonvoting. A 2007 settlement agreement with the City of Philadelphia contained some language that might appear inconsistent with those other decrees, but that agreement did not, in context, undermine the Department's longstanding interpretation. In 2010, the Department issued extensive guidance regarding the application of the NVRA – guidance that specifically reaffirmed that the failure to vote cannot be the basis for commencing a purge process. And the Department subsequently defended that interpretation in the lower courts. The Solicitor General's brief thus

marks a significant departure from the Department's longstanding position.

ARGUMENT

I. The NVRA Prohibits Ohio's "Supplemental Process"

Under Ohio's "supplemental process," the failure to vote is the reason the state initiates its voter-purge procedure by sending a confirmation notice. The failure to vote is also, as the Solicitor General acknowledges, "the most immediate cause" of a voter's removal *after* the state sends that notice. U.S. Br. 19 n.5. That process is not, as the NVRA requires, a "reasonable effort" to identify voters who are "ineligible" by reason of a change in residence. 52 U.S.C. § 20507(a)(4)(B). To the contrary, it violates the statute by "result[ing] in the removal of" a registrant "by reason of the person's failure to vote." *Id.* § 20507(b)(2).

A. The NVRA Protects Both the Right to Vote and the Right Not to Vote

When it adopted the NVRA, Congress declared that "the right of citizens of the United States to vote is a fundamental right." 52 U.S.C. § 20501(a)(1). Congress recognized that, as with other fundamental rights, the right to vote includes a right *not* to vote. The House and Senate Reports explained that the NVRA aimed "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." S. Rep. No. 103-6 at 17 (1993) ("Senate Report"). Accord H.R. Rep. No. 103-9 at 18 (1993). The Senate Report noted that citizens not only have the affirmative right to vote; they also "have an equal right not to vote, for whatever reason." Senate Report at 17. And it explained that the statute sought to prevent states from "penaliz[ing] such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election." *Id.* "Such citizens," the Report went on, "may not have moved or died or committed a felony. Their only 'crime' was not to have voted in a recent election." *Id.* Quoting the testimony of Rev. Jesse Jackson, the Report observed: "'No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue.'" *Id.*

Congress's understanding of the right to vote – and the right *not* to vote – resonates with two important strands of this Court's cases. First, the Court has recognized that voting is an important means of expression and association. Voting is the ultimate expression of one's political preferences. And it is a means of associating with others to express support for a political candidate and the agenda for which that candidate stands. See, *e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992) (describing voting for a chosen political party as implicating "the constitutional interest of like-minded voters to gather in pursuit of common political end" and to "express their own political

preferences"); *Anderson v. Celebrezze*, 460 U.S. 780, 787-788 (1983) (describing voting for a preferred candidate as an aspect of an individual's "right to associate with others for political ends"); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (describing "the right to vote" as "that of having a voice in the election of those who make the laws") (internal quotation marks omitted). Cf. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (discussing "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"). In *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1440-1441 (2014), Chief Justice Roberts's plurality opinion specifically included "vot[ing]" along with "run[ning] for office," "urg[ing] others to vote for a particular candidate, volunteer[ing] to work on a campaign, and contribut[ing] to a candidate's campaign," all as components of the "right to participate in electing our political leaders."

Second, this Court has recognized that the rights to speak and associate include a right *not* to speak and associate. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (describing "[t]he right to speak and the right to refrain from speaking" as "complementary").

The NVRA's protection of the right not to vote is most overt in the failure-to-vote clause, 52 U.S.C.

§ 20507(b)(2), which we discuss in Part I.C., *infra*. But the statute's express, narrow limitations on the circumstances in which states may remove properly registered voters from the rolls, which we discuss in Part I.B., immediately below, plainly advance the same end. By recognizing that citizens do not lose their right to vote in future elections by failing to vote in past elections, the NVRA underscored the important principle that the right to vote includes a right not to vote.

B. Under the NVRA's Narrow Limitations on Removing Registrants, States May Not Initiate a Voter-Purge Process Based on the Failure to Vote

As an exercise of Congress's Elections Clause power, the NVRA did not, of course, simply adopt the rules this Court has applied in its First Amendment jurisprudence. But the statute did impose narrow limitations on the circumstances in which states may remove registered voters from the rolls. Those limitations prohibit states from using the mere failure to vote as the basis for initiating a voter-purge process.

Section 8(a)(3) of the NVRA, 52 U.S.C. § 20507(a)(3), directs that "the name of a registrant may not be removed from the official list of eligible voters except" for the following delineated reasons: "at the request of the registrant," *id.* § 20507(a)(3)(A); "as provided by State law, by reason of criminal conviction or mental incapacity," *id.* § 20507(a)(3)(B); or "as provided under paragraph (4)," *id.* § 20507(a)(3)(C). Paragraph (4) provides, in turn, that states shall "conduct a

general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" either "the death of the registrant" or "a change in the residence of the registrant." *Id.* § 20507(a)(4). And Section 8(d), *id.* § 20507(d), further limits states' ability to remove voters based on a change in residence. That provision directs that a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant" either (a) "confirms in writing that the registrant has changed residence" or (b) "has failed to respond to a notice" sent by forwardable mail, and has not voted in the two federal general elections following that notice. *Id.*

The statutory text thus provides that, once a state determines that a voter is eligible and places her on the rolls, it can remove her for only four reasons: the registrant's request; criminal conviction or mental incapacity; death; or a change in residence. Noticeably absent from this list is the failure to vote.

Ohio does not defend its "supplemental process" as a means of removing voters due to request, criminal conviction or mental capacity, or death. It defends the process only as a means of removing those who have moved. Ohio Br. 49. See also Jon Husted, Ohio Sec'y of State, Directive No. 2011-15 at 1 (Apr. 18, 2011), https://goo.gl/frd7Pb (stating that the "supplemental process" seeks "to identify electors whose lack of voter initiated activity indicates they may have moved"). But

the text and structure of the NVRA make clear that the failure to vote, even when followed by the Section 8(d)(2) confirmation procedure, is not a "reasonable" means of identifying those individuals who have become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B).

The failure to vote is not a reasonable indication that someone has moved. There are simply too many competing explanations for a citizen's failure to cast a ballot at a particular election. See generally LYN RAGSDALE & JERROLD G. RUSK, THE AMERICAN NONVOTER 114 (2017) (describing many reasons for not voting, including a lack of clear distinctions between candidates, negative views of one or both candidates, and "hardship" that makes it difficult to vote). Nonvoters may conclude that no candidate running in a given election sufficiently represents their views, and thus that they have nothing to vote for. See JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 121-153 (2014). They may conclude that there is little difference between the candidates, so that choosing between them is pointless. See RAGSDALE & RUSK, *supra*, at 105-108. Or they may conclude that the election will not be a competitive one, so their votes are unlikely to matter. See LEIGHLEY & NAGLER, *supra*, at 122-123. Increasingly sophisticated gerrymandering, which often packs members of the minority party into noncompetitive districts, see Richard Holden, *Voting and Elections: New Social Science Perspectives*, 12 ANN. REV. L. SOC. SCI. 255, 259 (2016), exacerbates these problems.

And, for many citizens, the failure to vote may result from barriers imposed by state and local election procedures. Limitations on absentee and early voting, for example, present a particular problem for poor and working-class voters.[2] So do restrictive voter identification laws. See, *e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (*en banc*) (noting district court findings that Texas's voter identification law "disproportionately impacts the poor"), cert. denied, 137 S. Ct. 612 (2017).

It is apparent from the NVRA's legislative history that Congress recognized these problems. The Senate Report explains that, even when states "use the procedure of removal for non-voting merely as an inexpensive method for eliminating persons believed to have moved or died," the result will be to remove "many persons" from the rolls "merely for exercising their right not to vote." Senate Report at 17. The Report noted concerns that such a practice "tends to disproportionately affect persons of low incomes, and blacks and other minorities." *Id.* at 18.

The Ohio process, which begins purge procedures after failure to vote for a mere two years, presents these problems in a particularly extreme form. Under

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[2] Limitations like these have been a particular focus of controversy in Ohio. See, *e.g.*, *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (affirming preliminary injunction against law limiting early voting for nonmilitary voters); *Ohio State Conference of N.A.A.C.P. v. Husted*, No. 2:14-CV-404 (S.D. Ohio, April 17, 2015) (settlement agreement in litigation challenging limitations on early voting hours), https://goo.gl/bJQsUk.

that process, a voter will be subject to the purge procedures if she votes in a presidential election but then fails to vote in the subsequent midterm election. But many citizens vote only in presidential years. See Drew DeSilver, *Voter Turnout Always Drops Off for Midterm Elections, But Why?*, PEW RESEARCH CENTER FACTANK, July 24, 2014, https://goo.gl/84ZHKE. In midterm elections, voters who see no clear ideological differences between the candidates are even more likely to stay home than in presidential elections. See RAGSDALE & RUSK, *supra*, at 108. Midterm falloff is particularly significant for minority voters. See Ronald Brownstein, *The Great Midterm Divide*, THE ATLANTIC, Nov. 2014, https://goo.gl/P3QSBn ("Midterm elections have long attracted fewer voters than elections in presidential years have, with minorities and young people among the groups most likely to stay home."). Especially following the 2008 presidential election – which saw historically high turnout – a failure to vote in the following election does not at all suggest that a voter had moved out of the jurisdiction. See DeSilver, *supra* (noting that in 2008 "57.1% of the voting-age population cast ballots – the highest level in four decades," while "two years later only 36.9% voted in the midterm election").

The unreasonableness of the Ohio process is apparent when compared to the one means specifically listed in the NVRA for identifying voters who have moved. The statute provides that a "State may meet the requirement of subsection (a)(4) by establishing a

program under which" it uses "change-of-address information supplied by the Postal Service" to "identify registrants whose addresses may have changed." 52 U.S.C. § 20507(c)(1)(A). If "it appears from [that] information" that "the registrant has moved to a different residence address not in the same registrar's jurisdiction," the state must then "use[] the notice procedure described in subsection (d)(2) to confirm the change of address." *Id.* § 20507(c)(1)(B)(ii).

Under the procedure laid out in the statute, the purge process is not triggered by voting behavior. Instead, it is triggered by an independent indication that the voter has moved – the voter's listing on the National Change of Address (NCOA) database maintained by the United States Postal Service. Of course, a state is not limited to using the NCOA database. As the Department of Justice has long explained, there are other independent indications of a change in residence on which a state might rely to begin the purge process. See Civil Rights Div., Dep't of Justice, *The National Voter Registration Act of 1993 (NVRA)* at ¶¶ 33-35, https://goo.gl/fMWdc8 ("2010 NVRA Guidance").[3] For example, a state could send "a uniform mailing" to "all voters in a jurisdiction," and then "use information obtained from returned non-deliverable mail" to begin

[3] The Department first issued this guidance in 2010. On August 7, 2017, to accompany the Solicitor General's filing of his brief in this case, the Department amended the language relevant to this case, and deleted the prior language from its website. See U.S. Br. 14 n.4. We cite the 2010 guidance, as it appeared on the Department's website prior to that change; it can currently be found on the Internet Archive's "Wayback Machine."

the confirmation procedure set forth in the statute. *Id.* ¶ 33. A 2009 report by the National Association of Secretaries of State found that 14 states used "nonforwardable address confirmation mailings" in this way. Nat'l Ass'n of Secretaries of State, *Maintenance of State Voter Registration Lists* 6 (Oct. 6, 2009), https://goo.gl/wgjiAC. Or a state could begin the process based on some other "reliable second-hand information indicating a change of address outside of the jurisdiction." 2010 NVRA Guidance ¶ 34. For example, the National Association of Secretaries of State found that five states employ the confirmation process "whenever information received from the state's department of motor vehicles indicates that a registered voter has surrendered their driver's license and obtained a new license in a different state." Nat'l Ass'n of Secretaries of State, *supra*, at 7. And states may rely on other information as well, such as "juror notices," *id.*, or even in-person canvassing, see *id.* at 22, 49, 54.

The mere failure to vote, however, is not a reliable indication that an individual has become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). To the contrary, if a state may begin the purge process simply because a registrant failed to vote, there is a substantial risk that the result will be to penalize the exercise of a protected right to refrain from voting. That is not a fair reading of the NVRA's text, which requires states to make a "reasonable effort" to identify those voters who are no

longer eligible – not those who have simply declined to vote. 52 U.S.C. § 20507(a)(4).[4]

C. Under the Failure-to-Vote Clauses in the NVRA and HAVA, States May Not Use the Failure to Vote to Initiate a Voter-Purge Process

1. Ohio argues that its "Supplemental Process" is consistent with the failure-to-vote clause in the NVRA. Ohio Br. 19-35. As originally enacted, that clause provided that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll * * * 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." Pub. L. No. 103-31 § 8(b)(2), 107 Stat. 77, 87 (1993).

But a problem immediately arose in interpreting that clause. A separate provision of the statute, Section 8(d), mandates that states use the confirmation procedure before removing a voter based on change

[4] Departing from the position the government took below, see U.S. CA6 Br. 18-20, the Solicitor General argues that Section 8(a)(4) "should not be read as" imposing limitations on states, because it uses the phrase "reasonable efforts." U.S. Br. 28. But whatever "latitude" that subsection provides to states, cf. *id.*, Sections 8(a)(3) and 8(a)(4) together plainly prohibit using un-"reasonable" means to identify voters who have moved. As we show in text, and as the government argued below, Ohio's "supplemental process" violates that prohibition.

in residence. See 52 U.S.C. § 20507(d). Under that procedure, unless the voter confirms in writing that she no longer lives in the jurisdiction, the immediate reason the state will remove her from the rolls will be her failure to vote. See U.S. Br. 19 n.5 (conceding that "[t]he registrants' failure to vote after receipt of the notice could fairly be deemed a proximate cause of their removal – indeed, it is the most immediate cause"). Controversy quickly developed regarding how to reconcile that confirmation procedure with the failure-to-vote clause. In one of the first cases litigated under the statute, California proposed to send a nonforwardable residency confirmation postcard to all registrants who had not voted within the past six months. For any registrant for whom that postcard was returned as undeliverable, the state would begin Section 8(d)'s two-election-cycle mail-notice procedure. See *Wilson v. United States*, No. C 95-20042 at 5 (N.D. Cal. Nov. 2, 1995), as modified by Joint Stipulation to Substitute Language (N.D. Cal. Nov. 13, 1995). Private plaintiffs and the United States argued that California's proposal violated the failure-to-vote clause, but the court disagreed. Because the state did not initiate the Section 8(d) procedure until the postcard was returned as undeliverable – an action that gave the state an independent indication that the voter had moved – the court concluded that California's proposal complied with the NVRA. See *id.* at 5-6.

When it enacted the Help America Vote Act in 2002, Congress resolved any controversy by making clear that Section 8(b)(2)'s failure-to-vote clause does

not bar Section 8(d)'s confirmation procedure. HAVA added the following language to the end of NVRA Section 8(b)(2):

> except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) 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.

52 U.S.C. § 20507(b)(2). HAVA also added a separate, stand-alone provision that required states to adopt a "system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(A). That provision included its own, parallel failure-to-vote clause. Congress directed that, "consistent with the National Voter Registration Act of 1993, 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." *Id.* (citation omitted).

2. Ohio and the Solicitor General contend that these provisions authorize the "Supplemental Process." Because no registrant is struck from the rolls unless she has *both* failed to respond to the mail notice *and* failed to vote, the state argues that the failure to vote is not the "sole proximate cause" of the registrant's removal. Ohio Br. 24-25. That is true, the Solicitor General argues, even though failures to vote serve as both the trigger that sets the purge process in motion and the final step that leads to the removal of a voter from the rolls. See U.S. Br. 16-17. That argument fails for two reasons.

a. First, Ohio's argument misses the point. The HAVA amendments clarified that a state does not violate the failure-to-vote clause merely by using the Section 8(d) procedure to confirm that a registrant has moved. They "made a conclusion clear that might otherwise have been fought over in litigation," *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 87 (2002), and thus, contrary to the Solicitor General's insinuation, had a "practical effect." U.S. Br. 22. Cf. Ohio Br. 41 (arguing that its interpretation is necessary to prevent the HAVA amendments from being "meaningless") (internal quotation marks omitted). But they did not at all change the underlying rule, in Section 8(a) of the NVRA, that the state must use a reasonable means of identifying registrants to whom to send the confirmation notice in the first place. As we showed above, Section 8(a) requires states to have reliable independent information suggesting that the registrant has

moved out of the jurisdiction before commencing the mail-notice process. See Part I.B., *supra*.

Indeed, the NVRA's text makes clear that the mail-notice process is, as Ohio acknowledges, a "Confirmation Procedure," Ohio Br. 7-8 – a process designed to *corroborate* some *independent* indication that the registrant is no longer eligible. See Black's Law Dictionary (10th ed. 2014) (definition of "confirm" is "verify" or "corroborate"). Thus, Section 8(c) provides that when a state uses the NCOA procedure to identify voters who have moved, it must then "use[ ] the notice procedure described in subsection (d)(2) to *confirm* the change of address." 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added). And Section 8(d) provides that in all cases a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant" either "*confirms* in writing that the registrant has changed residence" or fails to respond to the mail notice. *Id.* § 20507(d)(1) (emphasis added).

When a state initiates the Section 8(d) process based solely on a failure to vote, the process cannot *confirm* the registrant's change of address, because that failure may indicate nothing more than that the registrant has exercised the protected right not to vote. See Parts I.A. & B., *supra*. A voter's lack of response to the notice, too, does not indicate that she has moved out of the jurisdiction. The voter may have failed to see the notice, thought it was junk mail, or intended to return the card but been unable to follow through in the

press of daily life. If the process began with some reliable evidence that a registrant had moved – such as the individual's inclusion on the NCOA database, or the return of mail as undeliverable to her address on file – the subsequent failure to return a card or to vote might lead a reasonable person to conclude that the registrant had, in fact, left the jurisdiction. Absent any such evidence, the failure to vote or return the card is too readily explained on too many alternative grounds. It thus cannot "confirm" that the registrant is no longer eligible to vote.

Neither HAVA's amendment to the NVRA's failure-to-vote clause, nor its stand-alone file-maintenance provision, suggests that a state may employ the mail-notice process *without* first having reliable independent information that a registrant is no longer eligible. The amendment to the failure-to-vote provision specifically allows the state to employ "the procedures described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2) – procedures that, as we have shown, are expressly designed to *confirm* prior indications that a registrant has moved. And the stand-alone file-maintenance provision requires that a state's efforts to remove ineligible voters must be "consistent with the National Voter Registration Act." 52 U.S.C. § 21083(a)(4)(A). See also *id.* § 21083(a)(2)(A)(i) (providing that "[i]f an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993"). It thus does not grant states any latitude that the NVRA denies them.

Indeed, HAVA provides that, except for a specific provision relating to identification requirements for first-time voters who registered by mail, "nothing in [the statute] may be construed to authorize or require conduct prohibited under" the NVRA. 52 U.S.C. § 21145(a)(4).

b. Second, Ohio's interpretation denies independent force to the NVRA's failure-to-vote clause, and to the parallel language in HAVA's stand-alone file-maintenance provision. A "failure to respond to a notice," the state contends, "breaks th[e] required causal connection between nonvoting and removal." Ohio Br. 19. Under that argument, it is impossible to violate the failure-to-vote clause, and the parallel HAVA provision, so long as a state conducts the mail-notice procedure before ultimately removing a registrant from the rolls. And that is true even if a registrant's failure to vote is the proximate or even sole reason why the state initiates the purge process. If Ohio's interpretation were right, there would be no need for Section 8(b)(2)'s failure-to-vote clause, because Sections 8(c) and (d) of the NVRA already require states to conduct the mail-notice procedure before removing registrants from the rolls.

In its brief on the merits, Ohio tries to suggest some daylight between the provisions. Because Sections 8(c) and (d) specifically address removal of voters based on a *change in residence*, the state says that the failure-to-vote clause has the independent effect of barring states from using nonvoting – at least absent the confirmation process – to determine that a registrant

has *died*. Ohio Br. 34. But states do not use nonvoting to determine that a registrant has died. They have much more authoritative ways of making that determination. See Nat'l Ass'n of Secretaries of State, *supra*, at 9 ("In most states, information on deceased voters is received from a state office of vital statistics, the state department of health, or a similar entity. Additionally, a number of states permit election officials to remove a deceased voter from sources such as obituary notices, copies of death certificates, and notification from close relatives."). It is implausible that Congress would have included the failure-to-vote clause to address removals due to death.

Ohio also asserts that Congress used different language to describe the voters covered by Section 8(b)'s failure-to-vote clause and Section 8(d)'s requirement to use the mail-notice procedure. See Ohio Br. 34-35 (arguing that Section 8(d) applies only to "registrants," while Section 8(b) applies to "any person"). That difference, it avers, suggests that Section 8(d)'s confirmation procedure applies only when a state seeks to remove voters who have become ineligible *after* they registered to vote, while "the Failure-To-Vote Clause applies even to state programs or activities designed to uncover persons who were wrongly added to the rolls as an initial matter." Ohio Br. 35.

Ohio's argument founders on a basic problem: The language Congress used to describe the reach of Section 8(b) is essentially identical to the language it used to describe the reach of Section 8(d). Compare 52 U.S.C. § 20507(b)(2) (covering "the removal of the name of any

person from the official list of voters registered to vote"), with *id.* § 20507(d)(1) (covering the removal "of a registrant from the official list of eligible voters"). And in HAVA's stand-alone file-maintenance provision, the mail-notice clause and the failure-to-vote clause use exactly the same language to describe the individuals they cover. See 52 U.S.C. § 21083(a)(4)(A) (stating 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") (emphasis added). Ohio's interpretation rests on a strained effort to find a distinction between the language of NVRA Section 8(b) and 8(d), and it denies independent force to the failure-to-vote clause in HAVA's file-maintenance provision.

3. If the failure-to-vote clauses in the NVRA and HAVA mean anything, they must mean that a state may not use nonvoting as a basis for initiating the mail-notice purge process. Although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from *deriving* its belief that she has changed her residence based on nonvoting. If a registrant's failure to vote before the mailing of the notice is the reason the state *begins* the mail-notice process, and the failure to vote after not returning the card is, as the Solicitor General concedes, "the most immediate cause" of the registrant's removal from the rolls at

the *end* of the process, U.S. Br. 19 n.5, the state's action plainly "result[s] in the removal" of that registrant "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

Contrary to Ohio's suggestion, Ohio Br. 19, 24-25, the registrant's failure to return the card sent with the notice is not an independent, intervening cause. The state, after all, waits a full two federal election cycles after sending that notice before removing the voter from the rolls. The failure to vote – which is the reason the state sends the notice in the first place, and which must continue for a four-year period afterwards – is the proximate cause of the registrant's removal. The removal thus violates the NVRA's failure-to-vote clause.

Nor can the state find shelter in the "solely by reason of" language of *HAVA*'s failure-to-vote clause. 52 U.S.C. § 21083(a)(4)(A). The state suggests that if there is *any* other fact that led a voter to be removed from the rolls – such as not returning a card – then the failure to vote cannot have been the "sole[]" reason for the removal. Ohio Br. 39. That is an implausible reading of the statutory text. As an analytic matter, there is never a *single* but-for cause for anything. This Court has thus read statutory "sole cause" language in a more practical way, as imposing a requirement of proximate cause. For example, in *F.C.C. v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), the Court considered the meaning of a statute that barred the FCC from revoking the license of a debtor "'solely because'" the

debtor had not paid a debt dischargeable in bankruptcy. *Id.* at 300 (quoting 11 U.S.C. § 525(a)). The FCC agreed that the proximate reason it cancelled the debtor's license was the failure to pay a debt, but it argued that it had a "valid regulatory motive" for the cancellation; that motive, it contended, meant that the failure to pay the debt was not the "sole[]" reason for its action. *Id.* at 301. In an opinion by Justice Scalia, the Court rejected that argument. The sole-cause language, the Court held, "means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation – the act or event that triggers the agency's decision to cancel." *Id.*

So too here. The failure to vote is what triggers Ohio's "supplemental process," and it is the final proximate step before the state removes a registrant under that process. The process thus violates the failure-to-vote clauses in both the NVRA and HAVA. And even if those clauses were not alone sufficient to establish the unlawfulness of Ohio's process, they would nonetheless bolster the conclusion that the process violates Section 8(a) of the NVRA, because it is not a "reasonable effort" to identify voters who are ineligible due to a change in residence.

D. Principles of Constitutional Avoidance, if Anything, Argue Against Ohio's Construction of the NVRA

Ohio argues that its interpretation of the NVRA is supported by the canon of constitutional avoidance. Ohio Br. 46-53. Ohio contends, principally, that barring the use of nonvoting as a basis for beginning a purge process will improperly encroach on the state's power to make residency a qualification for voting. *Id.* at 49-51. That argument is unpersuasive. States have ample means of obtaining information about residency even without relying on the failure to vote. As we have shown, states can use the Postal Service's NCOA database, send registrants a nonforwardable mailing, or rely on other reliable information. See pp. 15-17, *supra*. Because "the statute provides another means by which [the state] may obtain information needed for enforcement," *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013), there is no serious constitutional question that implicates the avoidance canon.

Ohio invokes the avoidance canon for two other reasons: First, the state argues that voter registration might itself be a "qualification" that Congress may not regulate under the Elections Clause, U.S. Const. Art. I, § 4. Ohio Br. 51-53. Second, the NVRA regulates how states administer presidential elections, a matter Ohio argues might fall outside of congressional power. Ohio Br. 53. But there is no serious constitutional question here. This Court has long explained that the Elections

Clause power extends to registration,[5] and that Congress has authority to regulate the procedures used in presidential elections.[6]

In any event, these latter arguments misunderstand what the avoidance canon does. That canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Even if regulating voter registration or regulating the administration of presidential elections *did* raise serious constitutional questions, there is no plausible interpretation of the NVRA's text that would avoid them. By its plain text, the statute extensively regulates voter registration (a fact evident from its title, the National Voter *Registration* Act). And it also plainly covers presidential elections. See 52 U.S.C. § 20502(2) (incorporating by reference 52 U.S.C. § 30101(3)). Any constitutional questions regarding *those* aspects of the statute thus provide no basis for invoking the avoidance canon. See *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (canon " 'has no application in the absence of . . .

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[5] See, *e.g.*, *Cook v. Gralike*, 531 U.S. 510, 523-524 (2001) ("manner" of holding elections under Article I, Section 4 "encompasses matters like 'notices, *registration*, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.' ") (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932); emphasis added).

[6] See *Burroughs v. United States*, 290 U.S. 534, 544 (1924).

ambiguity'") (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001)).

If anything, constitutional avoidance concerns counsel *against* the interpretation Ohio places on the NVRA. If the state's reading is correct, Congress has, pursuant to its Article I, Section 4 power to "make or alter" election regulations, authorized states to remove citizens from the rolls simply for exercising their protected right not to vote. See Part I.A., *supra*. That interpretation would itself raise serious constitutional questions. Fortunately, the reading of the NVRA that avoids those questions is also the best interpretation: The statute bars states from initiating a purge process based on a registrant's failure to vote. See Parts I.B.-C., *supra*.

II. From 1994 Until the Solicitor General's Brief in This Case, the Department of Justice Repeatedly Interpreted the NVRA to Prohibit Using the Failure to Vote as the Basis for Initiating a Purge Procedure

In the Sixth Circuit, the United States contended, consistent with the argument we have presented in this brief, that Ohio's "supplemental process" violates the NVRA. See U.S. CA6 Br. 11-30. That argument is also consistent with the Department of Justice's longstanding interpretation of the NVRA, under which a state may not initiate a purge process based merely on the failure to vote. The Department first articulated

that interpretation shortly after the statute's enactment. Until the Solicitor General's brief in this Court, the Department had repeatedly reaffirmed that interpretation – both before and after HAVA became law – in a variety of fora.

Congress enacted the NVRA in 1993. The next year, Georgia amended its voter registration practices. Under those new practices, registrants "who fail[ed] to vote (or otherwise have 'contact' with the election administration system) during a three-year period would be specifically targeted to be included in the state's purge procedures." Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., to Dennis R. Dunn, Senior Assistant Attorney General, State of Georgia, at 2 (Oct. 24, 1994) ("Georgia Preclearance Objection"). When the state sought preclearance under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, the Department of Justice objected. Then-Assistant Attorney General Patrick explained that the state's reliance on nonvoting as the trigger for a purge process was "directly contrary to the language and purpose of the NVRA" and was "likely to have a disproportionate adverse effect on minority voters in the state." Georgia Preclearance Objection, *supra*, at 2.

The Department subsequently reiterated this position in litigation. In 1995, Pennsylvania adopted legislation under which election officials would initiate the mail-notice purge process for any registrant who had not voted in the previous five years. The Department argued that Pennsylvania's law violated the NVRA. See Memorandum in Support of Motion for

Summary Judgment at 14-18, *United States v. Pennsylvania*, No. 95-CV-382 (E.D. Pa., filed Aug. 7, 1996). It explained that the law improperly removed voters from the rolls by reason of their failure to vote: "a voter gets a notice for failing to vote, and it is for failing to vote in the ensuing period after the notice is sent, that a registrant is then stricken from the rolls." *Id.* at 16.

The Department took the same position when California sought to adopt a new voter-purge procedure. Recall that in 1995, the district court in *Wilson*, *supra*, had upheld a procedure in which the Section 8(d) mail-notice process was triggered by the return of a residency-confirmation postcard as undeliverable. In 1996, the state sought to abandon that regime in favor of one in which the simple failure to vote for four years initiated the Section 8(d) process. The Department argued that the proposed procedure violated the NVRA because it would function "as a purge for nonvoting." United States' Memorandum in Support of Motion for Further Relief at 9, *Wilson v. United States*, No. C-95-20042 JW (N.D. Cal., filed Oct. 23, 1997).[7]

[7] Also in 1997, the Acting Assistant Attorney General for Civil Rights notified the States of Alaska and South Dakota that she had authorized lawsuits against them for violating the NVRA by using nonvoting as a basis for initiating the purge process. See Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Div., to Bruce M. Botelho, Attorney General, State of Alaska (Feb. 11, 1997); Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Div., to Mark Barnett, Attorney General, State of South Dakota (Feb. 11, 1997).

After HAVA's enactment, the Department negotiated a series of settlement agreements that incorporated the same interpretation of the NVRA. In *United States v. Pulaski County*, No. 4-04-CV-389 SWW (E.D. Ark., entered Apr. 19, 2004), the Department entered into a consent decree that permitted the defendants to initiate Section 8(d)'s confirmation process only for those "active voters for whom there is reason to believe there has been a change of address"; the decree did not identify the failure to vote as such a reason. *Id.*, Consent Decree ¶ 5. In *United States v. Indiana*, No. 1:06-cv-1000-RLY-TAB (S.D. Ind., entered June 27, 2006), the Department entered into a consent decree that directed the state to send Section 8(d) confirmation notices to those voters for whom prior mailings had been "returned as undeliverable with no forwarding address or a forwarding address outside the registrar's jurisdiction." *Id.*, Consent Decree and Order ¶ 2. The decree noted that the state might also infer that voters had become ineligible, and thus initiate the mail-notice procedure, based on "specific information provided in writing that calls into question those voters' continued eligibility to vote at their currently registered addresses, such as jury declinations or county or state tax filings which claim non-resident status." *Id.* ¶ 4. But the decree did not list nonvoting as a permitted basis for initiating the purge process. Contrary to the suggestion made by the group of former Department of Justice attorneys who filed in support of the state, see Former Civ. Rts. Div. Attys. Br. 14, the *Pulaski County* and *Indiana* decrees did not permit the defendants to

initiate a purge process based on nonvoting. Indeed, they barred such a practice.[8]

And in a decree in *United States v. Cibola County*, No. CIV-93-1134-LH/LFG (D.N.M., entered Jan. 31, 2007), the Department stated its position especially clearly. The decree provided:

> The County shall not place the name of any voter on the inactive list or otherwise remove the voter's name from the official voter registration list solely by reason of the person's failure to vote. The County shall only place the name of any voter on an inactive list based on *objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address or National Change of Address program data showing a move outside the County*.

Id., Amended Joint Stipulation ¶ 13 (emphasis added). That language plainly barred the defendant election officials from using the failure to vote as a basis for initiating the NVRA's mail-notice confirmation procedure.

One sub-provision of a settlement agreement the Department also entered in 2007, when read out of context, might seem to suggest a contrary position. See Settlement Agreement ¶ 16(5), *United States v. City of*

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[8] Notably, the Solicitor General does not endorse the suggestion that the government's current position is consistent with the *Pulaski County* and *Indiana* consent decrees. See U.S. Br. 14 n.3.

Philadelphia, No. 06-4592 (E.D. Pa., entered Apr. 26, 2007) (stating that it was to "be the policy of the [Philadelphia County Board of Elections]" to "send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner"). On closer examination, however, that sub-provision does not undermine the Department's longstanding interpretation of the NVRA. The *Philadelphia* case, as filed, was principally about providing language assistance to Spanish-speaking voters, not about voter-purge procedures. See *id.* at 1-2 (recitals). And it is doubtful that the sub-provision addressing confirmation notices, which was framed in terms of the Board's "policy" rather than as a direct mandate, was even enforceable. Even taking it for everything it is worth, that single sub-provision, which formed a small part of a larger settlement agreement, is an outlier. It is inconsistent with the interpretation and practice of the Department both before and since.

In 2010, the Department issued extensive guidance regarding the application of the NVRA. See 2010 NVRA Guidance, *supra*. Reaffirming the longstanding position described above, the guidance explained that the statute barred states from initiating the mail-notice purge process without "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." *Id.* ¶ 34. The Department relied on its longstanding interpretation, and on the 2010 guidance, when it argued below that Ohio's

"supplemental process" violates the NVRA. See U.S. CA6 Br. 2-3. See also Statement of Interest of the United States, *Common Cause v. Georgia*, No. 1:16-cv-452-TCB (N.D. Ga., filed May 4, 2016) (taking the same position in a challenge to a Georgia purge practice).

From 1994 until the Solicitor General's brief in this case, the Department of Justice had repeatedly interpreted the NVRA to prohibit a state from using a registrant's failure to vote as the basis for initiating the Section 8(d) voter-purge process. As we showed in Part I, *supra*, the Department's longstanding interpretation was correct. Ohio's "supplemental process" violates the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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