No. 16–980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

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

BRIEF OF CERTAIN MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

The *Amici* Members of the Congressional Black Caucus are:

- Representative John Conyers, Jr. (Michigan 13th District), a member of Congress since 1965.

- Representative John Lewis (Georgia 5th District), a member of Congress since 1987.

- Representative Eleanor Holmes Norton (District of Columbia, at large), a member of Congress since 1991.

- Representative Jim Clyburn (South Carolina 6th District), a member of Congress since 1993.

- Representative Alcee L. Hastings (Florida 20th District), a member of Congress since 1993.

- Representative Eddie Bernice Johnson (Texas 30th District), a member of Congress since 1993.

- Representative Bobby Rush (Illinois 1st District), a member of Congress since 1993.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. No party or entity other than the *Amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents both have consented to the filing of this brief.

- Representative Bobby Scott (Virginia 3rd District), a member of Congress since 1993.

- Representative Elijah Cummings (Maryland 7th District), a member of Congress since 1995.

- Representative Danny Davis (Illinois 7th District), a member of Congress since 1997.

- Representative Barbara Lee (California 13th District), a member of Congress since 1997.

- Representative Gregory Meeks (New York 5th District), a member of Congress since 1997.

- Representative William Lacy Clay Jr. (Missouri 1st District), a member of Congress since 2001.

- Representative David Scott (Georgia 13th District), a member of Congress since 2003.

- Representative G. K. Butterfield (North Carolina 1st District), a member of Congress since 2004.

- Representative Al Green (Texas 9th District), a member of Congress since 2005.

- Representative Keith Ellison (Minnesota 5th District), a member of Congress since 2007.

- Representative Marcia L. Fudge (Ohio 11th District), a member of Congress since 2008.

- Representative Terri Sewell (Alabama 7th District), a member of Congress since 2011.

- Representative Frederica Wilson (Florida 24th District), a member of Congress since 2011.

- Representative Donald Payne Jr. (New Jersey 10th District), a member of Congress since 2012.

- Representative Hakeem Jeffries (New York 8th District), a member of Congress since 2013.

- Representative Marc Veasey (Texas 33rd District), a member of Congress since 2013.

- Representative Bonnie Watson Coleman (New Jersey 12th District), a member of Congress since 2015.

- Representative Anthony Brown (Maryland 4th District), a member of Congress since 2017.

- Representative Val Demings (Florida 10th District), a member of Congress since 2017.

- Representative Donald McEachin (Virginia 4th District), a member of Congress since 2017.

Collectively, the *Amici* Members of the Congressional Black Caucus have served 411 years proudly representing their constituents in the United States Congress.

The *Amici* Members of the Congressional Black Caucus have a deep and abiding interest in voting rights issues. Historically, African Americans fought and died for access to the ballot. A century after the passage of the Fifteenth Amendment to the Constitution, which granted all men the right to vote, African

Americans largely remained disenfranchised. In March 1965, Representative Lewis (long before he became a Member of Congress and the Congressional Black Caucus), suffered a skull fracture after being hit with a nightstick when he joined with civil rights leaders and other peaceful protestors seeking voting rights in Selma, Alabama. The courage of those leaders, and countless others, led to the passage of the landmark Voting Rights Act of 1965.

Certain of the *Amici* were Members of Congress in 1993, when the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq.* ("NVRA") was enacted into law. These include Representatives John Conyers, John Lewis, Eleanor Holmes Norton, James Clyburn, Alcee L. Hastings, Eddie Bernice Johnson, Bobby Rush, and Bobby Scott. Indeed, Representative Conyers was one of the original co-sponsors of the bill that later became the NVRA. He enthusiastically urged his colleagues in the House to support the NVRA, colloquially called the "motor voter" bill, as a means of expanding the franchise:

> The motor-voter bill empowers traditionally unregistered citizens, the poor, working class unemployed Americans, our youth, and millions of disabled citizens.
>
> In closing, Mr. Speaker, let me say that 1993 marks 25 years since the assassination of Martin Luther King, Jr., and 30 years since the assassination of Medgar Evers, gunned down in his front yard while trying to register blacks in Jackson, MS, to vote. There can be no better tribute to their legacy than to pass the strongest motor-voter bill possible.

Conference Report on H.R. 2, National Voter Registration Act of 1993, 139 Cong. Rec. H2266 (May 5, 1993). Representative Lewis also urged his colleagues to support the NVRA to increase voter participation:

> By passing the National Voter Registration Act, Mr. Speaker, we can renew our commitment to democracy. The United States has the lowest rate of voter turnout among the world's major democracies. This legislation would make it easier and more convenient for people to vote. It will increase voter participation.

Id. at H2271. In voicing her support for the NVRA, Representative Johnson expressly noted that the bill prohibited discriminatory voter purges:

> This measure also insures that removal of names from voting rolls is done without discrimination and sets the provisions by which this can be done.

Id. at H2268.

Additional *Amici* Members of the Congressional Black Caucus were members of Congress in 2002, when the Help America Vote Act of 2002 ("HAVA") was enacted into law to remedy the profound dysfunctions in the nation's electoral systems revealed by the 2000 Presidential election. These *Amici* include Representatives Elijah Cummings, Danny Davis, Gregory Meeks, Barbara Lee, and William Lacy Clay, Jr. In the words of Representative Johnson:

> There was such an overwhelming outcry from this Nation and internationally that came to the Black Caucus after January 6, 2001, that we knew we had to act.
>
> This became the number one priority for the Congressional Black Caucus to do something about election reform. . . .
>
> The time to improve our elections system is now. We must make sure all Americans can register to vote, remain on the rolls once registered, vote free from harassment, and have those votes counted. I believe that this bill achieves those goals.

Conference Report on H.R. 3295, Help America Vote Act of 2002, 148 Cong. Rec. H7846 (Oct. 10, 2002). Representative Jackson-Lee, who was actively involved in drafting HAVA, urged her fellow members of the House to support the bill because it was intended to reduce, not expand, purges of eligible voters from voter registration rolls:

> Although purging of voter rolls may be a well-intentioned attempt to remove inappropriate votes from being cast—such purging has rarely, if ever, been done effectively and fairly. Done improperly, purging can be an expensive tool for discrimination or mistreatment. Consistently through the history of our nation, purging has been a mechanism for silencing minorities, and the socio-economically disadvantaged.
>
> In Florida alone, thousands of eligible voters have been misidentified as being felons who are

> unable to vote: 3,700 before election 1998, and 11,000 before election 2000. There is no reason to think that this is a Florida-specific problem. This means that perhaps hundreds of thousands of American citizens, living in the richest Democracy in the world, are having their fundamental right to vote stripped due to clerical errors. This is absolutely unacceptable. I have fought to preserve language in this bill that will ensure that voters are not unfairly purged from the voting rolls.

Id. at H7849.

The *Amici* Members of the Congressional Black Caucus continue to support policies that would protect, not impede, access to crucial voting rights for all American citizens, including enforcement of voting rights through challenges to improper voter registration purges and other means of voter disenfranchisement. Those policies include, among others, restoration of the full protections of the Voting Rights Act; enforcement of voting rights through challenges to improper voter registration purges and other means of voter disenfranchisement; an end to modern-day poll taxes in the form of burdensome voter identification laws; and modernization of voter registration and election administration procedures.

More recently, members of the Congressional Black Caucus have introduced legislation such as the Voter Empowerment Act of 2017, the Voting Rights Enhancement Act of 2017, the Same Day Registration Act of 2017, the Redistricting and Voter Protection Act of 2017, the Election Infrastructure and Security Promotion Act of 2017, the Election Integrity Act of 2016,

and the Voting Rights Amendment Act of 2017. Additionally, in May 2016, Members of the Congressional Black Caucus formed the Congressional Voting Rights Caucus, whose goal is to educate the public on voter suppression, inform constituents on voter rights, and create and advance legislation that blocks current and future suppressive and discriminatory tactics that deny American citizens the right to vote. Thirty-one Members of the Congressional Black Caucus (and nineteen of the *Amici*) are also members of the Congressional Voting Rights Caucus.

SUMMARY OF ARGUMENT

Petitioner tries to defend voter registration purges triggered by non-voting as a "longstanding state practice." *Brief for the Petitioner* at 2. "Longstanding" as Ohio's practice may be, Congress intended to uproot it in the NVRA. The Department of Justice and the Federal Election Commission acknowledged that Congressional mandate when they repeatedly put states on notice—in lawsuits, written reports, and otherwise—that the practice of targeting non-voters with confirmation mailings to initiate the purge process was either prohibited by the NVRA or, at best, was of doubtful validity.

In the years after the NVRA was enacted, bills seeking to amend the statute to allow non-voters to be targeted for registration purges were introduced in both the House and Senate, further demonstrating that the NVRA did not already permit the practice. None of those bills, however, was enacted. When Congress enacted HAVA in 2002, it repeatedly confirmed, in both the text of the statute and in the Conference Report, that the NVRA's substantive and procedural

protections would be preserved. The Federal Election Commission, the Department of Justice and Members of Congress all understood that the targeting of non-voters for confirmation mailings violated the NVRA's ban on purges of non-voters; the "clarification" of the NVRA in HAVA cannot be construed to effect that change implicitly in light of the previous failures to effect it explicitly.

The Sixth Circuit's decision correctly interpreted the NVRA and HAVA when it invalidated Ohio's "Supplemental Process" of targeting non-voters for confirmation mailings and eventual removal from the rolls; its decision should be affirmed.

ARGUMENT

I. The NVRA Was Intended to End the Practice of Targeting Non-Voters for Registration Purges.

As recognized by the Sixth Circuit, "Congress' stated purposes in enacting the NVRA were, inter alia, 'to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained.'" Pet. App. 10a (citing 52 U.S.C. § 20501(b)). When Congress considered the NVRA in 1993, it had been presented with evidence that the means then used by most states to purge voter registration rolls—the routine elimination of non-voters—acted to discriminate against poor and minority voters:

> While most States use the procedure of removal for non-voting merely as an inexpensive method for eliminating persons believed to

> have moved or died, many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

S. Rep. No. 103–6, at 17–18 (1993); *see id.* at 17 (voter list maintenance processes "must be structured to prevent abuse which has a disparate impact on minority communities."). Congress intended that individuals should remain registered to vote so long as they remained eligible to do so, without regard to whether, or how often, they actually exercised that right:

> One of the purposes of this bill is 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. The Committee recognizes that while voting is a right, people have an equal right not to vote, for whatever reason. However, many States continue to penalize 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. at 17.

In response to these concerns, the NVRA imposed several substantive prohibitions on the process of purging ineligible voters, set forth in Section 8 of the statute. First, subsection (a) provides the limited grounds on which a voter may be removed from the registration rolls: upon the registrant's request,

death, criminal conviction or mental incapacity (if provided by state law) or "a change in the residence of the registrant, in accordance with subsections (b), (c) and (d)." 52 U.S.C. § 20507(a)(3)–(4). Failure to vote for any period of time, no matter how long, is not a permissible ground for removing voters from the registration rolls. Subsection (b), as originally enacted, required that any voter registration list maintenance process:

> (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*); and
>
> (2) 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…

52 U.S.C. § 20507(b)(1)–(2).

These provisions were included in the bill "[i]n response to the concerns of various witnesses representing civil rights organizations . . . to prevent the discriminatory nature of periodic purges, which they assert appear to affect blacks and minorities more than others." S. Rep. No. 103–6 at 20. The House Committee on Rules and Administration "concluded that language on list verification procedures was appropriate, specifically prohibiting any registered voter from being removed from the rolls for failure to vote." H. Rep. No. 103–9 at 5 (1993). Thus, in the NVRA, Congress recognized and specifically intended to address the discriminatory impact of targeting non-voters for removal from lists of registered voters.

II. Congress Has Not Amended the NVRA To Permit Non-Voters To Be Targeted for Registration Purges.

The NVRA was signed into law on May 20, 1993. Congress directed that the Federal Election Commission "shall provide information to the States with respect to the responsibilities of the States under this Act," and that it also report to Congress every second year on "the impact of this Act on the administration of elections for Federal office during the preceding 2-year period." National Voter Registration Act of 1993, Pub. L. No. 103–31, § 9, 107 Stat. 77 (1993) (prior to 2002 amendment). The Federal Election Commission's first biennial report to Congress in 1995 explained the magnitude of the transition facing state registrars, because the overwhelming majority of them had been conducting voter registration purges by means now "specifically prohibited" by the NVRA:

> [T]he 38 states covered by this report took a more common approach to purging their voter registration lists—an approach specifically prohibited by the NVRA. Twenty-eight (28) of the states used failure to vote within a specified time frame (2 to 5 years) as their principal purging method purging the list each year or at each general election. And twenty-five (25) of these routinely notified the registrant by mail of the impending purge of their names."

FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1993-1994* (1995) at 8; *see also* FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems*

and Solutions Discovered 1995-1996 at 5–1 (March 1998) ("Prior to implementing the NVRA, local jurisdictions in most States relied on the removal of those who failed to vote as the primary method of keeping voter registration lists up-to-date. Under the Act, this procedure could no longer be used; many States had to develop other methods to identify and remove those who had died or moved . . . ."). Significantly, the Federal Election Commission deemed this "common approach" of purging non-voters to violate the NVRA even though 25 of the 28 states using that approach *also* gave non-voters notice by mail of the impending removal. The argument made here by Petitioner and (in a notable about-face) the Department of Justice—that *only* the practice of purging non-voters without notice was intended to be prohibited by the NVRA—is palpably wrong. *See Brief for the Petitioner* at 28–29; *Brief for the United States as Amicus Curiae Supporting the Petitioner* at 31.[2]

In its first publication providing "information to the States with respect to [their] responsibilities" under the NVRA, the Federal Election Commission emphasized that "[a]lthough most jurisdictions remove

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[2] Both Petitioner and the Department of Justice base their argument on an ambiguous reference in one sentence in the Congressional Budget Office's cost analysis, reproduced in the House and Senate Committee Reports for the NVRA: "These states could not continue *this practice* under the bill." S. Rep. No. 103–6 at 46 (emphasis added); H. Rep. No. 103–9 at 30 (emphasis added). In light of the Federal Election Commission's unequivocal statement that all non-voter purges—both with and without notice—were "specifically prohibited" by the NVRA, "this practice" must refer to *all* non-voter purges, not merely those executed by a small minority of states without giving any notice.

the names of individuals from the voter registration list after their failure to vote within a specified time frame, the NVRA prohibits this practice." FEC, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches and Examples* (1994) at 5–5. The Federal Election Commission further advised states that registrars could use the confirmation process of section 8(d)(2) with "any registrant whom the registrar has legitimate reason to believe has changed address." *Id.* at 5–8. The guide identified three possible ways of using a non-voter list to trigger such confirmation mailings: first by sending non-forwardable forms to non-voters, then confirmation mailings to those non-voters whose mailing was returned; second; by running non-voters' names against the U.S. Postal Service's "National Change of Address Files"; and third, by sending confirmation mailings to non-voters. *Id.* at 22–23. At that early date, six months after the NVRA had been adopted and before it had even gone into effect, the Federal Election Commission cautioned that the last of these options is "considered by some advocates to violate the provisions of the Act." *Id.* at 23.

The Department of Justice, charged with enforcement of the NVRA under Section 9 of the statute, *see* 52 U.S.C. § 20510, weighed in on this question and determined that the practice of targeting non-voters for confirmation mailings ran afoul of the NVRA. As chronicled in the Brief for the United States as Amicus Curiae submitted to the Sixth Circuit in this case, beginning in 1994 and continuing through 2016, the Department of Justice consistently challenged the

practice of targeting non-voting registrants for confirmation mailings in the absence of some indication that the registrant had moved.

By the time of its second report to the states, in March 1998, the Federal Election Commission expressed its own doubts about the legality of the practice of targeting non-voters for confirmation mailings, as Ohio does in the "Supplemental Procedure." In response to a survey of state registrars conducted by the Federal Election Commission, two states proposed to "allow all registrars to target non-voters or those who have not maintained contact during a specific period of time to receive forwardable confirmation mailings." *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* at 5–44 (March 1998). The FEC marked that proposal with a footnote: "Appears to require federal legislation." *Id.* at 5–46.[3]

Petitioner claims that in HAVA, Congress "sided with the states" and gave them the authority to target non-voters for confirmation mailings. *Brief for the Petitioner* at 36. But the text and legislative history of HAVA belie the suggestion that the statute was a vehicle for making any substantive changes to section 8 of the NVRA. To the contrary:

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[3] The Federal Election Commission also reported that the Joint Election Officials Liaison Committee and National Association of County Recorders and Clerks had "suggested a legislative change to the NVRA to implement this approach" of targeting non-voters with confirmation mailings. *Id.* at 5–22.

- "[N]othing in [HAVA] may be construed to authorize or to require conduct prohibited under [the NVRA], or to supersede, restrict or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

- HAVA's specific amendment to the language of section 8(d)(2) is denominated a "clarification," not a revision, modification or limitation. *Help America Vote Act of 2002*, Pub. L. No. 107-252, 116 Stat. 1666, § 903 (2002).

- HAVA's mandate that states remove "ineligible" registrants from the official list of registered voters must be implemented "consistent with the [NVRA]." 52 U.S.C. § 21083(a)(4)(A).

- The Conference Report on HAVA gave comfort to Members of Congress being asked to vote on the bill that it would not "undermine the [NVRA] in any way." H.R. Rep. No. 107–730 at 81 (2002).

- HAVA does not explicitly say that confirmation notices under section 8(d)(2) may be targeted to non-voters in the absence of some evidence that the non-voter has changed residence. *See* 52 U.S.C. § 20507(b)(2).

Tellingly, Members of Congress have also acknowledged that the NVRA does not permit states to target non-voters for confirmation mailings, because they have unsuccessfully sought to amend it to provide that authority both before and after the passage of HAVA. In 1997, Senator John Warner and Representative Bob Goodlatte each introduced a bill that would have amended the NVRA in several respects, including to permit the very practice that Ohio adopted in the

"Supplemental Procedure." Each of the Warner and Goodlatte bills included a provision, openly titled "Removal of certain registrants from official list of eligible voters" which sought to add the following language to section 8(d) of the NVRA:

> (3)(A) At the option of the State, a State may remove the name of a registrant from the official list of eligible voters in elections for Federal office (and, if necessary, correct the registrar's record of the registrant's address) on the ground that the registrant has changed residence if—
>
> (i) the registrant has not voted or appeared to vote in an election during the period beginning on the day after the date of the second previous general election for Federal office held prior to the date the confirmation notice described in subparagraph (B) is sent and ending on the date of such notice;
>
> (ii) the registrant has not voted or appeared to vote in any of the first two general elections for Federal office held after the confirmation notice described in subparagraph (B) is sent; and
>
> (iii) during the period beginning on the date the confirmation notice described in subparagraph (B) is sent and ending on the date of the second general election for Federal office held after the date such notice is sent, the registrant has failed to notify the State in response to the notice that the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction.

> (B) A confirmation notice described in this subparagraph is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which a registrant may state his or her current address, together with information concerning how a registrant can continue to be eligible to vote if the registrant has changed address to a place outside the registrar's jurisdiction and a statement that the registrant may be removed from the list of eligible voters if the registrant does not respond to the notice. . . .

S. 1561, § 703, 105th Cong. (1st sess. 1997); H.R. 2076, § 3, 105th Cong. (1st sess. 1997). Senator Warner introduced this proposal again in 1999. *See* S. 1107, § 703, 106th Cong. (1st sess. 1999). Unlike HAVA, which does not state how registrars might select the registrants who would get notices that could lead to their removal from the voter registration list, these proposed bills explicitly stated that non-voters could be targeted.

None of the proposed iterations of this bill was approved by the House or Senate.[4] Still, the bills' detailed elaboration of the process of targeting non-voters for registration purges—and their forthright titles—shows that before HAVA was introduced, Congress knew how to go about revising section 8 of the

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[4] Representative Goodlatte sought to add this provision to a proposed bill on campaign finance reform, but the amendment was soundly defeated by a vote of 165 to 260 on July 30, 1998. H. Amdt. 747 to H.R. 2181, 105th Cong. (2nd sess. 1998); *Bipartisan Campaign Integrity Act of 1997*, 144 Cong. Rec. H6811 (Jul. 30, 1998).

NVRA to permit that procedure, if that was its intention.

Indeed, before HAVA was enacted, the House of Representatives defeated a bill that would have sanctioned much less draconian treatment of non-voters. In 1998, Representative William Thomas introduced H.R. 3581, which would have permitted state registrars to target non-voters with additional mailings. H.R. 3581, § 512, 105th Cong. (2nd sess. 1998). Rather than removing such a registrant from the list of registered voters, this bill would have required the registrant to whom the notice was sent to provide "oral or written affirmation of the registrant's identification and address . . . before the registrant is permitted to vote in a subsequent Federal election." *Id.* Only seventy-four Representatives voted in favor of this bill; 337 Representatives (including several of the *Amici* Members of the Congressional Black Caucus) voted against it. *Campaign Reform and Election Integrity Act of 1998*, 144 Cong. Rec. H1764-02 (Mar. 30, 1998). And three years after HAVA was enacted, Representative Charles Dent introduced yet another unsuccessful bill designed to sanction the practice of targeting non-voters for registration purges. H.R. 2778, 109th Cong. (1st sess. 2005).

Each of these unsuccessful attempts to amend the NVRA to permit the targeting of non-voters for registration purges confirms that the NVRA as originally enacted prohibited the practice, and that HAVA did not surreptitiously modify the NVRA to permit it. *See Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("we decline to read any implicit directive into that Congressional silence").

CONCLUSION

For the foregoing reasons, as well as those offered by Respondents, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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