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

REPLY BRIEF FOR THE PETITIONER

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Ohio Secretaries of State from both political parties have long verified Ohio's rolls through a Supplemental Process that sends notices to persons without voter activity over two years, and removes them if they fail to respond or to vote for four more. Secretary Husted's opening brief showed why this process comports with the "Failure-To-Vote Clause" in the National Voter Registration Act (NVRA), 52 U.S.C. § 20507(b)(2). *First*, the clause must be interpreted harmoniously with the "Confirmation Procedure," which requires States to use nonvoting in removal. *Id.* § 20507(d)(1)(B). Thus, the failure to respond to a notice under the Confirmation Procedure should be read to break the prohibited link between nonvoting and removal under the Failure-To-Vote Clause. *Second*, the "Clarifying Amendment" in the Help America Vote Act (HAVA) explained that the clause cannot be "construed" to bar States from removing persons through the Confirmation Procedure. *Id.* § 20507(b)(2). The clause instead bars removals "solely" for nonvoting. *See id.* § 21083(a)(4)(A). *Third*, if any remaining doubt existed, canons of construction would suggest the reading that intrudes less on traditional state functions.

Respondents' contrary reading conflicts with the plain text and balanced purposes of the NVRA and HAVA. They *add* text to the NVRA by claiming that States may not send notices under the Confirmation Procedure unless they have "predicate information" that registrants have moved. Resp. Br. 41. And they *subtract* text from HAVA by claiming that the Failure-To-Vote Clause bars the Supplemental Process even though that process does not remove anyone "solely" for nonvoting. *Id.* at 49. Respondents justify these changes by reciting certain NVRA goals—such

as increasing registration or avoiding penalizing nonvoters. *Id.* at 30. Yet the NVRA serves *dueling* purposes, including keeping voter lists current. And Congress pursued the goals that Respondents highlight in a narrower fashion—by expanding registration, 52 U.S.C. §§ 20504-20506, and requiring notices before removals, *id.* § 20507(d). It did not go further because of fraud concerns with outdated lists. *Id.* § 20501(b)(3)-(4). This Court must enforce the careful compromise that Congress reached, not the lopsided legislation that Respondents prefer. After all, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), and the judiciary must "apply, not amend, the work of the People's representatives," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

I. RESPONDENTS FAIL TO SHOW THAT THE ORIGINAL NVRA BARRED OHIO'S PROCESS

As the Secretary noted (at 19-35), the original NVRA permitted the Supplemental Process. Respondents' contrary reading lacks merit.

A. Respondents' Claim That Ohio's Process Violates § 20507(a)(3) Misreads The Text

Respondents argue that the Supplemental Process violates § 20507(a)(3) because it removes individuals for a *ground* (failing to respond to a notice and to vote for six years) that is not one of the grounds for removal identified in that provision. Resp. Br. 25-26. This argument invokes reasoning that the Sixth Circuit did not accept at the expense of reasoning that it did employ.

The Sixth Circuit correctly did not adopt this argument. Section 20507(a)(3) identifies only *grounds*

for which States may remove registrants (criminal conviction, mental incapacity, death, or changed residence); the provision does not regulate the *evidence* that States may use to find those grounds met. Other subsections—such as the Failure-To-Vote Clause or Confirmation Procedure—address that evidence. Section 20507(a)(3)'s text makes this plain. It notes that States may not remove registrants except "as provided under paragraph (4)," which tells States to remove registrants for changed residence "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(3)(C), (a)(4)(B). If a process comports with those subsections, therefore, it necessarily satisfies § 20507(a)(3). And here, the Supplemental Process uses a failure to respond to a notice and to vote for six years as *evidence* of changed residence. Brunner Directive 2009-05, R.38-7, PageID#401. The real question thus remains: Does the Supplemental Process remove persons for a listed ground (changed residence) in a way that adheres to the Failure-To-Vote Clause and Confirmation Procedure? The process does so for the reasons described below.

Respondents' argument also undercuts one of the Sixth Circuit's main justifications. That court gave the Failure-To-Vote Clause a broad sweep to prevent its alleged superfluity, noting that the Confirmation Procedure already required States to follow its steps. Pet. App. 17a-18a. But, as the Secretary indicated (at 32-35), the clause retains independent meaning under his reading just as much as under the court's. It regulates *all* programs, not just those based on *changed address*, and so reaches programs designed to identify wrongly registered persons (such as noncitizens). Respondents now concede that § 20507(a)(3) does *not* provide the exclusive grounds

for removal, and that States may remove persons who were ineligible when they were added to the rolls. Resp. Br. 26. Thus, they barely invoke the Sixth Circuit's superfluity rationale, as the logic in their (mistaken) § 20507(a)(3) argument precludes it.

B. Respondents' Reading Of The NVRA Creates A Conflict Within The Statute, And Adds An Atextual Element To It

The Secretary explained (at 19-29) that the Supplemental Process does not violate the Failure-To-Vote Clause for two reasons. *First*, while the Failure-To-Vote Clause bars programs that result in removal by reason of nonvoting, the Confirmation Procedure affirmatively requires programs to use nonvoting in removal. The Court can reconcile these provisions by holding that the failure to respond to a notice under the Confirmation Procedure breaks the prohibited link between nonvoting and removal under the Failure-To-Vote Clause. *Second*, the Confirmation Procedure places no limits on the persons to whom a State may send notices. The Court should read that silence as a delegation to the States to choose their notice "triggers," not to the courts to designate triggers in common-law fashion. Respondents' contrary view (1) reads the Failure-To-Vote Clause as conflicting with the Confirmation Procedure, and (2) hinges on an implied limit on sending notices.

1. Respondents do not reconcile the NVRA's provisions

Respondents assert that the Failure-To-Vote Clause bars *any* maintenance program that uses nonvoting in any way. Resp. Br. 27-43. Their arguments do not justify their expansive reading.

a. "*Result In*." Respondents begin with the wrong definition of "result." They argue that "[a] thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process or design.'" Resp. Br. 27 (quoting *Burrage v. United States*, 134 S. Ct. 881, 887 (2014)). But *Burrage* interpreted the phrase "result from" (in which the subject is the effect), not "result in" (in which the subject is the cause). As the Secretary noted (at 20, 30-31), "result in" means to "cause," which signals that the clause contains causation concepts. *McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs* 560 (2005).

Respondents also get nowhere by noting that the Failure-To-Vote Clause's text ("result in . . . removal . . . by reason of") covers more than § 20507(a)(4)'s text ("remove . . . by reason of"). Resp. Br. 27-28. All agree that the Failure-To-Vote Clause does not just bar removing persons on the *ground of nonvoting*; it also bars some evidentiary uses of nonvoting to conclude that individuals are ineligible on *other grounds* (such as using nonvoting alone to conclude that registrants have died). The question here is how far that evidentiary restriction extends—to *all* uses of nonvoting no matter how remote from removal, or *only* uses that make nonvoting the proximate cause of removal. The phrases "result in" and "by reason of"—combined with the Confirmation Procedure's required use of nonvoting—point to the latter view.

b. "*Removal*." Respondents contend that Ohio violates the Failure-To-Vote Clause by "subject[ing] registrants to the Supplemental Process"—i.e., sending notices—"based solely on their failure to vote . . . ." Resp. Br. 28-31. This reading conflicts with the statute's text, legislative history, and purposes.

Start with text: Respondents disregard the object within the Failure-To-Vote Clause. The clause bars programs that result in *removal* for nonvoting; it does not bar programs that result in *sending notices* for nonvoting. And the Supplemental Process does not treat nonvoting in one election as the "equivalent" of a move that justifies removal. Resp. Br. 29. Instead, the process requires six years of nonvoting *and* a failure to return a postage-prepaid notice asking recipients to confirm their eligibility.

Turn to legislative history: Respondents claim that a Senate Report described a right not to vote and suggested that using nonvoting as evidence of changed residence or death could reach eligible registrants. Resp. Br. 30. Yet their takeaway from this report—that Congress barred *all* uses of nonvoting—conflicts with the statute's *required* use of nonvoting. 52 U.S.C. § 20507(d)(1)(B)(ii). Instead, the report detailed a narrower concern with using nonvoting alone from one election, noting that "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*." S. Rep. No. 103-6, at 17 (1993) (emphases added). The NVRA remedied that concern by requiring *both* nonresponse to a notice *and* nonvoting across two elections. Statements in the Senate and House Reports thus suggested that the Failure-To-Vote Clause would bar *only* programs using nonvoting alone. S. Rep. No. 103-6, at 46; H.R. Rep. No. 103-9, at 30-31 (1993). Respondents reject these statements because they were made by the Congressional Budget Office. Resp. Br. 42 n.18. Yet "the report of the Congressional Budget Office, included in the Senate [and House] Report[s], expressly called Congress' atten-

tion" to this interpretation, so the Court can "assume" that legislators were "in full awareness" of it. *Cf. Heckler v. Turner*, 470 U.S. 184, 206-07 (1985).

No better is Respondents' reliance on the NVRA's purposes. Resp. Br. 30. "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Congress could have banished *any* use of nonvoting from maintenance efforts. But it adopted a balanced approach: "An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis." S. Rep. No. 103-6, at 18. Respondents wrongly use the NVRA's purposes to trump the means by which its text achieved them—by requiring States to send notices and wait four years before removals. 52 U.S.C. § 20507(d)(1)(B).

Respondents thus end with pure policy, claiming that the Supplemental Process is not "reliable." Resp. Br. 30-31. But Congress *itself* decided what counts as sufficiently "reliable" evidence for a changed residence—a failure to return a notice and to vote for four years. The Supplemental Process's six years of nonvoting thus requires *more* evidence than Congress deemed sufficient. And, as the Secretary noted (at 26), it would be odd for the NVRA to prohibit programs that rely on *six* years of nonvoting, but allow statewide canvasses to the entire electorate that rely on only *four*. (Respondents later argue that such a canvass would violate a different element that

they impute to the Confirmation Procedure, but that argument further flouts the text. *See* Part I.B.2.)

c. "*By Reason Of*." Respondents claim that the Failure-To-Vote Clause contains no proximate-clause element. Resp. Br. 31-36. They assert that such an element would conflict with the "result in" phrase. *Id.* at 31. That phrase comports with causation concepts. In fact, the case that Respondents cite left open the possibility that "result from" might include proximate cause. *Burrage*, 134 S. Ct. at 887-88. Here, moreover, Congress combined "result in" with a phrase ("by reason of") that many cases have read to require proximate cause. *E.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267-68 (1992).

Respondents distinguish these cases as addressing "statutory claims that sound in tort." Resp. Br. 32-33. True, this Court usually uses causation principles for statutory claims. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). But Respondents identify *no* case limiting their use to that context. And they ignore cases cited by the Secretary (at 21-22) adopting them elsewhere. The Court, for example, read the National Environmental Policy Act to include an element like the "'familiar doctrine of proximate cause from tort law.'" *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted); *cf. Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986) (noting that the *Gingles* test protects against vote dilution "'proximately caused by the districting plan'" (citation omitted)). Here, "Congress' intent" requires proximate cause because that concept reconciles the Failure-To-Vote Clause's restrictions with the Confirmation Procedure's requirements. *DOT*, 541 U.S. at 767-68.

Indeed, Respondents do not try to reconcile their reading of the Failure-To-Vote Clause—that it bans *all* use of nonvoting—with the Confirmation Procedure's *required* use of nonvoting. They say that the Court need not give the clause a "cramped reading" to reconcile those provisions because of HAVA's Clarifying Amendment. Resp. Br. 36. That amendment allegedly clarified that the clause bars *all* procedures using nonvoting "'except . . . the procedures described in subsections (c) and (d).'" *Id.* (quoting 52 U.S.C. § 20507(b)(2)). As detailed below, Part II.A, this disregards the amendment's text.

More fundamentally, Respondents' reliance on the *later HAVA* to reconcile these provisions confirms that they treat the *original NVRA* as barring (in the Failure-To-Vote Clause) what it allows (in the Confirmation Procedure). That departs from bedrock principles, including the need to interpret a provision in light of the "larger statutory landscape." *Henson*, 137 S. Ct. at 1722. One clause should not be read to prohibit what another clause was "designed to allow." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994). The "harmonious-reading canon" instead directs the Court to give the Failure-To-Vote Clause an interpretation that permits the Confirmation Procedure. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

Respondents' alternative proximate-cause test fails for similar reasons. Resp. Br. 34-35. Claiming that the Failure-To-Vote Clause adopts a foreseeability test, they argue that some registrants foreseeably will not respond to notices. *Id.* at 34. Yet foreseeability has never been the singular proximate-cause test; the doctrine has long required a "direct relationship" between an effect and a cause. *Hemi Grp.*,

LLC v. City of New York, 559 U.S. 1, 12 (2010). Here, the Supplemental Process's initial use of non-voting is an "indirect" cause of removal given that a person must fail to respond to a notice. *Id.* at 10.

Further, proximate cause is a "flexible concept," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008), that depends on the statute, *DOT*, 541 U.S. at 767. If, as Respondents claim, individuals foreseeably will disregard notices, their test does *not* serve proximate cause's function—to reconcile the Confirmation Procedure with the Failure-To-Vote Clause. Treating the failure to respond to a notice as the "sole proximate cause," by contrast, fits the NVRA because it squares these provisions. *Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996). Respondents counter that injuries can have more than one proximate cause. Resp. Br. 34-35. Yet, as the Secretary noted (at 24-26), contributory negligence (i.e., a failure to meet a duty) was long treated as the sole proximate cause. And the NVRA's text rebuts Respondents' claim that the statute relieves individuals of all registration "responsib[ilities]." Resp. Br. 35. It places a modest duty on them—to return a postage-prepaid, preaddressed card asking them to confirm their address. 52 U.S.C. § 20507(d)(1)(B), (d)(2).

2. Respondents add an element to the Confirmation Procedure

Recognizing that sending notices to the entire electorate cannot violate the *Failure-To-Vote Clause*, Respondents claim that this statewide canvass violates the *Confirmation Procedure*. Resp. Br. 37-43. But they identify nothing in the Confirmation Procedure's two elements that limits who may receive notices. 52 U.S.C. § 20507(d)(1)(B)(i)-(ii). Instead, they

discover in the penumbra between (d)(1)(B) and (d)(1)(B)(i) an initial, implicit element: that States must have "grounds for determining that a registrant may be ineligible due to a change in residence" before sending notices. Resp. Br. 37. Respondents create this element from whole cloth. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." Scalia & Garner, *supra*, at 93. As Justice Brandeis recognized, *Iselin v. United States*, 270 U.S. 245, 251 (1926), Respondents' requested "gap-filling ultimately comes down to the assertion of an inherent judicial power to write the law," Scalia & Garner, *supra*, at 95.

Respondents' arguments do not justify their gap-filling. *First*, they cite the Secretary's use of "Confirmation Procedure" to describe § 20507(d)(1)(B), and assert that the word *confirm* "presupposes that a state already has information indicating that the registrant has moved out of the jurisdiction, which it then seeks to 'verify' or 'corroborate' through" the two-step procedure. Resp. Br. 38. Yet the Confirmation Procedure's notices need not verify that persons have moved to a *different* address; they can verify that persons remain at the *same* one. That is, these notices confirm the rolls. S. Rep. No. 103-6, at 2 (noting that "[t]he bill would not require a specific mandatory procedure for verifying or confirming voter rolls, but would establish standards for any such procedure a State might employ").

That is how the NVRA uses the word "confirmation" when describing the notices. It states that a notice must explain that, "[i]f the card is not returned, affirmation or *confirmation* of the registrant's address may be required before the registrant is permitted to vote" after the notice is sent. 52

U.S.C. § 20507(d)(2)(A) (emphasis added). Persons sent notices thus "confirm" their eligibility with a response or at the polls. Ohio's notice uses the word in the same way, directing registrants to "confirm" that their address remains the same or to "update" it. Notice, Doc. 38-19, PageID#1365.

Second, Respondents note that the "Safe-Harbor Provision"—the subsection using the postal service's change-of-address database—tells States to "use[] the notice procedure described in subsection (d)(2) to confirm the change of address" of individuals in the database. *Id.* § 20507(c)(1)(B)(ii). Because that provision uses the Confirmation Procedure to "confirm" predicate information, Respondents argue, *any* program that uses the Confirmation Procedure must send notices to confirm predicate information. Resp. Br. 41. This argument misreads the Safe-Harbor Provision's text and purpose.

As for its text, the subsection provides an option, not a command. The NVRA compels States to make a "reasonable effort" to remove names of individuals who have moved. 52 U.S.C. § 20507(a)(4) ("Maintenance Duty"). The Safe-Harbor Provision provides one way that States "may" meet this duty by sending notices *only* to the subset of registrants identified in the database. *Id.* § 20507(c)(1).

As for its purpose, Respondents flip the Safe-Harbor Provision on its head by suggesting that it sets a *ceiling* on maintenance efforts. The provision represents a safe harbor for States to meet the duty *to keep up-to-date rolls*. While States need not undertake that specific program, they *must* undertake an equivalent program or risk lawsuits from the DOJ or private parties. Thus, the Safe-Harbor Provision

(or that equivalent) represents the NVRA's *minimum* maintenance effort. Respondents paradoxically read the Safe-Harbor Provision (or that equivalent) as representing the *maximum* effort. The Court should not read a safe harbor for States to satisfy their explicit *duty* to maintain the rolls as creating an implied *restriction* on their ability to maintain the rolls.

Third, Respondents claim that the NVRA would be "'absurd'" if it allowed the removal of those who did not respond to a notice and vote for four years. Resp. Br. 41 (citation omitted). Respecting federalism is not "absurd." As the Secretary noted (at 27-29), most States used nonvoting as a trigger for sending notices before the NVRA. If Congress intended to bar States from *sending notices* based on nonvoting, it would have done so through an express ban, not through an implied restriction. While Respondents argue that this "elephant-in-mouseholes" canon applies only to interpreting congressional "delegation of agency power," Resp. Br. 56, a case from last term refutes their claim. Because the Bankruptcy Code's priority system "has long been considered fundamental," the Court refused to find a "major departure" from it in "statutory silence." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017). Here, however, Respondents discover in the "statutory silence" about who may receive notices a broad ban on sending those notices—one that would constitute a drastic departure from preexisting state practices.

II. RESPONDENTS DISREGARD HAVA'S TEXT AND GIVE IT AN IMPLAUSIBLE PURPOSE

Respondents cannot rebut the Secretary's showing (at 35-45) that HAVA clarified the NVRA in a way that permits the Supplemental Process.

A. Respondents Misread HAVA's Clarifying Amendment

As the Secretary noted (at 35-38, 40-44), the Clarifying Amendment clarified that the Failure-To-Vote Clause permits processes incorporating the Confirmation Procedure. In response, Respondents misread both the amendment and the Secretary's interpretation of it.

1. Respondents argue that the amendment adopted a "narrow exception" to the Failure-To-Vote Clause, Resp. Br. 37, by reading the clause as barring all procedures that remove registrants for nonvoting "'except . . . the procedures described in subsections (c) and (d),'" *id.* at 36 (citation omitted). This argument has two problems. For one, Respondents edit the Clarifying Amendment's text. Congress did not draft it "as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). Rather, Congress drafted the amendment as a rule of interpretation—directing courts to "construe[]" the Failure-To-Vote Clause in a manner that permits the Confirmation Procedure. Respondents do not attempt to do so; instead, they use ellipses to transform this clarification into an exception.

For another, the Supplemental Process would come within the Clarifying Amendment even if the amendment were viewed as an exception. Respondents claim that the amendment protects only the Confirmation Procedure's use of nonvoting *after* a notice, not the Supplemental Process's initial use of nonvoting *beforehand*. Resp. Br. 39, 44-45. That is not how the amendment reads. The Supplemental

Process "us[es] the procedures described in subsection [] . . . (d) to remove" individuals from the rolls. 52 U.S.C. § 20507(b)(2). The Failure-To-Vote Clause thus cannot "be construed" to bar it. *Id.* In short, just as the Safe-Harbor Provision creates a safe harbor for States to meet their Maintenance Duty, so too the Clarifying Amendment illustrates that the Confirmation Procedure creates a safe harbor for States to comport with the Failure-To-Vote Clause. These symmetrical safe harbors give States "play in the joints" in which to implement the NVRA's competing mandates without risking lawsuits from either side.

2. Respondents wrongly claim that the Secretary interprets the Clarifying Amendment as *changing* the Failure-To-Vote Clause's scope. Resp. Br. 44-45. Not so. Under the Secretary's view, the amendment clarified that the States—not the DOJ—properly read the NVRA to permit sending notices to nonvoters. It "correct[ed] the [DOJ's] error, thus clarifying the original meaning of the section." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988). Under Respondents' view, the amendment clarified only that the Failure-To-Vote Clause permitted the Confirmation Procedure's specific use of nonvoting. They identify nothing predating HAVA suggesting why this "clarification" would have been necessary. Giving the amendment such an implausibly narrow purpose deprives it of "'real and substantial [clarifying] effect.'" *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1588 (2016) (citation omitted).

HAVA's "savings clause" also does not help Respondents. Resp. Br. 45-46. It notes that, with one exception, HAVA does not "supersede, restrict, or limit the application" of the NVRA. 52 U.S.C. § 21145(a). Unlike the exception listed in the sav-

ings clause, which *newly limited* the NVRA's use of mail registration, *id.* § 21083(b)(2)(A), the Clarifying Amendment clarified the Failure-To-Vote Clause's *originally limited* domain.

B. Respondents Rewrite HAVA's Section On Statewide Voter Lists

The Secretary showed (at 38-39, 44-45) that his view followed from the HAVA subsection requiring a "system of file maintenance" for statewide voter lists. 52 U.S.C. § 21083(a)(4)(A). That subsection noted: "Under such system, consistent with the [NVRA], 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.* This provision required list-maintenance systems to remove certain registrants, but clarified that States could not remove others solely for nonvoting.

In response, Respondents read the "solely" clause to mean that nonvoting "cannot be the sole basis" for "subjecting [a] registrant to the Confirmation Procedure." Resp. Br. 46. Yet the clause states that nonvoting cannot be the sole basis for *removal*; it says nothing about *invoking the Confirmation Procedure*. Respondents support their rewrite with the rule against superfluity, arguing that the clause begins with "except that" and is an exception to the previous clause mandating the removal of those who do not respond to notices. *Id.* at 47. They ignore the Secretary's response (at 45) to this point. The rule against superfluity cannot permit this unnatural departure from the clause's unambiguous meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Re-

gardless, the Secretary's reading gives meaning to all of the text. The sentence "explains how" a maintenance system "must operate." *Colón-Marrero v. Vélez*, 813 F.3d 1, 11 (1st Cir. 2016). That system *must* remove persons who do not respond to a notice and do not vote over four years, but *cannot* remove persons solely for nonvoting. The "solely" clause thus creates an exception from the permissible "system[s] of file maintenance." 52 U.S.C. § 21083(a)(4)(A).

Respondents next ignore the word "shall." Even though this subsection notes that registrants who have not responded to a notice and not voted in two elections "shall be removed," *id.*, Respondents claim that it *cannot* be read "as a command," Resp. Br. 47. That is wrong. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement," especially when a "statute distinguishes between 'may' and 'shall.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *cf.* 52 U.S.C. § 21081(a)(1)(B). This new obligation is also "consistent with the [NVRA]." *Id.* § 21083(a)(4)(A). Nearby HAVA provisions adopted further maintenance obligations, such as using criminal or death records. *Id.* § 21083(a)(2)(A)(ii).

Respondents treat "shall" as "may" on the ground that this subsection contemplates removals of those who have not voted *only* "in 2 consecutive general elections," *id.* § 21083(a)(4)(A), which allegedly conflicts with the Confirmation Procedure's ban on removals unless registrants have failed to vote during *any* election over that time. Resp. Br. 47-48. Changing "shall" to "may" would not fix this purported conflict (since the sentence would still *permit* what the Confirmation Procedure *prohibits*). Instead, "in 2 consecutive general elections" can be read "consistent

with the [NVRA]" as shorthand for the Confirmation Procedure's detailed rules (analogous to *within* two elections). *Cf.* Random House Dictionary of the English Language 964 (1987) (noting that "in" can indicate "inclusion within or occurrence during a period or limit of time").

C. Respondents Interpret HAVA To Serve An Implausible Purpose

As the Secretary noted (at 35-38), States long debated the DOJ over whether they could send notices to nonvoters before HAVA. One FEC report even told Congress that a State suggested "clarifying" the NVRA to permit the practice. FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 106th Congress*, at 19 (June 30, 1999). That backdrop clarifies any ambiguity.

Respondents counter by citing the next FEC report to the Congress that passed HAVA. That report allegedly expressed the FEC's view that the NVRA permitted States to maintain the rolls only with the postal service's database or a nonforwardable mailing to the entire electorate. Resp. Br. 50. As Respondents concede, however, the FEC had *no* authority to interpret the NVRA. *Id.* The report is instead useful because it, too, told Congress that a State recommended "allowing confirmation notices to be sent based on the combination of not voting and no contact." FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 107th Congress*, at 26 (June 30, 2001). Thus, from just after the NVRA to just before HAVA, States pushed for HAVA's clarification.

Respondents also ask the Court to ignore the debate between the DOJ and States because it was not

referenced in HAVA's legislative history. Resp. Br. 50-51. Yet, "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). The text of the Clarifying Amendment and § 21083(a)(4)(A) unambiguously permit the Supplemental Process. Regardless, those HAVA provisions did not escape notice during the lawmaking process. Legislative history is riddled with criticisms or defenses over whether States should be able to remove registrants for nonvoting and nonresponse to a notice, and over whether that would change or clarify the NVRA. *E.g.*, Hearing Before the Comm. on the Judiciary on H.R. 3295, 107th Cong., 1st Sess. 45, 48, 62-63, 67-68, 75-76, 78, 79-80, 92-93 (2001). Further, legislative actors read these provisions, just as the Secretary does, to provide that "you can't be removed simply because you haven't voted. You have to have not voted and not responded to a notice." *E.g.*, Mark Up of H.R. 3295, The Help America Vote Act of 2001: Mark Up Before the Comm. on H. Admin., 107th Cong., 1st Sess. 12 (2001) (Chairman Ney describing statements from counsel).

III. CANONS OF CONSTRUCTION SUPPORT OHIO

As the Secretary lastly showed (at 46-57), any lingering ambiguity must be resolved in Ohio's favor because of constitutional concerns and federalism values. Respondents' counterarguments fall short.

A. Respondents Ignore Serious Constitutional Questions

The Secretary explained (at 46-53) that the Court should avoid a broad reading of the NVRA because that reading would exacerbate three serious consti-

tutional questions. Respondents claim that these questions are not sufficiently "serious" to trigger the canon. Resp. Br. 52. They argue generally that *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), held that Congress has comprehensive authority to regulate all aspects of registration. Yet *Inter Tribal* recognized that federal laws would raise serious constitutional questions if they intruded too much on the States' authority to set qualifications. *Id.* at 2258-59. And it reserved whether registration represents a "qualification" within the States' domain. *Id.* at 2259 n.9. If anything, then, that case expressly identified the constitutional concerns on which the Secretary relies.

Residency Enforcement. Respondents admit that residency is a qualification, but downplay Ohio's interest in enforcing it. If federal law gives Ohio *some* ability to enforce a qualification (no matter how impractical), they argue that no constitutional issue exists. Resp. Br. 53. That has things backward. The delegation of a power typically includes the delegation of authority over how to execute it. *See* 1 Joseph Story, *Commentaries on the Constitution of the United States* § 430, at 412-13 (1833). Thus, States, not the federal government, get to choose how to enforce their qualifications. *Inter Tribal* supports this view. It avoided the constitutional question by noting that Arizona had another way to get the "information *the State deems necessary*" for determining qualifications. 133 S. Ct. at 2259 (emphasis added).

Registration. Respondents belittle the Secretary's argument (at 51-53) that the Constitution treats registration as a "qualification." They suggest that this question depends on state law. Resp. Br. 54. Yet whether a particular voting prerequisite counts as a

"qualification" under Article I, § 2 or a "manner" regulation under Article I, § 4 represents a *federal* constitutional question turning on the meaning of those provisions—not a *state* law question turning on each state supreme court's view. An identical prerequisite to be registered 30 days before an election, Ohio Const. art. V § 1, either is or is not a qualification under the U.S. Constitution. Further, the fact that state courts hotly debated this issue as a matter of state law when registration first arose, *Morris v. Powell*, 25 N.E. 221, 223-24 (Ind. 1890), illustrates the serious nature of the federal question. So does *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which intentionally interpreted the Elections Clause to protect federalism. *Id.* at 2673-74. And if registration rules are qualifications, the Failure-To-Vote Clause *directly* infringes a qualification.

Presidential Elections. Respondents agree that the Elections Clause gives Congress authority only over *congressional* elections, but that the NVRA covers *presidential* elections. Resp. Br. 54. Yet they try to avoid the avoidance argument by claiming that they challenge the Supplemental Process only as "used in congressional elections." *Id.* at 55. To the contrary, this case arose before the 2016 election, and led to a broad injunction. Pet. App. 95a. Further, while the Secretary did not raise this specific constitutional challenge below, Resp. Br. 55, he invoked the avoidance canon generally, Appellee's Br. 35-37, 6th Cir. R.31, No. 16-3746. This issue provides yet another reason to read the NVRA in favor of state authority. That could indefinitely postpone any need for the Court to confront this glaring con-

stitutional defect. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009).

B. Respondents Wrongly Claim That Federalism Plays No Role Here

As the Secretary noted (at 54-57), federalism-protecting, clear-statement principles favor a reading that grants States latitude to perform traditional election functions. In response, Respondents insist that federalism concerns have "no application" here because *Inter Tribal* said that those concerns play no role when interpreting Elections Clause legislation. Resp. Br. 55. They overread *Inter Tribal*. It rejected only the broad presumption against preemption—which applies at the *start* of interpretation and directs courts to choose a plausible reading over the "fairest" one. 133 S. Ct. at 2257 (reading the NVRA to "mean what it says"); *cf. Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (describing presumption against preemption). Even if that presumption does not apply, federalism principles can at least "resolve ambiguity" that exists at the *end* of interpretation after all traditional tools have been exhausted. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

Indeed, Respondents' broad reading of *Inter Tribal* fails to reconcile it with *Arizona State Legislature* or *Ex Parte Siebold*, 100 U.S. 371 (1880). Respondents simply ignore *Arizona State Legislature*, which "resist[ed] reading the Elections Clause" to intrude on the States' "autonomy to establish their own governmental processes." 135 S. Ct. at 2673. If the Elections Clause *itself* should be read to accommodate federalism, it is hard to see why legislation passed under that clause should not be read in the same way. As for *Siebold*, Respondents note that it

held that Elections Clause legislation preempts state law. Resp. Br. 56. But *Siebold* added a rule of construction for interpreting such legislation, noting that the Court was "bound to presume that Congress had [exercised its Elections Clause power] in a judicious manner" and "endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." 100 U.S. at 393. This rebuts Respondents' efforts to displace all federalism concerns from this area.

Lastly, the statements from *Inter Tribal* on which Respondents rely were "unnecessary for the proper disposition of the case" because the NVRA was "unambiguous in its pre-emption of Arizona's statute." 133 S. Ct. at 2260-61 (Kennedy, J., concurring in judgment). The same cannot be said here. If anything, the NVRA and HAVA unambiguously permit Ohio's decades-old process. Yet any remaining doubt should be resolved in favor of the States' "continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials." *Id.* at 2261.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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