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 OF *AMICI CURIAE* LANDMARK LEGAL FOUNDATION, *ET AL.* IN SUPPORT OF PETITIONER

MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Avenue
Suite 312
Leesburg, VA 20176
703-554-6100

LINDA CARVER WHITLOW KNIGHT
GULLETT SANFORD ROBINSON & MARTIN, PLLC
Suite 1700
150 Third Avenue South
Nashville, TN 37201-2041
615-244-4994

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

U.S. CONST.:

FEDERAL STATUTES & REGULATIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner, the State of Ohio. For reasons stated herein, Landmark respectfully requests the Court to reverse the decision of the Sixth Circuit Court of Appeals and grant the relief sought by the State of Ohio.

Landmark is joined by *Amici Curiae* from Tennessee, a state within the Sixth Circuit and therefore directly and negatively affected by the Sixth Circuit Court of Appeals' decision below. The Tennessee *Amici* include members of the Tennessee Senate and two individuals who have been directly involved in, and are knowledgeable about, the administration of elections under both federal and Tennessee law. They respectfully contend that the Sixth Circuit's construction of the statutes at issue was erroneous; and, further, that

[1] The parties have provided blanket consent for the filing of *Amicus Curiae* briefs in this case. Counsel for *Amici Curiae* provided notice to counsel for parties of its intent to file this brief on July 18, 2017. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

if the ruling below is allowed to stand, the State of Tennessee will be unable adequately to maintain voter registration rolls that are correct and current, thus impairing the vital interest of the citizens of Tennessee in fair and open elections, the protection of the "purity of the ballot box," the implementation of Tennessee law requiring that each voter vote in the precinct in which he or she is domiciled, and the preservation of every citizen's civil right to have his or her vote be counted without dilution caused by illegal votes. All of the Tennessee *Amici* are citizens of, and duly qualified and registered to vote in, the State of Tennessee.

The Tennessee Legislative *Amici*, who are participating herein in their individual capacities, are: Speaker of the Senate, Randy McNally, who represents the Fifth Senatorial District, and is also the Lieutenant Governor of Tennessee; Senator Mae Beavers, who represents the Seventeenth Senatorial District; Senator Mike Bell, who represents the Ninth Senatorial District; Senator Janice Bowling, who represents the Sixteenth Senatorial District; Senator Rusty Crowe, who represents the Third Senatorial District; Senator Dolores Gresham, who represents the Twenty-Sixth Senatorial District; Senator Ferrell Haile, who represents the Eighteenth Senatorial District; Senator Edward Jackson, who represents the Twenty-Seventh Senatorial District; Senator Jack Johnson, who represents the Twenty-Third Senatorial District; Senator Brian Kelsey, who represents the Thirty-First Senatorial District; Senator Bill Ketron, who represents the Thirteenth Senatorial District; Senator Jon Lundberg,

who represents the Fourth Senatorial District; Senator Jim Tracy, who represents the Fourteenth Senatorial District; and Senator Ken Yager, who represents the Twelfth Senatorial District.

Amicus Mr. H. Lynn Greer, Jr. recently served for ten years on the Davidson County (Metropolitan Nashville) Election Commission, including four years as Chairman. He has remained active with the Commission as an election official, working at polls both during early voting and on Election Day. One of the important accomplishments of Mr. Greer's tenure on the Commission was his strong insistence that the Commission comply with the federal and state laws requiring address verification. He continued to monitor that program throughout his service. Due to his oversight, by the end of his membership, the Commission's voter rolls were accurate and well-maintained. He has seen the administrative problems that occur when voter lists are inaccurate and bloated, not only inviting fraudulent voting in the names of people who should no longer be on the rolls, but also administrative delays and confusion in the Commission office and at the polls.

Amicus Mr. Timothy Ishii, of Nashville, Tennessee, is a practicing attorney. He has served as a member of the Davidson County board to count provisional ballots and as a poll watcher during various elections. He is a member of a minority group, a disabled person, a citizen of Tennessee and a duly registered voter in Davidson County, Tennessee. Like Mr. Greer, he has had the opportunity to observe first-hand the confusion

and delays occasioned by bloated and inaccurate voter registration rolls.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ensuring integrity in the voting system is a fundamental obligation and a compelling interest of our government at all levels, from federal to local. See *City of Memphis v. Hargett*, 2013 Tenn. LEXIS 1101 (2013). Additionally, as the Court has wisely noted, public confidence in the electoral process is crucial. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Doubts concerning the system's integrity "breeds distrust of our government" and "drives honest citizens out of the democratic process." *Id*. If voters cannot be sure that adequate steps have been taken so that only eligible voters are included on the voter registration rolls, their confidence in the electoral system will perforce be undermined. They may even be less likely to vote at all.

Since the advent of our republic, the individual states have played an integral role in ensuring open and fair elections. Article I, § 4 charges the states with the responsibility to set the "Times, Places, and Manner of holding Elections for Senators and Representatives. . . ." U.S. CONST. art. I, § 4. As James Madison stated at Virginia's ratifying convention:

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to

> leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.

3 Debates on the Adoption of the Federal Constitution 367 (J. Elliot ed. 1876) (James Madison, Virginia).

The Constitution merely carried forward existing precepts of freedom, honest elections and civic responsibility. For example, the Virginia Declaration of Rights, adopted in June 1776, provides:

> A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free convention which rights do pertain to them and their posterity, as the basis and foundation of government.
>
> . . .
>
> Section 6. That elections of members to serve as representatives of the people, in assembly ought to be free; and that all men, *having sufficient evidence of permanent common interest with, and attachment to, the community*, have the right of suffrage. . . .

Virginia Decl. of Rights, The Avalon Project (July 27, 2017, 3:55 PM), http://avalon.law.yale.edu/18th_century/virginia.asp (emphasis added).

Local and state control of the election process furthers these purposes and preserves liberty. "Preservation of the integrity of the electoral process is a

legitimate and valid state goal." *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1972). See also *City of Memphis*, *supra*. Further, "The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome." H.R. Rep. No. 107-329, pt. 1, at 32 (2001). The United States Constitution reserves to the states the duty and authority to maintain accurate and up-to-date voter rolls. It defers to the states to determine the qualifications of those who may vote in Congressional and Presidential elections, with the exception that they may vote in federal elections at the age of 18. U. S. CONST. art. I, § 1; amends. XVII, XXVI.

The courts should not disturb Ohio's well-designed processes for attempting to ensure accurate voter registration rolls, which processes are consistent *not only* with the texts of the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") – the statutes presently at issue – and the clearly-expressed Congressional intent underlying them, *but also* with the U.S. Constitution and longstanding American tradition.

Ohio complies with the NVRA and HAVA, and attempts to ensure that its voter rolls are accurate and up-to-date, by using two processes enacted in 1994. 145 Ohio Laws 2516, 2521 (1994). Ohio first uses the U.S. Postal Service's National Change of Address ("NCOA") Database as a touchpoint for contacting individuals who may have moved and should no longer be on a particular voter roll. This is referred to as the "safe harbor"

method of voter verification. The "safe harbor" method does not violate the NVRA and the HAVA and it is not at issue in this appeal.

What is at issue in this appeal is Ohio's second method of verifying whether or not voters have moved from their voting district of registration. This is referred to as the "supplemental method." It is used because it is known that some persons, including some voters, move without notifying the Postal Service and other official sources of address information.[2] It is folly to assume that all voters notify official agencies when they move. By the supplemental method, Ohio addresses this situation by using a voter's lack of voting activity in the county where he is registered as the impetus for initiating the procedure to determine whether that voter should remain on a particular voter roll. Exactly like the "safe harbor method," the "supplemental method" includes a notice and opportunity for the voter to respond. *Amici* respectfully contend that the "supplemental method" is equally compliant with the NVRA and HAVA.

The Sixth Circuit invalidated this method, incorrectly ruling that the NVRA and HAVA do not permit

---

[2] A recent study that compared voter history data in 21 states concluded that it was highly likely that 8,471 votes were cast in the 2016 election as a result of registration irregularities. Government Accountability Institute, *America the Vulnerable: The Problem of Duplicate Voting* (July 31, 2017, 3:23 PM), http://www.g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf. Such evidence further demonstrates the need for supplemental processes such as Ohio's.

Ohio's supplemental voter verification program. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016). While one subsection of the NVRA prohibits removal of a voter from the roll for failure to vote, another subsection allows removal of the voter for failing to vote ***and*** failing to reply to a notice directed to him or her. These subsections are not in conflict with each other; rather, they complement each other. The latter provision is consistent with the former; they are easy to construe together; and they form a logical progression.

The lower court erroneously concluded that the NVRA's general prohibition against removing individuals from voting lists for failing to vote invalidated Ohio's supplemental process that included the ***additional*** step of sending a notice to which the voter failed to respond, as a *sine qua non* to removal. *Id*. Ohio does not remove individuals from voting lists for failing to vote. Rather, it removes individuals who do not respond to verification notices triggered by a carefully constructed registration confirmation plan. The removal is based upon the entirely reasonable conclusion that such a voter has changed his address and no longer lives at the address on his voter registration record, and not merely upon his failure to vote.

A state must have a way of inferring that a voter may have moved without being deemed to violate the NVRA or HAVA, when the voter does not notify an official agency such as the Postal Service or the Tennessee Department of Safety, or the election office itself. Ohio would only be violating the NVRA and HAVA if it

summarily removed voters from the rolls without sending them a notice. Indeed, if it wanted to remove voters from the rolls "by reason of the person's failure to vote," Ohio law would not even include, as a condition of removal, the requirement of sending the notice and failing to receive a response. If Ohio were removing voters from the rolls for failing to vote, sending a notice and failing to receive a response would be a charade, a farce, and a sham.

The Sixth Circuit misconstrued the NVRA and HAVA and misapprehended the role and significance of Ohio's supplemental voter verification program, and its ruling must be reversed.

The text and legislative history of the NVRA and HAVA demonstrate that Congress both understood and affirmed the inherent power of states to ensure the integrity of their voter rolls and thus not only protect the rights of lawful voters, but also to further the interest of fair and efficient administration of elections. Congress balanced two governmental purposes: On the one hand, the need to foster voter turnout by lawful voters, and on the other hand, the compelling and time-honored need to preserve the integrity of the election process by obligating states to conduct periodic voter list maintenance. The NVRA establishes a system whereby states develop and implement systems (some of which existed before either NVRA or HAVA was enacted) to ensure that ineligible names are removed from the voter rolls. HAVA further clarifies the process by which states are permitted to implement these systems.

This is of the utmost importance to Tennessee *Amici*, in light of the Tennessee Constitution, which provides: "The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box." TENN. CONST. art. IV, § 1, cl. 2. Accuracy of voter rolls is expressly stated to be of the utmost importance in two ways: Rolls must be accurate to ensure that voters vote in the precincts where they are domiciled, and to secure the purity of the ballot box.

Beyond that, however, the Tennessee *Amici* respectfully assert that the Sixth Circuit's ruling carries a negative implication for voter verification programs nationwide, with a strong potential to affect the outcomes of elections at all levels and complicate the administration of elections and procedures at the polls. For example, if election officials are presented with irrefutable evidence of illegally-registered voters, they could interpret these statutes to prohibit them from taking any affirmative steps to investigate and if warranted, remove voters. They could conclude that they are hamstrung by the statutes at issue, and the lower court's holding is detrimental to proper election administration.

Not only do the NVRA and HAVA balance the public policies of encouraging voter registration and turnout with the compelling interest in ensuring accurate voter rolls; but also, they are expressed in state statutes, including Tennessee's, whose election statutes

are found in Title 2 of the Tennessee Code. At the outset of Title 2, Tenn. Code Ann. § 2-1-102 provides:

> The purpose of this title is to regulate the conduct of all elections by the people so that:
>
> (1) The freedom and purity of the ballot are secured;
>
> (2) Voters are required to vote in the election precincts in which they reside, except as otherwise expressly permitted;
>
> (3) Internal improvement is promoted by providing a comprehensive and uniform procedure for elections; and
>
> (4) Maximum participation by all citizens in the electoral process is encouraged.

Like the public policies embodied in NVRA and HAVA, Tennessee's election law exists to balance, effectuate and implement ***all*** of these interests.

One of the means by which this is accomplished is set out in Tenn. Code Ann. § 2-2-106, which governs removal of voters from the rolls. Pursuant to that section, some voters are "purged" – literally removed – from the rolls, including when they do provide written confirmation that they have moved outside the county, or have registered in another jurisdiction. Tenn. Code Ann. § 2-2-106(a)(5).

Of course, Tennessee has a voter verification program, set out in Tenn. Code Ann. § 2-2-106(c)-(f). It is required to "conform to the intent of this section and this part and the National Voter Registration Act of

1993, compiled in 52 U.S.C. §§ 20501 *et seq*. (formerly 42 U.S.C. §§ 1973gg *et seq*.)." Tenn. Code Ann. § 2-2-106(b). A voter identified through the verification program and sent a notice is placed on inactive status. Tenn. Code Ann. § 2-2-106(d). If the voter responds and is still domiciled in the county, the Election Commission puts him back on active status, and if he responds that he has moved out of the county, he is purged. *Id*.

If he does not respond at all, he remains on inactive status. Tenn. Code Ann. §§ 2-2-106(d) and 2-7-140 describe how a voter on inactive status can vote.

The voter's registration will be purged only if he fails to respond to the notice, ***and*** takes no other steps to update his registration, ***and*** does not vote between the sending of the notice and the second regular November election. Tenn. Code Ann. § 2-2-106(e).

The Tennessee *Amici* respectfully contend that the Ohio supplemental verification procedure that the Sixth Circuit found deficient, and the similar procedure described in the Tennessee Code, are in complete compliance with the NVRA and HAVA, and further that they provide more than adequate safeguards to preserve the voting rights of everyone who is still domiciled in the precinct, ward or district in which he is registered, and thus is entitled to continue to vote therein.

The Tennessee *Amici* also request the Court to acknowledge that *all* citizens, including all voters, have civil rights. *Anderson v. U.S*., 417 U.S. 211 (1974), authored by Justice Marshall. "Civil" rights mean

rights "relating to or consisting of citizens; . . . of the commonwealth or state; . . . of citizens in their ordinary capacity, or of the ordinary life and affairs of citizens; . . . of the citizen as an individual; . . . befitting a citizen; . . . of, or in a condition of, social order or organized government." Dictionary.com (July 27, 2017, 3:37 PM), http://www.dictionary.com/browse/civil?s=t, see also Wikipedia, wikipedia.org (July 27, 2017, 3:40 PM), https://en.wikipedia.org/wiki/Civil_and_political_rights.

Leaving ineligible voters on the rolls increases the chances that parties intent upon committing election fraud will peruse the records, ascertain who has not voted in a while, and vote in the name of the absent voter. *Anderson*, *supra*. As the law now stands, it will be six years before an ineligible voter is removed. That allows plenty of time for an impostor to begin voting in his name, which may prevent the needed removal from ever occurring.

The other side of the same coin is that citizens, including voters, must bear responsibility for keeping their own voter registrations correct and current. See *Taylor v. Armentrout*, 632 S.W.2d 107, 113-114 (Tenn. 1981). No reasonable voter should want to remain on the rolls if she has moved from the jurisdiction, with someone else able to cast a fraudulent vote in her name. A voter should be expected to take the initiative to find out her correct voting place (and the voting place itself may change from time to time). Voters should be presumed to be intelligent and cognizant, especially in light of today's means of communication and transportation, in contrast to those of past times.

Thus, all citizens have both the ***civil right*** to have their vote cast and counted without dilution by illegal votes – to the assurance that no one is on the roll who should not be there – and the ***civic responsibility*** to keep their own registrations current.

ARGUMENT

I. Congress designed the NVRA and HAVA to balance the interests between ballot integrity and ballot access.

The NVRA and HAVA set certain standards for how states conduct voter registration and voter list maintenance for federal elections. Among other things, Congress enacted the NVRA with dual purposes: To "increase the number of eligible citizens who register to vote," while protecting "the integrity of the electoral process" by ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b).

Both statutes require and allow states to perform certain tasks and conduct programs to reduce inaccuracies on their respective voter rolls.

A. The NVRA and HAVA compel states to conduct a program to maintain accurate voter lists.

The NVRA obligates states to "conduct a general program that makes a reasonable effort to remove the

names of ineligible voters from the official lists" of registered voters. 52 U.S.C. § 20507(a)(4). HAVA obligates states to "ensure that voter registration records in the State are accurate and are updated regularly. . . ." 52 U.S.C. § 21083(a)(4). States are further tasked with protecting the integrity of their electoral processes by maintaining accurate and current voter registration rolls. 52 U.S.C. § 20507(b). To that end, states are required to conduct a "general program that makes reasonable efforts to remove ineligible voters from the official lists of voter rolls." 52 U.S.C. § 20507(a)(4). Any registration confirmation process must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Further, the NVRA mandates that no registration process can result in the removal of an individual from the list of registered voters "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

The language of subsection 52 U.S.C. § 20507(b)(2) was "appended," to use the Sixth Circuit's term (838 F.3d at 706), by HAVA to clarify and emphasize Congress's intention that an individual shall not be removed from the voter rolls "solely" by reason of failure to vote. See 52 U.S.C. § 21083(a)(4)(A).

While states are barred from removing individuals from their voter rolls for failure to vote, states are obligated to remove those individuals who have ***both*** (1) failed to vote in two or more consecutive general elections for Federal office; ***and*** (2) failed to respond to a notice sent by a designated election official. *Id*.

The process under Ohio law begins with identifying a universe of individuals whose addresses may have changed, and then giving them notice and the opportunity to respond.

1. The "safe harbor" method.

The first method by which a state ***may*** fulfill its obligation to make its "reasonable effort" to remove ineligible voters is by cross-checking against the NCOA database. 52 U.S.C. § 20507(c)(1). States are not required to use ***only*** the NCOA database. The word "may" in § 20507(c)(1) indicates that states have discretionary authority to utilize the NCOA database, but does not prohibit states from designing and implementing additional list maintenance processes. For example, Tennessee also uses the state Department of Safety driver's license records. Tenn. Code Ann. § 2-2-106(c)(1)(C).

After using the NCOA (and perhaps other cross-check sources) and identifying a universe of voters who may have moved, election officials begin the process of ascertaining who *has* moved. This entails sending a verification notice to the voters so identified.

Ohio operates two registration confirmation processes. Damschroder Dec., R.38-2, Page ID #294. The first process compares the NCOA data with Ohio's registration database to identify individuals who may have moved. *Id*. Matches of individuals who may have moved are sent to local boards of elections, which send confirmation notices to those individuals at their

addresses of registration. Failure to respond to the notice ***and*** no voter activity for four more years results in cancellation of the registration. *Id*.

This procedure is referred to as the "safe harbor" method. This procedure is not at issue in this appeal. *A. Philip Randolph Inst. v. Husted*, 838 F.3d at 704.

2. The "supplemental" method.

The second, or "supplemental," process seeks to identify voters who may have moved without notifying the Postal Service (or other official source with which the voter roll might permissibly be compared under a state law). Damschroder, *supra*. An individual's lack of voter activity for two years spurs the local board of elections to send a confirmation notice. *Id*. If the individual returns the confirmation, the voter information is updated. *Id*., Page ID #295-96. Some voters will respond to the notice, indicating either that (1) they have not moved, (2) they have moved, but live in the same voting district as before, (3) they have moved within the county, but to a different voting district, or (4) they have moved outside the county (whether within the state or to a different state).

Other voters do not respond at all. If a voter fails to take any action (i.e., returning the card or confirming residency via the internet), ***and then*** fails to vote or update his/her registration over the next four years, the registration is cancelled. *Id*.

A state can only remove an individual from a voter roll for changing residences if one of two criteria has been met: One, the individual has confirmed in writing that he/she has changed residences to a locale outside of the registrar's jurisdiction; or, two, the individual has failed to respond to a notice ***and*** has not voted or appeared to vote in two consecutive general elections for Federal office. 52 U.S.C. § 20507(d). Thus, in Ohio, it takes six years of voter inactivity ***and*** failure to respond to a verification notice in order to remove a voter from the roll.

Like the safe harbor method, the supplemental method removes only those individuals who have ***both*** failed to engage in voter activity ***and*** failed to respond to a notice for a total of six years.

Like the safe harbor method, the supplemental method complies with the express requirements of the NVRA and HAVA.

B. Ohio's supplemental process conforms to the texts of the NVRA and HAVA.

The Sixth Circuit erroneously concluded that congressional reports pertaining to the NVRA and HAVA's voter registration confirmation procedures are ambiguous. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016). On the contrary, these reports show that Congress balanced the legitimate interests of the states in ensuring accurate voter rolls with the need to protect the rights of the voter in question – and the rights of other, properly-registered, voters. Congress

achieved this balance by prohibiting states from removing an individual from the voter rolls solely for failing to vote. The provisions that the Sixth Circuit considered ambiguous or conflicting are actually consistent and logical steps in a progression. Construed together, they simply say, "You are not allowed to do this *alone*, but you are allowed to do this *in conjunction with that*," and remove the voter from the active roll.

C. Ohio's voter verification procedure conforms to the texts, histories and purposes of the NVRA and HAVA.

The supplemental process comports with the requirements prescribed in the NVRA. It is also consistent – and does not conflict – with the dual goals stated in committee reports filed contemporaneously with the passage of the NVRA and with the enactment of HAVA.

1. The wording of the statutes is clear and permits voter verification procedures such as Ohio's.

Four sections of the statute are at issue in this case:

First, 52 U.S.C. § 20507(b)(2), which provides that the verification procedures "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*." (Emphasis added.)

Second, 52 U.S.C. § 20507(d)(1), which provides that states "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*" without *first subjecting the registrant to the confirmation notice procedure* outlined in that subsection. (Emphasis added.)

Third, 52 U.S.C. § 21083(a)(4)(A), in which HAVA requires states to implement

> . . . [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. Under such system, consistent with the National Voter Registration Act of 1993 ([52 U.S.C. §§ 20501] *et seq.*), 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.)

Fourth, 52 U.S.C. § 21145(a), which addresses 52 U.S.C. § 20507(b)(2), adding the following clause to the general prohibition on removal by reason of failure to vote:

> . . . nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsection[] . . . (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.

The Sixth Circuit pointed out: "By the HAVA's own terms, however, this language is not to 'be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA],'" referring to 52 U.S.C. § 21145(a). 838 F.3d at 706. It also relied on H.R. Rep. 107-329, at 37 (2001), "(indicating that under the HAVA, 'removal of those deemed ineligible must be done in a manner consistent with the [NVRA]. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [the HAVA] leaves NVRA intact, and does not undermine it in any way.')." *Id*.

The Court of Appeals concluded that this provision brought the analysis straight back to § 20507(b)(2). Thus, the court was not persuaded that failing to vote combined with failing to reply to a verification notice did not violate § 20507(b)(2).

Amici respectfully argue that this is simply incorrect. While it is comforting to have § 21145(a) in the statute, § 20507(d)(1) is sufficient in and of itself to stand as an exception to § 20507(b)(2).

The only reason a voter might be removed from the rolls for failure to vote would be that there is some other underlying reason – the voter is dead, the voter is in prison, or ***the voter has moved away***. Removal of voters who have died, are in prison, etc., is covered elsewhere. Thus, "failure to vote" as used in § 20507(b)(2) is synonymous with "the registrant has changed residence" as used in § 20507(d)(1). Failure to vote is a symptom of the reason, not the reason itself.

This interpretation is logical, makes sense, and comports with the maxim that all provisions of a statute should be given effect.

2. The NVRA's legislative history demonstrates that Ohio's supplemental voter verification procedure complies with the statute.

While Congress enacted the NVRA (and later HAVA), in part to address a perceived decline in voter participation, Congress also stressed the equal and longstanding importance of maintaining accurate and up-to-date voter rolls. "Every effort [in passing the NVRA] has been made to produce a bill that balances the legitimate administrative concerns of election officials." S. Rep. No. 103-6 at 3. These concerns included, "the detection and prevention of fraud, the maintenance of accurate and up-to-date voter rolls, and the removal of the names of ineligible persons from the rolls." *Id*. The "mobility of our population" makes these

tasks "particularly difficult" for state election officials. *Id*.

Congress recognized the necessity of balancing the goal of enhancing the "participation of eligible citizens as voters in elections for Federal office" with "the need to maintain the integrity of the rolls." S. Rep. No. 103-6 at 1, 18. Indeed, Congress noted that "the maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." *Id*. at 18. The NVRA thus requires states to maintain the integrity of the voter rolls by making a "reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence." *Id*. States are authorized to maintain their voter roll integrity by operating a maintenance program in conformance with the provisions described in the NVRA.

Congress further recognized the existence of varying state voter list maintenance programs that were in effect before the enactment of the NVRA. *Id*. at 46. "Of [the states that used non-voting ***alone*** as an indication he/she may have moved], only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under the bill." *Id*. This shows that Congress was aware that certain states had programs that dropped voters from rolls solely for not voting. It further shows that Congress intended to prohibit only this specific practice – states are permitted to use not voting as one step toward removal, ***provided that*** they do not remove individuals solely on the basis of those individuals not

voting, but rather give voters notice and an opportunity to respond – the quintessence of due process.

The above-quoted statement supports the text of the statute. A state's process for confirming domicile comports with the NVRA's mandate to be uniform, nondiscriminatory and in conformance with the Voting Rights Act, provided it does not remove an individual from the voter rolls solely as a result of the individual not voting.

Congress further stated that the NVRA "suggests, but does not require, an approach election officials can use to make sure that their list cleaning method is uniform and nondiscriminatory." S. Rep. No. 103-6 at 46. Additional sources confirm Congressional intention to allow states to craft their supplemental processes, only so long as removal was not based solely on mere failure to vote:

> No State may remove the name of a voter from the rolls due to possible change of address ***unless*** the registrant confirms in writing to have moved out of voting jurisdiction, ***or*** the voter fails to respond to a notice and does not appear to vote and correct the record during period between date of notice and second general election for Federal office.

Joint Explanatory Statement of the Committee of Conference on H.R. 2: Before the H. Comm. of Conference, 103rd Cong. (1993) (emphasis added).

The Sixth Circuit's reliance on H.R. Rep. No. 103-9 stating that "one of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction," is misplaced. It begs the question – if a voter has moved, he or she is ***no longer*** "eligible to vote in that jurisdiction," and the local election offices are both entitled and obligated to ascertain who those voters are.

3. HAVA's legislative history demonstrates that Ohio's supplemental voter verification procedure complies with the statute.

Congressional reports of the debates on HAVA also conform to the precepts established by the NVRA. While HAVA addressed perceived voting registration problems that arose during the 2000 presidential election, it also confirmed the states' authority to enact programs to maintain accurate voter rolls.

To address issues related to voter registration and voting, Congress heard extensive testimony from election officials and election technology experts. Legislators in Congress proposed as many as 50 bills involving campaign finance reform or election reform. *Federal Election Reform Before the H. Comm. on House Admin.*, 107th Cong. 3 (2001) (statement of Rep. Steny H. Hoyer, Ranking Minority Member). Ultimately, Congress addressed these issues by enacting HAVA.

HAVA addresses the "disconnects" that arose following enactment of the NVRA between voter registration

systems such as DMV or social services agencies, and election officials. *Id*. at 8 (statement of Doug Lewis, Director, The Election Center). These included voter files that had become "inflated" in states such as Kansas due to zealous compliance with the registration provisions of the NVRA, without compliance with voter verification provisions. *Id*. at 14 (statement of Connie Schmidt, Election Commissioner, Johnson County Kansas). NVRA implementation also had resulted in the problem of duplicate registrations, attributable to a massive influx of registration data and a failure of individuals to notify election officials that they had moved. *Voting Technology Hearing Before the H. Comm. on House Admin.*, 107th Cong. 16 (2001). If individuals had not notified election officials that they had moved, and election officials were doing nothing affirmative to ascertain whether they had moved, this was the recipe for exactly what NVRA and HAVA were designed to prevent.

The fraudulent registration process, where identical voters appeared on multiple voting lists because they are not removed from ones on which they no longer belonged, concerned Congress as it was considering HAVA:

> The other problem is, of course, that people are not purged from the list when they move from one jurisdiction and register in another jurisdiction. They can easily vote in both places and it would not be detected under any

> system we have now. So I just wanted to lay that issue out clearly.

Id. at 17-18 (2001) (statement of Rep. Vernon J. Ehlers).

Congress singled out the voter registration process as particularly vulnerable to fraud:

> I think the greatest opportunity for fraud, is in voter registration; and we need to pay much more attention to voter fraud there and ensuring that voting lists are good, that we purge them regularly; that when someone moves, they can't keep registration at their former address and so forth.

Hearing on Technology and the Voting Process Before the H. Comm. on House Admin., 107th Cong. 39 (2001) (statement of Rep. Vernon J. Ehlers).

Expanding on the issue of the effect of a mobile population on the voter rolls, the final report from the House Committee on Administration found:

> People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income

> groups, who are more likely to move than higher-income groups within the same state.

H.R. Rep. No. 107-329, pt. 1, at 36 (2001).

After considering input from experts in voting technology and state election officials, Congress agreed to impose in HAVA, as enacted, seven minimum standards to protect the integrity of the voting process while respecting the important role states and localities play. HAVA thus imposed upon the states the implementation of a statewide registration system that would be networked to every jurisdiction within the state. HAVA also obligated the states to implement a "system of file maintenance which ensures that the voting rolls are accurate and updated regularly." *Mark up of H.R. 3295, The Help America Vote Act of 2001 Before the H. Comm. on House Administration*, 107th Cong. 3 (2001) (statement of Rep. Bob Ney, Chair).

Congress designed HAVA, in part, to ensure that voting rolls are accurate and updated on a regular basis, by clarifying the NVRA's procedures for removal of ineligible registrants. *Id*. at 4. Removal from the voter rolls would only occur ***if*** a registrant did not vote for at least two consecutive federal elections ***and*** failed to respond to a notice. When commenting at the mark up hearing for HAVA, the following exchange occurred:

> [Congressman Doolittle]: I understand everything until we get to the phrase, which says, "except that no registrant may be removed solely by reason of the failure to vote." And that seems to me to kind of muddy the water

> to what it said prior to that. So could I just ask what the effect of that is?
>
> The Chairman: Counsel is telling me you can't be removed simply because you haven't voted. *You have to have not voted and not responded to a notice.*

Id. at 12 (emphasis added).

Ranking minority member Representative Steny Hoyer further expanded on the issue raised by Congressman Doolittle:

> Mr. Hoyer: I think I understand what you are saying. If you read these two together; they both mean that you can't remove somebody for not voting solely. That is what the –
>
> Mr. Fattah: The gentleman suggested somebody should be removed from the rolls?
>
> Mr. Hoyer: That is what the National Voter Registration Act says, and therefore from our perspective if that causes you some concern, it doesn't add anything or detract anything, but from our standpoint it makes it clear that is the intent. That is what the current law is and we just wanted to indicate so we don't create a controversy outside this bill that frankly we don't need. We have got enough controversy as it is.

Id.

This sentiment is reflected in the final report from the House Committee on Administration:

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance which removes registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not voted in 2 or more consecutive general elections for federal office *and who have not responded to a notice* 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.

H.R. Rep. No. 107-329, pt. 1 at 36-37 (2001) (emphasis added).

Representative Hoyer's explanation, and the final Report of the Committee on Administration taken in the correct context, underscore the Sixth Circuit's error in relying on the statement that, "[b]y the HAVA's own terms, however, this language is not to 'be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA],'" referring to 52 U.S.C. § 21145(a) and relying on H.R. Rep. 107-329, pt. 1 at 37 (2001). 838 F.3d at 706.

HAVA then reinforced the existing language from NVRA § 20507(b)(2) following the general rule prohibiting removal from the voter rolls for failure to vote:

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

As clear as it already was, the amendment to the NVRA removed any possible confusion regarding voter removal procedures. In the original HAVA legislation, the amendment is entitled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change in residence." H.R. Rep. No. 107-730, pt. 1 at 81 (2001). Statements from legislators during hearings and mark ups show that states could only remove an individual from the voter rolls if the individual did not vote ***and*** did not respond to a notice. Under HAVA, states are obligated to remove "registrants who have not responded to a notice ***and***

who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A) (emphasis added).

Congress thus provided a roadmap for the states. Consistent with the NVRA and HAVA, an individual cannot be removed from the voter rolls solely for not voting. States ***can*** remove individuals who have failed to vote for a certain period ***and*** failed to respond to a notice.

Nothing in the debates concerning the NVRA and HAVA suggests that Congress intended to limit the states' authority to use only the NCOA safe harbor method as a touchstone for voter eligibility confirmation. In fact, accompanying reports note that the NVRA "***suggests***, but does not require" the use of the NCOA. S. Rep. No. 103-6 at 46 (emphasis added). A suggestion, rather than a specific direction, indicates that Congress did not want to limit states to using only the NCOA as the means for ensuring the integrity of voter rolls. The only specific limitation is removing a voter *solely* for failing to vote. The NVRA says that a state "may" use the NCOA system. 52 U.S.C. § 20507(c). It does not mandate that the only acceptable system is one that uses the NCOA and/or other official registries of addresses.

The voter's removal is not for failure to vote. It is because there is a reasonable inference that the voter has changed his or her place of domicile and no longer belongs on that voter registration roll.

II. The Sixth Circuit erred when it concluded that the supplemental process violates the NVRA.

Ohio uses the supplemental process to identify electors "whose lack of activity indicates they may have moved, even though their names did not appear" in the NCOA change-of-address database. Brunner Directive 2009-05, R.38-7, Page ID #401. Those individuals who have not voted for two years are sent confirmation notices. Damschroder Decl., R. 38-2, Page ID #295. Should the voter return the notice via prepaid mail or confirmation via the internet, the local board of election will update the voter's information. *Id.*, Page ID #295-96. Should the voter ignore the notice and fail to vote or update the voter's registration over the next four years, the board will cancel the registration. *Id*.

The supplemental process only removes individuals who ***both*** fail to respond to a notice ***and*** fail to either vote or update their registration for six years. The Sixth Circuit reversed the lower court's dismissal of a challenge to Ohio's supplemental process. The Sixth Circuit erred when it concluded that the NVRA and HAVA did not permit Ohio to use nonvoting at all, since it is a mere trigger to initiate a voter confirmation process whose purpose is to ascertain whether or not the voter has moved outside the jurisdiction. *A. Philip Randolph Inst. v. Husted*, 838 F.3d at 710.

Ohio has an obligation to ensure that its voter rolls are accurate. "The separate States have a continuing, essential interest in the integrity and accuracy

used to select both state and federal officials." *Arizona v. Inter Tribal Council of Ariz., Inc.*, ___ U.S. ___, 133 S. Ct. 2652, 2261 (2015) (Kennedy, J., concurring). When individuals appear to have moved from a voting district without informing their local election officials, those officials must be permitted to take reasonable steps to determine whether they should continue to be on the voter rolls. Contrary to the Sixth Circuit's holding, the procedure embodied in Ohio law, and that of other states, including Tennessee, is expressly authorized under the NVRA and HAVA.

Moreover, even if the express language of the statutes were considered ambiguous, the debates surrounding enactment of the NVRA and HAVA are clear and resolve any ambiguity: A voter cannot be, ***and will not be***, removed from the voter rolls solely for failing to vote. Failure to return a verification notice is an additional, integral and indispensable part of the removal procedure. Removal because of an inference that a voter has moved cannot take place without failure to return a notice. As noted above, voters share the responsibility to ensure that their respective counties have accurate and up-to-date information as to whether the individual is duly registered (including, if he has not voted for a while, checking to be sure that he is still on the roll). *Taylor v. Armentrout*, *supra*. Failure on the part of the individual to respond to a notice, in addition to voter inactivity for a period of six years, is ample justification for removal. Nothing stops a voter who has been removed, and still lives in the same county,

from re-registering and being able to vote in future elections.

CONCLUSION

Nothing in either the texts or the legislative histories of the NVRA and HAVA suggests that Congress intended to exclude the type of supplemental voter verification program employed by Ohio. In fact, the extensive discussions regarding restoring and preserving the integrity of the American ballot system support the supplemental process.

Ohio's supplemental voter verification program is consistent with the texts and histories of the NVRA and HAVA. It serves the public interest and promotes the purposes of election laws, including securing the freedom and purity of the ballot, requiring voters to vote in the precincts where they are domiciled, and promoting internal improvement by providing a comprehensive and uniform procedure; and it does not detract from encouraging maximum participation in the electoral process on the part of voters who take minimal steps to preserve their registration if they indeed have not moved.

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Avenue
Suite 312
Leesburg, VA 20176
703-554-6100

LINDA CARVER WHITLOW KNIGHT
GULLETT SANFORD ROBINSON
& MARTIN, PLLC
Suite 1700
150 Third Avenue South
Nashville, TN 37201-2041
615-244-4994

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amici Curiae