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 the American Civil Rights Union as *Amicus Curiae* in Support of Petitioner

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Interests of *Amicus Curiae*[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have agreed to the timely filing of *amicus* briefs.

Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections and preserving the Constitutional balance of state control over their own elections.

Summary of the Argument

Since 1994, Ohio has used a voter's inactivity as one basis for identifying ineligible registrants who will begin the removal process provided by the National Voter Registration Act of 1993 ("NVRA"). The Sixth Circuit held that this so-called "Supplemental Process" for removing ineligible registrants violates the NVRA because it considers a registrant's failure to vote as part of the removal process.

Contrary to the decision below, the NVRA does not categorically prohibit consideration of voter inactivity. When Congress exercised its power to regulate the removal of ineligible registrants, it did so narrowly and unambiguously, forbidding any removal based on "the failure to vote," 52 U.S.C. § 20507(b)(2), a prohibition later clarified by law to mean "*solely*" based on the failure to vote, 52 U.S.C. § 21083(a)(4) (emphasis added). Congress regulated no further.

Ohio does not remove any registrant "solely" by reason of a failure to vote. Rather, a registrant is removed only if she fails to respond to an address confirmation mailing and then fails to engage in any

voting activity for an additional four years—a procedure explicitly authorized by Congress under the NVRA. 52 U.S.C. § 20507(b)(2). This case can thus be decided in Secretary Husted's favor on statutory grounds, alone.

If, however, the NVRA indeed prohibits the States from utilizing inactivity as a factor that leads to deeming a registrant ultimately to be unqualified—as the lower court found—then the NVRA intrudes on the important federalist balance in the Constitution.

The Federal Constitution gives Congress limited power with respect to elections. Regulatory power concerning the "Times, Places, and Manner" of holding federal elections is preserved for the States under the Constitution's Elections Clause. U.S. Const., Art. I, § 4, cl. 1. In this area, Congress's power to regulate is superior to the States' power *only* when the regulations cannot be reconciled. That is, Congress's regulations "supersede those of the State which are inconsistent therewith." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("*ITCA*").

However, "[p]rescribing voting qualifications . . . forms no part of the power to be conferred upon the national government by the Elections Clause." *ITCA*, 133 S. Ct. at 2258 (citations and quotations omitted). Rather, the Constitution's Qualification's Clause gives the power to set voter qualifications to the States, exclusively. The power to set voter qualifications includes the power to enforce them. *Id.* at 2258-59.

This Court has not had the occasion to decide whether list maintenance programs are properly considered "qualification" regulations or "manner" regulations. However, the Court need not make that determination now, because the "Supplemental Process" is a valid exercise of authority under either classification.

The Sixth Circuit, by enjoining the "Supplemental Process," encroached on the Constitutional prerogatives of the State of Ohio. That decision cannot withstand scrutiny and should be accordingly reversed.

Argument

I. The NVRA and HAVA Permit Ohio's Supplemental Process.

Congress directed that the States must make a reasonable effort to remove registrants who have changed residency to a different voting jurisdiction. 52 U.S.C. § 20507(a)(4)(B), subject to certain constraints. The first constraint is general, but unambiguous. The NVRA prohibits the removal of registrants "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Congress, however, did not categorically prohibit the use of voter inactivity as a means to maintain clean voters rolls. In fact, Congress provided an explicit exception to the general constraint that actually depends on voter inactivity, explaining that "nothing in [Section (b)(2)] may be construed to prohibit a State from" removing a registrant if she (1) fails to respond to an address confirmation mailing, and then (2) fails to vote in two consecutive general elections. 52 U.S.C. §

20507(b)(2)(A)-(B); *see also* 52 U.S.C. § 20507(d)(1)(B).

In 2002, Congress passed the Help America Vote Act ("HAVA"), which clarified these list maintenance procedures:

> [C]onsistent with the National Voter Registration Act of 1993 . . . , registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added).

The Sixth Circuit made much of the fact that the NVRA uses different language than HAVA, referencing not just removals based "solely" on a failure to vote, but list maintenance programs that "result[]" in the removal of voters "by reason of the person's failure to vote." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016) (citing 52 U.S.C. § 20507(b)(2)). But this ignores that when Congress drafted HAVA to prohibit removals based "solely" by reason of a failure to vote, it carefully explained that this prohibition was "consistent with the National Voter Registration Act." 52 U.S.C. § 21083(a)(4). Thus, HAVA did not modify the NVRA, but clarified what it means.

Ohio does not remove any registrants "solely by reason of a failure to vote." *Id.* Rather, registrants are removed only if they (1) do not respond to the confirmation notice or update their registration; *and* (2) do not subsequently vote during a period of four

consecutive years that includes two federal elections." *A. Philip Randolph Inst.*, 838 F.3d at 703 (emphasis in original). In other words, Ohio's Supplemental Process expressly tracks what is permissible under the NVRA. 52 U.S.C. § 20507(b)(2). The Supplemental Process therefore can and should be upheld under a plain reading of the NVRA and HAVA.

II. The Sixth Circuit's Interpretation of the NVRA and HAVA Contravenes Established Principles of Federalism.

The lower court determination that the NVRA categorically prevents the States from considering voter inactivity as a means to determine voter eligibility implicates important constitutional concerns. Whether viewed under the Qualifications Clause or the Elections Clause, the Supplemental Process is a lawful exercise of Ohio's authority to regulate its elections for federal office.

A. The Constitution Grants the States the Power to Set Voter Qualifications and Decide the Manner In Which Ineligible Registrants are Removed From the Voter Rolls.

The regulation of federal elections is directed by the Constitution. Under the Qualifications Clause, the Framers reserved exclusively to the States the authority to control who may vote in federal elections. *See* U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures); *ITCA*, 133 S. Ct. at 2258 (quoting

Oregon v. Mitchell, 400 U. S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) ("'Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'")). In this area, the Constitution is clear: "[t]he Framers did not intend to leave voter qualifications to Congress." *ITCA*, 133 S. Ct. at 2263 (Thomas, J., dissenting).

The Framers also gave the States the authority to control how elections are conducted. The Elections Clause "imposes the duty ("*shall* be prescribed")" upon the States "to prescribe the time, place, and manner of electing Representatives and Senators." *ITCA*, 133 S. Ct. at 2253. This power is "broad" in scope, "embrac[ing] [the] "authority to provide a complete code for congressional elections." *Id.* (citations and quotations omitted).

While State authority over elections is the "default," the Framers empowered Congress to "pre-empt state legislative choices" with respect to the times, places and manner of holding elections. *Id.* The original purpose of giving Congress pre-emptive rights in this area was precise—it acted as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *ITCA*, 133 S. Ct. at 2253.

Where exercised, Congress's pre-emptive power has narrowly defined limits. Congressional action is superior to that of the States only "so far as it is exercised[] and *no farther*." *ITCA*, 133 S. Ct. at 2254 (emphasis added). That is, Congress's regulations "supersede those of the State which are inconsistent

therewith." *Id.* at 2254; *see also Ex parte Siebold*, 100 U.S. 371, 384 (1879) ("When exercised, the action of Congress, *so far as it extends and conflicts* with the regulations of the State, necessarily supersedes them.") (emphasis added). In short, where Congress has not explicitly acted, regulatory authority over federal elections remains the exclusive prerogative of the States.

B. Ohio's Supplemental Process is a Valid Exercise of Constitutional Authority and is Consistent with the NVRA and HAVA.

Whether list maintenance programs are properly considered "qualification" regulations or "manner" regulations is an open question. This Court has suggested that the Elections Clause encompasses regulations relating to "registration," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), but has more recently reserved that question for consideration, *ITCA*, 133 S. Ct. at 2259 n.9. However, the Court need not make that determination now, because the "Supplemental Process" is lawful exercise of Ohio's constitutional authority under either classification.

1. The Supplemental Process is Valid Under the Qualifications Clause.

The States' power to prescribe qualifications broadly includes the power to enforce them. *ITCA*, 133 S. Ct. at 2258-59. Residency is a voter qualification in Ohio. Ohio Rev. Code § 3503.01(A). The Supplemental Process enforces Ohio's residency requirement by requiring registrants who have not voted recently to confirm their eligibility to vote at their registered address.

To read the NVRA as preventing this enforcement mechanism would contravene Ohio's exclusive prerogative under the Constitution's Qualifications Clause to enforce voter qualifications. Indeed, as this Court said recently in *ITCA*, any law that "precluded a State from obtaining information necessary to enforce its voter qualifications" "would raise serious constitutional doubts." *Id.*

Only under "exceptional conditions," such those under which the Voting Rights Act of 1965 was passed, could justify such a "drastic departure from basic principles of federalism." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013). The Voting Rights Act "employed extraordinary measures to address an extraordinary problem"—"entrenched racial discrimination in voting." *Id.* No such circumstances exist here.

2. The Supplemental Process is Valid Under the Elections Clause.

Even if viewed as a "manner" restriction subject to the contours of the Elections Clause, the Supplemental Process remains a valid exercise of power granted to the States by the Constitution.

With respect to the "times, places, and manner" of federal elections, Congress's regulations "supersede those of the State which are inconsistent therewith," and "*no farther*." *ITCA*, 133 S. Ct. at 2253-54 (emphasis added). To go farther, would encroach into an area of regulation preserved for the States by the Framers, thereby upsetting the federalist balance enshrined in the Constitution.

In HAVA, there is clear direction from Congress that the NVRA has regulated "no farther," *ITCA*, 133 S. Ct. at 2254, than to prohibit registrant removal "solely by reason of a failure to vote," 52 U.S.C. § 21083(a)(4). Ohio does not remove any registrants "solely by reason of a failure to vote." *Id.* Instead, Ohio *sends notices* to registrants who have not voted in two years asking that they confirm their registered address. Only if a registrant does not respond to the notice *and* does not vote during a period of four consecutive years that includes two federal elections, is the registrant's registration cancelled.

Of course, if a State removes a registrant both because the registrant has failed to respond to a notice and because the registrant has failed to vote, the State has not removed the registrant *solely* because the registrant has failed to vote.

Importantly, Congress was silent as to how States may determine which registrants receive the address confirmation notice described in the NVRA. In other words, there is no inconsistency between federal and state regulation with respect to that determination. Congress's silence means that such a determination remains within the realm of the States' authority under, at least, the Constitution's Elections Clause. *ITCA*, 133 S. Ct. at 2254 (With respect to the "Times, Places and Manner" of federal elections, Congress's regulations "supersede those of the State *which are inconsistent therewith*.") (emphasis added).

As this Court is aware, issues of constitutional interpretation are weighty and should not be

reached absent the "necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). That necessity is lacking here because this Court can and should find that the NVRA and HAVA permit Ohio's Supplemental Process.

However, should this Court be unable to resolve this case on statutory grounds, established principles of federalism demand that this case be resolved in favor of Secretary Husted.

III. Additional Voter Removal Tools, Like Ohio's Supplemental Process, Are Available to Election Officials and Are Necessary to Combat the Problem of Corrupted Voter Rolls Nationwide.

The current state of the nation's voter rolls is dismal. A recent study by Pew Charitable Trusts found that "approximately 24 million—one of every eight—voter registrations in the United States are no longer valid or are significantly inaccurate." The Pew Center on the States, *Inaccurate, Costly, and Inefficient, Evidence That America's Voter Registration System Needs an Upgrade*, February 2012, *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.

A 2015 investigation by the Public Interest Legal Foundation (PILF) found that 141 counties in 21 states have more people registered to vote than living, voting-age residents. Press Release, PILF, *141 Counties Have More Registered Voters Than People Alive* (August 27, 2015), *available at*

https://publicinterestlegal.org/blog/scores-of-counties-put-on-notice-about-corrupted-voter-rolls/.

A Virginia-focused investigation conducted by PILF in May 2017 revealed that over 5,500 registered voters had been removed for citizenship defects in the Commonwealth since 2011. PILF, *Alien Invasion II: The Sequel to the Discovery and Cover-up of Non-citizen Registration and Voting in Virginia* at 1 (May 29, 2017), *available at* https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf. A portion of these individuals cast nearly 7,500 ballots before election officials removed them from the voter rolls. *Id.*

Despite great advances in technology, most jurisdictions fail to use the latest database tools at their disposal and ignore best practices in their list maintenance activities. *See* PILF, Best Practices for Achieving Integrity in Voter Registration, available at https://publicinterestlegal.org/files/PILF-best-practices-report-FINAL.pdf. The mobility of the nation's population and the influx of non-citizens have certainly made the job of maintaining voter lists more difficult. However, the NVRA's goal of ensuring accurate and current voter registration rolls cannot be disregarded simply because the task has become more challenging. To the contrary, present circumstances require election officials to find new and creative ways to police their voter rolls.

The NVRA requires election officials to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters…." 52 U.S.C. § 20507(a)(4)(B). Congress did not include a detailed

checklist of steps within the NVRA for election officials to follow. Rather, Congress provided election officials wide flexibility to implement a generalized program to keep voter rolls clean. 52 U.S.C. § 20501(b) (Congress enacted the NVRA "to protect the integrity of the electoral process . . . and to ensure that accurate and current voter registration rolls are maintained.").

The current state of the voter rolls across the nation demonstrates the need for election officials to utilize the flexibility afforded by Congress under the NVRA. Ohio's use of voter inactivity to begin the removal process permitted under the NVRA is one example of where this is taking place. Other states should be encouraged to take similar and even further action to protect the sanctity of our nation's elections.

It is the responsibility of election administrators to use the list maintenance tools reasonably available to mitigate the potential for any registration or voting fraud. Irregularities and inflated rolls may lower voter confidence in the fairness and accuracy of elections. The end goal should be for all political parties and candidates to be confident that the winners and losers were correctly determined and the contest was conducted fairly. That requires an accurate voter registration list before anything else.

Conclusion

Ohio's Supplemental Process is a valid exercise of authority preserved in the Constitution. The Sixth Circuit's decision contravenes that authority. The

decision below should be reversed in order to reaffirm the State's constitutional authority to regulate the registration and removal of voters so it may address the serious and increasingly prevalent issue of corrupted voter rolls.

Respectfully submitted,

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