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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case considers the steps that States may take to maintain accurate voter-registration lists under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). These laws bar States from removing "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," but clarify that a State must remove a voter if the voter does not respond to a confirmation notice sent by the State and does not vote in the next two general federal elections. 52 U.S.C. §§20507(b)(2), 21083(a)(4)(A).

Since 1994, as part of its general list-maintenance program, Ohio has sent voters who lack voter activity over a two-year period the confirmation notice that the NVRA and HAVA both reference. If these voters do not respond to that notice and do not engage in any additional voter activity over the next four years (including two more federal elections), Ohio removes them from the list of registered voters and requires them to reregister if they otherwise remain eligible to vote. The Sixth Circuit held that this decades-old process violates §20507(b)(2) because Ohio uses a voter's failure to vote as the "trigger" for sending a confirmation notice to that voter.

The question presented is:

Does 52 U.S.C. §20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, EFELDF has consistently defended not only the Constitution's federalist structure, but also its limits on federal power. In the context of the integrity of the elections on which the Nation has based its

[1] *Amicus* EFELDF files this brief with the consent of all parties; petitioner's and respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to the preparation or submission of this brief.

political community, EFELDF has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Three plaintiffs – A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless, and Larry Harmon – (collectively, "Plaintiffs") sue Ohio's Secretary of State ("Ohio") to enjoin Ohio's "Supplemental Process" for voter-roll maintenance under the National Voter Registration Act, 52 U.S.C. §§20501-20511 ("NVRA"),[2] and the Help America Vote Act of 2002, 52 U.S.C. §§20901- 21145 ("HAVA").[3]

Constitutional Background

The Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. "'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to

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[2] PUB. L. NO. 103-31, 107 Stat. 77 (1993).

[3] PUB. L. NO. 107-252, 116 Stat. 1666 (2002).

the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Moreover, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Thus, appellate courts have the obligation to review not only their own jurisdiction, but also the jurisdiction of the lower courts and to dismiss litigation if jurisdiction is lacking. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a states' own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993). Significantly, states can waive immunity by consenting to be sued only in their own court systems, without consenting to suits in federal

court. *Florida Dep't of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981).

Legislative and Regulatory Background

In 1993, Congress enacted NVRA to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(b)(1) (1994); 52 U.S.C. §20501(b)(1), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3) (1994); 52 U.S.C. §20501(b)(3). In addition to making it easier to register to vote, NVRA also *required* "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" for reasons such as death or change of residence. PUB. L. NO. 103-31, §8(a)(4), 107 Stat. at 83.

In §8(b)(2), NVRA provided that such programs "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." *Id.* §8(b)(2), 107 Stat. at 83. At the time it acted, Congress was aware that almost all states updated their voting rolls at least biannually, with one fifth canvassing all voters, most canvassing only nonvoters (*i.e.*, using "not voting as an indication that an individual might have moved"), and only a "handful" striking nonvoters from the rolls with no prior notice. H.R. REP. NO. 103-9, at 30 (1993).

NVRA included an optional safe harbor of using the Postal Service's change-of-address data to identify voters who moved, PUB. L. NO. 103-31, §8(c), 107 Stat. at 83-84, but allowed any mechanism that complied with NVRA's provisions. As relevant here, NVRA's primary restriction prohibited removing registrants

unless they both failed to respond to a notice confirming their address and did not vote for two federal election cycles after that notice. *Id.* §8(d)(1)(B), 107 Stat. at 84. As its brief indicates, Ohio was one of the majority of states that culled its lists only after notice, from before NVRA's enactment to the present. Ohio Br. at 5.

The Clinton-era Department of Justice ("DOJ") took the position that NVRA precluded removing a registrant based on the *trigger* of nonvoting, even if final removal required the failure to respond to notice (*i.e.*, the practice that Ohio uses here and that most states used at the time of NVRA's enactment). Fed'l Election Comm'n, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, at 5-22 & n.13 (Mar. 1998) ("*FEC Report*"). In enacting HAVA, Congress made two relevant clarifications with respect to this issue.

First, HAVA appended the emphasized "except" clause onto the end of §8(b)(2):

> (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote*, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--*
>
> *(A) has not either notified the applicable registrar (in person or in writing) or*

> *responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then*
>
> *(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. §20507(b)(2) (emphasis added); PUB. L. NO. 107-252, §903, 116 Stat. at 1728.

Second, HAVA added a new provision on voter-roll maintenance, which included the following proviso:

> The State election system shall include 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 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, 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) (citations omitted); PUB. L. NO. 107-252, §303, 116 Stat. at 1709-10.

Factual Background

Amicus EFELDF adopts Ohio's statement of the facts, Ohio Br. at 2-11, but also summarizes here the jurisdictional facts as alleged by Plaintiffs. In several instances, an individual last voted in 2008, which

would have triggered notice for not voting after the 2010 election cycle and then removal after the 2014 election.

- ***Larry Harmon***. Mr. Harmon last voted in 2008, but votes in most presidential elections, Harmon Decl. ¶¶5-6 (ECF #39-6); he did not move and does not recall receiving a notice, *id.* ¶¶3, 10.
- ***Chad McCullough***. Mr. McCullough was 44 years old in 2016, but voted for the first – and apparently only – time in 2008, McCullough Decl. ¶¶2, 6 (ECF #39-7), presumably because he "usually only vote[s] when there is an issue or candidate on the ballot that [he] care[s] about," *id.* ¶7.
- ***Elizabeth Bonham***. An attorney for Plaintiffs, Ms. Bonham is an eligible and registered voter, Bonham Decl. ¶3 (ECF #39-4), and does not allege any injury from Ohio's Supplemental Process.
- ***Delores Freeman***. The President of APRI's Youngstown Chapter, Ms. Freeman does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on her chapter: the re-registration process "creates a burden on our Chapter because we provide food and water to our volunteers during these voter registration drives and may also provide them with a small stipend," and it "will reduce our ability to engage in voter education and other activities." Freeman Decl. ¶¶25-26 (ECF #39-3).
- ***Lisa Keil***. Ms. Keil voted in 2008, but did not try to vote again until 2015, when she learned that she had been removed from the rolls, Keil Decl.

¶¶10, 14 (ECF #39-8); Ms. Keil subsequently re-registered to vote in the 2016 primary, which she did, and plans to vote in the 2016 general election, *id.* ¶20.

- ***Angaletta Pickett***. Ms. Pickett voted in 2012, but not in 2014, and understands that she would have received a notice from her county registrar under Ohio's Supplemental Process, but she cannot locate that notice, causing her to worry that she might be removed, notwithstanding that she planned to vote in 2016. Pickett Decl. ¶¶11, 13, 15 (ECF #39-2).
- ***KaRon Waites, Jr.*** The President of APRI's Cleveland Chapter, Mr. Waites does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on his chapter: "The Chapter is increasing our voter-registration efforts, but it occurs at the expense of other get-out-the-vote efforts, such as voter education, as well as other Chapter activities more generally," Waites Decl. ¶16 (ECF #39-5); because the Chapter's "members are engaged and committed to assisting the community with voting, … that work takes away from the Chapter's energy and ability to help at a food bank or do other non-voting work in the community," *id.*
- ***Andre Washington***. The President of APRI's state chapter ("Ohio APRI"), Mr. Washington does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on his organization: Ohio APRI "has limited resources, the need to re-register infrequent voters and to expend resources on technology to assist in targeting those specific

> voters will prevent the Cleveland Chapter from conducting the amount of outreach with first-time voters and individuals who have never been registered as it would otherwise be able to do" Washington Decl. ¶29 (ECF #39-1). Further, although he does not allege that voting-related efforts impair non-voting efforts, he notes that "Ohio APRI's mission includes supporting charitable ventures, such as feeding the hungry and providing clothing to those in need, and voter engagement, including voter outreach, voter education, and voter registration," but that the "majority of APRI's resources are dedicated to its voter engagement work." *Id.* ¶13.

Although not pressed by the parties, these facts go to this Court's and the lower courts' Article III power to decide aspects of this litigation.

SUMMARY OF ARGUMENT

In recently holding the "presumption against preemption" inapplicable to Election Clause legislation and express-preemption statutes, the Court did not eliminate the clear-statement rule as a canon of statutory construction for Election Clause legislation and express-preemption statutes. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2256-57 (2013) ("*ITCA*"); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016). Indeed, *ITCA* itself relied on the Election Clause precedent of *Ex parte Siebold,* 100 U.S. 371 (1880), which includes the clear-statement requirement. This Court neither did nor should overturn interpretive canons *sub silentio*, and any such reversal would need to apply prospectively to

new legislation, not retroactively to legislation that Congress enacted under well-understood and long-established clear-statement principles (Section I).

Although this Court need evaluate only whether Ohio's Supplemental Process satisfies federal law as it currently exists – *i.e.*, NVRA as clarified by HAVA – *amicus* EFELDF analyzes both NVRA as enacted and NVRA as clarified by HAVA. NVRA's need for HAVA's clarification provides the legislative context for HAVA's enactment, which in turn helps resolve the question of congressional intent.

Under NVRA as informed by the clear-statement rule, the Sixth Circuit erred by reading "by reason of" out of §8(b)(2). Under this Court's precedents and the dictionary definition, that phrase means "because of," and Ohio's Supplemental Process – while initiated by non-voting in some instances – is never consummated on the basis of non-voting. Instead, removal from the rolls happens only when the registrant fails to respond to the notice (Section II.A.1).

Under HAVA's clarifications, Ohio's case is even stronger. The "except" clause added to §8(b)(2) makes clear that that paragraph's language is not open to the Sixth Circuit's (and Plaintiffs') interpretation because the "except" clause distinguishes the combination of non-responsiveness to notice and non-voting from non-voting alone. While HAVA's clarification of §8(b)(2) independently would suffice for Ohio to prevail, HAVA also added 52 U.S.C. §21083(a)(4). This second provision expressly distinguishes between "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections" on the one hand and "registrant[s]

… removed *solely* by reason of a failure to vote" on the other hand. 52 U.S.C. §21083(a)(4)(A) (emphasis added). HAVA's clarifications thus reinforce the distinction that Ohio seeks to draw, especially when viewed under a clear-statement rule (Section II.B).

Jurisdictionally, it is doubtful whether Plaintiffs have standing. With the possible exception of Mr. Harmon, the individual declarants lack an imminent injury under Article III (Section III.A.2), and the institutional plaintiffs cannot assert their voluntary expenditure of funds as an injury caused *by Ohio*: Article III does not contemplate such "self-inflicted injuries" (Section III.A.1). Similarly, no Plaintiff claims injury from inadequate notice after moving out of Ohio, so Plaintiffs cannot challenge that aspect of Ohio's notice (Section III.D). Plaintiffs' other notice-based claims are moot because Ohio cured them, which denies this case not only an ongoing controversy under Article III (Section III.B), but also an ongoing violation of federal law necessary to bypass Ohio's immunity from suit in federal court (Section III.C). Assuming *arguendo* that any of Plaintiffs' claims are justiciable, this Court should make clear that relief can issue only for justiciable claims (Section III.D).

ARGUMENT

I. THE CLEAR-STATEMENT RULE APPLIES, NOTWITHSTANDING *ITCA*'S REJECTION OF THE PRESUMPTION AGAINST PREEMPTION.

Until recently, the Court's preemption cases included two somewhat inconsistent or competing modes of analysis to determine the intent of Congress.

First, the analysis begins with the federal statute's plain text, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). But second, under *Santa Fe Elevator* and its progeny, the analysis would sometimes apply a presumption against preemption for legislation in areas of existing or traditional state concern. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). In recently rejecting the presumption against preemption in both express-preemption cases generally and Election Clause cases specifically, this Court did not simultaneously – and *sub silentio* – reject the clear-statement rule as a mechanism for interpreting what a statute's plain text actually means.

As an initial matter, the clear-statement rule and the presumption against preemption are not now the same thing, *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006) (distinguishing between the two), although the latter appears to have grown out of the former. Thus, while the precedents on which *Santa Fe Elevator* relied both merely required that Congress act clearly, *Napier v. Atlantic Coast Line,* 272 U.S. 605, 611 (1926) ("intention of Congress to exclude States from exerting their police power must be clearly manifested"); *Allen-Bradley v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (same), the presumption had grown over the years into a canon of statutory construction that could displace other canons: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,*

555 U.S. 70, 77 (2008) (interior quotations omitted). Thus, whatever their common origins, the clear-statement rule and the presumption against preemption had parted ways in recent years.

By contrast, the Court's "clear statement rules … are merely rules of statutory interpretation, to be relied upon only when the terms of a statute allow," as "rules for determining intent when legislation leaves intent subject to question." *U.S. v. Lopez*, 514 U.S. 549, 610-11 (1995). Moreover, clear-statement rules interact with other canons of construction, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-09 (1991) (rule against repeals by implication); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206-07 (1991) (*stare decisis*), rather than supplanting them.

Perhaps because of that potential to displace other canons of construction, "the Court's treatment of the presumption against pre-emption has not been uniform" and its "express pre-emption cases since [*Cipollone v. Liggett Grp.*, 505 U.S. 504 (1992)] have marked a retreat from reliance on it to distort the statutory text." *Altria Group*, 555 U.S. at 101 (Thomas, J., dissenting). In any event, the Court has apparently finally pulled the plug on the presumption against preemption in express-preemption cases:

> because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S.Ct. 1938, 1946 (2016) (interior quotations omitted). As part of that trend, *ITCA* rejected the presumption against preemption for legislation under the Election Clause, 133 S.Ct. at 2256-57, finding that "there is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Id.* at 2257. But that rejection begs the question whether the clear-statement rule applies, along with other canons of construction, to determine congressional intent if the legislation's plain text is unclear.

ITCA itself answers the question by citing *Siebold* as the basis for rejecting the presumption against preemption. *Id.* at 2256 (*quoting Ex parte Siebold,* 100 U.S. 371, 384 (1880)); *accord U.S. v. Bathgate,* 246 U.S. 220, 225 (1918). In both *Siebold* and *Bathgate*, this Court applied then-traditional preemption analysis, requiring a clear federal statement and presuming that Congress acted with deference to state laws. In *Siebold,* 100 U.S. at 393, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with state laws." Similarly, in *Bathgate,* 246 U.S. at 225-26, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting state authority over elections and "consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." Thus, for Election Clauses cases, this Court's clear-statement rule is congruent with the clear-statement rule on which *Santa Fe Elevator*

relied for Commerce Clause legislation that trenches on states' police power. All that *ITCA* rejected was using the modern presumption against preemption to distort legislative intent by picking a less-obvious but plausible statutory meaning to avoid ascribing an intent to Congress that was not clearly expressed.

Going the next step – *i.e.*, reversing this Court's historic clear-statement rule in Election Clause cases, *Siebold,* 100 U.S. at 393; *Bathgate,* 246 U.S. at 225-26 – would be improper, and nothing in *ITCA* requires that unsettling result. If this Court nonetheless seeks to change the way that it interprets Election Clause legislation, the Court should announce that change now, but apply the change prospectively to *new* legislation, as this Court has done in similar contexts. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979); *cf. Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"). Any other course would disrupt expectations and impose unintended restrictions on states' sovereignty.

II. OHIO'S SUPPLEMENTAL PROCESS COMPLIES WITH FEDERAL LAW.

There is no legitimate question that congressional intent – revealed through statutory text – *controls*: "Elections Clause legislation, 'so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.'" *ITCA*, 133 S.Ct. at 2256 (*quoting Siebold,* 100 U.S. at 384); *McPherson v. Blacker,* 146 U.S. 1, 40-41 (1892) ("[i]n this respect it is in conflict with the act of Congress, and must necessarily give

way"). Unfortunately, the parties and lower courts disagreed on what congressional intent *is* under NVRA, as clarified by HAVA. Accordingly, in addition to looking at the statutory text, this Court must look also to the statutes' structure and purposes in their context. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111-12 (1992). That analysis shows that NVRA and HAVA allow Ohio's Supplemental Process because deregistration flows from the failure to respond to Ohio's notice, not solely from nonvoting.

A. Ohio's Supplemental Process complies with NVRA.

Even before HAVA's clarification, NVRA did not preclude *most* states from continuing their pre-NVRA practice of deregistering voters after notice. The Sixth Circuit's contrary result flowed from reading §8(b)(2)'s "by reason of" language out of the statute. When that language is properly considered, the Sixth Circuit's reasoning – while wrong – becomes untenable.

1. Ohio's Supplemental Process does not purge voters "by reason of" non-voting.

As enacted in NVRA, §8(b)(2) prohibited removal "by reason of the person's failure to vote," albeit under the awkward phrasing that a state's voter-roll maintenance program "shall not result in the removal of [a] person … by reason of the person's failure to vote" 42 U.S.C. §1973gg-6(b)(2) (1994); 52 U.S.C. §20507(b)(2). The Sixth Circuit adopted a flows-from definition of "*result*" and ignored "*by reason of*" altogether. As Ohio explains, the Sixth Circuit's choice of definitions for result is not the best choice here, Ohio Br. at 19-26, but the bigger problem is that

the by-reason-of qualifier imposes a degree of causation that the Sixth Circuit failed to consider. Specifically, a voter who is removed for failing to respond to a notice is not removed "by reason of" non-voting.

Of course, "unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S.Ct. 1886, 1893 (2013) (alterations and interior quotations omitted). Under the Court's precedents and dictionary definitions, the phrase "by reason of" means "because of." *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2527 (2013) ("the ordinary meaning of 'because of' is 'by reason of' or 'on account of'") (interior quotations omitted); *Burrage v. U.S.*, 134 S.Ct. 881, 889 (2014) ("the phrase, by reason of, requires at least a showing of 'but for' causation") (internal quotations omitted); AMERICAN HERITAGE DICTIONARY 1506 (3d ed. 1992) (defining 'by reason of' as 'because of'). Under §8(d)(1)(B), deregistration requires both failing to respond to a notice *and* nonvoting for two federal-election cycles. 42 U.S.C. §1973gg-6(d)(1)(B) (1994); 52 U.S.C. §20507(d)(1)(B). Nonvoting alone is never enough to cause deregistration.

2. <u>The Clear-Statement Rule reinforces Ohio's compliance with NVRA.</u>

Even if the statutory text as interpreted in the prior section and Ohio's brief were inconclusive, this Court should rely on the clear-statement rule to find Ohio's Supplemental Process compliant with NVRA. *See* Section I, *supra* (clear-statement rule applies to Election Clause legislation). In context, it appears that Congress was aware of the states' roll-

maintenance procedures and prohibited only the no-notice culling practiced by a small minority of states, rather than the notice-based culling required by NVRA (and practiced by a majority of states):

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contract all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). *Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under H.R. 2.*

H.R. REP. NO. 103-9, at 30 (emphasis added). The states that could not continue the practice per the report are clearly the pre-NVRA "handful" that struck registrants without notice, *id.*, particularly under clear-statement principles. *Siebold,* 100 U.S. at 393 ("presum[ing] that Congress has [exercised its authority] in a judicious manner" and "endeavored to guard as far as possible against any unnecessary interference with state laws"); *Bathgate,* 246 U.S. at 225-26 (Congress must "express[] a clear purpose to establish some further or definite regulation" before supplanting state authority over elections, given "the policy of Congress not to interfere with elections within a state except by clear and specific provisions").

B. HAVA's clarifications make the case for Ohio's compliance stronger.

In HAVA, responding to an aggressive DOJ interpretation of NVRA, *FEC Report*, at 5-22 & n.13, Congress revisited the issues raised by this litigation by enacting two provisions. First, §903 amended NVRA by adding the "except" clause to the end of §8(b)(2). PUB. L. NO. 107-252, §903, 116 Stat. at 1728. Second, §303 added a new section on the criteria for maintaining statewide voter registration, PUB. L. NO. 107-252, §303, 116 Stat. at 1708-14, which includes the proviso that "no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. §20507(a)(4) (emphasis added). As explained below, both clarifications reinforce Ohio's position, which provides "great weight" in interpreting NVRA as enacted. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ([s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). Thus, even if NVRA itself were unclear in 1993, the state of federal law in place today would nonetheless be crystal clear.

HAVA's "except" clause supplements §8(b)(2) to make clear that nothing in §8(b)(2) prohibits states' using NVRA roll-maintenance procedures that remove registrants that both fail to respond to state notice and do not vote in two post-notice federal elections. 52 U.S.C. §20507(b)(2). Particularly when combined with the provision that disallows removing registrants "*solely* by reason of a failure to vote," 52 U.S.C. §21083(a)(4) (emphasis added), HAVA makes the Sixth Circuit's and Plaintiffs' position untenable.

Both of the Sixth Circuit's two counterarguments are unavailing. First, the Sixth Circuit argues that the "except" clause warrants a narrow reading as an exception to a general rule under *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). The problem with this analysis is that Congress has not here "enacted a general rule" (*e.g.*, one "that treats boot as capital gain"), which the Court would "eviscerate … through an expansive reading of a somewhat ambiguous exception." *Id.* To the contrary – notwithstanding the root word "except" – the "except" clause is not an exception at all. It is more of a proviso – and "except" could easily be replace by "provided" – that interprets the scope of the entire paragraph. If anyone doubted that interpretation, the "solely" clause in 52 U.S.C. §21083(a)(4) makes clear that Congress did not want registrants removed for non-voting alone, but allowed removing registrants for failing to respond to notice and then not voting for two federal elections.

The Sixth Circuit goes on to fault Ohio's position as rendering §8(b)(2)'s HAVA-added "except" clause as mere surplusage *vis-à-vis* the existing requirements of §8(d)(1). Given the then-extant dispute of whether §8(b)(2) allowed removal of non-voting registrants who failed to respond to notice, *FEC Report*, at 5-22 & n.13, it was not mere surplusage for Congress to answer that question. This Court has emphasized the need to read statutes in context to understand otherwise unclear text, *King v. Burwell*, 135 S.Ct. 2480, 2490 (2015), and the historical context here explains any repetition between NVRA's allowance for removal based on *both* unanswered notice *and* non-

voting *vis-à-vis* its prohibition of removal for non-voting alone (*i.e.*, without notice).

C. If Plaintiffs prevail, the remedy on remand should be limited to the areas where Plaintiffs prevailed.

Assuming *arguendo* that Ohio has violated some aspect of NVRA or HAVA, this Court should limit the remedy on remand in two jurisdictional ways. First, with respect to Article III jurisdiction, Plaintiffs can recover only on claims for which Plaintiffs state a case or controversy. *See* Section III.D, *infra*. But second, there is a merits-based jurisdictional element that goes to the jurisdiction of Congress under the Elections Clause:

> In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. *We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction*; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

Siebold, 100 U.S. at 393 (emphasis added). If Ohio on remand wants to split its voter rolls to deregister any

noncompliant registrants for *state* elections, Congress has no authority to regulate that choice. As this Court recognized in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008), courts should not invalidate entire statutes based on limited or minor instances of violations. If this Court remands with instructions for anything but dismissal for failure to state a claim, the remand should be confined to issues within not only the federal courts' jurisdiction but also the federal legislature's jurisdiction.

III. THIS COURT SHOULD ASSURE ITSELF OF ARTICLE III JURISDICTION.

Under *Steel Company*, this Court has the duty to police Article III's limits, even if the parties concede that jurisdiction is proper. 523 U.S. at 95. Regarding Ohio's immunity from suit in federal court, this Court may disregard the issue as long as Ohio does not raise it, but the Court must consider it if Ohio raises it at any time. While Mr. Harmon or some individual members potentially may have Article III standing, even that is doubtful for most, if not all, of the claims raised here.

A. The record does not establish that Plaintiffs *ever* had standing.

Before this Court can consider the merits, plaintiffs must establish their standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009). The lower courts never properly analyzed standing, and Plaintiffs appear to lack it for most, if not all, of their claims.

To establish standing, a plaintiff must show an "injury in fact," which consists of (1) an actual or imminent invasion of a constitutionally cognizable

interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).

Membership associations can sue on behalf of their members, *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977), but Article III requires specific names to ensure that the parties include an affected person, *FW/PBS*, 493 U.S. at 235, unless the injury applies to all members. *Summers*, 555 U.S. at 498-99 ("requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity") (emphasis in original). Here, the state's Supplemental Process does not affect each and every member of the institutional plaintiffs, so the jurisdictional analysis looks only to the identified members.

On top of the constitutional baseline, standing jurisprudence also recognizes prudential elements, such as a conditional bar against seeking to redress third parties' rights, *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004),[4] and a requirement that a claimed

[4] Third-party standing requires the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own

injury in fact falls within the zone of interest of the statutory provision that the plaintiff seeks to enforce. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Here, it is not clear whether the institutional plaintiffs' asserted injuries fall within NVRA's and HAVA's zones of interest.

1. <u>The institutional plaintiffs suffer self-inflicted injuries.</u>

In addition to asserting their members' injuries,[5] the institutional plaintiffs also assert injury in their own right, claiming that Ohio's Supplemental Process compelled the institutional plaintiffs to divert resources from other good works to counteract the effect of Ohio's actions. Washington Decl. ¶¶13, 29; Freeman Decl. ¶¶25-26; Waites Decl. ¶16. Unless such injuries fall within the relevant statute's zone of interests, these injuries would be self-inflicted injuries not caused by the defendant's conduct. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). While the institutional plaintiffs potentially may assert claims within NVRA's zone of interests, it is nonetheless important for the Court to resolve that issue.

Too often, the lower courts rely on standing based on a diverted-resources rationale that the defendant's challenged action *caused* the plaintiff to divert efforts to counteract that action. If mere spending could

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rights. *Id.* As Mr. Harmon's participation demonstrates, nothing precludes rights holders from bringing suit.

[5] Where the institutional plaintiffs assert their members' injuries, those claims are addressed in Section III.A.2, *infra*.

manufacture standing, any private advocacy or welfare organization could establish standing against any government action.[6] But that clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). The disconnect appears to be an overbroad reliance on the diverted-resource rationale in *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372-73 (1982), which concerned an unusual and specific statute in which Congress authorized suit by anyone, without regard to whether the person was "aggrieved" by the violation of the underlying statute.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens Realty* held that the Fair Housing Act at issue there extends "standing under § 812 … to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and

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[6] *Compare*, *e.g.*, *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 n.10 (11th Cir. 1989) *with Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.). In *Haitian Refugee Center*, the Eleventh Circuit incorrectly applied the *Havens Realty* diversion-of-resources theory to private expenditures without analyzing whether those expenditures fell within the zone of interests of the Immigration and Nationality Act. 872 F.2d at 1561 n.10. By contrast, in applying *Havens Realty* to diverted resources in *Action Alliance* then-Judge Ginsburg correctly recognized the need to ask whether those diverted resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939.

typical statute lack several critical criteria from *Havens Realty*.

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right … the alleged deprivation of [those rights] can confer standing." *Warth v. Seldin,* 422 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens Realty,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, under a typical statute, there will be no rights even *remotely* related to a third-party organization's spending.

Third, and most critically, the statute in *Havens Realty* eliminated prudential standing, so the zone-of-interest test did not apply. When a plaintiff – whether individual or organizational – sues under a statute that does not eliminate prudential standing, that plaintiff cannot bypass the zone-of-interest test or other prudential limits on standing. Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Here, this Court might – or might not – find that NVRA sought to ease voter-registration burdens for groups

like the institutional plaintiffs here, but that is not uniformly true for all statutes or all institutional plaintiffs. It is important for any federal court to ask the prudential questions, if only to assure itself of its jurisdiction.

2. <u>Mr. Harmon and the individual members lack injuries in fact.</u>

Of Plaintiffs' eight declarants, only four – Keil, Harmon, McCullough, and Pickett – allege personal injury from Ohio's Supplemental Process.[7] For various reasons, the injuries alleged here may not qualify as sufficiently actual or imminent for Article III.

Without concrete particulars, future injury can be insufficient to establish standing: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Defenders of Wildlife*, 504 U.S. at 564. Relatedly, as indicated, claims are unripe if they "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300. Most, if not all, of the claimed injuries fail to show the immediacy that Article III requires.

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[7] Of the remaining four, one is registered to vote and appears to have submitted her declaration as evidence about Ohio's Supplemental Process rather than to demonstrate her own personal injuries, Bonham Decl. ¶3, and the others are APRI officers who do not allege personal injury but instead provide evidence of the impact of Ohio's Supplemental Process on their group. Washington Decl. ¶¶13, 29; Freeman Decl. ¶¶25-26; Waites Decl. ¶16.

Mr. McCullough is 45 but has only voted once, preferring to "only vote when there is an issue or candidate on the ballot that [he] care[s] about." McCullough Decl. ¶¶2, 6-7. Similarly, Ms. Keil is currently registered and voted in 2016, Keil Decl. ¶20, so she would not be removed until after she ignored a notice two years after not having voted in a federal election, and then did not vote in another two election cycles. Neither Mr. McCullough's wanting to vote in a future election nor Ms. Keil's being removed for not voting in six future elections are sufficiently imminent to constitute an Article III controversy.

Ms. Pickett's injury – while it might come to pass sooner than Ms. Keil's injury – is also not imminent. She voted in 2012, but not in 2014, and she cannot locate her notice, but in any event planned to vote in 2016. Pickett Decl. ¶¶11, 13, 15. Even if she did not vote in 2016, she would not be removed from the voter rolls unless she also both failed to vote in 2018 and failed to otherwise update her records with the registrar. While possible, that eventuality may not come to pass.

Finally, Mr. Harmon voted in 2008 but not in 2012, although he prefers to vote in most presidential elections. Harmon Decl. ¶¶5-6. Assuming that he did not re-register and vote in 2016, Mr. Harmon may have an ongoing injury from his 2015 removal that may prevent his otherwise-likely wish to vote in the 2020 presidential election.

B. Assuming *arguendo* that standing existed, the notice-based claims are moot.

With regard to the insufficient-notice claims, Ohio has cured all alleged issues but one (notice for out-of-state movers). Because the only defendant here is a state officer imbued with Ohio's immunity from suit in federal court and Congress has not abrogated that immunity for NVRA claims, the basis for jurisdiction here is not NVRA's private right of action, 52 U.S.C. §20510(b),[8] but rather the *Ex parte Young*, 209 U.S. 123 (1908), doctrine of suing a state officer to enjoin ongoing violations of federal law.

The *Young* officer-suit exception offers a limited exception to sovereign immunity, but only for *ongoing violations* of federal law. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of the NVRA notice issues, which – except for out-of-state movers – Ohio has cured. As such, those notice claims are now moot, and – relatedly – Ohio could claim that the action now lies outside the *Young* exception to Ohio's sovereign immunity. *See* Section III.C, *infra*.

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[8] NVRA does not displace any otherwise-applicable remedies, 52 U.S.C. §20510(d)(1), so *Young* remains applicable. The only significant upshot of proceeding under *Young* instead of NVRA's private right of action is that Plaintiffs would lack a right to an attorney-fee award if they prevail under *Young*, whereas NVRA provides a fee-shifting mechanism for prevailing parties. 52 U.S.C. §20510(c).

C. Ohio's sovereign immunity bars the notice claims.

Although Plaintiffs potentially could have sued the individual local registrars, they chose to sue a state officer, who enjoys immunity from suit under the Eleventh Amendment. While federal courts may ignore sovereign immunity until a state asserts it, *Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998), states may raise it any time, even on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Moreover, unlike some states, *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975), Ohio does not authorize either state officers or their attorneys to waive Ohio's immunity.[9] Consequently, no "waiver" could be premised on Ohio's raising the defense for the first time at this stage.

D. The remedy must be limited to the Article III case or controversy.

Plaintiffs challenge several aspects of Ohio's voter registration procedures, including the Supplemental Process triggers and the adequacy of the notice forms. Regarding notice forms, Plaintiffs challenge the form on several grounds, all but one of which (concerning out-of-state movers) Ohio has cured. Neither Plaintiffs' allegations nor their evidence establish any out-of-state movers in their respective memberships, much less an individually identified member. Because "standing is not dispensed in gross," *Lewis v. Casey,*

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[9] *In re Pitts*, 241 B.R. 862, 878 (Bankr. N.D. Ohio 1999); *Taylor v. Perini*, 503 F.2d 899, 905-06 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1975); *Evans v. Cordray*, 2012 U.S. Dist. LEXIS 41238, at *14-15 (S.D. Ohio Mar. 26, 2012) (No. 2:09-cv-587).

518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006), plaintiffs must establish standing for each form of relief that they request. Nothing shows that Plaintiffs have any entitlement to relief for out-of-state movers. Similarly, as indicated above, it is not entirely clear that Plaintiffs have standing for any of their claims. Assuming *arguendo* that that Plaintiffs have standing for *some* relief, however, this Court has the duty to narrow that relief to the claims for which Plaintiffs state an Article III case or controversy.

CONCLUSION

For the foregoing reasons and those argued by Ohio, the Court should reverse the Sixth Circuit.

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Respectfully submitted,

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