No. 17-11315

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

COMMON CAUSE, ET AL.,
Plaintiffs-Appellants,

v.

BRIAN KEMP, Georgia Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division
Case No. 1:16-cv-00452-TCB

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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Date: July 26, 2017

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A) and 11th Cir. R. 26.1-1(a), *amici* Judicial Watch, Inc. and Allied Educational Foundation hereby submit they are registered 501(c)(3) educational non-profit organizations, that they are private non-publicly held corporations, and that they have no parent corporations. No publicly held corporation or parent corporation owns ten percent (10%) or more of *amici* stock. *Amici* further certify that, in addition to the persons and entities identified in the brief of Plaintiffs-Appellants Common Cause and the Georgia State Conference of the NAACP filed on June 5, 2017, the following persons may have interest in the outcome of this case:

Allied Educational Foundation (*amicus curiae*)

Judicial Watch, Inc. (*amicus curiae*)

Orfanedes, Paul J. (*counsel for amici curiae*)

Dated: July 26, 2017

Respectfully submitted,

s/ Paul J. Orfanedes
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IDENTITY, INTERESTS, AND AUTHORITY OF *AMICI CURIAE*[1]

Allied Educational Foundation and Judicial Watch, Inc. (collectively "*amici*") file this *amici curiae* brief pursuant to FED. R. APP. P. 29(a)(2) in support of Appellee Brian Kemp, Georgia Secretary of State, and urge this Court to affirm the judgment of the district court. ***Amici* have received prior consent from all parties to the filing of this brief.**

Judicial Watch is a non-partisan, § 501(c)(3) non-profit educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch is committed to the proper interpretation and implementation of Section 8 of the National Voter Registration Act of 1993 ("NVRA"). Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to its enforcement. *See, e.g.*, *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012) (NVRA Section 8 lawsuit against the State of Indiana). Just this year, Judicial Watch notified eleven states, including Georgia, that certain counties had more registered voters than age-eligible citizens, and that this indicated a failure to comply with the

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

NVRA. *See* Press Release, *Judicial Watch Warns 11 States to Clean Voter Registration Lists or Face Federal Lawsuit*, April 11, 2017, http://goo.gl/KLBN0a.

Judicial Watch has a particular interest in the legal issue presented in this case. In 2012, Judicial Watch filed an NVRA Section 8 lawsuit against Ohio. *Judicial Watch v. Husted*, Civil Action No. 12-792 (S.D. Ohio 2012). The lawsuit was settled, and Ohio agreed to perform certain list maintenance practices, including the mailing of address confirmation notices to voters who have had no contact with Ohio's election offices for two years. A subsequent lawsuit was filed challenging that procedure on the same basis as the challenge made in this case, namely, that voters were being removed from the rolls for failing to vote. Judicial Watch filed several *amicus* briefs in that case. The Supreme Court recently agreed to hear the appeal of that case. *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016), *cert. granted, Husted v. A. Philip Randolph Institute*, 137 S. Ct. 2188 (2017).

Allied Educational Foundation ("AEF") is a non-partisan, § 501(c)(3) non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF empowers Americans through education and legal action, sponsoring nationwide seminars and online courses on topics such as civil liberties, transparency in government, and electoral integrity. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared numerous times

as *amicus curiae* in U.S. courts of appeal and the U.S. Supreme Court in support of electoral integrity laws.

Together, *amici* share an interest in the integrity of the electoral process with the State and the people of Georgia. *Amici* have extensive knowledge of the statutory and constitutional questions involved. *Amici* believe, moreover, that the District Court's determination was correct, in that relying on the fact that a voter has not voted for three years is a valid reason to send an address inquiry letter to that voter, and that this is consistent with the plain language and congressional intent of the NVRA. *Amici* urge this Court to affirm the decision below and dismiss Appellants' claims.

STATEMENT OF THE ISSUE

The NVRA and the Help America Vote Act of 2002 (HAVA) forbid states to cancel a voter registration "by reason of [a] person's failure to vote," but allow such a cancellation if a voter fails to respond to an address confirmation notice and fails to engage in voting-related activity for two consecutive general federal elections. Pursuant to state law, Georgia sends confirmation notices to registered voters who have not engaged in voting-related activity for three years. If voters (1) do not respond to that notice, and (2) do not vote, reregister, or contact election officials during the NVRA's waiting period, their registrations are cancelled. Does Georgia's procedure remove voters from the rolls for failing to vote?

SUMMARY OF THE ARGUMENT

The National Voter Registration Act of 1993 consciously left to the states the choice of a "general program that makes a reasonable effort" to comply with the voter list maintenance requirements of the statute. To be sure, the NVRA specifies minimum standards for all such programs. It requires that such programs be uniform, nondiscriminatory, and comply with the Voting Rights Act, and that no voter may be removed from the rolls for failing to vote. The NVRA further mandates that no removal from the rolls because of a change in residence shall occur until a notice requesting address confirmation is sent to the old address, and no response is received, and, during a waiting period that includes the next two general federal elections, the voter does not vote or communicate with election authorities. It also provides an example of an acceptable program based on change-of-address information from the Post Office, the so-called "Safe Harbor" program. Beyond that, however, the NVRA says nothing about what such a general program must contain. In particular, it places no restrictions on the events states may rely on in deciding whether to send confirmation notices to voters.

The Georgia law challenged in this case simply requires that state officials send an NVRA confirmation notice to any voter who has had no voting-related activity for three years. If such a voter responds to the notice, that is the end of the matter, and the registration is left untouched. If the voter does not respond, then

that commences the NVRA's statutory waiting period. Any voting-related activity or communication during that waiting period stops the process, and the registration is restored. If, however, there is no such activity, then the registration may be cancelled – which will be five to seven years after the process started.

All of this is in perfect accord with the NVRA. Voters are not removed for failing to vote, as Appellants maintain. Rather, they are removed for failing to respond to a notice and then failing to engage in voting activity for two federal elections. Appellants' attempt to stretch the notion of causation beyond its natural bounds to refer equally to all prior events in a chain of events is not warranted by logic or the law.

The propriety of Georgia's approach is confirmed by the 2002 amendment to the NVRA, which expressly exempted the notice and waiting period from the restriction on removing voters for failing to vote. That amendment embodied the view that there is a crucial difference between sending voters letters and waiting for a few more years to hear from them, which is what Georgia does, and removing voters for failing to vote, which is what the NVRA forbids. Appellants, however, seek to draw from this amendment the exact opposite of its plain meaning. They rely almost entirely on the fact that the 2002 amendment refers both to Section 8(c) (containing the "Safe Harbor" provision) and to Section 8(d) (requiring the notice and waiting period). They conclude from this conjunction that states are only

covered by the exemption contained in the 2002 amendment when they simultaneously engage in *both* programs.

Appellants' argument simply ignores the text of Sections 8(c) and (d). Consulting that text, as we are constrained to do by basic principles of statutory interpretation, it becomes clear that the Safe Harbor provision is not mandatory, but permissive, and that states are not required to utilize it. The notice-and-waiting period provision, by contrast, is a standalone, mandatory provision. Taking Appellants' contrary arguments at face value, moreover, would lead to the absurd (and counter-textual) conclusion that the Safe Harbor provision is the *only* program permitted by the NVRA.

Finally, *amici* note that Congress, the Justice Department, and nineteen states all have assumed that using the failure to vote as a basis for sending confirmation notices is fully consistent with the NVRA.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Structure and Text of the NVRA Establish that It Does Not Restrict the Bases States May Use to Trigger the Sending of Confirmation Notices.

Section 8, the "integrity" provision of the NVRA, requires states to maintain accurate voter rolls. 52 U.S.C. § 20507; *see* 52 U.S.C. § 20501(b)(3) and (4) (NVRA's stated purposes include "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter rolls are maintained."); S.

Rep. 103-6 at 17-18, 103rd Cong., 1st Sess. (1993) (extolling "accurate and up-to-date voter registration lists").

The core requirement of Section 8 is the mandate that "each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." *Id.*, § 20507(a)(4). This mandate does not list the particular steps that a "general program" must incorporate, or specify how a state should go about complying. Rather, by its plain language, it only requires that states undertake a "reasonable effort." States have discretion to try to figure out how to make that effort. *See United States v. Missouri*, 2007 U.S. Dist. Lexis 27640 at *19 (W.D. Mo. 2007), *aff'd in part, rev'd in part on other grds.*, 535 F.3d 844 (8th Cir. 2008) ("The NVRA does not define 'reasonable effort' and the Court has found no authority that describes the parameter of the terms.").

While it does not prescribe any particular measures states must adopt, Section 8 does establish certain baseline requirements. Any state program to remove invalid registrations must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). And no state program may remove a person from the voter rolls "by reason of the person's failure to vote." *Id.*, § 20507(b)(2). In 2002, that provision was modified to add that "nothing in this paragraph may be construed to prohibit a State from using the

procedures described in subsections [8](c) and [8](d)" to remove ineligible voters from the rolls. *Id*.

Recognizing that the NVRA is short on guidance as to how states may comply, Congress included the "Safe Harbor" provisions of Section 8(c). That section allows states to meet the "reasonable effort" requirement of the NVRA by conducting a list maintenance program based on reviewing "change-of-address information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A).

Section 8(d) provides that, unless they confirm in writing that they have moved, registrants may not be removed from the rolls unless (1) they are mailed, and fail to respond to, a statutory notice requesting address confirmation, and (2) they then do not vote or contact the state about voting during a time period including the next two general federal elections. *Id.*, § 20507(d)(1), (2).[2] The NVRA says nothing, however, about when states may send confirmation notices to voters. As the District Court observed, "[t]he NVRA is silent on when and how a state may decide to send out the notifications. Other than the exemplar safe-harbor provision, there is no explicit statutory language governing 'trigger' provisions." *Common Cause v. Kemp*, 2017 U.S. Dist. Lexis 93417 at *10 (N.D. Ga. 2017).

[2] The NVRA also provides for the cancellation of registrations of those who have died, who are disqualified from voting because of a criminal conviction or mental incapacity, or who have notified a state that they have moved elsewhere. *See* 52 U.S.C. § 20507(a)(3). Those provisions are not at issue here.

Accordingly, the NVRA would not prevent Georgia from sending confirmation notices every year to every registrant in the State, although this undoubtedly would be quite expensive. Nor would it prohibit Georgia from sending confirmation notices on a "uniform" and "nondiscriminatory" basis to any meaningful subset of the foregoing, for example, to residents who have ceased filing state tax returns, or who do not respond to jury notices, which may indicate that they have moved.

In the same vein, nothing in the NVRA prohibits Georgia from sending a confirmation notice to all registered voters who have not engaged in any voting-related activity for a given period.

II. The NVRA Does Not Conflict with Georgia's Approach to List Maintenance, and, in Fact, Authorizes Programs Like It.

Georgia law provides that, every other year, a notice requesting address confirmation shall be sent by forwardable, first-class mail to registered voters "whose names appear on the list of electors with whom there has been no contact during the preceding three calendar years." GA. CODE ANN. § 21-2-234(a)(2). If there is no response to that notice within thirty days, the registration is designated as inactive. *Id.*, § 21-2-234(g). If there is no further contact from the voter during a period encompassing the next two general federal elections, the registration is cancelled. GA. CODE ANN. § 21-2-235(b).

Appellants' lawsuit is premised on the assertion that this sequence of events amounts to removing voters for failing to vote. They argue that Georgia's law violates the NVRA's stipulation that a state program "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

A. Georgia's Election Law Does Not Remove Voters for Failing to Vote.

Appellants' argument fails for many reasons, but the most basic is simply this: the plain meaning of the relevant Georgia law does not require anything forbidden by the plain meaning of the NVRA. Appellants' argument to the contrary badly misinterprets the ordinary language of these statutes.

There is no dispute that the NVRA precludes the removal of voters from the rolls solely because they have failed to vote. But the process embodied in GA. CODE ANN. § 21-2-234 for inactivating and then cancelling ineligible registrations does not remove anyone for not voting. The failure to vote only triggers a further, written inquiry, directed to the registrant. Whether the registration is cancelled depends entirely on what happens *after that*. Thus, while voters are *queried* on the basis of their failure to vote, they are never removed from the rolls on that ground. A registration is only cancelled when a voter does not answer a confirmation notice

and does not vote, register, or change addresses for two general federal elections. As the District Court correctly concluded, Appellants' argument

> ignores the fact that voters are removed from the rolls only if they fail to respond to the notification in addition to having no contact with the electoral process for seven years. Plaintiffs[-Appellants] would read the NVRA as prohibiting a state from ever considering a person's failure to vote when removing ineligible voters, but Congress did not write such a prohibition into the law . . .

Common Cause, 2017 U.S. Dist. Lexis 93417 at *12.

Appellants maintain that, because the process followed under Georgia law "considers" the failure to vote, "it thus 'results in the removal' of voters by reason of their failure to vote." Appellants' Br. 21. In support of this contention, Appellants argue that "the ordinary meaning of the term 'result' is 'to proceed or arise as a consequence, effect, or conclusion.'" *Id.* at 22, citing *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016), *cert. granted, Husted v. A. Philip Randolph Institute*, 137 S. Ct. 2188 (2017).

Appellants, in other words, would define "result" as strict, but-for causation, however attenuated. That interpretation is not consistent, however, with the usual meaning of that word. *Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202, 1204 (11th Cir. 2016) ("When interpreting a statute, '[w]ords are to be understood in their ordinary, everyday meanings.'"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012). In ordinary, everyday language, when it is said that one event "results in" another, the

first event is typically the immediate cause of the second – that is, the nearest to it in time, or the last event in a chain of events. To put it more concretely, it ordinarily would be said that the failure to vote for three years "resulted in" a confirmation notice being sent under Georgia law. In turn, the failure to respond to that notice, along with the passage of time through two general federal elections, "resulted in" the registration being cancelled. No one in everyday speech uses the terms "result" or "cause" or "consequence" to refer back indiscriminately and equally to all prior events, however remote, in a sequence of events. Ordinary speech limits the reference by a sense of nearness.

Lawyers have a word for this. "The term 'proximate cause' is 'shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.'" *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment) (citation omitted). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Id.* (citation omitted). Applying this principle here, the proximate cause of the removal of voters under GA. CODE ANN. § 21-2-234 is their failure to respond to a confirmation notice, along with the passage of a statutory period of time. Voters are *not* removed from the rolls for failing to vote.

B. The NVRA Anticipates and Permits Voter List Maintenance Programs Like Georgia's.

The NVRA allows the use of any "trigger" to identify voters who may have moved as long as those voters are sent, and fail to respond to, a confirmation notice, and then do not vote or contact the state during the statutory waiting period. This is apparent from the entire structure of the NVRA, which leaves it to states to define the "general program that makes a reasonable effort" to comply with the statute. 52. U.S.C. § 20507(a)(4). But this fact is particularly confirmed by the 2002 amendment to the NVRA. That amendment qualified Section 8's rule that no one may be removed from the voter rolls "by reason of the person's failure to vote," by adding: "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 a voter from the rolls. 52 U.S.C. § 20507(b)(2).

This simple amendment makes clear that procedures that involve sending Section 8(d) confirmation notices and then waiting for two general federal elections are *not* proscribed by Section 8(b)(2)'s restriction on removals for failure to vote. As all parties agree, the amendment was intended to resolve the apparent tension in the NVRA between its ban on removals for failure to vote and its authorization of removals following the statutory waiting period. Appellants' Br. 34; Appellees' Br. 24-25. By stating that the ban did not apply to Section 8(d)'s notice and removal procedures, the amendment authorized state procedures, like

Georgia's, that incorporate the notice and waiting period, and forecloses the very arguments made by Appellants in this case.

Appellants, however, respond with an argument that stands the statute on its head, ultimately reading it to ban the very thing it was amended to permit. Appellants point out that the 2002 amendment excepts "the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2). Appellants then argue that the use of the conjunction "and" in this clause means that the 2002 amendment applies only where both subsections are utilized – that is, where "change-of-address information supplied by the Postal Service" is used to identify those to whom confirmation notices are sent. *See* 52 U.S.C. § 20507(c)(1)(A); (d). Appellants conclude that, "[t]o exempt a voter removal program from the Failure-to-Vote Prohibition," a state program must use "*both* the USPS Safe Harbor Procedure in subsection 8(c) *and* the Address-Confirmation Procedure in subsection 8(d)." Appellants' Br. 32.

Appellants also cite Section 8(a)(4) of the NVRA, which requires states to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters" who have changed residence "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). They argue that, "[b]ased on the word 'and,' any removal of voters must comply with all three subsections." Appellants' Br. 28. They suggest that, because Georgia "*only* uses the Address-Confirmation

Procedure" of Section 8(d), it is not excepted from, and is invalid under, the NVRA's ban on removing voters for failing to vote. Appellants' Br. 33.

The word "and" in those two provisions of the NVRA does not bear the weight Appellants put on it. They interpret the phrase "(c) and (d)" to include the implicit stipulation that "(d) can never be utilized without (c)." But whether such an inference is warranted in any particular case of statutory interpretation depends *on the specific content of the identified subsections.*

In this case, Section 8(c) provides that, by utilizing change-of-address information provided by the Post Office, a state "*may* meet" the NVRA's requirement to have a reasonable, general program for removing ineligible voters. 52 U.S.C. § 20507(c)(1)(A) (emphasis added). By its own terms, Section 8(c) is permissive, as Appellants concede. Appellants' Br. 28 ("Subsection (c) states on its face that it is a permissive safe harbor – one way States 'may' comply" with the NVRA); *Common Cause*, 2017 U.S. Dist. Lexis 93417 at *10 n. 4 ("The language of the safe-harbor provision is permissive, not exclusive, meaning states may permissibly use other trigger methods.") (citation omitted); *see Great Lakes Reinsurance (UK) PLC v. TLU Ltd*., 298 F. App'x 813, 815 (11th Cir. 2008) ("use of the permissive 'may' indicates, the [statute] … does not impose a duty") (citations omitted). Section 8(c) also explicitly incorporates the notice and waiting period of Section 8(d), providing that a registrar must "use[] the notice procedure

described in subsection (d)(2) to confirm the change of address" of those who are identified by the Post Office as having moved to another jurisdiction. 52 U.S.C. § 20507(c)(1)(B)(ii).[3]

Section 8(d), by contrast, is mandatory, not permissive. It provides that a "State *shall not* remove the name of a registrant" who is believed to have moved "unless" the specific procedure set forth therein is followed. 52 U.S.C. § 20507(d)(1) (emphasis added). Also by way of contrast, Section 8(d) does *not* incorporate Section 8(c) – indeed, it makes no reference to, or mention of, the other subsection.

Given the statutory text, the operation of these two provisions is clear. A state program to remove ineligible voters from the rolls *may* comply with Section 8(c), but *must* comply with Section 8(d). Further, if a state utilizes Section 8(c), it must comply as well with Section 8(d)'s notice and waiting period. But this relationship between the subsections is not reciprocal: nothing in Section 8(d) requires those who follow its provisions to comply as well with Section 8(c).

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[3] That cross-reference explains why the 2002 amendment *did* refer to both subsections (c) and (d). It is undisputed that the 2002 amendment was intended to resolve the tension between the NVRA's restriction on removals for failing to vote on the one hand, and its authorization of removals after two general federal elections on the other. To address this issue, the 2002 amendment had to refer to both subsections – to 8(d) because it contained the core provision defining the notice and waiting period procedure, and to 8(c) because it expressly incorporated by reference Section 8(d)'s procedure. 52 U.S.C. § 20507(c)(1)(B)(ii).

In Appellants' version of the NVRA, the explicit, plain text of these two sections simply disappears from view, and all is decided by the magic word "and." That is the wrong way to construe a statute. Courts should avoid "slicing a single word from a sentence, mounting it on a definitional slide, and putting it under a microscope in an attempt to discern the meaning of an entire statutory provision." *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267 (11th Cir. 2006) (citation omitted). Rather, "[s]tatutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (citations omitted); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute").

The defect in Appellants' interpretation of the NVRA is readily established by noting another problem with their argument, namely, that it proves too much. Consider that Section 8(a)(4) of the NVRA requires states to make a reasonable effort to remove registrations that have become invalid by reason of "a change in the residence of the registrant, in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). According to Appellants, the "and" in that clause requires that "any removal of voters must comply with all three subsections." Appellants' Br. 28. But if this is so, then the Safe Harbor provision of Section 8(c) is a necessary part of *any* program to remove the registrations of voters who have

moved elsewhere. Because a general program to remove the registrations of those who have moved is required by the NVRA, then, by the logic of Appellants' argument, *the use of Section 8(c) is always mandatory*.

Such an interpretation is contrary to the plain language of the NVRA. Section 8(c) uses the permissive word "may," which means that it is *not* mandatory. Further, Section 8(a)(4)'s requirement that states "conduct a general program that makes a reasonable effort" would become superfluous if the Safe Harbor method in Section 8(c) were mandatory. *Compare* 52 U.S.C. § 20507(a)(4) with (c)(1). Indeed, another consequence of this interpretation is that Section 8(c) would become the *exclusive* means of complying with the NVRA, for the simple reason that no other program is included in the sections connected by an "and" in Section 8(a)(4). State laws approach the "reasonable effort" standard of the NVRA in countless ways.[4] The implications of Appellants' approach is that all of these efforts are invalid under the NVRA.

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[4] To take just one example of the inventive way states try to comply with the NVRA, 35 states compare their voter lists with other states in order to locate voters who have moved. *See Voter List Accuracy*, National Conference of State Legislatures (June 16, 2016), https://goo.gl/ihYHSA; *see, e.g.*, ALASKA STAT. ANN. § 15.07.195; ALA. CODE § 17-4-38.1; CONN. GEN. STAT. ANN. § 9-19k; 10 ILL. COMP. STAT. ANN. 5/1A-45; IND. CODE ANN. § 3-7-38.2-5; LA. STAT. ANN. § 18:18; MD. CODE ANN., ELEC. LAW § 3-101; NEV. REV. STAT. ANN. § 293.675; N.C. GEN. STAT. ANN. § 163-82.14; OHIO REV. CODE ANN. § 3503.15; R.I. GEN. LAWS ANN. § 17-9.1-34; S.C. CODE ANN. § 7-5-186; TENN. CODE ANN. § 2-2-140; UTAH CODE ANN. § 20A-2-109; VA. CODE ANN. § 24.2-404; WASH. REV. CODE ANN. § 29A.08.125; W. VA. CODE ANN. § 3-2-4a.

To be sure, Appellants do not claim that Section 8(c) is mandatory, let alone exclusive, but plainly admit instead that it is "permissive" and "one way States 'may' comply." Appellants' Br. 28. Nor has any court that Appellants cite (or that *amici* are aware of) said this. *Compare Common Cause*, 2017 U.S. Dist. Lexis 93417 at *10 n. 4 (Section 8(c) "is permissive, not exclusive, meaning states may permissibly use other trigger methods."). Nevertheless, this outcome is the unavoidable, logical consequence of Appellants' argument that "any removal of voters must comply" with both 8(c) and (d) because they are connected in Section 8(a)(4) by the word "and." Appellants' Br. 28. This fact shows that Appellants' argument is untenable.

In conclusion, neither of the two provisions of the NVRA cited by Appellants requires that Section 8(d) may *only* be used if Section 8(c) is used at the same time.

III. The Legislative History of the NVRA, the Federal Government's Enforcement of It, and the Implementation of the NVRA by the States All Confirm That a Failure to Vote for a Period of Time Can Be Used as a Trigger for Sending Confirmation Notices.

Because the plain language of the NVRA resolves the issue in this case, it is not necessary to review the legislative history. *United States v. Velez*, 586 F.3d 875, 879 n.4 (11th Cir. 2009) (no need to address legislative history "in light of our reading of the statute's plain meaning and context"). However, in the event that the Court finds the statute in any way ambiguous, or otherwise finds it helpful, we

note that the legislative history of the NVRA clearly shows that failing to vote is a permissible basis for sending a confirmation notice.

In surveying the then-current state voter registration practices, the Senate and House reports accompanying the Act observed:

> 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 contact 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* [the NVRA].

S. Rep. No. 103-6, at 46; H.R. Rep. No. 103-9, at 30 (emphasis added). The meaning of this passage is clear. It was only the "handful of states" that "drop non-voters from the list without notice" that would have to change their practices to comply with the new law. But the states identified in the immediately preceding sentence, who "target only those who did not vote in the most recent election," were *not* identified as among the states who would have to change their procedures. This means that the authors of these reports did not believe that using the failure to vote as reason to contact voters was proscribed by the NVRA.

Subsequent enforcement of the NVRA by the Department of Justice shows the same basic understanding of the statute. In 2007, the Department settled a lawsuit it had filed against the City of Philadelphia under the NVRA and other

statutes. *See United States v. City of Philadelphia, et al*., Civil Action No. 06-4592 (E.D. Penn. 2007). In the settlement agreement resolving that case, the Department *required* Philadelphia to "send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner . . ." and that it "place voters who do not respond to the confirmation notice in an inactive status." *See Common Cause v. Kemp*, Civ. Action No. 1:16-cv-452-TCB (N.D. Ga. May 23, 2016), ECF No. 22-1 at 10, ¶ 16(5), (6) (agreement attached as Defendants' exhibit).[5] If those voters failed to vote in the subsequent two federal general elections, Philadelphia was to remove them from the registration list. *Id.* In other words, the Department commanded Philadelphia to do what Appellants now say Georgia may *not* do. In fact, the Department's "trigger" for a confirmation notice in Philadelphia was a failure to vote in *any* election, which is a stricter standard than Georgia's three-year period.[6]

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[5] The agreement is also available on the Department's website, at https://goo.gl/LzjqtC.

[6] The Department's vacillating positions on Section 8 of the NVRA should call into question the weight given to its statements so far in this case. *See Young v. United Parcel Service*, 135 S. Ct. 1338, 1352 (2015) (holding that the Court could not rely significantly on agency's determination because its position was contrary to or inconsistent with previous government statements on the issue).

A significant proportion of state governments have reached the same conclusion. In addition to Georgia and Ohio, at least seventeen other states consider the failure to vote as a valid reason to send notices or targeted mailings, or to place voters on inactive lists. ALA. CODE § 17-4-9 ("Any voter who fails to vote for four years in his or her county shall have his or her name placed on an inactive voter list"); ALASKA STAT. ANN. § 15.07.130(a)(3) (confirmation notice sent to each voter "who has not voted or appeared to vote in the two general elections immediately preceding"); FLA. STAT. ANN. § 98.065(2)(c) (confirmation requests may be "mailed to all registered voters who have not voted in the last 2 years"); HAW. REV. STAT. § 11-17(a) (sixty days after every general election, clerks "shall remove the name of any registered voter who did not vote in" the last two general and primary elections); 10 ILL. COMP. STAT. ANN. 5/4-17 (clerk "shall send to every voter who has not voted during the preceding four years a notice [of suspension] through the mails"); IOWA CODE § 48A.28(2)(b) (notice sent "to each registered voter whose name was not reported by the national change of address program and who has not voted in two or more consecutive general elections and has not registered again"); MASS. GEN. LAWS ANN. ch. 51, § 37A (voter "not entered in the annual register . . . for 2 consecutive years and who during that time fails to vote in any election shall be maintained on an inactive voters list"); MICH. COMP. LAWS ANN. § 168.509r(6) ("if a voter does not vote for 6 consecutive years,

the secretary of state shall place the registration record of that voter in the inactive voter file"); MO. REV. STAT. § 115.181(2) (election officials may choose to canvass "only those voters who did not vote at the last general election"); MONT. CODE ANN. § 13-2-220(1)(c) (election administrator shall "mail a targeted mailing to electors who failed to vote in the preceding federal general election"); OKLA. STAT. ANN. TIT. 26, § 4-120.2(A)(6) (address confirmation card sent to any "active registered voter who did not vote in the second previous general election or any election conducted by a county election board since the second previous general election and who has initiated no voter registration change"); 25 PA. CONS. STAT. ANN. § 1901(b)(3) (notice sent "to any registered elector who has not voted nor appeared to vote during the period beginning five years before the date of the notice and ending on the date of the notice"); R.I. GEN. LAWS § 17-9.1-27(b) (notice sent annually "to every active registered voter who has not voted in the past five (5) calendar years"); TENN. CODE ANN. § 2-2-106(c) (county shall mail confirmation notice "if indications exist that the voter may no longer reside at the address at which the voter is registered, such as the voter's failure to vote"); UTAH CODE ANN. § 20A-2-304.5(3)(a) (clerk sends preaddressed return form to voter who "does not vote in any election during the period beginning on the date of any regular general election and ending on the day after the date of the next regular general election"); VT. STAT. ANN. tit. 17, § 2150(d)(2)-(3) (board of civil authority

"may consider and rely upon . . . any checklist or checklists showing persons who voted in any election within the last four years" as basis for sending a notice); W. VA. CODE ANN. § 3-2-25(j) (confirmation notice mailed to those who "have not voted in any election during the preceding four calendar years"). These states correctly perceived that the Congress had delegated to them the design of a reasonable, general program necessary to comply with the NVRA, and that they had the discretion to specify the events that would lead to the sending of a confirmation notice. If Appellants were to prevail, these same states would immediately be caught up in the ensuing flood of litigation.

In sum, using the failure to vote as a trigger for some further step in the list maintenance process was uniformly believed to be permissible by those in Congress who passed the NVRA, by those in the Department of Justice charged with enforcing the statute, and by the states responsible for implementing it.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation, Inc. respectfully request this Court to affirm the decision below and dismiss Appellants' claims.

Dated: July 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Pursuant to Federal Rule of Appellate Procedure 29(a)(5) and per Microsoft Word count, the brief is within the *amicus* word limit at 6030 words excluding tables and certificates, less than half of the 13,000 words allowed for the principal brief.

Dated: July 26, 2017 *s/ Paul J. Orfanedes*

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: July 26, 2017 *s/ Paul Orfanedes*