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IN THE SUPREME COURT OF THE UNITED STATES  
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JON HUSTED, OHIO SECRETARY OF STATE, )  
Petitioner, )  
V. ) No. 16-980  
A. PHILIP RANDOLPH INSTITUTE, )  
ET AL., )  
Respondents. )

- - - - -  
Washington, D.C.  
Wednesday, January 10, 2018

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:04 a.m.

APPEARANCES:  
GEN. ERIC E. MURPHY, State Solicitor for Ohio,  
Columbus, Ohio; on behalf of the Petitioner.  
GEN. NOEL J. FRANCISCO, Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the United States as amicus curiae.  
PAUL M. SMITH, Washington, D.C.; on behalf of  
the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 16-980, Husted  
5 versus the A. Phillip Randolph Institute.

6 Mr. Murphy.

7 ORAL ARGUMENT OF GEN. ERIC E. MURPHY

8 ON BEHALF OF THE PETITIONER

9 GENERAL MURPHY: Mr. Chief Justice,  
10 and may it please the Court:

11 Congress passed the NVRA to serve  
12 competing goals, increasing the number of  
13 eligible registered voters but decreasing the  
14 number of ineligible ones, and this  
15 congressional compromise is evident in the  
16 statute's conflicting mandates. It both  
17 requires states to undertake general programs  
18 to remove ineligible individuals but at the  
19 same time places limits on those federally  
20 mandated removal programs, including that  
21 states may not remove individuals for changed  
22 residence unless they fail to respond to a  
23 notice and to vote over two federal elections.

24 JUSTICE KENNEDY: I -- I know you have  
25 the -- the exceptions clause in -- in (b)(2).

1 Would your case have been stronger without the  
2 enactment of section (b)?

3 GENERAL MURPHY: Without the --

4 JUSTICE KENNEDY: In other words,  
5 could you rely just on (a) and (d)?

6 GENERAL MURPHY: If -- if there was no  
7 what I call the failure to vote --

8 JUSTICE KENNEDY: Whether -- if there  
9 were no (b) at all?

10 GENERAL MURPHY: I -- I think --  
11 certainly, I think, that if there is no failure  
12 to vote clause, that's one of the main  
13 prohibitions on which they are relying, but I  
14 think you have to interpret (b) in light of  
15 (d), of course.

16 JUSTICE KENNEDY: Yes.

17 GENERAL MURPHY: And (d) clearly  
18 indicates that we -- if we -- so long as we  
19 send individuals a notice and so long as we  
20 wait two federal elections before we remove  
21 them, that that is acceptable.

22 JUSTICE SOTOMAYOR: So why bother --

23 JUSTICE KENNEDY: Because of --  
24 because of the except clause?

25 GENERAL MURPHY: Well, because you

1 have to interpret the -- the -- the substantive  
2 provision in (b) (2), the failure to vote  
3 clause --

4 JUSTICE KENNEDY: Right.

5 GENERAL MURPHY: -- in a way that  
6 reconciles it with the use of failure to vote.  
7 And only our position interprets (b) in a way  
8 that -- that allows the back-end use of  
9 non-voting in (d) because --

10 JUSTICE GINSBURG: Mr. Murphy, the --  
11 the Act itself gives a safe harbor provision  
12 that triggers the confirmation -- the notice.  
13 And that safe harbor provision doesn't rely at  
14 all on failure to vote. It relies on a post  
15 office change of address form.

16 So isn't that some clue, the safe  
17 harbor, that Congress didn't want failure to  
18 vote to be a trigger for this procedure?

19 GENERAL MURPHY: I don't think so,  
20 Your Honor, because I think that is a safe  
21 harbor for something completely different.  
22 They treat it as a safe harbor for meeting an  
23 implicit element in (d) that a state have  
24 objective evidence that an individual has  
25 moved, but that element is not there.

1           In fact, the Postal Service provision  
2           is a safe harbor for on the other side of the  
3           balance between removing ineligible voters and  
4           keeping eligible voters on the roll.

5           JUSTICE SOTOMAYOR: This is a very  
6           complicated system for a very simple position.  
7           If you have any reason to believe someone has  
8           changed address, just send them a notice and,  
9           after two election cycles, disqualify them.

10          Why have the Post Office provision at  
11          all? Why have any other provision? As it is,  
12          I understand Ohio now is not waiting for people  
13          to miss two election cycles; they're waiting --  
14          every year they're purging, right?

15          GENERAL MURPHY: No. We -- we run the  
16          notices every year --

17          JUSTICE SOTOMAYOR: Every year.

18          GENERAL MURPHY: -- but we still wait  
19          the -- we still wait until --

20          JUSTICE SOTOMAYOR: Now, you have  
21          taken the position in your brief that you  
22          really don't need anything; you need -- you  
23          could send out a notice any time, any place,  
24          and if someone fails to respond to it, you can  
25          purge them. Isn't that your position?

1           GENERAL MURPHY: No. No. Our  
2 position is the notice gets sent out. If they  
3 respond, then obviously you can't honor --

4           JUSTICE SOTOMAYOR: But my point is  
5 you don't even need the failure to vote two  
6 years to use the notice.

7           GENERAL MURPHY: That's right.  
8 Because a statewide canvass would not be based  
9 on failure to vote whatsoever. And so that's  
10 why they have to read into (d) an element that  
11 they just make up from whole cloth, which is  
12 that they have objective evidence of a move.

13           JUSTICE SOTOMAYOR: Well, let --

14           GENERAL MURPHY: For sending the  
15 notice.

16           JUSTICE SOTOMAYOR: The Senate report  
17 that supported the NVRA explicitly says that  
18 what they wanted to avoid was a mailing that is  
19 unresponded to being a cause for removing  
20 someone.

21           So if that was its purpose, why  
22 wouldn't it make sense that the only reason  
23 that you can change -- send the notice is if  
24 you have some reasonable basis to believe  
25 someone has moved?



1           GENERAL MURPHY: Well --

2           JUSTICE SOTOMAYOR: Failure to vote  
3 can't it be it because the Senate report says  
4 that they believe the failure to vote was a  
5 constitutional right. You have a right not to  
6 vote.

7           GENERAL MURPHY: So there's a --  
8 there's a couple points there. The first was  
9 what if people do not respond to the notice.

10           I agree that there is a Senate report  
11 suggesting that they were concerned that people  
12 would be removed merely for failing to respond,  
13 but Congress did not put an objective evidence  
14 element into the (d) procedure in response to  
15 that concern.

16           They put in the safe harbor, what --  
17 what they called the fail-safe voting on the  
18 back end. So if an individual doesn't respond,  
19 they still have two federal elections in which  
20 they can show up to vote. So that's how they  
21 dealt with that provision.

22           With respect to failure to vote, I  
23 think the legislative history is quite clear  
24 that the concern was removing individuals  
25 merely for failing to vote in a recent

1 election. That's what the report says at page  
2 17. And that's not what Ohio does.

3 JUSTICE SOTOMAYOR: So why have the  
4 three provisions having to do with the Post  
5 Office notice?

6 GENERAL MURPHY: Because that --

7 JUSTICE SOTOMAYOR: That seems like a  
8 very reasonable -- why -- why do you need it at  
9 all under your interpretation?

10 GENERAL MURPHY: Because that is the  
11 minimal effort on the other side of the  
12 balance. As I was trying to -- mentioned to  
13 Justice Ginsburg, I think that is a safe harbor  
14 for the state's obligation to engage in  
15 maintenance efforts.

16 (A) (4) says that the states have a  
17 duty to remove ineligible voters, and (c) says  
18 -- begins by saying you can meet your  
19 obligation to remove ineligible voters by going  
20 through this process. It's the minimum on the  
21 one side of the balance --

22 JUSTICE KAGAN: But, General, if I can  
23 take you back to Justice Ginsburg's question  
24 because it seems as though you are effectively  
25 turning 8(d)(1) into a kind of safe harbor in

1 this sense: 8(d)(1) says that these  
2 confirmation procedures are a permissible part  
3 of the program, even though part of the  
4 confirmation procedures are about not voting.  
5 So that's clear that 8(d)(1) says that. But  
6 you are trying to take that and convert it into  
7 something bigger and broader, essentially  
8 saying if you use these confirmation  
9 procedures, your entire program is going to be  
10 insulated from criticism, even though there's  
11 another part of your program that explicitly  
12 relies on non-voting.

13 And I don't see that as in any way  
14 being the point of 8(d)(1). You're trying to  
15 take 8(d)(1), which says, sure, you can have a  
16 part of the program that does this, and turn it  
17 into a much bigger and broader safe harbor for  
18 everything that you do.

19 GENERAL MURPHY: So my response there  
20 would be you have to interpret the words of  
21 8(b)(2), the failure to vote clause, in a way  
22 that would not prohibit what 8(d) requires.  
23 And it affirmatively requires the use of  
24 non-voting over two federal elections.

25 We have the proximate cause argument

1 for why the failure to respond to the notice  
2 breaks the causal link. And there was this  
3 debate in the 1990s between the states --

4 JUSTICE KAGAN: I must say I don't  
5 understand the -- I think this is a little bit  
6 of a different question, but since you've  
7 raised it, the proximate cause argument, I  
8 don't understand, because essentially what the  
9 Ohio program does is it says non-voting,  
10 failure to respond, non-voting.

11 And you're trying to pick out the  
12 middle piece of that and say that's the only  
13 proximate cause. That's just not the way we  
14 think of proximate cause in any area.

15 GENERAL MURPHY: So I think clearly  
16 the "by reason of" adopts a proximate cause  
17 test. This Court has repeatedly said it's a  
18 flexible test.

19 JUSTICE KAGAN: No -- no argument on  
20 that. Sure, there's a proximate cause test,  
21 but there's more -- you know, there's more --  
22 there can be more than one proximate cause in  
23 the world.

24 GENERAL MURPHY: Well, exactly, and  
25 the Court has said that you have to pick the

1 proximate cause test that fits the statute.  
2 And this statute, the last cause undoubtedly is  
3 failure to vote.

4 That's why I think the best way to  
5 reconcile (b) and (d) is to say that a failure  
6 to respond to the notice breaks any causal  
7 prohibition between failure to vote and  
8 removal.

9 JUSTICE ALITO: Why do you need the --  
10 GENERAL MURPHY: And I think there was  
11 this debate --

12 JUSTICE ALITO: Why do you need the  
13 proximate cause argument at all? What the  
14 statute says is that you -- someone may not be  
15 removed from the list by reason of the person's  
16 failure to vote.

17 It can't mean but for cause because  
18 then it would run -- because the -- the statute  
19 itself takes failure to vote into account in  
20 (d). That's one of the things that is  
21 necessary in order for someone to be removed  
22 from the list under (d). So it can't be  
23 but-for.

24 And in the HAVA, Congress used the  
25 term "solely." So why isn't the best

1 interpretation of this that one cannot be  
2 removed from the list solely because of failure  
3 to vote?

4 GENERAL MURPHY: That's absolutely  
5 correct. In CSX, the Court said one -- one  
6 component of a proximate cause test, it was a  
7 malleable phrase, was the sole proximate cause.

8 JUSTICE KAGAN: Well, isn't that just  
9 adding a word into the statute that Congress  
10 wrote? The statute -- Congress said by reason  
11 to vote. There are multiple places in the U.S.  
12 code where Congress wants to say solely, you  
13 know, solely by reason, and Congress says it.  
14 It means something different because there are  
15 lots of situations in which two components  
16 together cause something.

17 And so to add that word "solely" is to  
18 change the meaning of the statute. And that  
19 word is not in this provision.

20 GENERAL MURPHY: Well, we think it's  
21 the best reading to reconcile the two  
22 provisions. And there was this --

23 JUSTICE KAGAN: Which -- which two?  
24 The --

25 GENERAL MURPHY: The -- the solely,

1 because the -- the failure to respond --

2 JUSTICE KAGAN: The HAVA and the NFRA  
3 -- NVRA provision?

4 GENERAL MURPHY: No, the (b) and (d)  
5 --

6 JUSTICE KAGAN: Okay.

7 GENERAL MURPHY: -- to reconcile the  
8 two provisions. And, remember, the solely  
9 clause from HAVA was not the only provision  
10 that was adopted in HAVA.

11 In addition, HAVA when it added that  
12 solely clause also added the clarifying  
13 amendment to the failure to vote.

14 JUSTICE KAGAN: General, everybody is  
15 looking here for a way to reconcile these two  
16 provisions. I mean, you're right, these two  
17 provisions are like, okay, what do we do with  
18 these?

19 But why isn't the obvious way to  
20 reconcile the two provisions just to say, look,  
21 you got this failure to vote clause, but don't  
22 think that this failure to vote clause bars a  
23 state from using the confirmation procedures.  
24 It doesn't bar a state from using the  
25 confirmation procedures. That can be a

1 permissible part of the state program.

2           So that's your way to reconcile the  
3 two things. Taken on its own, the failure to  
4 vote clause looks as though it might bar  
5 confirmation procedures. The confirmation  
6 procedure says, no, not these.

7           GENERAL MURPHY: So, look, I think  
8 that may have been one reconcile -- one way to  
9 reconcile it. Our way may have been one way to  
10 reconcile it. The states debated the federal  
11 government on this precise issue throughout the  
12 1990s, and then Congress intervened and  
13 reconciled it with the addition of the solely  
14 clause and the HAVA provision.

15           JUSTICE KAGAN: But the solely clause  
16 in HAVA --

17           JUSTICE ALITO: And I'm looking at --  
18 I'm listening --

19           JUSTICE KAGAN: -- is a completely  
20 independent provision in a completely  
21 independent statute. I mean, it's not the  
22 clarifying amendment, which we can talk about,  
23 and the solely clause is -- it's a part of a  
24 different provision in a different statute  
25 dealing with a related but different subject



1 matter.

2           So there would be no reason to take  
3 one provision that says solely, and says  
4 because that provision says solely, we're going  
5 to treat this provision as also saying solely  
6 when this provision does not say solely.

7           In fact, we have a rule against that  
8 in statutory interpretation. Usually, we say,  
9 look, Congress knows how to do a solely  
10 provision. It didn't do it here.

11           GENERAL MURPHY: But what it did add  
12 in the same law, in the HAVA law that -- in the  
13 computerized list maintenance for statewide  
14 programs that uses solely, and then with  
15 respect to the failure to vote clause in the  
16 NVRA, it adopted a clarification amendment that  
17 said except that nothing in this provision  
18 shall be construed to prohibit the state from  
19 using the procedures in (c) and (d). So I  
20 think you have to interpret the clarification  
21 amendment with the solely clause because it was  
22 in the same law.

23           JUSTICE KAGAN: Well, that's exactly  
24 what the clarifying amendment says. You're  
25 exactly right. It says don't -- don't

1 interpret the failure to vote clause as  
2 preventing use of the confirmation procedures.

3 And that's my point about how these  
4 two things are reconcilable. The clarifying  
5 amendment says how they're reconcilable.

6 JUSTICE ALITO: And I'm missing -- I'm  
7 sorry.

8 JUSTICE KAGAN: Don't -- don't  
9 interpret the failure to vote clause as barring  
10 the confirmation procedures. States can use  
11 the confirmation procedures, but that doesn't  
12 mean that they can do anything else that they  
13 want to on top of the confirmation procedures.

14 GENERAL MURPHY: So -- so you still --  
15 it's a -- it's a rule of clarification. So it  
16 says you have to construe (b)(2). And I think  
17 that with that, combined with the solely  
18 clause, makes quite clear that you have to  
19 interpret the "by reason of" language in some  
20 way to break the causal link between voting and  
21 removal that is required in (d).

22 I think interpreting it to be the sole  
23 cause is the way to accomplish that feat. I  
24 think that's why there was a clarification  
25 amendment on the one hand in (b) and -- and the

1 solely clause.

2 JUSTICE SOTOMAYOR: Counsel, can you

3 --

4 GENERAL MURPHY: I also think the  
5 public context is really important here. The  
6 public con --

7 JUSTICE SOTOMAYOR: Can we get to the  
8 essence of this case?

9 It appears as if what you're -- you're  
10 reading is that the failure to vote is enough  
11 evidence to suggest that someone has moved.  
12 That seems to be your position because it can  
13 be the only one.

14 But is that a reasonable effort to  
15 draw that conclusion when you do results in  
16 disenfranchising disproportionately certain  
17 cities where large groups of minorities live,  
18 where large groups of homeless people live, and  
19 across the country they're the group that votes  
20 the least, in -- in large measure because many  
21 of them work very long hours. And without the  
22 golden week that Ohio rescinded, many of them  
23 can't vote because the polls are not open while  
24 they're not working.

25 Places like Cleveland have very, very,

1 very long lines of -- of voter -- of voters  
2 trying to vote. All of these impediments  
3 result in large numbers of people not voting in  
4 certain spots in the state.

5 So if the word "reasonable effort" has  
6 any meaning with a Congress who said that the  
7 failure to vote is a constitutional right, how  
8 can we read this statute to permit you to begin  
9 a process of disenfranchising solely on the  
10 basis of that with no independent evidence  
11 whatsoever that the person has moved?

12 You can use the Post Office. They  
13 tell you that. You can use Certified Mail.  
14 You could use juror change of addresses. You  
15 can use driver license, motor vehicle change of  
16 addresses. There are dozens of other ways that  
17 you could verify a change of address, yet  
18 you're suggesting that using a failure to  
19 appear at an election or elections as evidence  
20 of moving when people have a right not to vote  
21 if they choose. Many have.

22 And others like the veteran who's a  
23 plaintiff in this case explains the reasons why  
24 he failed to vote in two elections. I have to  
25 give the meaning, the words that Congress said,

1 don't use the failure to vote as a result --  
2 that results in someone being disenfranchised.  
3 I don't understand how you can say that the  
4 failure to vote can be used as the sole basis  
5 for sending out notices.

6 GENERAL MURPHY: We don't say --

7 JUSTICE SOTOMAYOR: It's not a  
8 reasonable inference, so how could it be a  
9 reasonable effort?

10 GENERAL MURPHY: So the failure to  
11 vote clause says that failure to vote cannot be  
12 the sole basis for removal, not sending a  
13 notice, it says nothing about sending a notice.  
14 I would also add that subsection (d), within  
15 subsection (d), Congress identified the minimum  
16 evidence that it thought was sufficient for  
17 states to remove individuals for failure to  
18 respond -- or for --

19 JUSTICE SOTOMAYOR: So if that's  
20 minimum, don't you think that maximum should  
21 say something a little bit more than the  
22 failure to vote?

23 GENERAL MURPHY: Well, it does because  
24 the --

25 JUSTICE SOTOMAYOR: I mean, you know,

1 a change in the residence in accordance with  
2 (b), (c), and (d), and (b) has you using the  
3 Post Office, correct?

4 GENERAL MURPHY: (c).

5 JUSTICE SOTOMAYOR: (C) has you using  
6 the Post Office. (B) says shall not be removed  
7 -- shall not result in the removal of the name  
8 of a person from any official list registered  
9 to vote in election for federal office by  
10 reason of the person's failure to vote. So --

11 GENERAL MURPHY: That's correct. And  
12 if you interpret that to be a sole proximate  
13 cause test, then ours does not satisfy it  
14 because --

15 JUSTICE SOTOMAYOR: Well --

16 GENERAL MURPHY: -- nobody is removed  
17 solely by reason of their failure to vote.

18 JUSTICE SOTOMAYOR: Exactly. We're  
19 saying it's not a sole --

20 GENERAL MURPHY: They're -- they're  
21 removed -- they're removed if they fail to  
22 respond to a notice and fail to vote over six  
23 years, which is more than the minimum  
24 protections.

25 JUSTICE SOTOMAYOR: So please explain

1 to me why a change of address is reasonable.  
2 What -- what are the statistics that show that  
3 the vast majority of people that you  
4 disenfranchise from voting, that you strike  
5 from the election rolls have actually moved?

6 GENERAL MURPHY: So -- so there is no  
7 statistical evidence that is necessary because  
8 Congress made the determination of what  
9 evidence is necessary. And that  
10 determination is in (d) --

11 JUSTICE SOTOMAYOR: No, when it gave  
12 you an example, it gave you an example of an  
13 independent trigger.

14 GENERAL MURPHY: But that was an  
15 example from meeting our minimum duty on the  
16 other side to -- so there's a minimum duty, a  
17 minimum amount of protections for eligible  
18 voters and a minimum requirement on the states  
19 to undertake a minimum effort to --

20 JUSTICE SOTOMAYOR: So there's a  
21 minimum requirement on the voter who gets your  
22 notice to respond.

23 GENERAL MURPHY: Absolutely, the  
24 statute places a requirement on the voter to  
25 respond.

1 JUSTICE SOTOMAYOR: But that's after  
2 you have evidence that they've actually moved?

3 GENERAL MURPHY: No, there's no --  
4 there's nothing in the statute that suggests  
5 that there's limitations on the trigger.

6 With respect to -- to minorities, I  
7 would add, by the way, that our position is not  
8 at all -- (b)(1) -- Congress responded to that  
9 concern, suggesting that the process must be  
10 uniform, non-discriminatory, and in compliance  
11 with the Voting Rights Act --

12 JUSTICE SOTOMAYOR: Well, that's the  
13 problem, is --

14 GENERAL MURPHY: -- but that --

15 JUSTICE SOTOMAYOR: -- that there's a  
16 strong argument this is -- that at least in  
17 impact, this is discriminatory. I understand  
18 that some don't believe in impact, but you have  
19 to look at it to determine --

20 GENERAL MURPHY: But they didn't raise  
21 a (b)(1) claim.

22 JUSTICE SOTOMAYOR: -- whether  
23 something is reasonable.

24 GENERAL MURPHY: They didn't raise a  
25 (b)(1) claim. There -- we're only here today



1 under the failure-to-vote clause.

2 And if I could reserve the rest of --

3 CHIEF JUSTICE ROBERTS: I'll give you  
4 a couple more minutes so you can get more of  
5 your argument out.

6 GENERAL MURPHY: Okay. Thank you,  
7 Your Honor.

8 So I really would like to get back to  
9 the public context in which the HAVA provisions  
10 were enacted because I think that public  
11 context is quite powerful. On the one hand,  
12 you had states, from 1994 all the way up to the  
13 HAVA amendment, debating the Department of  
14 Justice, whether the processes just like Ohio's  
15 were permissible. On the other hand, you had  
16 nobody. There was nobody who made the argument  
17 that (b) could somehow be read to actually make  
18 (d) inoperative.

19 Under our view, the clarification in  
20 HAVA was designed specifically to address the  
21 -- the long-standing debate that started even  
22 before -- before -- before the statute became  
23 effective, states were suggesting that they  
24 should engage in approaches like Ohio's, all  
25 the way to the final FEC report, where South

1 Dakota suggested clarifying the NVRA in a way  
2 that's quite helpful to the states here. And  
3 HAVA was passed and it had two provisions.

4 It had the clarifying amendment,  
5 expressly a clarifying amendment, on the one  
6 hand, and then it had the related provision  
7 dealing with statewide list maintenance, which  
8 is effectively a comparable -- comparable  
9 decision.

10 JUSTICE GINSBURG: How -- how many  
11 states --

12 GENERAL MURPHY: I think if you read  
13 both of those together --

14 JUSTICE GINSBURG: How many states do  
15 it this way? That is, you get the notice, as I  
16 understand it, if you've missed just one  
17 election.

18 GENERAL MURPHY: That's incorrect. If  
19 you missed -- if you have no voter activity  
20 over a two-year period, which would include one  
21 general election and then one off-year election  
22 and any primary elections as well.

23 JUSTICE GINSBURG: Yeah. Are there  
24 other states who do it just like Ohio?

25 GENERAL MURPHY: There are several --

1 many states who -- I think around eight that  
2 use failure to vote as the trigger for the  
3 notice. I don't -- some -- some use two, some  
4 use three years, some use four years.

5 But the problem with my -- my friend's  
6 position on the other side is it would not only  
7 outlaw all of those states, those who use  
8 failure to vote as the trigger for sending the  
9 notice; it would outlaw any state that takes  
10 into account failure to vote on the front end.  
11 And that includes many states that target  
12 individuals who have not voted recently with a  
13 non-forwardable mailing and then respond to  
14 that non-forwardable mailing with a  
15 confirmation notice for any -- any individuals  
16 who the non-forwardable mailing is bounced back  
17 to.

18 That would be equally prohibited under  
19 the logic of their argument here today because  
20 they are saying any front-end use of non-voting  
21 would be illegal.

22 CHIEF JUSTICE ROBERTS: Thank -- thank  
23 you, counsel.

24 GENERAL MURPHY: Thank you.

25 CHIEF JUSTICE ROBERTS: You'll have a

1 couple minutes for rebuttal.

2 General Francisco.

3 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO  
4 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

5 GENERAL FRANCISCO: Mr. Chief Justice,  
6 and may it please the Court:

7 If I could begin with Justice  
8 Kennedy's question. Justice Kennedy, we think  
9 that Ohio's process was permissible before  
10 Congress enacted the clarification amendment in  
11 2002, but the clarification amendment made it  
12 even clearer for two basic reasons.

13 First, sections 8(c) and 8(d), that's  
14 the Postal Service process and the notice  
15 process, require that non-voting be the  
16 immediate cause for removal. The only way you  
17 can -- you can construe 8(b)(2) as not  
18 prohibiting that is if 8(b)(2) is limited to  
19 removing people only solely by reason of their  
20 failure to vote.

21 And, second, this reflected a  
22 significant shift in the federal/state balance  
23 at the time. Prior to the NVRA, many states  
24 removed people solely for failure to vote.  
25 Others had notice processes that were far less

1 protective than Ohio's notice process. None of  
2 them had a four-year waiting period.

3 What the NVRA did was it required  
4 everybody to improve their processes well  
5 beyond what they were before the NVRA was  
6 passed, but beyond that, left the states with  
7 flexibility. And there's nothing in the  
8 statute that says that, within that range of  
9 flexibility, states are barred from using a  
10 non-voting trigger in conjunction with 8(d)'s  
11 protective notice process.

12 JUSTICE SOTOMAYOR: General, could you  
13 tell me, there's a 24-year history of solicitor  
14 generals of both political parties under both  
15 -- Presidents of both political parties who  
16 have taken a position contrary to yours.  
17 Before the amendment and after the amendment.

18 In fact, the Federal Election  
19 Commission, when it wrote to Congress with  
20 respect to the Help America Vote Act, took the  
21 position the old solicitor generals were  
22 taking. Everybody but you today come in and  
23 say the Act before the clarification said  
24 something different.

25 Seems quite unusual that your office

1 would change its position so dramatically. I  
2 might accept it if you thought that the Help  
3 America Vote Act, in fact, clarified something  
4 that was ambiguous, but you're taking a very  
5 different position. You're saying even before  
6 that Act, it was clear you could do it this  
7 way.

8 GENERAL FRANCISCO: Your Honor, what  
9 I'm saying is I think that the Help America  
10 Vote Act and the clarification amendment made  
11 it even clearer and after that clarification  
12 amendment --

13 JUSTICE SOTOMAYOR: Well, so please  
14 explain the change of position.

15 GENERAL FRANCISCO: Sure.

16 JUSTICE SOTOMAYOR: After that many  
17 Presidents, that many solicitor generals, this  
18 many years -- the vast majority of states, over  
19 35, over 40, actually, who read it the way your  
20 opponents read it, most people read it that  
21 way -- how did the solicitor general change its  
22 mind? Do you believe this doesn't have an  
23 impact, a negative impact on certain groups in  
24 this society?

25 GENERAL FRANCISCO: Well, Your Honor,

1 I believe that after Congress passed the  
2 clarification amendment, it clarified what was  
3 at the time an ongoing debate between the  
4 Department of Justice and the states.

5 And the only plausible way to read  
6 that public context -- and with respect to some  
7 members of this Court, public context is not  
8 legislative history, it's --

9 JUSTICE SOTOMAYOR: So point me where  
10 in the legislative history people say that with  
11 absolute clarity.

12 GENERAL FRANCISCO: Well -- yeah.

13 JUSTICE SOTOMAYOR: As I understand  
14 the legislative history, both sides are saying,  
15 in its history, this helps us.

16 GENERAL FRANCISCO: And, Your Honor --

17 JUSTICE SOTOMAYOR: So it's as  
18 ambiguous as the language may be.

19 GENERAL FRANCISCO: Public context is  
20 not legislative history. Even the most diehard  
21 textualists look to the public context in which  
22 a law was enacted. I refer you to Justice  
23 Scalia's opinion in *Branch versus Smith* and  
24 Professor Manning's article in *What Divides*  
25 *Textualists From Purposivists?* And that public

1 context makes clear that the only thing that  
2 was in need of clarification at the time the  
3 clarification amendment was passed was  
4 precisely this question, whether states like  
5 Ohio's could use a non-voting trigger in  
6 conjunction with the 8(d) process.

7 And there's nothing in this statute  
8 that bars that. I think it reflects the  
9 balance that Congress was trying to strike in  
10 the NVRA between, on the one hand, dramatically  
11 increasing the number of voters on the voter  
12 rolls but, on the other, giving states the  
13 flexibility they need to manage the issues that  
14 arise when you have overinflated voter rolls.

15 JUSTICE GINSBURG: Was it the position  
16 of the United States -- I thought it was, but  
17 you correct me if I'm wrong -- I thought that  
18 -- that the United States was taking the  
19 position, consistently, that non-voting was not  
20 a reliable indicator of residence change.

21 GENERAL FRANCISCO: Your Honor, that's  
22 partly correct. Our prior position was based  
23 on an understanding of the statute that read  
24 into it a reliable evidence requirement, and we  
25 said that non-voting was not that kind of



1 reliable evidence.

2           Our current position is that when you  
3 look at the statute, there's simply no way to  
4 read into it a reliable evidence requirement  
5 that's found nowhere in the text and that  
6 Congress, in fact, rejected. And, again, it  
7 reflects this federal/state balance where  
8 8(b)(2) and 8(d) set a very protective floor,  
9 required everybody to be far more protective of  
10 voters than they were before the Act was  
11 passed, but beyond that floor, left the states  
12 with flexibility over the management of their  
13 list-maintenance programs precisely so they  
14 could address the other side of the compromise,  
15 which was giving states the flexibility they  
16 need to address the issues that arise when you  
17 have bloated voter rolls.

18           JUSTICE KAGAN: General, it would be  
19 right, isn't it -- I think you acknowledge this  
20 -- that if your position is correct, that the  
21 failure-to-vote clause simply doesn't apply to  
22 removal programs for change of residence. Is  
23 that correct?

24           GENERAL FRANCISCO: Your Honor --

25           JUSTICE KAGAN: Because, of course,

1 all those programs have to use the confirmation  
2 procedures, and your position is that if you  
3 use the confirmation procedures, that's a --  
4 basically, that's an out for everything?

5 GENERAL FRANCISCO: That's correct,  
6 but it does have much broader application.

7 JUSTICE KAGAN: Not much broader  
8 application, because how could you possibly use  
9 failure to vote to -- for, you know, mental  
10 incapacity or criminal convictions. What  
11 broader application does it have?

12 GENERAL FRANCISCO: What I think it  
13 does, it does a couple of things. One of the  
14 principal things -- issues at the time the NVRA  
15 was passed was what you put your finger on.  
16 This practice among some states of having a  
17 kind of use-it-or-lose-it mentality to the  
18 right to vote, you either exercise it or you  
19 lose it. And they definitely wanted to take  
20 that off the table.

21 The other thing they wanted to do was  
22 make sure that you could never use failure to  
23 vote to conclusively presume that any other  
24 basis for removal was met.

25 JUSTICE KAGAN: Right. But I guess

1 what I'm asking, General, is sort of two  
2 related questions. Number 1, if the effect of  
3 your position is to say, look, we don't mean  
4 for this failure-to-vote clause to apply to  
5 programs about change of residence, why didn't  
6 Congress just say that? That's Number 1.

7 And, Number 2, I mean, I -- I can see  
8 the point that it's not -- it doesn't make the  
9 failure-to-vote clause completely meaningless,  
10 but I'm still looking for the place where it  
11 has some real impact on anybody's --

12 GENERAL FRANCISCO: Sure.

13 JUSTICE KAGAN: -- voting programs.

14 GENERAL FRANCISCO: And I think it's  
15 because, and this comes out in some of the  
16 legislative history, prior to the NVRA, states  
17 simply used failure to vote as a proxy for the  
18 whole panoply of grounds for removal.

19 They didn't necessarily tie it to this  
20 basis or that basis. And Congress was very  
21 concerned about simply relying on the failure  
22 to vote.

23 So they wanted to take it completely  
24 off the board. And (b) (2) is the only  
25 provision in this statute that takes it

1 completely off the board and says nobody can  
2 ever be removed merely for their failure to  
3 vote.

4 But when you combine non-voting with  
5 the 8(d) process, the very protective process  
6 that Congress set that required everybody to  
7 improve their procedures, there's simply  
8 nothing in the statute that prohibits that, and  
9 the clarification amendment makes that even  
10 clearer.

11 JUSTICE KAGAN: But with respect,  
12 General, I don't think you answered either of  
13 the two questions that I asked you, so I'll try  
14 again.

15 Why wouldn't they just have said the  
16 failure-to-vote clause doesn't apply to -- to  
17 -- to -- to where a state uses the confirmation  
18 procedures?

19 GENERAL FRANCISCO: Well, Your Honor,  
20 I don't know the answer to that. And I would  
21 say that the NVRA is not one of these statutes  
22 that I would hold up as a paradigm for  
23 legislative draftsmanship, but --

24 JUSTICE KAGAN: Okay. So the second  
25 question is what is left of the failure-to-vote

1 clause, practically speaking?

2 GENERAL FRANCISCO: It takes  
3 completely off the table using failure to vote  
4 as a conclusive presumption for any other  
5 ground for removal.

6 JUSTICE KAGAN: Well, what other  
7 ground are we talking about?

8 GENERAL FRANCISCO: Well, prior to the  
9 NVRA --

10 JUSTICE KAGAN: I mean, it's not --  
11 nobody used it as a presumption for mental  
12 incapacity.

13 GENERAL FRANCISCO: Well, Your Honor,  
14 actually, the legislative history makes clear  
15 that prior to the NVRA, they used it as a  
16 presumption for meeting the whole panoply of  
17 different bases for removal.

18 JUSTICE ALITO: Well, wasn't it --  
19 wasn't it itself considered to be a ground for  
20 being removed? It wasn't necessarily -- these  
21 states didn't regard it necessarily as a proxy  
22 for anything else. They just took the position  
23 that it was use it or lose it. If you didn't  
24 vote for a certain period of time, that was  
25 grounds for taking your name off the

1 eligibility list.

2 GENERAL FRANCISCO: That's absolutely  
3 correct, and that's why it meant to address  
4 both of those issues, those states that had a  
5 use-it-or-lose-it mentality, you can never do  
6 that, and those states that used it to  
7 conclusively presume that some other basis for  
8 removal has been met.

9 But here Ohio joins the initial  
10 failure to vote with the very process that  
11 Congress established for determining whether  
12 somebody has been removed from the voter rolls.

13 And with respect to the notion that  
14 somehow 8(d)(1)(B) does not set forth a  
15 separate process apart from the 8(c) Postal  
16 Service process, it clearly does. If you look  
17 at Section 8(d), there are two provisions.

18 There's 8(d)(1)(A) which allows you to  
19 remove somebody if they've notified you that  
20 they've moved, clearly a standalone process.  
21 8(d)(1)(B) is simply the corollary to that. If  
22 you haven't notified us that you've moved, here  
23 is another process that states can use to make  
24 that determination.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 General.

2 GENERAL FRANCISCO: Thank you, Mr.  
3 Chief Justice.

4 CHIEF JUSTICE ROBERTS: Mr. Smith.

5 ORAL ARGUMENT OF PAUL M. SMITH

6 ON BEHALF OF THE RESPONDENTS

7 MR. SMITH: Mr. Chief Justice, and may  
8 it please the Court:

9 I think it's important to recognize  
10 that the Supplemental Process violates Section  
11 8 of the NVRA in two distinct ways. Of course,  
12 it violates the failure-to-vote clause, as  
13 we've been discussing, but it also violates  
14 8(a) because 8(a) sets out an exclusive list of  
15 four bases that can be used for purging people  
16 from the rolls, and bars states from doing it  
17 under any other circumstances.

18 And the Supplemental Process, the way  
19 it is designed, it assures that many, indeed  
20 probably most of the people who are purged,  
21 have not moved, let alone moved to a different  
22 county or state, which is the only moves that  
23 can justify a purge under the plain terms of  
24 the NVRA.

25 It simply doesn't provide adequate

1 evidence to come to the conclusion that the  
2 person has moved at all.

3 JUSTICE ALITO: Well, your argument is  
4 that failure to vote is not one of the listed  
5 grounds for being removed, right? That's --  
6 that's the argument you just made.

7 MR. SMITH: Yes, Your Honor.

8 JUSTICE ALITO: But is that what Ohio  
9 does? Does it say the failure to vote is a  
10 ground for removal, or does it say that moving  
11 out of the district is a ground for removal,  
12 and failure to vote plays a part in the  
13 determination of whether a person has moved out  
14 of the district? It's evidentiary. It's not  
15 the -- the ground for removal in and of itself.

16 MR. SMITH: Well, of course, they do  
17 say that they are -- they're using the change  
18 of residency provision of 8(a) and that that's  
19 what they're trying to -- to justify the  
20 Supplemental Process with. But if, in fact, it  
21 does not do that, then it becomes illegal.

22 And the reality is that the -- the  
23 failure to vote for two years tells you almost  
24 nothing about whether or not anybody has moved.  
25 Fifty or 60 percent of the voters in Ohio



1 routinely don't vote over a two-year period.

2 JUSTICE ALITO: Yeah, I understand  
3 that. But I wonder what your answer would be  
4 to this: Suppose the state statute said that  
5 if you have not voted for 20 years, then we're  
6 going to send out the notice. Would you say  
7 that that violates this Act?

8 MR. SMITH: Well, it plainly violates  
9 the Act, Your Honor, because the Act says you  
10 can't use failure to vote as the reason for  
11 purging somebody from the rolls. And what the  
12 Supplemental Process does is it says the reason  
13 we think the person has moved is because they  
14 haven't voted. It is the only piece of  
15 evidence that they have when they purge  
16 somebody that they have moved. Only --

17 JUSTICE ALITO: You think that if  
18 somebody hasn't voted for 20 years, that  
19 doesn't raise an inference that the person has  
20 moved or died?

21 MR. SMITH: Your Honor, in the  
22 legislative history, they rejected amendments  
23 precisely like that. They even rejected a  
24 100-year rule. They said we don't want failure  
25 to vote to be the basis for which people are

1 purged.

2 JUSTICE ALITO: In and of itself, but,  
3 I mean, that isn't enough even to spark an  
4 inquiry by sending a -- a postcard saying if,  
5 in fact, you just decided you didn't want to  
6 vote for 20 years, but you really want to keep  
7 your name on the list, and you're still in the  
8 district, send this back. That would be  
9 illegal?

10 MR. SMITH: Well, Your Honor, we're  
11 talking about the people who don't send it  
12 back, which, by the way, is the large majority  
13 of people. And when you don't get the notice  
14 back, what that tells you is absolutely nothing  
15 about whether the person has moved.

16 And so, when you get to the end of the  
17 three stages of the process, two years of  
18 non-voting, not getting the notice back, you  
19 have no idea why or where, and four more years  
20 of non-voting, the only evidence that they have  
21 that the person has moved is they're not  
22 voting. So it is, in fact, the sole reason  
23 that they're being purged.

24 JUSTICE ALITO: But if not getting the  
25 notice back tells you nothing, why did Congress

1 make that part of the determination?

2 MR. SMITH: It is a safeguard, Your  
3 Honor. It is a notice provision. It is a  
4 warning to the voter that their -- that their  
5 registration status is at risk, and it gives  
6 them two options.

7 They can send it back if they want --  
8 if they haven't moved and they want to tell  
9 them here's -- I'm still there, or it says you  
10 don't have to send it back. You can just vote  
11 sometime in the next four years.

12 But what reality is, most people don't  
13 send it back. And these statistics are in the  
14 record, Your Honor.

15 We have Exhibit I to the State's  
16 initial brief in the district court are  
17 statistics Ohio provided. They do this every  
18 two years to the Election Assistance  
19 Commission, at page 63, and they say: Here's  
20 what happens to these confirmation notices.  
21 And what it shows is in 19 -- in -- in 2011,  
22 they sent out 1.5 million of these confirmation  
23 notices.

24 JUSTICE BREYER: What are -- what are  
25 they supposed to do? That is, every year a

1 certain number of people die and every year a  
2 certain number move to California. All right.  
3 We don't want them on the voter roll. That  
4 used to be a big problem, voting dead people.  
5 Okay?

6 What should the state do?

7 MR. SMITH: Well, the dead -- the dead  
8 people aren't a problem, Your Honor. There are  
9 authoritative lists at both states and the  
10 federal government level.

11 JUSTICE BREYER: They went and died in  
12 Hawaii, I don't know, they went and died in  
13 Alaska. They went and died in Tasmania.

14 Is -- is Rhode Island supposed to look  
15 at the Tasmanian voting records or hospital  
16 records or what are -- what -- it's a serious  
17 question. I don't think there's no answer to  
18 it.

19 MR. SMITH: But I don't think there's  
20 any --

21 JUSTICE BREYER: And I want to know  
22 your opinion.

23 MR. SMITH: -- any realistic concern  
24 about the death issue, Your Honor. There are  
25 ways that people are informed about deaths.

1 JUSTICE BREYER: What?

2 MR. SMITH: There are lists that are  
3 maintained by the federal government and the  
4 states. And they don't even defend this as a  
5 -- as a way to address that.

6 JUSTICE BREYER: You know, I want to  
7 know what they are. I -- I am very ignorant in  
8 this field.

9 MR. SMITH: Well, I'm -- I'm --

10 JUSTICE BREYER: I'm in Rhode Island.  
11 I see the statute. I know some people have  
12 died, maybe in Rhode Island, maybe outside.  
13 Maybe they've moved to California.

14 I don't want them voting in my state  
15 or people pretending to be them voting in my  
16 state. What do I do?

17 MR. SMITH: I do not have a detailed  
18 understanding of this since it wasn't really  
19 part of the issue for this case, but I  
20 understand that there is a national database  
21 maintained by the federal government with  
22 information provided by all the states that  
23 lists who's died in the past year, and you can  
24 compare it.

25 CHIEF JUSTICE ROBERTS: Well, what

1 about people -- Justice Breyer's question also  
2 included people who moved. What about them?

3 MR. SMITH: People who move, there are  
4 a variety of ways that you -- you find them.  
5 If they move within the state, the first thing  
6 that happens is the Bureau of Motor Vehicles  
7 has a change-of-address process, and under the  
8 NVRA and under Ohio process, if you change your  
9 driver's license address, your -- your  
10 registration is automatically updated. You're  
11 registered. If you move from Cincinnati to  
12 Cleveland, you are fine.

13 CHIEF JUSTICE ROBERTS: What about  
14 Justice --

15 JUSTICE KENNEDY: Well, how often do  
16 you change your driver's license?

17 MR. SMITH: Well, when people move to  
18 a different place in Ohio, they're required to  
19 do -- to notify them within 10 days. That's  
20 the law. Whether people do that, I don't know.  
21 But then you have the NCOA process. When  
22 people move to another county or state, the  
23 odds are they posted a forwarding address with  
24 the post office. That address then, on an  
25 annual basis, gets -- gets -- those addresses

1 get compared to the -- the statewide database,  
2 and those people get taken care of long before  
3 the Supplemental Process.

4 JUSTICE KENNEDY: But are there -- are  
5 there statistics or -- is that just a  
6 commonsense argument, or are there statistics  
7 that show that?

8 MR. SMITH: Show what, Your Honor?

9 JUSTICE KENNEDY: That when you --  
10 that when you move, you always notify -- notify  
11 the post office?

12 MR. SMITH: No, Your Honor. It is  
13 just common experience. I don't think there  
14 are statistics. Certainly, the state does not  
15 have any statistics they've ever suggested for  
16 why they --

17 JUSTICE SOTOMAYOR: I'm sorry,  
18 Mr. Smith. I thought I read it was 40 or  
19 50 percent.

20 MR. SMITH: No, Your Honor. The  
21 statistic in -- in the record is that 40  
22 percent of the mail that gets returned for --  
23 as undeliverable is -- is because people have  
24 not posted a forward address. It's a much --  
25 likely to be a much smaller percentage of

1 people who don't actually forward -- do that  
2 when they move to a different county or state.

3 JUSTICE KENNEDY: Under -- under your  
4 interpretation, could -- under your  
5 interpretation, could Ohio send address  
6 verification notices to the entire electorate  
7 and -- and then do what it's doing?

8 MR. SMITH: The confirmation -- the  
9 forwardable ones that they do under the  
10 confirmation process, if they did that to the  
11 entire electorate, it would not violate  
12 8(b)(2), but it would most assuredly violate  
13 8(a) because --

14 JUSTICE KENNEDY: Right. So the fact  
15 that they use a general mail -- mail to  
16 everybody wouldn't affect the outcome in your  
17 view?

18 MR. SMITH: No, it wouldn't, Your  
19 Honor, because what happens is if 70 percent of  
20 the people don't return them -- that's what the  
21 statistics show about the notices in 2011:  
22 10 percent were returned as undeliverable,  
23 20 percent were returned, and 1.2 million  
24 people just threw them in the circular file.

25 JUSTICE BREYER: What about sending a



1 card? Look, the reason I'm asking these  
2 questions is because I don't believe Congress  
3 would have passed a statute that would prevent  
4 a state from purging a voting roll of people  
5 who have died or have moved out of the state.

6 So I'm trying to reconcile the two.  
7 And, therefore, I ask you what the state's  
8 supposed to do for that latter objective. And  
9 suppose they send a card which says no  
10 forwarding. Don't forward. And their theory  
11 of that is that if the person has moved, and  
12 they wait long enough, and they send it a  
13 couple of times, the post office will send it  
14 back and then they'll know the person has  
15 moved.

16 MR. SMITH: Your Honor, that is the  
17 precise system that 14 or so states use to  
18 identify people who have moved, and the key  
19 feature of it is that it's not forwardable  
20 because then it comes back if they have moved.

21 JUSTICE BREYER: Yes, that's right.  
22 And you think that's okay?

23 MR. SMITH: The Justice Department for  
24 20 years said that was okay.

25 JUSTICE BREYER: I'm asking you if you

1 think that's --

2 MR. SMITH: I think it's okay too.

3 JUSTICE BREYER: Okay. Now --

4 MR. SMITH: But you then have to go  
5 into the confirmation process.

6 JUSTICE BREYER: All right. Fine,  
7 fine. Okay. I got my answer.

8 MR. SMITH: Yes.

9 JUSTICE BREYER: Can I add one thing  
10 to it?

11 I -- I'd like to add that because they  
12 don't want to send non-forwardable cards to  
13 everyone since it's expensive -- in a state  
14 like California, it might cost several -- tens  
15 of millions of dollars -- what they do is they  
16 send those non-forwardable cards to people who  
17 haven't voted for three or four years. Okay?  
18 Now is it okay?

19 MR. SMITH: If they only proceed to  
20 purge people when it comes back and says no  
21 longer at this dress -- address, undeliverable,  
22 I think it's fine, Your Honor, because it's not  
23 based on non-voting at that point. It's based  
24 on concrete, reliable evidence --

25 CHIEF JUSTICE ROBERTS: So -- so the

1 triggering event can be the failure to vote? I  
2 would have thought that's inconsistent with the  
3 rest of your argument, which says what's wrong  
4 with this case is that they used failure to  
5 vote to trigger the sending of the notice.

6 MR. SMITH: Well, Your Honor, I -- I  
7 think that -- that you could differ --  
8 reasonable people could differ about this,  
9 whether that is -- that is illegal, but I -- I  
10 think when you have an intervening cause that  
11 very clearly says this person has moved, just  
12 as when they return the confirmation notice and  
13 they say they've moved, then it's okay even if  
14 they -- the reason they got the notice was  
15 non-voting. You have then some concrete  
16 information that says this person has moved.

17 CHIEF JUSTICE ROBERTS: But -- but, I  
18 mean, then I would -- the response is really  
19 the -- the substance of your argument, which is  
20 it's still triggered by the failure to vote,  
21 and the law says you cannot use failure to vote  
22 in -- in one of these processes.

23 MR. SMITH: Well, Your Honor, I think  
24 that -- what the law says is failure to vote  
25 can't be the reason you're purging them. And

1 when you -- when -- when the only evidence you  
2 have at all that they have moved is not voting,  
3 then that's clearly the reason that you are  
4 purging them. And that's what the Supplemental  
5 Process does. For the people that don't return  
6 the card --

7 JUSTICE KENNEDY: The reason they're  
8 purging them is they want to protect the voter  
9 rolls from people that have not -- that -- that  
10 have moved and they're voting in the wrong  
11 district. That's the reason. What we're  
12 talking about are the -- the best tools to --  
13 to implement that reason, to implement that  
14 purpose.

15 MR. SMITH: And Congress thought the  
16 worst thing you could do to try to find people  
17 who have moved is just look at who isn't voting  
18 because there were two problems with it.  
19 Congress knew there were vast numbers of people  
20 who simply choose not to vote and that that was  
21 therefore a terribly inaccurate way to identify  
22 people who have moved, and it also said very  
23 specifically people -- it's unfortunate that  
24 people don't vote, but they have a right not to  
25 vote. This is the Senate report. Many states

1 -- "the Committee recognizes that while voting  
2 is a right, people have an equal right not to  
3 vote."

4 CHIEF JUSTICE ROBERTS: Is that -- is  
5 that true? I mean, you think there is a  
6 constitutional right not to vote?

7 MR. SMITH: This is a statutory right  
8 here, Your Honor, but I actually do think it's  
9 the -- the --

10 CHIEF JUSTICE ROBERTS: I understand  
11 it's a statutory. But there are many  
12 democracies that require you to vote, right?  
13 Australia, it's -- you get a fine if you don't  
14 vote. And other places. And I have certainly  
15 seen it proposed that it would be a good idea,  
16 given the low voter turnouts in our country,  
17 that we adopt something like that as well.  
18 Now, you think that would be unconstitutional?

19 MR. SMITH: Well, I think there's a  
20 pretty persuasive argument to that effect in  
21 the National Libertarian brief that was filed  
22 in this case, filed by Wilmer. I think,  
23 basically, they said it's a First Amendment  
24 act. And, just as you have a right to vote  
25 protected by the First Amendment, a right not

1 to vote because you don't want to vote for any  
2 of those candidates would be protected as well,  
3 I would think. In any event, it --

4 JUSTICE GINSBURG: Mr. Smith, in -- in  
5 your view, you know, we have what's been called  
6 the safe harbor; that is, you use the post  
7 office notice of change of address. What else  
8 could be the trigger?

9 MR. SMITH: There's the -- the non- --  
10 the non-forwardable mail, the national change  
11 of address. There are the -- the DMV records,  
12 which come into play. They operate  
13 continuously. People -- people are  
14 reregistered on -- that's required by Section 5  
15 of the NVRA. And Ohio does that before it even  
16 gets to the NCOA process. There are statewide  
17 -- there are interstate databases. The ERIC  
18 system is the sort of state-of-the-art  
19 interstate database that lists everybody who  
20 goes somewhere else and registers or gets a  
21 driver's license in some other state. All of  
22 that stuff is available to the State of Ohio.

23 And I think it's important as well to  
24 understand the small number of people that they  
25 say they're looking for with this Supplemental

1 Process.

2 JUSTICE ALITO: I mean, this is a  
3 very -- it's a very important subject. It's a  
4 sensitive subject. There are -- as a policy  
5 matter, there are strong arguments on both  
6 sides.

7 Congress had struck a compromise.  
8 What we have before us is a question of  
9 statutory interpretation, not a question of  
10 what we think would be the ideal system for  
11 achieving the result of removing people who  
12 have moved from the voter lists.

13 And you haven't said very much about  
14 the language of the statute.

15 MR. SMITH: Yes, Your Honor.

16 JUSTICE ALITO: How do you get -- if  
17 "by reason of a person's failure to vote" is  
18 not but-for cause, how do you get around the  
19 language of (b) (2)?

20 MR. SMITH: Well, Your Honor, the --  
21 the language of (b) (2), I think, strongly  
22 supports our position because what it says is  
23 you can't have a system that uses non-voting as  
24 the reason for purging somebody, except you can  
25 use (c) and (d), which is to say you can use

1 the confirmation process. And so non-voting  
2 can come into play at the end of the process,  
3 not at the beginning of the process.

4 JUSTICE ALITO: But that actually  
5 isn't what (b) (2) says. It does not say you  
6 can't use failure to vote as a reason for  
7 removing someone, except that you can do what  
8 is set out in --- in (c) and (d).

9 What it says is that the principle  
10 that you can't use failure to vote as a reason  
11 for removing someone may not be construed to  
12 prohibit. So the -- it -- it tells you how to  
13 interpret the first part of (b) (2). It is not  
14 an exception to the first part of (b) (2).

15 MR. SMITH: Right, but it is -- it is  
16 an explanation that the one kind of  
17 consideration of non-voting that -- that it --  
18 that it should not be construed to prohibit is  
19 the part that comes in at the end of the  
20 process. And then they went on to emphasize  
21 that -- the sequence. They say (a), they have  
22 not responded to the notice and, then, they  
23 have not voted for two -- two consecutive  
24 elections. That is very clearly what Congress  
25 was trying to preserve and to eliminate the



1 tension, perceived tension, between (b) and (d)  
2 in the old version.

3 JUSTICE ALITO: It says -- it says  
4 that -- that it's all right if you followed  
5 either (c) or (d).

6 MR. SMITH: (c) and (d), Your Honor,  
7 with respect.

8 JUSTICE ALITO: Well, it says -- you  
9 think you have to follow (c) and (d)?

10 MR. SMITH: Well, I think you need to  
11 follow --

12 JUSTICE ALITO: That's not what it  
13 says.

14 MR. SMITH: You need to follow  
15 something like (c) because clearly Congress  
16 anticipated that there would be something that  
17 would tell you that they have moved before you  
18 go into the confirmation process, because the  
19 confirmation process consists, if they don't  
20 get the notice back, of no evidence at all  
21 about whether they've moved from the notice.  
22 And four more years of non-voting, precisely  
23 the thing Congress said should not be the  
24 reason that you purge somebody.

25 So the whole system only makes sense

1 if you assume there's something like the NCOA  
2 process or some other indication that they have  
3 moved before you put them into the process, and  
4 if you don't have that, you're going to vastly  
5 over-purge people. That's precisely what Ohio  
6 does because so many people don't vote for two  
7 years and they get put into this process where  
8 70 percent of them don't send back the notice  
9 and in four -- four more years of non-voting,  
10 you're going to end up with --

11 JUSTICE ALITO: You just told me that  
12 it doesn't matter how many years is required by  
13 the trigger. It could be 10. It could be 20.

14 MR. SMITH: Yes, Your Honor, because  
15 that's what the statute says. And that's --  
16 that --

17 JUSTICE ALITO: Well, where does the  
18 -- where does the statute say that?

19 MR. SMITH: The statute -- well, it  
20 says two things: It says A, don't purge people  
21 unless you have good reason to think they've  
22 moved. That's (a).

23 JUSTICE ALITO: And --

24 MR. SMITH: And in (b), don't purge --

25 JUSTICE ALITO: -- and not voting for

1 20 years isn't good reason to think that  
2 they've moved?

3 MR. SMITH: Well, it -- it -- they --  
4 they might be. I don't believe so. I mean,  
5 lots of people probably stay registered much  
6 longer than 20 years and don't move for 20  
7 years. It's not an unusual thing in -- in our  
8 country, I would believe.

9 In any event, the -- the -- the  
10 statute that we're dealing with here says that  
11 the reason you're purging them cannot be their  
12 non-voting. And when they get to the end of  
13 the Supplemental Process, that is the only  
14 evidence they have that anybody has moved.

15 Weak as it is, it's six years of  
16 non-voting, and -- and a notice that doesn't  
17 get returned, which tells them nothing. And so  
18 the --

19 CHIEF JUSTICE ROBERTS: Well, it  
20 doesn't --

21 MR. SMITH: -- entire process is --

22 CHIEF JUSTICE ROBERTS: -- it doesn't  
23 tell them nothing. It tells them that they did  
24 not respond to a notice that says you're going  
25 to lose the registration if you don't vote

1 through the two years, two elections. So it  
2 tells them something.

3 They have more evidence than just that  
4 they haven't voted. And you've indicated that  
5 under some circumstances, the method of the  
6 notification as we have in the states that you  
7 reference on pages 14 to 15, that that is okay,  
8 even though it's triggered solely by the  
9 failure to vote.

10 So I -- I don't think you can maintain  
11 in a principled way the acceptance of the  
12 validity of those states' positions and -- and  
13 your argument against the position here. Now,  
14 you may say: Well, it makes a difference  
15 because of the -- the -- the -- the quality of  
16 the information you get from one notice or  
17 another, but you can't just attack this on the  
18 basis that it's triggered by the failure to  
19 vote.

20 You have to say failure to vote, plus  
21 a method of notification that you think is not  
22 sufficient, because you do think in other cases  
23 failure to vote plus a different method of  
24 notification would be okay.

25 MR. SMITH: But --

1           JUSTICE ALITO:  So maybe your position  
2 still is the same, but it can't just base on  
3 the fact of failure to vote being the trigger.

4           MR. SMITH:  We're talking about the  
5 people who don't return the notice.  And I  
6 think it's clear that nobody would claim, and  
7 Ohio doesn't claim, that when they don't get  
8 anything back from the person, that that tells  
9 them anything about whether they're still  
10 living in the same place where they sent the  
11 notice or whether they moved to some other  
12 place.

13           They're forwardable.  They have no  
14 idea which trash can it was thrown in, at the  
15 original address or some other address.  It  
16 simply doesn't give them any information.

17           Now the alternative --

18           CHIEF JUSTICE ROBERTS:  Well, but they  
19 say they get more information.  It's not just  
20 that it's not -- you know, that it's not  
21 returned, but that they've gotten the notice  
22 and they haven't voted in the subsequent  
23 elections.

24           MR. SMITH:  Right, right.  So the --  
25 the -- in the end of the day, they have six

1 years of non-voting that tells them -- they say  
2 that's some evidence that they've moved. It is  
3 some evidence. It's pretty weak evidence, but  
4 it's some evidence. But it -- the statute says  
5 you need a lot better evidence than that. And  
6 the one thing we don't want you to do is use  
7 non-voting because people have a right not to  
8 vote. And we don't want them punished for it.

9 CHIEF JUSTICE ROBERTS: Well, maybe  
10 I'm just repeating myself, but --

11 MR. SMITH: Maybe I am too, Your  
12 Honor.

13 CHIEF JUSTICE ROBERTS: -- you don't  
14 just have the failure -- maybe we're both just  
15 repeating.

16 We -- we don't -- you don't just have  
17 the failure to vote. You have the failure to  
18 vote, plus the notification that you need to do  
19 something because you haven't voted.

20 Now, in some situations, you think the  
21 notification is sufficient, so you would say in  
22 those, it's not just the failure to vote. But  
23 in this case, you say the notification is not  
24 sufficient, so it is just the failure to vote.

25 MR. SMITH: It's a fundamental

1 difference between when you get back something  
2 the post office -- from the post office that is  
3 undeliverable, no longer at this address, and  
4 when you get nothing back.

5 CHIEF JUSTICE ROBERTS: Yeah, I  
6 understand that, but the point is that your  
7 argument then really turns on the adequacy of  
8 the notice and not simply the fact that the  
9 notice is triggered by a failure to vote.

10 MR. SMITH: Well, I think, Your Honor,  
11 the -- the notice that's in the statute, the  
12 forwardable notice that Congress specifies has  
13 to be forwardable, was not designed to be a  
14 test of whether people have moved.

15 It was designed to be a safeguard, a  
16 notice process telling people their rights were  
17 at risk, and they either have to return it or  
18 they need to vote sometime pretty soon or  
19 they're going to lose their registration  
20 status.

21 To turn it into the test, the state  
22 says we can give this to everybody and -- and  
23 then purge people when they don't return the  
24 notice on the assumption that that means they  
25 haven't voted -- haven't -- they've moved, if

1 they don't return the notice and they -- they  
2 don't vote for four years, it's -- the thing  
3 about that kind of notice is when it -- when  
4 70 percent of the people don't return it, which  
5 is what happened in 2011 in Ohio, the ones who  
6 don't return it, you have no more idea whether  
7 they've moved or not moved, it's no more likely  
8 --

9 JUSTICE BREYER: Is there any stat on  
10 that? I mean, this does seem at the moment to  
11 boil down to an empirical question.

12 You think that sending a notice, which  
13 is forwardable, is not going to tell you not  
14 much when it comes back because so many people  
15 just don't return notices.

16 MR. SMITH: It's not going to tell you  
17 much when it doesn't come back.

18 JUSTICE BREYER: Yeah, when it doesn't  
19 --

20 MR. SMITH: That's the problem.

21 JUSTICE BREYER: Exactly. Sorry, I  
22 misspoke. You think that returning a notice  
23 that's forwardable, when it doesn't come back  
24 tells you virtually nothing because people just  
25 throw things in the wastebasket or --



1 MR. SMITH: Well, it doesn't tell you

2 --

3 JUSTICE BREYER: -- or it tells you  
4 next to nothing.

5 MR. SMITH: It doesn't tell you  
6 whether they -- it's been forwarded to the new  
7 address or whether they're --

8 JUSTICE BREYER: You don't know where  
9 -- you don't know if they just got it at the  
10 old address or they had to forward it. You  
11 don't know.

12 But if it wasn't forwardable, you get  
13 it from the post office, that tells you quite a  
14 lot.

15 MR. SMITH: Yes, Your Honor.

16 JUSTICE BREYER: Okay. Got it. Got  
17 it.

18 MR. SMITH: Good, good.

19 JUSTICE BREYER: Now, that's what  
20 you've just said.

21 And if you're right on the first, then  
22 we have nothing left here or next to nothing  
23 left but the not voting. That's your point.

24 MR. SMITH: Right.

25 JUSTICE BREYER: His point is we have

1 something else. We do have the fact that that  
2 notice didn't come back, and that means more  
3 than you think it means. Okay? That's their  
4 point, I think.

5 MR. SMITH: They -- they don't  
6 actually claim --

7 JUSTICE BREYER: Now, if that's so,  
8 all I'm asking is, is there any place in this  
9 record that I can look for some numbers or  
10 surveys or something hard that will either  
11 support you or will support them?

12 MR. SMITH: Your Honor, there is no  
13 evidence about whether or not people who failed  
14 to return the notice have moved, because they  
15 have never claimed it was evidence that they  
16 have moved. Their only claim in this case is  
17 that we're -- we're -- we're targeting these  
18 people because --

19 JUSTICE BREYER: But there might be  
20 surveys about how many people throw everything  
21 in the wastebasket. I confess to doing that  
22 sometimes. And -- and --

23 MR. SMITH: Most people do.

24 JUSTICE BREYER: I know that's what  
25 your opinion is. And all I'm asking is, is

1     there any hard evidence of that one way or the  
2     other?

3             MR. SMITH:  The evidence we have in  
4     the record is that most people throw it in the  
5     wastebasket, 70 percent.  Excuse me?

6             JUSTICE BREYER:  Page?

7             MR. SMITH:  That's Exhibit I to their  
8     brief in the trial court.  Their -- their  
9     report to the Election Assistance Commission on  
10    their 2011 -- 1.5 million confirmation notices,  
11    1.2 million were simply ignored, 10 percent  
12    were returned undeliverable, 20 percent were --  
13    were returned.

14            That's the data on this.  Now I think  
15    the other important --

16            JUSTICE SOTOMAYOR:  Mr. Smith, there  
17    is one thing about -- and I maybe should have  
18    asked this of -- of Ohio -- of the state.  But,  
19    once you don't return the notice, you get put  
20    on the inactive list, correct?

21            MR. SMITH:  Right.

22            JUSTICE SOTOMAYOR:  That means that  
23    you no longer -- does it mean you no longer get  
24    mailings about elections?

25            MR. SMITH:  Yes, Your Honor.  It means

1 you can still vote, but you can't -- you're not  
2 notified of where your polling place is and you  
3 don't get the --

4 JUSTICE SOTOMAYOR: You're not sent  
5 any more reminders about --

6 MR. SMITH: That's my understanding.  
7 I -- I may --

8 JUSTICE SOTOMAYOR: It's one notice in  
9 four -- six years.

10 MR. SMITH: You disappear for purposes  
11 of mailing.

12 JUSTICE SOTOMAYOR: And -- and -- and  
13 you disappear from any further mailings.

14 MR. SMITH: That's my understanding.  
15 I couldn't necessarily swear to it, Your Honor,  
16 but it's my understanding, that that's the --

17 JUSTICE SOTOMAYOR: I'm sure Mr.  
18 Murphy will --

19 MR. SMITH: -- the consequence of the  
20 inactive status.

21 JUSTICE SOTOMAYOR: -- correct it if  
22 it's wrong.

23 MR. SMITH: Yes. Now, let -- let me  
24 talk, if I could, about this concept of  
25 proximate cause that's -- that's been brought

1 up here. I think it's -- it's a misplaced  
2 concept here because the term that the Congress  
3 used multiple times was "reason."

4 And I think the reason has to be  
5 something that is causally linked to the  
6 underlying reason, which is that they think  
7 you've moved to a different county or state.  
8 And the only evidence they have at the end of  
9 the Supplemental Process of that is the  
10 non-voting.

11 They don't even claim that the  
12 people -- the 70 percent of people who don't  
13 return the notice, that that's evidence of  
14 anything. It is a hoop they have to go  
15 through. It is a -- it is a safeguard, it is a  
16 requirement that Congress imposed, but it's not  
17 the reason that anybody is being purged in  
18 terms of the underlying issue of whether  
19 they've -- they've moved.

20 But even if you want to do this  
21 proximate cause concept, as Justice Kagan  
22 pointed out, there are three things that have  
23 to happen: Two years of non-voting, the  
24 failure to return the notice, and four more  
25 years of non-voting.

1           And calling the non-return of the  
2 notice the proximate cause is like saying when  
3 you strike out, the only proximate cause is  
4 strike two. It just doesn't -- it doesn't  
5 really make sense.

6           JUSTICE ALITO: So what is your  
7 standard of causation? It's not -- it's not  
8 solely, it's not proximate cause. The only  
9 thing I can think of that's left is but-for.

10          MR. SMITH: I think that the -- the  
11 analysis ought to use the -- be based on the  
12 term "reason," not "cause," Your Honor. It's  
13 not a -- this is not a tort law.

14          JUSTICE ALITO: What's the difference  
15 --

16          JUSTICE KAGAN: I don't understand why  
17 it's just -- it's proximate cause, but both --  
18 strike one, strike two, strike three. They're  
19 all proximate causes of the strikeout.

20          MR. SMITH: Well, I agree with that,  
21 Your Honor, as well. I just think that that's  
22 not -- that's not the right way to think about  
23 it here.

24                 The reason that they're being  
25 identified as having moved is because they're

1 not voting. That's the point.

2 JUSTICE ALITO: Well, in HAVA,  
3 Congress used the term "solely." Could you say  
4 something about -- about that provision of --  
5 of HAVA? That says that states shall include  
6 provisions. It's mandatory.

7 To have a system of file maintenance  
8 that makes a reasonable effort to remove  
9 ineligible voters, and goes on to say, "under  
10 this system, registrants who have not responded  
11 to a notice and who have not voted in two  
12 consecutive general elections for federal  
13 office shall be removed from the official list  
14 of eligible voters."

15 By itself, that seems pretty clear.  
16 How do you get around that?

17 MR. SMITH: Well, Your Honor, I think  
18 the except clause is a reference to the same  
19 principle that's set forth in -- in (b)(2) --  
20 (b)(2), which is to say the reason that you're  
21 getting put into the -- into the purge can't be  
22 simply not voting.

23 JUSTICE ALITO: Except -- but it -- it  
24 goes on to say: Except that no registrant may  
25 be removed solely by reason of failure to vote.

1 MR. SMITH: Right.

2 JUSTICE ALITO: Now, under Ohio's  
3 system, is someone removed solely because of  
4 failure to vote?

5 MR. SMITH: Yes, Your Honor.  
6 Absolutely.

7 JUSTICE ALITO: So the notices --  
8 there's no requirement -- if somebody doesn't  
9 vote forever but returns that notice, the  
10 person would be removed from the list?

11 MR. SMITH: We're talking about people  
12 who don't return the notice. The case is only  
13 about people who don't return the notice.

14 JUSTICE SOTOMAYOR: Now wait.

15 JUSTICE ALITO: I understand that, but  
16 I don't see how that -- how that's solely.

17 MR. SMITH: Well, because the only  
18 evidence that they have that you have moved,  
19 which is the permissible category, is your  
20 non-voting. And so Congress, when it -- when  
21 it -- when it wrote that would have thought  
22 that the -- the Supplemental Process removes  
23 people solely for non-voting. It didn't think  
24 of the confirmation process as a reason to  
25 remove people.



1           And it certainly didn't think  
2 non-return of the notice was a reason to remove  
3 people. It was looking at --

4           JUSTICE ALITO: If somebody returns  
5 the notice, they never vote, but they return  
6 the notice, are they removed from the list?

7           MR. SMITH: The notice, when they  
8 return the notice, the question is, what do  
9 they say? Do they say I'm still living on Main  
10 Street like I always have? Then they -- they  
11 stay on the list. If they say I have moved to  
12 Oklahoma, then they get purged.

13           But in either event, the state then  
14 has direct information about where they live  
15 and can take whatever action it should.

16           The -- the problem we have here is  
17 that this kind of notice, which, by the way,  
18 says you don't have to return it, you can just  
19 choose to vote sometime in the next four years,  
20 most of the time isn't going to get returned.  
21 And so it doesn't provide you any evidence at  
22 all on which to decide that these people should  
23 be purged. And you end up with a system which  
24 looks an awful lot like the old Ohio use-it-or-  
25 lose-it system, which is some period of

1 non-voting, one notice that most people don't  
2 return, and we're going to -- we're going to  
3 throw you off the rolls.

4 Now, the other thing -- the other fact  
5 that's in the record is the small number of  
6 people that were -- that the Supplemental  
7 Process supposedly is trying to find. We have  
8 in the record evidence about how many people  
9 moved to a different county or state in each  
10 year. This is evidence the State put in the  
11 record, Exhibit E to their main brief in the  
12 district court. And it shows that about  
13 3 percent of people in this country move to a  
14 different county or state outside of the  
15 registrar's jurisdiction, to use the term --  
16 terminology in the -- in the statute.  
17 Three percent a year.

18 That's a small number by itself. But  
19 then the Supplemental Process only is triggered  
20 to try to find that -- some sliver of those  
21 people who have not already been identified  
22 because they changed their address with the  
23 Bureau of Motor Vehicles or because they posted  
24 a forwarding address with the Post Office.

25 And so what --

1 JUSTICE SOTOMAYOR: Mr. Smith, could  
2 you give me concrete numbers? How many voters  
3 have been purged as a result of this system?

4 MR. SMITH: Well, Your Honor, I can't  
5 give you exact numbers, but I -- I would refer  
6 you to the biennial Election Assistance  
7 Commission reports that -- that look in detail  
8 at all the states' processes with respect to  
9 registration and perjury -- purge. I -- I -- I  
10 do know that -- two things I can tell you, Your  
11 Honor.

12 It's certainly in the hundreds of  
13 thousands in -- in many years. It was  
14 something like several hundred thousand in  
15 2015, according to the more recent report  
16 that's not in the record.

17 And I can also tell you that the  
18 evidence shows --

19 JUSTICE SOTOMAYOR: But you gave me  
20 3 percent of people nationally move.

21 MR. SMITH: Move to a different county  
22 or state.

23 JUSTICE SOTOMAYOR: I -- I guess what  
24 I'm trying to get to is about how many people  
25 in Michigan actually move?

1           MR. SMITH: Well, the -- the -- the  
2 Ohio, the statistics that were put in were  
3 national. But those --

4           JUSTICE SOTOMAYOR: I'm sorry, I  
5 misspoke. In Ohio.

6           MR. SMITH: Ohio apparently thinks  
7 it's pretty -- the -- the -- the national  
8 statistics represent Ohio because that's the  
9 statistics they put in. I don't think the  
10 Census does these mobility statistics by state,  
11 or at least that's not in the record.

12           But 3 percent is roughly the right  
13 amount. But then you'd have to reduce that --

14           JUSTICE SOTOMAYOR: I don't know.  
15 Three percent of what?

16           MR. SMITH: People move in each year.

17           JUSTICE SOTOMAYOR: I -- I understand  
18 that. But what's the -- 3 percent of what  
19 greater number?

20           MR. SMITH: Of all people in the  
21 country.

22           JUSTICE SOTOMAYOR: Of all people in  
23 the country.

24           MR. SMITH: Yes.

25           JUSTICE SOTOMAYOR: So we have to

1 divide it up and do that math.

2 MR. SMITH: Well, it is -- it is -- in  
3 other words, only -- 97 percent of people do  
4 not move to another county or state in any  
5 given year. That's -- that's what the  
6 statistic is.

7 And then, you know, most of those  
8 3 percent are going to be located presumably in  
9 some -- in one of the other ways.

10 So we're talking about a relatively  
11 tiny group of people which they then -- the  
12 process that they then use begins with 50 or  
13 60 percent of people who don't vote for two  
14 years. Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: You can have a  
16 couple of minutes as well.

17 MR. SMITH: And so, you know, the  
18 process is vastly overbroad in its design to  
19 try to find this relatively small group of  
20 people, starting with 50 or 60 percent in an --  
21 in an -- in an off-year election don't vote;  
22 70 percent don't return the notice. You're  
23 just going to end up with a lot of false  
24 positives in the end, and that is, in fact, how  
25 the system is -- is operating.

1           It -- it finds a lot of people that  
2           supposedly have moved who simply haven't moved.  
3           I think I'll leave it at that, Your Honor.

4           CHIEF JUSTICE ROBERTS: Okay. Thank  
5           you, counsel.

6           Two minutes, Mr. Murphy.

7           REBUTTAL ARGUMENT ON BEHALF OF GEN.

8           ERIC E. MURPHY ON BEHALF OF THE PETITIONERS

9           GENERAL MURPHY: Thank you, Mr. Chief  
10          Justice:

11          The first question I'd like to answer  
12          is about the statistics of the number of people  
13          who move without notifying the Post Office.  
14          That is in the record. There's an Inspector  
15          General report that suggests that 40 percent of  
16          individuals don't notify the Post Office.  
17          That's Doc 38-6, page ID number 39-5 in the  
18          district court's docket.

19          I think this is significant because it  
20          shows why the Postal Service provision is a  
21          safe harbor for meeting the state's obligation  
22          to remove individuals, because it's going to be  
23          woefully insufficient for that task. States  
24          are going to have to do other efforts if they  
25          actually want to maintain adequate rolls rather

1 than just worry about the threat of getting  
2 sued on the other side of the compromise that  
3 is -- that is at issue here.

4           And I think this goes to that this in  
5 the end was a -- a -- a statute that was  
6 balancing competing purposes: On the one hand  
7 trying to remove ineligible voters, on the  
8 other hand trying to ensure protections for  
9 eligible voters.

10           And it came up with a compromise. And  
11 that compromise left a lot of room for states  
12 in our federal system to adopt the procedures  
13 that are best in that state.

14           And with respect to sending  
15 information, I would say that my friend on the  
16 other side mentioned the ERIC program. Ahead  
17 of the 2016 election, Ohio sent something like  
18 1.6 million letters to potentially eligible yet  
19 unregistered voters, many of those if they were  
20 removed under our process could have received  
21 this notice from ERIC ahead of the registration  
22 deadline encouraging them to register. I'd  
23 also note that --

24           JUSTICE SOTOMAYOR: I'm sorry, they  
25 don't get -- people don't get notice that they

1 have been struck. They get one notice, they're  
2 put on the inactive list. Was I correct about  
3 that?

4 GENERAL MURPHY: Under the NVRA,  
5 you're only -- the minimum requirement is --

6 JUSTICE SOTOMAYOR: I'm not asking --

7 GENERAL MURPHY: Yeah.

8 JUSTICE SOTOMAYOR: Under Ohio's law,  
9 do they get only one notice?

10 GENERAL MURPHY: Only one notice, but  
11 --

12 JUSTICE SOTOMAYOR: They don't get a  
13 notice when they're purged. So they don't know  
14 they've been purged. They have to go to the  
15 polls to find that out.

16 GENERAL MURPHY: That's why I was  
17 mentioning the ERIC program --

18 JUSTICE SOTOMAYOR: Well, that --  
19 that's --

20 GENERAL MURPHY: -- because we just  
21 sent 1.6 million letters to all potentially  
22 eligible voters who -- who were not registered.

23 JUSTICE SOTOMAYOR: Would you answer  
24 my question? Are they ever sent, anyone who's  
25 sent a notice and put on the inactive list, are



1 they ever again sent any voting information  
2 outside of this ERIC program?

3 GENERAL MURPHY: So Matt Damschroder's  
4 declaration at Doc 38-2 suggested that the  
5 state ahead of the 2016 election sent absentee  
6 ballot applications, so you could vote because  
7 we have no excuse voting. That would have gone  
8 to many of these individuals. Not everybody.  
9 It would have gone to any of the individuals  
10 who had been sent this notice and had voted in  
11 the previous election, 2012.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel. The case is submitted.

14 (Whereupon, at 11:10 a.m., the case  
15 was submitted.)

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## Official - Subject to Final Review

<b>1</b>	<p><b>8(d)(1)(A)</b> <sup>[1]</sup> 37:18</p> <p><b>8(d)(1)(B)</b> <sup>[2]</sup> 37:14,21</p> <hr/> <p style="text-align: center;"><b>9</b></p> <hr/> <p><b>97</b> <sup>[1]</sup> 76:3</p> <hr/> <p style="text-align: center;"><b>A</b></p> <hr/> <p><b>A)(4)</b> <sup>[1]</sup> 9:16</p> <p><b>a.m.</b> <sup>[3]</sup> 1:15 3:2 80:14</p> <p><b>above-entitled</b> <sup>[1]</sup> 1:13</p> <p><b>absentee</b> <sup>[1]</sup> 80:5</p> <p><b>absolute</b> <sup>[1]</sup> 30:11</p> <p><b>absolutely</b> <sup>[5]</sup> 13:4 22:23 37:2 41:14 71:6</p> <p><b>accept</b> <sup>[1]</sup> 29:2</p> <p><b>acceptable</b> <sup>[1]</sup> 4:21</p> <p><b>acceptance</b> <sup>[1]</sup> 59:11</p> <p><b>accomplish</b> <sup>[1]</sup> 17:23</p> <p><b>accordance</b> <sup>[1]</sup> 21:1</p> <p><b>according</b> <sup>[1]</sup> 74:15</p> <p><b>account</b> <sup>[2]</sup> 12:19 26:10</p> <p><b>achieving</b> <sup>[1]</sup> 54:11</p> <p><b>acknowledge</b> <sup>[1]</sup> 32:19</p> <p><b>across</b> <sup>[1]</sup> 18:19</p> 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