

# 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. )		

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Pages: 1 through 80  
Place: Washington, D.C.  
Date: January 10, 2018

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A. PHILIP RANDOLPH INSTITUTE, )  
ET AL., )  
Respondents. )

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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:  
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 PROCEEDINGS

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

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 way  
20 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 --

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 the Help America  
3 Vote Act, in fact, clarified something that was  
4 ambiguous, but you're taking a very different  
5 position. You're saying even before that Act,  
6 it was clear you could do it this way.

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

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

14 GENERAL FRANCISCO: Sure.

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

24 GENERAL FRANCISCO: Well, Your Honor,  
25 I believe that after Congress passed the

1 clarification amendment, it clarified what was  
2 at the time an ongoing debate between the  
3 Department of Justice and the states.

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

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

11 GENERAL FRANCISCO: Well -- yeah.

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

15 GENERAL FRANCISCO: And, Your Honor --

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

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

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

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

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

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



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

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

23           GENERAL FRANCISCO: Your Honor --

24           JUSTICE KAGAN: Because, of course,  
25 all those programs have to use the confirmation

1 procedures and your position is that if you use  
2 the confirmation procedures, that's --  
3 basically, that's an out for everything?

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

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

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

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

24 JUSTICE KAGAN: Right. But I guess  
25 what I'm asking, General, is sort of two

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

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

11 GENERAL FRANCISCO: Sure.

12 JUSTICE KAGAN: -- voting programs.

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

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

22 So they wanted to take it completely  
23 off the board. And (b) (2) is the only  
24 provision in this statute that takes it  
25 completely off the board and says nobody can

1 ever be removed merely for their failure to  
2 vote.

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

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

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

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

23 JUSTICE KAGAN: Okay. So the second  
24 question is what is left of the failure-to-vote  
25 clause, practically speaking?

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

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

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

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

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

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

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

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

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

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

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 General.

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

3                   CHIEF JUSTICE ROBERTS: Mr. Smith.

4                   ORAL ARGUMENT OF PAUL M. SMITH

5                   ON BEHALF OF THE RESPONDENTS

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

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

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

24                   It simply doesn't provide adequate  
25 evidence to come to the conclusion that the

1 person has moved at all.

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

6 MR. SMITH: Yes, Your Honor.

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

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

21 And the reality is that the -- the  
22 failure to vote for two years tells you almost  
23 nothing about whether or not anybody has moved.  
24 Fifty or 60 percent of the voters in Ohio  
25 routinely don't vote over a two-year period.



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

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

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

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

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

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

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

23                   JUSTICE ALITO: But if not getting the  
24 notice back tells you nothing, why did Congress  
25 make that part of the determination?

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

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

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

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

23           JUSTICE BREYER: What are -- what are  
24 they supposed to do? That is, every year a  
25 certain number of people die and every year a

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

5 What should the state do?

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

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

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

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

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

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

25 JUSTICE BREYER: What?

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

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, what  
25 about people -- Justice Breyer's question also

1 included people who moved. What about them?

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

12 CHIEF JUSTICE ROBERTS: What about  
13 Justice --

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

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

1 and those people get taken care of long before  
2 the Supplemental Process.

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

7 MR. SMITH: Show what, Your Honor?

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

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

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

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

1 when they move to a different county or state.

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

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

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

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

24 JUSTICE BREYER: What about sending a  
25 card? Look, the reason I'm asking these



1 questions is because I don't believe Congress  
2 would have passed a statute that would prevent  
3 a state from purging a voting roll of people  
4 who have died or have moved out of the state.

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

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

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

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

24 JUSTICE BREYER: I'm asking you if you  
25 think that's --

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

2 JUSTICE BREYER: Okay. Now --

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

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

7 MR. SMITH: Yes.

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

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

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

24 CHIEF JUSTICE ROBERTS: So -- so the  
25 triggering event can be the failure to vote? I

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

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

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

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

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

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

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

1 is a right, people have an equal right not to  
2 vote."

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

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

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

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

1 of those candidates would be protected as well,  
2 I would think. In any event, it --

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

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

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

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

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

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

14           MR. SMITH: Yes, Your Honor.

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

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

1       come into play at the end of the process, not  
2       at the beginning of the process.

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

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

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



1 in the old version.

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

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

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

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

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

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

24 So the whole system only makes sense  
25 if you assume there's something like the NCOA

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

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

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

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

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

22 JUSTICE ALITO: And --

23 MR. SMITH: And in (b) --

24 JUSTICE ALITO: -- and not voting for  
25 20 years isn't good reason to think that

1 they've moved?

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

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

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

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

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

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

1 tells them something.

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

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

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

23           MR. SMITH: But --

24           JUSTICE ALITO: And maybe your  
25 position still is the same, but it can't just

1 based on the fact of failure to vote being the  
2 trigger.

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

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

16 Now the alternative --

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

22 MR. SMITH: Right, right. So in end  
23 of the day they have six years of non-voting  
24 that tells them -- they say that's some  
25 evidence that they've moved. It is some

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

7 CHIEF JUSTICE ROBERTS: Well, maybe  
8 I'm just repeating myself, but --

9 MR. SMITH: Maybe I am too.

10 CHIEF JUSTICE ROBERTS: -- you don't  
11 just have the failure -- maybe we're both just  
12 repeating.

13 We don't -- you don't just have the  
14 failure the vote. You have the failure to  
15 vote, plus the notification that you need to do  
16 something because you haven't voted.

17 Now, in some situations you think the  
18 notification is sufficient, so you would say in  
19 those, it is not just the failure to vote. But  
20 in this case, you say the notification is not  
21 sufficient, so it is just the failure to vote.

22 MR. SMITH: It's a fundamental  
23 difference between when you get back something  
24 the post office -- from the post office that is  
25 undeliverable, no longer at this address, and

1 when you get nothing back.

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

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

12 It was designed to be a safeguard, a  
13 notice process telling people their rights were  
14 at risk, and they either have to return it or  
15 they need to vote sometime pretty soon or they  
16 are going to lose their registration status.

17 To turn it into the test, the state  
18 says we can give this to everybody and -- and  
19 then purge people when they don't return the  
20 notice on the assumption that that means they  
21 haven't voted -- they have moved, if they don't  
22 return the notice and they don't vote for four  
23 years, it's -- the thing about that kind of  
24 notice is when 70 percent of the people don't  
25 return it, which is what happened in 2011 in

1 Ohio, the ones who don't return it, you have no  
2 more idea whether they've moved or not moved,  
3 it's no more likely --

4 JUSTICE BREYER: Any stat on that? I  
5 mean, this does seem at the moment to boil down  
6 to an empirical question.

7 You think that sending a notice, which  
8 is forwardable, is not going to tell you not  
9 much when it comes back because so many people  
10 just don't return notices.

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

13 JUSTICE BREYER: Yeah, when it doesn't  
14 --

15 MR. SMITH: That's the problem.

16 JUSTICE BREYER: -- sorry, I misspoke.  
17 You think that returning a notice that's  
18 forwardable, when it doesn't come back tells  
19 you virtually nothing because people just throw  
20 things in the wastebasket or --

21 MR. SMITH: It -- it doesn't tell you  
22 --

23 JUSTICE BREYER: -- or it tells you  
24 next to nothing.

25 MR. SMITH: It doesn't tell you



1 whether they -- it's been forwarded to the new  
2 address or --

3 JUSTICE BREYER: You don't know where  
4 -- you don't know if they just got it at the  
5 old address or they had to forward it. You  
6 don't know.

7 But if it wasn't forwardable, you get  
8 it from the post office, that tells you quite a  
9 lot.

10 MR. SMITH: Yes, Your Honor.

11 JUSTICE BREYER: Got it. Got it.

12 MR. SMITH: Good, good.

13 JUSTICE BREYER: Now, that's what  
14 you've just said.

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

18 MR. SMITH: Right.

19 JUSTICE BREYER: His point is we have  
20 something else. We do have the fact that that  
21 notice didn't come back and that means more  
22 than you think it means. Okay? That's their  
23 point.

24 MR. SMITH: They -- they don't  
25 actually claim --

1 JUSTICE BREYER: Now if that's so, all  
2 I'm asking is, is there any place in this  
3 record that I can look for some numbers or  
4 surveys or something hard that will either  
5 support you or will support them?

6 MR. SMITH: Your Honor, there is no  
7 evidence about whether or not people who had  
8 failed to return the notice have moved, because  
9 they have never claimed it was evidence that  
10 they have moved. Their only claim in this case  
11 is that we're -- we're -- we're targeting these  
12 people because --

13 JUSTICE BREYER: But there might be  
14 surveys about how many people throw everything  
15 in the wastebasket. I confess to doing that  
16 sometimes. And -- and --

17 MR. SMITH: Most people do.

18 JUSTICE BREYER: I know that's what  
19 your opinion is. And all I'm asking is, is  
20 there any hard evidence of that one way or the  
21 other?

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

25 JUSTICE BREYER: Page?

1           MR. SMITH: That's Exhibit I to their  
2 brief in the trial court. Their -- their  
3 report to the Election Assistance Commission on  
4 their 2011 -- 1.5 million confirmation notices,  
5 1.2 million were simply ignored, 10 percent  
6 were returned undeliverable, 20 percent were --  
7 were returned.

8           That's the data on this. Now I think  
9 the other important --

10          JUSTICE SOTOMAYOR: Mr. Smith, there  
11 is one thing about -- and I maybe should have  
12 asked this of -- of Ohio -- of the state. But  
13 once you don't return the notice, you get put  
14 on the inactive list, correct?

15          MR. SMITH: Right.

16          JUSTICE SOTOMAYOR: That means that  
17 you no longer -- does it mean you no longer get  
18 mailings about elections?

19          MR. SMITH: Yes, Your Honor. It means  
20 you can still vote, but you can't -- you're not  
21 notified of where your polling place is and you  
22 don't get the --

23          JUSTICE SOTOMAYOR: You're not sent  
24 any more reminders about --

25          MR. SMITH: That's my understanding.

1 I --

2 JUSTICE SOTOMAYOR: It's one notice in  
3 -- for four, six years.

4 MR. SMITH: You disappears for  
5 purposes of mailing.

6 JUSTICE SOTOMAYOR: And you disappear  
7 from any further mailings.

8 MR. SMITH: That's my understanding.  
9 I couldn't necessarily swear to it, Your Honor,  
10 but it's my understanding. That that's --

11 JUSTICE SOTOMAYOR: I'm sure Mr.  
12 Murphy will --

13 MR. SMITH: -- the consequence of the  
14 inactive status.

15 MR. SMITH: -- correct it, if it's  
16 wrong.

17 MR. SMITH: Yes. Now, let -- let me  
18 talk, if I could, about this concept of  
19 proximate cause that's been -- that's been  
20 brought up here. I think it's a misplaced  
21 concept here because the term that the Congress  
22 used multiple times was "reason."

23 And I think the reason has to be  
24 something that is causally linked to the  
25 underlying reason, which is that they think

1 you've moved to a different county or state.  
2 And the only evidence they have at the end of  
3 the Supplemental Process of that is the  
4 non-voting.

5           They don't even claim that the  
6 people -- the 70 percent of people who don't  
7 return the notice, that that is evidence of  
8 anything. It is a hoop they have to go  
9 through. It is a -- it is a safeguard, it is a  
10 requirement that Congress imposed, but it is  
11 not the reason that anybody is being purged in  
12 terms of the underlying issue of whether  
13 they've -- they've moved.

14           But even if you want to do this  
15 proximate cause concept, and as Justice Kagan  
16 pointed out, there are three things that have  
17 to happen: Two years of non-voting, the  
18 failure to return the notice, and four more  
19 years of non-voting.

20           And calling the non-return of the  
21 notice the proximate cause is like saying when  
22 you strike out, the only proximate cause is  
23 strike two. It just doesn't -- it doesn't  
24 really make sense.

25           JUSTICE ALITO: So what is your

1 standard of causation? It's not -- it's not  
2 solely, it is not proximate cause. The only  
3 thing I can think of that's left is but-for.

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

8 JUSTICE ALITO: What's the difference  
9 --

10 JUSTICE KAGAN: I don't understand why  
11 it's just -- it is proximate cause, but both --  
12 strike one, strike two, strike three. They're  
13 all proximate causes of the strikeout.

14 MR. SMITH: Well, I agree with that,  
15 Your Honor, as well. I just think that that's  
16 not -- that's not the right way to think about  
17 it here.

18 The reason that they're being  
19 identified as having moved is because they're  
20 not voting. That's the point.

21 JUSTICE ALITO: Well, in HAVA Congress  
22 used the term "solely." Could you say  
23 something about -- about that provision of --  
24 of HAVA? That says that states shall include  
25 provisions. It's mandatory.

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

9           By itself, that seems pretty clear.  
10          How do you get around that?

11          MR. SMITH: Well, Your Honor, I think  
12          the except clause is a reference to the same  
13          principle that is set forth in -- in (b) (2) --  
14          (b) (2), which is to say the reason that you're  
15          getting put into the -- into the purge can't be  
16          simply not voting.

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

20          MR. SMITH: Right.

21          JUSTICE ALITO: Now, under Ohio's  
22          system, is someone removed solely because of  
23          failure to vote?

24          MR. SMITH: Yes, Your Honor.  
25          Absolutely.

1 JUSTICE ALITO: So the notices --  
2 there's no requirement -- if somebody doesn't  
3 vote forever, but returns that notice, the  
4 person would be removed from the list?

5 MR. SMITH: We're talking about people  
6 who don't return the notice. The case is only  
7 about people who don't return the notice.

8 JUSTICE SOTOMAYOR: Now wait.

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

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

20 And it certainly didn't think  
21 non-return of the notice was a reason to remove  
22 people. It was looking at --

23 JUSTICE ALITO: If somebody returns  
24 the notice, they never vote but they return the  
25 notice, are they removed from the list?



1           MR. SMITH: The notice, when they  
2 return the notice, the question is what do they  
3 say? Do they say I'm still living on Main  
4 Street like I always have? Then they -- they  
5 stay on the list. If they say I have moved to  
6 Oklahoma, then they get purged.

7           But in either event, the state then  
8 has direct information about where they live  
9 and can take whatever action it should.

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

23           Now, the other thing, the other fact  
24 that's in the record is the small number of  
25 people that were -- that the Supplemental

1 Process supposedly is trying to find. We have  
2 in the record evidence about how many people  
3 moved to a different county or state in each  
4 year. This is evidence the state put in the  
5 record, Exhibit E to their main brief in the  
6 district court. And it shows that about  
7 3 percent of people in this country move to a  
8 different county or state outside of the  
9 registrar's jurisdiction, to use the term --  
10 terminology in the -- in the statute.  
11 Three percent a year.

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

19 And so what --

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

23 MR. SMITH: Well, Your Honor, I can't  
24 give you exact numbers, but I -- I would refer  
25 you to the biennial Election Assistance

1 Commission reports that -- that look in detail  
2 at all the states' processes with respect to  
3 registration and perjury -- purge. I -- I -- I  
4 do know that -- two things I can tell you, Your  
5 Honor.

6 It's certainly in the hundreds of  
7 thousands in -- in many years. It was  
8 something like several hundred thousand in  
9 2015, according to the more recent report  
10 that's not in the record.

11 And I can also tell you that the  
12 evidence shows --

13 JUSTICE SOTOMAYOR: But you gave me  
14 3 percent of people nationally move.

15 MR. SMITH: Move to a different county  
16 or state.

17 JUSTICE SOTOMAYOR: I -- I guess what  
18 I'm trying to get to is about how many people  
19 in Michigan actually move?

20 MR. SMITH: Well, the -- the -- the  
21 Ohio, the statistics that were put in were  
22 national. But those --

23 JUSTICE SOTOMAYOR: I'm sorry, I  
24 misspoke. In Ohio.

25 MR. SMITH: Ohio apparently thinks

1 it's pretty -- the -- the -- the national  
2 statistics represent Ohio because that's the  
3 statistics they put in. I don't think the  
4 Census does these mobility statistics by state  
5 or at least that's not in the record.

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

8 JUSTICE SOTOMAYOR: I don't know.  
9 Three percent of what?

10 MR. SMITH: People move in each year.

11 JUSTICE SOTOMAYOR: I -- I understand  
12 that. But what's the -- 3 percent of what  
13 greater number?

14 MR. SMITH: Of all people in the  
15 country.

16 JUSTICE SOTOMAYOR: Of all people in  
17 the country.

18 MR. SMITH: Yes.

19 JUSTICE SOTOMAYOR: So we have to  
20 divide it up and do that math.

21 MR. SMITH: Well, it is -- it is -- in  
22 other words, only -- 97 percent of people do  
23 not move to another county or state in any  
24 given year. That's -- that's what the  
25 statistic is.

1           And then, you know, most of those  
2    3 percent are going to be located presumably in  
3    some -- in one of the other ways.

4           So we're talking about a relatively  
5    tiny group of people which they then -- the  
6    process that they then use begins with 50 or  
7    60 percent of people who don't vote for two  
8    years. Thank you, Your Honor.

9           CHIEF JUSTICE ROBERTS: You can have a  
10   couple of minutes as well.

11          MR. SMITH: And so, you know, the  
12   process is vastly overbroad in its design to  
13   try to find this relatively small group of  
14   people, starting with 50 or 60 percent in an --  
15   in an -- in an off-year election don't vote;  
16   70 percent don't return the notice. You're  
17   just going to end up with a lot of false  
18   positives in the end, and that is, in fact, how  
19   the system is -- is operating.

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

23          CHIEF JUSTICE ROBERTS: Okay. Thank  
24   you, counsel.

25          Two minutes, Mr. Murphy.

1 REBUTTAL ARGUMENT ON BEHALF OF  
2 ERIC E. MURPHY ON BEHALF OF THE PETITIONERS

3 GENERAL MURPHY: Thank you, Mr. Chief  
4 Justice:

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

13 I think this is significant because it  
14 shows why the Postal Service provision is a  
15 safe harbor for meeting the state's obligation  
16 to remove individuals because it's going to be  
17 woefully insufficient for that task. States  
18 are going to have to do other efforts if they  
19 actually want to maintain adequate rolls rather  
20 than just worry about the threat of getting  
21 sued on the other side of the compromise that  
22 is -- that is at issue here.

23 And I think this goes to that this in  
24 the end was a -- a -- a statute that was  
25 balancing competing purposes. On the one hand

1 trying to remove ineligible voters. On the  
2 other hand trying to ensure protections for  
3 eligible voters.

4 And it came up with a compromise. And  
5 that compromise left a lot of room for states  
6 in our federal system to adopt the procedures  
7 that are best in that state.

8 And with respect to sending  
9 information, I would say that my friend on the  
10 other side mentioned the ERIC program. Ahead  
11 of the 2016 election, Ohio sent something like  
12 1.6 million letters to potentially eligible yet  
13 unregistered voters, many of those if they were  
14 removed under our process could have received  
15 this notice from ERIC ahead of the registration  
16 deadline encouraging them to register. I'd  
17 also note that --

18 JUSTICE SOTOMAYOR: I'm sorry, they  
19 don't get -- people don't get notice that they  
20 have been struck. They get one notice, they're  
21 put on the inactive list. Was I correct about  
22 that?

23 GENERAL MURPHY: Under the NVRA,  
24 you're only -- the minimum requirement is --

25 JUSTICE SOTOMAYOR: I'm not asking --

1           GENERAL MURPHY:  Yeah.

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

4           GENERAL MURPHY:  Only one notice, but  
5 --

6           JUSTICE SOTOMAYOR:  They don't get a  
7 notice when they're purged.  So they don't know  
8 they've been purged.  They have to go to the  
9 polls to find that out.

10          GENERAL MURPHY:  That's why I was  
11 mentioning the ERIC program --

12          JUSTICE SOTOMAYOR:  Well, that --  
13 that's --

14          GENERAL MURPHY:  -- because we just  
15 sent 1.6 million letters to all potentially  
16 eligible voters who -- who were not registered.

17          JUSTICE SOTOMAYOR:  Would you answer  
18 my question?  Are they ever sent, anyone who  
19 sent a notice and put on the inactive list, are  
20 they ever again sent any voting information  
21 outside of this ERIC program?

22          GENERAL MURPHY:  So Matt Damschroder's  
23 declaration at Doc 38-2 suggested that the  
24 state ahead of the 2016 election sent absentee  
25 ballot applications, so you could vote because



1 we have no excuse voting. That would have gone  
2 to many of these individuals. Not everybody.  
3 It would have gone to any of the individuals  
4 who had been sent this notice and had voted in  
5 the previous election, 2012.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. The case is submitted.

8 (Whereupon, at 11:10 a.m., the case  
9 was submitted.)

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