SUPREME COURT
OF THE UNITED STATES

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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.            )

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Pages: 1 through 80

Place: Washington, D.C.

Date: January 10, 2018

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10                  Washington, D.C.

11             Wednesday, January 10, 2018

12

13         The above-entitled matter came on for oral

14    argument before the Supreme Court of the United States

15    at 10:04 a.m.

16

17    APPEARANCES:

18    ERIC E. MURPHY, State Solicitor for Ohio, Columbus,

19         Ohio; on behalf of the Petitioner.

20    GEN. NOEL J. FRANCISCO, Solicitor General,

21         Department of Justice, Washington, D.C.; on behalf

22         of the United States, as amicus curiae, supporting

23         the Petitioner.

24    PAUL M. SMITH, Washington, D.C.; on behalf of

25         the Respondents.
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1   C O N T E N T S

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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. Philip Randolph Institute.
 6            Mr. Murphy.
 7            ORAL ARGUMENT OF ERIC E. MURPHY
 8              ON BEHALF OF THE PETITIONER
 9            MR. MURPHY:  Mr. Chief Justice, and
10   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).
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 1    Would your case have been stronger without the

 2    enactment of section (b)?

 3              MR. MURPHY:  Without the --

 4              JUSTICE KENNEDY:  In other words,

 5    could you rely just on (a) and (d)?

 6              MR. 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              MR. MURPHY:  I -- 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              MR. MURPHY:  And (d) clearly indicates

18    that we -- if we -- so long as we send

19    individuals a notice and so long as we wait two

20    federal elections before we remove them, that

21    that is acceptable.

22              JUSTICE SOTOMAYOR:  So why bother --

23              JUSTICE KENNEDY:  Because of --

24    because of the except clause?

25              MR. MURPHY:  Well, because you have to
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 1   interpret the -- the -- the substantive

 2   provision in (b)(2), the failure-to-vote

 3   clause --

 4   JUSTICE KENNEDY: Right.

 5   MR. 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   MR. MURPHY: I don't think so, Your

20   Honor, because I think that is a safe harbor

21   for something completely different. They treat

22   it as a safe harbor for meeting an implicit

23   element in (d) that a state have objective

24   evidence that an individual has moved, but that

25   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. It's --

         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   MR. MURPHY: No. We -- we -- we run

        16   the notices every year --

        17   JUSTICE SOTOMAYOR: Every year.

        18   MR. MURPHY: -- but we still wait the

        19   -- 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   MR. MURPHY: No. No. Our position is

                2   the notice gets sent out. If they respond,

                3   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   MR. MURPHY: That's right. Because a

                8   statewide canvass would not be based on failure

                9   to vote whatsoever. And so that's why they

               10   have to read into (d) an element that they just

               11   make up from whole cloth, which is that they

               12   have objective evidence of a move.

               13   JUSTICE SOTOMAYOR: Well, let -- let's

               14   --

               15   MR. MURPHY: For sending the 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   MR. 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   MR. MURPHY: So there's a -- there's a

     8   couple points there. The first was what if

     9   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   MR. 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   MR. 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   MR. 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 -- I must say I

 5   don't understand the -- I think this is a

 6   little bit of a different question, but since

 7   you've raised it, the proximate cause argument,

 8   I don't understand, because essentially what

 9   the 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   MR. MURPHY: So I think clearly the

16   "by reason of" adopts a proximate cause test.

17   This Court has repeatedly said it's a flexible

18   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   MR. MURPHY: Well, exactly, and the

25   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   MR. 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

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 1    interpretation of this that one cannot be

 2    removed from the list solely because of failure

 3    to vote?

 4              MR. 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 sole -- 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              MR. MURPHY:  Well, we think it's the

21    best reading to reconcile the two provisions.

22    And there was this --

23              JUSTICE KAGAN:  Which -- which two?

24    The --

25              MR. MURPHY:  The -- the solely,
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 1   because the -- the failure to respond --

 2   JUSTICE KAGAN: The HAVA and the NFRA

 3   -- NVRA provision?

 4   MR. MURPHY: No, the (b) and (d) --

 5   JUSTICE KAGAN: Okay.

 6   MR. MURPHY: -- to reconcile the two

 7   provisions. And, remember, the solely clause

 8   from HAVA was not the only provision that was

 9   adopted in HAVA.

10   In addition, HAVA, when it added that

11   solely clause, also added the clarifying

12   amendment to the failure to vote.

13   JUSTICE KAGAN: General, everybody is

14   looking here for a way to reconcile these two

15   provisions. I mean, you're right, these two

16   provisions are like, okay, what do we do with

17   these?

18   But why isn't the obvious way to

19   reconcile the two provisions just to say, look,

20   you got this failure-to-vote clause, but don't

21   think that this failure-to-vote clause bars a

22   state from using the confirmation procedures.

23   It doesn't bar a state from using the

24   confirmation procedures. That can be a

25   permissible part of the state program.

1   So that's your way to reconcile the

2   two things. Taken on its own, the

3   failure-to-vote clause looks as though it might

4   bar confirmation procedures. The confirmation

5   procedure says, no, not these.

6   MR. MURPHY: So, look, I think that

7   may have been one reconcile -- one way to

8   reconcile it. Our way may have been one way to

9   reconcile it. The states debated the federal

10   government on this precise issue throughout the

11   1990s, and then Congress intervened and

12   reconciled it with the addition of the solely

13   clause and the HAVA provision.

14   JUSTICE KAGAN: But the solely clause

15   in HAVA --

16   JUSTICE ALITO: And I'm looking at --

17   I'm listening --

18   JUSTICE KAGAN: -- is a completely

19   independent provision in a completely

20   independent statute. I mean, it's not the

21   clarifying amendment, which we can talk about,

22   and the solely clause is -- it's a part of a --

23   a different provision in a different statute

24   dealing with a related but different subject

25   matter.

1   So there would be no reason to take

2   one provision that says solely, and says

3   because that provision says solely, we're going

4   to treat this provision as also saying solely

5   when this provision does not say solely.

6   In fact, we have a rule against that

7   in statutory interpretation. Usually, we say,

8   look, Congress knows how to do a solely

9   provision. It didn't do it here.

10   MR. MURPHY: But what it did add in

11   the same law, in the HAVA law that -- in the

12   computerized list maintenance for statewide

13   programs that uses solely, and then with

14   respect to the failure-to-vote clause in the

15   NVRA, it adopted a clarification amendment that

16   said except that nothing in this provision

17   shall be construed to prohibit the state from

18   using the procedures in (c) and (d). So I

19   think you have to interpret the clarification

20   amendment with the solely clause because it was

21   in the same law.

22   JUSTICE KAGAN: Well, that's exactly

23   what the clarifying amendment says. You're

24   exactly right. It says don't -- don't

25   interpret the failure-to-vote clause as

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 1    preventing use of the confirmation procedures.

 2              And that's my point about how these

 3    two things are reconcilable.  The clarifying

 4    amendment says how they're reconcilable.

 5              JUSTICE ALITO:  And I'm missing -- I'm

 6    sorry.

 7              JUSTICE KAGAN:  Don't -- don't

 8    interpret the failure-to-vote clause as barring

 9    the confirmation procedures.  States can use

10    the confirmation procedures, but that doesn't

11    mean that they can do anything else that they

12    want to on top of the confirmation procedures.

13              MR. MURPHY:  So -- so you still --

14    it's a -- it's a rule of clarification.  So it

15    says you have to construe (b)(2).  And I think

16    that with that, combined with the solely

17    clause, makes quite clear that you have to

18    interpret the "by reason of" language in some

19    way to break the causal link between voting and

20    removal that is required in (d).

21              I think interpreting it to be the sole

22    cause is the way to accomplish that feat.  I

23    think that's why there was a clarification

24    amendment on the one hand in (b) and -- and the

25    solely clause.
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 1              JUSTICE SOTOMAYOR:  Counsel, can you

 2      --

 3              MR. MURPHY:  I also think the public

 4      context is really important here.  The public

 5      --

 6              JUSTICE SOTOMAYOR:  Can we get to the

 7      essence of this case?

 8              It appears as if what you're -- you're

 9      reading is that the failure to vote is enough

10      evidence to suggest that someone has moved.

11      That seems to be your position because it can

12      be the only one.

13              But is that a reasonable effort to

14      draw that conclusion when you do results in

15      disenfranchising, disproportionately, certain

16      cities where large groups of minorities live,

17      where large groups of homeless people live, and

18      across the country they're the group that votes

19      the least, in -- in large measure because many

20      of them work very long hours.  And without the

21      golden week that Ohio rescinded, many of them

22      can't vote because the polls are not open while

23      they're not working.

24              Places like Cleveland have very, very,

25      very long lines of -- of voter -- of voters
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 1   trying to vote. All of these impediments

 2   result in large numbers of people not voting in

 3   certain spots in the state.

 4   So if the word "reasonable effort" has

 5   any meaning with a Congress who said that the

 6   failure to vote is a constitutional right, how

 7   can we read this statute to permit you to begin

 8   a process of disenfranchising solely on the

 9   basis of that with no independent evidence

10   whatsoever that the person has moved?

11   You can use the Post Office. They

12   tell you that. You can use Certified Mail.

13   You could use juror change of addresses. You

14   can use driver license, motor vehicle change of

15   addresses. There are dozens of other ways that

16   you could verify a change of address, yet

17   you're suggesting that using a failure to

18   appear at an election or elections as evidence

19   of moving when people have a right not to vote

20   if they choose. Many have.

21   And others like the veteran who's a

22   plaintiff in this case explains the reasons why

23   he failed to vote in two elections. I have to

24   give the meaning, the words that Congress said,

25   don't use the failure to vote as a result --

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 1    that results in someone being disenfranchised.

 2    I don't understand how you can say that the

 3    failure to vote can be used as the sole basis

 4    for sending out notices.

 5              MR. MURPHY:  We don't say --

 6              JUSTICE SOTOMAYOR:  It's not a

 7    reasonable inference, so how could it be a

 8    reasonable effort?

 9              MR. MURPHY:  So the failure-to-vote

10    clause says that failure to vote cannot be the

11    sole basis for removal, not sending a notice,

12    it says nothing about sending a notice.  I

13    would also add that subsection (d) -- within

14    subsection (d), Congress identified the minimum

15    evidence that it thought was sufficient for

16    states to remove individuals for failure to

17    respond -- or for --

18              JUSTICE SOTOMAYOR:  So if that's

19    minimum, don't you think that maximum should

20    say something a little bit more than the

21    failure to vote?

22              MR. MURPHY:  Well, it does because the

23    --

24              JUSTICE SOTOMAYOR:  I mean, you know,

25    a change in the residence in accordance with
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 1   (b), (c), and (d), and (b) has you using the

 2   Post Office, correct?

 3   MR. MURPHY: (c).

 4   JUSTICE SOTOMAYOR: (c) has you using

 5   the Post Office. (b) says shall not be removed

 6   -- shall not result in the removal of the name

 7   of a person from any official list registered

 8   to vote in election for federal office by

 9   reason of the person's failure to vote. So --

10   MR. MURPHY: That's correct. And if

11   you interpret that to be a sole proximate cause

12   test, then ours does not satisfy it because --

13   JUSTICE SOTOMAYOR: Well --

14   MR. MURPHY: -- nobody is removed

15   solely by reason of their failure to vote.

16   JUSTICE SOTOMAYOR: Exactly. We're

17   saying it's not a sole --

18   MR. MURPHY: They're -- they're

19   removed -- they're removed if they fail to

20   respond to a notice and fail to vote over six

21   years, which is more than the minimum

22   protections --

23   JUSTICE SOTOMAYOR: So please explain

24   to me why a change of address is reasonable.

25   What -- what are the statistics that show that

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 1    the vast majority of people that you

 2    disenfranchise from voting, that you strike

 3    from the election rolls have actually moved?

 4              MR. MURPHY:  So -- so there is no

 5    statistical evidence that is necessary because

 6    Congress made the determination of what

 7    evidence is necessary.  And that

 8    determination is in (d) --

 9              JUSTICE SOTOMAYOR:  No, when it gave

10    you an example, it gave you an example of an

11    independent trigger.

12              MR. MURPHY:  But that was an example

13    from meeting our minimum duty on the other side

14    to -- so there's a minimum duty, a minimum

15    amount of protections for eligible voters and a

16    minimum requirement on the states to undertake

17    a minimum effort to --

18              JUSTICE SOTOMAYOR:  So there's a

19    minimum requirement on the voter who gets your

20    notice to respond.

21              MR. MURPHY:  Absolutely, the statute

22    places a requirement on the voter to respond.

23              JUSTICE SOTOMAYOR:  But that's after

24    you have evidence that they've actually moved?

25              MR. MURPHY:  No, there's no -- there's
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1   nothing in the statute that sects -- suggests

2   that there's limitations on the trigger.

3   With respect to -- to minorities, I

4   would add, by the way, that our position is not

5   at all -- (b)(1) -- Congress responded to that

6   concern, suggesting that the process must be

7   uniform, non-discriminatory, and in compliance

8   with the Voting Rights Act --

9   JUSTICE SOTOMAYOR: Well, that's the

10   problem, is --

11   MR. MURPHY: -- but that --

12   JUSTICE SOTOMAYOR: -- that there's a

13   strong argument this is -- that at least in

14   impact, this is discriminatory. I understand

15   that some don't believe in impact, but you have

16   to look at it to determine --

17   MR. MURPHY: But they didn't raise a

18   (b)(1) claim.

19   JUSTICE SOTOMAYOR: -- whether

20   something is reasonable.

21   MR. MURPHY: They didn't raise a

22   (b)(1) claim. There -- we're only here today

23   under the failure-to-vote clause.

24   And if I could reserve the rest of --

25   CHIEF JUSTICE ROBERTS: I'll give you

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 1    a couple more minutes so you can get more of

 2    your argument out.

 3             MR. MURPHY:  Okay.  Thank you, Your

 4    Honor.

 5             So I really would like to get back to

 6    the public context in which the HAVA provisions

 7    were enacted because I think that public

 8    context is quite powerful.  On the one hand,

 9    you had states, from 1994 all the way up to the

10    HAVA amendment, debating the Department of

11    Justice, whether the processes just like Ohio's

12    were permissible.  On the other hand, you had

13    nobody.  There was nobody who made the argument

14    that (b) could somehow be read to actually make

15    (d) inoperative.

16             Under our view, the clarification in

17    HAVA was designed specifically to address the

18    -- the long-standing debate that started even

19    before -- before -- before the statute became

20    effective, states were suggesting that they

21    should engage in approaches like Ohio's, all

22    the way to the final FEC report, where South

23    Dakota suggested clarifying the NVRA in a way

24    that's quite helpful to the states here.  And

25    HAVA was passed and it had two provisions.
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      1   It had the clarifying amendment,

      2   expressly a clarifying amendment, on the one

      3   hand, and then it had the related provision

      4   dealing with statewide list maintenance, which

      5   is effectively a comparable -- comparable

      6   decision.

      7   JUSTICE GINSBURG: How -- how many

      8   states --

      9   MR. MURPHY: I think if you read both

     10   of those together --

     11   JUSTICE GINSBURG: How many states do

     12   it this way? That is, you get the notice, as I

     13   understand it, if you've missed just one

     14   election.

     15   MR. MURPHY: That's incorrect. If you

     16   missed -- if you have no voter activity over a

     17   two-year period, which would include one

     18   general election and then one off-year election

     19   and any primary elections as well.

     20   JUSTICE GINSBURG: Yeah. Are there

     21   other states who do it just like Ohio?

     22   MR. MURPHY: There are several -- many

     23   states who -- I think around eight that use

     24   failure to vote as the trigger for the notice.

     25   I don't -- some -- some use two, some use three

      1   years, some use four years.

      2   But the problem with my -- my friend's

      3   position on the other side is it would not only

      4   outlaw all of those states, those who use

      5   failure to vote as the trigger for sending the

      6   notice; it would outlaw any state that takes

      7   into account failure to vote on the front end.

      8   And that includes many states that target

      9   individuals who have not voted recently with a

     10   non-forwardable mailing and then respond to

     11   that non-forwardable mailing with a

     12   confirmation notice for any -- any individuals

     13   who the non-forwardable mailing is bounced back

     14   to.

     15   That would be equally prohibited under

     16   the logic of their argument here today because

     17   they are saying any front-end use of non-voting

     18   would be illegal.

     19   CHIEF JUSTICE ROBERTS: Thank -- thank

     20   you, counsel.

     21   MR. MURPHY: Thank you.

     22   CHIEF JUSTICE ROBERTS: You'll have a

     23   couple minutes for rebuttal.

     24   General Francisco.

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 1            ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

 2                 ON BEHALF OF THE UNITED STATES,

 3          AS AMICUS CURIAE, SUPPORTING THE PETITIONER

 4               GENERAL FRANCISCO:  Mr. Chief Justice,

 5     and may it please the Court:

 6               If I could begin with Justice

 7     Kennedy's question.  Justice Kennedy, we think

 8     that Ohio's process was permissible before

 9     Congress enacted the clarification amendment in

10     2002, but the clarification amendment made it

11     even clearer for two basic reasons.

12               First, sections 8(c) and 8(d), that's

13     the Postal Service process and the notice

14     process, require that non-voting be the

15     immediate cause for removal.  The only way you

16     can -- you can construe 8(b)(2) as not

17     prohibiting that is if 8(b)(2) is limited to

18     removing people only solely by reason of their

19     failure to vote.

20               And, second, this reflected a

21     significant shift in the federal/state balance

22     at the time.  Prior to the NVRA, many states

23     removed people solely for failure to vote.

24     Others had notice processes that were far less

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

 2   What the NVRA did was it required

 3   everybody to improve their processes well

 4   beyond what they were before the NVRA was

 5   passed, but beyond that, left the states with

 6   flexibility. And there's nothing in the

 7   statute that says that, within that range of

 8   flexibility, states are barred from using a

 9   non-voting trigger in conjunction with 8(d)'s

10   protective notice process.

11   JUSTICE SOTOMAYOR: General, could you

12   tell me, there's a 24-year history of solicitor

13   generals of both political parties under both

14   -- presidents of both political parties who

15   have taken a position contrary to yours.

16   Before the amendment and after the amendment.

17   In fact, the Federal Election

18   Commission, when it wrote to Congress with

19   respect to the Help America Vote Act, took the

20   position the old solicitor generals were

21   taking. Everybody but you today come in and

22   say the Act before the clarification said

23   something different.

24   Seems quite unusual that your office

25   would change its position so dramatically. I

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 1    might accept it if you thought that the Help

 2    America Vote Act, in fact, clarified something

 3    that was ambiguous, but you're taking a very

 4    different position.  You're saying even before

 5    that Act, it was clear you could do it this

 6    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

19    your opponents read it, most people read it

20    that way -- how did the solicitor general

21    change its mind?  Do you believe this doesn't

22    have an impact, a negative impact on certain

23    groups in this society?

24              GENERAL FRANCISCO:  Well, Your Honor,

25    I believe that after Congress passed the
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 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, it's --

 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
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 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.
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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 --

 2   GENERAL FRANCISCO: Yeah.

 3   JUSTICE KAGAN: -- is that if you use

 4   the confirmation procedures, that's a --

 5   basically, that's an out for everything?

 6   GENERAL FRANCISCO: That's correct,

 7   but it does have much broader application. If

 8   they --

 9   JUSTICE KAGAN: Not much broader

10   application, because how could you possibly use

11   failure to vote to -- for, you know, mental

12   incapacity or criminal convictions. What

13   broader application does it have?

14   GENERAL FRANCISCO: Well, what I think

15   it is -- it does a couple of things. One of

16   the principal things -- issues at the time the

17   NVRA was passed was what you put your finger

18   on. This practice among some states of having

19   a kind of use-it-or-lose-it mentality to the

20   right to vote, you either exercise it or you

21   lose it. And they definitely wanted to take

22   that off the table.

23   The other thing they wanted to do was

24   make sure that you could never use failure to

25   vote to conclusively presume that any other

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 1    basis for removal was met.
 2              JUSTICE KAGAN:  Right.  But I guess
 3    what I'm asking, General, is sort of two
 4    related questions.  Number 1, if the effect of
 5    your position is to say, look, we don't mean
 6    for this failure-to-vote clause to apply to
 7    programs about change of residence, why didn't
 8    Congress just say that?  That's Number 1.
 9              And, Number 2, I mean, I -- I can see
10    the point that it's not -- it doesn't make the
11    failure-to-vote clause completely meaningless,
12    but I'm still looking for the place where it
13    has some real impact on anybody's --
14              GENERAL FRANCISCO:  Sure.
15              JUSTICE KAGAN:  -- voting programs.
16              GENERAL FRANCISCO:  And I think it's
17    because, and this comes out in some of the
18    legislative history, prior to the NVRA, states
19    simply used failure to vote as a proxy for the
20    whole panoply of grounds for removal.
21              They didn't necessarily tie it to this
22    basis or that basis.  And Congress was very
23    concerned about simply relying on the failure
24    to vote.
25              So they wanted to take it completely
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 1   off the board. And (b)(2) is the only

 2   provision in this statute that takes it

 3   completely off the board and says nobody can

 4   ever be -- be removed merely for their failure

 5   to vote.

 6   But when you combine non-voting with

 7   the 8(d) process, the very protective process

 8   that Congress set that required everybody to

 9   improve their procedures, there's simply

10   nothing in the statute that prohibits that, and

11   the clarification amendment makes that even

12   clearer.

13   JUSTICE KAGAN: But with respect,

14   General, I don't think you answered either of

15   the two questions that I asked you, so I'll try

16   again.

17   Why wouldn't they just have said the

18   failure-to-vote clause doesn't apply to -- to

19   -- to -- to where a state uses the confirmation

20   procedures?

21   GENERAL FRANCISCO: Well, Your Honor,

22   I -- I don't know the answer to that. And I

23   would say that the NVRA is not one of these

24   statutes that I would hold up as a paradigm for

25   legislative draftsmanship, but --

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 1              JUSTICE KAGAN:  Okay.  So the second
 2    question is what is left of the failure-to-vote
 3    clause, practically speaking?
 4              GENERAL FRANCISCO:  It takes
 5    completely off the table using failure to vote
 6    as a conclusive presumption for any other
 7    ground for removal.
 8              JUSTICE KAGAN:  Well, what other
 9    ground are we talking about?
10              GENERAL FRANCISCO:  Well, prior to the
11    NVRA --
12              JUSTICE KAGAN:  I mean, it's not --
13    nobody used it as a presumption for mental
14    incapacity.
15              GENERAL FRANCISCO:  Well, Your Honor,
16    actually, the legislative history makes clear
17    that prior to the NVRA, they used it as a
18    presumption for meeting the whole panoply of
19    different bases for removal.
20              JUSTICE ALITO:  Well, wasn't it --
21    wasn't it itself considered to be a ground for
22    being removed?  It wasn't necessarily -- these
23    states didn't regard it necessarily as a proxy
24    for anything else.  They just took the position
25    that it was use it or lose it.  If you didn't
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          1   vote for a certain period of time, that was

          2   grounds for taking your name off the

          3   eligibility list.

          4   GENERAL FRANCISCO: That's absolutely

          5   correct, and that's why it meant to address

          6   both of those issues, those states that had a

          7   use-it-or-lose-it mentality, you can never do

          8   that, and those states that used it to

          9   conclusively presume that some other basis for

         10   removal has been met.

         11   But here Ohio joins the initial

         12   failure to vote with the very process that

         13   Congress established for determining whether

         14   somebody has been removed from the voter rolls.

         15   And with respect to the notion that

         16   somehow 8(d)(1)(B) does not set forth a

         17   separate process apart from the 8(c) Postal

         18   Service process, it clearly does. If you look

         19   at Section 8(d), there are two provisions.

         20   There's 8(d)(1)(A) which allows you to

         21   remove somebody if they've notified you that

         22   they've moved, clearly a standalone process.

         23   8(d)(1)(B) is simply the corollary to that. If

         24   you haven't notified us that you've moved, here

         25   is another process that states can use to make

 1   that determination.

 2   CHIEF JUSTICE ROBERTS: Thank you,

 3   General.

 4   GENERAL FRANCISCO: Thank you, Mr.

 5   Chief Justice.

 6   CHIEF JUSTICE ROBERTS: Mr. Smith.

 7   ORAL ARGUMENT OF PAUL M. SMITH

 8   ON BEHALF OF THE RESPONDENTS

 9   MR. SMITH: Mr. Chief Justice, and may

10   it please the Court:

11   I think it's important to recognize

12   that the Supplemental Process violates Section

13   8 of the NVRA in two distinct ways. Of course,

14   it violates the failure-to-vote clause, as

15   we've been discussing, but it also violates

16   8(a) because 8(a) sets out an exclusive list of

17   four bases that can be used for purging people

18   from the rolls, and bars states from doing it

19   under any other circumstances.

20   And the Supplemental Process, the way

21   it is designed, it assures that many, indeed

22   probably most of the people who are purged,

23   have not moved, let alone moved to a different

24   county or state, which is the only moves that

25   can justify a purge under the plain terms of

 1   the NVRA.

 2   It simply doesn't provide adequate

 3   evidence to come to the conclusion that the

 4   person has moved at all.

 5   JUSTICE ALITO: Well, your argument is

 6   that failure to vote is not one of the listed

 7   grounds for being removed, right? That's --

 8   that's the argument you just made.

 9   MR. SMITH: Yes, Your Honor.

10   JUSTICE ALITO: But is that what Ohio

11   does? Does it say the failure to vote is a

12   ground for removal, or does it say that moving

13   out of the district is a ground for removal,

14   and failure to vote plays a part in the

15   determination of whether a person has moved out

16   of the district? It's evidentiary. It's not

17   the -- the ground for removal in and of itself.

18   MR. SMITH: Well, of course, they do

19   say that they are -- they're using the change

20   of residency provision of 8(a) and that that's

21   what they're trying to -- to justify the

22   Supplemental Process with. But if, in fact, it

23   does not do that, then it becomes illegal.

24   And the reality is that the -- the

25   failure to vote for two years tells you almost

 1   nothing about whether or not anybody has moved.

 2   Fifty or 60 percent of the voters in Ohio

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

 4   JUSTICE ALITO: Yeah, I understand

 5   that. My -- I wonder what your answer would be

 6   to this: Suppose the state statute said that

 7   if you have not voted for 20 years, then we're

 8   going to send out the notice. Would you say

 9   that that violates this Act?

10   MR. SMITH: Well, it plainly violates

11   the Act, Your Honor, because the Act says you

12   can't use failure to vote as the reason for

13   purging somebody from the rolls. And what the

14   Supplemental Process does is it says we -- the

15   reason we think this person has moved is

16   because they haven't voted. It is the only

17   piece of evidence that they have when they

18   purge somebody that they have moved. Only --

19   JUSTICE ALITO: You think that if

20   somebody hasn't voted for 20 years, that

21   doesn't raise an inference that the person has

22   moved or died?

23   MR. SMITH: Your Honor, in the

24   legislative history, they rejected amendments

25   precisely like that. They even rejected a

 1   100-year rule. They said we don't want failure

 2   to vote to be the basis for which people are

 3   purged.

 4   JUSTICE ALITO: In and of itself, but,

 5   I mean, that isn't enough even to spark an

 6   inquiry by sending a -- a postcard saying if,

 7   in fact, you've just decided you didn't want to

 8   vote for 20 years, but you really want to keep

 9   your name on the list, and you're still in the

10   district, send this back. That would be

11   illegal?

12   MR. SMITH: Your -- Your Honor, we're

13   talking about the people who don't send it

14   back, which, by the way, is the large majority

15   of people. And when you don't get the notice

16   back, what that tells you is absolutely nothing

17   about whether the person has moved.

18   And so, when you get to the end of the

19   three stages of the process, two years of

20   non-voting, not getting the notice back, you

21   have no idea why or where, and four more years

22   of non-voting, the only evidence that they have

23   that the person has moved is they're not

24   voting. So it is, in fact, the sole reason

25   that they're being purged.

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1              JUSTICE ALITO:  But if not getting the
2    notice back tells you nothing, why did Congress
3    make that part of the determination?
4              MR. SMITH:  It is a safeguard, Your
5    Honor.  It is a notice provision.  It is a
6    warning to the voter that their -- that their
7    registration status is at risk, and it gives
8    them two options.
9              They can send it back if they want --
10   if they haven't moved and they want to tell
11   them here's -- I'm still there, or it says you
12   don't have to send it back.  You can just vote
13   sometime in the next four years.
14             But what reality is, most people don't
15   send it back.  And these statistics are in the
16   record, Your Honor.
17             We have Exhibit I to the State's
18   initial brief in the district court are
19   statistics Ohio provided.  They do this every
20   two years to the Election Assistance
21   Commission, at page 63, and they say:  Here's
22   what happens to these confirmation notices.
23   And what it shows is in 19 -- in -- in 2011,
24   they sent out 1.5 million of these confirmation
25   notices.
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 1   JUSTICE BREYER: What are -- what are

 2   they supposed to do? That is, every year a

 3   certain number of people die and every year a

 4   certain number move to California. All right.

 5   We don't want them on the voter roll. That

 6   used to be a big problem, voting dead people.

 7   Okay?

 8   What should the state do?

 9   MR. SMITH: Well, the dead -- the dead

10   people aren't a problem, Your Honor. There are

11   authoritative lists at both states and the

12   federal government level.

13   JUSTICE BREYER: They went and died in

14   Hawaii, I don't know, they went and died in

15   Alaska. They went and died in Tasmania.

16   Is -- is Rhode Island supposed to look

17   at the Tasmanian voting records or hospital

18   records or what are -- what -- it's a serious

19   question. I don't think there's no answer to

20   it.

21   MR. SMITH: But I don't think there's

22   any --

23   JUSTICE BREYER: And I want to know

24   your opinion.

25   MR. SMITH: -- any realistic concern

 1   about the death issue, Your Honor. There are

 2   ways that people are informed about deaths.

 3   JUSTICE BREYER: What?

 4   MR. SMITH: There are lists that are

 5   maintained by the federal government and the

 6   states. And they don't even defend this as a

 7   -- as a way to address that.

 8   JUSTICE BREYER: You know, I want to

 9   know what they are. I -- I am very ignorant in

10   this field.

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

12   JUSTICE BREYER: I'm in Rhode Island.

13   I see the statute. I know some people have

14   died, maybe in Rhode Island, maybe outside.

15   Maybe they've moved to California.

16   I don't want them voting in my state

17   or people pretending to be them voting in my

18   state. What do I do?

19   MR. SMITH: I do not have a detailed

20   understanding of this since it wasn't really

21   part of the issue for this case, but I

22   understand that there is a national database

23   maintained by the federal government with

24   information provided by all the states that

25   lists who's died in the past year, and you can

1   compare it.

2   CHIEF JUSTICE ROBERTS: Well, what

3   about people -- Justice Breyer's question also

4   included people who moved. What about them?

5   MR. SMITH: People who move, there are

6   a variety of ways that you -- you find them.

7   If they move within the state, the first thing

8   that happens is the Bureau of Motor Vehicles

9   has a change-of-address process, and under the

10   NVRA and under Ohio process, if you change your

11   driver's license address, your -- your

12   registration is automatically updated. You're

13   registered. If you move from Cincinnati to

14   Cleveland, you are fine.

15   CHIEF JUSTICE ROBERTS: What about

16   Justice --

17   JUSTICE KENNEDY: Well, how often do

18   you change your driver's license?

19   MR. SMITH: Well, when people move to

20   a different place in Ohio, they're required to

21   do -- to notify them within 10 days. That's

22   the law. Whether people do that, I don't know.

23   But then you have the NCOA process. When

24   people move to another county or state, the

25   odds are they posted a forwarding address with

1   the post office. That address then, on an

2   annual basis, gets -- gets -- those addresses

3   get compared to the -- the statewide database,

4   and those people get taken care of long before

5   the Supplemental Process.

6   JUSTICE KENNEDY: But are there -- are

7   there statistics or -- is that just a

8   commonsense argument, or are there statistics

9   that show that?

10   MR. SMITH: Show what, Your Honor?

11   JUSTICE KENNEDY: That when you --

12   that when you move, you always notify -- notify

13   the post office?

14   MR. SMITH: No, Your Honor. It is

15   just common experience. I don't think there

16   are statistics. Certainly, the state does not

17   have any statistics they've ever suggested for

18   why they --

19   JUSTICE SOTOMAYOR: I'm sorry,

20   Mr. Smith. I thought I read it was 40 or

21   50 percent.

22   MR. SMITH: No, Your Honor. The

23   statistic in -- in the record is that 40

24   percent of the mail that gets returned for --

25   as undeliverable is -- is because people have

 1   not posted a forward address. It's a much --

 2   likely to be a much smaller percentage of

 3   people who don't actually forward -- do that

 4   when they move to a different county or state.

 5   JUSTICE KENNEDY: Under -- under your

 6   interpretation, could -- under your

 7   interpretation, could Ohio send address

 8   verification notices to the entire electorate

 9   and -- and then do what it's doing?

10   MR. SMITH: The confirmation -- the

11   forwardable ones that they do under the

12   confirmation process, if they did that to the

13   entire electorate, it would not violate

14   8(b)(2), but it would most assuredly violate

15   8(a) because --

16   JUSTICE KENNEDY: Right. So the fact

17   that they use a general mail -- mail to

18   everybody wouldn't affect the outcome in your

19   view?

20   MR. SMITH: No, it wouldn't, Your

21   Honor, because what happens is if 70 percent of

22   the people don't return them -- that's what the

23   statistics show about the notices in 2011:

24   10 percent were returned as undeliverable,

25   20 percent were returned, and 1.2 million

 1   people just threw them in the circular file.

 2   JUSTICE BREYER: What about sending a

 3   card? Look, the reason I'm asking these

 4   questions is because I don't believe Congress

 5   would have passed a statute that would prevent

 6   a state from purging a voting roll of people

 7   who have died or have moved out of the state.

 8   So I'm trying to reconcile the two.

 9   And, therefore, I ask you what the state's

10   supposed to do for that latter objective. And

11   suppose they send a card which says no

12   forwarding. Don't forward. And their theory

13   of that is that if the person has moved, and

14   they wait long enough, and they send it a

15   couple of times, the post office will send it

16   back and then they'll know the person has

17   moved.

18   MR. SMITH: Your Honor, that is the

19   precise system that 14 or so states use to

20   identify people who have moved, and the key

21   feature of it is that it's not forwardable

22   because then it comes back if they have moved.

23   JUSTICE BREYER: Yes, that's right.

24   And you think that's okay?

25   MR. SMITH: The Justice Department for

 1   20 years said that was okay.

 2   JUSTICE BREYER: I'm asking you if you

 3   think that's --

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

 5   JUSTICE BREYER: Okay. Now --

 6   MR. SMITH: But you then have to go

 7   into the confirmation process.

 8   JUSTICE BREYER: All right. Fine,

 9   fine. Okay. I got my answer.

10   MR. SMITH: Yes.

11   JUSTICE BREYER: Can I add one thing

12   to it?

13   I -- I'd like to add that because they

14   don't want to send non-forwardable cards to

15   everyone since it's expensive -- in a state

16   like California, it might cost several -- tens

17   of millions of dollars -- what they do is they

18   send those non-forwardable cards to people who

19   haven't voted for three or four years. Okay?

20   Now is it okay?

21   MR. SMITH: If they only proceed to

22   purge people when it comes back and says no

23   longer at this dress -- address, undeliverable,

24   I think it's fine, Your Honor, because it's not

25   based on non-voting at that point. It's based

Official

50

 1   on concrete, reliable evidence --

 2   CHIEF JUSTICE ROBERTS: So -- so the

 3   triggering event can be the failure to vote? I

 4   would have thought that's inconsistent with the

 5   rest of your argument, which says what's wrong

 6   with this case is that they used failure to

 7   vote to trigger the sending of the notice.

 8   MR. SMITH: Well, Your Honor, I -- I

 9   think that -- that you could differ --

10   reasonable people could differ about this,

11   whether that is -- that is illegal, but I -- I

12   think when you have an intervening cause that

13   very clearly says this person has moved, just

14   as when they return the confirmation notice and

15   they say they've moved, then it's okay even if

16   they -- the reason they got the notice was

17   non-voting. You have then some concrete

18   information that says this person has moved.

19   CHIEF JUSTICE ROBERTS: But -- but, I

20   mean, then I would -- the response is really

21   the -- the substance of your argument, which is

22   it's still triggered by the failure to vote,

23   and the law says you cannot use failure to vote

24   in -- in one of these processes.

25   MR. SMITH: Well, Your Honor, I think

 1   that -- what the law says is failure to vote

 2   can't be the reason you're purging them. And

 3   when you -- when -- when the only evidence you

 4   have at all that they have moved is not voting,

 5   then that's clearly the reason that you are

 6   purging them. And that's what the Supplemental

 7   Process does. For the people that don't return

 8   the card --

 9   JUSTICE KENNEDY: The reason they're

10   purging them is they want to protect the voter

11   rolls from people that have not -- that -- that

12   have moved and they're voting in the wrong

13   district. That's the reason. What we're

14   talking about are the -- the best tools to --

15   to implement that reason, to implement that

16   purpose.

17   MR. SMITH: And Congress thought the

18   worst thing you could do to try to find people

19   who have moved is just look at who isn't voting

20   because there were two problems with it.

21   Congress knew there were vast numbers of people

22   who simply choose not to vote and that that was

23   therefore a terribly inaccurate way to identify

24   people who have moved, and it also said very

25   specifically people -- it's unfortunate that

 1   people don't vote, but they have a right not to

 2   vote. This is the Senate report. Many states

 3   -- "the Committee recognizes that while voting

 4   is a right, people have an equal right not to

 5   vote."

 6   CHIEF JUSTICE ROBERTS: Is that -- is

 7   that true? I mean, you think there is a

 8   constitutional right not to vote?

 9   MR. SMITH: This is a statutory right

10   here, Your Honor, but I actually do think it's

11   the -- the --

12   CHIEF JUSTICE ROBERTS: I understand

13   it's a statutory. But there are many

14   democracies that require you to vote, right?

15   Australia, it's -- you get a fine if you don't

16   vote. And other places. And I have certainly

17   seen it proposed that it would be a good idea,

18   given the low voter turnouts in our country,

19   that we adopt something like that as well.

20   Now, you think that would be unconstitutional?

21   MR. SMITH: Well, I think there's a

22   pretty persuasive argument to that effect in

23   the National Libertarian brief that was filed

24   in this case, filed by Wilmer. I think,

25   basically, they said it's a First Amendment

 1   act. And, just as you have a right to vote

 2   protected by the First Amendment, a right not

 3   to vote because you don't want to vote for any

 4   of those candidates would be protected as well,

 5   I would think. In any event, it --

 6   JUSTICE GINSBURG: Mr. Smith, in -- in

 7   your view, you know, we have what's been called

 8   the safe harbor; that is, you use the post

 9   office notice of change of address. What else

10   could be the trigger?

11   MR. SMITH: There's the -- the non- --

12   the non-forwardable mail, the national change

13   of address. There are the -- the DMV records,

14   which come into play. They operate

15   continuously. People -- people are

16   reregistered on -- that's required by Section 5

17   of the NVRA. And Ohio does that before it even

18   gets to the NCOA process. There are statewide

19   -- there are interstate databases. The ERIC

20   system is the sort of state-of-the-art

21   interstate database that lists everybody who

22   goes somewhere else and registers or gets a

23   driver's license in some other state. All of

24   that stuff is available to the State of Ohio.

25   And I think it's important as well to

 1   understand the small number of people that they

 2   say they're looking for with this Supplemental

 3   Process.

 4   JUSTICE ALITO: I mean, this is a

 5   very -- it's a very important subject. It's a

 6   sensitive subject. There are -- as a policy

 7   matter, there are strong arguments on both

 8   sides.

 9   Congress had struck a compromise.

10   What we have before us is a question of

11   statutory interpretation, not a question of

12   what we think would be the ideal system for

13   achieving the result of removing people who

14   have moved from the voter lists.

15   And you haven't said very much about

16   the language of the statute.

17   MR. SMITH: Yes, Your Honor.

18   JUSTICE ALITO: How do you get -- if

19   "by reason of a person's failure to vote" is

20   not but-for cause, how do you get around the

21   language of (b)(2)?

22   MR. SMITH: Well, Your Honor, the --

23   the language of (b)(2), I think, strongly

24   supports our position because what it says is

25   you can't have a system that uses non-voting as

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 1    the reason for purging somebody, except you can
 2    use (c) and (d), which is to say you can use
 3    the confirmation process.  And so non-voting
 4    can come into play at the end of the process,
 5    not at the beginning of the process.
 6              JUSTICE ALITO:  But that actually
 7    isn't what (b)(2) says.  It does not say you
 8    can't use failure to vote as a reason for
 9    removing someone, except that you can do what
10    is set out in --- in (c) and (d).
11              What it says is that the principle
12    that you can't use failure to vote as a reason
13    for removing someone may not be construed to
14    prohibit.  So the -- it -- it tells you how to
15    interpret the first part of (b)(2).  It is not
16    an exception to the first part of (b)(2).
17              MR. SMITH:  Right, but it is -- it is
18    an explanation that the one kind of
19    consideration of non-voting that -- that it --
20    that it should not be construed to prohibit is
21    the part that comes in at the end of the
22    process.  And then they went on to emphasize
23    that -- the sequence.  They say (a), they have
24    not responded to the notice and, then, they
25    have not voted for two -- two consecutive
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 1    elections.  That is very clearly what Congress
 2    was trying to preserve and to eliminate the
 3    tension, perceived tension, between (b) and (d)
 4    in the old version.
 5              JUSTICE ALITO:  It says -- it says
 6    that -- that it's all right if you followed
 7    either (c) or (d).  And what --
 8              MR. SMITH:  (c) and (d), Your Honor,
 9    with respect.
10              JUSTICE ALITO:  Well, it says -- you
11    think you have to follow (c) and (d)?
12              MR. SMITH:  Well, I think you need to
13    follow --
14              JUSTICE ALITO:  That's not what it
15    says.
16              MR. SMITH:  You need to follow
17    something like (c) because clearly Congress
18    anticipated that there would be something that
19    would tell you that they have moved before you
20    go into the confirmation process, because the
21    confirmation process consists, if they don't
22    get the notice back, of no evidence at all
23    about whether they've moved from the notice.
24    And four more years of non-voting, precisely
25    the thing Congress said should not be the
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1   reason that you purge somebody.

2   So the whole system only makes sense

3   if you assume there's something like the NCOA

4   process or some other indication that they have

5   moved before you put them into the process, and

6   if you don't have that, you're going to vastly

7   over-purge people. That's precisely what Ohio

8   does because so many people don't vote for two

9   years and they get put into this process where

10   70 percent of them don't send back the notice

11   and in four -- four more years of non-voting,

12   you're going to end up with --

13   JUSTICE ALITO: You just told me that

14   it doesn't matter how many years is required by

15   the trigger. It could be 10. It could be 20.

16   MR. SMITH: Yes, Your Honor, because

17   that's what the statute says. And that's --

18   that --

19   JUSTICE ALITO: Well, where does the

20   -- where does the statute say that?

21   MR. SMITH: The statute -- well, it

22   says two things: It says A, don't purge people

23   unless you have good reason to think they've

24   moved. That's (a).

25   JUSTICE ALITO: And --

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

 2   JUSTICE ALITO: -- and not voting for

 3   20 years isn't good reason to think that

 4   they've moved?

 5   MR. SMITH: Well, it -- it -- they --

 6   they might be. I don't believe so. I mean,

 7   lots of people probably stay registered much

 8   longer than 20 years and don't move for 20

 9   years. It's not an unusual thing in -- in our

10   country, I would believe.

11   In any event, the -- the -- the

12   statute that we're dealing with here says that

13   the -- the reason you're purging them cannot be

14   their non-voting. And when they get to the end

15   of the Supplemental Process, that is the only

16   evidence they have that anybody has moved.

17   Weak as it is, it's six years of

18   non-voting, and -- and a notice that doesn't

19   get returned, which tells them nothing. And so

20   the --

21   CHIEF JUSTICE ROBERTS: Well, it

22   doesn't --

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

24   CHIEF JUSTICE ROBERTS: -- it doesn't

25   tell them nothing. It tells them that they did

 1   not respond to a notice that says you're going

 2   to lose the registration if you don't vote

 3   through the two years, two elections. So it

 4   tells them something.

 5   MR. SMITH: Well --

 6   CHIEF JUSTICE ROBERTS: They have more

 7   evidence than just that they haven't voted.

 8   And you've indicated that under some

 9   circumstances, the method of the notification

10   as we have in the states that you reference in

11   pages 14 to 15, that that is okay, even though

12   it's triggered solely by the failure to vote.

13   So I -- I don't think you can maintain

14   in a principled way the acceptance of the

15   validity of those states' positions and -- and

16   your argument against the position here. Now,

17   you may say: Well, it makes a difference

18   because of the -- the -- the -- the quality of

19   the information you get from one notice or

20   another, but you can't just attack this on the

21   basis that it's triggered by the failure to

22   vote.

23   You have to say failure to vote, plus

24   a method of notification that you think is not

25   sufficient, because you do think in other cases

1   failure to vote plus a different method of

2   notification would be okay.

3   MR. SMITH: But --

4   CHIEF JUSTICE ROBERTS: Now, maybe

5   your position still is the same, but it can't

6   just base on the fact of failure to vote being

7   the trigger.

8   MR. SMITH: We're -- we're talking

9   about the people who don't return the notice.

10   And I think it's clear that nobody would claim,

11   and Ohio doesn't claim, that when they don't

12   get anything back from the person, that that

13   tells them anything about whether they're still

14   living in the same place where they sent the

15   notice or whether they moved to some other

16   place.

17   They're forwardable. They have no

18   idea which trash can it was thrown in, at the

19   original address or some other address. It

20   simply doesn't give them any information.

21   Now the alternative --

22   CHIEF JUSTICE ROBERTS: Well, but they

23   say they get more information. It's not just

24   that it's not -- you know, that it's not

25   returned, but that they've gotten the notice

 1   and they haven't voted in the subsequent

 2   elections.

 3   MR. SMITH: Right, right. So the --

 4   the -- in the end of the day, they have six

 5   years of non-voting that tells them -- they say

 6   that's some evidence that they've moved. It is

 7   some evidence. It's pretty weak evidence, but

 8   it's some evidence. But it -- the -- the

 9   statute says you need a lot better evidence

10   than that. And the one thing we don't want you

11   to do is -- is use non-voting because people

12   have a right not to vote. And we don't want

13   them punish -- punished for it.

14   CHIEF JUSTICE ROBERTS: Well, maybe

15   I'm just repeating myself, but --

16   MR. SMITH: Maybe I am too, Your

17   Honor.

18   CHIEF JUSTICE ROBERTS: -- you don't

19   just have the failure -- maybe we're both just

20   repeating.

21   (Laughter.)

22   CHIEF JUSTICE ROBERTS: We -- we don't

23   -- you don't just have the failure to vote.

24   You have the failure to vote, plus the

25   notification that you need to do something

         1   because you haven't voted.

         2   Now, in some situations, you think the

         3   notification is sufficient, so you would say in

         4   those, it's not just the failure to vote. But

         5   in this case, you say the notification is not

         6   sufficient, so it is just the failure to vote.

         7   MR. SMITH: It's a fundamental

         8   difference between when you get back something

         9   the post office -- from the post office that is

        10   undeliverable, no longer at this address, and

        11   when you get nothing back.

        12   CHIEF JUSTICE ROBERTS: Yeah, I

        13   understand that, but the point is that your

        14   argument then really turns on the adequacy of

        15   the notice and not simply the fact that the

        16   notice is triggered by a failure to vote.

        17   MR. SMITH: Well, I think, Your Honor,

        18   the -- the notice that's in the statute, the

        19   forwardable notice that Congress specifies has

        20   to be forwardable, was not designed to be a

        21   test of whether people have moved.

        22   It was designed to be a safeguard, a

        23   notice process telling people their rights were

        24   at risk, and they either have -- have to return

        25   it or they need to vote sometime pretty soon or

         1   they're going to lose their registration

         2   status.

         3   To turn it into the test, the -- the

         4   state says we can give this to everybody and --

         5   and then purge people when they don't return

         6   the notice on the assumption that that means

         7   they haven't voted -- haven't -- they've moved,

         8   if they don't return the notice and they --

         9   they don't vote for four years, it's -- the

        10   thing about that kind of notice is when it --

        11   when 70 percent of the people don't return it,

        12   which is what happened in 2011 in Ohio, the

        13   ones who don't return it, you have no more idea

        14   whether they've moved or not moved, it's no

        15   more likely --

        16   JUSTICE BREYER: Is there any stat on

        17   that? I mean, this does seem at the moment to

        18   boil down to an empirical question.

        19   You think that sending a notice, which

        20   is forwardable, is not going to tell you not

        21   much when it comes back because so many people

        22   just don't return notices.

        23   MR. SMITH: It's not going to tell you

        24   much when it doesn't come back.

        25   JUSTICE BREYER: Yeah, when it doesn't

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 1      --
 2              MR. SMITH:  That's the problem.
 3              JUSTICE BREYER:  Exactly.  Sorry, I
 4      misspoke.  You think that returning a notice
 5      that's forwardable, when it doesn't come back
 6      tells you virtually nothing because people just
 7      throw things in the wastebasket or --
 8              MR. SMITH:  Well, it doesn't tell you
 9      --
10              JUSTICE BREYER:  -- or it tells you
11      next to nothing.
12              MR. SMITH:  It doesn't tell you
13      whether they -- it's been forwarded to the new
14      address or whether they're --
15              JUSTICE BREYER:  You don't know where
16      -- you don't know if they just got it at the
17      old address or they had to forward it.  You
18      don't know.
19              But if it wasn't forwardable, you get
20      it from the post office, that tells you quite a
21      lot.
22              MR. SMITH:  Yes, Your Honor.
23              JUSTICE BREYER:  Okay.  Got it.  Got
24      it.
25              MR. SMITH:  Good, good.
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 1              JUSTICE BREYER:  Now, that's what
 2    you've just said.
 3              And if you're right on the first, then
 4    we have nothing left here or next to nothing
 5    left but the not voting.  That's your point.
 6              MR. SMITH:  Right.
 7              JUSTICE BREYER:  His point is we have
 8    something else.  We do have the fact that that
 9    notice didn't come back, and that means more
10    than you think it means.  Okay?  That's their
11    point, I think.
12              MR. SMITH:  They -- they don't
13    actually claim --
14              JUSTICE BREYER:  Now, if that's so,
15    all I'm asking is, is there any place in this
16    record that I can look for some numbers or
17    surveys or something hard that will either
18    support you or will support them?
19              MR. SMITH:  Your Honor, there is no
20    evidence about whether or not people who failed
21    to return the notice have moved, because they
22    have never claimed it was evidence that they
23    have moved.  Their only claim in this case is
24    that we're -- we're -- we're targeting these
25    people because --
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 1            JUSTICE BREYER:  But there might be

 2    surveys about how many people throw everything

 3    in the wastebasket.  I confess to doing that

 4    sometimes.  And -- and --

 5            MR. SMITH:  Most people do.

 6            JUSTICE BREYER:  I know that's what

 7    your opinion is.  And all I'm asking is, is

 8    there any hard evidence of that one way or the

 9    other?

10            MR. SMITH:  The evidence we have in

11    the record is that most people throw it in the

12    wastebasket, 70 percent.  Excuse me?

13            JUSTICE BREYER:  Page?

14            MR. SMITH:  That's Exhibit I to their

15    brief in the trial court.  Their -- their

16    report to the Election Assistance Commission on

17    their 2011 -- 1.5 million confirmation notices,

18    1.2 million were simply ignored, 10 percent

19    were returned undeliverable, 20 percent were --

20    were returned.

21            That's the data on this.  Now I think

22    the other important --

23            JUSTICE SOTOMAYOR:  Mr. Smith, there

24    is one thing about -- and I maybe should have

25    asked this of -- of Ohio -- of the state.  But,
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1   once you don't return the notice, you get put

2   on the inactive list, correct?

3   MR. SMITH: Right.

4   JUSTICE SOTOMAYOR: That means that

5   you no longer -- does it mean you no longer get

6   mailings about elections?

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

8   you can still vote, but you can't -- you're not

9   notified of where your polling place is and you

10   don't get the --

11   JUSTICE SOTOMAYOR: You're not sent

12   any more reminders about --

13   MR. SMITH: That's my understanding.

14   I -- I may --

15   JUSTICE SOTOMAYOR: It's one notice in

16   four -- six years.

17   MR. SMITH: You disappear for purposes

18   of mailing.

19   JUSTICE SOTOMAYOR: And -- and -- and

20   you disappear from any further mailings.

21   MR. SMITH: That's my understanding.

22   I couldn't necessarily swear to it, Your Honor,

23   but it's my understanding, that that's the --

24   JUSTICE SOTOMAYOR: I'm sure Mr.

25   Murphy will --

 1   MR. SMITH: -- the consequence of the

 2   inactive status.

 3   JUSTICE SOTOMAYOR: -- correct it if

 4   it's wrong.

 5   MR. SMITH: Yes. Now, let -- let me

 6   talk, if I could, about this concept of

 7   proximate cause that's -- that's been brought

 8   up here. I think it's -- it's a misplaced

 9   concept here because the -- the term that the

10   Congress used multiple times was "reason."

11   And I think the reason has to be

12   something that is causally linked to the

13   underlying reason, which is that they think

14   you've moved to a different county or state.

15   And the only evidence they have at the end of

16   the Supplemental Process of that is the

17   non-voting.

18   They don't even claim that the

19   people -- the 70 percent of people who don't

20   return the notice, that that's evidence of

21   anything. It is a hoop they have to go

22   through. It is a -- it is a safeguard, it is a

23   requirement that Congress imposed, but it's not

24   the reason that anybody is being purged in

25   terms of the underlying issue of whether

1   they've -- they've moved.

2   But even if you want to do this

3   proximate cause concept, as Justice Kagan

4   pointed out, there are three things that have

5   to happen: Two years of non-voting, the

6   failure to return the notice, and four more

7   years of non-voting.

8   And calling the non-return of the

9   notice the proximate cause is like saying when

10   you strike out, the only proximate cause is

11   strike two. It just doesn't -- it doesn't

12   really make sense.

13   JUSTICE ALITO: So what is your

14   standard of causation? It's not -- it's not

15   solely, it's not proximate cause. The only

16   thing I can think of that's left is but-for.

17   MR. SMITH: I think that the -- the

18   analysis ought to use the -- be based on the

19   term "reason," not "cause," Your Honor. It's

20   not a -- this is not a tort law.

21   JUSTICE ALITO: What's the difference

22   --

23   JUSTICE KAGAN: I don't understand why

24   it's just -- it's proximate cause, but both --

25   strike one, strike two, strike three. They're

1   all proximate causes of the strikeout.

2   MR. SMITH: Well, I agree with that,

3   Your Honor, as well, Your Honor. I just think

4   that that's not -- that's not the right way to

5   phrase -- way to think about it here.

6   The reason that they're being

7   identified as having moved is because they're

8   not voting. That's the point.

9   JUSTICE ALITO: Well, in HAVA,

10   Congress used the term "solely." Could you say

11   something about -- about that provision of --

12   of HAVA? That says that states shall include

13   provisions. It's mandatory.

14   To have a system of file maintenance

15   that makes a reasonable effort to remove

16   ineligible voters, and goes on to say, under

17   this system, "registrants who have not

18   responded to a notice and who have not voted in

19   two consecutive general elections for Federal

20   office shall be removed from the official list

21   of eligible voters."

22   By itself, that seems pretty clear.

23   How do you get around that?

24   MR. SMITH: Well, Your Honor, I think

25   the except clause is a reference to the same

 1   principle that's set forth in -- in (b)(2) --

 2   (b)(2), which is to say the reason that you're

 3   getting put into the -- into the purge can't be

 4   simply not voting.

 5   JUSTICE ALITO: Except -- but it -- it

 6   goes on to say: "except that no registrant may

 7   be removed solely by reason of failure to

 8   vote."

 9   MR. SMITH: Right.

10   JUSTICE ALITO: Now, under Ohio's

11   system, is someone removed solely because of

12   failure to vote?

13   MR. SMITH: Yes, Your Honor.

14   Absolutely.

15   JUSTICE ALITO: So the notices --

16   there's no requirement -- if somebody doesn't

17   vote forever but returns that notice, the

18   person would be removed from the list?

19   MR. SMITH: We're talking about people

20   who don't return the notice. The case is only

21   about people who don't return the notice.

22   JUSTICE ALITO: No, I understand that,

23   but I don't see how that -- how that's solely.

24   MR. SMITH: Well, because the only

25   evidence that they have that you have moved,

 1   which is the permissible category, is your

 2   non-voting. And so Congress, when it -- when

 3   it -- when it wrote that would have thought

 4   that the -- the Supplemental Process removes

 5   people solely for non-voting. It didn't think

 6   of the confirmation process as a reason to

 7   remove people.

 8   And it certainly didn't think

 9   non-return of the notice was a reason to remove

10   people. It was looking at --

11   JUSTICE ALITO: If somebody returns

12   the notice, they never vote, but they return

13   the notice, are they removed from the list?

14   MR. SMITH: The notice -- when they

15   return the notice, the question is, what do

16   they say? Do they say I'm still living on Main

17   Street like I always have? Then they -- they

18   stay on the list. If they say I have moved to

19   Oklahoma, then they get purged.

20   That -- that -- but in either event,

21   the state then has direct information about

22   where they live and can take whatever action it

23   should.

24   The -- the problem we have here is

25   that this kind of notice, which, by the way,

       1   says you don't have to return it, you can just

       2   choose to vote sometime in the next four years,

       3   most of the time isn't going to get returned.

       4   And so it doesn't provide you any evidence at

       5   all on which to decide that these people should

       6   be purged. And you end up with a system which

       7   looks an awful lot like the old Ohio use-it-or-

       8   lose-it system, which is some period of

       9   non-voting, one notice that most people don't

      10   return, and we're going to -- we're going to

      11   throw you off the rolls.

      12   Now, the other thing -- the other --

      13   other fact that's in the record is the small

      14   number of people that were -- that the

      15   Supplemental Process supposedly is trying to

      16   find. We have in the record evidence about how

      17   many people moved to a different county or

      18   state in each year. This is evidence the State

      19   put in the record, Exhibit E to their main

      20   brief in the district court. And it shows that

      21   about 3 percent of people in this country move

      22   to a different county or state outside of the

      23   registrar's jurisdiction, to use the term --

      24   terminology in the -- in the statute.

      25   Three percent a year.

```
 1          That's a small number by itself.  But
 2     then the Supplemental Process only is triggered
 3     with -- to try to find that -- some sliver of
 4     those people who have not already been
 5     identified because they changed their address
 6     with the Bureau of Motor Vehicles or because
 7     they posted a forwarding address with the Post
 8     Office.
 9          And so what --
10          JUSTICE SOTOMAYOR:  Mr. Smith, could
11     you give me concrete numbers?  How many voters
12     have been purged as a result of this system?
13          MR. SMITH:  Well, Your Honor, I can't
14     give you exact numbers, but I -- I would refer
15     you to the biennial Election Assistance
16     Commission reports that -- that look in detail
17     at all the states' processes with respect to
18     registration and perjury -- purge.  I -- I -- I
19     do know that -- two things I can tell you, Your
20     Honor.
21          It's certainly in the hundreds of
22     thousands in -- in many years.  It was
23     something like several hundred thousand in
24     2015, according to the more recent report
25     that's not in the record.
```

 1   And I can also tell you that the

 2 evidence shows --

 3   JUSTICE SOTOMAYOR: But you gave me

 4 3 percent of people nationally move.

 5   MR. SMITH: Move to a different county

 6 or state.

 7   JUSTICE SOTOMAYOR: I -- I guess what

 8 I'm trying to get to is about how many people

 9 in Michigan actually move?

10   MR. SMITH: Well, the -- the Ohio, the

11 statistics that were put in were national. But

12 those --

13   JUSTICE SOTOMAYOR: I'm sorry, I

14 misspoke. In Ohio.

15   MR. SMITH: Ohio apparently thinks

16 it's pretty -- the -- the -- the national

17 statistics -- statistics represent Ohio because

18 that's the statistics they put in. I don't

19 think the Census does these mobility statistics

20 by state, or at least that's not in the record.

21   But 3 percent is roughly the right

22 amount. But then you'd have to reduce that --

23   JUSTICE SOTOMAYOR: I don't know.

24 Three percent of what?

25   MR. SMITH: People move in each year.

         1   JUSTICE SOTOMAYOR: I -- I understand

         2   that. But what's the -- 3 percent of what

         3   greater number?

         4   MR. SMITH: Of all people in the

         5   country.

         6   JUSTICE SOTOMAYOR: Of all people in

         7   the country.

         8   MR. SMITH: Yes.

         9   JUSTICE SOTOMAYOR: So we have to

        10   divide it up and do that math.

        11   MR. SMITH: Well, it is -- it is -- in

        12   other words, only -- 97 percent of people do

        13   not move to another county or state in any

        14   given year. That's -- that's what the

        15   statistic is.

        16   And then, you know, there's -- most of

        17   those 3 percent are going to be located

        18   presumably in some -- in one of the other ways.

        19   So we're talking about a relatively

        20   tiny group of people which they then -- the

        21   process that they then use begins with 50 or

        22   60 percent of people who don't vote for two

        23   years. Thank you, Your Honor.

        24   CHIEF JUSTICE ROBERTS: You can have a

        25   couple of minutes as well.

          1   MR. SMITH: And so, you know, the

          2   process is vastly overbroad in its design to

          3   try to find this relatively small group of

          4   people, starting with 50 or 60 percent in an --

          5   in an -- in an off-year election don't vote;

          6   70 percent don't return the notice. You're

          7   just going to end up with a lot of false

          8   positives in the end, and that is, in fact, how

          9   the system is -- is operating.

         10   It -- it finds a lot of people that

         11   supposedly have moved who simply haven't moved.

         12   I think I'll leave it at that, Your Honor.

         13   CHIEF JUSTICE ROBERTS: Okay. Thank

         14   you, counsel.

         15   Two minutes, Mr. Murphy.

         16   REBUTTAL ARGUMENT OF ERIC E. MURPHY

         17   ON BEHALF OF THE PETITIONER

         18   MR. MURPHY: Thank you, Mr. Chief

         19   Justice:

         20   The first question I'd like to answer

         21   is about the statistics of the number of people

         22   who move without notifying the Post Office.

         23   That is in the record. There's an Inspector

         24   General report that suggests that 40 percent of

         25   individuals don't notify the Post Office.

 1   That's Doc 38-6, page ID number 395 in the

 2   district court's docket.

 3   I think this is significant because it

 4   shows why the Postal Service provision is a

 5   safe harbor for meeting the state's obligation

 6   to remove individuals, because it's going to be

 7   woefully insufficient for that task. States

 8   are going to have to do other efforts if they

 9   actually want to maintain adequate rolls rather

10   than just worry about the threat of getting

11   sued on the other side of the compromise that

12   is -- that is at issue here.

13   And I think this goes to that this, in

14   the end, was a -- a -- a statute that was

15   balancing competing purposes: On the one hand

16   trying to remove ineligible voters, on the

17   other hand trying to ensure protections for

18   eligible voters.

19   And it came up with a compromise. And

20   that compromise let a lot of room for states in

21   our federal system to adopt the procedures that

22   are best in that state.

23   And with respect to sending

24   information, I would say that my friend on the

25   other side mentioned the ERIC program. Ahead

```
 1    of the 2016 election, Ohio sent something like

 2    1.6 million letters to potentially eligible yet

 3    unregistered voters, many of those if they were

 4    removed under our process could have received

 5    this notice from ERIC ahead of the registration

 6    deadline encouraging them to register.  I'd

 7    also note that --

 8              JUSTICE SOTOMAYOR:  I'm sorry, they

 9    don't get -- people don't get notice that they

10    have been struck.  They get one notice, they're

11    put on the inactive list.  Was I correct about

12    that?

13              MR. MURPHY:  Under the NVRA, you're

14    only -- the minimum requirement is --

15              JUSTICE SOTOMAYOR:  I'm not asking --

16              MR. MURPHY:  Yeah.

17              JUSTICE SOTOMAYOR:  Under Ohio's law,

18    do they get only one notice?

19              MR. MURPHY:  Only one notice, but --

20              JUSTICE SOTOMAYOR:  They don't get a

21    notice when they're purged.  So they don't know

22    they've been purged.  They have to go to the

23    polls to find that out.

24              MR. MURPHY:  That's why I was

25    mentioning the ERIC program --
```

1   JUSTICE SOTOMAYOR: Well, that --

2   that's --

3   MR. MURPHY: -- because we just sent

4   1.6 million letters to all potentially eligible

5   voters who -- who were not registered.

6   JUSTICE SOTOMAYOR: Would you answer

7   my question? Are they ever sent, anyone who's

8   sent a notice and put on the inactive list, are

9   they ever again sent any voting information

10   outside of this ERIC program?

11   MR. MURPHY: So Matt Damschroder's

12   declaration at Doc 38-2 suggested that the

13   state ahead of the 2016 election sent absentee

14   ballot applications, so you could vote because

15   we have no excuse voting. That would have gone

16   to many of these individuals. Not everybody.

17   It would have gone to any of the individuals

18   who had been sent this notice and had voted in

19   the previous election, 2012.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel. The case is submitted.

22   (Whereupon, at 11:10 a.m., the case

23   was submitted.)

24

25

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1.2 [2] **47:**25 **66:**18
1.5 [2] **42:**24 **66:**17
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