

# *HUSTED V. A. PHILIP RANDOLPH INSTITUTE: HOW CAN STATES MAINTAIN THEIR VOTER ROLLS?*

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## INTRODUCTION

Under our federal system of government, individual states designate how elections for federal office are carried out, including how voters register and stay registered, subject to certain guidelines imposed by the federal government. Oftentimes, broad policy goals of federal statutes can conflict, leaving states to determine what is an acceptable compromise. In *Husted v. A. Philip Randolph Institute*,<sup>1</sup> the Supreme Court has the opportunity to provide guidance to the states on what is an acceptable policy choice. By upholding Ohio’s Supplemental Process, the Supreme Court can delineate the line between maintaining an accurate voter roll and not removing people solely for failing to vote. This commentary argues that this would be the proper outcome for three reasons. First, the National Voter Registration Act of 1993 (“NVRA”) bans states from using nonvoting as the cause of removal, which the Ohio law does not do.<sup>2</sup> Second, the Help America Vote Act of 2002 (“HAVA”) clarifies that states are allowed to send out notices to voters to confirm where they live and can remove them if they do not respond or vote.<sup>3</sup> Third and finally, the NVRA only requires reasonable efforts on the part of states, implying that individual state choices should be given deference by the courts.

## I. FACTS

The state of Ohio uses two distinct methods for determining when a potential voter is ineligible due to having moved.<sup>4</sup> In the first

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1. *Husted v. A. Philip Randolph Inst.*, No. 16-980 (U.S. May 30, 2017).
2. National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (2012).
3. Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2012).
4. See OHIO REV. CODE. ANN § 3503.21 (2016).

method, which is not challenged in this case, the Ohio Secretary of State compares the state voter lists to the National Change of Address (“NCOA”) database.<sup>5</sup> If a registered voter is listed as having moved, a confirmation notice is sent to the old address.<sup>6</sup> Voters are then removed from the voter rolls if they do not respond to the notice and do not vote within the next four year period that contains two federal general elections.<sup>7</sup>

The second method, called the “Supplemental Process”, follows the same process as the first method, but the triggering event is different.<sup>8</sup> Under the Supplemental Process, each county’s board of electors compiles a list of registered voters who have not engaged in voter activities over the past two years.<sup>9</sup> Once on the list, a voter is sent a confirmation similar to the one sent in the first method.<sup>10</sup> They are then removed from the rolls if they do not respond to the notice or vote within the next four years.<sup>11</sup>

During the 2016 federal election, roughly 7,515 people who showed up to vote would have been unable to cast their ballots had the law been allowed to go into place.<sup>12</sup> With the injunction granted, all 7,515 individuals were allowed to cast a provisional ballot.<sup>13</sup>

## II. LEGAL BACKGROUND

The seemingly conflicting federal policies about when and how to ensure accurate voter rolls, which appear in both the NVRA and HAVA, are at issue in *Husted*.<sup>14</sup>

### A. National Voter Registration Act

Congress passed the National Voter Registration Act in 1993 for two specific purposes: to (1) increase the number of eligible citizens who register and participate in elections and (2) protect the integrity of the voting process by ensuring that accurate voter lists are

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5. See *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 702 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (2017).

6. *Id.* at 703.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Brief for Petitioner at 13–14, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (2017) [hereinafter Brief for Petitioner].

13. *Id.* at 14.

14. See *id.* at 2.

maintained.<sup>15</sup> Congress noted that some states used unfair registration and list maintenance practices that had the effect of keeping voters away from the polls, which deprived these voters of their fundamental right to vote.<sup>16</sup> The NVRA sought to end these practices while ensuring that ineligible voters were kept off voter rolls.<sup>17</sup>

As one of many methods<sup>18</sup> to achieve its first goal of increasing the number of registered voters, the NVRA sought to keep registered voters on the voter rolls until they actually became ineligible.<sup>19</sup> Because not being registered to vote was one of the primary reasons given for not voting,<sup>20</sup> Congress sought to increase the number of voters registered by making it more difficult to remove eligible voters.<sup>21</sup> The NVRA lists five specific reasons for removal from the voter rolls including: a voter's request for removal,<sup>22</sup> criminal conviction,<sup>23</sup> mental incapacitation,<sup>24</sup> death,<sup>25</sup> or change of residence.<sup>26</sup> Prior to NVRA's enactment, many states had used nonvoting or voter inactivity as a reason to remove voters from the rolls.<sup>27</sup> The NVRA specifically banned this practice in the Failure-to-Vote Clause.<sup>28</sup>

To achieve its second goal of maintaining accurate and current voter lists, the NVRA imposed new duties on the states. The primary duty at issue here required states to make a "reasonable effort to remove the names of ineligible voters" from the voter rolls if they died or moved out of the district.<sup>29</sup> These programs were subject to additional limitations. They could not violate the Voting Rights Act or remove a registered voter "by reason of the person's failure to vote."<sup>30</sup>

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15. See 52 U.S.C. § 20501(b)(1)–(4).

16. § 20501(a)(3).

17. § 20501(b)(1)–(4).

18. See, e.g., §§ 20504–20506 (requiring states to allow registration through the Department of Motor Vehicles, through mail, and through public offices); § 20507(a)(1) (requiring states to leave registration open until at least 30 days before an election).

19. See § 20507(a)(3)–(4) (limiting the situations in which the states can remove registered voters from the voter lists).

20. See H.R. REP. NO. 103-9, at 3.

21. See § 20507(a)(3)–(4).

22. § 20507(a)(3)(A).

23. § 20507(a)(3)(B).

24. *Id.*

25. § 20507(a)(4)(A).

26. § 20507(a)(4)(B).

27. Brief for Petitioner, *supra* note 12, at 4.

28. § 20507(b)(2).

29. § 20507(a)(4).

30. § 20507(b)(1)–(2).

To provide a guideline for how states could meet this duty, Congress laid out a two-step process for attempting to confirm that a person had moved to a new location if the Postal Service had not already documented the move.<sup>31</sup> The first step is to send a confirmation letter to the address, requesting that the voter fill out a form to confirm that they still lived at that address.<sup>32</sup> If the person did not return the completed form, he or she could be removed from the voter list if he or she did not vote or attempt to vote in any election before the next two general federal elections are held.<sup>33</sup> The NVRA did not explicitly prohibit or allow refraining from voting to serve as a trigger for the confirmation notices.<sup>34</sup> This omission had led to confusion over what states are allowed to do to reach the safe harbor of the two-step confirmation process outlined by the NVRA.<sup>35</sup>

### *B. Help America Vote Act*

Partially in response to this confusion, Congress passed the Help America Vote Act in 2002.<sup>36</sup> HAVA changed the NVRA in two main ways: by clarifying when a state election official could remove someone from the voter list because they had moved,<sup>37</sup> and adding the duty to maintain an accurate and current statewide voter list.<sup>38</sup>

The clarification was made by adding the phrase “except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list . . . if the individual” did not respond to the confirmation notice or vote in the next two general federal elections to the NVRA’s Failure-to-Vote Clause.<sup>39</sup> This made clear that it was acceptable to use the person’s lack of voting after the confirmation was sent to remove that person from the voter list, so long as the process was not discriminatory in nature.<sup>40</sup>

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31. § 20507(d)(1)(B)(i)–(ii).

32. § 20507(d)(1)(B)(i).

33. § 20507(d)(1)(B)(ii).

34. *See* § 20507.

35. *Compare* Brief for Petitioner, *supra* note 12, at 14, *with* Brief for Respondent at 21, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (2017) [hereinafter Brief for Respondent].

36. Brief for Respondent, *supra* note 35, at 8–9.

37. Brief for Petitioner, *supra* note 12, at 9; Brief for Respondent, *supra* note 35, at 9.

38. Brief for Petitioner, *supra* note 12, at 9–10; Brief for Respondent, *supra* note 35, at 10.

39. § 20507(b)(2).

40. *See id.*; Brief for Respondent, *supra* note 35, at 37.

The second change required states to keep a statewide list of all registered voters and make reasonable efforts to maintain it.<sup>41</sup> An added duty under HAVA made removal of voters who did not respond to confirmation notices or vote in the next two general federal elections mandatory.<sup>42</sup> The NVRA's exception to this rule, that otherwise eligible voters could not be removed for not voting, was kept in place. However, HAVA added a qualifier to the exception by stating that "no registrant may be removed *solely* by reason of a failure to vote" (emphasis in Brief for Petitioner, but not in statute).<sup>43</sup> Still, the change made clear that it was not overruling or substantially altering the NVRA's limitations on what processes were allowable.<sup>44</sup>

### III. HOLDING

The Sixth Circuit held Ohio's Supplemental Process violated the Failure-To-Vote Clause<sup>45</sup> because the notices were triggered by the would-be voter's failure to vote.<sup>46</sup> Since Ohio's Supplemental Process only begins when a registered voter does not vote, the Sixth Circuit held that not voting was the cause of removal.<sup>47</sup>

### IV. ARGUMENTS

The parties in *Husted* disagree on two basic points related to the NVRA and HAVA. The first basic question is whether Ohio's Supplemental Process violates Section 8 of the NVRA. The next question is whether or how the HAVA clarification changed what constitutes an allowable scheme under the regulation.

*A. Does Ohio's Supplemental Process, which relies on voter inactivity to trigger the sending of confirmation notices, violate Section 8 of the NVRA?*

Petitioner Jon Husted, Ohio's Secretary of State, argues that Ohio's Supplemental Process is allowed under the NVRA for three primary reasons.<sup>48</sup> First, Petitioner argues that the section requires

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41. Help America Vote Act of 2002, 52 U.S.C. § 21083(a) (2012).

42. § 21083(a)(4)(A).

43. *Id.*; see Brief for Petitioner, *supra* note 12, at 9–10.

44. § 21083(a)(4)(A).

45. § 20507(b)(2).

46. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 711–12 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (2017).

47. *Id.* at 15–16.

48. Brief for Petitioner, *supra* note 12, at 13.

voter inactivity to be the proximate cause of the purge for Ohio's process to violate the NVRA and that the requirement of a failure to respond to notice by the registered voter severs that required causal connection.<sup>49</sup> The relevant subsection of the statute explains how a state's process "shall not result in the removal of . . . any person from the official list of voters registered to vote . . . by reason of the person's failure to vote."<sup>50</sup> This language, particularly the "by reason of," has been interpreted by other courts to require proximate cause.<sup>51</sup> According to Petitioner, if failing to vote was not the proximate cause of the removal, then the process has not violated the NVRA.<sup>52</sup> Petitioner argues that the lack of a response to the confirmation notice is the proximate cause of the removal.<sup>53</sup> The voter is assumed to have moved because they did not respond to the letter, not simply because they have not voted.<sup>54</sup> Because this extra step is present, Petitioner argues that failure to vote is not the proximate cause and thus the process is allowable under the NVRA.<sup>55</sup>

Second, Petitioner argues that had Congress meant to ban this trigger for sending out confirmation letters, it would have made it far more explicit.<sup>56</sup> Petitioner notes how common this type of process was when the NVRA passed.<sup>57</sup> To ban it would have been seen as a large departure from the status quo.<sup>58</sup> Courts generally should not assume that Congress subtly makes massive changes to current processes.<sup>59</sup> Rather, Congress is assumed to only make large changes when it does so explicitly. The NVRA explicitly bans the failure to vote as the sole cause of removal, but it does not ban failure to vote as a triggering mechanism.<sup>60</sup> Petitioner argues that the NVRA should be read in a way that allows for processes like Ohio's Supplemental Process to be maintained.<sup>61</sup>

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49. *Id.* at 19.

50. § 20507(d)(2).

51. Brief for Petitioner, *supra* note 12, at 22 (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

52. *Id.* at 19.

53. *Id.* at 24.

54. *Id.*

55. *Id.* at 24–25.

56. *Id.* at 27.

57. *See id.* at 4 (noting states that used nonvoting as a trigger for removal).

58. *Id.* at 27–28.

59. *Id.* at 27 (citing *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

60. *See id.* at 27–29.

61. *See id.*

Third, Petitioner argues that the language banning use of voter inactivity should only apply to the actual removal, not the trigger for sending confirmation notices.<sup>62</sup> The statute says nothing about what can or can not trigger confirmation notices.<sup>63</sup> Petitioner argues that reading this phrase into the statute changes its meaning in an unacceptable way.<sup>64</sup> The statute must instead be read as a whole, with different requirements for its different parts.<sup>65</sup> This allows the use of voter inactivity to trigger the sending of confirmation notices, while it would clearly be impermissible to use it as the sole reason for removing voters.<sup>66</sup>

Respondent A. Philip Randolph Institute, in contrast, first argues that not responding to a confirmation notice is not an acceptable reason for removal under the NVRA.<sup>67</sup> Respondent notes that there are very clear examples of acceptable reasons for removal listed in the statute, and that being unresponsive is not one of them.<sup>68</sup> Thus, even if not responding was the proximate cause, that interpretation of the statute would still lead to a violation of the NVRA.<sup>69</sup>

Second, Respondent argues that the use of proximate cause at all in the interpretation of this statute is inappropriate.<sup>70</sup> Rather, the word “result” should be given its plain meaning.<sup>71</sup> This would lead to a much broader scope of what would be inappropriate under the statute than Petitioner’s view.<sup>72</sup> If failure to vote were a trigger for the notices, it would clearly have an effect on the outcome, if for no other reason than the process of removal would never have started without it.<sup>73</sup>

Third, Respondent argues that even though use of not voting to confirm a move is allowable under the statute, its use before notice has been sent out is clearly not allowed.<sup>74</sup> The delineation between the subparts of the statute is necessary to prevent part of it from being

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62. *See id.* at 31–32.

63. *See* 52 U.S.C. § 20507 (2012).

64. *See* Brief for Petitioner, *supra* note 12, at 30–31.

65. *Id.* at 31.

66. *See id.* at 34–35 (comparing the language used in different sections of the statute).

67. Brief for Respondent, *supra* note 35, at 25.

68. *Id.* at 25–26.

69. *Id.* at 26.

70. *Id.* at 31.

71. *See id.* at 28.

72. *See id.* at 29–30.

73. *See id.*

74. *See id.* at 38–39.

rendered mere surplusage.<sup>75</sup> If there is no distinction between the confirmation process requirements and the normal removal requirements, then the subsection setting out the specific requirements of confirmation becomes unnecessary.<sup>76</sup> Thus, Ohio's Supplemental Process cannot be deemed to have met the statutory requirements.<sup>77</sup>

*B. Did the HAVA amendments alter the legality of Ohio's Supplemental Process?*

Petitioner argues first that even if the language of the NVRA was ambiguous as to whether Ohio's Supplemental Process was allowed, HAVA's clarification clearly establishes it as an allowable process.<sup>78</sup> The legislative history of the amendment clarifies that it was designed to permit schemes like the one utilized by Ohio.<sup>79</sup> Prior to its enactment, the Department of Justice ("DOJ") had targeted other states with similar schemes.<sup>80</sup> Yet following the enactment of HAVA, the DOJ entered into an agreement with Philadelphia that mandated it use a scheme similar to the one used by Ohio.<sup>81</sup>

Additionally, Petitioner argues that the wording of the HAVA amendment makes it clear that it was designed to limit when the prohibition of removal for nonvoting applied.<sup>82</sup> The first part was in the Failure to Vote Clause, which added, "except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual" whom did not respond to notice or vote in over the next four-year period with two general federal elections.<sup>83</sup> This would indicate that HAVA hemmed in when the prohibition would apply.<sup>84</sup> The second major change caused by HAVA required the states to maintain statewide voter lists.<sup>85</sup> When maintaining these lists, states were banned from using nonvoting as the "sole[] . . . reason" for

75. *See id.* at 39–40.

76. *See id.*

77. *Id.* at 40.

78. Brief for Petitioner, *supra* note 12, at 35.

79. *See id.* at 36–37.

80. *See id.* at 36.

81. *Id.*

82. *See id.* at 37.

83. 52 U.S.C. § 20507(b)(2) (2012); Brief for Petitioner, *supra* note 12, at 36.

84. *See* Brief for Petitioner, *supra* note 12, at 36–37.

85. *See id.* at 38–39.



removing a voter from the list.<sup>86</sup> Since Ohio was maintaining its voter list and used a lack of response to a confirmation notice as a reason, Ohio's Supplemental Process should be allowed to stand.<sup>87</sup>

Conversely, Respondent argues that HAVA merely clarified NVRA's prohibition on the use of nonvoting as a reason for removal.<sup>88</sup> The amendment's main purpose was to clear up when there was an exception to the broad prohibition against the use of nonvoting.<sup>89</sup> Since it is an exception to the general rule and purpose of the statute, it should be limited in its scope.<sup>90</sup> Therefore, the clarified statute must be read so that removal for nonvoting is only allowed in the narrow example of not responding to confirmation notices.<sup>91</sup> The use of nonvoting to send out confirmation notices would still be impermissible under the HAVA amendments.<sup>92</sup>

Second, Respondent argues that the HAVA clarification in § 21083(a)(4)(A) confirms that Ohio's Supplemental Process violates the law.<sup>93</sup> The main contention is with the phrase "*except that* no registrant may be removed solely by reason of a failure to vote[]" in the statute (emphasis added).<sup>94</sup> If the two conditions of not responding and not voting were enough to always result in removal, this phrase would have no purpose, as no voter would be removed solely for nonvoting.<sup>95</sup> For the phrase to have any practical effect and not be mere surplusage, there must be an example of something that would fall under the exception.<sup>96</sup> Therefore, this phrase should be read in a way that gives it meaning, so using a nonresponse to a confirmation notice cannot always be enough to prevent nonvoting from being the sole cause.<sup>97</sup> Ohio's Supplemental Process is an example of removal for nonvoting and it should not be allowed to stand.<sup>98</sup>

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86. *Id.* at 39 (quoting 52 U.S.C. § 21083(a)(4)(A) (2012) ("except that no registrant may be removed solely by reason of a failure to vote")).

87. *Id.* at 45.

88. Brief for Respondent, *supra* note 35, at 44.

89. *Id.* at 44–45.

90. *See id.* at 45.

91. *See id.* at 45–46.

92. *See id.* at 46.

93. *Id.*

94. *Id.* at 46–47 (citing 52 U.S.C. § 21083(a)(4)(A) (2012)).

95. *See id.*

96. *Id.* at 47.

97. *See id.* (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).

98. *See id.* at 48–49.

## V. ANALYSIS

The Supreme Court should uphold Ohio’s Supplemental Process as a valid procedure under the NVRA and HAVA amendments. The statutory language, both prior to and after the HAVA amendments, permits such a process. A Supreme Court decision upholding the law as a valid exercise of state power would provide a much-needed guideline for other states seeking to thread the needle between keeping voters eligible and maintaining accurate voter lists.<sup>99</sup>

Courts normally read laws as a whole so that different clauses and parts do not conflict with each other.<sup>100</sup> This canon of construction should be applied to the NVRA. The ban on the use of nonvoting should not be read to conflict with the proscribed two-step process if a reconciliation between the two phrases is possible.<sup>101</sup> That is certainly the case with the NVRA. The clarification of the Failure-to-Vote clause makes it clear that it was not meant to conflict with the confirmation process. By reading a conflict into the statute, the Sixth Circuit left the mandate of maintaining accurate voter lists severely weakened, as there would be no specific event, absent self-reporting of a move, that could be sure to allow the process to begin.<sup>102</sup>

An alternative reading of the statute that avoids conflict is available to the Court. While the Court need not import causation analysis from tort law into the context of voting rights and voter list maintenance as Petitioner suggests,<sup>103</sup> a plain reading of when the confirmation process is allowed under the HAVA amendments provides a more palatable alternative. The word “solely” is crucial to the statute.<sup>104</sup> If something is caused by more than one factor, it is not solely caused by either one.<sup>105</sup> Under Ohio’s Supplemental Process, a voter can never vote and still retain eligibility. All the voter would have to do is respond to the confirmation notice when it is sent out, and the voter would remain on the voter list. Reading the statute as a

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99. Georgia, Montana, Oklahoma, Oregon, Pennsylvania, and West Virginia utilize a process similar to Ohio’s process. Brief for Respondent, *supra* note 35, at 15–16.

100. See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722–23 (2017) (presuming that identical words used in different parts of the same statute carry the same meaning).

101. See *id.*

102. See *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 711–12 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (2017).

103. See Brief for Petitioner, *supra* note 12, at 19.

104. 52 U.S.C. §§ 21083(a)(4)(A) (2012).

105. *Solely*, MERRIAM-WEBSTER (online ed. 2018) (“to the exclusion of all else”).

whole allows states to maintain accurate voter rolls while still prohibiting removal for non-voting. Such a reading would also place Ohio's Supplemental Process clearly within the acceptable limits.

There is also no reason to treat the potential use of non-voting to trigger the confirmation notices as an exception, as Respondent suggests.<sup>106</sup> If the Court were to treat this allowance as an exception to the general rule, it would be appropriate to limit its scope.<sup>107</sup> Such a limitation would allow for its use once the confirmation process has started, but would prohibit it from being a trigger. However, reading the language to create an exception is unnecessary when interpreting the NVRA. The law is silent about what can be used as a triggering event, except for the voter's appearance in the NCOA database.<sup>108</sup> The statute can be read as a whole to allow all the parts to complement each other by interpreting it as banning failure to vote as the sole cause for removal. Thus, there would be no need to read the mandate of § 21083(a)(4)(A) as an exception to this rule since it clearly does not fall under the prohibition.

From a more practical perspective, prior to a decision in this case, there is an open question about what is an acceptable trigger to send confirmation notices to voters. Clearly, if the voter is listed in the NCOA database, a confirmation notice can be sent to the address to start the removal process.<sup>109</sup> However, there are studies to suggest that a significant number of people do not go through the trouble of registering their moves to different addresses.<sup>110</sup> There is no clear, practical way for states to trigger the process for removing these ineligible voters from the list.

One potential legislative alternative to Ohio's Supplemental Process would be to send every registered voter a confirmation notice every two years, regardless of whether they have voted in the past two years. If they do not return the confirmation notice, they would be subject to the same removal process imposed by Ohio's current law.

This would not protect people from inaccurate removal. No effort would be made to determine if people had moved before sending out the notices. If a person were to be removed under Ohio's current

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106. See Brief for Respondent, *supra* note 35, at 39–40.

107. See *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (“[The Court] usually read[s] the exception narrowly in order to preserve the primary operation of the provision.”).

108. 52 U.S.C. § 20507(c)(1)(2012).

109. *Id.*

110. See Brief for Petitioner, *supra* note 12, at 46.

process, he or she would still be removed under this alternative. The person would still receive the notice, would still not respond, and would still not vote for the next four years. The only difference would be that under the mass confirmation process, more potentially eligible voters would be removed since a larger pool of people would be at risk. Yet, under the logic of the Sixth Circuit's opinion, this result would be acceptable under the law, since the trigger for sending out confirmation notices was in no way related to not-voting.<sup>111</sup>

The states are "laboratories for experimentation to devise various solutions where the best solution is far from clear."<sup>112</sup> That reasoning should rule the day in this case. According to census statistics, 16.9 million Americans move to a new county annually.<sup>113</sup> Yet, a significant amount of these Americans do not report their change of address.<sup>114</sup> The question of how to remove these unreported voters in accordance with the NVRA is still an open question. By allowing Ohio's program to stand, the Court would go a long way towards clearing up this issue. States seeking to be in compliance with the dual mandates of the NVRA would have the ability to do so by following Ohio's lead. Whereas if this law is struck down, states would still be scrambling to bring their voter list maintenance standards within the requirements of the law.

There is no question that voting rights and the sanctity of elections are hot-button topics.<sup>115</sup> Americans have become more politically polarized since the NVRA and HAVA amendments were enacted.<sup>116</sup> It would not be a surprise for the Supreme Court to split 5-4 with a Republican-appointed majority writing the opinion of the Court. Though upholding Ohio's Supplemental Process would seem to be a partisan decision, the federal law itself and the practical considerations of the effects of the opinion make this the correct

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111. See *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 711–12 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (2017).

112. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

113. Press Release, U.S. Census Bureau, Americans Moving at Historically Low Rates, Census Bureau Reports (Nov. 16, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-189.html>.

114. See Brief for Petitioner, *supra* note 12, at 46.

115. See Matt Ford, *Use It or Lose It?*, THE ATLANTIC (May 30, 2017), <https://www.theatlantic.com/politics/archive/2017/05/supreme-court-ohio-voting/528573/>; Ariane de Vogue, *Supreme Court Will Consider Ohio Voter Purge Case*, CNN (May 30, 2017), <http://www.cnn.com/2017/05/30/politics/ohio-supreme-court/index.html>.

116. *Political Polarization, 1994-2017*, PEW RES. CTR. (Oct. 20, 2017), <http://www.people-press.org/interactives/political-polarization-1994-2017/>.

decision for the Court to make. The Court has made far more impactful and potentially political decisions in the realm of voting rights before.<sup>117</sup> Therefore, it should not let the appearance of politics prevent the Court from coming to the correct legal decision.

#### CONCLUSION

The Court has an opportunity to provide certainty for states looking for answers on how to resolve the paradox created by conflicting federal policies on voter list maintenance. By following the plain language of the statutes at issue, the Supreme Court can provide states with a blueprint for how to comply with these dueling mandates. Ohio has sought and succeeded in finding an equitable balance that is allowable under the NVRA and HAVA. Consequently, the Supreme Court should overturn the Sixth Circuit and find Ohio's Supplemental Process is within the bounds of the NVRA and HAVA.

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117. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding that the Voting Rights Act provision setting forth a coverage formula was unconstitutional); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (holding that the state's interests identified as justifications for an Indiana statute requiring government issued photo identification to vote were sufficiently weighty to justify the limitation imposed on voters).