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# Notice, Due Process, and Voter Registration Purges

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# NOTICE, DUE PROCESS, AND VOTER REGISTRATION PURGES

ANTHONY J. GAUGHAN\*\*

## ABSTRACT

In the 2018 case of *Husted v. A. Philip Randolph Institute*, a divided United States Supreme Court upheld the procedures that Ohio election authorities used to purge ineligible voters from the state’s registration lists. In a 5-4 ruling, the majority ruled that the Ohio law complied with the National Voter Registration Act of 1993 (“NVRA”) as amended by the Help America Vote Act of 2002 (“HAVA”). This Article contends that the controlling federal law—the NVRA and the HAVA—gave the Supreme Court little choice but to decide the case in favor of Ohio’s secretary of state. But this article also argues that the Ohio procedure fails to constitute good public policy even though it complies with federal law. Accordingly, this Article concludes with a set of modest proposals for reforming the notification process used in list maintenance procedures.

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## I. INTRODUCTION

One of the most controversial rulings of the 2017–18 Supreme Court term was *Husted v. A. Philip Randolph Institute*.<sup>1</sup> In a 5-4 decision, the Court’s conservative majority upheld an Ohio election statute that establishes the State’s procedure for identifying and removing ineligible voters from the State’s voting rolls.<sup>2</sup> The statute’s challengers claimed that the Ohio list maintenance procedure—known as the “Supplemental Process”—purged thousands of eligible voters in violation of the National Voter Registration Act of 1993 (“NVRA”) as amended by the Help America

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<sup>1</sup> 138 S. Ct. 1833 (2018); see also Jeffrey Toobin, *The Supreme Court’s Husted Decision Will Make It More Difficult for Democrats to Vote*, THE NEW YORKER (June 11, 2018), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-husted-decision-will-make-it-more-difficult-for-democrats-to-vote> (arguing that the *Husted* decision will be viewed as a tool to purge “disfavored voters” from state voting rolls).

<sup>2</sup> *Husted*, 138 S. Ct. at 1848 (“We have no authority to second-guess Congress or to decide whether Ohio’s Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.”).

Vote Act of 2002 (“HAVA”).<sup>3</sup> Ultimately, the Supreme Court held that the Supplemental Process complied with the NVRA.<sup>4</sup>

Many media commentators and Democratic politicians condemned the *Husted* decision and accused the conservative majority of aiding and abetting voter disenfranchisement. For example, Jeffrey Toobin of the *New Yorker* asserted that the *Husted* “ruling is bad enough on its own terms, but what makes Justice Samuel Alito’s opinion so chilling is the way that it invites other states” to adopt Ohio’s “anti-democratic practice” of purging “less-frequent voters from its rolls.”<sup>5</sup> Mark Joseph Stern of *Slate* declared the ruling “a nightmare scenario for voting-rights advocates.”<sup>6</sup> Garrett Epps of the *Atlantic* predicted that the *Husted* ruling would aid the Republican Party and undermine the Democratic Party by facilitating the disenfranchisement of poor and minority voters.<sup>7</sup> Likewise, Democratic Congressman Tim Ryan warned that “[w]ith this decision, Ohio Secretary of State Jon Husted and states across the country were given the all clear to silence American voters.”<sup>8</sup>

This Article analyzes the *Husted* decision, and in the process, makes three central points. First, this Article contends that the controlling federal law—the NVRA (as amended by HAVA)—gave the Supreme Court little choice but to rule in favor of Ohio. The central question in *Husted* was straightforward: Does the NVRA permit states to use non-voting as a basis for identifying voters who may have moved out of state or out of their local voting jurisdiction? The Ohio law at issue in *Husted* used non-voting as a trigger event for the State’s list maintenance procedure. When a registered voter failed to participate in any election activity over a two-year period, Ohio law directed that such voters receive a postcard notification from state election officials asking the voter to confirm their address. If the voter failed to respond to the address-confirmation notification, and also failed to vote in any election in the subsequent four years, election authorities removed the voter from the State’s voter registration list.

In contesting Ohio’s law, the challengers argued that the NVRA entirely barred states from using non-voting as the trigger for beginning the list maintenance process.<sup>9</sup>

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<sup>3</sup> *Id.* at 1841 (“A pair of advocacy groups and an Ohio resident (respondents here) think that Ohio’s Supplemental Process violates the NVRA and HAVA.”).

<sup>4</sup> *Id.* at 1848.

<sup>5</sup> Toobin, *supra* note 1.

<sup>6</sup> Mark Joseph Stern, *Supreme Court, in 5–4 Decision, Allows States to Purge Voters for Their Failure to Vote*, SLATE (June 11, 2018), <https://slate.com/news-and-politics/2018/06/supreme-court-greenlights-ohio-voter-purges-in-husted-v-randolph.html>.

<sup>7</sup> Garrett Epps, *The Supreme Court Blesses Voter Purges*, THE ATLANTIC (June 12, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-supreme-court-blesses-voter-purges/562589/> (“The predictable result is that many Ohioans who should vote will not be allowed to; the other equally predictable result is that a disproportionate number of them will be poor or members of minority communities. The third predictable result is that disenfranchisement of those voters will aid the Republican Party and disadvantage their opposition, the Democrats.”).

<sup>8</sup> Tim Ryan, *Supreme Court Ruling on Voter Roll Purge Undermines the Right to Vote*, THE HILL (June 12, 2018), <http://thehill.com/blogs/congress-blog/politics/391900-supreme-court-ruling-on-voter-roll-purge-undermines-the-right-to>.

<sup>9</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1845 (2018).

The four dissenting justices in *Husted* agreed with the challengers.<sup>10</sup> The dissenters asserted that the NVRA bars state election authorities from using non-voting as one of the criteria for determining when an address confirmation notice should be sent to voters.<sup>11</sup>

But both the challengers, as well as the dissent, read more into the NVRA's language than the text would support. As the majority rightly pointed out, the NVRA only establishes bare minimum requirements for states to abide by when identifying ineligible voters.<sup>12</sup> Indeed, when Congress amended the NVRA with the HAVA in 2002, it added language that expressly barred states from using non-voting as the *sole* basis for purging voter registrations.<sup>13</sup> Consequently, the most logical interpretation of the NVRA's text was that it permitted the use of non-voting as a basis for implementing the list maintenance process, but not as the sole basis for removing a voter from registration lists. In the end, the majority's reading of the statute simply made more sense than the strained interpretation offered by the dissent.

Nevertheless, this Article also argues that the Ohio voter-purging procedure fails to constitute good public policy even though it complies with the NVRA. The bottom line is the NVRA does not hold states to a high enough standard in warning voters of the potential cancellation of their registration. It may have been reasonable in the 1990s for Congress to only require states to send a single address confirmation notice via U.S. Mail, but a quarter-century later such minimal notice is no longer adequate. The rise of email has reduced the importance of U.S. Mail in most voters' lives, and the concomitant increase in junk mail has increased the risk that voters will inadvertently ignore a single postcard from state election authorities.

This Article's third and final point consists of a modest set of proposals to remedy the NVRA's inadequacies. Foremost among them, Congress should amend the NVRA to require states to provide more notice to voters before removing them from registration rolls. Congress should also require the states to offer same-day registration in federal elections. At present, only a minority of states have adopted same-day registration, which means there is no fallback relief for most voters around the country victimized by overly aggressive voter registration purges. But until same-day registration becomes a reality nationwide, future plaintiffs in cases like *Husted* should consider bringing claims under the Fourteenth Amendment's Due Process Clause. When election authorities strike a voter from the registration rolls without providing adequate notice, the state violates the voter's right to due process. Thus, a due process claim may afford voters relief in cases like *Husted* where the plain language of the NVRA otherwise fails to protect disenfranchised voters.

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<sup>10</sup> *Id.* at 1850 (Breyer, J., dissenting).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1847 (majority opinion).

<sup>13</sup> *Id.* at 1844.

## II. THE NVRA AND THE OHIO SUPPLEMENTAL PROCESS

Historically, states routinely removed voters from registration rolls for the sole reason that the voters had failed to vote in recent elections.<sup>14</sup> In some cases, states even failed to provide prior notice to voters before striking them from the rolls.<sup>15</sup>

Concerned by the impact on federal elections, Congress took a much more active role in supervising the states' administration of voter registration lists in the early 1990s.<sup>16</sup> Acting pursuant to its authority under the Elections Clause,<sup>17</sup> Congress enacted the National Voter Registration Act in 1993.<sup>18</sup> The NVRA had two main objectives.<sup>19</sup> The first was to make "it easier for all Americans to register to vote."<sup>20</sup> The "Motor Voter Law," as the NVRA has come to be known, requires states to give qualified voters the opportunity to register to vote when applying for or renewing their drivers' licenses.<sup>21</sup> The NVRA's effort to increase voter registration succeeded almost immediately. In 1996—just three years after the law's adoption—the percentage of registered voters reached 72%, the highest percentage ever recorded.<sup>22</sup> By 2012, voter registration nationwide had increased by 7% from the 1990s.<sup>23</sup>

Besides increasing voter registration, Congress also had a second objective in enacting the NVRA: encouraging the states to update and modernize their voting rolls. To that end, the NVRA requires the states to maintain up-to-date voter registration

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<sup>14</sup> *Id.* at 1845 (describing "the once-common state practice of removing registered voters simply because they failed to vote for some period of time.").

<sup>15</sup> *Id.* at 1838 ("Before the NVRA, some States removed registrants without giving any notice").

<sup>16</sup> *Id.* at 1850–51.

<sup>17</sup> The Elections Clause provides that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

<sup>18</sup> *Husted*, 138 S. Ct. at 1850–51 (Thomas, J., concurring).

<sup>19</sup> *Id.* at 1838 (majority opinion) ("The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls.").

<sup>20</sup> *Id.*; see also *About the National Voter Registration Act*, UNITED STATES DEP'T OF JUST., <https://www.justice.gov/crt/about-national-voter-registration-act#1993> (last visited Mar. 10, 2019) ("The Act has made it easier for all Americans to register to vote and to maintain their registration.").

<sup>21</sup> 52 U.S.C. § 20504(a)(1) (2012) ("Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.").

<sup>22</sup> *The Impact of the National Voter Registration Act of 1993 on the Administration of Federal Elections*, FEDERAL ELECTION COMM'N (June 1997), <https://www.fec.gov/about/reports-about-fec/agency-operations/impact-national-voter-registration-act-1993-administration-federal-elections-html/>.

<sup>23</sup> ROYCE CROCKER, CONG. RESEARCH SERV., R40609, THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS 23 (Sept. 18, 2013), <https://fas.org/sgp/crs/misc/R40609.pdf>.

lists by removing ineligible voters from their rolls.<sup>24</sup> The NVRA specifically mandates that each state “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.”<sup>25</sup>

The NVRA’s concern with up-to-date registration lists reflected Congress’s awareness that Americans frequently move out of their voting jurisdictions. About forty million Americans change addresses each year,<sup>26</sup> a number so large it means that state voter registration rolls routinely become outdated with each new election cycle. For example, a 2012 Pew Center on the States study found that about twenty-four million voter registrations are either “no longer valid or significantly inaccurate.”<sup>27</sup> The Pew study underscored the disorganized and underfunded nature of the voter registration system in the United States.<sup>28</sup>

The NVRA sought to end that haphazard process by establishing minimum national standards for the states in cleaning up their voting rolls.<sup>29</sup> To modernize the system, the NVRA directs the states to cancel a voter’s registration if the registrant “confirms in writing that the registrant has changed residence to a place outside the registrar’s jurisdiction.”<sup>30</sup> The written notification described in the NVRA usually consists of the voter’s submission of an “Official USPS Change of Address” form, which is available online.<sup>31</sup> Approximately 60% of people who move notify the U.S. Postal Service of their address change,<sup>32</sup> and some estimates put the number as high as 70%.<sup>33</sup>

The Postal Service notification system thus enables state election authorities to identify a majority of voters who change addresses.<sup>34</sup> But because 30% to 40% of

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<sup>24</sup> *Husted*, 138 S. Ct. at 1838 (“The Act has two main objectives: increasing voter registration and removing ineligible persons from the States’ voter registration rolls.”).

<sup>25</sup> 52 U.S.C. § 20507(a)(4) (2012).

<sup>26</sup> Michael Sauter, *Population Migration: These Are the Cities Americans Are Abandoning the Most*, USA TODAY (July 5, 2018), <https://www.usatoday.com/story/money/economy/2018/07/05/cities-americans-abandoning-population-migration/35801453/>.

<sup>27</sup> *Election Initiatives Issue Brief*, PEW CTR. ON THE STATES (Feb. 2012), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2012/pewupgradin gvoterregistrationpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewupgradin gvoterregistrationpdf.pdf).

<sup>28</sup> Adam Liptak, *Voter Rolls Are Rife with Inaccuracies, Report Finds*, N.Y. TIMES (Feb. 14, 2012), <https://www.nytimes.com/2012/02/14/us/politics/us-voter-registration-rolls-are-in-disarray-pew-report-finds.html>.

<sup>29</sup> *Husted*, 133 S. Ct. at 1863–64 (Breyer, J., dissenting).

<sup>30</sup> 52 U.S.C. § 20507(d)(1)(A) (2012).

<sup>31</sup> *Official USPS Change of Address*, UNITED STATES POSTAL SERVICE, <https://moversguide.usps.com/mgo/disclaimer?referral=UMOVE> (last visited Apr. 14, 2019).

<sup>32</sup> *Husted*, 133 S. Ct. at 1840.

<sup>33</sup> Brief for Asian Americans Advancing Justice et al. as Amicus Curiae Supporting Respondents at 28, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980) [hereinafter AAAJ Amicus Brief].

<sup>34</sup> *Voter List Accuracy*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 22, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx>.

movers do not inform the Postal Service,<sup>35</sup> the states must rely on alternative methods to identify the millions of voters who move out of their voting jurisdictions without informing election officials.

Whatever supplemental methods a state uses, the NVRA requires election authorities to send an address-confirmation notice to the registrant's last known address to confirm whether the registrant still lives there.<sup>36</sup> The address-confirmation notice must include a pre-addressed, postage-paid return card.<sup>37</sup> The NVRA further requires that the confirmation notice must "explain what a registrant who has not moved needs to do to stay on the rolls."<sup>38</sup>

But even if the voter fails to mail back the return card, the state must wait years before canceling the voter's registration.<sup>39</sup> The NVRA mandates that—after sending the confirmation notice—state election authorities cannot strike a non-responding voter from the rolls until two federal election cycles pass without the voter participating in any voting activity.<sup>40</sup> Thus, the NVRA's procedure is straightforward. If a voter fails to respond to the address-confirmation notice, and then does not vote in any election during the following two federal election cycles, the state may cancel the voter's registration.<sup>41</sup> But not before then.<sup>42</sup>

All sides in the *Husted* case agreed on what happens *after* an address-confirmation notice is sent. The parties agreed that the NVRA requires states to send an address-confirmation notice to voters before canceling the voter's registration.<sup>43</sup> The parties also agreed that the NVRA requires election authorities to wait for two full federal election cycles to pass before striking a non-responding voter from the registration rolls.<sup>44</sup>

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<sup>35</sup> *Husted*, 133 S. Ct. at 1840; AAAJ Amicus Brief, *supra* note 33, at 28.

<sup>36</sup> *Husted*, 133 S. Ct. at 1839; 52 U.S.C. §20507(d)(2) (2012).

<sup>37</sup> *Husted*, 133 S. Ct. at 1839.

<sup>38</sup> *Id.* at 1839; 52 U.S.C. §20507(d)(2) (2012).

<sup>39</sup> *Husted*, 133 S. Ct. at 1839 ("Subsection (d) treats the failure to return a card as some evidence—but by no means conclusive proof—that the voter has moved. Instead, the voter's name is kept on the list for a period covering two general elections for federal office (usually about four years).").

<sup>40</sup> 52 U.S.C. § 20507(d)(1) (2012).

<sup>41</sup> *Husted*, 138 S.Ct. at 1839 ("Only if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district . . . may the registrant's name be removed.").

<sup>42</sup> 52 U.S.C. § 20507(d)(2) (2012) ("If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters. . . .").

<sup>43</sup> *Husted*, 138 S. Ct. at 1853 (Breyer, J., dissenting).

<sup>44</sup> *Id.*

The dispute in *Husted* concerned the circumstances under which the state could send the address-confirmation notice in the first place.<sup>45</sup> The question turned on the NVRA's "Failure-to-Vote" clause.<sup>46</sup> When enacted in 1993, the NVRA stated that state voter registration programs "shall not result in the removal of the name of any person . . . by reason of the person's failure to vote."<sup>47</sup> But the act also expressly permitted the states to cancel the registrations of voters who "did not mail back a return card and did not vote during a period covering two general federal elections."<sup>48</sup>

The Failure-to-Vote clause thus appeared to create a paradox. On the one hand, the clause prohibited states from canceling a voter's registration for failing to vote.<sup>49</sup> But on the other hand, the NVRA expressly authorized states to cancel a voter's registration when two conditions were met: (1) the voter failed to mail back a return card and (2) then *failed to vote* over the next two federal election cycles.<sup>50</sup> Under what circumstances, then, did the Failure-to-Vote Clause bar states from using non-voting as grounds for removing a registrant?

Congress attempted to clarify matters nearly a decade later. In 2002 Congress enacted the Help America Vote Act ("HAVA") as an amendment to the NVRA.<sup>51</sup> One of HAVA's new provisions explained that "registrants who have not responded to a notice and who have not voted in two consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote."<sup>52</sup> HAVA thus appeared to suggest that a state could use failure to vote as a criterion for removing a voter from the voting rolls, but not as the sole criterion. The state needed to have at least one additional indication that the voter had changed addresses.

Like other states across the country, Ohio found itself forced to change its voting registration procedures following the NVRA's adoption in 1993. Prior to the NVRA, Ohio had a strict practice of canceling voter registrations.<sup>53</sup> The Ohio state constitution directed state election authorities to cancel the registration of any voter who failed "to vote in at least one election during any period of four consecutive years."<sup>54</sup> Ohio required such individuals to reregister before being allowed to vote again.<sup>55</sup>

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<sup>45</sup> *Id.* at 1840–41 (majority opinion).

<sup>46</sup> *Id.* at 1840; 52 U.S.C. § 20507(b)(2) (2012).

<sup>47</sup> *Husted*, 138 S. Ct. at 1840; 52 U.S.C. § 20507(b)(2) (2012).

<sup>48</sup> *Husted*, 138 S. Ct. at 1840.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1840.

<sup>52</sup> *Id.* at 1840 (emphasis added); 52 U.S.C. § 21083(a)(4)(A) (2012).

<sup>53</sup> *Ohio A. Phillip Randolph Inst. v. Husted*, No. 2:16-cv-303, 2016 U.S. Dist. LEXIS 84519, at \*6 (S.D. Ohio June 29, 2016), *rev'd*, 838 F.3d 699 (6th Cir. 2016).

<sup>54</sup> OHIO CONST. art. V, § 1 ("Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote."); *Husted*, 2016 U.S. Dist. LEXIS 84519, at \*6.

<sup>55</sup> OHIO CONST. art. V, § 1.



In response to the NVRA, Ohio amended its registration maintenance process in 1994.<sup>56</sup> To identify ineligible voters, the amended state law directed Ohio election authorities to utilize the U.S. Postal Service's national change of address ("NCOA") service.<sup>57</sup> Ohio's list maintenance procedure specifically requires the Ohio Secretary of State to consult the Postal Service NCOA database on an annual basis to maintain the State's voter registration list.<sup>58</sup>

In *Husted*, neither the challengers nor the dissenting justices objected to Ohio's use of the NCOA process.<sup>59</sup> Instead, they objected to the supplementary process Ohio adopted to identify other ineligible registrants.<sup>60</sup>

At the time in which Ohio adopted the NCOA process, it also established a "Supplemental Process" to identify and remove registrants who failed to notify the Postal Service of their change of address.<sup>61</sup> In compliance with the NVRA, Ohio's Supplemental Process incorporated both the address-confirmation process and the post-notice waiting period of two federal election cycles—including a presidential general election—before removing voters from the rolls.<sup>62</sup> Ohio's Supplemental Process consisted of two stages. First, the state identified voters inactive for a two-year period and sent them a notice warning them that their failure to vote could lead to their removal from the voting rolls.<sup>63</sup> The notice informed the voters that they needed to confirm their current address using a pre-addressed, postage-paid return card provided by the state (as required by the NVRA).<sup>64</sup> Second, if a voter ignored the notice and failed to mail back the return card, a clock began running on the voter's registration.<sup>65</sup> If the voter ultimately skipped voting for a period of four years after

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<sup>56</sup> *Husted*, 138 S. Ct. at 1840.

<sup>57</sup> *Id.*

<sup>58</sup> *Husted*, 2016 U.S. Dist. LEXIS 84519, at \*5.

<sup>59</sup> *See Husted*, 138 S. Ct. at 1841.

<sup>60</sup> *Id.* at 1841.

<sup>61</sup> *Id.* at 1840.

<sup>62</sup> *Husted*, 138 S. Ct. at 1840–01; *see also Husted*, 2016 U.S. Dist. LEXIS 84519, at \*6 ("Ohio implemented its current procedures to comply with and mirror the procedures established by the NVRA."), *id.* at \*10 ("then fails to engage in any voter activity for a period of four consecutive years, including two federal general elections (one being a presidential general election) from the date that the confirmation card is mailed").

<sup>63</sup> *Id.* at \*23–24 ("Pursuant to the Ohio Supplemental Process, a confirmation notice is sent to voters who have been inactive for two years. If they do not respond to the confirmation notice, they are placed on an inactive list, but their ability to vote does not change at that time.").

<sup>64</sup> *Id.* at \*11 ("The boards of elections send each such individual identified a confirmation notice by forwardable mail with a postage pre-paid return envelope . . . . If the individual returns the confirmation notice and provides a new address, the individual's registration record is updated by the appropriate board of elections with the new address. If the individual returns the confirmation notice confirming that his or her current address is still accurate, the board notes on the individual's registration record that the confirmation notice was returned to the board and the address was confirmed.") (internal citations omitted).

<sup>65</sup> *Id.* ("If an individual fails to return the confirmation notice, fails to update his or her voter registration, and fails to engage in any other voter activity, the individual will be marked as 'inactive' in the registration database. This 'inactive' individual has all the rights of an otherwise

receiving the return card (for a total of six years of non-voting), the Ohio law automatically removed the voter from the state registration list.<sup>66</sup>

The controversy at issue in *Husted* arose from the method Ohio adopted to determine when to send address-confirmation cards to voters.<sup>67</sup> The Ohio law called for sending return cards to registrants “whose lack of voter activity” over a two-year period “indicates they may have moved.”<sup>68</sup> The statute defined “voter activity” as casting a ballot in any federal, state, or local election,<sup>69</sup> but it also included other election-related activities, such as signing a petition, submitting a new voter registration form, or updating a home address with state agencies.<sup>70</sup> Accordingly, under the Supplemental Process, if a voter failed to engage in any “voter activity” over a two-year period, the State of Ohio sent the voter a return card to confirm the voter’s address.<sup>71</sup>

More than two decades after Ohio amended its list maintenance procedures, a group of plaintiffs—the A. Philip Randolph Institute (“Randolph Institute”), the Northeast Ohio Coalition for the Homeless (“NEOCH”), and an Ohio voter named Larry Harmon—brought suit against Ohio’s Republican Secretary of State, Jon Husted, to enjoin the State from removing registered voters using the Supplemental Process.<sup>72</sup> The plaintiffs alleged that the Supplemental Process wrongfully canceled the registrations of thousands of eligible voters.<sup>73</sup> They further alleged that the Supplemental Process disproportionately burdened people of color and low-income communities.<sup>74</sup> The case emerged amid a nationwide uproar over a highly controversial series of voting restrictions—including, especially, Voter ID laws—that Republican legislatures across the country adopted in the 2010s.<sup>75</sup> Critics claimed that

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qualified elector, including the ability to cast a regular ballot at any election. If, however, four years (including two federal general elections) passes without voter activity, at that time the individual’s voter registration record is cancelled.”) (internal citations omitted).

<sup>66</sup> *Id.* at \*24 (“If those on the inactive list then fail to vote in the next two general federal elections, one of which is a Presidential election, then those voters are removed from the voter registration rolls.”).

<sup>67</sup> *Husted*, 138 S. Ct. at 1841.

<sup>68</sup> *Id.* at 1840.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1841 (“Moreover, the term ‘voter activity’ is broader than simply voting. It also includes such things as ‘sign[ing] a petition,’ ‘filing a voter registration form, and updating a voting address with a variety of [state] entities.’”).

<sup>71</sup> *Id.* at 1840–41.

<sup>72</sup> *Husted*, 2016 U.S. Dist. LEXIS 84519, at \*4.

<sup>73</sup> *Id.* at \*6.

<sup>74</sup> *Id.* (“Plaintiffs state that ‘the [Ohio] Supplemental Process disproportionately burdens Ohio’s most vulnerable and marginalized citizens. In Cuyahoga County, for example, the purged voters disproportionately reside in communities of color and low-income communities.’”).

<sup>75</sup> See Danny Hakim and Michael Wines, *‘They Don’t Really Want Us to Vote’: How Republicans Made It Harder*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/politics/voting-suppression-elections.html>.

Republicans enacted these new laws to discourage minority constituencies aligned with the Democratic Party from voting.<sup>76</sup>

The centerpiece of the plaintiffs' legal argument was the contention that the Supplemental Process violated the NVRA by using a voter's failure to vote during a two-year period as the "trigger" for sending the address-confirmation notice.<sup>77</sup> The plaintiffs asked the court "to interpret the NVRA as a mandate that voter inactivity can only be considered after the confirmation notice is sent and cannot be used as the trigger for initiating the address-confirmation process."<sup>78</sup>

In 2016, the district court granted summary judgment to Secretary of State Husted, holding that Ohio's list maintenance policies "comply with and mirror the procedures established by the NVRA."<sup>79</sup> The judge observed that the "Plaintiffs want the Court to read requirements and language into the NVRA that simply are not there."<sup>80</sup> The judge emphasized that no provision in the NVRA barred states from using voter inactivity as a trigger for initiating the address-confirmation process.<sup>81</sup> The judge further pointed out that Ohio removed voters from the State's registration lists "only after a person both (1) fails to respond to the confirmation process, and (2) subsequently fails to vote in the following two general federal elections."<sup>82</sup> Accordingly, the district court concluded that Ohio's Supplemental Process complied with the NVRA because "voters are never removed from the voter registration rolls *solely* for failure to vote."<sup>83</sup>

But a divided panel of the Sixth Circuit disagreed.<sup>84</sup> The panel majority focused on the fact that Ohio sent the confirmation notice when voters failed to vote over a

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<sup>76</sup> See Amy Gardner, *Concerns About Voter Access Dominate Final Stretch Before Election Day*, WASH. POST (Nov. 4, 2018), [https://www.washingtonpost.com/politics/concerns-about-voter-access-dominate-final-stretch-before-election-day/2018/11/04/b660c216-dece-11e8-b732-3c72cbf131f2\\_story.html?utm\\_term=.b0182428c8af](https://www.washingtonpost.com/politics/concerns-about-voter-access-dominate-final-stretch-before-election-day/2018/11/04/b660c216-dece-11e8-b732-3c72cbf131f2_story.html?utm_term=.b0182428c8af); Ari Berman, *How Voter Suppression Could Swing the Midterms*, N.Y. TIMES MAG. (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/opinion/sunday/voter-suppression-georgia-2018.html>.

<sup>77</sup> *A. Phillip Randolph Institute v. Husted*, 838 F.3d 699, 707–08 (6th Cir. 2016), *rev'd*, 138 S. Ct. 1833 (2018) ("[U]nder the Supplemental Process, the confirmation notice procedure is 'triggered' by a registrant's failure to engage in any 'voter activity' for two years.").

<sup>78</sup> *Husted*, 2016 U.S. Dist. LEXIS 84519, at \*21.

<sup>79</sup> *Id.* at \*7.

<sup>80</sup> *Id.* at \*22.

<sup>81</sup> *Id.* ("Plaintiffs argue that Ohio may only send a confirmation notice to a voter 'to confirm a change of residence after the state has already obtained reliable second-hand information, independent of the voter's failure to vote, indicating that a voter has moved.' Plaintiffs continue, '[a]llowing states to initiate the voter-removal process based on a failure to vote—as Ohio is now doing—would eviscerate subsection (b)'s plain language, allowing the exception to swallow the rule.' However, this is not what the NVRA states. The plain language of the NVRA contradicts Plaintiffs' position") (internal citations omitted).

<sup>82</sup> *Husted*, 2016 U.S. Dist. LEXIS 84519, at \*24.

<sup>83</sup> *Id.* at \*23.

<sup>84</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018) ("A divided panel of the Court of Appeals for the Sixth Circuit reversed.").

two-year period.<sup>85</sup> The two judges in the majority concluded that the “operation of the Supplemental Process’ trigger is ultimately based ‘solely’ on a person’s failure to vote.”<sup>86</sup> The panel viewed this as a fatal problem because the NVRA expressly prohibited “the removal of the name of any person . . . by reason of the person’s failure to vote.”<sup>87</sup> Accordingly, the Sixth Circuit panel ruled that the use of the two-year non-voting period as a trigger for the confirmation notice procedure violated the NVRA’s Failure-to-Vote Clause.<sup>88</sup> One judge on the panel, however, saw things differently. In dissent, Circuit Judge Siler argued that Ohio’s Supplemental Procedure complied with the NVRA because the State only removed registrants if they failed to vote *and* they “also failed to respond to the address-confirmation notice.”<sup>89</sup>

The divergent views on the Sixth Circuit panel foreshadowed the subsequent split on the United States Supreme Court. The difference of opinion came down to a single question: Did the NVRA’s Failure-to-Vote Clause bar the use of non-voting as a trigger for sending the address-confirmation notice?

### III. SCOTUS RULES FOR OHIO

In *Husted v. A. Philip Randolph Institute*, the United States Supreme Court was just as divided by the meaning of the NVRA’s Failure-to-Vote Clause as the lower courts. In a 5-4 ruling, the Supreme Court reversed the Sixth Circuit and held that Ohio’s Supplemental Process complied with the NVRA.<sup>90</sup>

In an opinion written by Justice Alito, the majority held that the NVRA permitted states to use non-voting as the basis for determining whether to send an address-confirmation notice to a voter.<sup>91</sup> Justice Alito asserted that the NVRA simply barred the “use of non-voting as the *sole* criterion for *removing* a registrant.”<sup>92</sup> Accordingly, in the majority’s view, sending an address-confirmation notice to a voter did not constitute removing a registrant from the voting rolls.<sup>93</sup> It simply put the voter on notice that state election authorities needed to confirm the voter’s address.<sup>94</sup> Therefore, in the majority’s view, Ohio’s use of the address-confirmation card brought the State

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<sup>85</sup> *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 703 (6th Cir. 2016), *rev’d*, 138 S. Ct. 1833 (2018) (“After compiling a list of inactive voters, each BOE [Board of Elections] sends a confirmation notice to those on its list.”).

<sup>86</sup> *Id.* at 711 (quoting *Common Cause of Colo. v. Buescher*, 750 F.Supp.2d 1259, 1274 (D. Colo. 2010)).

<sup>87</sup> 52 U.S.C. § 20507(b)(2) (2012); *Husted*, 138 S. Ct. at 1840.

<sup>88</sup> *Husted*, 838 F.3d at 711 (“operation of the Supplemental Process’ trigger is ultimately based ‘solely’ on a person’s failure to vote.”).

<sup>89</sup> *Id.* at 716 (Siler, J., dissenting in part and concurring in part).

<sup>90</sup> *Husted*, 138 S. Ct. at 1848 (“The only question before us is whether it violates federal law. It does not.”).

<sup>91</sup> *Id.* at 1842.

<sup>92</sup> *Id.* at 1842. (“We reject this argument because the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as the *sole criterion* for removing a registrant.”).

<sup>93</sup> *Id.* at 1843.

<sup>94</sup> *Husted*, 838 F.3d at 41–42 (Siler, J., dissenting in part and concurring in part).

into compliance with the NVRA.<sup>95</sup> Ohio's Supplemental Process only removed voters from the rolls if they failed to vote over a six-year period and failed to respond to the address confirmation notice, a procedure which the majority concluded was "expressly permitted" by the NVRA.<sup>96</sup>

The dissent, in contrast, contended that the NVRA's Failure-to-Vote Clause barred states from using non-voting as a trigger for starting the process of removing a registrant from the voting rolls.<sup>97</sup> Writing for the dissenting justices, Justice Breyer asserted that the words "by reason of the person's failure to vote" were "most naturally read to prohibit a State from considering a registrant's failure to vote as part of any process 'that is used to start, or has the effect of starting, a purge of the voter rolls.'"<sup>98</sup> Although Justice Breyer conceded that, when Congress amended the NVRA in 2002, it clarified that "no registrant may be removed *solely* by reason of a failure to vote," he did not think the qualification applied to the statute as a whole.<sup>99</sup> He argued that Congress only intended for it to apply to the period after state election authorities had already identified potentially ineligible voters and thus had already sent them address-confirmation cards.<sup>100</sup> In support of his narrow reading of the statute, Breyer pointed out that HAVA inserted the word "solely" in the NVRA section that addressed "registrants who have not responded to a notice," but not in the actual text of the Failure-to-Vote clause.<sup>101</sup> In the view of the plaintiffs and the dissenting justices, therefore, the NVRA only permitted states to consider non-voting *after* a state sent an address-confirmation card to a registrant and the registrant failed to respond to it.<sup>102</sup>

But the majority interpreted the NVRA's text quite differently. The idea that non-voting could be used as a criterion only after election authorities sent the voter a confirmation card struck Justice Alito as nonsensical.<sup>103</sup> In support of his broader reading of the statute, he pointed out an interesting juxtaposition. Just a few lines below the Failure-to-Vote clause—which barred states from removing registrants from the voting rolls "by reason of the person's failure to vote"—Congress went on to expressly permit removing registrants from the rolls if they ignored the address-confirmation card and then failed to vote in two consecutive federal elections.<sup>104</sup> In Alito's view, therefore, sole causation—not "but for" or proximate causation—was

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<sup>95</sup> *Husted*, 138 S. Ct. at 1843.

<sup>96</sup> *Id.* (holding that Ohio's procedure is "expressly permitted by federal law").

<sup>97</sup> *Id.* at 1853 (Breyer, J., dissenting).

<sup>98</sup> *Id.* at 1854 (quoting H.R. Rep. No. 103–9, at 15).

<sup>99</sup> *Id.* at 1858.

<sup>100</sup> *Id.* at 1853 ("In sum, § 8 tells States the following: . . . Do not target registered voters for removal from the registration roll because they have failed to vote. However, 'using the procedures described in subsections (c) and (d) to remove an individual' from the federal voter roll is permissible and does not violate the Failure-to-Vote prohibition.").

<sup>101</sup> *Id.* at 1858.

<sup>102</sup> *Id.* at 1843 (majority opinion) ("Respondents argue that the clause allows States to consider nonvoting only to the extent that subsection (d) requires—that is, only after a registrant has failed to mail back a notice.").

<sup>103</sup> *Id.* at 1844.

<sup>104</sup> *Id.* at 1842.

the only logical reading of the statute.<sup>105</sup> Thus, while it was true that a registrant's failure to vote triggered Ohio's process of reviewing the registrant's address status and sending the confirmation notice, the state's procedure did not constitute a violation of the Failure-to-Vote clause because Ohio used multiple criteria in ultimately removing the voter from the registration rolls.<sup>106</sup>

As Justice Alito saw it, Congress "made this point explicit" by enacting the 2002 HAVA amendments, one of which expressly directed that "no registrant may be removed *solely* by reason of a failure to vote."<sup>107</sup> The HAVA amendment, he concluded, "dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters."<sup>108</sup> Justice Alito thus asserted that the Failure-to-Vote Clause and the HAVA amendment should be read together as part of a cohesive whole to promote the congressional intent that "no registrant may be removed *solely* by reason of a failure to vote."<sup>109</sup> If a state only removed registrants who both failed to vote *and* failed to respond to a notice, the state was in compliance with the NVRA.

Accordingly, the majority ruled that Ohio's Supplemental Process complied with the NVRA because "[i]t does not strike any registrant solely by reason of the failure to vote" and it removes registrants in a manner "expressly permitted by federal law."<sup>110</sup> As the majority emphasized, Ohio used non-voting as one indication that the voter may have moved, but it did not use the failure to vote as an independent ground for removal.<sup>111</sup> Non-voting led to cancellation of a voter's registration only in conjunction with a voter's failure to respond to the address-confirmation notice. As Justice Alito explained, "Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years."<sup>112</sup>

The majority also emphatically rejected the idea that the NVRA gave federal courts a general power to judge the reasonableness of state policy decisions.<sup>113</sup> In dissent, Justice Breyer asserted that Congress required state list maintenance programs to use "reasonable" means to determine if a voter had moved.<sup>114</sup> Ohio, the dissent argued, had failed to use reasonable means in its Supplemental Process. According to the dissenting justices, "using a registrant's failure to vote is not a reasonable method for

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<sup>105</sup> *Id.* at 1843 ("By process of elimination, we are left with sole causation").

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1843 (emphasis added).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1842 ("the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as the sole criterion for removing a registrant, and Ohio does not use it that way. Instead, as permitted by subsection (d), Ohio removes registrants only if they have failed to vote and have failed to respond to a notice.").

<sup>110</sup> *Id.* at 1843.

<sup>111</sup> *Id.* at 1846 ("Ohio simply treats the failure to return a notice and the failure to vote as evidence that a registrant has moved, not as a ground for removal.").

<sup>112</sup> *Id.* at 1842.

<sup>113</sup> *Id.* at 1848.

<sup>114</sup> *Id.* at 1851 (Breyer, J., dissenting).

identifying voters whose registrations are likely invalid (because they have changed their addresses).<sup>115</sup> The dissent also argued that it was unreasonable to place much weight on a registrant's failure to respond to an address-notification card.<sup>116</sup>

But the majority easily brushed aside the dissent's reasonableness argument by pointing to the fact that the NVRA itself "attaches importance to the failure to send back the card" and the registrant's failure to vote.<sup>117</sup> As Justice Alito emphasized, "[t]he NVRA plainly reflects Congress's judgment that the failure to send back the card, coupled with the failure to vote during the period covering the next two general federal elections, is significant evidence that the addressee has moved."<sup>118</sup> In short, how could it be "unreasonable" for a state to follow the same procedures spelled out in the NVRA itself?

Underlying the majority ruling was its conclusion that Congress left it to the states to decide when an address-confirmation notice should be sent.<sup>119</sup> The key point in the majority's view was the fact that NVRA did not explain or direct the circumstances under which the address notification card could be sent.<sup>120</sup> As the majority explained, "[w]hile the NVRA is clear about the need to send a 'return card' (or obtain written confirmation of a move) before pruning a registrant's name, no provision of federal law specifies the circumstances under which a return card may be sent."<sup>121</sup> The majority saw Congress's failure to provide guidance regarding when the address-confirmation process should begin as evidence that Congress left it to the states to decide. As Justice Alito explained:

What matters for present purposes is not whether the Ohio Legislature overestimated the correlation between nonvoting and moving or whether it reached a wise policy judgment about when return cards should be sent. For us, all that matters is that no provision of the NVRA prohibits the legislature from implementing that judgment. Neither subsection (d) nor any other provision of the NVRA demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card. So long as the trigger for sending such notices is 'uniform, nondiscriminatory, and in compliance with the Voting Rights Act,' States can use whatever plan they think best.<sup>122</sup>

The Court thus reversed the Sixth Circuit panel and upheld the legality of Ohio's Supplemental Process.<sup>123</sup>

The Supreme Court's ruling in *Husted* elicited intense criticism from voting rights advocates. John Nichols of the *Nation* magazine declared that the *Husted* ruling "gave

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<sup>115</sup> *Id.* at 1853–54.

<sup>116</sup> *Id.* at 1854.

<sup>117</sup> *Id.* at 1848 (majority opinion).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1839.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1847.

<sup>123</sup> *Id.* at 1848.

Republican secretaries of state a go-ahead to resume the antidemocratic practice of purging fully qualified voters from registration rolls.”<sup>124</sup> Renée Graham of the *Boston Globe* accused the *Husted* majority of “aiding and abetting voter suppression.”<sup>125</sup> Leading Democrats also condemned the decision. Senator Elizabeth Warren warned that “[t]he Supreme Court’s decision to make it easier for Ohio to cross eligible voters off the rolls is a major step backwards for our democracy.”<sup>126</sup> Similarly, Senator Bernie Sanders declared that “[i]t’s a travesty that the Supreme Court upheld Ohio’s voter suppression efforts.”<sup>127</sup>

From a public policy perspective, the critics made important points. As discussed in the next section below, Ohio’s Supplemental Process is not sound public policy.

But from a legal perspective, the majority’s reasoning was ultimately far more persuasive than the dissent. The legal question was simple: When may states use non-voting as an indication that a voter has changed addresses? The dissenters’ answer to that question made little sense in practical terms. After all, the dissenting justices conceded that the NVRA permits states to cancel a voter’s registration if the voter fails to respond to an address-confirmation card and then fails to vote for two consecutive federal election cycles.<sup>128</sup> At the same rate, however, the dissenters insisted that the NVRA does not permit state election authorities to initiate the address-confirmation process on the basis of a voter’s failure to vote.

The dissent’s interpretation of the NVRA thus created a strange paradox. Why would Congress bar the use of non-voting as a trigger for sending an address-confirmation card, but then permit its use as a trigger for later cancelling the voter’s registration? Cancelling a voter’s registration is a far more severe penalty than simply being sent an address-confirmation notice. As a matter of logic and fairness, it would make more sense to permit the use of non-voting as a basis for sending the address-confirmation notice but not to permit the use of non-voting as a criterion for cancelling a voter’s registration. The dissent nevertheless claimed that the NVRA created an odd system that barred the use of non-voting for notification purposes but permitted it for cancellation purposes. The dissent never adequately explained why Congress would have created such a convoluted statute.

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<sup>124</sup> John Nichols, *How Did the Supreme Court Give a Green Light to Massive Voter Suppression? Two Words: Neil Gorsuch*, THE NATION (June 11, 2018), <https://www.thenation.com/article/supreme-court-give-green-light-massive-voter-suppression/>.

<sup>125</sup> Renée Graham, *The Supreme Court Aids and Abets Voter Suppression*, BOS. GLOBE (June 12, 2018), <https://www.bostonglobe.com/opinion/2018/06/12/supreme-court-aids-and-abets-voter-suppression/A304hBnWqfQ3eiMmmw5NiO/story.html>.

<sup>126</sup> Andrea Germanos, *‘Setback for Voting Rights’: Supreme Court Upholds Ohio’s Voter-Purge Process*, COMMON DREAMS (June 11, 2018), <https://www.commondreams.org/news/2018/06/11/setback-voting-rights-supreme-court-upholds-ohios-voter-purge-process>.

<sup>127</sup> *Id.*

<sup>128</sup> *Husted*, 138 S.Ct. at 1853 (Breyer, J., dissenting) (“In sum, § 8 tells States the following: . . . Do not target registered voters for removal from the registration roll because they have failed to vote. However, ‘using the procedures described in subsections (c) and (d) to remove an individual’ from the federal voter roll is permissible and does not violate the Failure-to-Vote prohibition.”).



In contrast, the majority offered a far more sensible interpretation of the NVRA. Justice Alito drew the quite logical inference that if four years of non-voting could be used as a criterion for cancelling the registration of a voter who failed to respond to an address-confirmation card, then surely it was also permissible to use two-years of non-voting as a basis for sending the confirmation card in the first place.<sup>129</sup>

Further support for the majority's reasoning came from the fact that Ohio's law—which was enacted in 1994—did not face a serious court challenge until 20 years and 10 federal election cycles after its passage. If Ohio and other states had so badly misread the NVRA, why had the issue not ended up in the courts decades before the *Husted* case?

The belated timing of the case suggested the real dispute was not over the legality of Ohio's Supplemental Process, but rather was part of a new national battle over election administration policy. Indeed, contrary to the misleading impression created by press coverage,<sup>130</sup> Ohio's Supplemental Process did not represent a new Republican effort to disenfranchise Democratic voters. Republican and Democratic secretaries of state had enforced the Ohio law for twenty years without controversy.<sup>131</sup> Moreover, if it were so obvious that Ohio's Supplemental Process (and similar list maintenance procedures in other states) violated the NVRA, voting rights advocates had a golden opportunity to amend and clarify the NVRA during the first two years of Barack Obama's presidency. In 2009–2010 Democrats held the White House and large majorities in both houses of Congress.<sup>132</sup> The Democrats could have amended the NVRA in any manner without needing the support of a single Republican member of Congress. But during the 2009–2010 term, neither the Obama Administration nor the Democratic Congress expressed significant objections to the procedures adopted by states like Ohio to maintain their registration lists. Only in the 2010s—as Voter ID laws became a flashpoint of national controversy—did voter registration systems become a hot button national issue.<sup>133</sup> The late-arising nature of the legal dispute thus

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<sup>129</sup> *Id.* at 1841 (majority opinion).

<sup>130</sup> See Richard Pildes, *Ohio's Voter Purge Law Has Been in Place for 24 Years*, ELECTION L. BLOG (June 12, 2018) <https://electionlawblog.org/?p=99500> (“[I]f the media coverage of this case has left you with the impression this was a recently enacted law, that’s wrong”).

<sup>131</sup> For a thoughtful discussion of this point, see Justin Levitt, *Voter Registration's Disappointing Day at the Court*, AM. CONST. SOC'Y BLOG (June 12, 2018), <https://www.acslaw.org/acsblog/voter-registrations-disappointing-day-at-the-court/> (“This is not a new piece of voter suppression devised by current elections officials: Ohio put the process in place 24 years ago, and it has been implemented by both Rs and Ds.”).

<sup>132</sup> Elana Schor, *Democrats in Firm Control of Both Houses*, THE GUARDIAN (Nov. 5, 2008), <https://www.theguardian.com/world/2008/nov/06/us-elections-2008-democrats-congress-house-representatives>.

<sup>133</sup> Robert Barnes, *Supreme Court Upholds Ohio's Way of Removing Infrequent Voters from Rolls*, WASH. POST (June 11, 2018), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-upholds-ohios-way-of-removing-voters-from-rolls-after-they-miss-elections/2018/06/11/5013195e-62c4-11e8-a768-ed043e33f1dc\\_story.html?utm\\_term=.61a7be18495c](https://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-ohios-way-of-removing-voters-from-rolls-after-they-miss-elections/2018/06/11/5013195e-62c4-11e8-a768-ed043e33f1dc_story.html?utm_term=.61a7be18495c) (“The subtext of the decision was a continuing battle between Republicans and Democrats over laws that regulate who gets to vote and when, including voter-ID requirements and restrictions on early voting. Republicans say the integrity of the process demands ensuring that only the eligible vote, while Democrats say

provided further evidence that Ohio's procedure complied with the NVRA. If not, litigation over it would have occurred in the 1990s, not the 2010s.

Also missing from the dissent was an appreciation of the states' legitimate interest in updating their voting rolls, an interest that the NVRA expressly recognized and promoted.<sup>134</sup> Although Justice Breyer minimized the change-of-address issue by emphasizing that only 4% of Americans move out of their counties every year,<sup>135</sup> 4% translates to over twelve million people, a significant number that creates ongoing administrative challenges for state election authorities. The postal service notification system is insufficient because 30-to-40% of Americans who change addresses fail to notify the postal service.<sup>136</sup> For that reason, the NVRA directs the states "to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence."<sup>137</sup> Thus, identifying and removing inactive voters from registration lists is not simply a necessary component of competent election administration; it is a federal mandate under the NVRA, one that Ohio complied with through the Supplemental Process.

The bottom line is that the NVRA gives states broad discretion in deciding how to maintain the accuracy of their voter registration lists. Few would have disagreed with that conclusion prior to the 2010s. Indeed, the Federal Election Commission noted in 1997—two decades before the *Husted* controversy—that "[t]he list maintenance provisions of the NVRA grant the States considerable latitude in the routine and systematic methods by which they may ensure the accuracy of their voter registration lists by removing the names of those who are no longer eligible."<sup>138</sup> Congress gave states such broad leeway under the act that it did not even assign enforcement of the NVRA to any particular federal agency.<sup>139</sup>

To be sure, Congress should have taken a more careful approach when drafting the NVRA. As discussed below, it was a mistake to give states such wide discretion. The NVRA should have provided clearer and more comprehensive guidance to ensure that list maintenance procedures did not lead to the disenfranchisement of eligible voters.

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that voter fraud is practically nonexistent and that the goal should be to enfranchise all who are eligible.").

<sup>134</sup> *About the National Voter Registration Act*, *supra* note 20.

<sup>135</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1856 (2018) (Breyer, J., dissenting) ("Ohio tells us that a small number of Americans—about 4% of all Americans—move outside of their county each year.").

<sup>136</sup> *Id.* at 1840 (majority opinion).

<sup>137</sup> *Id.* at 1838.

<sup>138</sup> *The Impact of the National Voter Registration Act of 1993 on the Administration of Federal Elections*, FED. ELECTION COMM'N (June 1997), <https://www.fec.gov/about/reports-about-fec/agency-operations/impact-national-voter-registration-act-1993-administration-federal-elections-html/>.

<sup>139</sup> CROCKER, *supra* note 23, at 10 ("Under the NVRA, no federal agency is responsible for implementation of the act. Although the FEC (EAC) was responsible for developing the mail registration form and for delivering a report to Congress every two years on the effectiveness of the NVRA, it had no further legal authority under the act. Similarly, the Department of Justice could bring suit against a state for the nonimplementation of the law, or for violations as specifically outlined in the NVRA, but had no authority to prescribe state implementation of the law. Implementation is, and has always been, the sole responsibility of each state.").

But that is a legislative prerogative, not a judicial mandate. As Justice Alito emphasized in the majority opinion in *Husted*:

[T]his case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio's Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.<sup>140</sup>

Justice Alito got it exactly right. The Constitution does not permit the Supreme Court to supplant the Congress as the Nation's federal legislative body. Consequently, in the *Husted* case, the Court's sole responsibility was to apply the language of the NVRA to the Ohio statute, not to rewrite the law. The majority fulfilled its responsibility in a sensible and competent manner, notwithstanding the ruling's unpopularity with much of the country.

#### IV. A POST-*HUSTED* REFORM AGENDA

The fact that Ohio's Supplemental Process complies with the NVRA does not mean Ohio's list maintenance procedure constitutes sound public policy. It does not. The Supplemental Process fails to provide sufficient notice to inactive voters prior to removing them from the state registration list. Making matters worse, Ohio and many other states do not offer safeguards—such as same-day registration—to protect voters wrongfully purged from the state's voting rolls. Legislative reform of the system is therefore both necessary and long overdue.

Although the dissenting justices in *Husted* did not make a persuasive legal argument, they nevertheless offered a compelling policy critique of the Ohio statute. In his dissent, Justice Breyer hit upon the core problem with Ohio's Supplemental Process: a single postcard notice is woefully inadequate.<sup>141</sup> In an age when email and other types of electronic messaging have become the dominant form of communication, many eligible voters will inevitably overlook a single notice sent via U.S. Mail. The U.S. Mail simply no longer plays the vital role it once did in American life. Email, texting, and online options for paying bills have supplanted the U.S. Postal Service, leading to a large decline in mail volume.<sup>142</sup> The overall volume of mail has fallen by 36% since 2007.<sup>143</sup>

In the meantime, the percentage of junk mail has surged.<sup>144</sup> To address its multi-billion dollar deficits, the U.S. Postal Service in the early 2010s began to actively

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<sup>140</sup> *Husted*, 138 S. Ct. at 1848.

<sup>141</sup> *See id.*

<sup>142</sup> Ryan W. Miller, *Debt-Plagued U.S. Postal Service Eyes Bipartisan Bill to Solve Woes*, USA TODAY (March 1, 2017), <https://www.usatoday.com/story/news/nation/2017/03/01/debt-plagued-us-postal-service-eyes-bipartisan-bill-solve-woes/97944594/>.

<sup>143</sup> *Id.*

<sup>144</sup> OFFICE OF INSPECTOR GEN., UNITED STATES POSTAL SERV., RARC-WP-16-006, ADVERTISING MAIL: PAST AND PRESENT (Mar. 28, 2016), [https://www.uspsoidg.gov/sites/default/files/document-library-files/2016/RARC-WP-16-006\\_0.pdf](https://www.uspsoidg.gov/sites/default/files/document-library-files/2016/RARC-WP-16-006_0.pdf).

solicit junk mail from advertisers to bolster declining postal revenues.<sup>145</sup> Unwanted advertisements now account for 59% of all mail delivered by the U.S. Postal Service<sup>146</sup> and the average American receives forty-one pounds of junk mail per year.<sup>147</sup>

The dramatic increase in junk mail heightens the risk that voters will overlook address-confirmation notices. For example, a study by New York University found that 44% of junk mail is thrown away unopened.<sup>148</sup> One can easily imagine how a voter might inadvertently discard a single postcard mailing from the secretary of state amid a sea of junk mail. Although the NVRA's return card system may have made sense a quarter-century ago in the age before email, it no longer accurately reflects how Americans communicate. Therefore, as a public policy matter, the Ohio return card procedure is manifestly inadequate. It can and should be replaced with a more effective method for notifying inactive voters.

Ohioans' low response rate to the address-confirmation notices further underscores the scale of the problem. For example, the Ohio Secretary of State's Office sent 1.5 million address-confirmation notices to inactive voters in 2012.<sup>149</sup> Approximately 300,000 people responded, with 60,000 confirming they had moved and 235,000 reporting that they had not moved.<sup>150</sup> The upshot is over one million people failed to respond, a number far larger than the total number of people who moved out of Ohio.<sup>151</sup> Adding to the concern is the disproportionate burden the Supplemental Process places on minority and impoverished communities.<sup>152</sup> For example, as Justice Sotomayor pointed out in her dissent, the National Association for the Advancement of Colored People found that in 2012 "African-American-majority neighborhoods in

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<sup>145</sup> Ron Nixon, *Seeking Revenue, Postal Service Plans to Deliver More Junk Mail*, N.Y. TIMES (Sept. 9, 2012), <https://www.nytimes.com/2012/09/20/business/seeking-revenue-postal-service-plans-to-deliver-more-junk-mail.html>.

<sup>146</sup> *How to Stop Junk Mail—Forever*, CBS NEWS (May 10, 2011), <https://www.cbsnews.com/news/how-to-stop-junk-mail-forever/> ("Advertising mail accounts for 59 percent of all mail Americans receive. But only half of that mail is ever read, according to the United States Postal Service.").

<sup>147</sup> Elisabeth Leamy, *How to Stop Junk Mail and Save Trees—and Your Sanity*, WASH. POST (Feb. 13, 2018), [https://www.washingtonpost.com/lifestyle/home/how-to-stop-junk-mail-and-save-trees--and-your-sanity/2018/02/12/6000e4c4-05d9-11e8-b48c-b07fea957bd5\\_story.html?utm\\_term=.9fbf70943996](https://www.washingtonpost.com/lifestyle/home/how-to-stop-junk-mail-and-save-trees--and-your-sanity/2018/02/12/6000e4c4-05d9-11e8-b48c-b07fea957bd5_story.html?utm_term=.9fbf70943996).

<sup>148</sup> Amy Rowley, *Event Advertising Turns Green with Boosts from Digital Media*, NORTH AMERICA TALK (Sept. 19, 2019), <https://www.northamericatalk.com/news/green-advertising-options/>.

<sup>149</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1856 (2018) (Breyer, J., dissenting).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ("[T]hose 1 million or so voters accounted for about 13% of Ohio's voting population. So if those 1 million or so registered voters (or even half of them) had, in fact, moved, then vastly more people must move each year in Ohio than is generally true of the roughly 4% of all Americans who move to a different county nationwide (not all of whom are registered voters). But there is no reason to think this. Ohio offers no such reason. And the streets of Ohio's cities are not filled with moving vans; nor has Cleveland become the Nation's residential moving companies' headquarters.") (internal citations omitted).

<sup>152</sup> *Id.* 138 S. Ct. at 1865–66 (Sotomayor, J., dissenting).

downtown Cincinnati had 10% of their voters removed due to inactivity” whereas the same was true of “only 4% of voters in a suburban, majority-white neighborhood.”<sup>153</sup>

The only saving grace is the fact that, ironically, Ohio’s turnout rate has steadily increased over the last two decades.<sup>154</sup> For example, voter turnout in presidential elections in Ohio rose from 57.8% in 2000<sup>155</sup> to 64.2% in 2016.<sup>156</sup> Midterm elections have also seen a significant turnout increase in Ohio.<sup>157</sup> For example, voter turnout in Ohio rose from 40.3% in the 2002 midterm elections<sup>158</sup> to 50.9% in the 2018 midterm elections.<sup>159</sup> Because the Supplemental Process only removes voters from the rolls after six consecutive years of not voting, the spike in voter turnout reduces the number of voters stricken from the state’s registration rolls. The turnout increase has thus mitigated some of the Supplemental Process’s flaws.

But increased turnout does not relieve election authorities of their obligation to ensure that no one is wrongfully disenfranchised. Even at a time of much improved turnout rates, some voters choose not to vote for six consecutive years. Therefore, in removing ineligible voters from registration lists, the states should put in place appropriate safeguards to protect eligible voters from the purge process. Unfortunately, however, the NVRA’s minimal standards do not mandate that the states adopt such safeguards.

Accordingly, Congress should strengthen the NVRA to prevent state voter registration purges from disenfranchising eligible voters.

First, Congress should require the states to substantially expand the notice they provide to voters who face removal from registration rolls. At a minimum, Congress should require state election authorities to send address-confirmation mailings to inactive voters on an annual basis. Sending more than one notice is crucial, as the example of political campaigns demonstrates. It is a routine feature of election seasons that political campaigns inundate voters with direct mailings.<sup>160</sup> The reason is because voters are more likely to respond to multiple mailings than just a single contact.

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<sup>153</sup> *Id.* at 1864.

<sup>154</sup> Compare 2000 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT (Dec. 28, 2011), <http://www.electproject.org/2000g>, with 2016 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT (Sept. 5, 2018), <http://www.electproject.org/2016g>.

<sup>155</sup> 2000 November General Election Turnout Rates, *supra* note 154.

<sup>156</sup> 2016 November General Election Turnout Rates, *supra* note 154.

<sup>157</sup> Compare 2002 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT (Dec. 28, 2011), <http://www.electproject.org/2002g>, with 2018 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT (Dec. 14, 2018), <http://www.electproject.org/2018g>.

<sup>158</sup> 2002 November General Election Turnout Rates, *supra* note 157.

<sup>159</sup> 2018 November General Election Turnout Rates, *supra* note 157.

<sup>160</sup> See, e.g., Martin E. Comas, *Political Mailers Are Pesky but Effective, Experts Say*, ORLANDO SENTINEL (Oct. 24, 2016), <https://www.orlandosentinel.com/news/politics/os-political-campaign-fliers-mailers-20161021-story.html> (describing how Florida voters’ mailboxes were “filled lately with glossy, colorful and sometimes obnoxious fliers from candidates hoping to grab a voter’s attention for a few seconds before the mail pieces land in the recycling bin.”).

Indeed, political scientists have found that “direct mail raises turnout by .6 percentage points for each mailing.”<sup>161</sup> Keenly aware of that fact, the average political campaign sends four-to-nine mailings to its target voters each election cycle.<sup>162</sup> If any doubt remained about the importance that campaigns place on repeated contacts with voters, they should be allayed by the 2.7 billion pieces of political mail the U.S. Postal Service delivered during the 2018 election.<sup>163</sup> If the candidates understand the importance of sending multiple mailings to voters, then elected officials should as well.

Address-confirmation notices should also be sent in multiple formats. As email and texting have become major communications platforms, state election authorities should take reasonable steps to collect more information from voters than just home addresses. On a purely voluntary basis, registrants should be asked for their email address and cellphone number. If election authorities employ a combination of email, text, and U.S. Mail notices to confirm current addresses, far fewer voters will fall through the cracks.

The federal government has an important role to play as well. Congress should require election authorities to cross-check voter address information with federal government databases before concluding that a voter has changed addresses. The federal government possesses up-to-date address information on tens of millions of Americans who receive Social Security, Medicare, Medicaid, and veteran’s benefits. To assist the state governments in administering federal elections, Congress should allow state election authorities easy access to all address-related data in the federal government’s possession.

The federal government’s data could be put to use in an even more direct way. Automatic voter registration offers the most comprehensive and efficient way to put millions of currently unregistered Americans on voting rolls. To that end, state and federal authorities should take responsibility for registering all eligible citizens to vote by using information from the Social Security Administration, departments of motor vehicles, state universities, and other government agencies.<sup>164</sup> As a study by the

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<sup>161</sup> Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 600 (2000).

<sup>162</sup> *Id.* (“Direct mail vendors informed us that a regimen of 4 to 9 mailings is common in political campaigns”).

<sup>163</sup> D. Eadware Tree, *Eight Factors That Drove This Year’s Red Hot Political Direct Mail Season*, PRINTING IMPRESSIONS (Dec. 19, 2018), <https://www.piworld.com/post/eight-factors-that-drove-this-years-red-hot-political-direct-mail-season/> (“The average registered voter in the U.S. received about 24 pieces of mail from political campaigns this year, for a total of 2.7 billion pieces.”); *Political Mail Revenue Grows*, MAIL MAG., <https://mailomg.com/2018/11/29/political-mail-revenue-grows/> (last visited April 14, 2019); OFFICE OF INSPECTOR GEN., UNITED STATES POSTAL SERV., MR-MA-16-001, POLITICAL MAIL STRATEGY 1 (Feb. 23, 2016), <https://www.uspsoig.gov/sites/default/files/document-library-files/2016/MR-MA-16-001.pdf>.

<sup>164</sup> *The Case for Automatic Voter Registration*, BRENNAN CTR. FOR JUST. (2016), [https://www.brennancenter.org/sites/default/files/publications/Case\\_for\\_Automatic\\_Voter\\_Registration.pdf](https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf); Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CTR. FOR JUST. 6 (July 20, 2018), <https://www.brennancenter.org/publication/purges-growing-threat-right-vote> (“When an eligible citizen gives information to the government—for example, to get a driver’s license, receive Social Security benefits, apply for public services, register for classes at a public university, or become a naturalized citizen—she will be automatically registered to vote unless she chooses to opt out. No separate process or paper form is required.

Brennan Center for Justice pointed out, the government data is already vetted and thus provides an accurate source of registration information.<sup>165</sup> The adoption of a modern electronic registration system will harness, in real time, the vast amount of data the government holds, thus eliminating the risk of outdated or duplicate registrations.<sup>166</sup>

The nationwide adoption of an automatic voter registration system would bring the United States into line with peer democracies around the world.<sup>167</sup> In countries as diverse as Argentina, Australia, Belgium, Germany, Peru and Sweden the national governments maintain and update voter registration databases.<sup>168</sup> Although state governments in the United States administer both federal and state elections, the federal government can and should offer far more assistance to the states in updating voter registration lists. The best model for Congress to use is quite close to home. In Canada, all federal and provincial agencies share in real time voter address and eligibility information with Elections Canada, the Canadian version of the Federal Election Commission.<sup>169</sup> By integrating federal and provincial databases Canada's 93% registration rate is far higher than that of the United States, and, ironically, costs 35% less than the American system to maintain.<sup>170</sup> The bottom line is the burden of

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Once the voter completes her interaction with the agency, if she doesn't decline, her information is electronically and securely sent to election officials to be added to the rolls. Once registered, election officials would send each eligible voter a confirmation that their registration has been accepted, providing a receipt and confirmation for any electronic voter transaction.”)

<sup>165</sup> *Id.* at 7 (“The most appropriate agencies for automatic registration already collect citizenship information and the other information needed for voter registration—so the data being used has already been vetted. It is this already-vetted information that will form the basis for voter registration records and updates. A modern system will reduce errors of all types throughout the registration process, including improper registrations. And election officials will continue to review applications for eligibility and errors”).

<sup>166</sup> *Id.* at 11 (“In 2012, the Pew Center found that more than 1.8 million deceased individuals are listed as voters. In 2014, North Carolina's elections board reported finding thousands of names and birth dates on their rolls that matched those of people who voted elsewhere. Some fear that these deceased and duplicate registrations could help unscrupulous people manipulate our elections. At the very least, these concerns about security undermine the public's confidence in our voting system. But a modern system effectively counters the threat. Duplications and deceased registrants can be dramatically reduced if public officials are constantly updating the rolls based on automatically transmitted information. In this respect, modernizing reforms can make our elections more secure and boost voters' confidence in our system.”).

<sup>167</sup> Heather Gerken, *Make It Easy: The Case for Automatic Registration*, DEMOCRACY J. (2013), <https://democracyjournal.org/magazine/28/make-it-easy-the-case-for-automatic-registration/>.

<sup>168</sup> Adam Liptak, *Voter Rolls Are Rife with Inaccuracies, Report Finds*, N.Y. TIMES (Feb. 14, 2012), <https://www.nytimes.com/2012/02/14/us/politics/us-voter-registration-rolls-are-in-disarray-pew-report-finds.html>.

<sup>169</sup> Michael Li et al., *Three Things the U.S. Could Learn from Canada's Election*, BRENNAN CTR. FOR JUST. (Oct. 23, 2015), <https://www.brennancenter.org/blog/three-things-us-could-learn-canadas-election>.

<sup>170</sup> Liptak, *supra* note 168; Li et al., *supra* note 169.

getting voters registered should rest primarily on the government, rather than on the voters themselves.<sup>171</sup>

Most importantly, Congress should no longer permit states to create arbitrary and unnecessary registration deadlines.<sup>172</sup> Many states require voters to register in advance of elections, with some state registration deadlines coming as early as four weeks before Election Day.<sup>173</sup> At present, only seventeen states plus the District of Columbia offer same-day registration.<sup>174</sup> As the name suggests, same-day registration permits voters to register and vote on the same day, including Election Day and during early voting periods.<sup>175</sup>

The *Husted* decision would be rendered moot if Congress directed the states to adopt same-day registration for federal elections. If a registration purge wrongfully removes an eligible voter, same-day registration permits the voter to reregister and vote at the same time. But early, pre-election registration deadlines can prevent wrongfully removed voters from casting a ballot if the voter does not discover their removal until after the registration deadline has passed. Same-day registration is thus a crucial safeguard to prevent eligible voters from being disenfranchised by inaccurate or overzealous voter registration purges. If every state adopted same-day registration, no one would be wrongfully disenfranchised by failing to respond to a single address-confirmation notice.

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<sup>171</sup> As Ellen Kurz has argued, “Why can’t voting be automatic with Selective Service Registration and expanded to include women? Or with a Social Security number?” See Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let’s Finally End It*, WASH. POST (Oct. 11, 2018), [https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f\\_story.html?utm\\_term=.913f47ba8ff7](https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f_story.html?utm_term=.913f47ba8ff7).

<sup>172</sup> *Same Day Voter Registration*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 3, 2018), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

<sup>173</sup> See Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 647–48 (2016) (“In Hawaii, the registration cut-off deadline is thirty days. In other states, such as Florida and Arizona, the cut-off is twenty-nine days. In Kentucky, it is twenty-eight days. Another set of states requires approximately three weeks for new registrations. The time period is twenty-four days in Oklahoma; twenty-two days in Colorado; twenty-one days in Maryland, Maine, Oregon, Virginia, and West Virginia; and twenty days in Kansas, Massachusetts, and Minnesota. Other jurisdictions close their registration periods approximately two weeks before an election. In Alabama and California the period is fourteen days, and in Iowa it is eleven days. Connecticut requires a new voter to be registered only seven days before an election, and at least one state—North Dakota—uses same-day voter registration, so that a new voter could actually register to vote and cast his or her ballot on the same day.”).

<sup>174</sup> *Id.*

<sup>175</sup> *The Case for Automatic Voter Registration*, *supra* note 164, at 8 (“One highly successful option is same-day registration, which would allow every eligible voter to register and vote on Election Day and during early voting. This protection ensures that voters do not bear the brunt of government mistakes, and it has significantly boosted turnout in every state that has adopted it. At a minimum, it is critical that every state has procedures during the voting period that permit voters to correct any error or omission on the rolls and be able to cast a ballot that counts. And in a fully modern system, this fail-safe would rarely be used because the rolls would be far more complete and accurate.”).



There is a growing awareness in Congress of the need to reform state voter registration procedures. In the 1970s, Congress nearly implemented a national “postcard” registration system, but the House and Senate failed to reconcile differences in the proposed bills.<sup>176</sup> The issue remained dormant until partisan battles over election rules in the 2010s rekindled the idea of expanding the NVRA to include election day and same-day registration.<sup>177</sup> In 2017 Senator Amy Klobuchar authored a bill to amend the NVRA to require states to make same-day registration available in all federal elections.<sup>178</sup> Her bill provided that:

[E]ach State shall permit any eligible individual on the day of a Federal election and on any day when voting, including early voting, is permitted for a Federal election—(A) to register to vote in such election at the polling place using a form that meets the requirements under section 9(b) of the National Voter Registration Act of 1993 (52 U.S.C. 20508(b)); and (B) to cast a vote in such election.<sup>179</sup>

The Senate did not act on Senator Klobuchar’s bill, but as a policy matter her proposal is exactly right. The House of Representatives has taken up Klobuchar’s proposal and seems likely to approve it.<sup>180</sup> In January 2019, House Democrats introduced H.R. 1, which would require states to adopt both automatic voter registration and same-day registration for federal elections.<sup>181</sup>

It is possible that some states might bring a legal challenge if Congress expanded the NVRA to require same-day registration. In his concurring opinion in *Husted*, Justice Thomas hinted at a constitutional argument against expanding the NVRA’s registration requirements.<sup>182</sup> Thomas observed that “constitutional text and history both ‘confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.’”<sup>183</sup> The justice’s concurrence emphasized the limited nature of the Constitution’s Elections Clause, which authorizes

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<sup>176</sup> CROCKER, *supra* note 23, at 1.

<sup>177</sup> Same Day Registration Act, S. 360, 115th Cong. (2017).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Chris Carson & Virginia Kase, *Why Same Day Registration Is Critical to the Success of HRI*, THE HILL (Dec. 31, 2018), <https://thehill.com/blogs/congress-blog/politics/423343-why-same-day-registration-is-critical-to-the-success-of-hr1>.

<sup>181</sup> Lindsay McPherson, *House Democrats Unveil First Major Legislative Package of Voting, Campaign Finance and Ethics Overhauls*, ROLL CALL (Jan. 4, 2019), <https://www.rollcall.com/news/politics/house-democrats-unveil-first-major-legislative-package-of-voting-campaign-finance-and-ethics-overhauls>; Tim Lau & Daniel I. Weiner, *Historic Bill to Strengthen Democracy Introduced in Congress*, BRENNAN CTR. FOR JUST. (Jan. 3, 2019), <https://www.brennancenter.org/blog/historic-bill-strengthen-democracy-introduced-congress>.

<sup>182</sup> *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1849 (2018) (Thomas, J., concurring).

<sup>183</sup> *Id.* (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 29 (2013) (Thomas, J., dissenting)).

Congress to regulate the “Time, Place, and Manner” of federal elections.<sup>184</sup> In his concurring opinion in *Husted*, Thomas pointedly noted that the Elections Clause “does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met.”<sup>185</sup>

Consequently, states with a durational residency requirement might argue that a federal mandate requiring states to provide Election Day registration exceeds Congress’s authority under the Elections Clause. For example, Mississippi requires voters to have established a Mississippi residency at least thirty days prior to an election.<sup>186</sup>

But it is noteworthy that no other justice joined Thomas’s concurrence, and for good reason. The Supreme Court has long recognized Congress’s authority to set registration requirements for federal elections.<sup>187</sup> For example, in amending the Voting Rights Act in 1970, Congress barred the “States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements.”<sup>188</sup> Accordingly, in *Oregon v. Mitchell*, the Supreme Court upheld the VRA amendment.<sup>189</sup> Equally important, in 1972 the Supreme Court struck down Tennessee’s one-year durational residency requirement, holding that “the durational residence requirements in this case founder because of their crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise.”<sup>190</sup>

Therefore, it seems likely that the Supreme Court would affirm the constitutionality of a congressional mandate that the states adopt same-day registration in federal elections.<sup>191</sup> As the Supreme Court noted in an 1879 case, “the power of

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<sup>184</sup> See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators”).

<sup>185</sup> *Husted*, 138 U.S. at 1850 (Thomas, J. concurring).

<sup>186</sup> See *Mississippi Voter Information Guide 2*, <http://www.sos.ms.gov/elections-voting/documents/voterinformationguide.pdf> (last visited Mar. 19, 2019).

<sup>187</sup> See, e.g., *Mazo*, *supra* note 173, at 645 (“given that the Supreme Court has declared lengthy residency requirements for voting in state and local elections unconstitutional, most of the states have changed or eliminated their durational residency requirements to comply with the Court’s rulings.”).

<sup>188</sup> *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

<sup>189</sup> *Id.* at 119.

<sup>190</sup> *Dunn v. Blumstein*, 405 U.S. 330, 357–58, 360 (1972) (“Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest.”).

<sup>191</sup> See, e.g., *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2670 (2015) (describing Congress’s “plenary authority” under the Elections Clause to “make or alter” state redistricting plans); see also L. PAIGE WHITAKER, CONG. RESEARCH SERV., RS22628, CONGRESSIONAL REDISTRICTING: THE CONSTITUTIONALITY OF CREATING AN AT

Congress over the subject [of House elections] is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”<sup>192</sup> Similarly, in a 1946 case, the Court asserted that:

[T]he Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility . . . . Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.<sup>193</sup>

Supreme Court precedents thus make clear that the Constitution gives Congress the authority it needs to improve the NVRA. All that remains is for Congress to exercise the will to improve the law.

But the optimism that informs proposals to expand the NVRA must be tempered by two realities. The first is that neither the White House nor the Senate shows any interest in amending the NVRA. In this era of hyperpolarization, election law changes have become intensely partisan matters.<sup>194</sup> It is highly unlikely that Congress would enact substantive election law reforms at a time of divided government. Any real change, therefore, is likely to be at least a few years away.

The second reality is that states have proven stubbornly effective at disregarding some of the NVRA’s more demanding provisions. Although the NVRA has undeniably increased voter registration rates,<sup>195</sup> states have undermined the law to a troubling degree. As Justin Weinstein-Tull explained in a recent study, both the NVRA and HAVA have been met with “widespread noncompliance” by states in several important respects.<sup>196</sup> One major reason for noncompliance is the delegation of election administration to county governments, local entities that sometimes fail to understand—let alone meet—their obligations under federal law.<sup>197</sup>

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LARGE DISTRICT 2 (2008) (observing that the Supreme Court has interpreted the Elections Clause “to mean that Congress has extensive power to regulate most elements of congressional elections, including a broad authority to protect the integrity of those elections”).

<sup>192</sup> *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

<sup>193</sup> *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

<sup>194</sup> On hyperpolarization and the politicization of election law, see Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. OF CONST. L. & PUB. POL’Y 57, 59 (2017).

<sup>195</sup> CROCKER, *supra* note 23, at 21 (“A survey conducted by the National Association of Secretaries of State (NASS) of 43 states covered by the NVRA indicated that gains in voter registration had occurred in every state.”).

<sup>196</sup> Justin Weinstein-Tull, *Election Law Federalism*, 114 U. MICH. L. REV. 747, 751 (2016).

<sup>197</sup> *Id.* at 752 (“The Constitution initiates decentralization by placing the primary responsibility for holding elections with states. States have further decentralized election administration by delegating most election administration responsibilities to local governments”), *id.* at 800 (“Federal election legislation like the NVRA, UOCAVA, and HAVA, which all seek to standardize aspects of the elections process, suffers from noncompliance in part because the statutes ask states to assume administrative responsibilities that states have delegated to local governments.”).

One example is the “motor voter” provisions of the NVRA, which require states to offer eligible voters the opportunity to register to vote while applying for or renewing their driver licenses.<sup>198</sup> Despite the clear federal directive requiring state compliance, a 2014 Pew Charitable Trust Study revealed that state agencies often fail to make voter registration materials available to individuals who visit DMV offices.<sup>199</sup> The Pew Study noted that “[i]n most states, motor vehicles and elections are administered by separate agencies with very different missions and little obvious incentive to cooperate.”<sup>200</sup> The authors concluded that “with limited enforcement of the law, many motor vehicle agencies have seen little reason to allocate scarce time and money to meet this responsibility.”<sup>201</sup>

The problem of state and local noncompliance can be reduced if the federal government takes a more active role in NVRA enforcement and oversight. As Weinstein-Tull rightly points out, “[l]egislation can accomplish those ends by providing the federal government with stronger oversight tools; by empowering states to manage their local governments; and by allowing local governments to modestly tailor the administration of the law to their jurisdictions.”

But until Congress embraces these sensible reforms, and the states abide by them, voters will need legal theories to vindicate their rights in the post-*Husted* world. The Due Process Clause may offer voter-rights advocates a way to meet that challenge.

#### V. THE DUE PROCESS CLAUSE

Since the 1960s, most plaintiffs challenging state restrictions on voting rights have based their claims on the Equal Protection Clause of the Fourteenth Amendment.<sup>202</sup> The 1966 case of *Harper v. Virginia Board of Elections* played a key role in the rise of equal protection claims by disenfranchised voters.<sup>203</sup> In *Harper*, the U.S. Supreme Court struck down Virginia’s \$1.50 poll tax on grounds it violated the Equal Protection Clause.<sup>204</sup> Writing for the majority, Justice Douglas declared that “the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.”<sup>205</sup>

Equal protection analysis lays at the heart of cases as diverse as the presidential election controversy in *Bush v. Gore*<sup>206</sup> and the Voter ID dispute in *Crawford v. Marion County Election Board*.<sup>207</sup> To resolve equal protection claims in voting rights cases, the Supreme Court developed a test known as the “*Anderson-Burdick* balancing

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<sup>198</sup> *Id.* at 755.

<sup>199</sup> *Measuring Motor Voter*, PEW CHARITABLE TRUSTS 2 (May 2014), <https://www.pewtrusts.org/~media/assets/2014/05/06/measuringmotorvoter.pdf>.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 671 (1966) (holding that “the right to vote is too precious, too fundamental to be so burdened or conditioned” by a poll tax).

<sup>203</sup> *Id.* at 666.

<sup>204</sup> *Id.* at 664.

<sup>205</sup> *Id.* at 666.

<sup>206</sup> *Bush v. Gore*, 531 U.S. 98, 103 (2000).

<sup>207</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207 (2008).

test.”<sup>208</sup> Named after the Supreme Court’s decisions in *Anderson v. Celebrezze*<sup>209</sup> and *Burdick v. Takushi*,<sup>210</sup> the *Anderson-Burdick* test requires courts to balance the state’s regulatory interests in defending its election law against the burden the law imposes on voters.<sup>211</sup> But in *Anderson*, the Court emphasized that “the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”<sup>212</sup> Moreover, in *Burdick* the Court pointedly observed that “[e]lection laws will invariably impose some burden upon individual voters” and thus “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>213</sup>

The *Anderson-Burdick* test is thus highly deferential to legislative judgments, a fact demonstrated by the Court’s ruling in *Crawford* to uphold Indiana’s Voter ID law.<sup>214</sup> Consequently, as Professor Edward Foley has persuasively argued, the Equal Protection Clause is not a useful tool for challenging many types of voting restrictions, such as early registration deadlines or reductions in early voting periods.<sup>215</sup> The fundamental problem, Foley explains, is that “[f]or there to be an equal protection issue requiring some level of judicial scrutiny, a state must be engaging in some sort of differential treatment between two groups of persons.”<sup>216</sup> But even the most controversial election laws usually do not distinguish between groups of voters.<sup>217</sup> On the surface at least, Voter ID laws, polling hours, and other restrictions on voting apply equally to all voters.

Early registration deadlines offer a case in point. Most states do not offer same-day registration and many require voters to register thirty days in advance of Election

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<sup>208</sup> Edward B. Foley, *Due Process, Fair Play, And Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 674–75 (2017) (“Over the years, this equal-protection-for-voting jurisprudence has evolved into what is known as the ‘*Anderson-Burdick* balancing test,’ so named after two leading cases in this long line of precedents: *Anderson v. Celebrezze* and *Burdick v. Takushi*.”).

<sup>209</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983).

<sup>210</sup> *Burdick v. Takushi*, 504 U.S. 428, 428 (1992).

<sup>211</sup> Foley, *supra* note 208, at 675.

<sup>212</sup> *Anderson*, 460 U.S. at 788.

<sup>213</sup> *Burdick*, 504 U.S. at 433.

<sup>214</sup> *Crawford*, 553 U.S. at 204 (upholding Indiana’s Voter ID law on grounds that the state’s interests “are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the ‘integrity and reliability of the electoral process.’”); *see also* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1847 (2013).

<sup>215</sup> Foley, *supra* note 208, at 686 (“[T]here is no avoiding the conclusion that *Anderson-Burdick* balancing is a poor doctrinal vehicle for considering the constitutionality of laws that cut back on the availability of voting opportunities.”).

<sup>216</sup> *Id.* at 683.

<sup>217</sup> *Id.* at 684.

Day.<sup>218</sup> But voters who seek to challenge such laws have limited tools available because the Equal Protection Clause offers no relief.<sup>219</sup> The reason, Professor Foley points out, is because a voting law “does not differentiate among voters if it provides all voters with exactly the same opportunity to cast a ballot.”<sup>220</sup> As long as a state requires all voters to register at the same time, the Equal Protection Clause is not implicated.

The same logic holds true in the case of voter registration purges. Take, for example, Ohio’s Supplemental Process. It removes from the state registration list all voters who fail to vote over a six-year period and also fail to respond to an address-confirmation notice. Accordingly, the plaintiffs in *Husted* did not have a viable equal protection claim and found themselves confined to an unsuccessful statutory challenge.

However, the right to equal protection under law is not the only right enshrined in the Fourteenth Amendment. The Due Process Clause offers an alternative basis for plaintiffs in voting rights cases.<sup>221</sup> Due process is a cornerstone principle of the rule of law. As the Supreme Court emphasized in the famous case of *International Shoe v. Washington*, due process requires “fair play and substantial justice.”<sup>222</sup> Although *International Shoe* arose from a Washington court’s assertion of specific personal jurisdiction over an out-of-state defendant, the due process principles it articulated have direct relevance to voting rights cases.<sup>223</sup> As Professor Foley explains:

A purely partisan change of voting procedures, designed to ‘unlevel’ the playing field between the opposing parties, is a breach of the norm of fair play as applied to the domain of electoral competition. Consequently, if the judiciary encounters a partisan change in voting procedures of this nature, the appropriate judicial response is to invalidate the change as a breach of the norm of fair play embedded within the Due Process Clause.<sup>224</sup>

Although Professor Foley’s argument focuses on the due process principle of fair play, his reasoning applies equally well to the due process principle of notice. In *Husted*, the fundamental problem with Ohio’s Supplemental Process was the

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<sup>218</sup> *Id.* at 683.

<sup>219</sup> *Id.* (“Many states besides Ohio and North Carolina currently offer no option of registering and voting at the same time. Instead, all of these states require voters to register in advance (often thirty days in advance) before the thus-registered voter casts a ballot in the election, whether early or on Election Day itself. No one considers this conventional arrangement an equal protection problem.”).

<sup>220</sup> *Id.* at 684.

<sup>221</sup> *Id.* at 738 (“[J]udicial review of curtailments of voting opportunities under due process could potentially play a meaningful role in protecting voters from inappropriately partisan legislation.”).

<sup>222</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>223</sup> Foley, *supra* note 208, at 692 (“None of these many cases, either civil or criminal, in which the Supreme Court has linked due process with fair play specifically concerns the regulation of the electoral process. That fact, however, is no barrier to such linkage in the future. . . . Indeed, there already have been hints of this use of fair play in cases concerning the procedures that the government uses to count votes.”).

<sup>224</sup> *Id.* at 739.

inadequate notice provided to voters placed on the inactive list. Such voters only received a single address-confirmation notice from Ohio election authorities. As discussed above in Section IV, many voters may simply overlook a postcard notice amid the junk mail that increasingly fills Americans' mailboxes. Indeed, according to the U.S. Postal Service, advertising appeals now constitute half of all U.S. Mail,<sup>225</sup> a significant portion of which is never opened or read.<sup>226</sup> If an inactive voter inadvertently disposes of the address-confirmation notice along with the mountain of junk mail that the typical voter receives on a daily basis, the voter will not know that their registration status is in jeopardy.

An eligible voter who does not receive adequate notice of their removal from state voting rolls has suffered a cognizable injury under the Due Process Clause. The U.S. Supreme Court has repeatedly emphasized that notice is a core requirement of due process.<sup>227</sup> As the Supreme Court famously observed in *Mullane v. Central Hanover Bank & Trust Co.*, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>228</sup> The Court has repeatedly reaffirmed that point.<sup>229</sup> In a 1993 takings case, the Court declared that “[t]he right to prior notice and a hearing is central to the Constitution’s command of due process.”<sup>230</sup> Without adequate notice to all interested parties, the truth-seeking function of the judicial system is undermined. As Justice Felix Frankfurter once observed, “[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”<sup>231</sup>

The U.S. Supreme Court closely examined the notice required by the Due Process Clause in the 1982 case of *Greene v. Lindsey*.<sup>232</sup> The case arose from a Kentucky state

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<sup>225</sup> Ron Nixon, *Seeking Revenue, Postal Service Plans to Deliver More Junk Mail*, N.Y. TIMES (Sept. 9, 2012), <https://www.nytimes.com/2012/09/20/business/seeking-revenue-postal-service-plans-to-deliver-more-junk-mail.html> (“About 48 percent of the mail is advertising appeals, according to Postal Service data. Last year, Americans received about 84 billion pieces of junk mail.”).

<sup>226</sup> Rowley, *supra* note 148.

<sup>227</sup> *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (“Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.”).

<sup>228</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>229</sup> *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasizing that the right to notice and a hearing “is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing ‘appropriate to the nature of the case,’ and ‘depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any), the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.”) (quoting *Mullane*, 339 U.S. at 313, and *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)).

<sup>230</sup> *James Daniel*, 510 U.S. at 53.

<sup>231</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–172 (1951) (Frankfurter, J., concurring).

<sup>232</sup> *Greene v. Lindsey*, 456 U.S. 444, 451 (1982).

law permitting landlords to post eviction proceeding notices on their tenants' apartment doors.<sup>233</sup> But the facts in the record showed that children often took down the notices.<sup>234</sup> In *Greene* the Supreme Court ruled that Kentucky's notice procedures failed to satisfy due process.<sup>235</sup> In striking down the state law, the justices articulated a standard for judging whether a notice procedure satisfies the requirements of the Due Process Clause:

The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.<sup>236</sup>

A single postcard mailer does not meet that test. In a busy world where most communication occurs online, due process requires that election authorities make more than a lone effort to communicate with inactive voters through the U.S. mail. The fundamental constitutional right to vote should not be forfeited because a voter overlooked a single postcard.<sup>237</sup>

To be sure, an important caveat must be added. In *Greene*, the Court described the U.S. Mail as an adequate form of notice, holding that “notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings.”<sup>238</sup> In reaching that conclusion, the Court asserted that “the mails provide an ‘efficient and inexpensive means of communication,’ upon which prudent men will ordinarily rely in the conduct of important affairs.”<sup>239</sup>

But the Supreme Court made that determination in 1982,<sup>240</sup> an era before email, texting, and the worldwide web. At the time of the *Greene* case, Americans naturally paid close attention to traditional mail, which was the dominant means by which consumers received and paid their bills.<sup>241</sup> The world has changed dramatically in the

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<sup>233</sup> *Id.* at 453–54.

<sup>234</sup> *Id.* at 453 (“As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were ‘not infrequently’ removed by children or other tenants before they could have their intended effect.”).

<sup>235</sup> *Id.* at 456 (“We conclude that in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment.”).

<sup>236</sup> *Id.* at 451 (quoting *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)).

<sup>237</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[T]he right to vote is too precious, too fundamental to be so burdened or conditioned”).

<sup>238</sup> *Greene*, 456 U.S. at 455.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> James Gattuso, *Can the Postal Service Have a Future?*, THE HERITAGE FOUND. (Oct. 10, 2013) (“[A]bout 6.8 billion pieces are bill payments from consumers to businesses. But the practice of sending checks in the mail is being abandoned as Americans are becoming increasingly comfortable with paying their bills online. As late as 2002, 75 percent of all bills



intervening years. In the three and a half decades since *Greene*, email, texting, social media, and online bill paying have long since surpassed the U.S. Mail as the primary means of communication in the United States.<sup>242</sup> For example, in 2002 about 75% of all bills were paid by traditional mail and only 17% online.<sup>243</sup> But by 2012 the percentage of bills paid electronically had risen to 56%.<sup>244</sup>

Email in particular has become the preferred method of written communication.<sup>245</sup> As a 2013 report by the Heritage Foundation pointed out, “[t]he market for traditional mail has been shrinking rapidly, as Americans have fled ‘snail mail’ in favor of electronic alternatives.”<sup>246</sup> As electronic communication has become central to American society, first-class mail volume has plummeted from 103 billion pieces of mail delivered in 2001 to only fifty-eight billion in 2017.<sup>247</sup> The U.S. Postal Service lost \$65 billion between 2007 and 2018.<sup>248</sup> Meanwhile, junk mail has soared as a percentage of U.S. Mail, which is no accident.<sup>249</sup> As discussed above, the Postal Service has actively solicited junk mail from businesses in a desperate effort to shore

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were paid by mail and only 17 percent were paid electronically. In 2012, by contrast, the Postal Service reports that 56 percent of bills were paid electronically and only 40 percent by mail.”), <https://www.heritage.org/government-regulation/report/can-the-postal-service-have-future>.

<sup>242</sup> See Devin Leonard, NEITHER SNOW NOR RAIN: A HISTORY OF THE UNITED STATES POSTAL SERVICE (2016); Frank Newport, *The New Era of Communication Among Americans*, GALLUP (Nov. 10, 2014), <https://news.gallup.com/poll/179288/new-era-communication-americans.aspx>.

<sup>243</sup> Gattuso, *supra* note 241.

<sup>244</sup> *Id.*

<sup>245</sup> Hank H. Cox, *From the Pony Express to ‘Going Postal,’ the History and Lore of Delivering the Mail*, WASH. POST (July 7, 2016), [https://www.washingtonpost.com/opinions/from-the-pony-express-to-going-postal-the-history-and-lore-of-delivering-the-mail/2016/07/07/ac8af3da-ef8c-11e5-85a6-2132cf446d0a\\_story.html?utm\\_term=.760b5cdfb40f](https://www.washingtonpost.com/opinions/from-the-pony-express-to-going-postal-the-history-and-lore-of-delivering-the-mail/2016/07/07/ac8af3da-ef8c-11e5-85a6-2132cf446d0a_story.html?utm_term=.760b5cdfb40f) (“[M]odern technology such as email has superseded much of the U.S. Postal Service’s traditional work, raising serious questions about its viability.”).

<sup>246</sup> Gattuso, *supra* note 241.

<sup>247</sup> *First Class Mail Volume Since 1926*, UNITED STATES POSTAL SERV. (March 2018), <https://about.usps.com/who-we-are/postal-history/first-class-mail-since-1926.pdf>; Gattuso, *supra* note 241.

<sup>248</sup> Chris Isidore, *Postal Service Losses Soar to \$1.3 billion, but Don’t Blame Amazon*, CNN (May 11, 2018), <https://money.cnn.com/2018/05/11/news/companies/postal-service-losses/index.html>.

<sup>249</sup> Kevin O’Marah, *Can Amazon Save the Post Office?*, FORBES (April 12, 2018), <https://www.forbes.com/sites/kevinomarah/2018/04/12/can-amazon-save-the-post-office/#1f96c0512bc3>.

up its budget woes.<sup>250</sup> By any measure, the U.S. Postal Service simply no longer plays the prominent role in American life that it once did.<sup>251</sup>

The upshot is Americans no longer pay the same close attention to standard mail that they once did. Consequently, a single address-confirmation notice sent via the junk mail-clogged U.S. Postal Service is a far less effective way to convey notice than would have been the case in 1982. The constitutional test for due process was articulated by the Supreme Court in *Mullane*: “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>252</sup> Thus, the requirements of due process must change as communication habits evolve. The Supreme Court has acknowledged as much in many cases. For example, it has held that due process is “flexible and calls for such procedural safeguards as the situation demands”<sup>253</sup> and it has repeatedly emphasized that the “notice required will vary with circumstances and conditions.”<sup>254</sup>

Accordingly, in more recent years, the Supreme Court held that even service by certified mail may not satisfy due process.<sup>255</sup> In the 2006 case of *Jones v. Flowers*, a taxpayer alleged that Arkansas failed to provide sufficient notice before seizing his property for a tax sale.<sup>256</sup> The Supreme Court agreed<sup>257</sup> and held that “when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.”<sup>258</sup> The Court further held that a “reasonable step” for Arkansas to have taken was “to resend the notice by regular mail, so that a signature was not required.”<sup>259</sup>

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<sup>250</sup> Ron Nixon, *Seeking Revenue, Postal Service Plans to Deliver More Junk Mail*, N.Y. TIMES (Sept. 9, 2012), <https://www.nytimes.com/2012/09/20/business/seeking-revenue-postal-service-plans-to-deliver-more-junk-mail.html>.

<sup>251</sup> Veronica Stracqualursi, *Postal Service Reports \$3.9 Billion in Losses for Fiscal Year 2018*, CNN (Nov. 15, 2018), <https://www.cnn.com/2018/11/15/politics/postal-service-losses-fiscal-year-2018/index.html>; Steve Pociask, *A Failed Mission: U.S. Postal Service Details Another Massive Loss for the 2017 Fiscal Year*, FORBES (2017), <https://www.forbes.com/sites/stevepociask/2017/11/14/a-failed-mission-u-s-postal-service-details-another-massive-loss-for-the-2017-fiscal-year/#624ae93d7f79>.

<sup>252</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>253</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>254</sup> *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) (holding that newspaper publication of condemnation proceedings was inadequate under the circumstances).

<sup>255</sup> *Jones v. Flowers*, 547 U.S. 220, 235 (2006).

<sup>256</sup> *Id.* at 224 (“Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner’s failure to provide notice of the tax sale and of Jones’ right to redeem resulted in the taking of his property without due process.”).

<sup>257</sup> *Id.* at 225.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 234.

Most interesting of all, the Supreme Court in *Flowers* approvingly noted that “[m]any States already require in their statutes that the government do more than simply mail notice to delinquent owners,” further noting that such states engage in “follow up” communications with owners “if initial mailed notice is ineffective.”<sup>260</sup> Yet, when it comes to protecting the fundamental right to vote, states like Ohio do not engage in follow up communications with inactive voters. Ohio election officials do nothing more than simply mail notice in the form of a single postcard.<sup>261</sup> If a single mailed notice is not sufficient in the context of a tax sale, it should not be sufficient in the context of voter disenfranchisement either.

Two recent cases suggest that the courts may be receptive to due process arguments brought by disenfranchised voters. In August 2018, a New Hampshire federal court struck down on due process grounds a state voting requirement that barred 275 absentee ballots from being counted during the 2016 election.<sup>262</sup> The case of *Saucedo v. Gardner* arose from a New Hampshire state law requiring signatures on absentee ballots to match the signatures on absentee ballot applications.<sup>263</sup> But absentee voters received no notice that their signature would be compared with another signature.<sup>264</sup> The only way absentee voters could learn of their ballot’s rejection was by consulting the Secretary of State’s website, and even then, the notice only came after the election.<sup>265</sup>

The federal court in *Saucedo* granted summary judgment to the plaintiffs and struck down the signature match law on due process grounds.<sup>266</sup> The judge put particular weight on the fact that election administrators received “no training in handwriting analysis or signature comparison” and state law provided no “functional standards to distinguish the natural variations of one writer from other variations that suggest two different writers.”<sup>267</sup> The state’s failure to provide adequate notice of the rejected absentee ballots also factored in the court’s decision.<sup>268</sup> By the time the case reached the court in 2018, New Hampshire had amended its election law to require

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<sup>260</sup> *Id.* at 228.

<sup>261</sup> Catherine Candisky, *Inactive Ohio Voters Sent ‘Last-Chance’ Notice Before Purge*, THE COLUMBUS DISPATCH (Jan. 9, 2019), <https://www.dispatch.com/news/20190109/inactive-ohio-voters-sent-last-chance-notices-before-purge>.

<sup>262</sup> *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 207 (“What is most relevant here is that the application requires the voter to sign her name. Prior to and in the 2016 General Election, there was no notice on the application that the application signature would be compared with another signature; instead, below the signature line was the following statement: ‘Voter must sign to receive an absentee ballot.’”).

<sup>265</sup> *Id.* at 209 (“[N]o formal notice of rejection is sent to the voter after Election Day. Rather, after the election, a voter may determine whether and why her absentee ballot was rejected via a website maintained by the Secretary of State.”).

<sup>266</sup> *Id.* at 222 (“Therefore, in light of the undisputed, material facts in the record, plaintiffs are entitled to summary judgment on their procedural due process claim.”).

<sup>267</sup> *Id.* at 206.

<sup>268</sup> *Id.* at 222 (“But taken as a whole, and in light of the fundamental importance of the right to vote, the current process for rejecting voters due to a signature mismatch fails to guarantee basic fairness.”).

advanced notice of the signature match requirement in future elections.<sup>269</sup> But that was still not good enough in the judge’s view. In her ruling, the judge pointed out that the amended law did not change the fact that “the voter is not even given notice that her ballot has been rejected due to a signature mismatch.”<sup>270</sup> The court concluded, therefore, that “in light of the fundamental importance of the right to vote, the current process for rejecting voters due to a signature mismatch fails to guarantee basic fairness.”<sup>271</sup> As the court explained, the law gave rise to an unacceptably high “risk that qualified voters are wrongly disenfranchised” and minor refinements would be insufficient to remedy the flaws in the signature-match process.<sup>272</sup>

The 2018 Georgia gubernatorial election also saw a successful due process challenge brought by disenfranchised voters.<sup>273</sup> In the weeks before the election, the state rejected hundreds of absentee ballots and absentee ballot applications due to alleged signature mismatches.<sup>274</sup> In *Martin v. Kemp*, a federal court enjoined enforcement of Georgia’s signature match law because the state had failed to provide adequate due process protections.<sup>275</sup> Much like the *Saucedo* case, the judge ruled that it was a violation of due process for “a single election official . . . not trained in handwriting analysis” to exercise “unchecked discretion to determine whether two signatures match.”<sup>276</sup> As the court explained, “[h]aving created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection.”<sup>277</sup>

There are potential lessons here that apply to the *Husted* case. As Justice Alito explained in the majority opinion, *Husted* only presented “a question of statutory interpretation.”<sup>278</sup> The case thus turned solely on the NVRA’s notice requirements, not the notice requirements of constitutional due process. But had the plaintiffs brought a due process challenge, rather than just a statutory challenge, it is possible they might have encountered more success with the Court. To be sure, due process claims face a high bar. As the Supreme Court in *Mathews v. Eldridge* noted, “procedural due process

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<sup>269</sup> *Id.* at 207 (noting that “as a result of amendments to the absentee-ballot statutory scheme in 2017, the application now contains the following statement below the signature line: ‘The applicant must sign this form to receive an absentee ballot. The signature on this form must match the signature on the affidavit envelope in which the absentee ballot is returned, or the ballot may be rejected.’”).

<sup>270</sup> *Id.* at 206.

<sup>271</sup> *Id.* at 222.

<sup>272</sup> *Id.*

<sup>273</sup> *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018).

<sup>274</sup> *Id.* at 1331.

<sup>275</sup> *Id.* at 1339 (“While the Court recognizes that the risk of an erroneous deprivation is by no means enormous, permitting an absentee voter to resolve an alleged signature discrepancy nevertheless has the very tangible benefit of avoiding disenfranchisement.”), *id.* at 1341 (“Plaintiffs have shown they are entitled to an injunction on the signature mismatch issue”).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1338.

<sup>278</sup> *Husted v. A. Philips Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018).

rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.”<sup>279</sup> But the facts of *Husted* made clear the plaintiffs were not “rare exceptions” to the “generality of cases.”<sup>280</sup> The record showed that over one million Ohioans failed to respond to address-confirmation notices, which removed any doubt that the risk of error created by the Supplemental Process was general in nature, and not limited to “rare exceptions.”<sup>281</sup>

It remains to be seen how the U.S. Supreme Court would respond to due process arguments in the context of a voter registration purge such as that at issue in *Husted*.<sup>282</sup> But the plaintiffs’ success in the *Saucedo* and *Kemp* cases suggests that we might be in the early stages of a new era in election law jurisprudence. The bottom line is the states have an obligation to do more than simply go through the motions of providing due process. As the Supreme Court explained in *Mullane*, “when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>283</sup>

The conclusion seems clear: when election authorities provide notice in the form of a single address-confirmation postcard, the state is engaged in nothing more than a mere gesture of compliance with due process. The Constitution requires more than that. Full and robust notice in the form of multiple mailings using a range of communication mediums—including email, texts, and social media—can and should be employed by state elections officials before they remove inactive voters from the voting rolls. Courts and plaintiffs should demand nothing less from state election officials than full compliance with the requirements of due process.

#### VI. CONCLUSION: THE FUTURE OF VOTING RIGHTS

When adopted in 1993, the NVRA represented a major advance. It expanded registration options for voters, and it required states to incorporate an address-confirmation notice as part of their list maintenance procedures. Ohio’s Supplemental Process complies with the NVRA and thus the majority in *Husted* reached the right result as a matter of law. But serious shortcomings nevertheless remain in the address-confirmation system. Accordingly, Congress should amend the NVRA to prevent state list maintenance programs from wrongfully removing eligible voters from the voting rolls.

In the meantime, when faced with overzealous voter registration purges, plaintiffs and courts should expand their constitutional horizons. In *Mullane*, the Supreme Court observed that the Due Process Clause requires “notice reasonably calculated, under all

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<sup>279</sup> *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

<sup>280</sup> *Id.*

<sup>281</sup> *Husted*, 138 S. Ct. at 1856 (Breyer, J., dissenting).

<sup>282</sup> *See, e.g., Mathews*, 424 U.S. at 335 (holding that “the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

<sup>283</sup> *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950).

the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>284</sup> In the email age, when unsolicited advertisements and other forms of junk mail have become an ever larger share of the U.S. Mail, a single postcard-sized notice is no longer “notice reasonably calculated under the circumstances” to inform voters of their pending removal from the registration lists. Accordingly, until Congress improves the NVRA, the Due Process Clause offers inactive voters a promising option for preserving their voting rights.

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<sup>284</sup> *Id.*