

When Names Disappear: State Roll-Maintenance Practices

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I. INTRODUCTION

Registration laws govern how people become registered to vote and how and when names may be removed from the voter registration

rolls. The rules around registration vary significantly from one state to the next,¹ and while they can assist in election administration, these rules have also restricted access to the ballot.²

The myriad of laws that exist can create confusion among U.S. residents. Individuals may not be aware of the deadline for registration, that they need to update their registration information after a move, where they can register, and more fundamentally, if they even qualify to vote. Further, even after individuals have gone through the process of registering—their information has been verified and their names added to the voter rolls—they may show up to vote and find that their names do not appear in the poll books. One reason for this? State roll-maintenance practices.

All too often stories describe people appearing at the polls and learning that—by no fault of their own and despite the fact that their eligibility has remained unchanged since the time that they registered—their names have been removed from the voter registration rolls.³ This can occur when a state is using information that falsely

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1. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 123, 254 (rev. ed. 2009).

2. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 461 (2008) (noting that while registration laws can be “used to keep eligible citizens from voting[,]” they also serve a vital need); see also Brief for American History Professors as Amici Curiae in Support of Respondents at 7–8, *Husted v. A. Philip Randolph Inst. (Husted)*, 138 S. Ct. 1833 (2018) [hereinafter *Historian Br.*].

3. For example, Larry Harmon, a lifetime Ohio resident, noted that in November 2015 he went to cast a ballot at the same polling location where he had previously registered and found out that his name was no longer on the voter rolls. See, e.g., *Ohio A. Phillip Randolph Inst. v. Husted*, No. 2:16-cv-303, 2016 WL 3542450, at *2 (S.D. Ohio June 29, 2016), *rev'd and remanded*, 838 F. 3d 699 (6th Cir. 2016); Declaration of Larry Harmon at ¶¶ 7–9, *Ohio A. Phillip Randolph Inst.*, 2016 WL 3542450 (April 7, 2016). Mr. Harmon had been disinclined to vote in recent elections after the death of his mother and because he had been disillusioned with the candidates and the political process. See, e.g., Declaration of Larry Harmon, *supra*, at ¶ 6 (noting that abstention from voting was Mr. Harmon’s “own way of having [his] voice heard,” as there is “no option on a ballot for ‘none of the above’”); ACLU, *Larry’s Fight to Vote Goes to the Supreme Court*, YOUTUBE (Jan. 8, 2018),

identifies individuals as having moved, as well as when individuals do not receive a notice that adequately informs them that their names have been placed in a queue for removal from the registration rolls.

This Article will focus on state practices aimed at identifying and removing registrants from the voter rolls for a perceived change of residence. Part II will provide an overview of several problematic removal practices that states employ and offer some suggestions about how these practices may be challenged. Part III will briefly discuss some policy solutions states may adopt to help eliminate barriers to voting and protect the right to vote.

II. VOTER ROLL-MAINTENANCE LAWS

By World War I, most U.S. states had adopted formal voter registration procedures.⁴ Significant variance existed in the rules governing both how individuals could register to vote and processes—referred to here as voter roll-maintenance or purge laws—for maintaining registration lists and removing names from the voter rolls.

While adopted partly as a tool to address the corruption that sometimes dominated the political process in the late nineteenth and

<https://www.youtube.com/watch?v=BViRNLHgfM>. Because of an Ohio purge practice that removes infrequent voters from the registration rolls based on the presumption that they had moved, Mr. Harmon's name was taken off the registration rolls after he sat out several elections. See, e.g., Declaration of Larry Harmon, *supra*, at ¶¶ 6, 12; ACLU, *supra*.

4. KEYSSAR, *supra* note 1, at 123. "Before the 1870s in most states, there were no official prepared lists of eligible voters, and men who sought to vote were not obliged to take any steps to establish their eligibility prior to election day." *Id.* at 122; see also Lily Rothman, *For National Voter Registration Day, Here's How Registering to Vote Became a Thing*, TIME (Sept. 26, 2016), <http://time.com/4502154/voter-registration-history/> (noting that "[i]t wasn't until the middle of the 19th century . . . that the idea of voter registration really spread throughout the country").

early twentieth centuries,⁵ voter-registration laws have also served, often intentionally, “to limit the participation of particular groups,”⁶ including black, “working-class, immigrant, and poor voters.”⁷ “[G]iving registration boards sufficient discretion to . . . unfairly pad or purge the rolls” was one mechanism used to disproportionately deny black voters access to the ballot.⁸

Other methods of roll-maintenance were more systematized and implemented statewide. One mechanism for roll-maintenance, endorsed by the National Municipal League in 1927,⁹ was using failure

5. KEYSSAR, *supra* note 1, at 253; Tokaji, *supra* note 2, at 457–58. See generally Historian Br., *supra* note 2, at 7 (noting these laws arose in an effort to maintain accurate records as jurisdictions implemented permanent voter registration lists).

6. Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 371 (1991); see also KEYSSAR, *supra* note 1, at 123–24 (“During the Progressive era . . . registration became the centerpiece of efforts . . . to limit corruption and reduce the electoral strength of immigrants, blacks, and political machines.”).

7. KEYSSAR, *supra* note 1, at 253; see also Cunningham, *supra* note 6, at 370 (“A powerful theme in th[e] efforts at registration reform has been a deep distrust and prejudice against illiterate, poor, and minority voters.”).

8. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 34 (1999); see also S. REP. NO. 103-6, 103rd Cong., at 3 (1993) [hereinafter S. REP. NO. 103-6] (noting that “selective purging of the voter rolls” was one of “the techniques developed in . . . various localities to inhibit or exclude potential voters”); H.R. REP. NO. 103-9, at 2 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 106 [hereinafter H.R. REP. NO. 103-9] (noting that “selective purges” and “annual reregistration requirements were . . . techniques developed to discourage participation”).

9. The National Municipal League was an organization with a declared purpose of “promot[ing] the thorough investigation and discussion of the conditions and details of civic administration, and of the methods for selecting and appointing officials in American cities, and of laws and ordinances relating to such subjects.” Clinton Rogers Woodruff, *The National Municipal League*, 5 PROC. AM. POL. SCI. ASS’N 131, 141 (1908) (quoting the National Municipal League’s constitution). The League created products, like model charters, that outlined “tools for democracy” and advocated for the adoption of its proposals. Maureen A. Flanagan, *Progressives and Progressivism in an Era of Reform*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (Aug. 2016), [http://oxfordre.com/americanhistory/view/10.1093/acrefore-9780199329175.001.0001/acrefore-9780199329175-e-84#ref_acrefore-9780199329175-e-84-note-20](http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-84#ref_acrefore-9780199329175-e-84-note-20). Today, the organization is known as the National Civic League. *History of the National Civil League*, NAT’L CIVIC LEAGUE (Nov. 11, 2014), <https://www.nationalcivicleague.org/history-of-the-national-civic-league/>.

to vote as a means of identifying registered voters who may have moved or died, and then removing the names of these infrequent voters from the registration rolls.¹⁰ Most states had adopted a roll-maintenance practice that used non-voting to remove registered voters from the rolls by the 1950s.¹¹ The form that such laws took varied across jurisdictions. Some states removed people for failure to vote after two years, while others waited four years or more; some states removed registered voters for failure to vote without providing the registrants any notice, while others provided limited notice or multiple notices.¹² Other methods used to identify potentially ineligible individuals included conducting censuses of adult registrants.¹³

As a result of the low levels of voter participation in the U.S., as compared to other developed democracies, questions arose regarding the appropriateness, effectiveness, and reliability of using non-voting to purge a registrant's name from the voter rolls in the 1960s and 70s.¹⁴ And in 1973, the National Municipal League revisited its earlier recommendations, noting that purging registrants from the rolls for failure to vote over a period of less than four years is "discriminatory and undesirable."¹⁵ It recommended that election officials use "door-to-door

10. JOSEPH P. HARRIS, NAT'L MUN. LEAGUE, A MODEL REGISTRATION SYSTEM: REPORT OF THE COMMITTEE ON ELECTION ADMINISTRATION OF THE NATIONAL MUNICIPAL LEAGUE 37–39 (Russel Forbes ed., Supp. 1927); *see also id.* at 18–19.

11. JOSEPH P. HARRIS, NAT'L MUN. LEAGUE, MODEL VOTER REGISTRATION SYSTEM 44 (4th ed. 1954) [hereinafter NAT'L MUN. LEAGUE 4TH ED.]; *see also* Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 CONN. L. REV. 372, 373–78 (1974) (describing how thirty-eight states purged registrants for failure to vote by the 1970s); O. Douglas Weeks, *Permanent Registration of Voters in the United States*, 14 TEMP. L.Q. 74, 75–76 (1939) (noting that by 1939, twenty states had adopted such laws).

12. Menchel, *supra* note 11, at 373–78; Weeks, *supra* note 11, at 84–85.

13. HARRIS, *supra* note 10, at 7, 19, 39–41 (discussing censuses that may occur by going door-to-door to canvass all registered voters or all adult residents).

14. Historian Br., *supra* note 2, at 11–12 (first citing PRESIDENT'S COMM'N ON REGISTRATION AND VOTING PARTICIPATION, REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION 7–9 (1963); then citing NAT'L MUN. LEAGUE, A MODEL ELECTION SYSTEM 1 (1973)).

15. NAT'L MUN. LEAGUE, A MODEL ELECTION SYSTEM, *supra* note 14, at 33 (advising also that "[c]ancellation provisions . . . should include the opportunity to maintain registration by return notification within a reasonable period of time").

canvassing” or visitation—rather than non-voting—to conduct roll-maintenance activities.¹⁶

Congress tackled the issue of voter registration, including roll-maintenance practices, after the 1988 Presidential Election, in which “only about half of the voting age population” participated.¹⁷ Noting that qualified voters most often cited issues with registration as their reason for not participating in an election,¹⁸ Congress used its powers under the U.S. Constitution’s Elections Clause to enact the National Voter Registration Act of 1993 (“NVRA”).¹⁹ The NVRA mandates that states provide voter registration services during certain interactions with their citizens, and it regulates when and how voters may be removed from the registration rolls.²⁰

When Congress enacted the NVRA, “only a handful of states . . . drop[ped] the non-voters from the list without notice,” while most states canvassed voters to determine if they had moved.²¹ Section 8 of the NVRA, which set forth the requirements for conducting roll-maintenance activities, sought “to prohibit selective or discriminatory purge programs” by requiring that efforts to identify and remove people who may have become ineligible because of a change in residence be “uniform, nondiscriminatory, . . . in compliance with the Voting Rights

16. *Id.* at 24–34 (recommending such canvassing occur “every one or two years to register all eligible voters and to remove the names of voters who no longer reside at their registered address”).

17. S. REP. NO. 103-6, *supra* note 8, at 2.

18. *See id.*; H.R. REP. NO. 103-9, *supra* note 8, at 3.

19. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7–9 (2013) (noting that the Elections Clause of the U.S. Constitution provides Congress with broad discretion to dictate the “Times, Places, and Manner” of conducting federal elections, including by establishing “regulations relating to ‘registration’” (internal citations omitted)); *see also* S. REP. NO. 103-6, *supra* note 8, at 3.

20. *See* 52 U.S.C. §§ 20503–20508 (2012 & Supp. 2015). States that did not have voter registration requirements, as well as states that provided Election Day registration at polling locations, on the day that the NVRA went into effect and have continuously maintained those requirements since are exempt from the NVRA. *Id.* § 20503(b). These states include Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last updated Aug. 7, 2017).

21. S. REP. NO. 103-6, *supra* note 8, at 46 (noting that “[a]bout one-fifth of the stat[e]s canvass[ed] all voters on the list[, and t]he rest of the states” targeted their canvasses at non-voters); H.R. REP. NO. 103-9, *supra* note 8, at 30.

Act of 1965 [(“VRA”)],” and “not result in the removal of the name of any person from the [voter rolls] because of a failure to vote.”²² Congress explicitly endorsed one procedure that met these requirements—using the U.S. Postal Service’s National Change of Address (“NCOA”) Program to identify registered voters who may have moved;²³ it noted that bounced mail could also be used to identify such voters, so long as the initial mailings were conducted in a uniform and non-discriminatory manner that complied with the VRA.²⁴ Once it is determined that a voter may have moved, a notice-and-waiting procedure must be followed before a voter may be removed from the registration rolls.²⁵ And election officials are prohibited from conducting change-of-address removals within 90 days of a federal election.²⁶

Today, as compared to when the NVRA was first passed, states have a more centralized and cohesive election infrastructure that allows them to maintain voter rolls with increased accuracy. Currently, the vast majority of Americans who move in any given year move within the state in which they already reside.²⁷ Given that each state already has a statewide voter registration database, updating voters’ registrations when they move to a new address in the same state should be

22. S. REP. NO. 103-6, *supra* note 8, at 31; *see also* 52 U.S.C. § 20507(b)(1)–(2) (2012 & Supp. 2015).

23. S. REP. NO. 103-6, *supra* note 8, at 32; H.R. REP. NO. 103-9, *supra* note 8, at 15–16; *see also* 52 U.S.C. § 20507(c)(1) (2012 & Supp. 2015) (noting that a state may meet its obligation of conducting a reasonable program aimed at identifying and removing individuals who may have become ineligible by reason of a change in address by using data provided by the NCOA to initiate a removal procedure). The procedure for removing registered voters from the rolls using NCOA data is described in note 111, *infra*.

24. *See* S. REP. NO. 103-6, *supra* note 8, at 31–32.

25. *See, e.g.*, 52 U.S.C. § 20507(a)(4)(B), (d)(1)–(2) (2012 & Supp. 2015). The notice-and-waiting requirements are discussed in Part II(C), *infra*.

26. *Id.* § 20507(c)(2).

27. *Data: State-to-State Migration Flows*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html> (last revised Nov. 26, 2018). The 2017 state-by-state migration flow numbers indicate that approximately 80% of those who move, move within a state. *Id.* (indicating that about 36,468,599 individuals live in the same state as of one year ago out of about 43,940,092 total individuals).

relatively simple because the state has already verified each voter's information and entered it into a statewide database.²⁸ Further, there are multiple ways that a change of address can be reported to election officials, including directly by the voter through a paper form, an online system, or through a state-designated voter registration agency. In the forty-four states subject to the NVRA,²⁹ motor vehicle offices and public assistance agencies must provide voter registration services to individuals whenever they apply for or renew public assistance benefits, driver's licenses, or state-issued identification cards, as well as when they report a change of address to the relevant state agency, which allows registered voters to update their existing registration.³⁰ In fact, it was Congress's intent in passing the NVRA that providing voter registration services at these junctures would obviate the "need for large scale purges and list cleaning systems."³¹

28. For individuals who have become ineligible on other grounds, states also have ways to identify them. For example, courts report on which individuals have become ineligible in a state by reason of a felony conviction, and those individuals are then removed by election officials. *See, e.g.*, FRANK LAROSE, OHIO SEC'Y OF STATE, ELECTION OFFICIAL MANUAL § 1.11, at 66–67 (2018), https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-10_eom.pdf. Further, states use a wide variety of information to identify registered voters who have passed away and remove their names from the registration rolls. *See, e.g., id.* § 1.11, at 61–65. Sources of information for such removal include department of health or vital statistics records, interstate databases such as the State and Territorial Exchange of Vital Events ("STEVE") database, reports from family members, and obituary notices. *Id.*; NAT'L ASS'N OF SEC'YS OF STATE, MAINTENANCE OF STATE VOTER REGISTRATION LISTS: A REVIEW OF RELEVANT POLICIES AND PROCEDURES 8–9 (rev. 2017), <https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf>.

29. The states that are not subject to the NVRA either do not have voter registration requirements or allow voters to register on Election Day at their polling locations. *See supra* note 20 and accompanying text; *see also* 52 U.S.C. § 20503(b) (2012 & Supp. 2015). Having such registration regimes in place allows anyone who was inaccurately removed from the registration rolls to re-register on the day of the election and vote.

30. 52 U.S.C. §§ 20504, 20506 (2012 & Supp. 2015).

31. S. REP. NO. 103-6, at *supra* note 8, at 18 ("One of the advantages of the bill is the fact that the motor-voter and agency-based programs are ongoing and that applications and renewals may serve as updating the addresses of registered voters. Thus, the need for large scale purges and list cleaning systems becomes superfluous.").

Further, other data exists that can be used to identify individuals who may have moved, such as the NCOA Program, mail that is returned as undeliverable, information indicating that a registered voter obtained a license in another state, and canvasses.³² In addition, interstate data sharing systems exist that help identify if a person has moved to or registered to vote in another state.³³

Regardless of the fact that the NVRA barred purging registrants for not voting and that voter roll-maintenance processes have generally become more systematized, states use a number of deeply flawed procedures and mechanisms for identifying voters who may have moved, which results in eligible individuals being removed from the registration roll, and could be subject to legal challenges. A few of these types of purges are discussed below, notably those purges that have the effect or intent of disproportionately disenfranchising people of color or other traditionally marginalized populations, lack uniformity, are conducted without providing adequate notice, or are conducted within 90 days of a federal election.

A. Discriminatory Voter Purges

Voter purge practices that are enacted with discriminatory intent or that have a discriminatory effect can run afoul of the Fourteenth Amendment's Equal Protection Clause, Section 2 of the VRA, and Section 8(b)(1) of the NVRA.

32. See, e.g., Brief for the States of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, New Mexico, Oregon, and Washington, and the District of Columbia as Amici Curiae in Support of Respondents at 23–27, *Husted*, 138 S. Ct. 1833 [hereinafter Brief for the States as Amici Curiae in Support of Respondents]; Brief of the League of Women Voters of the United States, League of Women Voters of Ohio, and the Brennan Center for Justice as Amici Curiae in Support of Respondents at 21–24, *Husted*, 138 S. Ct. 1833.

33. See, e.g., Brief for the States as Amici Curiae in Support of Respondents, *supra* note 32, at 27; Brief of the League of Women Voters of the United States, League of Women Voters of Ohio, and the Brennan Center for Justice as Amici Curiae in Support of Respondents at 21–22, *Husted*, 138 S. Ct. 1833. Some of these programs are considered unreliable, often falsely flag a registered voter as having moved, and have a tendency to result in the disproportionate removal of traditionally marginalized groups. See *infra* Section II(A)(1).

The Fourteenth Amendment of the U.S. Constitution³⁴ protects the right of “a citizen . . . to participate in elections on an equal basis with other citizens in the jurisdiction.”³⁵ In analyzing whether the impact of a challenged election law or procedure is discriminatory and in violation of the Equal Protection Clause, courts employ a sliding scale analysis, often referred to as the *Anderson-Burdick* balancing test.³⁶ Under *Anderson-Burdick*, a court’s assessment of “the propriety of a state election law[, practice, or procedure] depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”³⁷ When a challenged practice places a severe restriction on the right to vote, it “must be ‘narrowly drawn to advance a state interest of compelling importance.’”³⁸ And, when a practice “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restriction[.]” on the right to vote.³⁹ Further, if a law or practice is shown to have a discriminatory purpose, courts assess its constitutionality by applying the appropriate level of scrutiny. For example, a law or practice implemented with discriminatory intent will be subject to strict scrutiny if it discriminates based on race or unduly burdens a fundamental right.⁴⁰

34. U.S. CONST. amend. XIV, § 1 (prohibiting states from depriving “any person within its jurisdiction the equal protection of the laws”).

35. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citations omitted).

36. *See generally* *Burdick v. Takushi*, 504 U.S. 428 (1992) (holding that Hawaii’s prohibition on write-in ballots did not unreasonably infringe on Fourteenth Amendment rights); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (holding that an Ohio statute that prescribed requirements for an independent candidate for President of the United States to be placed on the general election ballot placed an unconstitutional burden on voting rights for the independent candidate’s supporters).

37. *Burdick*, 504 U.S. at 434.

38. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

39. *Id.* (quoting *Anderson*, 460 U.S. at 788).

40. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that discriminatory purpose or intent may be inferred from circumstances and that intent rather than effect is needed to trigger strict scrutiny in Equal Protection challenges (citing *McLaughlin v. Florida*, 379 U.S. 184, 191–93 (1964))). As the Supreme Court noted in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), proof of discriminatory purpose does not require establishing that a challenged action was solely or primarily motivated by a discriminatory purpose, but rather “that a discriminatory purpose has been a motivating factor in the decision.” *Id.* at 265–66. Because direct evidence of discriminatory intent or purpose is frequently unavailable, the

Section 2 of the VRA prohibits states and election jurisdictions from using a “voting . . . standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁴¹ A Section 2 violation may be established when it is shown that a voting practice or procedure was enacted with a discriminatory purpose,⁴² as well as in instances where the challenged practice has a discriminatory effect.⁴³ While it is beyond the scope of this Article to discuss how the jurisprudence on Section 2 vote denial⁴⁴ claims has developed, it is worth noting that a court considering whether a purge practice or procedure will

Supreme Court has noted that circumstantial evidence may be examined to determine what motivated the adoption of a practice or procedure. *See id.* at 266. Evidence that the courts may consider includes, but is not limited to, whether the challenged action “bears more heavily on one race than another,” the “historical background” of an action, “[t]he specific sequence of events leading up [to] the challenged decision,” “[d]epartures from the normal procedural sequence,” and “legislative or administrative history.” *Id.* at 266–68.

41. 52 U.S.C. § 10301(a) (2012 & Supp. 2015). Section 2 “was designed as a means of eradicating voting practices that ‘minimize or cancel out the voting strength and political effectiveness of minority groups.’” *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 497 (1997) (quoting S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205).

42. As Congress noted in passing the 1982 Amendments to the VRA, the *Arlington Heights* factors, *see supra* note 40, are also often referred to when trying to determine if a voting practice or procedure was adopted with discriminatory purpose or intent. S. REP. NO. 97-417, at 133–35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 305–08).

43. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting that, in its 1982 Amendments to the VRA, Congress established that Section 2 bars not only voting practices and procedures enacted with a discriminatory purpose, but also those that have a discriminatory effect); *see also* 52 U.S.C. § 10301(b) (noting that “[a] violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”).

44. Section 2 may give rise to vote dilution and vote denial claims. *See, e.g.,* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015). Vote dilution claims are those used to challenge practices that impact the weight of a group’s vote. *See id.* Vote denial claims, on the other hand, challenge practices or procedures that impact a person’s ability to cast a vote and have it counted. *See id.*

have a discriminatory effect will assess (1) the disparate impact that practice will have on voters of color, and (2) the factors outlined in the Senate Report to the 1982 Amendments of the VRA.⁴⁵ However, circuits vary in how this test is applied.⁴⁶

45. The Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have all discussed this two-part test. *See* Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 711–12 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019); Ohio Democratic Party v. Husted, 834 F.3d 620, 637–38 (6th Cir. 2016); Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); Frank v. Walker, 768 F.3d 744, 754–55 (7th Cir. 2014); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court noted that:

The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44–45. It stressed, however, that the “list of . . . factors is neither comprehensive nor exclusive,” “there is no requirement that any particular number of factors be prove[n],” and that courts can consider other factors of relevance. *Id.* at 45 (citing S. REP. NO. 97-417, at 29–30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207).

46. While the courts that have considered Section 2 vote denial claims, *see supra* notes 44–45, have noted that the same two-part test is applicable, “the circuits differ somewhat as to the evidentiary showing needed to satisfy it.” Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. F. 799, 809 (2018) (discussing the differences in how the test has been applied and noting that the Seventh Circuit, which found that showing an effect on voter turnout and “intentional state-sponsored discrimination is one of the ‘social and historical conditions’ that a plaintiff must establish,” stands as an outlier and “appears to have misconstrued the text and purpose of Section 2”).

Section 8(b)(1) of the NVRA, which requires that removal programs be “nondiscriminatory[] and in compliance with the [VRA],”⁴⁷ may largely overlap with the requirements above. The meaning of Section 8(b)(1)’s nondiscriminatory language has not been parsed out in the courts. However, if a program violates the requirements of the VRA, it would also by the plain terms of Section 8(b)(1) necessarily violate the NVRA.⁴⁸

When roll-maintenance practices—disproportionally or intentionally—target people of color or other traditionally marginalized groups for removal from the registration rolls, they may run afoul of the aforementioned laws. This may happen when the information used to initiate a roll-maintenance procedure has a discriminatory effect or when people, towns, or neighborhoods are specifically targeted for removal from the registration rolls.

1. Use of Non-Voting of Other Potentially Discriminatory Systems to Initiate a Removal Process

Some sources of information that states use to initiate a removal process based on a perceived change of address may disproportionately target traditionally disenfranchised populations. Two sources of information that are typically used on a statewide basis to begin the removal process, and which may produce discriminatory results, are the use of non-voting and the Crosscheck program.

First, the use of non-voting to target voters for removal could run afoul of the rights and protections guaranteed by Section 2 of the VRA and the Fourteenth Amendment’s Equal Protection Clause. For example, in Ohio, a state roll-maintenance practice known as the Supplemental Process uses two years of non-voting “to identify electors

47. 52 U.S.C. § 20507(b)(1) (2012 & Supp. 2015) (“Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”).

48. The precise meaning of “nondiscriminatory,” and the extent to which it has independent significance from the requirements that a process be “uniform” and conducted “in compliance with the Voting Rights Act,” has not been litigated in courts. However, the Senate and House Reports produced while the NVRA was being considered indicate that “‘non-discriminatory’ is intended to mean that the procedure complies with the requirements of the” VRA. S. REP. NO. 103-6, *supra* note 8, at 31; H.R. REP. NO. 103-9, *supra* note 8, at 15.

whose lack of voter initiated activity indicates they may have moved” and initiate a removal process.⁴⁹ Limited numerical analyses examining the impact of Ohio’s purge procedure in two of Ohio’s largest counties indicated that those who had been targeted for removal based on their failure to vote, and ultimately purged from the registration rolls, were disproportionately African American.⁵⁰ Contributing to this disparity may be the systemic inequalities that have given rise to unequal education and employment opportunities, resulting in African Americans being more likely to hold “lower-rung service and sales work positions,” which have “lower earnings and benefits, less autonomy and

49. See, e.g., JON HUSTED, OHIO SEC’Y OF STATE, DIRECTIVE 2013-10, 2013 GENERAL VOTER RECORDS MAINTENANCE PROGRAM (NATIONAL CHANGE OF ADDRESS AND SUPPLEMENTAL PROCESSES); GROUNDS FOR REGISTRATION CANCELLATIONS (2013) (describing the Supplemental Process).

In 2016, a case, *Ohio A. Phillip Randolph Institute v. Husted*, was brought that challenged Ohio’s Supplemental Process on two grounds. The first cause of action alleged that the Supplemental Process’s use of failure to vote to initiate a removal procedure violated the NVRA’s prohibition on removing voters from the roll by reason of their failure to vote. Plaintiffs’ First Amended Complaint at 15–16, *Ohio A. Phillip Randolph Inst. v. Husted*, No. 2:16-cv-303, 2016 WL 3542450 (S.D. Ohio June 29, 2016). The second cause of action alleged that the notice the State had been sending to voters targeted for removal under the Supplemental Process did not meet the specific notice requirements set forth in the NVRA. *Id.* at 16–17; see also Part II(C)(1), *infra*, discussing the NVRA’s notice requirements. No violations of the VRA, Equal Protection Clause, or the NVRA’s non-discriminatory provision were alleged. See generally Plaintiffs’ First Amended Complaint, *supra*. When the Supreme Court granted certiorari, it was purely to address the first cause of action. See, e.g., Petition for Writ of Certiorari at i, *Husted*, 138 S. Ct. 1833 (requesting that the Supreme Court consider the first cause of action). While the U.S. Supreme Court, in *Husted*, found that Ohio’s use of non-voting did not violate the NVRA’s prohibition on removing voters from the rolls “by reason of [a] person’s failure to vote,” it did not consider whether the practice violated Equal Protection, the VRA, or Section 8(b)(1) of the NVRA. *Husted*, 138 S. Ct. at 1842–46.

50. See Declaration of Cameron Bell at ¶¶ 5–11, *Ohio A. Phillip Randolph Inst.*, 2016 WL 3542450 (discussing how a disproportionate number of voters purged under Ohio’s Supplemental Process resided in neighborhoods that were largely Black, Latino, and Asian); Andy Sullivan & Grant Smith, *Use It or Lose It: Occasional Ohio Voters May Be Shut Out in November*, REUTERS (June 2, 2016, 6:05 AM), <https://www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D> (discussing how Ohio’s purge of infrequent voters has resulted in people living in Cincinnati “neighborhoods that have a high proportion of poor, African-American residents” being removed from the registration rolls at much higher rates).

scheduling flexibility, [are] more likely to pay hourly wages . . . , and [have less] job security.”⁵¹ Additionally, in Ohio, African Americans are less likely to have access to a vehicle and are approximately three times as likely to use public transportation or walk to work.⁵² These and numerous other disparities reduce accessibility to voting among African Americans in the state. Because the inequalities that exist in Ohio are not unique to that state, use of non-voting to purge individuals from the voter rolls may directly violate Section 2 of the VRA by disproportionately denying voters of color of their right to vote. It is also possible that an Equal Protection challenge to such practices may succeed on showing that African Americans or other traditionally disenfranchised groups have been disproportionately denied their right to vote. As Justice Sotomayor has noted, “low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under” Ohio’s practice of purging infrequent voters.⁵³

Second, the Crosscheck program, which uses voter lists from multiple states to identify people who share a first name, last name, and date of birth, can inaccurately target large numbers of voters for removal⁵⁴ and disproportionately and incorrectly identify people of color.

51. Expert Report of Vincent J. Roscigno at 6, *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio Sept. 4, 2014). “African Americans in Ohio are disparately located in non-salaried, lower-paying jobs where it is much more difficult to take time off to vote” *Id.* at 16.

52. *Id.* at 16.

53. *Husted*, 138 S. Ct. at 1864 (Sotomayor, J., dissenting). As noted above, while *Husted* was decided in Ohio’s favor, that decision was based on other grounds and did not consider whether the challenged roll-maintenance practice violated Section 8(b)(1) of the NVRA, Section 2 of the VRA, or the Equal Protection Clause. *See supra* note 49 and accompanying text.

54. As many as 30 states were using the Crosscheck program for roll-maintenance activities in 2016. NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 28, at 10. States have expressed concerns about Crosscheck’s accuracy, with some leaving the program entirely. *See generally id.* at 9–10 (“States participating in the program may have different procedures for processing the information.”). However, individuals were frequently targeted and removed from the registration rolls in error on the basis of Crosscheck data. JONATHAN BRATER, BRENNAN CTR. FOR JUSTICE, VOTER PURGES:

It is estimated that approximately one-sixth “of all Asian-Americans share just 30 surnames and 50 percent of minorities share common last names, versus 30 percent of whites.”⁵⁵ After reviewing lists produced by Crosscheck, Mark Swedlund, a list analytics specialist, stated:

It appears that Crosscheck does have inherent bias to over-selecting for potential scrutiny and purging voters from Asian, Hispanic and Black ethnic groups. In fact, the matching methodology, which presumes people in other states with the same name are matches, will always over-select from groups of people with common surnames.⁵⁶

Programs like Crosscheck can therefore result in disproportionate targeting and removal of people of color from the registration rolls. As with using non-voting to target people for removal, the use of Crosscheck could violate the promises of Section 2 of the VRA and the Equal Protection Clause.

THE RISKS IN 2018, at 4-6 (2018), <https://www.brennancenter.org/publication/voter-purges-risks-2018>; see also, e.g., Greg Palast, *The GOP's Stealth War Against Voters*, ROLLING STONE (Aug. 24, 2016, 2:40 PM), <https://www.rollingstone.com/politics/politics-features/the-gops-stealth-war-against-voters-247905/> (noting that when Oregon decided to stop using Crosscheck data to conduct roll-maintenance activities, its Secretary of State remarked that they had left Crosscheck “because the data [they] received was unreliable”); see also Sean Holstege, *Do Voter Purges Discriminate Against the Poor and Minorities?*, NBC NEWS (Aug. 24, 2016, 11:07 AM) <https://www.nbcnews.com/news/us-news/do-voter-purges-discriminate-against-poor-minorities-n636586> (noting that the States of Washington and Colorado noted that Crosscheck could be unreliable and that Washington had never used information received from the program to remove registrants from the voter rolls).

55. Greg Palast, *Jim Crow Returns: Millions of Minority Voters Threatened by Electoral Purge*, ALJAZEERA AMERICA (Oct. 29, 2014), <http://projects.aljazeera.com/2014/double-voters/>; see also Christopher Ingraham, *This Anti-Voter-Fraud Program Gets It Wrong Over 99 Percent of the Time. The GOP Wants to Take it Nationwide.*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nation-wide/?utm_term=.e75c3c57a3ea (noting that Crosscheck primarily relies on names and birth dates).

56. Palast, *Jim Crow Returns: Millions of Minority Voters Threatened by Electoral Purge*, supra note 55.

2. Targeted Removals

Aside from statewide roll-maintenance programs that use non-voting and Crosscheck to identify voters who may have moved, in recent years there has also been a troubling uptick in purge practices that are localized and seemingly targeted at communities of color. For example, in 2015, the majority-white Hancock County Board of Elections and Registration challenged the registrations of nearly 17% of the City of Sparta's registered voters in advance of a local municipal election⁵⁷ by "dispatching deputies with summonses commanding [the challenged voters] to appear in person [at a hearing] to prove their residence or lose their voting rights."⁵⁸ Almost all these voters were black.⁵⁹

In 2016, three North Carolina counties initiated voter removal proceedings against individuals based off "of single mailings" sent by independent individuals that were returned as undeliverable.⁶⁰ In at least one of these counties, Beaufort, black registrants comprised more than 65% of the number of voters whose registrations were canceled, even though the county's population was less than 26% black.⁶¹

57. Complaint at 1–2, *Ga. State Conf. of the NAACP v. Hancock Cty. Bd. of Elections and Registration*, No. 5:15-CV-00414, 2018 WL 1583160 (M.D. Ga. Mar. 30, 2018).

58. Michael Wines, *Critics See Efforts by Counties and Towns to Purge Minority Voters from Rolls*, N.Y. TIMES (July 31, 2016), <https://www.nytimes.com/2016/08/01/us/critics-see-efforts-to-purge-minorities-from-voter-rolls-in-new-elections-rules.html>. In the Sparta area, blacks "are arrested at a rate far higher than that of whites," which led to some of those targeted with these summons to be "confused and rattled." *Id.* And as one Sparta elections official noted, "[p]eople just d[id] not understand why a sheriff [wa]s coming to their house to bring them a subpoena, especially if they ha[d]n't committed any crime." *Id.*

59. Complaint, *supra* note 57, at 2.

60. N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284, at *1 (M.D.N.C. Nov. 4, 2016).

61. See Eliza Collins, *State NAACP Office Sues North Carolina, Alleging Voter Suppression*, USA TODAY (Oct. 31, 2016, 3:02 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/10/31/state-naacp-north-carolina-voting/93068458/>; Julia Craven, *North Carolina NAACP Sues State Over Voter Suppression*, HUFFINGTON POST (Oct. 31, 2016, 12:43 PM), https://www.huffingtonpost.com/entry/north-carolina-naacp-voter-suppression_us_5817634fe4b064e1b4b385df; Danielle Root & Liz Kennedy, *Voter Purges Prevent Eligible Americans From Voting*, CTR. FOR AM. PROGRESS (Jan. 4, 2018,

Targeted purges, like those seen in Sparta and North Carolina, may violate the VRA or Equal Protection Clause if implemented with discriminatory intent. Such acts would also be subject to challenge under such laws if they either result in the disproportionate disenfranchisement of people of color or cannot withstand scrutiny under the Equal Protection Clause's *Anderson-Burdick* framework.

B. Lack of Uniformity in State Roll-Maintenance Practices

State roll-maintenance programs and procedures must not only be “nondiscriminatory[] and in compliance with the Voting Rights Act,” but Section 8 of the NVRA requires that such programs must also “be uniform.”⁶² While there has been limited litigation regarding Section 8's uniformity requirement, there are several ways in which state roll-maintenance practices could foreseeably violate Section 8's mandate. For example, the uniformity requirement may be violated when a state fails to apply the same roll-maintenance practice consistently across all election jurisdictions, or when election jurisdictions accept information sent from a third party *ad hoc* and use the information to remove voters from the registration rolls.

1. Inconsistent Application of Roll-Maintenance Practices and Procedures Across a State

The uniformity requirement may be violated when local jurisdictions are not consistently implementing state roll-maintenance practices. For example, a number of state laws seem to provide local election officials with discretion on what sources of information they use to identify a registered voter who may have moved and initiate a procedure to remove that registrant from the voter rolls.⁶³ If local election

10:46 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/01/04/444536/voter-purges-prevent-eligible-americans-voting/>.

62. 52 U.S.C. § 20507(b)(1) (2012 & Supp. 2015). Some ways in which programs can run afoul of the NVRA's requirement that practices be nondiscriminatory and in compliance with the VRA are discussed above. *See supra* Part II.A.

63. ARK. CONST. amend. 51, § 10(d) (allowing for the use of “other unconfirmed data”); CONN. GEN. STAT. § 9-35(e) (2013) (election officials may start a removal process upon obtaining “reliable information” that a registrant has moved); LA. STAT. ANN. § 18:198(A) (2009) (permitting parishes to initiate removals when they have “reason to believe that a registrant” has moved); NEV. REV. STAT.

jurisdictions in such states are employing different methods to identify voters who may have moved, the state-mandated roll-maintenance activity would seemingly violate Section 8's uniformity requirements.⁶⁴

Similarly, a state's roll-maintenance practices may violate Section 8 when local election officials are not given guidance on how a prescribed, statewide roll-maintenance procedure should be implemented. A case addressing this issue is currently being litigated in federal court.⁶⁵ *Common Cause Indiana v. Lawson* challenges Indiana's use of the Crosscheck program to identify voters who may have moved and alleges, among other things, that the state's use of the program fails to meet the NVRA's uniformity requirements.⁶⁶ When Indiana provides local election officials with the information that the State received from Crosscheck, it does not provide any "guidance or a standardized procedure . . . for how to determine whether the record of an Indiana voter is actually the same individual who is registered [to vote] in another state or how to determine whether the out-of-state registration [or the Indiana registration] is more recent."⁶⁷ When granting Common Cause's motion for a preliminary injunction and thereby halting the State's method of using Crosscheck for roll-maintenance activities, the Southern District of Indiana noted that when the court makes its final determination regarding the legality of the practice, it is "likely" that the court will hold that the practice "fail[s] to be uniform . . . based on the evidence that Indiana's 92 county officials are left to use wide discretion in how they determine [whether a voter has likely

§ 293.530(1)(a) (2004) (allowing local election officials to "use any reliable and reasonable means available . . . to determine whether a" registrant has moved); TEX. ELEC. CODE ANN. § 15.051(a), (c) (West 2010) (election officials can initiate removal when they have "reason to believe" that a registrant has moved); UTAH CODE ANN. § 20A-2-306(2)(b) (LexisNexis 2013) (allowing removals to be initiated "[w]hen a county clerk obtains information" indicating a registrant may have moved). The NVRA's removal procedure is described in greater detail below. *See infra* Part II.C.

64. *See also* S. REP. NO. 103-6, *supra* note 8, at 31 (noting that Section 8 intends "to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity that is used to start, or has the effect of starting, a purge of the voter rolls, without regard to how it is described"); H.R. REP. NO. 103-9, *supra* note 8, at 15 (same).

65. *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139 (S.D. Ind. 2018).

66. *Id.* at 1149–50.

67. *Id.* at 1145.

moved based on the data received from Crosscheck], and they have used that discretion in very divergent ways.”⁶⁸

2. Lists Compiled by Other Parties

Lists of potentially ineligible voters that are used for roll-maintenance purposes do not always originate from state officials. Another current practice that could be subject to challenge under the uniformity provision of Section 8 relates to voter caging—a practice whereby individuals or “groups target certain communities by sending out mass direct[, non-forwardable] mailings to registered voters.”⁶⁹ For example, in 2016, individuals in North Carolina challenged the registrations of approximately 4,538 North Carolina voters registered in three counties “based on correspondence that was sent to each of the voters and returned undeliverable.”⁷⁰ The counties used this information to remove the names of nearly 4,000 of the challenged voters—many of who remained eligible to vote—from the registration rolls.⁷¹

68. *Id.* at 1153.

69. Root & Kennedy, *supra* note 61.

70. N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284, at *1–2 (M.D.N.C. Nov. 4, 2016) (noting that approximately 138 of the challenged voters were registered in Beaufort County, approximately 400 were registered in Moore County, and approximately 4,000 were registered in Cumberland County).

71. N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf’t, No. 1:16CV1274, 2018 WL 3748172, at *3, *8–9 (M.D.N.C. Aug. 7, 2018). These were not the first of such purges in the State. In 2016, a news report indicated that “nearly 6,700 challenged voters were removed from registration lists in eight counties over the past two years.” Pete Williams, *Judge Says North Carolina Illegally Purged Voter Lists*, NBC NEWS (Nov. 4, 2016, 5:03 PM), <https://www.nbcnews.com/story-line/2016-election-day/judge-says-north-carolina-illegally-purged-voter-lists-n677431>.

The counties also canceled the registrations without following the notice-and-waiting requirements. For these requirements, see *infra* Section II.C. It should be noted that, when a statewide mailing is sent to all registered voters, and mail is returned as undeliverable, states may use that information to initiate a removal process that follows the notice and waiting procedures. For a discussion on these procedures, see *infra* Part II.C. See, e.g., *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last updated Aug. 7, 2017) (noting that roll-mainte-

The 2016 purges conducted in North Carolina lacked uniformity. Not only were these mailings geographically focused within certain counties,⁷² but the purges at issue appear to have occurred in only three of North Carolina's 100 counties.⁷³ As the legislative history of the NVRA explains, the statute's requirement that roll-maintenance practices be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," was intended to prohibit election officials from "conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity."⁷⁴

C. Failure to Meet the NVRA's Notice Requirements

Aside from claims that may exist about the information used to initiate roll-maintenance activities, procedural restrictions exist that limit how and when states may remove registrants from the voter rolls based on a perceived change of address. For instance, after receiving information, through the NCOA or another uniform and non-discriminatory source or process that indicates a voter may have moved, states must send a notice to the registered voter.⁷⁵ The voter cannot be removed from the registration rolls until they either respond or fail to

nance programs can "involve a State undertaking a uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction, and then using information obtained from returned non-deliverable mail as the basis for correcting voter registration records (for apparent moves within a jurisdiction) or for initiating the notice process (for apparent moves outside a jurisdiction or non-deliverable mail with no forwarding address noted)").

72. *See, e.g.*, Brief of the Beaufort County Defendants in Opposition to the Plaintiffs' Motion for Partial Summary Judgment at 2–3, N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016) (noting that the voters targeted in Beaufort County were limited to those living in the city of Belhaven).

73. It is worth noting that, while a case was brought challenging these purges under Section 8 of the NVRA, the challenge did not include a uniformity claim. *See generally* Complaint, N.C. State Conf. of the NAACP, 2016 WL 6581284.

74. S. REP. NO. 103-6, *supra* note 8, at 18, 31; *see also* H.R. REP. NO. 103-9, *supra* note 8, at 15.

75. 52 U.S.C. § 20507(d)(1)–(2) (2012 & Supp. 2015).

both respond and vote in a time period encompassing two federal general elections.⁷⁶ These requirements are set forth in Section 8(d) of the NVRA, which states:

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant-

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
(B) (i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an 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.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

76. Pursuant to Section 8 of the NVRA, states must "conduct a general program that makes a reasonable effort to remove the names of" registrants who have become ineligible to vote by reason of a change in residence. *Id.* § 20507(a)(4)(B). Such programs must be conducted in accordance with "subsections (b), (c), and (d)." *Id.* Section 8(b) requires that state roll-maintenance programs and activities "be uniform, nondiscriminatory, . . . in compliance with the Voting Rights Act," and "not result in the removal of the name of any person from the official list of . . . [registered voters] by reason of the person's failure to vote." *Id.* § 20507(b). Subsection (d) requires that any state program designed to identify voters who have moved include a notice-and-waiting requirement, as discussed in this subsection. *Id.* § 20507(d)(1)-(2). And subsection (c) prohibits states from removing voters pursuant to such programs within 90 days of a federal election. *Id.* § 20507(c)(2).

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) [(i.e., the state's voter registration deadline)]. 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.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.⁷⁷

The only exception to the notice-and-waiting requirement exists when a registrant requests that his or her name be removed from the registration rolls.⁷⁸ Such a request must be made in writing.⁷⁹

The United States Supreme Court has described Section 8(d)'s notice requirement as “[t]he most important” of the “requirements . . . a State must meet in order to remove a name on change-of-residence grounds.”⁸⁰ The Court recognized that “[i]f the State does not send . . .

77. *Id.* § 20507(d)(1)–(2).

78. *See id.* § 20507(a)(3)–(4) (noting that names may be removed from the voter registration rolls in only five circumstances: “at the request of the registrant,” as well as in instances where an individual has become ineligible by reason of death, criminal conviction, mental incapacity, or a change in residence); *see also id.* § 20507(d)(1) (prohibiting states from removing registrants from the rolls on change-of-address grounds unless (1) the registrant “confirms in writing” that they have moved “to a place outside the registrar’s jurisdiction in which the registrant is registered” or (2) the notice and waiting requirements of Section 8(d) have been met).

79. *Id.* § 20507(d)(1)(A).

80. *Husted*, 138 S. Ct. at 1838.

a card [meeting the specifications set forth in § 8(d)(2)], it may not remove the registrant on change-of-residence grounds.”⁸¹

Violations of Section 8(d)’s notice requirement may occur in several ways, including, but not limited to, failing to provide a notice that includes the information required by NVRA Section 8(d)(2) or purging voters without providing any form of notice whatsoever.

1. Instances of Inadequate Notice

As noted above, when an election jurisdiction collects information in a lawful manner that indicates that a registered voter may have become ineligible to vote because of a change in address, the registrant must be sent a “postage prepaid and pre-addressed return card . . . by forwardable mail” that informs the registrant:

- a. If they did not move, or moved within their election jurisdiction, they “should return the card no[] later than the” deadline for voter registration in the state;
- b. “[D]uring 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” notice was sent:
 - i. The registrant may need to affirm or confirm their address before voting in an election;
 - ii. The registrant’s name “*will* be removed from the” rolls if they do not vote and do not respond to the notice; and
- c. How, if the registrant has moved outside of their voting jurisdiction, they “can continue to be eligible to vote.”⁸²

81. *Id.* at 1838–39 (citing 52 U.S.C. § 20507(d)(1) (2012 & Supp. 2015)). The Court noted that the only instance when a state does not have to meet the notice requirements set forth in Section 8(d)(2) before removing a registrant’s name from the voter rolls on such grounds, is in those instances where a state receives “written notice that the person has moved.” *Id.* at 1839; *see also* 52 U.S.C. § 20507(d)(1)(a) (2012 & Supp. 2015) (permitting the removal of a registrant who confirms in writing that he or she has moved); *id.* § 20507(a)(3)(A) (noting that a resident may be removed “at the request of the registrant”).

82. 52 U.S.C. § 20507(d)(2) (2012 & Supp. 2015) (emphasis added).

There has been little litigation over the adequacy of Section 8(d) notices. *A. Philip Randolph Institute v. Husted* (“*APRI*”), currently pending before the Sixth Circuit, directly addressed questions surrounding point (c) in 2016,⁸³ and is set to consider other issues regarding the sufficiency of Ohio’s notice later this year.⁸⁴

First, in 2016, the Sixth Circuit considered whether Ohio’s notice failed to meet the NVRA’s requirements by omitting any information on how voters who had moved to a different state could continue to be eligible to vote.⁸⁵ All three judges sitting on the panel noted that the NVRA’s plain language required that such information be provided.⁸⁶ Ohio subsequently amended its notice to provide information about how out-of-state movers could register to vote in their new election jurisdiction.⁸⁷ On remand, the district court required the State to continue using a notice that provided this information to recipients and to update the Secretary of State’s website to provide voters who may have moved out of Ohio with information on how they could continue to be eligible to vote in their new election jurisdiction.⁸⁸

The Sixth Circuit is set to consider whether Ohio’s notice was flawed in other ways in 2019.⁸⁹ In *APRI*, it is alleged that Ohio’s notice

83. See, e.g., *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 714–15 (6th Cir. 2016), *rev’d*, 138 S. Ct. 1833 (2018).

84. See generally Brief of Appellants, *A. Philip Randolph Inst. v. Husted* (*APRI*), 907 F.3d 913 (6th Cir. *appeal docketed* Oct. 12, 2018).

85. *A. Philip Randolph Inst.*, 838 F.3d at 714–15. At the same time, the Sixth Circuit also considered whether Ohio could use a registrant’s failure to vote over a two-year period to start a removal process and trigger the sending of the notice described in Section 8(d)(2) of the NVRA. The Court’s determination that using failure to vote to initiate the removal process violated Section 8, *id.* at 705–12, is the portion of the Sixth Circuit’s decision that was overturned by the U.S. Supreme Court in 2018. *Husted*, 138 S. Ct. at 1841–46.

86. *A. Philip Randolph Inst.*, 838 F.3d at 714–15; *id.* at 717 (Siler, J., dissenting in part and concurring in part).

87. See, e.g., Plaintiffs’ Motion for Entry of Judgment or Summary Judgment and for a Permanent Injunction at 2–3, *Ohio A. Phillip Randolph Inst. v. Husted*, No. 2:16-cv-303, 2016 WL 3542450 (S.D. Ohio June 29, 2016) (describing the changes made to the SOS Form and attaching the newly amended SOS 10-S-1 form filed with the motion as Exhibit E, ECF No. 132-5).

88. *Ohio A. Phillip Randolph Inst. v. Husted*, No. 2:16-cv-303, 2018 WL 4907081, at *14 (S.D. Ohio Oct. 10, 2018). The District Court held that Ohio’s notice had otherwise complied with the NVRA. *Id.* at *9–12.

89. See, e.g., Brief of Appellants, *APRI*, 907 F.3d 913.

fails to meet the NVRA's requirements by: (1) failing to inform voters that if they fail to respond to the notice and vote before the second federal general election occurs, their names *will be* removed from the voter registration rolls⁹⁰ and (2) failing to provide the voter registration deadline as the time by which voters must respond.⁹¹

The Sixth Circuit reflected on the likelihood of success on the first claim on an emergency injunction pending appeal, noting that: "A statement that the individual 'may be removed' is not a statement that the individual 'will be removed' and a confirmation notice with such language appears at least in tension with, and likely in violation of, the NVRA."⁹²

The NVRA sets forth technical and specific requirements regarding the content of notices sent to individuals that election officials believe may have moved. If a voter is removed without receiving a notice that provides the information required under Section 8(d), their removal would be unlawful. Relatedly, if a voter does not submit a written request for removal, the NVRA prohibits states from removing voters from the registration rolls on change-of-address grounds without following the notice-and-waiting requirements of Section 8(d).

90. *See, e.g., id.* at 26–31. Ohio's notice informed voters only that their names may be removed if they failed to respond and vote. *See id.* at 5–6.

91. It is also alleged that the forms violated the NVRA's notice requirements by having essentially operated as a re-registration form in the past—requiring voters to fill out all five fields of information they were required to submit in their original voter registration application. *Id.* at 34–35. When the Sixth Circuit considered this issue on an emergency injunction pending appeal, it expressed some skepticism about this claim, but noted that it was "not conclusively decid[ing] the merits of [the] issue" at that time. *APRI*, 907 F.3d 913, 919.

92. *APRI*, 907 F.3d at 919–21 (noting also that "[a] letter from the IRS advising that 'if you do not file Form X or Form Y, you will be audited' is not the functional equivalent of a letter stating that 'if you do not file Form X or Form Y, you may be audited' because it does not put the recipient on notice of the urgency"). With respect to the claim that Ohio's notice violated the NVRA because it did not state that individuals needed to respond by a specific date—the next cut-off for voter registration—the court did "not reach the question of likelihood of success." *Id.* at 921 n.6.

2. Failure to Provide Notice

Under the NVRA, when states receive information indicating a voter may have moved to a new election jurisdiction—such as information obtained through the NCOA Program—they must still complete the notice-and-waiting requirements outlined in Section 8(d).⁹³ There are several recent instances where states have tried to claim information obtained from a third party can serve as a request for removal or written confirmation that a voter has changed residences.⁹⁴

Take, for instance, *Common Cause Indiana v. Lawson*,⁹⁵ which was filed in 2018 in the Southern District of Indiana. *Common Cause Indiana* challenges an Indiana roll-maintenance law passed in 2017.⁹⁶ As discussed in Part II.B.1, Indiana uses the Crosscheck program to identify voters who may have moved and removes them from the voter registration rolls.⁹⁷ Prior to passage of the 2017 law, Indiana used the information it obtained from Crosscheck to begin the removal process set forth in Section 8(d) of the NVRA—that is, it sent a notice and, if a registrant failed to respond, waited the requisite amount of time before removing the registrant’s name from the voter rolls.⁹⁸ In 2017, Indiana eliminated the notice and waiting requirement, allowing registrants whose names matched those identified through Crosscheck as having potentially moved to another state to be removed immediately and without notice.⁹⁹ The Southern District of Indiana considered the legality of this practice and issued a preliminary injunction halting the process in 2018.¹⁰⁰ The court found that the program plainly violated

93. See, e.g., 52 U.S.C. § 20507(c)(1)(B)(ii) (2012 & Supp. 2015); see also *id.* § 20507(a)(4)(B) (requiring that programs conducted to identify and remove individuals who appear to have moved must be conducted “in accordance with” the NVRA’s notice-and-waiting requirements).

94. See *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1151 (S.D. Ind. 2018).

95. *Id.* at 1139.

96. *Id.* at 1145–47.

97. See *supra* Part II.B.1.

98. *Common Cause Ind.*, 327 F. Supp. 3d at 1145–46.

99. *Id.* at 1146 (noting that the law “remove[d] the requirement to send an address confirmation notice to the voter”).

100. See *generally id.* at 1139–41 (issuing a preliminary injunction because *Common Cause* established a likelihood of success that the amended state law violated the NVRA).

the NVRA's requirement that no voter be removed from the rolls on change-of-address grounds unless they confirm the move in writing or the notice-and-waiting requirements of Section 8(d) have been met.¹⁰¹ The court stated:

The act of registering to vote in a second state as determined by Crosscheck cannot constitute a written request to be removed from Indiana's voter rolls or a confirmation in writing from the voter that they have changed their address There is no request for removal, and the voter is not confirming for Indiana that they have had a change in residence. Notably this information is not coming from the voter but rather from Crosscheck, which may or may not be reliable. It is significant that the NVRA still requires the notice and waiting period before cancelling a voter registration when a change in address has been confirmed through the U.S. Postal Service, which might be more reliable than Crosscheck.¹⁰²

Additionally, the 2016 voter purges conducted in three North Carolina counties, described above, used information obtained from private individuals who sent mass, non-forwardable mailings and used bounce-backs to challenge the registrations of over 4,500 voters.¹⁰³ County boards of elections used this information to remove the names of nearly 4,000 voters from the registration rolls without ever sending the notice required in Section 8(d) and waiting the prescribed period of time.¹⁰⁴ An August 2018 decision from the Middle District of North Carolina determined that failure to follow the NVRA's notice-and-waiting requirements before proceeding with these removals violated federal law.¹⁰⁵

In both Indiana and North Carolina, the states attempted to use information that was not provided directly from the voters themselves to circumvent the NVRA's notice-and-waiting requirements, outlined

101. *Id.* at 1153 (citing 52 U.S.C. § 20507(d)(1) (2012 & Supp. 2015)).

102. *Id.*

103. N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284, at *1–5 (M.D.N.C. Nov. 4, 2016).

104. N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections and Ethic Enf't., No. 1:16CV1274, 2018 WL 3748172, at *8–9 (M.D.N.C. Aug. 7, 2018).

105. *Id.* at *4–5, *8–9.

in Section 8(d), and conduct immediate removals based on a perceived change of address. The decisions of the district courts in both instances set forward a warning to other states and election jurisdictions that roll-maintenance practices following such a pattern are likely to violate Section 8(d)'s notice procedure.

D. Conducting Removals Within 90 Days of An Election

States must not only ensure that their roll-maintenance practices are non-discriminatory, uniform, and compliant with the NVRA's notice requirements, they must also guarantee that no large-scale removals take place in the months directly proceeding a federal election.

Section 8(c)(2)(A) of the NVRA prohibits states from systematically removing individuals from the registration rolls on change-of-address grounds within 90 days of a federal election.¹⁰⁶ In *Arcia v. Florida Secretary of State*,¹⁰⁷ the Eleventh Circuit described the balance Congress appears to have attempted to strike in establishing this prohibition, noting that:

[I]ndividualized removals are safe to conduct at any time because this type of removal is usually based on individual correspondence or rigorous individualized inquiry, leading to a smaller chance for mistakes.

106. Section 8(c)(2) states:

(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a);
or

(ii) correction of registration records pursuant to this chapter.

52 U.S.C. § 20507(c)(2) (2012 & Supp. 2015). The removals permitted per Section 8(c)(2)(B)(i) include removals made “at the request of the registrant,” and by reason of criminal conviction, mental incapacity, and death. *See id.* § 20507(a)(3)–(4); *see also, e.g.*, S. REP. NO. 103-6, *supra* note 8, at 32. Thus, election officials may remove the names of those individuals who have moved and submit written requests to remove their names from the voter-registration rolls during this 90-day period.

107. *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335 (11th Cir. 2014).

For programs that systematically remove voters, however, Congress decided to be more cautious. At most times during the election cycle, the benefits of systematic programs outweigh the costs because eligible voters who are incorrectly removed have enough time to rectify any errors. In the final days before an election, however, the calculus changes. Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote. This is why the 90 Day Provision strikes a careful balance: It permits systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disenfranchising eligible voters is the greatest.¹⁰⁸

When elected officials systematically remove individuals within 90 days of a federal election—even if they have sent the notice required under Section 8(d) and waited the requisite time period—they run afoul of Section 8's 90-day rule.¹⁰⁹

The Equal Protection Clause, Section 2 of the VRA, and Section 8 of the NVRA provide basic protections to help prevent the removal of qualified voters from the registration rolls. The Fourteenth Amendment and the VRA ensure that unjust burdens are not placed on the fundamental right to vote, and the NVRA seeks to balance Congress's desire to “increase the number of eligible citizens who register to vote”

108. *Id.* at 1346. The court noted that Congress had to balance the four competing purposes of the NVRA:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and
- (4) to ensure that accurate and current voter registration rolls are maintained.

Id. (citing 52 U.S.C. § 20501(b) (2012)).

109. The removals conducted in three North Carolina counties in 2016 were also conducted within 90 days of the 2016 General Election. *See supra* Part II.A.2, II.C.2. As a result, these removals were found to not only have violated Section 8(d)'s notice requirement but also the 90-day rule set forth in Section 8(c)(2). *See, e.g., N.C. State Conf. of NAACP*, 2018 WL 3748172, at *5–10.

with the need “to ensure that accurate and current voter registration rolls are maintained.”¹¹⁰

III. POLICY SOLUTIONS

In addition to employing roll-maintenance practices that are uniform, non-discriminatory, in compliance with the VRA, conditional on the use of reliable data, and that conform to the procedural requirements of the NVRA (such as the notice-and-waiting requirements of Section 8(d) and the 90-day rule), there are a number of policy solutions that would help protect the right to vote and allow states to keep their voter registration rolls current. These include both (1) back-end fixes that would allow voters who are removed from the registration rolls, but whose eligibility never lapsed, to be able to cast a vote that is counted, and (2) pro-voter reforms that increase registration opportunities and make it easier for those already registered to update their voter registration information after a move.

A. Back-End Fixes

States can implement reforms to prevent the disenfranchisement of eligible voters who have been removed from the registration rolls. Even model roll-maintenance processes are prone to some error.¹¹¹ This means that voters whose eligibility was already assessed by the state, and whose eligibility has not waivered, will sometimes learn that their names no longer appear on the registration rolls after the voter

110. 52 U.S.C. § 20501(b)(1), (4) (2012).

111. For example, while the NVRA suggests that information provided by the U.S. Postal Service’s NCOA program provides a reasonable indicator that someone may have moved, *see, e.g.*, 52 U.S.C. § 20507(c)(1) (2012 & Supp. 2015), the statute explicitly prohibits states from immediately removing the names of individuals identified through the NCOA Program. *Id.* By requiring that states using NCOA information to identify people who may have moved still send a Section 8(d)(2) notice and wait the prescribed time period before removing a registrant’s name from the rolls, *id.*, Congress recognized that even NCOA change of address information may falsely indicate a person may have moved. Section 8’s notice-and-waiting requirements were adopted to try to reduce the number of individuals who are removed in error based on a perceived change of residence. *See, e.g.*, S. REP. NO. 103-6, *supra* note 8, at 19–20.

registration cut-off (often when they appear at the polls to vote).¹¹² Safeguards should exist to guarantee that when this happens, there is a way for the voter—who was removed based on an erroneous presumption—to cast a ballot and have it counted. One way to accomplish this, and more, is through the adoption of same-day registration (“SDR”), described as part of the suite of pro-voter reforms below. A second procedure states could adopt is one that allows people who show up at the polls and claim they are registered to cast a ballot if the local election office determines that the person was previously registered in that jurisdiction and was removed based on a belief that the individual had moved.¹¹³ A third procedure that states can employ would involve changes to provisional ballot counting procedures.¹¹⁴ Voters use a provisional ballot, sometimes known as an “affidavit ballot,” to record

112. *See, e.g., supra* note 3 and accompanying text. At such a point, it is typically too late to correct the error, which means that qualified voters who have properly registered will be denied their right to vote.

113. For example, some states already have procedures that prevent the disenfranchisement of individuals whose registrations have been canceled in error by allowing them to have their registrations restored and to cast a ballot that counts. *See, e.g.,* IND. CODE ANN. § 3-7-48-5(b) (2015) (allowing voters who have been removed from the rolls, but who have not moved, to affirm their eligibility and vote); OHIO REV. CODE ANN. § 3503.21(F)(2) (2016) (requiring that, if an elector’s registration was canceled based on the mistaken belief that they had died, their registration “be restored and treated as though it were never canceled”); IND. SEC’Y OF STATE, OVERVIEW OF “FAIL-SAFE” VOTING PROVISIONS 1–3, http://www.state.in.us/sos/elections/files/2014_IVRA_Fail-Safe_Summary.pdf (allowing voters removed from the rolls to vote after affirmation); OHIO SEC’Y OF STATE, DIRECTIVE 2018-22, NOTICE OF CANCELLATION PROCEDURES (2018), <https://www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-22.pdf> (requiring that if a “board of elections finds that [an] elector was cancelled in error [based on the mistaken belief that he had been convicted of a disqualifying felony], the board of elections shall restore the elector’s registration as if it had not been cancelled”).

114. *See, e.g.,* JON HUSTED, OHIO SEC’Y OF STATE, DIRECTIVE 2016-39, PROVISIONAL BALLOTS CAST BY VOTERS CANCELLED SINCE 2011 UNDER OHIO’S SUPPLEMENTAL PROCESS (2016) [hereinafter DIRECTIVE 2016-39] (establishing a process for counting provisional ballots of voters who had been inaccurately identified as having moved outside of their election jurisdictions). While provisional ballot processes do provide a backstop to prevent disenfranchisement, they are by no means perfect. First, poll workers may fail to offer voters a provisional ballot when the voter’s name does not appear in the poll books. *See, e.g.,* League of Women Voters v. Brunner, 548 F.3d 463, 469 (6th Cir. 2008) (noting that the Plaintiffs alleged that “[p]oll workers did not provide provisional ballots where necessary, causing voters to

their vote when their eligibility is in question.¹¹⁵ Any time that a voter shows up at the polls and the poll worker cannot find the name of the voter on the registration rolls, the voter should be offered a provisional ballot.¹¹⁶ Each provisional ballot is examined against the county voter rolls—which tend to include voter history, including the reason why a person’s name was removed.¹¹⁷ While this process places a greater burden on the voter and means that votes cast using the procedure will not be counted until after the day of the election, it provides a last-ditch back-stop to prevent voters from being shuttered out of the political process.

leave [the polls] without voting” in 2004); Declaration of Larry Harmon, *supra* note 3, at ¶ 11 (noting that Mr. Harmon was not offered a provisional ballot in November 2015). Second, poll-worker error can lead to provisional ballots being considered incomplete and result in the need for legal challenges to ensure that ballots cast by qualified voters get counted. *See, e.g., State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 837–38 (S.D. Ohio 2008). And third, errors in transcribing information—such as a “birthdate or address”—can result in the rejection of a provisional ballot. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628 (6th Cir. 2016) (noting that requiring the casting and counting of provisional ballots may place more of a burden on the voter).

115. 52 U.S.C. § 21082 (2012); *Provisional Ballots*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx>. These ballots are segregated from other ballots, and often assessed within days of an election and counted if the voter is found to be eligible. *See, e.g., LAROSE, supra* note 28, at § 1.03(A), at 6-9 to 6-11.

116. 52 U.S.C. § 21082(a) (2012); *see also Provisional Ballots, supra* note 115.

117. This is precisely the sort of procedure that was mandated by the court in *APRI*, and it has been effectively employed, starting in November 2016, in each Ohio election that has taken place. *See, e.g., DIRECTIVE 2016-39, supra* note 114. During that time, the procedure prevented at least 8,570 Ohio voters from facing certain disenfranchisement. *See, e.g., Frank Larose, Election Results and Data*, OHIO SECRETARY OF ST., <https://www.sos.state.oh.us/elections/election-results-and-data/> (last visited Apr. 8, 2019) (adding the data from the “Provisional Supplemental Report” available for each election starting with the November 2016 General Election).

B. Pro-Voter Reforms

The suite of pro-voter reforms that would increase registration opportunities and improve accuracy of the voter registration rolls, thus helping alleviate the need for wide-scale purges,¹¹⁸ includes:¹¹⁹

1. Same-Day Voter Registration

SDR provides qualified voters an opportunity to both register and vote simultaneously.¹²⁰ A comprehensive SDR regime would allow qualified voters to register and vote at their assigned polling location both during early voting and on Election Day.¹²¹

First pioneered in the 1970s,¹²² and then adopted by an increasing number of states starting in the 90s,¹²³ a number of best practices already exist for how states can implement SDR. In addition, states have indicated that implementation is not overly burdensome and that costs of implementation are often minimal.¹²⁴ Adoption of SDR not

118. S. REP. NO. 103-6, *supra* note 8, at 18 (noting that “[o]ne of the advantages of the [NVRA] is the fact that” increasing opportunities and times when qualified voters can register and update their information would make “the need for large scale purges and list cleaning systems . . . superfluous”).

119. This list is intended to be illustrative and not exhaustive.

120. ESTELLE H. ROGERS & EMMANUEL CAICEDO, DEMOS & PROJECT VOTE, SAME-DAY REGISTRATION 1 (2014), <https://www.demos.org/sites/default/files/publications/SameDayRegistration-2015.pdf>.

121. The vast majority of states that currently offer SDR, offer SDR on Election Day, but the configurations of SDR opportunities available in states differ. For example, some states offer SDR only during the early voting period, others offer it solely on Election Day, while others offer SDR during both early voting and on Election Day. *Same Day Voter Registration*, NAT’L CONF. ST. LEGISLATURES (Jan. 25, 2019), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (providing a summary of state SDR laws).

122. Maine, Minnesota, and Wisconsin all adopted SDR in the 1970s. *See id.*

123. *Id.* Before the close of 2019, 19 states and the District of Columbia will offer SDR. *See id.* Michigan and Washington will be implementing SDR for the first time this year, joining the ranks of Maine, New Hampshire, Vermont, Connecticut, Maryland, North Carolina, Wisconsin, Illinois, Iowa, Minnesota, Montana, Idaho, Wyoming, Colorado, Utah, California, and Hawaii. *See id.*

124. Amicus Brief for Amici Curiae Demos, Rock the Vote, Service Employees International Union Massachusetts State Council, and Massachusetts Community Action Network in Support of Appellee and Affirmance at 36–43, Chelsea Collaborative,

only allows for the correction of election administration errors,¹²⁵ but it also increases voter participation and turnout¹²⁶ and eliminates procedural barriers.¹²⁷

2. Automatic Voter Registration

The United States stands as one of the few purported democracies that places the burden of registration on the voter.¹²⁸ This is illustrated by the fact that, “[m]ore than 60% of eligible voters report having never been asked to register to vote.”¹²⁹ Automatic voter registration (“AVR”) turns the burden of registration on its head, by assigning designated government agencies the duty of seamlessly transmitting to election officials that information which is necessary to register an individual to vote (or update a voter’s registration information) when the agency has information on file indicating that an individual meets the state’s voter registration criteria.¹³⁰ While many states have limited

Inc. v. Sec’y of the Commonwealth, 100 N.E.3d 326 (Mass. 2018) (No. SJC-12435) [hereinafter *Chelsea Collaborative Amicus*].

125. See, e.g., GEORGE PILLSBURY & JULIAN JOHANNESSEN, NONPROFIT VOTE & U.S. ELECTIONS PROJECT, AMERICA GOES TO THE POLLS 2016: A REPORT ON VOTER TURNOUT IN THE 2016 ELECTION 20 (2017).

126. *Id.* at 6, 20; ESTELLE H. ROGERS, PROJECT VOTE, SAME DAY REGISTRATION 1 (2015); *Chelsea Collaborative Amicus*, *supra* note 124, at 24–27.

127. Voter registration deadlines vary from state to state. *Voter Registration Deadlines*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 23, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>. This can cause confusion among voters, who have often indicated that a primary barrier to voting surrounds issues with getting registered. See, e.g., S. REP. NO. 103-6, *supra* note 8, at 2. Further, many voters may not become engaged in the political process until after the voter registration deadline has passed, increasing the need for more flexibility in registration. See *Chelsea Collaborative Amicus*, *supra* note 124, at 21–22.

128. JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 1 (2009).

129. DEMOS, EVERYONE’S AMERICA: STATE POLICIES FOR AN EQUAL SAY IN OUR DEMOCRACY AND AN EQUAL CHANCE IN OUR ECONOMY 164 (Allie Boldt et al. eds., 2018) (citing *Why Are Millions of Citizens Not Registered to Vote?*, PEW CHARITABLE TR. (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>), https://www.demos.org/sites/default/files/publications/EveryonesAmerica_July23.pdf).

130. See, e.g., *id.* at 165–66.

adoption of AVR to motor vehicle agencies, expanding the number of agencies covered under an AVR statute would help improve the accuracy of the voter rolls and better protect the right to vote.¹³¹ For example, states could include public assistance agencies, disability services offices, and the departments of corrections, to name a few, among those agencies covered under their AVR statutes. Given that individuals interacting with such agencies may be less likely to interact with their state motor vehicle agency,¹³² and more likely to move, expanding AVR in such a way could help states keep voter rolls current and guarantee that election resources are efficiently and accurately allocated.¹³³

Further, states can use information transmitted from AVR agencies to not only register voters and update voter registration information but also to *confirm* that a voter has not moved. States can qualify evidence that an individual has interacted with an AVR agency and indicated that her current and presently registered addresses are the same as voter activity. Such use of AVR would: (1) help prevent voters from being targeted for removal in jurisdictions that use non-voting as a reason to initiate removal proceedings; and (2) take any voter who has received a Section 8(d) notice out of the queue for removal by treating their interaction with the AVR agency as the equivalent of responding to the notice or casting a ballot.¹³⁴

131. *Automatic Voter Registration*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 6, 2019), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (noting that “[a]s of December 2018, 17 states and the District of Columbia ha[d] authorized automatic voter registration”).

132. *See, e.g.*, S. REP. NO. 103-6, *supra* note 8, at 15–16 (noting that limiting registration agencies to motor vehicle agencies “may not adequately reach low income citizens and minorities,” and that “voter registration programs available through . . . public assistance offices . . . are more likely to reach these eligible citizens”).

133. For example, the number of active voters listed in a county may impact election administration decisions, so having an accurate reflection of where voters live can contribute to making better informed decisions on how to allocate resources. *See, e.g.*, OHIO REV. CODE ANN. § 3501.18 (West 2012) (authorizing counties to draw precinct boundaries based on the number of active voters on their registration list).

134. For example, in July 2018, Ohio implemented a procedure to use information from the State’s motor vehicle agency to allow election officials to confirm a voter’s address and take them out of the queue for removal if they had been sent a notice pursuant to Section 8(d) of the NVRA. *See* JON HUSTED, OHIO SEC’Y OF STATE, DIRECTIVE 2018-21, AUTOMATIC CONFIRMATION OF ADDRESS SAFEGUARD 1 (2018) (noting that “if an elector’s interaction with the Ohio Bureau of Motor Vehicles (BMV) can serve to *update* automatically his/her voter registration address, it follows

3. Increase the Number of Designated Voter Registration Agencies

Currently, states are required to provide voter registration services when individuals engage in certain transactions at motor vehicle agencies, public assistance agencies, and disability services agencies.¹³⁵ Federal law also requires that states designate additional agencies as voter registration agencies; those agencies “*may*” include “public libraries, public schools, offices of city and county clerks . . . , fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, . . . and [f]ederal and nongovernmental offices, with the agreement of such offices.”¹³⁶ Providing registration services at these and other governmental offices would serve as another method of improving registration rates and ensuring that the registration information of those already registered is updated more frequently following a move.

4. Online Voter Registration

Online voter registration (“OVR”) serves similar objectives as the previous three policy proposals. OVR provides qualified voters who have access to a computer or smartphone with a quick and efficient way of registering and reporting a change in voting address.¹³⁷ It reduces the likelihood of errors in processing, as election officials will not have to type in information received on paper voter registration forms.¹³⁸

that an elector’s interaction with the BMV also can serve to *confirm* automatically the elector’s registration address”).

135. See 52 U.S.C. § 20504(a) (2012); see also *id.* § 20506(a)(2).

136. *Id.* § 20506(a)(3) (emphasis added).

137. See generally *Register to Vote and Check or Change Registration*, USA.GOV, <https://www.usa.gov/register-to-vote#item-212825> (last visited Apr. 9, 2019) (providing that “[y]ou can check and may be able to change your registration online” including “your name, address, and political party”). OVR systems should be accessible, meaning, among other things, providing services in any languages required under federal and state language assistance laws and being accessible to people with disabilities.

138. *Online Voter Registration*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 10, 2018), <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx> (noting that “[a]s of October 10, 2018 a total of 37 states plus

5. Portable Voter Registration

Another mechanism that can be used to keep clean rolls and prevent voter disenfranchisement is the adoption of portable voter registration. Portable voter registration systems allow voters already registered in a state to update their registration information and cast a ballot on Election Day, even if the voter moved to a different election jurisdiction and did not update his or her voter information before the registration cutoff.¹³⁹ Each voter who benefits from a portable registration system is a voter whose information already exists in a state's voter registration database and who the state has already determined meets the voter eligibility requirements.

Adoption of policies like those described above can help keep rolls clean and up to date, improve the administration of elections, and prevent voter disenfranchisement. They are key tools that can be used in preventing the names of qualified voters from being erroneously removed from the registration rolls, correcting erroneous removals when they do occur, and expanding access to the ballot. When combined with lawful roll-maintenance procedures, these policies can help protect the right to vote and improve faith in the electoral system.

IV. CONCLUSION

Registration is a prerequisite to voting in the U.S. But restrictive voter registration laws and unlawful roll-maintenance practices can block the path to the ballot box and prevent voters from having a say in who and what law governs. If the true promise of a democracy is to be met, we must do better.

the District of Columbia offer online registration, and . . . Oklahoma . . . has passed legislation and is currently phasing in implementation of their online registration"). States have cited cost savings, voter satisfaction, and "improved integrity of the voter rolls that results from reduced dependency on illegible handwritten applications," as benefits in adopting OVR. *See, e.g.*, PEW CHARITABLE TRS., ONLINE VOTER REGISTRATION: TRENDS IN DEVELOPMENT AND IMPLEMENTATION 4 (2015), https://www.pewtrusts.org/-/media/assets/2015/05/ovr_2015_brief.pdf?la=en&hash=E960B7E9E3945750B2B1F5617E3AC3EC6BB1F3C6.

139. PILLSBURY & JOHANNESSEN, *supra* note 125, at 20 (noting also that, in 2016, seven states had established portable registration systems).

Today, nearly 25% of eligible voters are reportedly not registered,¹⁴⁰ and our society's mobility necessitates the need for those already registered to often update their voter information. In order to increase access to our democracy, we must rethink our registration practices.¹⁴¹ State roll-maintenance practices must not only meet those requirements set forth in federal law and the U.S. Constitution, but it is incumbent that policies be adopted that both increase registration numbers and ensure that, once a voter's name is placed on the registration rolls, it remains there so long as the voter remains eligible. These steps are necessary for our government to genuinely be considered one that reflects the will of the people.¹⁴²

140. *Why Are Millions of Citizens Not Registered to Vote?*, PEW CHARITABLE TR. (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>. This may be the result of an individual not having registered in the first place, or the fact that the voter's name was removed from the registration rolls as a result of state roll-maintenance practices or more targeted purges.

141. Restrictions on registration were often developed before the advent of statewide voter registration databases and other technological advances. *See, e.g.*, 52 U.S.C. § 21083(a)(1)(A) (2012) (requiring that states with registration requirements establish "a single, uniform, official, centralized, interactive computerized statewide voter registration list"); *see also* Sean Greene, *Statewide Voter Registration Systems*, U.S. ELECTION ASSISTANCE COMMISSION: BLOGS (Aug. 31, 2017), <https://www.eac.gov/statewide-voter-registration-systems/> (noting that "[t]he Help America Vote Act (HAVA) of 2002 required states to adopt a computerized statewide voter registration list").

142. As noted in *Why Americans Still Don't Vote*, "the United States ranks at the bottom in turnout compared with other major democracies." FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY 3* (2000). "[I]n fact[,] the United States is the only major democratic nation in which the less-well-off, as well as the young and minorities, are substantially underrepresented in the electorate." *Id.* (noting also that "the . . . American electorate overrepresents those who have more and underrepresents those who have less").