



Husted v. A. Philip Randolph Institute: What's at Stake for Voters

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On January 10, 2018, the U.S. Supreme Court heard oral arguments in *Husted v. A. Philip Randolph Institute*, a case that could impact how states maintain their voter registration lists. The National Voter Registration Act (NVRA), the main law at issue, takes great care in specifying what a state may—and may not—do when removing registrants' records from state rolls. Its very aim, when passed 25 years ago, was to enhance voter turnout through providing additional voter registration opportunities at agencies across the country. Ohio and a handful of states, though, engage in practices that most strict textualists and voting rights advocates would say defy both the letter and the spirit of the law. Under Ohio's practices, voters who miss just one federal election are targeted for removal from the registration rolls.¹ Only one appellate court—the Sixth Circuit Court of Appeals—has addressed the matter, holding that Ohio's practice of targeting voters who've missed an election (or more) to initiate the purging process violates federal law.² Will at least five justices see it that way?

This Issue Brief will address the NVRA's purpose and how Ohio's current voter registration purging practices violate the spirit and intent of the law. It will also examine arguments on both sides of the *Husted* case, as demonstrated in oral argument, and the impact of practices such as those in Ohio. Lastly, the Issue Brief will provide an alternative method for maintaining registration lists that comports with the NVRA.

I. The National Voter Registration Act's Purpose: Enhancing Voter Participation

Unlike most other established democracies, the United States has not yet solved its registration and voter turnout deficiencies, many of which date back to the Jim Crow era and continue to reflect racial and economic disparities in our system. Although the Voting Rights Act of 1965 helped millions of citizens register for the first time—the Black registration rate in Mississippi

¹ Georgia, Oklahoma, Oregon, Pennsylvania, and West Virginia each target individuals after they've missed more than one federal election.

² *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

alone soared from 6.7% in 1965 to 60% in 1968—registration rate disparities between high- and low-income Americans and by race persisted for decades.³ With the aim of reducing these divisions and enhancing overall turnout, Congress passed the NVRA in 1993. Members found that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation ... and disproportionately harm voter participation by various groups, including racial minorities.”⁴ The NVRA’s overall goals were to “increase the number of eligible citizens who can register to vote,” while also “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office,” and “ensur[ing] that accurate and current voter registration rolls are maintained.”⁵

The bulk of the law specifies how states are to provide voter registration opportunities: through use of a mail voter registration application, during transactions made at departments of motor vehicles, and at any number of designated voter registration agencies, including all state offices providing public assistance and state-funded disabilities services.⁶ Again, the NVRA aimed to enhance voting opportunities for Americans by getting previously unregistered citizens registered and on the voting rolls. Lawmakers knew that the way to increase turnout was to open the gateway to voting through more accessible registration.

An additional section—known as “Section 8”—specifies how each state is to update and maintain the voter registration lists in order to have the timeliest information and list of voters. It provides clear instructions on what steps a state must take before it can deem an individual no longer eligible to vote at his or her earlier stated address and thus can remove the person from the registration rolls.⁷ States are prohibited, for example, from removing individuals from the rolls for the sole reason that they failed to vote, and are additionally prohibited from engaging in purging processes that are non-uniform, discriminatory, or otherwise in violation of the Voting Rights Act. These instructions aside, the main thrust of the NVRA is to get eligible citizens registered to vote and keep them registered: “[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction.”⁸ It’s worth noting, too, that the Department of Justice—the agency tasked with the NVRA’s enforcement—entered into several settlement agreements with

³ J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS, <http://www.demos.org/sites/default/files/publications/RegisteringMillions-NVRA-Demos.pdf>

⁴ 52 U.S.C. § 20501(a)(3) (2016).

⁵ 52 U.S.C. § 20501(b)(1), (2), and (4) (2016).

⁶ 52 U.S.C §§ 20504-20506 (2016).

⁷ See 52 U.S.C. § 20507 (2016).

⁸ See S. REP. NO. 103-6, at 19.

states prohibiting them from targeting individuals for removal from registration rolls for the very reason that they had missed an election.⁹

II. Ohio Targets Voters Solely for Missing Elections

Under the NVRA, a state's chief election officer must ensure the state abides by the federal law's requirements, including maintenance of its voter registration lists. In Ohio, the Secretary of State, currently Jon Husted, carries this responsibility. With respect to how the state updates its registration lists—and whom it removes—the state employs two practices. The first practice is consistent with the NVRA's requirements and does not factor into the current litigation. It employs the statute's so-called "safe-harbor provision," whereby the Secretary's office compares change-of-address data obtained from the U.S. Postal Service with the voter rolls to identify registrants who may have moved. County boards of elections then send NVRA-compliant notices to the identified registrants requesting that they contact the boards if they still reside at that address and additionally notifying them that, if they do not respond to the notice and then fail to vote during the next two consecutive federal elections, their registrations will be canceled.¹⁰ This process adequately complies with the requirements of Section 8 of the NVRA.

Ohio additionally uses a "supplemental process," which is the practice in question before the Supreme Court. Under this process, elections boards in Ohio send notices to registrants who have earlier been identified as not having voted during the previous two-year period.¹¹ The boards have no other information indicating that these individuals may have since moved or otherwise become ineligible to vote. Instead, these registrants are targeted for potential removal from the registration rolls based *solely* on a failure to vote during a very short period. If a registrant receives and returns the notice, or otherwise responds through the internet, then the board updates that individual's information and the registrant remains on the rolls. If, however, he or she "ignore[s] the notice [or fails to receive and return it] and [then] fail[s] to vote or update their registration over the next four years, boards cancel the registration."¹²

In April 2016, plaintiffs A. Philip Randolph Institute, the Northeast Ohio Coalition for the Homeless, and Larry Harmon, a U.S. Navy Veteran whose registration record was removed as a result of Ohio's supplemental process,¹³ filed suit against Ohio Secretary of State Husted for

⁹ See discussion at Section III *infra*. The constitutionality of the NVRA, moreover, has been upheld several times based on Congress' authority under the Elections Clause to "pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections ... including regulations relating to 'registration.'" U.S. Const. art. I, § 4; See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

¹⁰ OHIO REV. CODE ANN. § 3503.21 (West 2018).

¹¹ OHIO REV. CODE ANN. § 3503.21(D) (West 2018).

¹² *Id.*

¹³ All plaintiffs are represented by Demos and the American Civil Liberties Union.

violations of the NVRA. While the district court dismissed the case, the Court of Appeals for the Sixth Circuit reversed, finding that Ohio's process of targeting individuals for failure to vote acted as a "trigger" to initiate purging their records from the registration rolls, in violation of the federal law.¹⁴ The U.S. Supreme Court granted Husted's petition for a writ of certiorari and heard oral arguments on January 10, 2018.

III. At the Supreme Court

A. The Department of Justice's Sudden Shift

The Department of Justice (DOJ), the federal agency tasked with enforcing the NVRA,¹⁵ has traditionally found practices such as Ohio's supplemental process in violation of the statute's prohibition against removing registrants for missing an election. As it claimed in amicus briefs submitted before both a Georgia federal district court and the Sixth Circuit Court of Appeals in this case, "states may not 'consider a registered voter's failure to vote to be reliable evidence that the voter has become ineligible by virtue of a change of residence, thus triggering the [subsection 8(d) Confirmation Procedure].'"¹⁶ Well before that, in 1994, DOJ "advised Georgia that its then-proposed program to 'send[] a registration confirmation notice to persons who have not voted ... during a three-year period' was 'directly contrary to the language and purpose of the NVRA.'"¹⁷ And it additionally argued that a comparable law in Pennsylvania "'r[an] afoul of Section 8(b)(2)'s prohibition on purges for non-voting,"¹⁸ and sent notice-of-intent-to-sue letters to Alaska and South Dakota for comparable purging programs.¹⁹ As a number of former DOJ attorneys, both politically appointed and career, note in their amicus brief to the Supreme Court in this case, "although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from using nonvoting to *derive* its belief that a voter has changed her residence."²⁰ That's why, from 1994 until recently, "the Department has repeatedly expressed its view that the statute prohibits states from initiating a voter-purge process based merely on the failure to vote."²¹

¹⁴ A. Philip Randolph Institute v. Husted, 838 F.3d 699 (6th Cir. 2016).

¹⁵ 52 U.S.C. § 20510 (2016).

¹⁶ Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, A. Philip Randolph Institute v. Husted, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 ("U.S. C.A. Br.").

¹⁷ Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, A. Philip Randolph Institute v. Husted, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 ("U.S. C.A. Br.").

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Brief for Eric Holder et al. at 6 as Amici Curiae Supporting Respondents, Husted v. A. Philip Randolph Institute, No. 16-980 (2018).

²¹ *Id.* at 7.

With Attorney General Jeff Sessions at the helm, DOJ has now switched positions for the first time since the NVRA became law, claiming that the Sixth Circuit’s finding that Ohio’s supplemental process violates the NVRA “is not the best reading of [the law] as originally enacted, and it is foreclosed by the clarifying clause that Congress added in [the Help America Vote Act].”²² This reference concerns the Help America Vote Act (HAVA) which was enacted in 2002 and amended parts of the NVRA. The DOJ further claims its reversal is warranted due to voter fraud concerns that programs such as the supplemental process purportedly remedy, despite failing to demonstrate evidence of widespread fraud at either the national level or in Ohio and in contradiction to extensive research finding no such problem.²³ This new view—a reversal of DOJ’s longstanding view that practices such as Ohio’s violate the text and purpose of the NVRA—could be an attempt to shrink, rather than expand, the electorate, as the federal law has aimed to do for the past 25 years.

B. The NVRA’s Language

The issue before the Supreme Court is straightforward: Under Section 8 of the NVRA, can Ohio target voters for the sole reason that they did not vote in one election to be purged through its supplemental process? The NVRA provides that a state’s removal program “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person’s failure to vote.*”²⁴ Indeed, under the NVRA, states may remove registrants’ records from the rolls for one of *only five specific reasons*: (1) at the individual’s request; (2) by reason of criminal conviction; (3) by reason of mental incapacity; (4) by reason of death; or (5) by reason of a change in residence.”²⁵ “[N]either failure to vote, nor failure to respond to a notice—nor the two together—is among the grounds for removal under subsection 8(a).”²⁶ Furthermore, subsection 8(b) of the law, which addresses mass programs to update registration rolls, prohibits state practices that “result in the removal of the name of any person ... by reason of the person’s failure to vote.”²⁷ The question for the Court then concerns what is a fair interpretation of this language, especially in light of the NVRA’s overall purpose to expand—not shrink—the electorate.²⁸

²² Brief for the United States at 10 as Amici Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Institute*, No. 16-980.

²³ Brief for Eagle Forum Education and Legal Defense Fund at 16, 17 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018); see Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?noredirect=on&utm_term=.9bff26482bb3.

²⁴ 52 U.S.C. § 20507(b)(2) (emphasis added) (2016).

²⁵ 52 U.S.C. § 20507(b)-(d) (2016).

²⁶ Brief of Respondents in Opposition at 25, 26, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

²⁷ 52 U.S.C. § 20507(b) (2016).

²⁸ See *supra* note 5.

Although oral arguments are never a sure-fire way to get inside the Justices' minds, one could easily note dissension among the nine on January 10, 2018, particularly on the issue of how to interpret the "by reason of" language in the NVRA. Ohio State Solicitor Eric. E. Murphy insisted that "[a] failure to respond to the [confirmation] notice breaks any causal prohibition between failure to vote and removal."²⁹ Thus, according to Ohio, the state does not remove voters' names for the sole reason that they failed to vote but rather because they failed to respond to confirmation notices and then failed to vote in two successive federal elections. Justices Kagan, Ginsburg, and Sotomayor seemed unconvinced by Ohio's argument.

Paul Smith, arguing on behalf of the challengers, noted that, to the contrary, Ohio's practice targets individuals precisely because they had not voted, in violation of the NVRA's "by reason of" language. This position relies on the principle that Ohio's practice violates the law because it purges voters from the rolls for reasons other than the five permitted under the statute. As Smith noted during oral argument, "the failure to vote for two years tells you almost nothing about whether or not anybody has moved."³⁰ Unfortunately, American voters often skip elections for any number of reasons, including dislike of the candidates, busy schedules, or belief that one's vote would not make a difference, among others (including not being registered).³¹ As a result, turnout for a presidential election is often below 60% of the electorate.³²

C. HAVA's Language

A second focus of oral argument centered on how to reconcile language in HAVA with the language in the NVRA. As previously noted, HAVA clarified that the NVRA "prohibits programs that result in removal of [a registrant] by reason of the person's failure to vote, except that" such prohibition does not prevent a state from using confirmation procedures in which the state (1) informs voters by notice that they'll be removed unless they respond affirming that they still live at that residence, and (2) then removes those voters' names if they've both failed to respond and then failed to vote in two successive federal elections.³³ In these instances, and these instances only, the individuals' names can be removed for failure to vote.

Justice Alito expressed concern with what he saw as a contradiction between HAVA's language and the NVRA's language, given that the former allows the state to remove a voter's registration record after he or she has failed to vote. His questions, which appeared to align

²⁹ Transcript of Oral Argument at 12, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

³⁰ Transcript of Oral Argument at 39, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

³¹ Gustavo López and Antonio Flores, *Dislike of Candidates or Campaign Issues was Most Common Reason for not Voting in 2016*, PEW RESEARCH CENTER (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/>.

³² *Id.*

³³ See 52 U.S.C. § 20507(b)(2).

with Ohio’s argument, emphasized that the failure to return a confirmation notice is what triggers a purge from the voting rolls, rather than the nonvoting. Justice Alito maintained that this reading of HAVA and the NVRA reconciles what appears to be contradictory language in the statutes.

It is true that the NVRA permits a state to remove a registrant’s name from the rolls if, following its mailing to the voter of a confirmation notice,³⁴ the voter both fails to respond to the notice, as he or she is instructed to do, and then fails to vote over the next four years. However, as Smith explained at oral argument, the state may *only* consider non-voting as a means for removal *after* the confirmation notices have been sent.³⁵ The state may *not* send these confirmation notices to registered individuals *for the very reason* that they missed an election. In other words, they may not send these mass mailings as a means to determine whether voters have moved. Rather, the confirmation process may only be administered by the state if it has received some information—whether from the U.S. Postal Service or some other legitimate means—that the individual has changed residence.

As the challengers to Ohio’s process argued, “[i]t would make no sense for Congress to demand that states use the Confirmation Procedure when a state has objective evidence of an address change from the Postal Service, while at the same time authorizing a state to use the Confirmation Procedure as a standalone mechanism to purge registrants when it does not have any evidence of a change in residence whatsoever.”³⁶

Furthermore, any reading of the NVRA and HAVA must recognize that these laws were designed to protect the sanctity of the vote. Programs such as Ohio’s most certainly cut from the rolls eligible voters who are still present in the state.³⁷ Considering there are other more effective ways of updating voter registration rolls, removing voters simply because they missed an election both smacks of unfairness and runs afoul of both the letter and purpose of the NVRA and HAVA. Justice Sotomayor emphasized that when she asked:

Is [the failure to vote] ... a reasonable inference to draw that conclusion [that one has moved] when ... do[ing so] results in disenfranchising disproportionately certain cities where large groups of minorities live, where large groups of homeless people live, and across the country they’re the group that votes the least ... So if the word ‘reasonable effort’ has any meaning with a Congress who said

³⁴ 52 U.S. § 20507(d)(2) (2016).

³⁵ Transcript of Oral Argument at 55, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

³⁶ Brief of Respondents in Opposition at 41, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

³⁷ Indeed, a federal district court allowed 7,515 voters who were improperly removed by Ohio to cast a ballot before Election Day in 2016. See Matt Ford, *Use It or Lose It?*, THE ATLANTIC (May 30, 2017), <https://www.theatlantic.com/politics/archive/2017/05/supreme-court-ohio-voting/528573/>.

that the failure to vote is a constitutional right, how can we read this statute to permit you to begin a process of disenfranchising solely on the basis of that with no independent evidence whatsoever that the person has moved?³⁸

Indeed, a voter's failure to miss an election in no way indicates that he or she has moved given—as noted earlier—the many reasons Americans miss elections. Ohio has no additional independent evidence to indicate a move aside from this one failure. Most states, moreover, do not treat such an omission as indicative of a move, as demonstrated by their failure to use processes comparable to Ohio's. Indeed, 38 states and the District of Columbia use independent sources, such as the U.S. Postal Service, to identify whether an individual has moved before issuing confirmation notices. Additionally, six states either do not have a voter registration requirement or have same day registration and are exempt from these NVRA requirements.³⁹ Common sense, coupled with the letter of the law, therefore, dictates a reading of these laws that does not deprive citizens of their right to vote.

IV. An Ohio Victory Would Have Serious, Discriminatory Consequences

In Ohio, hundreds of thousands of voter registration records have been removed for the sole reason that the voters failed to cast a ballot in one or more elections. Secretary of State Husted has conceded that “at least 7,515 citizens were struck from the rolls despite not moving.”⁴⁰ That number is likely much higher. According to other findings, “[r]ecords from just *two* of Ohio's 88 counties show that 66,570 registrants were removed from the rolls due to the Supplemental Process.”⁴¹ In the 2015-2016 period, moreover, “Ohio purged 426,781 voters who failed to respond to the confirmation notice for voter inactivity.”⁴² Before that, “from 2011 to 2014 Ohio purged 846,391 voters for the same reason.”⁴³

As current and former elections officials from Ohio claim, such removals run afoul of Ohio law. The law “ensures that voters who move within the State remain eligible to vote. Ignoring this critical component of Ohio law, the [state] eliminates them from the rolls even though they can still lawfully appear at their polling place and cast a ballot under Ohio's portable voter-registration system.”⁴⁴ If, then, Secretary Husted truly believes the supplemental process eliminates voters from the rolls because they likely moved, then he is depriving those who did

³⁸ Transcript of Oral Argument at 18-19, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

³⁹ Brief for the League of Women Voters of the United States et al, at 21, as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁴⁰ Brief of Petitioner at 14, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁴¹ Brief for the League of Women Voters of the United States et al., at 19, as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018) (citing Bell Decl. R. 9-1 (emphasis included)).

⁴² Brief for Current and Former Ohio Elections Officials as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁴³ *Id.*

⁴⁴ *Id.* at 2.

in fact move with the opportunity to cast a ballot using the state’s portability law, at which time an address update could be made without compromising the individual’s right to vote. And those whose records were purged despite having *not moved* similarly lose a right to which they are constitutionally entitled.

Furthermore, some populations are likely to be impacted by Ohio’s practice more so than others. In the 2016 presidential election, for example, “Ohio saw a decline in Black voter participation rates compared to the national decrease in Black voter turnouts, despite overall record national turnout among total voters.”⁴⁵ Though decline was likely due, in part, to cuts to what’s known as “Golden Week,” in which eligible voters have the opportunity to both register and vote on the same day,⁴⁶ as a result of this lower turnout, Black voters are more likely to be targeted by the state for removal from the rolls. “African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity, compared to only 4% of voters in a suburban, majority-white neighborhood.”⁴⁷ Several other voting sub-groups are also disproportionately impacted. For example, because Ohio’s confirmation notice is generally in English only, limited English proficient populations may not understand its instructions and, thus, may not respond, potentially resulting in their removal as well.⁴⁸

It is potentially for this reason that only a handful of states currently engage in practices comparable to Ohio’s supplemental process: Georgia, Oklahoma, Oregon, Pennsylvania, and West Virginia.⁴⁹ Even so, Ohio is the only state that targets individuals after having missed just one election.⁵⁰ If all states were to adopt practices comparable to Ohio’s, millions of eligible voters could be cut from registration rolls, resulting in potentially millions showing up on Election Day only to learn they cannot cast a ballot that will be counted.

When members of Congress were considering the NVRA, they heard testimony from experts as to what is behind low turnout rates. Many experts “concluded that cumbersome state registration laws—including purging for non-voting—were among the primary culprits. Critics also cited evidence showing that these laws disproportionately impacted poor and minority voters.”⁵¹ Indeed, these problems persist and, if other states adopt practices comparable to

⁴⁵ Brief for the National Association for the Advancement of Colored People and the Ohio State Conference of the NAACP at 13 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at 18 (citing Andy Sullivan & Grant Smith, *Use it or Lose it: Occasional Ohio Voters May be Shut Out in November*, REUTERS (June 2, 2016, 7:05 AM)).

⁴⁸ Brief for Asian Americans Advancing Justice et al., at 3 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁴⁹ *Id.* at 25.

⁵⁰ *Id.*

⁵¹ Brief for American History Professors at 4 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

Ohio's supplemental process, several sub-groups stand to lose their electoral impact because they vote at lower levels:

- Lower-income and working Americans, many of whom are minorities, due to multiple responsibilities and fewer resources vote less often than Americans of higher means. "In 2016, less than forty-six percent of eligible adults with family incomes under \$20,000 voted whereas over seventy-eight percent of eligible adults with family incomes \$100,000 and over voted."⁵² Poorer Americans, moreover, are likelier to fail to respond to a confirmation notice: "scarcity of resources—of time, opportunities, or money—can have significant impact on an individual's attention to anything other than the present scarcity."⁵³
- Disabled and older citizens, due to barriers at polling places, vote at lower rates than individuals without disabilities or younger voters do.⁵⁴
- Limited English proficient citizens are less likely to respond to confirmation notices, which are usually written in English only, and thus are likelier to be removed from the rolls under programs such as the supplemental process.⁵⁵
- Service men and women vote less often than other voters, and the actual voting rate for active duty service members fell from 59% during the 2012 election to just 46% in 2016."⁵⁶
- Third-party voters may be less likely to show up on Election Day if their candidates are not on the ballot, and as a result, are likely to be removed.⁵⁷

If the Supreme Court grants Ohio and other states *carte blanche* to target individuals who have missed an election, millions of Americans could lose their registration status, undoing the NVRA's legacy and purpose.

⁵² Brief for National Disability Rights Network et al., at 18 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018) (citing U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members by Age and Family Income: Nov. 2016 (2017)).

⁵³ *Id.* at 31.

⁵⁴ *Id.* at 7-8, 22.

⁵⁵ Brief for Asian Americans Advancing Justice et al., at 3 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁵⁶ Brief for VoteVets Action Fund at 13 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018) (citing U.S. Dep't of Defense, Federal Voting Assistance Program, 2016 Post-Election Report to Congress, at 9 (2017)).

⁵⁷ Brief for the Libertarian Party of Ohio and the Center for Competitive Democracy at 3, 4 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

Conclusion

“Congress was clear that the touchstone for any ... state-devised method [for identifying ineligible voters] is reasonableness.”⁵⁸ Reasonableness in this area would include clear and highly accurate ways for a state to identify voters who are no longer eligible before purging them from the voter rolls. A law designed to encourage greater participation in the franchise could not achieve this goal if it was easy to inaccurately remove citizens from the voter rolls. Ohio’s approach does not meet this standard of reasonableness. According to state elections officials across the country, “there are far better sources of readily available evidence that a voter has moved than the mere fact that a person did not vote,” including use of Postal Service information, tracking of undeliverable mail, reconciling of voter registration rolls with other more up-to-date information, and the inter-state sharing of information on moves, through the Electronic Registration and Information Center (ERIC) and other services.⁵⁹ Indeed, most states plus the District of Columbia use some combination of these processes.

We do not know yet how the Supreme Court will rule on the matter, but even if it upholds Ohio’s supplemental process as compliant with the NVRA, states should not read this ruling as encouragement to adopt a comparable program. Doing so would not only result in inappropriate removals but would potentially also cause administrative headaches for elections officials. When voters, who believe themselves to be currently registered, show up at the polls to vote, only to learn that their names are no longer on the rolls, the resulting confusion and disputes result in longer lines and thus added work for those running the election. To be sure, voters and administrators alike want and need a streamlined, efficient process both for voting and for keeping updated registration rolls. Ohio’s process, even if deemed legal, leads to more problems than it does solutions.

Thus, in order to ensure compliance with the NVRA’s mission and text, the Supreme Court should hold Ohio’s supplemental process incompatible with the law. Courts have already upheld the constitutionality of the NVRA as an extension of Congress’s power under the Elections Clause, and the law’s language clearly prohibits states from discriminating against voters for failure to have missed a vote. Additionally, apart from its recent deviation, the DOJ, the agency tasked with enforcing the law, has interpreted the NVRA this way over its 25-year history. No other interpretation comports with either the language or spirit of the law.

We still have much work to do in this country to ensure that every eligible American has access to the polls on Election Day, and one of the most effective ways to provide equal access to the

⁵⁸ Brief for Lawyers’ Committee for Civil Rights Under Law et al., at 9 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

⁵⁹ Brief for the states of New York et al., at 12 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

franchise is to eliminate hurdles surrounding the voter registration process. For two and a half decades, the states, in compliance with the NVRA's mandates, worked toward closing the registration gaps that still exist in this country based often on race and class. The law had not yet realized full access for all citizens, but it was trending in that direction. Indeed, in cases where the DOJ and other private plaintiffs brought actions to ensure compliance, voter registration rates increased in those areas. As Justice Ruth Bader Ginsburg noted in her dissent in *Shelby v. Holder*, throwing out a voting rights protection that has been working is akin to "throwing away your umbrella in a rainstorm."⁶⁰ You just don't do it.

As advocates, legislators, and citizens push for additional registration reforms—same day registration, online registration, and automatic voter registration—it is essential that, once these citizens become newly registered, the state not be permitted to undo the good work of pulling Americans into a system—our most important for democracy's sake—of which they had previously been on the outskirts. A true democracy requires participation from all citizens, not just the bare majority. That's why the NVRA aimed, in 1993, to improve access to voter registration. And that's why it cannot be taken away now.

⁶⁰ *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

About the Author

Allegra Chapman is the Director of Voting and Elections at Common Cause, where she leads national and state efforts to reduce barriers to voting and ensure that elections are run efficiently and fairly throughout the country. Prior to coming to Common Cause, Chapman was an Assistant Attorney General in the Civil Rights Bureau for the State of New York. She was also previously staff counsel for Demos, where she engaged in litigation and negotiations in several states to enforce Section 7 of the National Voter Registration Act. She also helped defend the constitutionality of New York's statute eliminating prison-based gerrymandering and worked on other electoral reforms including Election Day voter registration. Chapman clerked for DC Superior Court Judge Michael Rankin. She graduated from Emory University Law School in 2002.

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