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Legal Sidebar

Supreme Court Rules Ohio Voter Roll Law Comports with National Voter Registration Act

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In a 5-4 decision, the Supreme Court recently ruled in *Husted v. A. Philip Randolph Institute* that an Ohio process for removing the names of registrants from its official federal voter registration rolls comports with the National Voter Registration Act (NVRA). The case turned on the interpretation of the NVRA's so-called "Failure-to-Vote Clause," which provides that any state program or activity to maintain accurate and current federal voter registration rolls "shall not result in the removal of [any registrant] . . . by reason of the person's failure to vote." The Court held that Ohio's use of voter inactivity to *initiate* a process to remove registrants from its rolls does not violate the NVRA because the registrant's failure to vote is not the sole determinant of removal. Although the Supreme Court's ruling upholds Ohio's voter roll maintenance process, Ohio Secretary of State Jon Husted reportedly has indicated that names of registrants will not be removed from the voter rolls prior to the November 2018 federal midterm elections.

National Voter Registration Act (NVRA)

Congress enacted the NVRA in 1993 to, among other things, establish procedures to increase the number of eligible citizens who register to vote in federal elections while also ensuring that states maintain accurate and current official voter registration rolls, subject to certain constraints. The NVRA was amended, in part, by the Help America Vote Act of 2002 (HAVA).

In its current form, the NVRA contains both requirements and restrictions relating to the removal of registrants from federal election voter rolls. First, the NVRA prohibits states from removing individual registrants except in five circumstances, including "by reason of" the registrant's change in residence. Second, the NVRA requires states to "conduct a general program that makes a reasonable effort to remove . . . ineligible voters . . . by reason of" change in residence. And third, the NVRA prescribes the procedures by which a state may remove a registrant due to a change in residence. Three subsections of the law that contain or refer to these procedures, and the interplay among them, presented the greatest interpretive challenges for the courts in *Husted*:

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- Subsection (c) provides a way for a state to satisfy the "general program" requirement by establishing a program that uses information from the U.S. Postal Service to identify registrants whose addresses may have changed and either verify a change of address within the voting jurisdiction, or use the notice procedure set forth in subsection (d) to confirm the change of address.
- Subsection (d) prohibits a state from removing a registrant from its federal voter rolls due to a change in residence unless the registrant either: (1) confirms in writing that the registrant has moved outside of the voting jurisdiction; or (2) has not responded to the state's "notice" in the form of a prepaid return card seeking verification of the registrant's address *and* fails to vote in an election during the period beginning on the date of the notice and ending after the second federal general election that occurs after the notice date.
- Subsection (b) applies broadly to "any state program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current [federal] voter registration roll," and thus is not limited to programs or activities based on change-in-residence. In addition to requiring a uniform and nondiscriminatory program that complies with the Voting Rights Act, this subsection contains a provision, which the Supreme Court referred to as the "Failure-to-Vote Clause," that reads:

  > [The program or activity] shall not result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
  >
  > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
  >
  > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Ohio Law

Under the Ohio law at issue in *Husted*, known as the "Supplemental Process" for voter roll maintenance, the Ohio secretary of state's office removes a registered voter's name from the state's federal voter rolls if the individual—after a two-year period of voter inactivity—does not vote for four more years (including two general federal elections), and does not either (1) respond to a mailed confirmation notice or (2) reregister to vote. (Not at issue in *Husted*, Ohio also has a primary process for voter roll maintenance that utilizes the postal service's change-of-address system.)

Lower Court Rulings

In 2016, a group of civil rights organizations filed suit alleging that Ohio's Supplemental Process violates the NVRA's prohibition against removing names from voter rolls due to failure to vote because the confirmation notice that Ohio initially sends to a registrant is based on the registrant having not engaged in voter activity, which includes nonvoting. Ohio countered that the Supplemental Process comports with the NVRA because a registrant is merely sent a confirmation notice on the basis of not engaging in voter activity, but the registrant's name is not removed from the rolls on that basis. In other words, the state argued, in order for a registrant's name to be removed, the registrant must fail to respond to the notice *and* fail to vote. Agreeing with the state, a lower court dismissed the lawsuit in 2016. However, later that year, a divided Sixth Circuit reversed and ruled that the Supplemental Process violates the "Failure-to-Vote Clause" of the NVRA because it explicitly uses a person's voting inactivity for two years as the "trigger"

for sending the person a confirmation notice. In October 2016, a federal district court ordered the State of Ohio to allow voters who were illegally removed from the official voter rolls to cast a provisional ballot during the November 8, 2016 election, in accordance with procedures set forth by the court. The State of Ohio appealed the ruling of the Sixth Circuit to the Supreme Court.

Supreme Court Ruling

In *Husted v. A. Philip Randolph Institute*, the Supreme Court held that the "Failure-to-Vote Clause" in the NVRA merely forbids a state from using failure to vote as *the sole criterion* for removing a registrant's name from the rolls. Accordingly, the Court rejected the respondents' arguments that the Ohio law violates the "Failure-to-Vote Clause" by using a person's failure to vote twice—once as the trigger for sending confirmation notices and again as one of the two requirements for removal. As the Ohio Supplemental Process does not remove a registrant unless the registrant first, fails to return a confirmation notice, and then second, fails to vote for an additional four years, the Court held that the Ohio law does not remove a registrant's name from the voter rolls *solely* because of nonvoting and thus does not violate the "Failure-to-Vote Clause."

Writing for the Court, Justice Alito engaged in an extensive analysis of the statutory language, focusing on two provisions of law. First, the Court referenced the HAVA amendment to the "Failure-to-Vote Clause" in the NVRA, providing that the prohibition on removing names from the voter rolls for nonvoting shall not be construed to prevent a state from using the procedures described in subsections (c) and (d). Because one of the requirements for removal under subsection (d) is the failure to vote, the Court reasoned that the HAVA amendment "makes it clear" that the phrase "by reason of the person's failure to vote" in the "Failure-to-Vote Clause" does not prohibit a state from using nonvoting *as a portion* of a test for deciding when to remove a voter's name from the rolls. To interpret the statute otherwise, the Court concluded, would render the implausible result that a state that comports with the confirmation notice procedure in subsection (d), which allows for removal after a period of voter inactivity, could also violate the "Failure-to-Vote Clause." In addition, the Court opined that the phrase "by reason of" denotes some form of causation, and that in this context, it is more likely that Congress meant to prohibit using one's failure to vote as the "sole" criterion for removal than as one of the steps that eventually causes removal. Second, the Court characterized another provision of HAVA as supporting its interpretation in a more straightforward manner. That is, after directing that "registrants who have not responded to a notice and . . . have not voted in 2 consecutive general elections for Federal office shall be removed," another provision of HAVA expressly provides that "no registrant may be removed solely by reason of a failure to vote."

Moreover, the Court rejected the argument by the respondents and the dissent that large numbers of registrants often simply discard the mailed confirmation notices and, consequently, the failure to send back the confirmation notice does not prove that a registrant has moved residences. Characterizing this argument as being based on a "dubious empirical conclusion," the Court reasoned that it conflicts with Congress' determination that the failure to return a confirmation notice provides some evidence of a registrant having moved residences. Congress evidenced this judgment, the Court observed, by expressly providing that the failure to return a confirmation notice is one of the two requirements for a registrant's removal from the voter rolls under subsection (d).

In a concurrence, Justice Thomas further argued that the respondents' proposed interpretation of the NVRA—as preventing the states from using failure to vote as evidence of when their voting qualifications have been satisfied—would significantly interfere with the states' constitutional authority to establish and enforce voter qualifications. According to Justice Thomas, referencing his dissent in *Arizona v. Inter Tribal Council of Arizona, Inc.*, under the Constitution, the states retain the authority to decide voter qualifications in federal elections so long as they do not "establish special requirements" for congressional elections that are inapplicable to state legislative elections.

Writing for the four dissenting justices, Justice Breyer argued that the *Husted* Court misinterpreted the NVRA as merely forbidding a state from using the failure to vote as the *sole* criterion for removing a registrant's name from the rolls. According to the dissent, the Ohio law violates the "Failure-to-Vote Clause" because, among other reasons, a state using a registrant's failure to vote in order to even *initiate* the confirmation notice procedure violates the prohibition on removing registrants from the federal voter rolls because a person failed to vote. The words, "by reason of the person's failure to vote," the dissent argued, "are most naturally read" to prohibit states from even taking into account a registrant's nonvoting as part of the process of removing names from the voter rolls. Further, the dissent criticized the Court for overreliance on the significance of the term "solely," which is contained within another provision of HAVA, emphasizing that the "Failure-to-Vote Clause" itself does not contain that term. In addition, the dissent argued that the failure of registrants to respond to mailed confirmation notices does not contribute to a state's knowledge of whether a voter has in fact moved. Observing "the human tendency not to send back cards received in the mail," and citing nationwide statistics indicating the percentage of Americans on average who move per year, the dissent reasoned that one cannot reasonably conclude that the more than one million Ohio voters who failed to respond to the notices had actually moved.

In a separate dissent, Justice Sotomayor argued that the Court's decision ignores Congress' intent in enacting the NVRA, which was to increase voter registration. Justice Sotomayor further argued that the Court's decision disregards the history of voter suppression against which the NVRA was enacted by upholding a state law "that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."

Implications

The Supreme Court's decision in *Husted* upholding the Ohio Supplemental Process for removing names from the federal voter rolls increases the likelihood that similar laws in other states will likewise be determined to be in compliance with the federal law. Further, one commentator has opined that *Husted* may prompt additional states to enact similar laws, using the Ohio law as a model.

As this case resolved a question of statutory interpretation, Congress could decide to amend the NVRA in order to clarify further the circumstances under which states may remove the names of registrants from their voter rolls for federal elections, if it so chooses. For example, a bill introduced in the 115th Congress before *Husted* was decided, H.R. 3091, would amend the NVRA to limit states' authority to remove the names of registrants from the federal voter registration rolls on the basis of interstate cross-checks. Further, should Congress decide to respond directly to the Court's interpretation of the NVRA in *Husted*, it could enact legislation that would, for example, amend the law in such a manner to prohibit a voter roll maintenance program in which the failure to vote is a factor in initiating the process for removing a registrant's name from the voter rolls. More broadly, Congress could enact legislation with the goal of increasing voter registration rates overall by establishing an automatic voter registration program for federal elections. For example, S. 2106 would amend the NVRA to require states to automatically register eligible voters for federal elections at the time they turn 18 years of age. On the other hand, Congress may choose to maintain the status quo and consequently, let stand the Court's interpretation that the Ohio process for federal voter roll maintenance, and similar state processes, comport with the NVRA.

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