



# Supreme Court to Hear Voter Roll Case: What Are the Implications?

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January 9, 2018

In what has been called a “[potentially major case on voting rights](#),” on January 10, 2018, the U.S. Supreme Court is to hear oral argument in *Husted v. A. Philip Randolph Institute*. *Husted* involves the question of whether an Ohio process for removing or “[purging](#)” names from its official voter registration lists violates the National Voter Registration Act (NVRA). Specifically, the “[Supplemental Process](#)” for [voter roll maintenance at issue in \*Husted\*](#) involves the Ohio secretary of state’s office’s removal of a registered voter’s name from the state 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.) At the same time, the NVRA prohibits states from removing an individual’s name from its voter rolls for federal elections “[by reason of the person’s failure to vote](#),” while directing them to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of” death or relocation. In 2016, by a 2 to 1 vote, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) [held](#) that Ohio’s Supplemental Process violated the NVRA because the “trigger” for its process of voter roll purging is “ultimately based ‘solely’ on a person’s failure to vote.” The anticipated Supreme Court ruling in this case, in addition to resolving the Ohio dispute, will likely clarify [whether five states with similar laws](#) comport with the NVRA and may impact who is eligible to vote in Ohio (and possibly other states) in the 2018 federal election cycle. A decision is expected by June 2018.

## National Voter Registration Act

*Husted* involves the Court’s interpretation of section 8 of the NVRA and provisions of the [Help America Vote Act of 2002](#) (HAVA). These laws set forth a series of statutory requirements and exceptions that

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

LSB10053

spurred the litigation in this case. Congress enacted 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. [Accordingly, Section 8 of the NVRA](#) forbids states from removing the names of registrants for federal elections from the rolls except in five specific circumstances, including, of relevance to the Ohio case, a change in the registrant's residence. Section 8 of the NVRA further requires that states institute a general program to remove the names of ineligible voters from the rolls in response to a change in residence, but section 8(b)(2) of the NVRA provides that the program may not result in the removal of any name from the official voter rolls for federal elections "by reason of the person's failure to vote." HAVA amended the NVRA to provide that section 8(b)(2) does not prohibit a state from removing an individual's name from the voter rolls in accordance with the confirmation notice procedure set forth in section 8(d) of the NVRA. In turn, section 8(d) provides that a state may remove a name from its voter rolls if (i) the individual has failed to either notify the state or respond to a notice from the state during a specified period, and then (ii), has not voted or appeared to vote in two or more consecutive federal elections. In addition, HAVA provides that "consistent with the [NVRA] . . . registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed [solely by reason of a failure to vote.](#)"

## Lower Court Litigation

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 because of a failure to vote, as the confirmation notice that Ohio initially sends to a registrant is based on the registrant having not engaged in voter activity, including not voting. 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, the Sixth Circuit reversed and [ruled](#) that the Supplemental Process violates the NVRA. The court held that Ohio's Supplemental Process violates section 8(b)(2) 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. The NVRA "would have no teeth at all," the court warned, if states would be in compliance simply by including the act of voting in a disjunctive list of activities that a registrant must fail to do in order to trigger the confirmation notice procedure. In other words, the court explained, a state cannot avoid the determination that its voter roll maintenance process is tantamount to removing names because of failure to vote simply "by providing that the confirmation process is triggered by a registrant's failure either to vote *or* to climb Mt. Everest *or* to hit a hole-in-one." 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.

## Preview of Arguments Before the Supreme Court

In its Supreme Court briefs, among other arguments, the State of Ohio [contends](#) that its process of removing voters from the rolls only after they fail to respond to a confirmation notice is harmonious with the NVRA. According to the state, the NVRA and HAVA simply prohibit the removal of registrant names "solely by reason of failure to vote," while at the same time, affirmatively *requires* the use of a confirmation notice procedure that results in the removal of voters from the rolls for failure to vote. Under its process, the state argues, the failure to respond to a confirmation notice serves as a sufficient "break"

in the prohibited link between nonvoting and removal from the voter rolls. Furthermore, the state maintains that the HAVA amendment to section 8(b)(2) of the NVRA clarified that the law's prohibition on removing voters' names for failure to vote cannot be construed to prevent states from removing names through section 8(d)'s confirmation notice procedure. As a result, the state contends that the Sixth Circuit's interpretation of the HAVA amendment, as providing for a broad ban on the use of nonvoting at any stage in the voter roll maintenance process, conflicts with the purpose of the amendment to limit section 8(b). In addition, the state argues that two substantive canons of statutory construction suggest a more limited interpretation of the prohibition on states removing registrant's names based on nonvoting. First, relying on the constitutional avoidance canon, the state argues that a broad reading of the statutes would impermissibly establish qualifications for voting, which the Supreme Court has [held](#) is generally within the states' authority. Second, and relatedly, the state argues that a clear statement is required when Congress intrudes into the traditional state function of [election administration](#).

In contrast, the respondents generally [maintain](#) that the Ohio Supplemental Process runs afoul of the NVRA because it removes an individual from the rolls for failure to vote unless the individual takes affirmative steps to remain on the rolls. The respondents argue that section 8 of the NVRA only allows states to remove names from their voter rolls for [five specific reasons](#), none of which include the failure to vote or failure to respond to a notice. Under the HAVA amendment to the NVRA, the respondents argue, the failure to vote can only be used to confirm a state's prior determination of a registrant's changed residence, whereas the Supplemental Process impermissibly uses the failure to vote as a way of *initially* determining that a registrant may have changed residence. As a result, the respondents argue that HAVA clarified, but did not modify, the NVRA's original restrictions on a state's ability to maintain its voter rolls. In addition, the respondents counter Ohio's reliance on the [clear statement rule](#), arguing that it is inapposite in this case because the [Elections Clause](#) of the Constitution decisively provides Congress with the authority to legislate in this area.

## Implications

As the 2018 midterm federal election cycle begins, the Court's decision in *Husted* could impact who will be eligible to vote in Ohio and possibly other states. If the Supreme Court holds that the Ohio law violates the NVRA, it is likely that similar laws in [five other states](#) could be challenged successfully. On the other hand, if the Court rules in favor of the State of Ohio, [some](#) have [predicted](#) that such a ruling could prompt additional states to enact similar laws. While [some](#) [argue](#) that the Ohio process of voter roll purging facilitates efforts to curb voter fraud and may ameliorate the [expense](#) of maintaining large voter rolls, [others](#) [maintain](#) that such a process results in erroneous voter disenfranchisement. As this debate continues, and depending on how the Court interprets the NVRA, Congress may decide to amend the law to clarify the circumstances under which states may purge voters from their voter rolls for federal elections.