Supreme Court upholds Ohio purge of registered voters

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In yet another anti-democratic 5-4 decision by its right-wing majority, the US Supreme Court ruled Monday that the state of Ohio's method of purging its voter rolls does not violate federal law. The decision in *Husted v. A. Philip Randolph Institute* is the latest in a series of high court rulings favoring efforts at voter suppression by state governments, most of them Republican-controlled.

Ohio initiates the removal of voters from registration rolls after a single failure to vote in a federal election. All non-voters are sent notices requiring that they return a prepaid postcard indicating that they have not moved. Anyone who does not return the postcard, and who then does not vote for two more federal elections, is automatically removed from the rolls.

A suit against the Ohio policy was brought by Navy veteran Larry Harmon who did not vote in 2009 and 2010, did not return the postcard (which he does not remember receiving) and then did not vote in 2012 and 2014. When he tried to vote in 2015, he found his name had been struck from the list, even though he had lived at his current address for 16 years, paying both income and property taxes to the state of Ohio—which nonetheless sought to deny him the right to vote.

Harmon sued, with the support of numerous civil rights and voting rights groups, charging that Ohio's policy violated both the 1993 National Voter Registration Act (NVRA) and the 2002 Help America Vote Act. In 2016, a federal appeals court ruled in his favor and barred Ohio from enforcing the procedure, allowing 7,500 state residents to cast ballots after they had been removed from the voter rolls.

The majority opinion overturning the appeals court decision sought to evade the clear mandate of the NVRA, which forbids state governments from using non-voting as the grounds for removing voters from the registration rolls. The language of the NVRA, and its legislative history, clearly recognized that non-voting is itself a positive decision by the voter and, as such, should not be penalized by the state.

The Ohio procedure both begins and ends by using non-voting as its principal criterion for purging voters from the rolls. The process begins with a single act of non-voting, and it ends with two consecutive acts of non-voting. The majority opinion, written by Justice Samuel Alito, uses the middle action in the sequence, failure to return a prepaid postcard, as a screen, arguing that Ohio "does not strike any registrant solely by reason of the failure to vote … Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote and have failed to respond to a change-of-residence notice."

As the dissenting opinion by Justice Stephen Breyer pointed out, the failure to return a prepaid postcard proves nothing at all, since the clear majority of those who receive the postcard in the mail do not return it, even though only a small fraction has actually moved.

Breyer wrote that Ohio's process for purging voters "starts from an unjustified premise. It is unreasonable to infer that a person may have moved (or died or been disenfranchised) simply because the registrant failed to vote in a single federal election cycle."

In 2012, 2.3 million Ohioans chose not to vote despite being registered. In 2010 and 2014, which were midterm elections, this figure shot up to 4.1 million and 4.6 million respectively. As a result of the huge rate of voter abstention in the 2010 midterm, the office of Ohio Secretary of State Jon Husted sent 1.5 million prepaid postcards in mailings to non-voters. Only 60,000, about 4 percent, were returned as confirmation that the voter had moved. Nearly six times as many, about 235,000, were returned with the indication that

the voter still lived at the address in question. But more than 1.2 million postcards were not returned at all—accounting for some 15 percent of Ohio's voting population.

Breyer's dissent cites figures demonstrating that many non-voters are expressing a political opinion, and hence that non-voting should not be taken as an indication that the voter has moved or died. A survey of non-voters by the Census Bureau found that the leading reason for failure to vote, cited by nearly 25 percent, was "did not like candidates or campaign issues," followed by 15.4 percent "not interested." Another 38.6 percent cited schedule conflicts, illness or disability, problems getting to the polls, or were out of town on election day. Only 4.4 percent cited "registration problems," such as moving and failing to re-register.

Breyer also noted that in congressional hearings on the NVRA, "If there was a single point of agreement among all participants … it was the fact that not only is voting a right, but also, in this country, everyone has an equal right to choose not to vote. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election."

The proportion of non-voters is a staggering indication of popular alienation from the corporate-controlled two-party system. In 2016, for example, 74 million registered voters did not cast a ballot, refusing to choose between Donald Trump and Hillary Clinton, the two most despised major-party candidates in American history. In 2014, almost 100 million registered voters did not cast a ballot, a clear majority, 57.45 percent of the total.

A separate dissent written by Justice Sonya Sotomayor cited evidence of discriminatory intent on the part of the state of Ohio. She wrote that the majority opinion "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."

Sotomayor cited figures in one "friend of the court" brief indicating that "African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity" in the last few years, as "compared to only 4% of voters in a suburban, majority-white neighborhood."

Five other states—Georgia, Tennessee, West Virginia, Oklahoma and Pennsylvania—use non-voting as the triggering act for the process of removal from registration rolls, although none of them have a procedure as aggressive and rapid as Ohio's. Most states follow the procedure set down in the NVRA, in which the triggering act is either Postal Service notification that someone has moved, or the voter providing the state a new address by seeking a new driver's license.

An array of voting rights organizations opposed the Ohio law, including the League of Women Voters of the United States, the League of Women Voters of Ohio, and the Brennan Center for Justice at NYU School of Law. The American Civil Liberties Union, and the ACLU of Ohio represented the A. Philip Randolph Institute, an arm of the AFL-CIO, in the lawsuit.

The case was unusual because the federal government switched sides in the course of its passage through the court system. The Democratic administration of Barack Obama supported the lawsuit against the state of Ohio, while the Republican administration of Donald Trump opposed it. Similarly, a dozen Democratic-led state governments filed amicus curiae briefs in support of the plaintiff, while 17 Republican-led state governments filed amicus briefs in support of the state of Ohio.

While Democrat-appointed Supreme Court justices opposed the *Husted* ruling, and Democratic-controlled state governments filed legal briefs against it, the Democratic Party has done little or nothing to defend voting rights when it has had the opportunity to do so, as in 2009-10, when the Democrats controlled both houses of Congress and the White House. Nor did the Obama administration take any significant action in response to the Supreme Court's 2013 decision in *Shelby v. Holder*, effectively gutting the enforcement provisions of the Voting Rights Act.