

MEMORANDUM

To: Stephen Menendian
From: Pooja Shivaprasad & Amanda Miller
Re: Voter Purge Issues and Relevant Legal Claims

I. Key Legal Protections to Protect Against Discriminatory Voter Purges

Federal statutes codify voter protections predominately through the Voter Rights Act of 1965 and the National Voter Registration Act of 1993. These statutes set the bare minimum of what states must do to ensure their voting policies and practices are not in violation of the 15th Amendment's prohibition of discriminatory voter suppression. States are able to bolster federal protections through state-specific legislation. This memo will only include information on Ohio's state specific voter protection rights in light of rising voter suppression concerns in this state. The following section will include a brief introduction of main federal protections as well as a brief summary of state laws relevant to Ohio, a state with rising voter suppression concerns.

a. Federal Statutory Protections

Voting Rights Act of 1965

The Voting Rights Act ("VRA") was enacted to increase the number of registered voters in areas where there was a record of previous discrimination. Spurred by the Civil Rights Movement, the VRA outlawed literacy tests, which disproportionately kept Black voters out of polls. It also provided for the appointment of Federal examiners, who had the power to register qualified citizens in jurisdictions with a history of voter discrimination.

An important case that dismantled key parts of the VRA was *Shelby County v. Holder*, 570 U.S. 529 (2013), in which Alabama claimed that Section 5 of the VRA was unconstitutional. Section 5 of the VRA was a key provision requiring jurisdictions with a history of discrimination to submit proposed changes in voting procedures to the U.S. Department of Justice or federal district court for approval. In *Shelby*, the Supreme Court ruled that the coverage formula in Section 4(b) of the VRA, which determines which jurisdictions Section 5 covers, was unconstitutional. This effectively rendered Section 5, and ultimately the VRA, inoperable.¹ As such, little litigation is brought under the VRA to challenge facially neutral yet discriminatory impactful voter suppression policies.

National Voter Registration Act of 1993 (Motor Voter Act)

The National Voter Registration Act (“NVRA”) was enacted under the Elections Clause of the Constitution and signed into law in 1993. The purpose of the NVRA was to require state governments to offer voter registration opportunities to any eligible person who applies for or renews a driver’s license or applies for public assistance. The Act also mandates the U.S. Postal Service to mail election materials. Furthermore, the NVRA prohibits states from removing registered voters from voter rolls unless certain criteria are met. These criteria are governed by Section 8, which allows a State to remove a name upon the request of the registrant, mental incapacity, or criminal convictions. This section also requires states to conduct general voter registration list maintenance procedures that make a reasonable effort to remove ineligible persons by reason of death or change in

¹ See Brennan Center for Justice, “Voting Rights Act” last accessed March 9, 2020 at <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/voting-rights-act>

residence. The Act prohibits removal from voter registration lists solely because of a failure to vote.²

Help America Vote Act of 2002

In response to the problems during the 2000 presidential elections, Congress passed the Help America Vote Act (“HAVA”) mandating significant changes in virtually every aspect of election administration.³ In general, it provides key provision to ensure states are adequately and accurately protecting their constituents right to vote. Key provisions include state-wide computerized voter registration lists, specific voter identification requirements, and the availability of provisional ballots for voters not included on the official voter registration list.⁴

b. Ohio State Voter Protections Specific to Voter Purges

Ohio’s voter purge practices were litigated in *Husted v. A. Phillip Randolph*, 138 S. Ct. 1833 (2018) under the NVRA’s failure-to-vote provision. The issue in question was whether Ohio’s process of clearing the state’s voter rolls of individuals who had died or relocated violated NVRA’s prohibition on removing voters for failure to vote.

To identify voters who had “relocated,” the state sent notice to all registered voters who had not voted for two years. Ohio subsequently removed voters from their voter registration lists if the they did not receive a response to the change of address notice and

² National Voter Registration Act of 1993 (NVRA), Civil Rights Division, U.S. Dept. of Justice, last accessed March 9, 2010 at <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

³ See 42 U.S.C. § 15481; see also Pub. Law 107-252 § 30.

⁴ See Brennan Center for Justice, “The Help American Vote Act”, last accessed Marcy 9, 2020 at <https://www.brennancenter.org/sites/default/files/legacy/d/HAVA%20Fact%20Sheet.pdf>

if that individual did not vote over the next four years. In *Husted*, the Court ruled that Ohio’s voter purge process did not violate the NVRA or the Help American Vote Act of 2002.⁵ The majority found that (1) failure to vote for two years; (2) failure to return a notice card; and (3) subsequently failure to vote for four additional years was a rigorous enough standard to determine relocation. Because Ohio’s provision that removed voters for failure to vote was supplemented by other processes—notice and a four-year waiting period—the Court found that Ohio did not violate the NVRA. Advocates found that *Husted*’s holding has disproportionately affects low-income communities, communities of color, and the housing insecure.

Additionally, Ohio has a voter ID requirement.⁶ Before constituents may cast their vote at their local polling place, Ohio voters must provide proof of identity through: an unexpired driver’s license or state identification card; military, state or federal identification documents; or an original copy of a utility bill, bank statement, or paycheck from the last 12 months with the voter’s name and address.⁷

II. Rights to Review or Inspect Voter Files

a. State Obligations to Maintain and Upkeep Voter Files

⁵ See German Lopez, “Supreme Court’s conservative justices uphold Ohio’s voter purge system,” *Vox*, June 11, 2018 available at <https://www.vox.com/policy-and-politics/2018/6/11/17448742/ohio-voter-purge-supreme-court-ruling>

⁶ See Nina Totenberg, “Supreme Court Upholds Controversial Ohio Voter-Purge Law,” *National Public Radio*, June 11, 2018 available at <https://www.npr.org/2018/06/11/618870982/supreme-court-upholds-controversial-ohio-voter-purge-law>

⁷ See Frank LaRose, Ohio Secretary of State, “Identification Requirements,” last visited March 9, 2020 at <https://www.sos.state.oh.us/elections/voters/id-requirements/#gref>

The NVRA requires states to conduct a general voter registration list maintenance program that makes a reasonable effort to remove ineligible person from the voter rolls by reason of the person's death or a change in the residence. The Act requires that list maintenance be uniform, nondiscriminatory, and in compliance with the VRA. As discussed above, Section 8 of the NVRA prohibits removing registrants from voter registration lists solely for failure to vote, yet states can implement "supplemental" processes to get around this prohibition.

The Act also requires states to complete any purge program that will systematically remove the names of ineligible voters from the official list of eligible voters no later than 90-days prior to the date of a primary or general election for federal office. However, this 90-day restriction does not apply to removals based on death, criminal conviction, or mental incapacity.

The state is responsible for ensuring its practices are in compliance with the NVRA. The NVRA requires each state to designate a State officer or employee as the chief State election official to be responsible for coordinating State responsibilities under the Act. The Act recommends but does not require that States employ a person at the State level to serve as the NVRA State coordinator. In addition, States may consider employing a person at each designated voter-registration agency office whose primary responsibility would be coordinating and overseeing the conduct of all voter registration systems. Responsibilities include: ensuring they are administered in a uniform and non-discriminatory manners; reviewing monthly data of voter-registration activity at voter registration offices; monitoring voter-registration activities; training new employees;

providing training updates at periodic intervals; ensuring an adequate supply of forms; and resolving voter-registration coordination issues that arise between State and local officials.⁸

b. Updating Voter Registration Lists Pursuant to HAVA

HAVA requires state election to develop clear procedures for accepting, verifying, updating, and canceling voter registrations across the state. These procedures should ensure that voter registration applications are not rejected for failure to provide a driver's license or social security number, and that a unique identifying number is assigned to those applicants who do not provide this information. These procedures should also define what is required to "match" information in registration applications with state records in a manner that does not result in a high rate of erroneous "non-matches."

Furthermore, in an effort to promote uniformity and consistency, HAVA requires using a broad network of databases to verify registration information. In addition to the Department of Motor Vehicles and Social Security Administration, the statewide voter registration list should be coordinated with state agencies mandated to provide voter registration information under the NVRA, public assistance and disability offices, Medicaid and Medicare offices, public universities, and other state agencies. HAVA considers privacy concerns and recommends that privacy should be fully and carefully addressed in designing the system.⁹

c. Public Access to State Voter Registration Lists

⁸ See National Voter Registration Act of 1993 (NVRA), *supra* at note 2.

⁹ See Help American Vote Act, *supra* at note 4.

Generally, the public has access to state voter registration lists. The information provided in these lists varies by state, but they generally contain all voter registration information except for information that should be kept confidential. Confidential information generally consists of social security numbers, age/date of birth, driver's license numbers, voter ID numbers, signatures, and other unique identifiers. The non-confidential information provided typically includes a person's name, address, political party, and vote history. This information should *not* contain the candidate that the individual voted for.

While voter rolls are generally open to the public, some states require requesters to pay a nominal administrative fee. Candidates, campaign committees, political party committees, elected officials, political actions committees, and individuals can typically request voter information. There are some states that have more strict access requirements. Notably, Maine allows law enforcement agencies to make written requests for bona fide law enforcement purposes. Furthermore, California makes all voter information confidential except for candidates, parties, ballot measure committees, and to any person seeking information to inform election, scholarly, journalistic, or political/governmental purposes.¹⁰

d. Legal Remedies for Denied Access to Voter Information

There are no federal legal remedies in place that allow for voter list maintenance transparency. States could enact laws that provide remedies if access is denied to voter

¹⁰ See National Conference of State Legislators, "Access to and Use of Voter Registration Lists," August 5, 2019 available at <https://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx>

lists, but no such state laws exist at the moment. Conversations around publicizing voter registration lists stress the need to balance privacy with transparency.

For example, in 2014, the District of Columbia published an online list of voters 14 days before the primary elections. D.C. published names, home addresses, party affiliations, and voting frequency. Privacy advocates noted that D.C. improperly went beyond the requirements of the 2015 Primary Date Alteration Act, a statute enacted to alter the date of D.C. primary elections and to facilitate compliance with federal election law.¹¹ D.C. argued that this information is typically provided in voter registration information requests, thus their release was proper. D.C. likewise argued they properly disclosed this information because the data was public and was disclosable through the Freedom of Information Act (“FOIA”). However, privacy advocates argued that information dumps of personal information have the potential to lead to individual and significantly damage broader public trust in the government’s ability to make wise decisions about public information.

As such, privacy advocates argue that states should be mindful of how they approach the digital age in a way that balances both the public’s right to know and access information with privacy and security concerns. Voter registration data can be used in positive ways, such as analyzing how party affiliations or voter participation has shifted over time to provide insight on gentrification, population shifts, and voting patterns. Conversely, a full voter file could be used in negative ways, such as targeting individuals on the basis of their party affiliations. Recognizing this harm, **some states allow victims**

¹¹ See D.C. Act 20-620, “Primary Date Alteration Amendment Act of 2014”, available at <http://lims.dccouncil.us/Download/29421/B20-0265-SignedAct.pdf>

of domestic abuse to remove their information from voter registration lists. States must balance these privacy concerns with the public's interest in reviewing the accuracy of the state's voter registration database.¹²

Finally, there are no legal remedies for prohibitive voter registration information-request costs in a way that constitutes a denial of access. The fees are typically administrative and nominal in all states.

e. Restrictions to Access or Use Voter Registration Information

Currently there are no restrictions on how voter registration files can be used. If usage were to be limited, campaigns that use information for targeted advertisements would likely make a First Amendment claim. Candidates, campaign committees, and political parties typically use voter registration information to create targeted campaign advertisements and analyze voting patterns. Additionally, for researchers, files offer an easy way to examine the real electorate (those who really voted) and to add registration and turnout data to surveys. Useful applications of voter files include the demographic composition of the electorate, what kinds of voters tend to vote early or by absentee

¹² See Alex Howard, "Publishing voter registration data must balance privacy with transparency," *Sunlight Foundation*, June 16, 2016, available at <https://sunlightfoundation.com/2016/06/16/publishing-voter-registration-data-must-balance-privacy-with-transparency/>

ballot, who votes in primary elections, and what kinds of people are habitual versus episodic voters.¹³

III. The Legality of Voter Purges

Officially referred to as “list maintenance,” there are six general pathways for local and state officials to purge registered voters: (1) Change of Address; (2) Death; (3) Disenfranchisement through Criminal Convictions; (4) Duplicate Records; (5) Inactivity/Failure to Vote; and (6) Incapacitation.

Under federal law, these purge practices must be “uniform, non-discriminatory, and in compliance with the [VRA].”¹⁴ HAVA also requires that list maintenance procedures employ minimum standards of accuracy to ensure records are accurate and regularly updated. Purges can be “systematic,” meaning that they are large-scale and done in an organized and pre-planned fashion, or they can be “routine,” meaning that they affect an individual voter and are based on individualized information. Routine purges can have serious consequences for individual voters, but given the sheer number of persons affected, it is especially important to ensure that systematic purges are done accurately do not undermine voter protections.

In general, purging practices vary widely from jurisdiction to jurisdiction and offer few protections for affected voters. The following will briefly summarize the six major mechanisms government actors use to purge voters.

¹³ See Drew DeSilver, “Q&A: The growing use of ‘voter files’ in studying the U.S. electorate,” *Pew Research Center*, February 15, 2018, available at <https://www.pewresearch.org/fact-tank/2018/02/15/voter-files-study-qa/>.

¹⁴ See 42 U.S.C. § 1973gg-6(b)(1) (2008).

a. Change of Address

Due to the relatively transient nature of the general population, election officials often report that changes of address are the most difficult aspect of list maintenance.¹⁵ Under federal law, voters can be purged if election officials believe the voter has moved to a different voting jurisdiction and the following two conditions are met: (1) the registrant failed to respond to an address confirmation notice and (2) the registrant must fail to vote in two federal general elections following the mailing of the address confirmation notice.¹⁶

As to the first prong, officials usually send address confirmation notices after election office correspondence is returned to the office, an acceptable source provides information suggesting that the person has moved, or the election office undertakes a larger program to verify addresses and finds an address that appears questionable. Failure to respond to a address confirmation notice triggers the second prong. Flagged voters must fail to vote in the two subsequent and consecutive federal elections to be removed from the voter lists. However, removal cannot occur within 90 days of a federal election. According to the Brennan Center, Michigan's change of address purging process is likely in violation of federal law because it does not satisfy this second prong.¹⁷

Although this is one of the most common strategies to purge voters, undeliverable mail is a highly unreliable method to assess change of address. This unreliability often

¹⁵ See Myrna Pérez, "Voter Purges," Brennan Center for Justice, September 30, 2008 at p. 8, available at <https://www.brennancenter.org/our-work/research-reports/voter-purges>.

¹⁶ See 42 U.S.C. § 1973gg-6(b)(2).

¹⁷ See MCLS § 168.499(3) (2008).

disparately affects low-income and housing insecure people. Many false positives occur due to clerical and postal service errors, non-traditional housing situations, the use of P.O boxes as opposed to receiving mail at residential addresses, and temporary departures from permanent residence, such as military deployment.

Other less common strategies to identify voters who have moved include relying on third party data bases, such as the U.S. Postal Services federal “Change of Address” database or door-to-door canvassing.¹⁸

b. Death

Both HAVA and the NVRA address the removal of deceased voters from the voter rolls. Under the NVRA, states must make a “reasonable effort” to remove those who have died from the registration rolls.¹⁹ HAVA directs each state to coordinate its voter registration database with state death records for the purposes of removing names of deceased persons from the voter rolls. Most states collect death record data through various state agencies tasked with this data collection. However, some states permit election officials to consider other sources such as newspaper obituaries.²⁰

c. Disenfranchisement through Criminal Convictions

State laws vastly differ regarding the disenfranchisement of persons with criminal convictions. Some states like Kentucky and Virginia permanently disenfranchise person with criminal convictions while others, such as Maine and Vermont never disenfranchise

¹⁸ See Pérez, *supra* note 15 at pp. 12-13.

¹⁹ See 42 U.S.C. § 1973gg-6(a)(4)(A) (2008).

²⁰ See, e.g., Wash. Rev. Code Ann. § 29A.08.510(2) (2008) (permitting county auditors to use newspaper obituary articles to cancel a voter’s registration).

persons due to criminal convictions even while they are incarcerated. However, most states fall somewhere between these two extremes.²¹ Federal law provides little guidance and instead defers to state discretion on how to identify and purge voters with criminal convictions.²²

d. Duplicate Records

Federal law mandates that states screen their voting registration lists for duplicate records but provides no specific guidance how to do so.²³ As a result, from state to state and county to county, officials identify and remove duplicates in an inconsistent and confusing manner.

State laws similarly provide little guidance to local election officials and do not specify what identifying characteristics should be verified after a potential duplicate record has been flagged or what degree of approximation is permitted when comparing potentially duplicative entries.²⁴ Despite these vague laws local election officials report increased pressure from state officials to “clean” the voter registration list of duplicate records.²⁵

e. Inactivity/Failure to Vote

²¹ See Pérez, *supra* note 15 at p. 14.

²² See 42 U.S.C. § 1973gg-6(a)(3)(b) (2008); 42 U.S.C. § 15483(a)(2)(A)(ii)(I) (2008).

²³ See 42 U.S.C. § 15483(a)(2)(B)(iii) (2008).

²⁴ See, e.g., Nev. Rev. Stat. Ann. § 293.540(9) (2008) (authorizing removal of duplicate records but providing no criteria for identifying matching records). But see Wash. Rev. Code Ann. § 29A.08.610 (2008) (providing required criteria of identical date of birth, similar names and compared signatures; the only statute of those surveyed to provide such detailed criteria).

²⁵ See Pérez, *supra* note 15 at p. 16.

Federal law explicitly states that a person cannot be purged merely for a failure to vote.²⁶ Therefore, federal law prevents election officials from relying on the fact that a voter has not voted for some time to remove them from the registered voting list.

However, agencies get around this prohibition by using the “Change of Address” provision discussed above. If a registered voter fails to respond to an address confirmation notice and subsequently fails to vote over the next two federal elections, they can be legally removed from the voter registration list.²⁷ There are many programs that specifically target “inactive” voters by sending address confirmation notices after general elections.²⁸

f. Incapacitation

Federal law offers even fewer guidelines for removing voters from the registration rolls because of “mental incapacitation”. HAVA is silent regarding the removal of persons adjudged incapacitated. The NVRA simply mandates states to comply with their own mental incapacitation removal laws.²⁹

State laws vary with respect to the voting rights of persons who are mentally incapacitated and range from full disenfranchisement to full voter protection.³⁰

²⁶ See 42 U.S.C. § 1973gg-6(b)(2) (2008).

²⁷ See 42 U.S.C. § 1973gg-6(d)(2) (2008).

²⁸ See Ohio Rev. Code Ann. § 3503.21(B) (2008); Wis. Stat. Ann. § 6.50(1)-(3) (2007).

²⁹ See 42 U.S.C. § 1973gg-6(a)(3)(b) (2008).

³⁰ See Pa. Cons. Stat. § 1302(a)(4) (2008); Ind. Code Ann. § 12-26-2-8(1)(F) (2008); Or. Const. art. 2, § 3 (2007).

Those states that do disenfranchise mentally incapacitated people have a range of purging processes. Some states require general findings of mental incapacitation while others require mental incapacitation specific to voting decisions.³¹ Most require proof of a court adjudication identifying the voter as incapacitated.³² State circuit or probate courts, district courts, or the office of the court administrator often directly provide this information to election office officials.³³

IV. Legal Challenges to Voter Purges

a. Legal Strategies Used in the Past to Challenge Voter Purges

In *Husted*, the plaintiffs contended that Ohio’s process for removing voters on change-of-residence grounds violated the NVRA. Specifically, subsection (d) of the NVRA, which provides that a State may not remove a registered voter on change-of-residence grounds unless the registrant either (1) confirms in writing that he or she has moved or (2) fails to return a preaddressed, postage prepaid “return card” containing statutorily prescribed content and also subsequently fails to vote in any election during the period covering the next two general federal elections. Plaintiffs argued that that latter mechanism violated NVRA’s clear prohibition of removing voters based on failure to vote. The court disagreed. Instead, the Court pointed to a provision in HAVA that

³¹ See Mo. Rev. Stat. §§ 115.199, 115.133 (2) (2008); N.Y. ELEC. LAW § 5-400(1)(c) (Consol. 2008) (cancelling a voter’s registration, including the registration of a voter in inactive status, if he has been adjudicated incompetent); Nev. Rev. Stat. Ann. § 293.540(2) (2008); Fla. Stat. Ann. § 98.075(4) (2008); Wash. Rev. Code Ann. § 29A.08.515 (2008); Ohio Rev. Code Ann. § 3503.21(4) (2008)

³² See Mo. Rev. Stat. §§ 115.199, 115.133 (2) (2008); N.Y. Elec. Law § 5-400(1)(c); see also Brennen Center at p. 19.

³³ See N.Y. Elec. Law §§ 5-614(5), 5-106(6) (Consol. 2008).

specified that failure-to-vote should not be construed to prohibit a State from using voter history to initially identify voters who may relocated. Because Ohio had multiple processes in place in addition to failure-to-vote, the upheld this voter purge law as constitutional.³⁴

On the other side of this debate, some parties are bringing lawsuits in order to facilitate voter purges. In 2019, right-wing group Wisconsin Institute for Law & Liberty (“WILL”) filed *Zignego et al v. Wisconsin Election Commission et al*, No. 19-CV-0449 (Wis. Cir. Ct. Ozaukee Cty.)³⁵ in an effort to purge over 200,000 voters, most of who reside in heavily Democratic areas. WILL filed a complaint against the Wisconsin Elections Commission (“WEC”) arguing that the Commission is required by law to remove voters flagged as “movers” by the Electronic Registration Information Center (“ERIC”). ERIC, a project of Pew Charitable Trusts, uses official data, such as motor vehicle registration and U.S. Postal Service addresses, to help identify people eligible for voter registration and to keep voter rolls up to date.

Based on ERIC’s data, WEC sent out postcards to over 234,000 flagged voters to confirm their address. Over 209,000 registered voters did not respond to such notices. While state law instructs WEC to mark such respondents as “ineligible” to vote, WEC decided to wait until after the 2020 elections to deactivate those voters because they believed the ERIC data was unreliable based on the previous years’ error rates. WILL

³⁴ *Husted v. A. Philip Randolph Inst.*, 138 US 1833 (2018).

³⁵ See Wisconsin Institute for Law & Liberty, *Zignego et al v. Wisconsin Election Commission et al*, available at <https://www.will-law.org/our-cases/good-government/zignego-v-wec/#case-documents>.

claims ERIC's database is reliable and, as such, state law requires WEC remove voters who failed to respond to address verification forms.

The trial court agreed with WILL and ordered WEC to remove the 209,000 voters from rolls if they had not responded to the address notification 30 days after they were sent.³⁶ WEC has filed an appeal of the lower court's decision and requested a stay of the order pending appeal.³⁷ WILL filed a petition to bypass the appeals court so that the Wisconsin Supreme Court can timely address the urgent legal matter.³⁸ As of the date of this memo, the higher court had not yet issued its decision regarding WILL's petition to bypass.

Ultimately, most lawsuits litigating against unlawful voter purge practices rely on provisions of the NVRA and HAVA. Those on the other side, like WILL, tend to rely on pointing to inconsistent state voter list maintenance practices.

b. Showing of Discriminatory Intent for Voter Purges

Federal voter protections emphasize that voter protections apply to intentional discriminatory policies and practices as well as those that result in a disparate impact.

Specifically, § 2 of the VRA outlaws any voting policies or procedures that result in the dilution of a protected classes' voting power regardless of proof of discriminatory purpose. However, the holding in *Shelby* strongly undermines these disparate impact

³⁶ See David Armiak & Arn Pearson, "Group Behind Wisconsin Voter Purge Lawsuit Has Strong GOP Ties," Common Dreams, January 16, 2020 available at <https://www.commondreams.org/views/2020/01/16/group-behind-wisconsin-voter-purge-lawsuit-has-strong-gop-ties>

³⁷ See Plaintiff's Notice to Appeal, available at <https://www.will-law.org/wp-content/uploads/2019/12/91-2019-12-17-defendants-notice-of-appeal.pdf>

³⁸ See Defendant's Petition to Bypass, available at <https://www.will-law.org/wp-content/uploads/2019/12/2019-12-20-petition-to-bypass-signed-final.pdf>

protections. In the wake of *Shelby*, voting rights attorneys have made concerted efforts to prove more claims of intentional discrimination rather than relying solely on § 2 of the VRA.

An article by Danielle Lang and J. Gerald Hebert in the Yale Law Journal proposes an innovative strategy under the VRA to prevent discriminatory impactful voting policies.

They argue intentionally discriminatory claims made under Section 3 of the VRA open the door to preclearance, which is the practice under which covered jurisdictions must submit any proposed voting changes to the Department of Justice or a federal court for approval. In effect, jurisdictions would be unable to implement a potentially discriminatory policy until the DOJ or federal court has reviewed their proposed changes.

Referred to as the “bail-in” process, courts are able to review the proposed changes for any violations of the Equal Protection Clause or Due Process Clause. According to the authors, § 3 of the VRA could impose a system similar to the § 5 preclearance structure which was more or less eviscerated by *Shelby*. The authors also argue that despite this potential door into disparate impact protections, evidence of discriminatory intent is helpful strengthen § 3 claims under the VRA³⁹

c. Potential Expansions of Voter Purges Under Husted

The Supreme Court’s ruling in this *Husted* ultimately allows for failure-to-vote provisions to exist in voter purge practices so long as there are additional safeguards in place to protect voters. In *Husted*, “additional safeguards” include written notice of

³⁹Danielle Lang & J. Gerald Hebert, “A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation,” The Yale Law Journal, February 2018, available at <https://www.yalelawjournal.org/forum/a-post-shelby-strategy>.

potential removal from the voter registration list and subsequent four-year waiting period to see if the voter is inactive. However, it is unclear what other “safeguards” the court will find sufficient to supplement failure-to-vote removals. Activists and advocates fear that Ohio will become a model for other states particularly with Republican strongholds.⁴⁰

d. Specific Emerging Risks in Voter Purges

While voter purges have long been a concern, the current political and legal landscape are presenting new risks. The majority of these new risks have yet to be litigated due to the novel issues they present.

One current risk (as identified in WILL’s *Zinegro* suit⁴¹) is the growth of interstate databases such as Crosscheck program (Crosscheck) and Electronic Registration Information Center (ERIC) that purport to identify voters who have moved to a new state and are registered in both their current and former state.⁴² In 2017, 28 states participated in Crosscheck by sharing voter data with the system. Not all of those states actively used Crosscheck data to subsequently remove voters.⁴³ ERIC began with assistance from the Pew Charitable Trusts in 2012. Twenty-four states and the District of Columbia are or

⁴⁰ See Totenberg, *supra* note 6. <https://www.npr.org/2018/06/11/618870982/supreme-court-upholds-controversial-ohio-voter-purge-law>

⁴¹ See Wisconsin Institute for Law & Liberty, *supra* note 35.

⁴² See Jonathan Brater et al, “Purges: A Growing Threat to the Right to Vote,” Brennan Center for Justice, 2018, available at https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.1.pdf

⁴³ Kansas State Rep. Keith Esau, “Interstate Voter Registration Crosscheck Program” (PowerPoint presentation, National Conference of State Legislators, Williamsburg, VA, June 15, 2017), 5, available at http://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf.

will soon be members of ERIC.⁴⁴ Despite the heavy reliance on these databases, many have raised concerns about each database’s accuracy and reliability.

The second emerging risk is an increased focus on identifying alleged noncitizens registered to vote. Sources that states use to verify a voter’s citizenship status are unreliable and such concerns of non-citizen voter fraud are widely unsupported by data.⁴⁵

The final emerging risk with unknown consequences is the rise of litigation from conservative groups filed against local and state agencies to more aggressively “clean” their voter registration lists. In addition to the WILL litigation discussed above, as of September 2017, the Public Interest Legal Foundation had brought nine suits in six states in the previous two years alleging lax vigilance of voter rolls.⁴⁶

e. Additional Policy Strategies to Prevent or Challenge Voter Purges

The Brennan Center suggests several ways to safeguard voters from overly aggressive and potentially discriminatory list maintenance policies.⁴⁷ However, most require

⁴⁴ See “ERIC,” Electronic Registration Information Center, accessed May 24, 2018, <http://www.ericstates.org/>.

⁴⁵ See Jonathan Brater et al, *supra* note 41 at p. 6; see also Christopher Famighetti, Douglas Keith, and Myrna Pérez, “Noncitizen Voting: The Missing Millions,” Brennan Center for Justice, May 2017, available at https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf.

⁴⁶ Public Interest Legal Foundation, “248 Counties Have More Registered Voters Than Live Adults,” news release, September 25, 2017, <https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/>; see also Brennan Center for Justice, “Civil Rights Groups Launch National Effort to Combat Alarming Voter Purge Attempt,” news release, November 22, 2017, <https://www.brennancenter.org/press-release/civil-rights-groups-launch-national-effort-combat-alarming-voter-purge-attempt>.

⁴⁷ See Jonathan Brater et al, *supra* note 41 at p. 6.

affirmative actions by state actors to enhance voter protections, which may be unrealistic in conservative states.

First, state and legal actors should actively enforce the NVRA's protections and litigate all non-compliance issues. The NVRA permits an aggrieved voter to sue if a jurisdiction has been informed of a possible violation of NVRA and the jurisdiction does not correct it in a set period of time. Under the Trump administration, the federal Department of Justice is unlikely to enforce voter protections. As such, litigation led by civil rights and other pro-voter organizations to enforce the NVRA is especially crucial.

Second, states should enact laws that provide more stringent protections than those provided in the NVRA. This is particularly helpful to counter outside groups that are agitating for more aggressive purges. For example, most states do not provide notice beyond what is federally required. States should surpass minimal standards and all voters should be informed in advance of their possible deletion. This should include easy mechanisms for correcting errors on or right before Election Day.

Finally, states should enact automatic voter registration. This popular reform minimizes errors, saves money, and increases registration of eligible citizens. Automatic voter registration has two features: (1) eligible citizens are registered unless they affirmatively decline; and (2) voter registration information is electronically transferred from a government office to election officials instead of relying on pen and paper. In addition to adding more voters to the rolls, automatic voter registration programs identify more address updates, which reduces the need for change-of-address voter purges.