



November 4, 2016

Via U.S. and Electronic Mail

The Honorable Tre Hargett
Secretary of State
312 Rosa L. Parks Avenue
7th Floor, Snodgrass Tower
Nashville, TN 37243-1102

Dear Secretary Hargett:

As you have been made aware, the United States Court of Appeals for the Sixth Circuit recently struck down the practice of purging voters from the rolls based on their failure to vote in prior elections as violating the National Voter Registration Act (NVRA). *A. Philip Randolph Institute, et al. v. Husted*, --- F.3d ---, 2016 WL 5328160 (6th Cir. 2016). I am writing on behalf of the American Civil Liberties Union of Tennessee and its thousands of supporters across the state to urge you to acknowledge that Tennessee's law is now invalid and to take all steps necessary to ensure that those wrongfully purged voters will have their vote counted in the upcoming November 8 election.

The October 20, 2016 letter you received from Dēmos provides an excellent summary of the requirements of the NVRA and the Sixth Circuit's decision. Unfortunately, your October 28, 2016 response claiming that Tennessee's purge procedures are "substantially different" from those invalidated in Ohio and that "changing the rules at this stage would present a major disruption to elections in Tennessee" is wrong.

APRI v. Husted declared that Ohio's purge law was invalid because the antecedent to beginning the process of purging a voter is a person's failure to vote. In its opinion the court stated that Ohio:

explicitly uses a person's failure to engage in any "voter activity" which includes voting for two years as the "trigger" for sending a confirmation notice . . . [this] Process would violate the prohibition clause [of the NVRA] because removal of a voter "proceed[s] or arise[s] as a consequence" of his or her failure to vote.

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Tennessee's procedures share this common, fatal trait. No difference between the Ohio and Tennessee purge procedures, no matter how minor or significant, will change this fact. Tennessee's procedures are predicated on a person's failure to vote and will undoubtedly be found to violate the NVRA under the Sixth Circuit's reasoning. While it is too late to reverse the purges that occurred in the past, your office should be ready to take the lead in reforming the law and procedures to come into compliance with the NVRA after the election. Failure to do so would undoubtedly end in needless and costly litigation to declare the law invalid.

Your response was correct in one regard, Election Day is looming. The damage from Tennessee's unlawful purge law has been done. Your office is in the unique position to control some of that damage. However, taking some remedial steps will in no way disrupt the election as you have suggested.

While purged voters cannot be returned to the rolls in time for November 8, your office can notify and prepare county election commissions to identify those voters who have been wrongfully removed from their rolls. If these voters arrive at their precinct on Election Day, and barring some other disqualifying reason, they should be offered a provisional ballot in accordance with T.C.A. § 2-7-112(a)(3). These provisional ballots must be counted. Additionally, your office can and should make public announcements concerning the ability of certain purged voters to cast their votes.

ACLU-TN would be happy to discuss any of these proposed solutions, or any other solution that will address this problem.

Sincerely,



Hedy Weinberg
Executive Director



Thomas H. Castelli
Legal Director