



**American Civil Liberties Union
Statement For**

“The State of the Right to Vote After the 2012 Election”

Hearing Before the U.S. Senate Committee on the Judiciary

Submitted by

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Introduction

The American Civil Liberties Union (ACLU), on behalf of its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, is pleased to submit this statement for the record for the “The State of the Right to Vote After the 2012 Election” Hearing, before the U.S. Senate Committee on the Judiciary. The ACLU is a nationwide, non-partisan organization working daily in courts, Congress, state legislatures, and communities across the country to defend and preserve the civil rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU works at the federal, state and local levels to lobby, litigate, and conduct public education in order both expand opportunities and to prevent barriers to the ballot box.

In the wake of significant voter suppression efforts and other election administration concerns that arose on Election Day, which threatened the electoral participation of millions of Americans, disproportionately racial and ethnic minority voters, it is particularly crucial and timely for the Senate Judiciary Committee to consider the state of our most fundamental right as citizens. We thank the Committee for its attention to these barriers, and we ask that the Committee consider advancing the federal reforms outlined in this statement in order to ensure full electoral participation.

I. The State of the Right to Vote in 2012

Although state voter suppression efforts are not a new phenomenon, during the past two state legislative sessions, there was a dramatic proliferation of bills that would restrict access to the ballot. Regressive measures were introduced in 38 states in 2011¹ and in 22 states in 2012,² with 25 new or expanded barriers signed into law since January 2011.³ These laws cumulatively represented a significant retrenchment in voting rights, and they had the potential to disfranchise as many as five million Americans during the 2012 election.⁴

However, due to a series of successful legal challenges and advocacy in support of voting rights, the effect of many of these new laws was blunted in time for the 2012 election. Notably, voter ID laws were enjoined from going into effect in time for the 2012 election in Pennsylvania, Texas, Wisconsin, and South Carolina. Other legal challenges resulted in the preservation of early voting on the three days before Election Day in Ohio,⁵ the allotment of the same number of early voting hours in Florida as in 2008 (albeit over 8 days, rather than 14), and the removal of strict restrictions on third-party voter registration in Florida.⁶

Yet, despite the injunction or defeat of several laws that would likely have disfranchised millions of Americans, access to the ballot was nonetheless limited in many places across the country. Reports from news organizations, poll monitors, and non-partisan election protection officials indicated that certain election administration problems, such as polling places that were not properly equipped, outdated or inaccurate voter rolls, and poll workers who were poorly or inadequately trained on issues like the use of provisional ballots or the type, if any, of identification required of voters in their state, were national in scope.

Some of these types of issues recur every presidential election year, when voter turnout is at its highest nationally, but the 2012 election proved particularly difficult to administer in states that enacted suppressive voter measures because those laws often strain resources and create

¹ BRENNAN CENTER FOR JUSTICE, APPENDIX: SUMMARY OF STATE LAWS AND BILLS (2011), available at http://brennan.3cdn.net/28377eda8414bb7b55_rxm6ibk4c.pdf [hereinafter *State Laws Appendix*]; See also ACLU Map, 2011: Voting Rights Under Attack in State Legislature, available at <http://www.aclu.org/maps/2011-voting-rights-under-attack-state-legislatures>; Letter from American Civil Liberties Union and Lawyers' Committee for Civil Rights Under Law to T. Christian Herren, Chief, Voting Section, Civil Rights Division (September 28, 2011), available at http://www.lawyerscommittee.org/admin/voting_rights/documents/files/LC-ACLU-comment-letter-final.pdf; Jessica Bakeman, *Voter ID Initiative Passes*, The (Jackson, MS) Clarion-Ledger, November 9, 2011, available at <http://www.clarionledger.com/article/20111109/NEWS04/111090358/Voter-ID-initiative-passes?odyssey=modldefconlimglHome>.

² See generally, WENDY R. WEISER & DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES: ELECTION UPDATE, available at http://www.brennancenter.org/content/resource/voting_law_changes_election_update/ [hereinafter *Voting Law Changes*].

³ *Id.*

⁴ *Id.* at 1.

⁵ See *Obama For America v. Husted*, 2012 WL 4753397 (6th. Cir. 2012); *Florida v. United States*, CA No. 11-01428 (D.D.C.).

⁶ *League of Women Voters v. Browning*, 2012 WL 1957793 (N.D. Fla.).

additional bureaucratic challenges for election officials and poll workers. Minority voters were also disproportionately impacted by both the retrogressive state election laws, as well as election administration challenges. According to Hart Research Associates, African American and Hispanic voters are between two to three times more likely than white voters to wait more than 30 minutes to vote.⁷

This statement will explore the impact of different changes to state election laws and the election administration concerns, their effect on minority voters, and suggestions for federal reforms. Federal legislative reform is sorely needed in order to establish uniform national standards, not only to help protect the fundamental right of every American to participate across the states, but also to help produce a modern, more streamlined election process that works for all voters.

II. Voting Law Changes Impacting Access to the Polls

A. Cutbacks to Early Voting

Generous early voting periods, that include weekend days, facilitate voter participation.⁸ Early voting eases congestion at polling places on Election Day, and thereby improves the efficient operation of elections by reducing the ratio of poll workers to voters. Early voting periods also afford extra time to address deficiencies in election administration, including inaccuracies in voter rolls, which could prevent votes from being timely cast and counted, if encountered for the first time on Election Day itself. Early voting is an increasingly popular option for citizens, particularly minority voters. Yet, five states passed legislation to reduce their early voting after the 2010 election, including Florida and Ohio – both of which eliminated early voting on the Sunday before Election Day.⁹ Although legal challenges resulted in voters being able to vote early during the three days before Election Day in Ohio, including Sunday¹⁰, and for the same number of cumulative early voting hours in Florida as in 2008 (96 hours over 8 days, rather than the 14 days of early voting),¹¹ the reductions in early voting days foreclosed the option of voting early for hundreds of thousands of people and resulted in long lines for residents of both states.¹² In Florida, for instance, about 300,000 fewer votes were cast early in 2012 (2.4

⁷ Hart Research Associates, AFL-CIO Election Night Survey 2012 (2012),

<https://docs.google.com/presentation/d/1TGQPrvxJ5ODgSPf4CL-aS1HKVmrz4UF70gso4IUa1o/present?pli=1&ueb=true#slide=id.p59>. See also Ari Berman, *The GOP's Voter Suppression Strategy*, NATION, Dec. 10, 2012, available at <http://www.thenation.com/article/171404/gops-voter-suppression-strategy#>; Paul Leonard, Study Finds Blacks More Likely to Wait in Long Lines at Polls, <http://carrollgardens.patch.com/articles/study-finds-blacks-more-likely-to-wait-in-long-lines-at-polls>.

⁸ Jan E. Leighley and Jonathan Nagler, *The Effect of Non-Precinct Voting Reforms on Turnout, 1972-2008* 13-14 (January 15, 2009), available at <http://www.electiononline.org>; Paul Gronke et al., *Early Voting in Florida, 2004-2008*, The Early Voting Information Center. Sept. 1, 2005, available at <http://people.reed.edu/~gronkep/docs/GronkeBishinStevensGalanes-Rosenbaum.APSA.2005.pdf>.

⁹ *Voting Law Changes*, *supra* note 2, at 3.

¹⁰ *Obama For America v. Husted*, 2012 WL 4753397 (6th Cir. 2012).

¹¹ *League of Women Voters v. Browning*, 2012 WL 1957793 (N.D. Fla.); *Florida v. United States*, CA No. 11-01428 (D.D.C. Oct. 28, 2011).

¹² Luke Johnson, *Ohio Early Voting: Long Lines Reported Outside Polling Places*, THE HUFFINGTON POST, Nov. 4, 2012, http://www.huffingtonpost.com/2012/11/04/ohio-early-voting_n_2073287.html.

million), in comparison with 2008 (2.7 million), which academic observers attributed to the state legislature's decision to sharply reduce early voting by six days.¹³

Given the flexibility early voting affords citizens, it is not surprising that many voters have taken advantage of this option. In states like Tennessee, Nevada, Oregon, and Florida, more than half of all votes in recent elections have been cast during early voting periods or by absentee ballot.¹⁴ In 2008, 13% of all votes nationwide were cast during early voting periods;¹⁵ the total number of early voters in 2012 was comparable to 2008 – 32 million voted early.¹⁶

Many battleground states including Colorado, Florida, Iowa, and Ohio experienced increases in early voting numbers in 2012 compared with 2008.¹⁷ Early voting options are also used more frequently by voters of color. In Florida in 2008, for example, African Americans comprised 13% of the electorate, but cast 22% of early votes.¹⁸ Although comparable data for 2012 is not yet available, reports of the first few days of early voting in Florida indicate that a similar percentage of early votes (23.7%) were cast by African Americans.¹⁹ Likewise, approximately half of African American voters in North Carolina voted early in 2008 and 2012, compared to about 40% of white North Carolina voters.²⁰

The option of voting on the Sunday before Election Day is particularly popular with African American and Latino voters, a significant number of whom participate in voter turnout efforts organized by churches on that day. For instance, on that Sunday before Election Day in 2008 in Florida, one-third of the voters were African American, even though they only comprise 13% of the state's electorate.²¹ In an effort to encourage early voting and highlight the negative

¹³ Lloyd Dunkelberger, *Change in Florida voting law is felt at polls*, HERALD-TRIBUNE, Nov. 5, 2012, available at <http://politics.heraldtribune.com/2012/11/05/change-in-florida-voting-law-is-felt-at-polls/>.

¹⁴ See *Florida Early Voting May Change*, WJHG.COM Apr. 20, 2011, available at http://www.wjhg.com/home/headlines/Florida_Early_Voting_May_Change_120255094.html; Editorial, *They Want to Make Voting Harder?*, N.Y. TIMES, June 5, 2011, available at http://www.nytimes.com/2011/06/06/opinion/06mon1.html?_r=1 [hereinafter *Voting Harder*]; Early Voting Information Center, *Frequently Asked Questions*, available at <http://earlyvoting.net/faq> (last visited Aug. 31, 2011).

¹⁵ U.S. Election Assistance Commission, *The 2008 Election Administration and Voting Survey* (November 2009) at 9, available at <http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf>.

¹⁶ United States Elections Project, *2012 Early Voting Statistics*, http://elections.gmu.edu/early_vote_2012.html (last visited Dec. 17, 2012); United States Elections Project, *2008 Early Voting Statistics*, http://elections.gmu.edu/early_vote_2008.html (last visited Dec. 17, 2012).

¹⁷ Elizabeth Hartfield, *Early Voting Battleground Tallies*, ABC NEWS, Nov. 6, 2012, available at <http://abcnews.go.com/Politics/OTUS/battleground-state-early-voting-tallies/story?id=17652724#.UMuH8OSxzXw>.

¹⁸ Letter from Laughlin McDonald, ACLU Voting Rights Project, to T. Christian Herren, Chief, Voting Section, Civil Rights Division, (2011) available at <http://www.aclufl.org/pdfs/2011-06-20-ACLUDOJLetter.pdf> [hereinafter *FL Preclearance Letter*].

¹⁹ Joy-Ann Reid, *African-Americans voting early in large numbers, campaign says*, THEGRIO, Oct. 30, 2012, available at <http://thegrio.com/2012/10/30/african-americans-early-voting-in-record-numbers/>.

²⁰ *Voting Harder*, *supra* note 12; United States Elections Project, *2012 Early Voting Statistics*, http://elections.gmu.edu/early_vote_2012.html (last visited Dec. 17, 2012); *African American turnout in NC*, THE DAILY KOS, Nov. 4, 2012, <http://www.dailykos.com/story/2012/11/04/1155592/-African-American-turnout-in-NC>.

²¹ *Voting Law Changes*, *supra* note 2, at 4.

consequences of these restrictions for minority voter participation, the ACLU has worked with pastors to protect early voting and their “Take Your Souls to the Polls” programs.²²

Thus, legislation reducing early voting on the weekend before Election Day not only complicates administration of polling places during the general election, but it also has a disparate negative impact on voting by people of color. In Ohio, voting during the three days prior to Election Day was ultimately restored after a legal challenge.²³ Litigation challenging the prohibition on early voting in the three days prior to Election Day succeeded on equal protection grounds, since Ohio was permitting military and overseas voters to vote during that time period, thereby providing differential treatment to one group of voters over another.²⁴

The Ohio Secretary of State also prompted public indignation over disparities in early voting hours between counties with more registered Republicans and counties with more registered Democrats, with the Democratic-dominant counties of Cleveland and Cincinnati receiving shorter early voting hours.²⁵ This differential also had a disparate impact on voters of color, as counties with longer early voting hours – like Butler and Warren – tended to have fewer minority voters, while counties with shorter early voting hours – like Cincinnati and Cleveland – have majority-minority populations.²⁶ In response to public pressure, Secretary Husted standardized the early voting hours statewide.

In Florida, voters facing lines up to seven hours in the state’s most populous counties on the Saturday before Election Day – the last day of early voting – were granted a reprieve when federal lawsuits were filed the following day to force the state to extend early voting.²⁷ Although early voting was not available to Florida voters on the Sunday or Monday before Election Day,

²² Take Your Souls to the Polls is an effort organized by African American churches to take advantage of early voting, and most recently, to combat voter suppression laws. The program initially encouraged voting by taking church members directly from Sunday services to the polls. See ACLU, Take Your Souls to the Polls: Voting Early in Ohio,

<http://www.aclu.org/voting-rights/take-your-souls-polls-voting-early-ohio> (last visited Dec. 12, 2012).

See also Deborah J. Vagins & Mike Brickner, *Keeping Ohio’s Souls at the Polls: Sen. Durbin Holds Field Hearing on Ohio Voting Law*, ACLU, (May 4, 2012), <http://www.aclu.org/blog/voting-rights/keeping-ohios-souls-polls-sen-durbin-holds-field-hearing-ohio-voting-law> (Congressional field hearing in Ohio); Remarks of Deborah J. Vagins, ACLU Senior Legislative Counsel, at Congressional Black Caucus: Inaugural Faith Leaders Summit on Voting Rights, U.S. Voting Rights Forum (May 30, 2012), available at <http://www.c-spanvideo.org/program/SVot>.

²³ *Obama for America v. Husted*, 2012 WL 4753397 (6th Cir. Oct. 5, 2012); *Senate Field Hearing: New State Voting Laws III: Protecting the Right to Vote in America’s Heartland Before the Subcomm. on Constitution, Civil Rights and Human Rights on the Judiciary*, 112th Cong. (2012) (statement of the American Civil Liberties Union of Ohio), available at

http://www.acluohio.org/issues/VotingRights/TestimonyStatementForSenateFieldHearing2012_0507.pdf.

²⁴ *Obama For America v. Husted*, 2012 WL 4753397 (6th Cir. Oct. 5, 2012).

²⁵ Editorial, *Overt Discrimination in Ohio*, N.Y. TIMES, Aug. 14, 2012, at A22, available at http://www.nytimes.com/2012/08/15/opinion/overt-discrimination-in-ohio.html?_r=2&hp.

²⁶ *Id.* (“Cincinnati, for example, is 45 percent black, and Cleveland 53 percent. Butler County, however, is 8 percent black, and Warren 3.5 percent.”).

²⁷ *Florida Democratic Party v. Detzner*, 1:2012cv24000 (November 4, 2012), available at http://images.politico.com/global/2012/11/fdp_v_detzner_complaint.pdf; Warren Richey, *Democrats reach settlement in Florida early-voting lawsuit*, CHRISTIAN SCIENCE MONITOR, Nov. 5, 2012, available at <http://www.csmonitor.com/USA/Elections/2012/1105/Democrats-reach-settlement-in-Florida-early-voting-lawsuit>; Lizette Alvarez, *Democrats Sue to Extend Florida’s Early Voting*, N.Y. TIMES, Nov. 4, 2012, <http://thecaucus.blogs.nytimes.com/2012/11/04/democrats-sue-to-extend-floridas-early-voting/>

election supervisors in Miami-Dade, Palm Beach, and Broward Counties permitted individuals to request and to vote by in-person absentee ballots on those days in recognition of their inability to accommodate all of the voters who sought to cast an early ballot.²⁸

B. Voter ID Laws

Voter ID laws have become increasingly common across the country. Today, 33 states have laws requiring voters to present some form of identification to vote in federal, state and local elections,²⁹ although some laws or initiatives passed since 2011 have not yet gone into effect.³⁰ Some must also be pre-cleared under the Voting Rights Act prior to implementation. In 11 of those 33 states, voters must (or will soon be required to) present a photo ID – that in many states must be government-issued – in order to cast a regular ballot.³¹ Strict photo ID laws were only in effect in 4 states – Georgia, Indiana, Kansas, and Tennessee – for the general election this year, due to ongoing legal challenges, the need for Section 5 preclearance under the Voting Rights Act, or a delayed implementation date for the new photo ID law. However, confusion over whether these photo ID laws were in effect appeared to have depressed voter participation in at least once of the states – Pennsylvania – where litigation postponed the law’s implementation. Pennsylvania voter turnout was down by 7% from 2008, despite extensive outreach by both presidential campaigns and non-partisan get-out-the-vote efforts.³²

Strict voter ID laws deny the right to vote to thousands of registered voters who do not have, and, in many instances, cannot obtain the limited forms of identification accepted for voting. Since so many Americans of voting age – 21 million, in total – lack documentation that would satisfy photo ID laws,³³ there was a substantial risk that millions would be disfranchised in the 2012 elections, had all of the new photo ID laws gone into effect. This exclusion from the electorate would have disproportionately impacted low-income Americans, racial and ethnic minorities³⁴, and the elderly. As many as one in four African Americans of voting age lack government-issued photo ID, compared to only 8% of their white counterparts.³⁵ Eighteen percent of Americans over the age of 65 do not have government-issued photo ID.³⁶

In addition, many of these Americans cannot afford to pay for the documents required to secure a government-issued photo ID. Requiring voters to pay for an ID, as well as the

²⁸ Richey, *supra* note 27.

²⁹ National Conference of State Legislatures, *Voter Identification Requirements*, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#OK> (last visited Dec. 17, 2012) [hereinafter NCSL Map].

³⁰ *Id.*

³¹ These states include Alabama, Georgia, Kansas, Indiana, Mississippi, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin. Voters without photographic identification meeting the state statutory requirements are permitted to cast a provisional ballot, and return with their photographic identification within a specified time period after Election Day in order to have their ballot counted. *Id.*; *State Laws Appendix, supra* note 1

³² Berman, *supra* note 7.

³³ BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf [hereinafter *Without Proof*].

³⁴ NALEO Educational Fund, *Latino Voters At Risk* (2012), available at [http://www.naleo.org/downloads/NALEO_LatinoVotersatRisk_\(Condensed\).pdf](http://www.naleo.org/downloads/NALEO_LatinoVotersatRisk_(Condensed).pdf).

³⁵ *Without Proof, supra* note 33, at 3.

³⁶ *Id.*

background documents necessary to obtain an ID in order to vote, is tantamount to a poll tax. Although some states issue IDs for free, the birth certificates, passports, or other documents necessary to secure a government-issued ID cost money, and many Americans simply cannot afford to pay for them. Furthermore, obtaining a government-issued photo ID poses significant – at times insurmountable – obstacles to certain members of the electorate, including low-income individuals who lack the funds to pay for documentation, people with disabilities, individuals with limited access to transportation, and elderly Americans who never had a birth certificate and cannot obtain alternate proof of their birth in the U.S.³⁷

However, in advance of the general election, court challenges to many of these laws temporarily halted their implementation.³⁸ In those states covered by Section 5 of the Voting Rights Act (VRA), the Department of Justice objected to suppressive voting laws by denying preclearance and litigating subsequent challenges. South Carolina and Texas, both of which passed strict voter ID laws within the past two years, were blocked from implementing their laws in this year’s election. Both states, which are covered in their entirety by Section 5, were denied preclearance, and then brought unsuccessful challenges in the D.C. District Court.

Demonstrating the critical role of Section 5 of the VRA in blocking regressive voting changes, in each case, the court determined that neither state met their burden to show that their measures would not result in a discriminatory impact on minority voters in the general election.³⁹ The ACLU intervened in the South Carolina and Texas cases, along with other civil rights organizations, urging rejection of that the proposed changes, because the voting power of minorities would be diluted or diminished.

In the Texas litigation, the district court based its holding on the fact that, “(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and

³⁷ See, e.g., *Coalition of Civic Organizations Oppose Texas Voter ID Law, Vote Set For Monday*, LATINO DAILY NEWS, Mar. 18, 2011, available at <http://www.hispanicallyspeakingnews.com/notitas-de-noticias/details/coalition-of-civic-organizations-oppose-texas-voter-id-law-vote-set-fo/6199/> (statement of Terri Burke, Executive Director of the ACLU of Texas).

³⁸ Elizabeth Titus, *GOP suffers tough week for voting issues in court*, POLITICO, Aug. 31, 2012, <http://www.politico.com/blogs/charlie-mahtesian/2012/08/gop-suffers-tough-week-for-voting-issues-in-court-134027.html>. Note, however, that the State of New Hampshire’s voter ID law (which takes effect in 2013) was precleared by the Department of Justice after the state suspended a proposed change to the affidavit option alternative for those without ID. Thus, voters without ID in New Hampshire next year may cast a regular ballot, after signing an affidavit affirming that they are who they purport to be, that they are qualified to vote, and that they have a legal domicile in the ward or town that they are voting in. Emily Schultheis, *Justice Dept. clears New Hampshire voter ID law*, POLITICO, Sept. 5, 2012, available at <http://www.politico.com/blogs/burns-haberman/2012/09/justice-dept-clears-new-hampshire-voter-id-law-134499.html>; Ryan Reilly, *Justice Department Clears New Hampshire Voter ID Law*, TALKING POINTS MEMO, Sept. 5, 2012, <http://livewire.talkingpointsmemo.com/entry/justice-department-clears-new-hampshire-voter-id-law..>

³⁹ *Texas v. Holder*, 2012 WL 3743676 (D. D.C. 2012); *South Carolina v. Holder*, 2012 WL 4814094 (D. D.C. 2012) (granting preclearance for subsequent elections *but only* because the state law “allows citizens with non-photo registration cards to still vote without a photo ID so long as they state the reason for not having obtained one.” This provision, known as the “reasonable impediment” provision, was given the broadest possible interpretation by the court and any future limitations on the exception, according to the court, would be subject to additional Section 5 preclearance. Finally, the court stressed, no voter will be denied the right to vote “if they have the non-photo voter registration card.”).

(3) racial minorities in Texas are disproportionately likely to live in poverty.” Thus, the court concluded that the photo ID law would “likely ‘lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’”⁴⁰ In the South Carolina decision, the court based its decision on similar reasoning, determining that there was not sufficient time to implement the law prior to the 2012 general election in a manner that would not disparately impact minority voters. Yet, the court did grant preclearance of South Carolina’s voter ID law for future elections, on the condition that the law create a safety valve for individuals without an ID, who could provide one of certain enumerated reasons for lacking an ID.⁴¹

In addition to Section 5 litigation this year, strict new voter ID laws were also challenged in Wisconsin and Pennsylvania by the ACLU and coalition partners. These laws were enjoined in both states in time for the general election, on the basis that the photo ID requirements violated their respective state constitutions due to the restrictions they imposed on individuals’ access to the ballot and the likely discriminatory impact on minority voters. However, the litigation challenges to the voter ID laws in both Wisconsin⁴² and Pennsylvania⁴³ are ongoing, so eventual implementation of the laws is possible in the near future. The voter ID law in Tennessee, which was also enacted within the past two years, was not fully in effect for the general election.

Finally, on Election Day, Minnesota voters became the first in the nation to reject a voter ID proposal, which would have amended their State Constitution to require voters to present an ID in order to vote.⁴⁴

⁴⁰ *Texas v. Holder*, 2012 WL 3743676 *26 (D. D.C. 2012) (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)).

⁴¹ *South Carolina v. Holder*, 2012 WL 4814094 *3 (D. D.C. 2012).

⁴² On March 6, Circuit Court Judge David Flanagan issued a temporary injunction blocking the implementation of the voter ID provisions, finding that the plaintiffs are likely to succeed on the merits at trial and that further implementation of the law would cause irreparable harm. *NAACP v. Walker*, No. 11 CV 5492 (Wis. Cir. Ct. 2012) (order granting temporary injunction), available at

<http://www.courthousenews.com/2012/03/07/VoterIDInjunction.pdf>. This decision was made permanent with a March 12 decision by Judge Neiss granting a permanent injunction against the implementation of the voter ID law, having found it unconstitutional under the Wisconsin constitution. *League of Women Voters v. Walker*, No. 11 CV 4669 (Wis. Cir. Ct. 2012) (order granting permanent injunction), available at

<http://media.jsonline.com/documents/voteridruling.pdf>. The ACLU has a pending case challenging Wisconsin’s voter ID law under Section 2 of the Voting Rights Act. *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wis.).

⁴³ The ACLU and coalition partners were successful in preventing the implementation of the Pennsylvania photo ID requirement for the general election. The court granted a preliminary injunction against implementation of the requirement for the November 2012 presidential election, concluding that it would cause disfranchisement of voters. A final decision on the merits of the case is pending. See *Applewhite v. Pennsylvania*, 2012 WL 4497211 (Pa. Commw. Ct. Oct 2012).

Karen Langley, *State voter ID law is far from resolved*, PITTSBURGH POST-GAZETTE, Dec. 14, 2012, available at <http://www.post-gazette.com/stories/local/state/state-voter-id-law-is-far-from-resolved-666312/>.

⁴⁴ Doug Belden, *Minnesota voter ID amendment defeated*, Nov. 7, 2012, available at

http://www.twincities.com/elections/ci_21946038/minnesota-voter-id-amendment-trailing-60-precincts-tallied.

C. Restrictions on Third Party Voter Registration

After passage of the National Voter Registration Act (NVRA) facilitated third-party registration efforts, these organizations have registered millions of Americans to vote. For instance, in the 2004 election cycle, the non-profit Project Vote registered 1.2 million voters.⁴⁵ During the following election cycle in 2008, Rock the Vote registered 2.5 million voters.⁴⁶ Unfortunately, efforts to restrict voter participation have included imposing unjustified restrictions on third-party registration activities. Since 2011, six states have passed laws making it more difficult to register to vote, with Florida and Texas enacting laws that strictly limited the voter registration activities of third-party organizations. Although the laws in Texas and Florida were ultimately lifted prior to the general election, residents of the state were impacted by the absence of groups conducting registration drives for nearly one year.⁴⁷ In Florida, for instance, new voter registration was down by 14% from the 2008 election period, prior to the injunction of the law.⁴⁸

Minority voters nationally are vulnerable to the effects of such laws placing restrictions on third-party groups. When the NVRA was initially drafted, it was premised on the concern that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.”⁴⁹ As data from the 2008 election indicated, more than 33% of voters who registered through third-party drives were racial minorities,⁵⁰ though minorities constituted only 18% of the voting age population.⁵¹ According to the League of Women Voters working in Florida, African American and Latino voters register with third-party groups at twice the rate of other voters.⁵²

The ACLU, along with a coalition of civil rights groups, won an injunction blocking Florida’s suppressive law in advance of the general election.⁵³ The League of Women Voters

⁴⁵ Letter from Penda D. Hair, Co-Director, Advancement Project and Holli Holliday, National Director, Project Vote, to The Honorable Cathy Cox, Chairperson, Georgia State Election Board (Sept. 12, 2005) at 1, *available at* <http://www.advancementproject.org/sites/default/files/GAcom2.pdf>.

⁴⁶ Ari Berman, *The GOP War on Voting*, ROLLING STONE, Aug. 30, 2011, *available at* <http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830?page=2> [hereinafter *Rolling Stone*].

⁴⁷ Jessica Vess, *Court overturns Texas voter registration ruling*, KVUE, Sept. 7, 2012,

<http://www.kvue.com/news/Court--168890916.html>;

Adam C. Smith, *League of Women Voters to restart registration drive*, MIAMI HERALD, June 6, 2012, *available at* <http://www.miamiherald.com/2012/06/06/2836567/league-of-women-voters-to-restart.html>.

⁴⁸ Berman, *supra* note 7.

⁴⁹ The National Voter Registration Act of 1993, P.L. 103-31, 107 Stat.77, 77 (1993).

⁵⁰ *FL Preclearance letter*, *supra* note 18, at 19.

⁵¹ U.S. Census Bureau, *Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States, Table 4b, (Nov. 2008)*, *available at*

<http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html>.

⁵² Dan Wagner, *Voting law's Sunday punch*, SARASOTA HERALD-TRIBUNE, June 15, 2011, *available at* <http://www.heraldtribune.com/article/20110615/opinion/110619722>.

⁵³ *League of Women Voters v. Browning*, 2012 WL 1957793 (N.D. Fla.). On May 31, 2012, the Florida District Court issued a preliminary injunction against enforcement of the most of the third party registration provisions. Following the decision, the state withdrew the remaining changes involving restrictions on third party registration organizations, and advised the court that it had amended some of the changes and would later submit them to DOJ for preclearance. On September 12, 2012, the DOJ precleared the early voting changing providing for 96 hours of

and other organizations resumed their voter registration drives in advance of the general election, after ceasing all registration activity for about a year due to the steep threat of legal consequences for failure to adhere to each of the law's new provision.⁵⁴ Unfortunately, new forms of state voting restrictions, modeled after legislation passed in Florida and Texas, could chill registration among these historically disfranchised groups in other states in advance of the next federal election.

D. Criminal Disfranchisement

Millions of Americans have had their right to vote revoked because of criminal convictions. Upon release from incarceration, these citizens work, pay taxes, live in our communities and bring up families, yet they are without a voice. An estimated 5.85 million citizens cannot vote as a result of criminal convictions, and nearly 4.4 million of those have been released from prison and are living and working in the community.⁵⁵

Sadly, in reversing a trend over the last decade to dismantle these barriers to the ballot, two states – Florida and Iowa – enacted regressive policy changes through administrative changes to make it nearly impossible for people with past convictions to ever regain their voting rights.⁵⁶ Those states now join Kentucky and Virginia in essentially imposing lifetime voting bans on people with felony records.⁵⁷ In Florida alone, an estimated 1.5 million citizens may be affected by this draconian policy.⁵⁸ In addition to these roll-backs of rights for people with convictions, South Dakota recently passed a law disfranchising people on probation.

States have vastly different approaches to voting eligibility for those with a criminal conviction. Some states permanently disfranchise some, but not all, citizens with felony convictions, while others allow voting after a sentence is completed or after release from prison.⁵⁹ Unfortunately, this patchwork of voting laws has caused widespread confusion about the proper administration of state laws that, in turn, has contributed to the disfranchisement of even citizens eligible to vote.⁶⁰ These criminal disfranchisement laws also have a troubling history, as they are rooted in the Jim Crow era and were originally intended to bar minorities from voting. The disproportionate impact of these laws on African Americans continues today,

early voting over an eight day period from 7:00 am to 7:00 pm. Also on September 12, 2012, DOJ filed a notice that all claims were now moot. And on October 15, 2012, all parties filed a joint stipulation of dismissal of all claims. The following day, the court issued its final judgment and order dismissing the case.

⁵⁴ Smith, *supra* note 47.

⁵⁵ CHRISTOPHER UGGEN, SARAH SHANNON, & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf

⁵⁶ Georgeanne M. Usova, *The Democracy Restoration Act: Everyone Deserves a Voice*, ACLU, Apr. 24, 2012, <http://www.aclu.org/blog/voting-rights/democracy-restoration-act-everyone-deserves-voice>.

⁵⁷ UGGEN *et al.*, *supra* note 55, at 3.

⁵⁸ *Id.*

⁵⁹ See ACLU Map, *Voting Rights for People with Criminal Records*, <http://www.aclu.org/map-state-felony-disfranchisement-laws> (last visited Aug. 8, 2011) (contains a map detailing state laws); see also DEBORAH J. VAGINS AND ERIKA WOOD, AMERICAN CONSTITUTION SOCIETY, THE DEMOCRACY RESTORATION ACT: ADDRESSING A CENTURIES-OLD INJUSTICE (2010), available at <http://www.acslaw.org/issues/democracy-andvoting>.

⁶⁰ See ERIKA WOOD AND RACHEL BLOOM, AMERICAN CIVIL LIBERTIES UNION AND BRENNAN CENTER FOR JUSTICE, DEFACTO DISENFRANCHISEMENT (2008).

as 1 of every 13 of African Americans male citizens have lost the right to vote – a rate seven times the national average.⁶¹

The disfranchisement of millions of citizens is undemocratic, contributes to confusion in election administration, and it is counterproductive to the rehabilitation and reintegration of these citizens into society. For all these reasons, the ACLU continues to be a leader in supporting the Democracy Restoration Act,⁶² introduced by Rep. John Conyers in the House of Representatives and Senator Ben Cardin in the Senate, which would restore voting rights in federal elections to the millions of Americans who are living in the community, but continue to be denied their ability to fully participate in civic life.⁶³

E. Proof of Citizenship Requirements

Laws mandating presentation of proof of citizenship impose a potentially insurmountable burden for a sizable number of Americans, for whom obtaining documentary proof of citizenship is difficult or impossible. Research from the Brennan Center found that an estimated 7% of Americans – more than 13 million people – do not have ready access to proof of their citizenship.⁶⁴ People with low incomes, the elderly, women, and people of color living in rural areas are among those least likely to have appropriate documentation. As birth registration was becoming standard practice throughout the U.S. in the 1920s, 30s, and 40s, for example, Native Americans, children born to Spanish-speaking families, and others with minimal access to formal healthcare remained significantly less likely than their urban and white counterparts to have their births officially recorded.⁶⁵ Such individuals often cannot obtain a delayed birth certificate because no living birth witness is available.⁶⁶ Women of voting age are also disproportionately impacted by these laws, since as many as 32 million women of voting age lack documentation of citizenship reflecting their current legal names.⁶⁷

Despite the significant potential that proof of citizenship laws have to prevent many Americans from registering and casting a ballot, three states – Alabama, Kansas, and Tennessee – passed laws in the past two years implementing such a requirement,⁶⁸ joining Arizona and Georgia.⁶⁹ In October, the Supreme Court granted certiorari to consider the Ninth Circuit's determination that the National Voter Registration Act superseded Arizona's documentary proof

⁶¹ Fact Sheet, ACLU, The Democracy Restoration Act of 2011 (2011), available at <http://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2011>;

Voting After Criminal Conviction, Brennan Center,

http://www.brennancenter.org/content/section/category/voting_after_criminal_conviction (last visited Dec. 17, 2012).

⁶² Democracy Restoration Act of 2011, H.R. 2212/S. 2017, 112th Cong. (2011).

⁶³ Fact Sheet, *supra* note 61.

⁶⁴ *Without Proof*, *supra* note 33.

⁶⁵ Hetzel, *U.S. Vital Statistics System Major Activities and Developments, 1950-95*, 59, (U.S. Dept. of Health and Human Services 1997), available at <http://www.cdc.gov/nchs/data/misc/usvss.pdf>.

⁶⁶ Gonzalez Plaintiffs' Proposed Findings of Fact Nos. 570-72, *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS (D. Ariz., May 9, 2006).

⁶⁷ *Without Proof*, *supra* note 33.

⁶⁸ WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012 17 (2011).

⁶⁹ *Id.* at 16-17.

of citizenship law.⁷⁰ The ACLU, along with other civil rights organizations, won the legal challenge in the lower courts, in the consolidated case of *Gonzalez v. Arizona*.⁷¹ The *en banc* decision by the Ninth Circuit affirmed the panel ruling from October 26, 2010, finding that the NVRA preempted Arizona's proof of citizenship requirement for registration by mail using the federal form.⁷²

F. Improper Purges of Voter Registration Rolls

While the maintenance of accurate and current voter rolls is necessary to the efficient administration of elections, improper purges of voter registration may result in the exclusion of duly-registered citizens from the electoral process. Such voter purges often employ incorrect and incomplete information in the decision to cull the voter rolls, and these systematic decisions tend to disproportionately impact – and exclude – minority voters. Furthermore, the utility of these mass voter purges is often questionable, since they may produce very few, if any, erroneously-registered voters.

For example, prior to the 2012 general election, both Florida and Texas engaged in the systematic purges of registered voters from the rolls. In Florida, in an effort to remove “non-citizens” from voter rolls, the state sent an error-ridden list of 2,700 possible non-citizens to county election supervisors for verification.⁷³ From the list of 2,700 individuals, hundreds responded within the 30 day time frame to prove their citizenship and avert being dropped from the rolls; only 40 individuals were identified as non-citizens by the state, but it is inconclusive if any of those individuals intentionally registered or have ever voted.⁷⁴ The threat of being purged did disproportionately target minority voters in Florida. Although minorities comprise only 30% of Florida voters, they constituted 82% of the 2,700 names on the purge list.⁷⁵ Thus, this voter purge – and others like it – disproportionately endanger the voting rights of minority citizens without any indication that they are successful in pinpointing non-citizen voters.

Similarly, Texas' voter purge efforts are predicated on outdated information from unreliable sources, prompting even County officials to admit that errors are inevitable.⁷⁶ One of the tactics employed in Texas' voter purges is to drop registered voters with identical names to the recently deceased or other individuals who moved to another county in Texas. Yet, in Harris County, Texas alone, more than 100,000 voters share duplicate names; for example, former County Election Commissioner, Sylvia Garcia, shares her name with 35 other individuals in the

⁷⁰ *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *cert. granted Arizona v. Inter Tribal Council* (U.S. Oct. 15, 2012) (No. 12-71).

⁷¹ See *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010).

⁷² *Gonzalez v. Arizona*, 677 F.3d 383, (9th Cir. 2012) (*en banc* decision) available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/04/17/08-17094.pdf>.

⁷³ Rachel Weiner, *Florida's Voter Purge Explained*, WASH. POST, Jun 18, 2012, available at http://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvcNIV_blog.html.

⁷⁴ Marc Caputo, *County Elections Chiefs to State: We Won't Resume Voter Purge Program*, MIAMI HERALD, June 8, 2012, available at <http://www.miamiherald.com/2012/06/07/2838176/county-elections-chiefs-to-state.html>.

⁷⁵ Ari Berman, *Florida Voter Purge Is Unlikely to Resume*, THE NATION, July 3, 2012, available at <http://www.thenation.com/blog/168714/florida-voter-purge-unlikely-resume#>.

⁷⁶ Lise Olsen, *Watch out for voter registration cancellations*, CHRON, June 7, 2012, available at <http://www.chron.com/news/politics/article/Watch-out-for-voter-registration-cancellations-3606064.php>.

county.⁷⁷ Purges under such parameters can result in the removal of voters whose registrations are both current and active.

The potential disfranchisement of Florida and Texas voters, however, was blunted by several litigation challenges to these purge efforts. The ACLU, and many other civil and voting rights organizations filed suit against Florida's voting purge.⁷⁸ Representing five citizens threatened with removal from the rolls, the ACLU sought an injunction to block Florida from dropping qualified voters, arguing that the state's actions violated Section 5 of the Voting Rights Act.⁷⁹ Since five of Florida's counties are covered jurisdictions under Section 5, any statewide change in election procedures affecting those counties requires DOJ approval.⁸⁰ The United States filed a lengthy Statement of Interest that Florida was in violation of Section 5;⁸¹ the litigation is still pending.⁸²

Days after the filing of the ACLU's suit against Florida, DOJ also brought suit, under Section 8 of the National Voter Registration Act (NVRA), which prohibits the purging of voter rolls 90 days prior to an election for federal office.⁸³ DOJ's challenge to Florida's purge of voters was dismissed on October 4, with the court interpreting that the purge based on citizenship challenges was permitted under the NVRA. Although the litigation challenge was unsuccessful, Florida had proactively reduced its swollen purge list of nearly 3,000 names down to 200 during the pendency of legal proceedings.⁸⁴

Similar challenges to voter purges in Texas proved more successful, where a coalition of civil rights organizations reached a settlement with Harris County, after the County incorrectly sent over 9,000 individuals' letters threatening to remove them from voter rolls on the incorrect belief that those individuals were deceased. As a result of the settlement, Harris County agreed to send written notice to each of the more than 9,000 impacted voters to advise them that they would not be removed from the rolls and could vote in the general election.⁸⁵

⁷⁷ *Id.*

⁷⁸ *Mi Familia Vota v. Detzner*, No. 8:12-cv-01294 (M.D. Fla.).

⁷⁹ Complaint for Declaratory and Injunctive Relief and Req. for a Three Judge Panel *Mi Familia Vota v. Detzner*, No. 8:12-cv-01294 (M.D. Fla., June 8, 2012), available at <http://miamiherald.typepad.com/files/2012-06-acluvoterpurgecomplaint.pdf>.

⁸⁰ The Department of Justice, Civil Rights Division, Voting Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Dec. 17, 2012).

⁸¹ Press Release, ACLU, Department of Justice Supports ACLU Suit to stop Florida's Inaccurate and Illegal Voter Purge (July 30, 2012), available at <http://www.aclu.org/voting-rights/departament-justice-supports-aclu-suit-stop-floridas-inaccurate-and-illegal-voter-purge>.

⁸² *Mi Familia Vota v. Detzner*, No. 8:12-cv-01294 (M.D. Fla. Oct. 29, 2012) (case management and scheduling order), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/OrderSettingTrialDate.pdf>.

⁸³ Press Release, Department of Justice, Justice Department Files Lawsuit Against Florida Alleging Violations of the National Voter Registration Act (June 12, 2012), available at <http://www.justice.gov/opa/pr/2012/June/12-crt-746.html>.

⁸⁴ Michael Peltier, *Federal Judge Approves Scaled-down Florida Voter Purge* REUTERS, Oct. 4, 2012, available at <http://www.reuters.com/article/2012/10/05/us-usa-campaign-florida-voting-idUSBRE89400420121005>.

⁸⁵ *Lawsuit Forces Partial Settlement for Harris County, Texas Voters*, Project Vote (Oct. 19, 2012), available at <http://www.projectvote.org/newsreleases/953-lawsuit-forces-partial-settlement-for-harris-county-texas-voters.html>.

III. Election Administration Issues Impacting Access to the Polls

In addition to the impact or confusion caused by voter suppression efforts on Election Day this year, voters also encountered difficulty voting because of election administration issues. These included last minute changes to state procedures, failure to maintain accurate voter rolls, inadequate poll worker training, including the improper use of provisional ballots, disproportionate allocation of resources, and technological glitches with voting equipment.

The cumulative impact of election administration issues is significant. Across the country this year, voters waited in line for hours to cast their ballot, with reports of wait times of four to five hours in Texas, Virginia, and Florida.⁸⁶ In fact, some voters were still in line when Mitt Romney conceded the presidential race to the incumbent, President Obama.⁸⁷ In his acceptance speech, President Obama acknowledged the pervasiveness of the problem, when he thanked everyone who participated, “whether you voted for the first time, or waited in line for a very long time,” before adding, “by the way we have to fix that.”⁸⁸

These administration issues have become endemic in our national elections despite previous efforts to address them at the federal level through legislation, such as the Help America Vote Act. In the absence of stronger and uniform federal standards for election administration, differences in state or county-level procedures have the potential to turn voters away. These issues are deserving of searching, bipartisan Congressional inquiry. With fewer than 4 million votes separating the presidential candidates this election year, election administration barriers could easily become determinative of election outcomes.⁸⁹ The following section represents only a snapshot view of election administration issues in the 2012 election.

A. Last Minute Changes to Election Administration Procedures

On the eve of the election, Ohio Secretary of State Jon Husted issued a last minute directive to election officials on provisional ballots. Previously, poll workers were responsible for correctly recording which form of ID the voter presented when voting provisionally, but Secretary Husted’s order placed this burden on the voter. This change in election administration increased the possibility of error, and risked the disfranchisement of those forced to cast a provisional ballot – because his order provided that any incorrectly filled-out provisional ballot would not be counted.⁹⁰

B. Failure to Maintain Accurate Voter Rolls

⁸⁶ Ethan Bronner, *Long Lines, Demands for ID and Provisional Ballots Mar Voting for Some*, N.Y. TIMES, Nov. 6, 2012, available at <http://www.nytimes.com/2012/11/07/us/politics/long-lines-id-demands-and-provisional-ballots-mar-voting.html>.

⁸⁷ Scott T. Smith, *Not All Florida Voting Precincts are Created Equally*, CBS12 NEWS, Nov. 17, 2012, available at http://www.cbs12.com/news/top-stories/stories/vid_3179.shtml.

⁸⁸ Dan Froomkin, *Obama on Long Lines at the Polls: ‘We Have to Fix That,’* HUFFINGTON POST, Nov. 7, 2012, available at http://www.huffingtonpost.com/2012/11/07/obama-long-lines-polls_n_2086291.html.

⁸⁹ See generally, Alexander Keyssar, *Voter Suppression Returns*, HARVARD MAGAZINE, July-Aug. 2012, available at <http://harvardmagazine.com/2012/07/voter-suppression-returns>.

⁹⁰ Ari Berman, *Eleventh-Hour GOP Voter Suppression Could Swing Ohio*, THE NATION, Nov. 4, 2012, available at <http://www.thenation.com/blog/171011/eleventh-hour-gop-voter-suppression-could-swing-ohio#>

In addition to the improper purges, discussed above, voter rolls do not always reflect those who are properly registered. People whose names are not found on the rolls may be denied the opportunity to cast a ballot – even a provisional one. For instance, Arizona sent removal notices to 1.6 million voters in the state, which equates to almost half of the state’s total registered voters; the national average ratio of removal notices to number of registered voters was 7.8%.⁹¹ Such removal efforts can significantly reduce the number of people on the voter rolls in advance of an election.

Another election administration issue impacting the accuracy of voter rolls is the failure of a state or locality to enter all of the voter registration forms into their system prior to Election Day. Some localities produce a supplemental voting list the night before Election Day, to account for these late registrations, but not all poll workers or election officials are aware of such lists or that the named individuals are entitled to vote with a regular ballot. In Fulton County, Georgia and Philadelphia, Pennsylvania, for instance, there were reports of voters being either turned away from the polls or given provisional ballots, because poll workers forgot about or did not consult the supplemental voting list.⁹²

C. Inadequate Poll Worker Training

i. Misuse of Provisional Ballots

On Election Day, poll workers across the country were given the daunting task of managing limited resources, confusing interpretations of state law, and higher turnout than was anticipated in many jurisdictions. In the absence of adequate training, too many poll workers misinterpreted the law,⁹³ as in Pennsylvania, where voters did not need a photo ID to vote in the 2012 election. The temporary order issued in the ACLU’s challenge to Pennsylvania’s voter ID law permitted poll workers to ask voters for a photo ID, but explicitly provided that voters could cast a regular ballot regardless of whether they could produce an ID on Election Day.⁹⁴ The ACLU of Pennsylvania predicted that this order could produce confusion among poll workers on Election Day,⁹⁵ and there were multiple reports that poll workers gave provisional ballots to

⁹¹ US ELECTION ASSISTANCE COMM’N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009-2010 (June 30, 2011), *available at* <http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf>.

⁹² Johnny Edwards, et al., *Fulton elections operations riddled with glitches*, ATL. J. CONST., Nov. 6, 2012, *available at* <http://www.ajc.com/news/news/state-regional-govt-politics/fulton-elections-operations-riddled-with-glitches/nSywQ>

⁹³ *Registered Philly voters required to cast provisional ballots in large numbers*, PHILADELPHIA CITY PAPER, Nov. 6, 2012, *available at* <http://www.citypaper.net/blogs/nakedcity/177510161.html>.

⁹⁴ Ryan J. Reilly, *Pennsylvania Judge Rules Poll Workers Can Still Ask For ID*, TPM, Oct. 2, 2012, http://tpmmuckraker.talkingpointsmemo.com/2012/10/pennsylvania_voter_id_law_ruling.php.

⁹⁵ Pennsylvania State Education Association, *It’s simple: No photo ID required to vote Nov. 6* (Nov. 2012), <http://www.psea.org/general.aspx?id=9894> (last visited Dec. 17, 2012). (“‘You can’t be telling people you need ID if you’re not actually requiring ID,’ said Vic Walczak, ACLU-PA attorney. ‘Confusion is not a good thing on Election Day. Confusion is going to mean some voters stay home. Confusion is going to mean that some poll workers get it wrong.’”).

voters without ID under the mistaken impression that the law was fully in effect.⁹⁶ In Philadelphia, twice as many voters had to cast provisional ballots as in 2008, and the Lawyers Committee' Election Protection program reported more than 9,000 calls from the state on Election Day, with many voters being told that a photo ID was necessary to cast a regular ballot.⁹⁷

While voters have a right to vote provisionally if their names do not show up on a valid voter list, the Help America Vote Act “does not direct state or local election officials to conduct any particular investigation to determine whether the provisional ballot should be counted.”⁹⁸ Since individual county boards of elections may determine voter eligibility, in the absence of stronger federal legislation, the decision to give a provisional ballot to a voter may result in their vote not ultimately being counted.

ii. Non-Compliance with Section 203 of the Voting Rights Act and Refusals to Assist Language Minority Voters

Across the country, language minority voters encountered difficulty voting. Under Section 203 of the Voting Rights Act, covered jurisdictions are required to provide language assistance at polling locations and to provide election material in the minority language if a jurisdiction meets certain population thresholds.⁹⁹ In covered jurisdictions across the country this year, language minority voters' right to participate was jeopardized after jurisdictions failed to provide, or provided misleading, information to these individuals. The Asian American Legal Defense and Education Fund reported that its poll monitoring uncovered violations of Section 203, including error-ridden election materials, in jurisdictions around the country, ranging from Queens, New York to Harris County, Texas to Cook County, Illinois.¹⁰⁰ The Asian American Justice Center reported similar issues, including indications of violations of Section 203 in covered jurisdictions in California, Illinois, Massachusetts, Michigan, and New Jersey.¹⁰¹

⁹⁶ Dan Stamm, *More Provisional Ballots Will Be Supplied if Needed in Philly*, NBC 10, Nov. 6, 2012, available at <http://www.nbcphiladelphia.com/news/politics/Provisional-Ballots-Philadelphia-Low-177542311.html>; Mary Wilson, *Number of provisional ballots, voter ID issues spur call for Pa. probe of voting irregularities*, NEWSWORKS, Nov. 14, 2012, available at <http://www.newsworks.org/index.php/local/philadelphia/47046-number-of-provisional-ballots-voter-id-issues-spur-call-for-pa-probe-of-voting-irregularities>; Ryan J. Reilly, *Turmoil Follows As Pennsylvania Voter ID Law Meets Reality*, TPM, Nov. 6, 2012), http://tpmmuckraker.talkingpointsmemo.com/2012/11/pennsylvania_voter_id_election_day.php?ref=fpnewsfeed; Ethan Bronner, *Long Lines, Demands for ID and Provisional Ballots Mar Voting for Some*, N.Y. TIMES, Nov. 6, 2012 at P9, available at <http://www.nytimes.com/2012/11/07/us/politics/long-lines-id-demands-and-provisional-ballots-mar-voting.html>.

⁹⁷ Berman, *supra* note 7.

⁹⁸ RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 112 (Yale University Press 2012).

⁹⁹ Department of Justice, *The Voting Rights Act of 1965*, <http://www.justice.gov/crt/about/vot/vra06.php> (last visited Dec. 17, 2012); CAROLINE FREDRICKSON & DEBORAH J. VAGINS, *ACLU, PROMISES TO KEEP* (Mar. 2006), available at <http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006>.

¹⁰⁰ AALDEF, *LANGUAGE ACCESS FOR ASIA AMERICANS UNDER THE VOTING RIGHTS ACT IN THE 2012 ELECTIONS* (2012), available at <http://aaldef.org/AALDEF%20Election%202012%20Interim%20Report.pdf>.

¹⁰¹ Press Release, Asian American Justice Center, *Poll monitors, voter hotline in 10+ states find language assistance for Asian American voters, but also missing bilingual poll workers, lack of knowledge about language access laws* (Nov. 7, 2012), available at <http://www.advancingequality.org/news-releases/poll-monitors-voter-hotline-in-10->

There were also multiple reports of misinformation given to Spanish-speaking voters in Maricopa County, Arizona, including the County listing the wrong election date on Spanish-language election materials, including voter registration cards,¹⁰² and inaccurate bookmarks produced by the County Election Board.¹⁰³ In addition, there were multiple incidents across the country in covered¹⁰⁴ and non-covered¹⁰⁵ jurisdictions of polling locations being ill-equipped to handle non-English-speaking voters.¹⁰⁶ Some of these limited-English proficient voters, who were duly-registered and qualified voters, were turned away from the polls or experienced long delays when preferential treatment was provided to English speaking voters.¹⁰⁷ For instance, the Lawyers' Committee National Election Protection program received a report of Korean American senior citizens being segregated into a separate voting line from native-English speakers in Virginia on Election Day.¹⁰⁸ Finally, Native American voters – particularly in states with a significant proportion of tribal members – continue to confront Section 203 violations, in addition to violations of other language access provisions of the VRA, like Section 208.¹⁰⁹

D. Disproportionate Allocation of Election Administration Resources

Given the highly-localized nature of elections currently, states, and even counties, have adopted different standards for the allocation of scarce election resources. In the absence of additional federal standards for the allocation of resources, there are significant variations in their distribution that can impact voter access. For example, from reports on Election Day, the allocation of electronic voting machines and ballot scanners was highly variable from location to location, sometimes insufficient to meet the voter turnout.¹¹⁰

states-find-language-assistance-for-asian-american-voters-but-also-missing-bilingual-poll-workers-lack-of-knowledge-about-language-access-laws [hereinafter “AAJC”].

¹⁰² Ed Payne & Michael Martinez, *Arizona county gives wrong election date in Spanish voter cards*, CNN, Oct. 18, 2012, <http://www.cnn.com/2012/10/18/us/arizona-spanish-election-ballot/index.html>.

¹⁰³ Matthew Hendley, *Maricopa County Elections Office Had More Materials With Wrong Election Date in Spanish, So It Got a Calendar*, PHOENIX NEW TIMES, Oct. 23, 2012, http://blogs.phoenixnewtimes.com/valleyfever/2012/10/maricopa_county_elections_offi_1.php.

¹⁰⁴ Jean-Paul Salamanca, *Arizona Election Results 2012: Votes Finally Counted, But Many Call For Reform to Ballot-Counting Measures*, LATINOS POST, <http://www.latinospost.com/articles/7252/20121123/arizona-election-results-2012-votes-finally-counted.htm>.

¹⁰⁵ Borys Krawczeniuk & Laura Legere, *Polls officially closed in Pennsylvania*, TIMES-TRIBUNE, Nov. 6, 2012, available at <http://thetimes-tribune.com/news/polls-officially-closed-in-pennsylvania-1.1399309>.

¹⁰⁶ AAJC, *supra* note 101.

¹⁰⁷ Jason Cherkis, *Election Problems Included Confusion, Intimidation, Untrained Poll Workers*, HUFFINGTON POST, Nov. 12, 2012, http://www.huffingtonpost.com/2012/11/08/election-problems-confusion-intimidation_n_2095384.html.

¹⁰⁸ AAJC, *supra* note 101.

¹⁰⁹ See, e.g. *Nick v. Bethel*, Alaska, No. 3:07-CV-0098 (TMB) (D. Alaska) (The ACLU and the Native American Rights Fund obtained a settlement against the City of Bethel and the State of Alaska on behalf of Yup'ik-speaking voters for violating Section 203 of the VRA, by failing to provide any written assistance and providing little to no oral language assistance, and Section 208 of the VRA, by preventing Yup'ik voters from bringing a person of their choosing into the voting booth to assist them with casting a ballot.).

¹¹⁰ Adam Brandolph, *Voters report problems with long lines, confusion over voter ID law*, PITTSBURGH TRIB.-REV., Nov. 6, 2012, available at <http://triblive.com/news/adminpage/2904078-74/outside-county-identification-judge-polls-order-asking-homestead-voters-allegheeny#axzz2EBvbh2ZC>; Donna Rapado et al., *Voters Endured Delays Amid Election Day Glitches in South Florida*, NBC MIAMI, Nov. 7, 2012, <http://www.nbcmiami.com/news/Malfunctioning-Machines-Reported-Throughout-South-Florida-on-Election-Day->

In Florida, for instance, the number of registered voters assigned to polling places can vary from 1,000 to 8,000, which means that some voters – who are assigned to less populated polling sites – will have a greater number of voting booths and ballot scanners at their disposal.¹¹¹ These variations can have a disparate impact on predominantly minority communities. An analysis of Orange County, Florida this election year, where the average number of registered voters assigned to each precinct was 3,042, indicated that precincts with a majority of Hispanic voters had an average of 3,575 voters. By comparison, precincts with a majority of white voters (at least 80%) in Orange County had an average of 2,144 voters assigned.¹¹²

In the absence of federal guidelines providing for equitable distribution of equipment and polling sites, minority communities will continue to be vulnerable to changes in state election procedures or resource allocations.

E. Technological Glitches with Voting Equipment

During early voting and Election Day, there were reports from across the country of machine glitches that impacted voters. Some poll workers encountered difficulty unlocking or activating the electronic voting machines, so they could be operational for voters. In Galveston County, Texas, electronic voting machines at all 45 polling places experienced delays “zeroing out,” which is the process by which the machine verifies that no ballots have been recorded prior to the beginning of voting.¹¹³ This delayed the opening of polling places by as long as two hours, and interfered with the ability of hundreds of Galveston County residents to vote during the early morning poll hours.¹¹⁴ In response to a request from the County Clerk to extend the poll hours to account for the delay, the district judge ordered that the polls remain open approximately two additional hours – rather than the scheduled 7pm closure – but that all ballots cast after 7pm would be provisional.¹¹⁵

These technological glitches were not limited to the electronic voting machine themselves, as states with paper ballots experienced technological problems with ballot scanners. In Cuyahoga County, Ohio, multiple cities – including Maple Heights, Cleveland Heights, Cleveland, and Parma – reported that their ballot scanners jammed, forcing voters to put their

177488311.html; Renee Standera & Jack Kuenzie, *Richland County election investigation: not enough voting machines used*, WISTV, Dec. 9, 2012, <http://www.wistv.com/story/20223227/richland-county-election-investigation-not-enough-voting-machines-used>; Ed Barnes, *Electronic Voting Machine Problems Raise Early Concerns*, FOX NEWS, Nov. 2, 2012, <http://www.foxnews.com/politics/2010/11/02/electronic-voting-machine-problems-raise-concerns/>; Beth Sawicki, *Election Day glitches frustrate voters*, WXIA-TV, Nov. 6, 2012, <http://www.11alive.com/news/article/263250/3/Election-Day-glitches-frustrate-voters>.

¹¹¹ Scott T. Smith, *Not All Florida Voting Precincts Are Created Equal*, CBS12 NEWS, Nov. 17, 2012, http://www.cbs12.com/news/top-stories/stories/vid_3179.shtml.

¹¹² *Id.*

¹¹³ Harvey Rice, *Galveston County voting extended two hours*, HOUSTON CHRON., Nov. 6, 2012, available at <http://www.chron.com/news/houston-texas/houston/article/Galveston-County-voting-extended-two-hours-4012465.php>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

paper ballots in a holding box until the scanners were repaired.¹¹⁶ In Broward County, Florida, there were also reports of scanners malfunctioning throughout Election Day, with some poll workers advising voters to put their ballots in a sealed bag, and others providing voters with the option to wait to scan their ballots themselves when the replacement equipment arrived.¹¹⁷

IV. Recommendations for Reform

The 2012 election firmly established the necessity of vigorous enforcement of the Voting Rights Act and other federal voting statutes, as well as of the need for more uniform standards and procedures for the administration of federal elections. Both suppressive voting laws and faulty election administration procedures can result in the denial of the right to vote, and minorities continue to be disproportionately impacted.

A. Additional Enforcement of the Voting Rights Act and Other Federal Voting Rights Statutes

When Congress re-authorized the Voting Rights Act in 2006 on a broad, bi-partisan basis, it concluded that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹¹⁸ In the re-authorization process, Congress extended the Section 5 provisions for another twenty-five years, based on the voluminous record compiled, which unequivocally demonstrated that despite gains, minorities continue to confront pernicious voter suppression tactics in states that have historically excluded them from the electoral process.

It is particularly crucial that the Department of Justice continue to take action under Section 5 in response to voter suppression in states with a sordid history of excluding racial and ethnic minorities. In addition, DOJ should also refuse to pre-clear any new criminal disenfranchisement laws, which is has not yet done, because these laws disproportionately impact communities of color.

Indeed, the role of Section 5 is particularly important. Not only does it provide an important deterrent to discrimination, if some states still try to enact discriminatory laws, Section 5 also stands as the bulwark to place the burden on those states to show that their laws do not discriminate, rather than placing that burden on the shoulders of historically disenfranchised groups. This is precisely what the congressional drafters of the Voting Rights Act intended. While the nation has made significant progress since the Voting Rights Act first became law in 1965, in 2006, Congress determined that Section 5’s broad and remedial powers were still necessary in covered districts to avert a potential backslide to the legacy of entrenched voter

¹¹⁶ Sarah Jane Tribble, *Voting equipment down at several locations in Cuyahoga County; elections chief says all votes will be counted*, PLAIN DEALER, Nov. 6, 2012, available at http://www.cleveland.com/politics/index.ssf/2012/11/voting_equipment_down_at_scatt.html.

¹¹⁷ Donna Rapado et al. *supra* note 110.

¹¹⁸ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, § 2(b)(9), 120 STAT. 578 (2006).

suppression and ineffective piecemeal litigation challenges that pre-dated the Voting Rights Act.¹¹⁹ In reaffirming Congress' findings on the continued necessity of Section 5, the D.C. Circuit Court of Appeals, in *Shelby County v. Holder*, found that sufficient evidence exists for Congress to conclude that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed".¹²⁰ *Shelby County* will be heard by the Supreme Court this term.¹²¹

In addition to litigation challenges brought under the Section 5, other challenges under state constitutional provisions successfully forestalled some voter suppression measures that would have impacted the general election. However, the ultimate fate of many of these laws was simply postponed until after the election, so access to the franchise may be restricted in the next election cycle to a greater degree than it was this year – making DOJ's continuing involvement in these and new voter suppression efforts necessary. Therefore, in addition to additional Section 5 objections, where applicable to the voter suppression tactic at issue, the Voting Section of the Civil Rights Division should also increase emphasis on prosecution of Section 2 and 11b cases under the Voting Rights Act, the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA).

DOJ and local agencies should also provide additional training for election officials and poll workers and greater outreach to the public. Polls are often run by dedicated, civic-minded volunteers who generously give their time to help make Election Day run smoothly, but they often are not provided with adequate training or with comprehensive information on election laws specific to their state. Better training for poll workers and election officials will help ensure that everyone has up-to-date information on the often-rapidly changing voting laws in their jurisdictions.

Finally, the ACLU and other civil rights groups will continue to engage in voter empowerment and public education campaigns, but it is also the responsibility of federal, state, and local officials to ensure that voters know what their rights are and what they need to do in order to cast a ballot.

B. Congressional Action Supporting Uniform Standards in Federal Legislation

In a speech this month at the JFK Library in Boston, Attorney General Eric Holder spoke on the urgency of enacting uniform election standards to prevent the problems seen on Election

¹¹⁹ Laughlin McDonald & Laura W. Murphy, *Voting-rights struggle isn't over*, POLITICO, Aug. 6, 2011, available at <http://www.politico.com/news/stories/0811/60787.html>.

¹²⁰ *Shelby County v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012). The court goes on to hold that, "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference" *Id.* at 873.

¹²¹ *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted* (Nov. 9, 2012) (No. 92-16), available at http://www.supremecourt.gov/orders/courtorders/110912zr_d18e.pdf.

Day this year.¹²² He echoes the sentiment of the nation -- according to a study by the MacArthur Foundation, nearly 90% of voters support the creation of national election standards.¹²³

Congress should heed the Attorney General's call and respond to these ongoing threats to the full democratic participation of citizens. Specifically, Congress should enact legislation providing uniform standards in federal elections that can help address the problems identified in this statement. Among other reforms, such legislation should maintain and expand upon early voting periods, address the distribution, casting and counting of provisional ballots, re-enfranchise all citizens, encourage no-excuse absentee voting, and ensure equitable distribution of resources. More specifically, such reforms should include:

- Longer early voting periods, with uniform requirements across states on the number of days and hours of operation, including the weekend before the election. This would help ensure that voters have more flexibility in participating and ease the burden of accommodating potentially thousands of voters on a single day.
- Greater federal requirements on the use and criteria for distributing, casting, and counting provisional ballots. In his recent speech, Attorney General Holder said: “[w]e must recognize that, in some cases, there is a risk that elections may hang in the balance for days or weeks due to the need to count hundreds – if not thousands or hundreds of thousands – of provisional ballots; and that it is a potential problem if these ballots are subject to counting standards that vary between jurisdictions.”¹²⁴ This change would help ensure that all eligible voters have their vote counted, in addition to ending the confusion among state and local officials about how to handle provisional ballots.
- Elimination of mandatory excuses to vote absentee. Voters in many states must provide a qualifying “excuse” in order to vote by mail.¹²⁵ Requirements to justify the “excuse” vary by state, but can go so far as to require that the voter produce a notary’s seal, a doctor’s note, or signatures from multiple witnesses to request an absentee ballot. Still other states require a voter to list work hours, explain a religious obligation, or detail the nature of a disability in order to prove that the voter fits into one of the state’s “excuse” categories. The disclosure of personal information or the imposition of financial burdens should not be required for citizens to exercise their right to vote. Voters in some states should not be more heavily burdened, simply because of their location, while voters in other states can conveniently, without question or cost, request a mail-in ballot.

¹²² Eric Holder, U.S. Attorney General, Address at the John F. Kennedy Presidential Library (Dec. 11, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-121211.html>.

¹²³ A recent study by the MacArthur Foundation found that nearly 90% of those who voted in the general election would support creating national voting standards. Press Release, MacArthur Foundation, *New Poll: Americans Strongly Support National Standards for Voting* (Nov. 14, 2012), *available at* <http://www.macfound.org/press/press-releases/new-poll-americans-strongly-support-national-standards-voting/>.

¹²⁴ Holder, *supra* note 122.

¹²⁵ National Conference of State Legislatures, *Absentee and Early Voting*, <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx> (last visited Dec. 12, 2012).

A federal law is needed to guarantee that all citizens have the same opportunity to vote by mail in federal elections if they so choose. The Universal Right to Vote by Mail Act¹²⁶ would give all voters the choice of voting by mail by eliminating the unnecessary, burdensome, and often intrusive “excuse” requirements that some states impose on voters requesting absentee ballots.¹²⁷ While this would supplement, not replace, in-person voting, allowing voters this choice could help more voters avoid long lines.

- Increase future funding for election administration and streamline existing resources. Long lines should never be caused by a lack of paper ballots or inequitable distribution of voting machines or ballot scanners. Congress should examine current allocation of resources, working with state officials in assessing inequities, and appropriate or allocate additional funds as needed.
- Re-enfranchise people with past convictions. Congress should also pass the Democracy Restoration Act, which will re-enfranchise millions of citizens with past convictions. These Americans are living and working in our communities, but they are denied their most basic right – to participate in our democracy through exercise of the franchise.

The provisions of the Democracy Restoration Act¹²⁸ would:

- Restore voting rights in federal elections to the 4.4 million Americans who have been released from prison and are living in the community.
- Ensure that probationers never lose their right to vote in federal elections.
- Notify people about their right to vote in federal elections when they are leaving prison, sentenced to probation, or convicted of a misdemeanor.

Passage of the Democracy Restoration Act would:

- Create a uniform standard across the country in federal elections.
- Strengthen our democracy by creating a broader and more just base of voter participation.
- Aid law enforcement by encouraging participation in civic life, assisting reintegration, and rebuilding ties to the community.
- Facilitate election administration by streamlining registration issues and eliminating the opportunity for erroneous purges of eligible voters.
- Eliminate the confusion about who is eligible to vote

¹²⁶ The Universal Right to Vote by Mail Act of 2011, H.R. 2084, 112th Cong. (2011).

¹²⁷ Letter from Laura Murphy, Director & Deborah Vagins, Legislative Counsel, ACLU Washington Legislative Office to U.S. Senate Committee on Rules and Administration regarding the Universal Right Vote by Mail Act (Apr. 29, 2010), available at <http://www.aclu.org/voting-rights/aclu-letter-support-universal-right-vote-mail-act-senate-rules-hearing>.

¹²⁸ Democracy Restoration Act of 2011, H.R. 2212/S. 2017, 112th Cong. (2011).

V. Conclusion

The ACLU thanks the Senate Judiciary Committee for holding this important hearing to address the issues of voter suppression and concerns over election administration during the 2012 election. As Attorney General Holder recently remarked: “we must also acknowledge that which is historically true: that the arc of American history has bent towards expanding the franchise. This generation must be true to that more inclusive history. This is our time; it is not a time to restrict the franchise.”¹²⁹

Therefore, it is crucial that additional legal and congressional action be taken to resolve the widespread issues that impeded access to the ballot. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen.

¹²⁹ Holder, *supra* note 122.