



**American Civil Liberties Union
Statement Before the Senate Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Human Rights**

"New State Voting Laws: Barriers to the Ballot?"

Submitted by

Laura W. Murphy
Director
ACLU Washington Legislative Office

and

Deborah J. Vagins
Senior Legislative Counsel
ACLU Washington Legislative Office

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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, commends the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights for focusing public attention on recent state laws which may severely restrict the fundamental right to vote for millions of Americans.

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.

We are pleased to submit this written statement for the record on this hearing, addressing the serious problem of new voting restrictions and new barriers to the ballot box across the country.

During the 2011 state legislative season, there has been a dramatic proliferation of bills that would restrict access to the ballot. According to Bloomberg News, this year saw states passing the most election-related laws since 2003.¹ Regressive measures were introduced in more than 30 states, and thirteen states proceeded to adopt new or expanded barriers to voting.² Stopping voter fraud is the posited rationale for these laws. There is much more evidence, however, that qualified voters are disfranchised by these measures than there is evidence of fraud. Instead of creating unnecessary and discriminatory barriers to the ballot box, state governments must re-direct their resources to ensuring the right to vote for all.

I. Restricting Access to the Vote

No right is more fundamental than the right to vote. It is protected by more constitutional amendments - the 1st, 14th, 15th, 19th, 24th and 26th - than any other right we enjoy as Americans. Broad political participation ensures the preservation of all our other rights and freedoms.³ State laws that impose new restrictions on voting, however, undermine our strong democracy by impeding access to the polls and reducing the number of Americans who vote and whose votes are counted.

There have been several restrictive voting bills considered and approved by states in the past several years. The most commonly advanced initiatives are laws that require voters to present photo identification when voting in person. Additionally, states have proposed or passed laws to require proof of citizenship when registering to vote; to eliminate the right to register to vote and to submit a change of address within the same state on Election Day; to shorten the time allowed for early voting; to make it more difficult for third-party organizations to conduct voter registration; and even to eliminate a mandate on poll workers to direct voters who go to the wrong precinct.⁴ These recent changes are on top of the disfranchisement laws in 48 states that

¹ Mark Niquette, *U.S. States Tighten Voting Regulation With Republicans in Charge*, Bloomberg News, Aug. 25, 2011, available at <http://www.bloomberg.com/news/2011-08-25/republicans-make-drive-to-tighten-state-voting-rules-before-2012-elections.html>.

² See, e.g., ACLU Map, 2011: *Voting Rights Under Attack in State Legislature*, available at <http://www.aclu.org/maps/2011-voting-rights-under-attack-state-legislatures>. States that passed laws or adopted policy changes imposing voting restrictions during 2011 are Alabama, Florida, Georgia, Iowa, Kansas, Maine, Ohio, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin. These laws will require voters in several states to show photo ID to vote in person and/or proof of citizenship to register to vote; shorten early voting periods; limit Election Day registration, registration by third party organizations, and absentee voting; and disfranchise more people with felony records. In addition, Mississippi and Missouri voters are slated to consider ballot initiatives in 2011 and 2012, respectively, that would restrict voting rights, and the Pennsylvania legislature still has pending before it a law to require photo ID, as of September 6, 2011. It is also possible that the North Carolina legislature could override the gubernatorial veto of the voter ID bill in that state.

³ *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

⁴ Jim Provance, *Obama campaign fighting Ohio voting law*, Toledo Blade, Aug. 31, 2011, available at <http://www.toledoblade.com/Politics/2011/08/31/Obama-campaign-fighting-Ohio-law.html>; See also H.B. 194, 129th Leg., Reg. Sess. (Ohio 2011).

deprive an estimated 5.3 million people with criminal convictions – disproportionately African Americans and Latinos – of their political voice.⁵

A. Photo Identification Requirements

Voter ID laws are becoming increasingly common across the country. Today, 30 states have laws requiring voters to present identification to vote in federal, state and local elections, although some laws passed during the 2011 legislative session have not yet gone into effect. In 15 of those 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 ballot.⁶

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 identification states accept for voting. Many of these Americans cannot afford to pay for the required documents needed to secure a government-issued photo ID. As such, these laws impede access to the polls and are at odds with the fundamental right to vote. In total, more than 21 million Americans of voting age lack documentation that would satisfy photo ID laws,⁷ and a disproportionate number of these Americans are low-income, racial and ethnic minorities, and elderly. As many as 25% of African Americans of voting age lack government-issued photo ID, compared to only 8% of their white counterparts.⁸ Eighteen percent of Americans over the age of 65 do not have government-issued photo ID.⁹

Laws requiring photo identification to vote are a “solution” in search of a problem. There is no credible evidence that in-person impersonation voter fraud – the only type of fraud that photo IDs could prevent – is even a minor problem. Multiple studies have found that almost all cases of alleged in-person impersonation voter “fraud” are actually the result of a voter making an inadvertent mistake about their eligibility to vote, and that even these mistakes are extremely infrequent.¹⁰ It is important, instead, to focus on both expanding the franchise and ending practices which actually threaten the integrity of the elections, such as improper purges of voters, voter harassment, and distribution of false information about when and where to vote. None of these issues, however, are addressed or can be resolved with a photo ID requirement.

Furthermore, the ACLU believes that requiring voters to pay for an ID, as well as the background documents necessary to obtain an ID in order to vote, is tantamount to a poll tax.

⁵ See generally, Deborah J. Vagins and Erika Wood, *The Democracy Restoration Act: Addressing a Centuries-Old Injustice* (March 2010), American Constitution Society, available at <http://www.acslaw.org/issues/democracy-and-voting>.

⁶ American Civil Liberties Union, *Oppose Voter ID Legislation – Fact Sheet* (July 21, 2011), available at <http://www.aclu.org/voting-rights/oppose-voter-id-legislation-fact-sheet> (hereinafter Voter ID Fact Sheet); National Conference of State Legislatures, *Voter Identification Requirements* (August 8, 2011), available at <http://www.ncsl.org/?tabid=16602> (hereinafter NCSL Map).

⁷ Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf [hereinafter *Without Proof*].

⁸ *Id.*

⁹ *Id.*

¹⁰ Justin Levitt, *The Truth About Voter Fraud* 11, Brennan Center for Justice (2006), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf (hereinafter *Truth About Voter Fraud*); Voter ID Fact Sheet, *supra* note 6.

Although some states issue IDs for free, the birth certificates, passports, or other documents required to secure a government-issued ID cost money, and many Americans simply cannot afford to pay for them. In addition, obtaining a government-issued photo ID is not an easy task for all members of the electorate. Low-income individuals who lack the funds to pay for documentation, disabled people 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., are among those who face significant or insurmountable obstacles to getting the photo identification needed to exercise their right to vote.¹¹ For example, because of Texas' recently passed voter ID law, an estimated 36,000 people in West Texas's District 19 are 137 miles from the nearest full service Department of Public Safety office, where those without IDs must travel to preserve their right to vote under the state's new law.¹²

In addition, women who have changed their names due to marriage or divorce often experience difficulties with identity documentation, as did Andrea Tangredi, who recently moved from Massachusetts to South Carolina and who, in the span of a month, spent more than 17 hours online and in person trying without success to get a South Carolina driver's license.¹³

As Rep. John Lewis recently wrote in the New York Times, "[t]hese schemes are clearly crafted to affect not just how we vote, but who votes."¹⁴ Voter ID laws send not-so-subtle messages about who is and is not encouraged to vote. As states approve laws requiring photo ID to vote, each formulates its own list of acceptable forms of documentation. Another common thread emerging from disparate state approaches is a bias against robust student electoral participation. Henceforth, students at Wisconsin state universities will not be able to vote using their student IDs, because these documents lack signatures.¹⁵ Nor will South Carolina, Texas, or Tennessee accept student identification at the polls.¹⁶ Policies that limit students' electoral participation are particularly suspect, appearing on the heels of unprecedented youth turnout in the 2008 election.¹⁷

B. Proof of Citizenship

Laws mandating presentation of proof of citizenship likewise impose a potentially insurmountable burden and have been adopted largely in response to allegations of problems that evidence reveals to be illusory. Investigations have failed to identify a confirmed case of a

¹¹ See, e.g., statement of Terri Burke, Executive Director of the ACLU of Texas (March 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/>.

¹² Sen. Carlos Uresti, *Thousands face 137-mile trip for Voter ID in one Senate district*, San Antonio Express-News, Jan. 28, 2011, available at <http://blog.mysanantonio.com/texas-politics/2011/01/thousands-face-137-mile-trip-for-voter-id-in-one-senate-district/>.

¹³ Schuyler Kropf, *Voter ID Battle: Some Rally Against S.C. Law They Think Is 'Trying To Change Electorate'*, The Post and Courier (August 9, 2011), available at <http://www.postandcourier.com/news/2011/aug/09/voter-id-battle/>.

¹⁴ Rep. John Lewis, Op-Ed, *A Poll Tax by Another Name*, Aug. 26, 2011, available at <http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html>.

¹⁵ Brennan Center for Justice, *Voter ID Laws Passed in 2011* (August 8, 2011), available at http://www.brennancenter.org/content/resource/voter_id_laws_passed_in_2011/.

¹⁶ *Id.*; Michael Lollar, *Law requiring photo ID puts some Tennessee voters in a tizzy*, *The Commercial Appeal*, July 29, 2011, available at <http://www.commercialappeal.com/news/2011/jul/29/identity-crisis/>.

¹⁷ E.g., Center for Information & Research on Civic Learning and Engagement, *Youth Voting: Voter Turnout by Age, 1972-2008*, available at <http://www.civicyouth.org/quick-facts/youth-voting/>.

noncitizen intentionally registering or voting while aware that s/he was not eligible to do so.¹⁸ Aggressive enforcement efforts by the Bush Administration produced a mere 14 convictions for voting fraud involving noncitizens between 2002 and 2005, in cases in which “[i]t was absolutely clear that there were some people who just did not understand that they could not vote,” according to expert and Barnard College professor Lorraine Minnite.¹⁹

Though there is no significant evidence of noncitizens voting, there are a sizable number of Americans for whom obtaining documentary proof of citizenship is difficult or impossible. A Brennan Center poll concluded that an estimated 7% of Americans – more than 13 million people – do not have ready access to proof of their citizenship.²⁰ 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.²¹ Such individuals often cannot obtain a delayed birth certificate because no living birth witness is available.²² The Brennan Center’s poll concluded that citizens earning less than \$25,000 per year are more than twice as likely to lack ready documentation of their citizenship as those earning more than \$25,000, and that as many as 32 million women of voting age lack documentation of citizenship reflecting their current legal names.²³

Proof-of-citizenship laws are far more likely to prevent American citizens from accessing the ballot box than to stop noncitizens attempting to vote illegally. For example, in Arizona, 37,000 registration applications have been rejected since 2006 for lack of proof of citizenship.²⁴ But in the 10 years prior to the passage of that state’s proof-of-citizenship law, a mere 20 cases of suspected voting by noncitizens were recorded. It is likely, therefore, that almost all of those impacted by the law are qualified voters lacking the required documentation.²⁵

C. Restrictions on Registration Leading Up to an Election

Laws that restrict the time allowed for voter registration prior to an election, and that limit the ability to record a change of address close in time to an election, merely serve as an unjustified hindrance on voting participation. For example, Florida’s H.B. 1355, which became law on May 19, 2011, eliminated the ability to submit address changes within Florida (that is, from one Florida address to another) on the day of an election, except for active-duty military families.²⁶

¹⁸ *Truth About Voter Fraud*, *supra* note 10, at 18.

¹⁹ *Immigrant Voter Fraud Fears Didn’t Materialize*, (NPR radio broadcast Nov. 5, 2010), *available at* <http://www.npr.org/templates/story/story.php?storyId=131089170>.

²⁰ *Without Proof*, *supra* note 7.

²¹ 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>.

²² Gonzalez Plaintiffs’ Proposed Findings of Fact Nos. 570-72, *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS (D. Ariz., May 9, 2006).

²³ *Without Proof*, *supra* note 7.

²⁴ American Civil Liberties Union of Utah, Senate Bill 210 “Proof of Citizenship Required to Vote” is an Unnecessary Bill That Will Discourage Voter Participation (Feb. 26, 2008), *available at* http://www.acluutah.org/SB210_factsheet.pdf.

²⁵ *Id.*

²⁶ H.B. 1355, 2011 Leg., Reg. Sess. (Fla. 2011).

The likely effect of this change in policy is that individuals who have the poor fortune to move just prior to an election will be disfranchised for no other reason but bad timing. Victims of the law are likely to be disproportionately African American and Latino, given that Pew Research Center data shows these demographic groups move more frequently than do whites – 43% of African Americans and 48% of Latinos moved between 2003 and 2008, compared to just 27% of whites.²⁷ Relocating should not cause someone to lose his or her right to vote.

A varied patchwork of state rules surrounding residence, moves, and voter registration breeds confusion, and excludes those with more precarious housing arrangements. The ACLU documented cases in 2008 in which Ohio voters were threatened with prosecution when requesting absentee ballots less than thirty days after registering, even though both federal and state courts had upheld the voters' right to register and request an absentee ballot on the same day.²⁸ Enhanced residence prerequisites to registration have also been used in attempts to prevent students from voting where they attend school. The ACLU has worked on cases occurring across the country in which students' votes were challenged solely on the basis of issues immaterial to their qualifications as voters, including their provenance, parents' residence elsewhere, community activities, church membership, car registration, and status as dependents of their parents.²⁹

D. Early Voting

Generous early voting periods, that include weekend days, facilitate voter participation.³⁰ 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 registration problems and other barriers to voting that can keep votes from being cast and counted if encountered for the first time on Election Day itself. Thus states' proposals to reduce voting periods may result in further obstacles to voting or possible diminished voter turnout. Recently, Ohio repealed Sunday voting, eliminating the convenience of weekend voting for those unable to make it to the polls on a workday.³¹

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.³²

²⁷ Pew Research Center, *American Mobility: Who Moves? Who Stays Put? Where's Home?* at 23 (December 17, 2008), available at <http://pewsocialtrends.org/category/datasets/>.

²⁸ Press Release, American Civil Liberties Union, Voting Rights Groups Call on Greene County Officials to Halt Investigation on Innocent Voters (Oct. 10, 2008), available at <http://www.acluohio.org/pressreleases/2008pr/2008.10.10.asp>.

²⁹ See, e.g., *Saunders v. Davis*, Civ. No. 4:04 CV 20 (E.D. Va. 2004); *Prairie View Chapter of NAACP v. Kitzman*, No. H-04-459 (S.D. Texas 2004); *Copeland v. Priest*, Civ. No. 4-02-CV-675 (E.D. Ark. 2002).

³⁰ 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* 2, The Early Voting Information Center. Sept. 1, 2005, available at <http://people.reed.edu/~gronkep/docs/GronkeBishinStevensGalanes-Rosenbaum.APSA.2005.pdf>.

³¹ H.B. 194, Sec. 3509.01(B)(3), 129th Leg., Reg. Sess. (Ohio 2011).

³² 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?*, The New York Times, June 5, 2011, available at http://www.nytimes.com/2011/06/06/opinion/06mon1.html?_r=1 (hereinafter N.Y. Times Voting Barriers); Early

In 2008, 13% of all votes nationwide were cast during early voting periods.³³ Additionally, early voting options are used more frequently by voters of color than by white voters. In Florida in 2008, for example, African Americans comprised 13% of the electorate, but cast 22% of early votes.³⁴ Nearly 54% of African American voters in Florida cast their ballots before Election Day, compared with 27% of white voters.³⁵ Likewise, more than half of African American voters in North Carolina voted early in 2008, compared to about 40% of white North Carolina voters.³⁶ This history strongly suggests that reducing early voting periods will not only complicate administration of polling places on Election Day, but have a disparate negative impact on voting by people of color. As the Early Voting Information Center at Reed College reports, "[t]here is no evidence that any form of convenience voting has led to higher levels of fraud."³⁷

E. Third-Party Voter Registration Restrictions

The National Voter Registration Act (NVRA) signaled the advent of enhanced efforts to facilitate widespread voter registration. The bill 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.”³⁸ Among other provisions aimed at redressing barriers to election participation, the NVRA authorized registration by mail-in form, and emphasized that the forms must be made available to private entities wishing to conduct voter registration drives. Third-party organizations have responded by helping many more millions register to vote. For example, during the 2004 election cycle alone, the non-profit Project Vote registered 1.2 million voters.³⁹ During the 2008 cycle, Rock the Vote registered 2.5 million voters.⁴⁰

Not surprisingly, efforts to restrict voting participation have included imposing unjustified restrictions on third-party registration activities. Restrictions that apply only to third-party registration efforts and not to other registrars of voters will result in fewer Americans registered, and fewer Americans participating in our democracy. For example, Florida’s 2011 H.B. 1355 dramatically shortens the period of time third-party organizations have to return completed

Voting Information Center, Frequently Asked Questions, *available at* <http://earlyvoting.net/faq> (last visited Aug. 31, 2011).

³³U.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>.

³⁴Letter 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-ACLU DOJLetter.pdf> [hereinafter *FL Preclearance Letter*].

³⁵*Id.*

³⁶N.Y. Times Voting Barriers, *supra* note 32.

³⁷Early Voting Information Center, *Frequently Asked Questions: Why do states adopt early voting? Are there risks?* (accessed September 3, 2011), *available at* <http://www.earlyvoting.net/faq>.

³⁸The National Voter Registration Act of 1993, P.L. 103-31, 107 Stat.77, 77 (1993).

³⁹Letter 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>.

⁴⁰Ari 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*].

applications to the state; require third-party registrars of voters to register themselves with the state and submit names and sworn statements of each person who will conduct registration activities on the organization's behalf; and sets potentially heavy fines for non-compliance, among other provisions.⁴¹

Already, Florida's new third-party registration restrictions have prompted the League of Women Voters to announce plans to end registration activities in the state, and other groups may be forced to do the same.⁴² As with many of the other restrictions cited in this statement, such proposals have a disproportionate impact on voters of color. Based on nationwide statistics, in 2008, more than one-third of voters who registered through third-party drives were racial minorities⁴³, though minorities constituted only approximately 18% of the voting age citizen population.⁴⁴ African American and Latino voters register with third-party groups at twice the rate of other voters.⁴⁵ Moves to restrict third-party registration will effectively chill registration and election participation among historically disfranchised people.

F. 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 5.3 million citizens cannot vote as a result of felony convictions, and nearly 4 million of those who are not in prison, but are living and working in the community.⁴⁶

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.⁴⁷ Despite a trend over the last decade of increasing access to the polls, this year, governors in two states – Florida and Iowa – enacted regressive policy changes to make it nearly impossible for people with past convictions to ever regain their voting rights. Those states now join Kentucky and Virginia in essentially imposing lifetime voting bans on people with felony records.⁴⁸ In Florida alone, an estimated one million citizens are affected by this draconian policy.⁴⁹ Two states, Maine and Vermont, allow all persons with felony convictions to vote, even while incarcerated; all other

⁴¹ H.B. 1355, 2011 Leg., Reg. Sess. (Fla. 2011).

⁴² *Voting laws Sunday punch*, The Herald-Tribune, June 15, 2011 [hereinafter *Sunday Punch*]; *Rolling Stone*, *supra* note 40.

⁴³ *FL Preclearance letter*, *supra* note 34, at 4.

⁴⁴ 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>.

⁴⁵ *Sunday Punch*, *supra* note 42.

⁴⁶ See Vagins and Wood, *The Democracy Restoration Act*, *supra* note 5, at 1; Erika Wood and Rachel Bloom, *DeFacto Disenfranchisement* (2008), available at <http://www.aclu.org/votingrights/exoffenders/36992pub20081001.html>.

⁴⁷ 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).

⁴⁸ *Id.*

⁴⁹ The Sentencing Project Map, *Felon Disenfranchisement by State*, <http://www.sentencingproject.org/map/map.cfm#map> (last visited Sept. 5, 2011) (1,179,687 Floridians in total estimated to be disfranchised).

states fall somewhere in between.⁵⁰ 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 eligible citizens.

Worse still, criminal disfranchisement laws are rooted in the Jim Crow era and were originally intended to bar minorities from voting. The impact of these laws continues today. Nationwide 13% of African American men have lost the right to vote – a rate seven times the national average.⁵¹ Contributing to the disfranchisement, African Americans and Latinos are disproportionately targeted by the criminal justice system.⁵² Surveys show that whites, African Americans, and Latinos in the U.S. use and sell illegal drugs at very similar rates, but two-thirds of all those incarcerated in state prisons for drug offenses are African American or Latino.⁵³ This is true at a time when African Americans constitute just 12.6% of the U.S. population, and Latinos 16.3%.⁵⁴ In turn, this has impacted the families of those who are disfranchised and the communities in which they reside by reducing their collective political voice.

By continuing to deny citizens the right to vote based on past criminal convictions, the government is endorsing a system that expects these citizens to contribute to the community, but denies them participation in our democracy. Not only is the disfranchisement of millions of citizens undemocratic, but it is counterproductive to the rehabilitation of those released from prison and their reintegration into society. As the New York Times recently opined, “[f]ully integrating ex-offenders back into society is...the best way to encourage their lasting rehabilitation. It is past time for all states to restore individual voting rights automatically to ex-offenders who have served their time.”⁵⁵

In sum, the potential consequence of restrictive measures like the foregoing examples is immense. According to the Cooperative Congressional Election Survey, 4 million registered voters did not vote in the 2008 presidential election because of administrative problems.⁵⁶ Another 4 million to 5 million people reported administrative problems as their reason for not registering.⁵⁷ With just less than 10 million votes separating the candidates in the 2008 elections,

⁵⁰ 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).

⁵¹ *Voting After Criminal Conviction*, Brennan Center,

http://www.brennancenter.org/content/section/category/voting_after_criminal_conviction.

⁵² See generally, e.g., Leadership Conference on Civil and Human Rights, *Justice On Trial: Racial Disparities in the American Criminal Justice System* (May 2000), available at <http://www.civilrights.org/publications/justice-on-trial/>.

⁵³ Drug Policy Alliance, *Drug War By the Numbers* (accessed September 2, 2011), available at www.drugpolicy.org/facts/drug-war-numbers.

⁵⁴ U.S. Census Bureau, *Overview of Race and Hispanic Origin*, Table 1 (March 2011), available at www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

⁵⁵ Editorial, *Their Debt is Paid*, New York Times, Oct. 20, 2010, available at http://www.nytimes.com/2010/10/20/opinion/20wed4.html?_r=2&partner=rssnyt&emc=rss.

⁵⁶ *Voter Registration: Assessing Current Problems: Hearing Before the S. Comm. on Rules and Administration*, 111th Cong. 1 (2009) (statement of Stephen Ansolabehere, Professor, Department of Government, Harvard University, Cambridge, M.A.), available at

http://rules.senate.gov/public/index.cfm?FuseAction=CommitteeSchedule.Testimony&Hearing_ID=c33b5ae8-ae8-413e-85db-a256ce6169f6&Witness_ID=e394ba39-8bf4-441c-8ed3-6e8c68cf4b23.

⁵⁷ *Id.*; see also Editorial, *Shut Out at the Polls*, WASH. POST, Mar. 16, 2009, at A16, available at

<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031501668.html?referrer=emailarticle>.

and additional legal obstacles now in effect in a number of states, voting barriers could easily become determinative of election outcomes.⁵⁸

II. The Impact of Restricting Access to the Vote

The chilling impact of new state-level voting restrictions is not just a theory based on statistics and extrapolation: it is a known fact, featuring real victims. Citizen surveys as well as individual anecdotes tell this story.

It has been known for some time that the move toward requiring photo ID to vote and proof of citizenship to register results in fewer votes cast, particularly by people of color and others disproportionately unlikely to possess the relevant documents. The New York Times noted that imposition of identification requirements had reduced turnout in the 2004 election by about 3%, but disproportionately reduced turnout by minorities by two to three times as much.⁵⁹

Studies offer further confirmation that from state to state, as well as nationally, voter ID laws depress voter participation, particularly among people of color, people with disabilities, and other groups who have been historically excluded from elections.⁶⁰ The coming years will demonstrate the similar impact of new policies that reduce opportunities to register, to amend registration, and to vote before Election Day.

Evidence submitted by the plaintiffs in the course of litigation over Arizona's voter ID law showed that between the beginning of 2005 and fall 2007, 31,550 voter registration applications were rejected in that state because of a failure to provide proof of citizenship.⁶¹ Even though approximately 90% of those submitting rejected applications listed the U.S. as their place of birth, only about 11,000 of the 31,550 were ultimately successful in registering to vote. Not surprisingly, given the additional hurdles to be surmounted by prospective voters, Arizona lost 11,000 registered voters during a period in which the state's population increased by 650,000.⁶²

The ACLU is working across the country to defend the rights of people who will be disfranchised by the wave of new voting restrictions. In Missouri, for example, the ACLU is representing citizens who would be disfranchised by attempts in that state to impose a voter ID requirement. Before the state can enact such a law, it must first amend the Constitution to eliminate certain protections for voters that currently make voter ID unconstitutional. Our clients include:

- two elderly women – 90 and 86 – who no longer drive and would have great physical and financial difficulty obtaining necessary ID documents;

⁵⁸ Federal Election Commission, *2008 Official Presidential General Election Results*, Jan. 22, 2009, available at <http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf>.

⁵⁹ Christopher Drew, *Lower Voter Turnout Is Seen in States That Require ID*, N. Y. TIMES, Feb. 21, 2007, at A16.

⁶⁰ E.g., Matt Barreto, Stephen Nuno, Gabriel Sanchez, *Voter ID Requirements and the Disenfranchisements of Latino, Black, and Asian Voters*, Prepared for the 2007 American Political Science Association Annual Conference (September 1, 2007), available at http://faculty.washington.edu/mbarreto/research/voter_ID_APSA.pdf.

⁶¹ Gonzalez Plaintiffs' Proposed Findings of Fact No. 603, *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS (D. Ariz., May 9, 2006).

⁶² ITCA Plaintiffs' Proposed Findings of Fact No. 22, *Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS (D. Ariz. May 9, 2006).

- a former musician now stricken with multiple sclerosis and confined to a wheelchair, whose ID has expired and for whom obtaining new state identification would be both physically and financially difficult;
- a woman on disability due to a severe accident, who would encounter significant physical and financial hardship obtaining new state identification;
- a naturalized citizen who has had difficulty renewing her driver's license when officials have questioned her Russian birth certificate;
- a former school board member who is likely to encounter difficulties at the polls because the name on her birth certificate is not the name under which she is registered to vote, and whose hand tremor could result in a signature that poll workers do not believe matches her signature on file; and
- a college student and a recent graduate whose out-of-state and student IDs will no longer serve as valid voter identification under the proposed amendment.⁶³

The ACLU and allies have also conducted outreach to determine the likely impact of a new voter ID law in Wisconsin. This work has identified many individuals who will be negatively affected, including:

- three senior citizens, ages 89, 91, and 96, who each lack photo ID, subsist on Social Security income, and are active voters. There is no public transportation available to these individuals, so they will each need a friend or relative to take them to obtain identification documents. The 91-year old lacks a birth certificate, which she will need to obtain state ID. Procuring a copy of a birth certificate, if it exists, is logistically difficult at best, but at worst, potentially impossible.
- two people with disabilities, ages 71 and 91, who are not mobile – in fact, the 71 year old is unable to leave her home. Their hometown of Winter is an hour's drive from the nearest state office that issues qualifying identification. Both will face significant difficulty arranging to obtain the necessary documentation to continue voting.
- a Native American resident of Green Bay, who is living with disabilities and dependent on public assistance, and lacks a photo ID as well as a copy of his birth certificate. He has few financial and other resources with which to seek the documentation he will need to continue voting.

III. Dispelling the Myths Behind Voting Restrictions

"No one could give me an example of all this [voting] fraud they speak about."
 – Mike Fasano, Florida State Senator (R-FL 11th District)⁶⁴

Proponents of restrictions on the right to vote allege that controls are needed to combat the danger of voting fraud, and further, that measures like requiring photo ID to vote will not impose any significant burden on voters. Evidence tells a different story, however: while there is little indication of fraud in elections, and even less reason to suspect that any improper voting is

⁶³ Press Release, American Civil Liberties Union, Civil Rights Groups Sue Missouri Officials Over Voter ID Ballot Initiative (July 7, 2011), available at <http://www.aclu-em.org/pressroom/2011pressreleases/civilrightsgroupssuemissou.htm>.

⁶⁴ Rolling Stone, *supra* note 40.

intentionally done, millions of Americans will be less able and likely to vote as a result of voter ID and other limitations emerging in state legislation.

A. Lack of Documented Fraud

Nationally, an intensive anti-fraud initiative conducted by the Bush Administration's Department of Justice between 2002 and 2007 resulted in just 86 voting fraud convictions for more than 300 million votes cast, and most of these targets were, as Rolling Stone reported, "immigrants and former felons who were simply unaware of their ineligibility."⁶⁵ Investigations in state after state also have consistently failed to produce evidence to justify fear of intentional voting fraud. A statewide survey conducted in Ohio uncovered a mere four instances of ineligible people voting in the 2002 and 2004 elections, out of nine million votes cast during that period.⁶⁶ In Texas, some 50 million votes have been cast since 2002, yet only one documented case has emerged of a person falsely claiming the identity of someone else for voting purposes.⁶⁷

In Alabama, sponsors of this year's voter ID legislation were able to identify only three cases of voter fraud in the state since 2008, none of which dealt with voters misrepresenting themselves during the registration process or at polling places.⁶⁸ South Carolina, which also passed restrictive voting legislation this year, recorded not one single report of voting fraud during the 2008 election.⁶⁹ The South Carolina State Election Commission also reported this year that there had been no substantiated cases of fraud in the state in the past decade.⁷⁰ In Wake County, North Carolina, about 280,000 votes were cast in 2010, however, the Board of Elections identified just six cases of potential voter fraud, fewer of which have resulted in any legal action.⁷¹ Although the Secretary of State of Kansas has advocated tougher voter restrictions, records obtained from his office show that in 14 years, between 1997 and 2010, there were a mere 221 alleged instances of voter fraud in the state, 200 of which could not have been prevented by the new proof of citizenship and photo ID requirements, and only eight of which resulted in legal action.⁷²

Legislation requiring voters to show photo ID at the polls is the most popular recent form of voting restriction considered by the states. But the kind of fraud that such restrictions could halt – impersonation of a registered voter – simply does not exist to any significant degree. The

⁶⁵ *Id.*

⁶⁶ Press Release, Brennan Center for Justice, Voting Rights Groups Urge Carter-Baker Election Commission to Oppose National Voter Identification Card (June 29, 2005), available at http://www.brennancenter.org/content/resource/voting_rights_groups_urge_carter_baker_election_commission_to_oppose_nation/.

⁶⁷ Terrence Stutz, *Texas House OKs bill requiring voters to show ID*, Dallas Morning News, Mar. 23, 2011, available at <http://www.dallasnews.com/news/politics/texas-legislature/headlines/20110323-texas-house-oks-bill-requiring-voters-to-show-id.ece>.

⁶⁸ Press Release, Alabama Democratic Party, *ADP Calls on Senate to Block Costly Voter ID Bill*, March 23, 2011, available at http://www.aladems.org/2011/03/adp_calls_on_se_1.php.

⁶⁹ Desiree Evans, *GOP Pushes Voter ID Bills in the South*, Facing South, Mar. 27, 2009, available at <http://www.projectvote.org/in-the-news/408-gop-pushes-voter-id-bills-in-the-south-facing-south.html>.

⁷⁰ Gina Smith, *Opposition Grows to New Voter ID Law*, The State, Aug. 27, 2011, available at <http://www.thestate.com/2011/08/27/1948342/opposition-grows-to-new-law.html>.

⁷¹ See e.g., Press Release, NC Center for Voter Education, *NCCVE Supports Veto of Voter Photo ID Bill* (June 23, 2011), available at http://www.ncvotered.com/releases/2011/6_23_11_voter_id_veto.php.

⁷² Katie O'Connor and Jon Sherman, *Lions and Tigers and Fraud, Oh My! Secretary of State Kris Kobach Is At It Again*, Huffington Post, June 14, 2011, available at http://www.huffingtonpost.com/katie-oconnor/lions-and-tigers-and-frau_b_876836.html.

Election Assistance Commission concluded in 2006 that voter impersonation “is probably the least frequent type of [election] fraud.”⁷³ It is so rarely seen, in fact, that instances of in-person impersonation fraud at the polls happen less often than lightning striking a person.⁷⁴ In part, this is because in-person fraud by individual voters is an ineffective way to influence an election. There are severe criminal penalties for voter fraud in federal elections, and in return, it yields at most one additional vote.⁷⁵

B. Fraud Allegations Do Not Withstand Scrutiny

When state officials have argued that fraud has occurred on anything approaching a large scale, their allegations have relied upon seriously flawed methodology. For example, New Mexico Secretary of State Dianna Duran announced in March that she had identified 37 cases of registered voters whose names matched names on a list of foreign nationals, as well as 117 registrants whose names did not match their social security numbers.⁷⁶ There was no indication, however, that she had confirmed whether or not these individuals had become naturalized citizens before voting, nor that her office had conducted investigation into the extent to which clerical errors – a common occurrence where handwritten registration documents must be entered into computer databases – were responsible for non-matches.⁷⁷

Similarly, Colorado Secretary of State Scott Gessler released a report earlier this year that alleged that 11,805 Coloradans who were foreign nationals were registered to vote.⁷⁸ His report covered the years 2006-11, during which time more than 32,000 Colorado residents became naturalized citizens.⁷⁹ Secretary Gessler’s report failed to conclusively establish that even one of these individuals was not a citizen at the time of his or her voter registration, because it revealed his office had not accessed citizenship information held by the federal government.⁸⁰ Though he submitted that 106 individuals registered to vote prior to providing documentation indicating immigrant status to obtain a driver’s license, this fact fails as proof of fraud, given that naturalized citizens often possess documents identifying themselves as legally present immigrants even after the date of their naturalization. In sum, widespread voting fraud has not yet, or ever, been demonstrated to exist through sound, validated analysis.

⁷³ U.S. Election Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Study* (Dec. 2006), available at http://www.eac.gov/assets/1/workflow_staging/Page/57.pdf.

⁷⁴ *Truth About Voter Fraud*, *supra* note 10, at 6.

⁷⁵ *Id.* at 7.

⁷⁶ Keesha Gaskins, *Smoke and Mirrors: Alleged Non-Citizen Voting in NM and CO*, Brennan Center for Justice (Apr. 1, 2011), http://www.brennancenter.org/blog/archives/smoke_and_mirrors_alleged_non-citizen_voting_in_new_mexico_and_colorado/.

⁷⁷ E.g., Milan Simonich, *New Mexico Dems Pan Official’s Voter Fraud Claims*, The El Paso Times, June 19, 2011, available at http://www.elpasotimes.com/news/ci_18308522; Matthew Reichbach, *Legality of Actions Questioned: Duran Grilled Over Voter File Examination*, Center for Civic Policy: ClearlyNewMexico.com, July 15, 2011, available at <http://www.clearlynewmexico.com/?p=6917>.

⁷⁸ Colorado Dept. of State, *Comparison of Colorado’s Voter Rolls with Department of Revenue Non-Citizen Records* (March 8, 2011), available at http://cha.house.gov/images/stories/documents/co_non_citizen_report.pdf.

⁷⁹ Dept. of Homeland Security, *2009 Yearbook of Immigration Statistics* (Aug. 2010) at 57, available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

⁸⁰ Colorado, *supra* note 78 at 4.

C. *Anti-Fraud Measures Have Chilled Voter Participation*

Though the fraud that new state voting restrictions supposedly redress is an illusion, massive disfranchisement of Americans through the implementation of these restrictions is a reality. A recent academic study concluded that approximately 2.2 million registered voters did not or could not vote in 2008 because of a lack of identification.⁸¹ In coming elections, this number is likely to grow, as millions more voters who lack identification become subject to strict photo ID requirements. In 2008, only two states, Georgia and Indiana, required in-person voters to produce one of a limited number of acceptable photo IDs.⁸² As of September 3, 2011, seven more states – Kansas, Wisconsin, Rhode Island, Texas, Tennessee, South Carolina, and Alabama – will impose similar requirements on voters during or after the 2012 election cycle.

Based on what we know about those who lack identification and struggle with barriers to obtaining it, these excluded voters were disproportionately racial and ethnic minorities. A 2010 report from the South Carolina State Elections Commission, for example, found that 178,175 registered voters in the state did not possess either a driver's license or identification card issued by the Department of Motor Vehicles. African Americans constitute 30.4% of registered voters in South Carolina, but a disproportionate 35.8% of voters who lack a DMV-issued photo identification.⁸³

Many proponents have argued that, since photo IDs are required for so many common purposes, like driving a car or boarding an airplane, producing an ID for voting does not impose a great burden. Such comparisons are misplaced. Voting is not a privilege like driving or flying. Rather, it is a fundamental right guaranteed by more constitutional amendments than any other right we have as Americans. Because of the primary importance of the franchise, any law that threatens to make it more difficult to vote faces the strongest constitutional scrutiny. By contrast, actions like buying alcohol, driving, and flying are not constitutionally enshrined, and can be limited by restrictions, such as ID requirements, so long as restrictions are applied evenly and are justified by a legitimate government interest.⁸⁴

Conclusion

In order for the United States to continue as one of the world's leading democracies, it must ensure all eligible citizens are able to register and cast their ballots. Elected officials should be seeking ways to encourage more voters, not inventing baseless excuses to deny voters the ability to cast their ballots.

The ACLU urges states to revisit the use of voter IDs, citizenship requirements, restrictions imposed on registrations, voting periods, criminal disfranchisement laws and other voter

⁸¹ Alvarez, R. Michael et al., 2008 Survey of the Performance of American Elections, 59 (2009) *available at* <http://vote.caltech.edu/drupal/node/231>.

⁸² NCSL Map, *supra* note 6.

⁸³ South Carolina Voter Registration Demographics: Registered Voters Without A Driver's License or Identification Issued by DMV, Jan. 25, 2010 (appendix to ACLU letter to DOJ re: SC preclearance), *available at* http://www.aclu.org/files/assets/comment_under_section_5_re_submission_no_2011-2495.pdf.

⁸⁴ *See, e.g.*, Todd B. Tatelman, Congressional Research Service, *Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations* 9 (December 21, 2004), *available at* www.fas.org/sgp/crs/RL32664.pdf.

suppression tactics. However, turning back the tide on such regressive state measures is not enough. As it did by passing the historic Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act, Congress should continue to adopt uniform federal laws designed to protect, restore, and expand all citizens' fundamental right to vote. Such proposals should include passage of the Democracy Restoration Act – a federal standard that restores 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 because of a past criminal conviction. Other federal legislative reforms should include providing affidavit alternatives to voter ID and citizenship requirements, modernizing voter registration processes, and developing uniform federal standards for early voting, voting by mail, and casting provisional ballots in federal elections.

Finally, the ACLU has urged and continues to urge the Department of Justice (DOJ) to fully enforce federal laws where states violate citizens' fundamental rights by the passage of new regressive voting laws. Over the last few weeks, the ACLU has been joined by over 50,000 of our members and activists in calling on DOJ to ensure compliance with the Voting Rights Act (VRA). We have urged DOJ to scrutinize new voting restrictions aggressively for discriminatory impact, refuse to pre-clear laws under Section 5 of the VRA that have a discriminatory purpose or effect, and to bring cases under Section 2 of the VRA in other states where necessary to challenge regressive voter laws. As we approach another election year, Congress must continue to provide the Department of Justice and other federal entities with the resources and support they need in order to enforce the laws that guarantee Americans broad and nondiscriminatory access to the ballot.

Measures that repress voting are a dangerous and misguided step backward in our ongoing quest for a more democratic society and we commend this Subcommittee's attention to the impact of these new restrictive state voting laws.