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# Voter Challengers

*By Nicolas Riley*

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## EXECUTIVE SUMMARY

Forty-six states have laws that allow private citizens to challenge the eligibility of prospective voters, either on or before Election Day. Although these laws are more than a century old, they have drawn increased public scrutiny in recent years as the number of citizen poll-watchers and challengers in elections continues to grow.<sup>1</sup> With the 2012 general election fast approaching, these “challenger laws” will likely be in the spotlight once again.

Recent controversies involving partisan and discriminatory voter challenge efforts have prompted many election officials, state lawmakers, and even courts to reexamine these antiquated state laws. States have substantially cabined the role of challengers over the past decade and, earlier this year, a federal appeals court upheld a 30 year-old consent decree barring the Republican National Committee from focusing its challenge efforts in communities of color.<sup>2</sup>

Yet, even as courts and lawmakers have sought to curb parties’ challenge efforts,<sup>3</sup> independent groups of private citizens have pushed ahead with their own plans to challenge voters in many states. In 2011, a Houston-area organization called True The Vote announced its goal of recruiting one million people to serve as poll-watchers during the 2012 general election.<sup>4</sup> The group has been supporting local activists’ efforts to challenge voters in dozens of states over the past few months.<sup>5</sup> In May, one of these local activists challenged over 500 voters in Wake County, North Carolina, most of whom were voters of color.<sup>6</sup> Although local election officials later dismissed almost all of these challenges for insufficient evidence, the incident nevertheless highlights the kinds of problems that often occur when untrained private citizens seek to police access to the polls.<sup>7</sup>

This report examines the laws that give rise to these citizen-led challenge efforts and the difficulties that those laws create for both voters and election officials. It focuses on the shortcomings of existing voter challenge rules, the historical origins of these laws, the recent problems challengers have caused, and the ways that lawmakers and election officials have responded to those problems. The report, which is based on the Brennan Center’s extensive analysis of challenger laws in all 50 states, concludes by proposing recommendations for future reform.

### KEY FINDINGS:

- **Many states’ challenger laws are susceptible to abuse.** Twenty-four states allow private citizens to challenge a voter at the polls without offering any documentation to show that the voter is actually ineligible.<sup>8</sup> This leaves even lawful voters vulnerable to frivolous or discriminatory challenges. Illinois, for example, currently permits any legal voter to contest another voter’s qualifications at the polls but does not require the challenger to offer any proof to substantiate his or her allegations.<sup>9</sup> The challenged voter, in turn, must provide two forms of identification (or a witness known to the election judges) to establish her qualifications before she can vote.<sup>10</sup> Challengers can exploit these unequal evidentiary burdens to intimidate or delay voters on Election Day.

- **In recent years, challengers have targeted voters of color, student voters, and voters with disabilities.** Over the past several election cycles, challengers have stationed themselves at polling places in predominantly African-American and Latino neighborhoods, on university campuses, and even near residential mental healthcare facilities to contest the eligibility of voters who live in these areas.<sup>11</sup> These patterns reveal a heightened focus on challenging specific groups of new and vulnerable voters.
- **Challenger laws were historically enacted and used to suppress newly enfranchised groups, like African Americans and women.** Many states originally enacted challenger laws to block minority voters' access to the polls. Virginia, for instance, passed its first challenger law in the immediate wake of Reconstruction alongside a host of other suppressive measures, such as poll taxes and literacy tests, aimed at recently freed former slaves.<sup>12</sup> Other states — like Florida, Ohio, and Minnesota — similarly passed challenger legislation during the nineteenth century to suppress turnout in black communities.<sup>13</sup> Even in states where challenger laws were not enacted with an obvious discriminatory purpose, political operatives still often used challenges to discriminate against newly enfranchised groups of voters. For example, during a special election in Lisle, NY, in 1918 — the first election after women won the right to vote in the state — every woman who attempted to cast a ballot was challenged at the polls.<sup>14</sup> This history of discriminatory voter challenges casts doubt on the fraud-prevention arguments traditionally used to justify these laws.
- **Since the 2000 election, lawmakers and election administrators have been working to rein in challenger authority.** Three states — Texas, Ohio, and Alabama — repealed laws enabling private citizens to challenge voters at the polls.<sup>15</sup> In addition, more than half a dozen states have raised the evidentiary burdens that private citizens must satisfy to initiate a challenge.<sup>16</sup> These and other recent measures, which were passed largely as a response to specific problems caused by overzealous poll-watchers, reveal a clear trend toward narrowing private citizens' ability to challenge voters.

## **POLICY RECOMMENDATIONS:**

- **Private citizens should not be allowed to challenge voters at the polls on Election Day.** Challenges should only be permitted *before* Election Day to ensure that election officials have enough time to thoroughly review every challenge. This will also limit polling place disruptions and give voters a fair opportunity to correct any errors in their registration.
- **Challengers should be required to provide reliable evidence to substantiate their claims.** Anyone who has successfully registered to vote is entitled to a presumption of eligibility. Therefore, the challenger should bear the burden of proving that the voter is ineligible and should be required to produce reliable evidence to support that claim.
- **Voters should be shielded from frivolous challenges and given a meaningful opportunity to respond to any legitimate challenges on or before Election Day.** Election officials should screen all challenges to ensure that voters are not forced to respond to frivolous allegations. Voters, in turn,

should be given a fair opportunity to respond to any non-frivolous challenges on or before Election Day. In responding to these challenges, voters should have a chance to update any errors in their registration status.

In addition to these reforms, the Brennan Center encourages states to take steps to modernize their voter registration systems. **Voter registration modernization** provides a more permanent and cost-effective way for states to improve the accuracy of their voter rolls than citizen challenges.

## I. INTRODUCTION

Private citizens have always played an important role in American civic life. From local PTAs to neighborhood watch associations, engaged groups of volunteers routinely offer valuable assistance to public institutions like schools and police forces. But when these groups seek to take on the responsibilities of public officials, they can overstep their bounds and undermine the very institutions that they hoped to support.<sup>17</sup>

Voters and election officials have had to contend with this problem in recent years as growing numbers of private citizens have sought to “police” the polls during elections. These citizen poll-watchers typically station themselves inside polling places to monitor Election Day activities and report any irregularities they witness. While these observers can sometimes serve a useful purpose — for example, by documenting polling place problems that might otherwise go unreported — they can also disrupt the voting process, particularly when they attempt to perform the same duties as election officials or law enforcement officers.

This problem arises most often when poll-watchers seek to not only observe election activities but also to “challenge” individual voters attempting to cast their ballots. These challenges are usually based on allegations that a voter lacks the requisite citizenship or residency status for voting. While challengers are supposed to prevent ineligible voters from participating in elections, the practice is also susceptible to abuse since state laws often fail to prevent people from lodging frivolous or unfounded challenges. As a result, challenges can be used to hinder many legitimate voters’ access to the ballot box and cause confusion on Election Day. What’s more, allowing private citizens to single out certain voters and to contest their eligibility — particularly, at the polls — often contributes to a charged or partisan voting environment that can provoke fears of intimidation and suppression.<sup>18</sup>

These fears came to a head just before the 2004 presidential election. Only a few weeks before Election Day, the Ohio Republican Party announced its plan to deploy thousands of citizen challengers across the state, mostly in African-American voting precincts.<sup>19</sup> The announcement led to multiple voting rights lawsuits and sparked a media firestorm. Although party leaders later abandoned the plan, the ensuing controversy shined a national spotlight on the disruptions that partisan and discriminatory challenge efforts can cause.

But even when these efforts do not deliberately target specific groups for partisan or discriminatory reasons, they can still create serious problems for both voters and election officials. Indeed, challenges based on false or inaccurate information can undermine the voting process, even when they are filed by well-intentioned citizens acting in good faith. At bottom, the various problems that challengers have caused in recent elections — and threaten to cause in future elections — stem from the lack of safeguards and oversight provided by existing challenger rules and procedures. Until states address these shortcomings in their current laws, challengers will continue to pose a threat in future elections.



## II. HOW DO CHALLENGER LAWS WORK?

Voter challenger laws vary widely from state to state.<sup>20</sup> The specific rules governing who can serve as a challenger, when voters can be challenged, and what procedures challengers must follow will often depend on a state's particular challenger statute. In some states, for instance, any registered voter may serve as a challenger at the polls while, in others, challengers must be appointed by local political parties.<sup>21</sup> Several states require challenges to be made in writing while others allow them to be made orally.<sup>22</sup>

Despite these procedural differences, however, all voter challenges can generally be grouped into two broad categories: (1) **challenges made inside the polling place during an election**; and (2) **challenges made before an election**. Most states give private citizens an opportunity to make one or both of these kinds of challenges, while only four states — Alabama, Kansas, Oklahoma, and Wyoming — prohibit private citizens from challenging voters altogether. The following sections of this report outline the critical differences between polling place challenges and pre-election challenges.<sup>23</sup>

### *A. Challenges at the Polls*

Thirty-nine states currently permit private citizens to challenge prospective voters in person on Election Day.<sup>24</sup> In most of these states, challengers must provide an election official at the polls with a valid reason for contesting a particular voter's eligibility. Reasons for challenging a voter might include that the voter lacks U.S. citizenship, resides outside the relevant election district, is underage or mentally incompetent, or has already cast a ballot during the same election. Once the voter has been challenged, an election official will typically question the voter about her qualifications and ask the voter to swear an oath affirming her eligibility. If the voter fails to demonstrate that she is eligible and refuses to affirm her eligibility, the election official may refuse her vote.

Election Day challenges can put stress on both voters and election officials. Voters can sometimes be confused or intimidated by the presence of challengers at the polls. Moreover, the public nature of polling place challenges can make even lawful voters apprehensive about being confronted and questioned in front of their neighbors and family members.<sup>25</sup> Election officials, meanwhile, are often under immense pressure to decide Election Day challenges quickly in order to avoid polling place delays and, therefore, do not typically have time to thoroughly verify challengers' allegations.<sup>26</sup> These factors — along with various other Election Day distractions — make polling places a poor venue for deciding voter challenges.

### *B. Pre-Election Challenges*

Twenty-eight states allow private citizens to challenge registered voters before an election.<sup>27</sup> These pre-election challenges, also known as “registration challenges,” must typically be directed towards a county or local election official and, like polling place challenges, must identify a specific reason for challenging the voter. After receiving the challenge, the election official will usually notify the challenged voter and ask her to either appear at a hearing to prove her qualifications or affirm her eligibility in writing. Many states, like North Carolina and Nevada, require that pre-election challenges be filed at least 25 days before an election so

that election officials have sufficient time to notify challenged voters and give them an opportunity to respond.<sup>28</sup>

In contrast to polling place challenges, pre-election challenges can provide election officials with a reasonable amount of time to evaluate the validity of a challenger's allegations. They can also give the official an opportunity to reject any unfounded challenges before the voter is even notified of the challenge or asked to respond. In addition, the pre-election challenge process can give voters more time to respond to specific allegations, if necessary, and allows them to do so before they enter the polling place on Election Day. When all of these features are present, pre-election challenges can serve as a more sensible alternative to polling place challenges.

### III. HISTORICAL ORIGINS OF CHALLENGER LAWS

The long history of voter challenger laws raises important questions about whether challengers still play a useful role in modern elections. Most challenger laws pre-date major reforms in election administration such as the secret ballot,<sup>29</sup> absentee voting,<sup>30</sup> the demise of urban political machines,<sup>31</sup> and the advent of computerized voter registration systems, all of which significantly diminish the need for poll challengers. Taken together, these modern reforms have largely eliminated the very problem that challengers are ostensibly meant to address — namely, in-person voter fraud — and reveal just how unlikely it is that an untrained, citizen challenger will serve any useful purpose at the polls today.<sup>32</sup>

Although challengers have received increased media attention in recent years, they have actually played a role in American elections for centuries.<sup>33</sup> Many states' challenger laws were enacted before the Civil War and some date back as far as the revolutionary war era. New York, for example, passed its first challenger law in 1781, during the revolution itself, to allow private citizens to challenge any voter suspected of harboring British loyalties.<sup>34</sup>

These origins cast doubt on whether challenger laws were always enacted to prevent election fraud. In some states, lawmakers first empowered private citizens to challenge voters at the polls only because they believed it would be an effective way to suppress voter turnout in black, Latino, or working-class communities.<sup>35</sup> The legislative record in these states indicates that challenger laws were often enacted, amended, and used not for the purpose of preventing fraud but, rather, to disenfranchise voters of color.<sup>36</sup>

Even in states where challenger laws were not passed with an obviously discriminatory purpose, they were still often enacted in an era when voting qualifications were closely tied to physical characteristics, like race and sex, which private citizens could easily use to identify unqualified voters at the polls.<sup>37</sup> The subsequent elimination of these outmoded suffrage restrictions, however, has made it virtually impossible for today's challengers to identify a voter's qualifications based on physical appearance alone.<sup>38</sup> In short, the gradual expansion of the franchise over the past century — along with coinciding developments in election administration — has rendered citizen challengers increasingly obsolete in modern polling places.

The Brennan Center has examined the historical origins and development of voter challenger laws in several states, where the legislative and historical record permitted. This analysis reveals that some states enacted or amended their challenger laws shortly after the Civil War in order to hinder political participation among newly enfranchised voters of color. The following state profiles illustrate how lawmakers used voter challenge laws during the post-Reconstruction period to facilitate voting discrimination among private citizens, not only in the South but in other parts of the country, as well, including the Midwest and Southwest.

#### ***A. Arizona***

Arizona's challenger statute has its roots in the territorial laws that predate statehood.<sup>39</sup> As early as 1865, the Territory of Arizona permitted private citizens to challenge voters at the polls.<sup>40</sup> Shortly after Arizona attained

statehood in 1912, however, lawmakers adopted a new ground for challenging a voter at the polls — namely, illiteracy.<sup>41</sup> The new provision expressly permitted poll challenges based on a voter’s inability to read the U.S. Constitution and was enacted, according to contemporary accounts, for the purpose of disenfranchising Mexican Americans.<sup>42</sup> This provision was used by political operatives as late as the 1960s to target voters in African-American, Native American, and Latino communities on Election Day.<sup>43</sup> It was not formally repealed until 1970.<sup>44</sup>

### ***B. Florida***

Florida’s challenger statute was enacted as part of its first state election law in 1845, when the franchise was still limited to “free white male[s].”<sup>45</sup> Although Florida eventually extended voting rights to African-American men shortly after the Civil War, the state’s challenger law remained largely unchanged until Reconstruction ended and the Democrats regained control of the state government in 1877.<sup>46</sup> That year, lawmakers passed a series of amendments to Florida election law designed to suppress black voter turnout, including a new provision that required every voter challenged at the polls to produce two witnesses from the election district who could vouch for his voting qualifications.<sup>47</sup>

Black voters would have had an especially hard time satisfying the new requirement since the new law specifically required that each witness be “personally known” to at least two polling place officials.<sup>48</sup> Florida’s polling places in this era were staffed almost exclusively by whites, most of whom lived in segregated communities and likely had little contact with black voters.<sup>49</sup> Moreover, the same 1877 law that created the witness requirement for challenged voters also imposed a new literacy requirement on all polling place officials,<sup>50</sup> making it even less likely that African Americans would have had opportunities to serve as polling place officials. Taken together, these changes would have made it virtually impossible for black voters to overcome challenges on Election Day. Historians have documented how white Democrats would use challengers in this period to enforce Florida’s other discriminatory voting restrictions, such as laws disenfranchising voters convicted of petty crimes.<sup>51</sup>

### ***C. Minnesota***

The Territory of Minnesota enacted its first challenger law in 1851 during just its second legislative session.<sup>52</sup> The law remained in effect when Minnesota attained statehood in 1858 and even when it later extended the franchise to African-American men in 1868.<sup>53</sup> In 1878, however, state lawmakers amended the challenge process by requiring every voter who was challenged at the polls to (1) complete an affidavit affirming his voting qualifications<sup>54</sup> and (2) produce a witness who could affirm that he lives in the election district.<sup>55</sup> Voters who failed to satisfy either requirement would be barred from casting a ballot.<sup>56</sup> The 1878 law only applied to voters in Minneapolis and St. Paul<sup>57</sup> — where Minnesota’s growing African-American population was concentrated at the time — and within only a couple years of its enactment, political operatives began using the law to target black voters in these cities.<sup>58</sup>

## *D. Ohio*

Ohio passed its first challenger law in 1803 during the state’s first legislative session.<sup>59</sup> The statute remained essentially unchanged until 1868, when the legislature passed a new provision that required election judges to challenge any prospective voter who had a “distinct and visible admixture of African blood.”<sup>60</sup> Ohio law had always limited suffrage rights to free white males but the 1868 law was the first to explicitly use poll challenges to enforce this restriction.<sup>61</sup> Although the law technically applied only to challenges made by election officials — and was later struck down by the Ohio Supreme Court<sup>62</sup> — its passage nevertheless seems to reflect a growing preference for poll challenges as a means of excluding African Americans from Ohio elections in the 1860s.

Indeed, even after African Americans were enfranchised by the Fifteenth Amendment in 1870, Ohio’s private citizens continued to target black voters for poll challenges. During a congressional hearing about an 1878 Cincinnati election, witnesses testified that they saw challengers targeting black Republicans and blocking their access to the polls.<sup>63</sup> Reports from another Cincinnati election a few years later, in 1884, included similar account of black voters being targeted for challenges and facing violence at the polls.<sup>64</sup> These accounts reveal how challengers were used to not only impede but also intimidate African American voters in Ohio during this period.

## *E. Texas*

Texas’s challenger law dates back to 1844, one year before Texas was admitted into the United States.<sup>65</sup> Although the law was amended repeatedly over the following years,<sup>66</sup> the most significant changes occurred after Reconstruction, when white Democrats regained control of the Texas legislature and began working to restrict black suffrage rights.<sup>67</sup>

In 1891, state lawmakers amended the challenge procedure for all elections held in major cities.<sup>68</sup> The new law required every challenged voter to produce a “well known resident of the ward” who could swear to the voter’s qualifications.<sup>69</sup> Since Texas’s previous law only required a challenged voter to swear an oath affirming his own qualifications, the new witness requirement made it substantially harder for voters to overcome challenges at the polls.<sup>70</sup>

Historians believe that Democratic state legislators enacted the new challenge procedures to suppress turnout among black and working-class white voters in Dallas, since these groups consistently voted to defeat the Democratic Party’s candidates for local office there.<sup>71</sup> After the party failed to win the mayor’s office in 1887 and 1889, a Democratic state senator from the Dallas area introduced the challenger law amendment in 1891, just one month before the city’s next mayoral election. Though the bill did not pass until eight days before Election Day, lawmakers included an emergency provision in the bill so that it would go into effect immediately, circumventing their normal legislative procedures.<sup>72</sup> As a result, over 300 Dallas voters — mostly African Americans and unskilled laborers — were ultimately challenged under the new law during the election.<sup>73</sup>

Texas lawmakers continued to use the state’s challenger law as a tool for black disenfranchisement in the early twentieth century. In 1905, the legislature authorized local political parties to appoint challengers to every voting precinct.<sup>74</sup> This change was part of a broader set of amendments to Texas’s voting rules, known collectively as the Terrell Election Law, many of which were designed to impede black political participation at the county level.<sup>75</sup> The law gave sweeping new authority to county political party leaders, which not only eased white Democrats’ efforts to exclude black voters from local primary elections across the state,<sup>76</sup> but also greatly expanded their influence over the challenge process.

### *F. Virginia*

Virginia enacted its first Election Day challenger law in 1870,<sup>77</sup> only a few months after Reconstruction ended in the state and the Conservative Party gained control of the legislature.<sup>78</sup> The law empowered every voter to challenge anyone who was “known or suspected not to be a duly qualified voter.”<sup>79</sup>

Since the new law employed such broad language and permitted challenges based on any disqualifying characteristic, its reach quickly expanded as Virginia imposed new restrictions on the franchise over the next few years. With the adoption of a poll tax and new criminal disenfranchisement measures in 1876,<sup>80</sup> for instance, state lawmakers effectively created new voting qualifications upon which challenges could be based. Since many of these new voting qualifications were specifically aimed at disenfranchising African Americans,<sup>81</sup> the growing reach of Virginia’s challenger law in this period increasingly offered private citizens a tool for independently enforcing the state’s discriminatory suffrage restrictions. Newspaper accounts from this period suggest that white citizens routinely took advantage of these new suffrage restrictions to challenge black voters at the polls.<sup>82</sup>

Virginia lawmakers continued to use the state’s challenger law as a tool for suppressing black political participation decades after it was first enacted. In 1904, the Virginia General Assembly re-enacted the state’s Election Day challenger law during the first legislative session following the state’s 1901-02 constitutional convention,<sup>83</sup> which was convened for the express purpose of disenfranchising African Americans.<sup>84</sup> The convention’s delegates specifically incorporated a new poll tax and literacy test into the state constitution — both of which took effect the same month that the legislature enacted the new challenger law.<sup>85</sup>

\* \* \*

The above examples demonstrate that, in many states, challenger laws once served a very different set of purposes than they ostensibly do today. While many of these laws have been amended over the past several decades — and, in the cases of Texas and Ohio, repealed outright — their troubling historical origins nevertheless cast doubt on contemporary justifications for citizen poll challengers. The history of these laws also provides greater context for understanding some of the various problems that challengers continue to cause during elections today.

## **IV. PROBLEMS WITH CHALLENGERS TODAY**

Challengers have caused a variety of problems for both voters and election officials in recent years. These problems, which are described in greater detail below, arise from four distinct but overlapping types of voter challenges: baseless, discriminatory, disruptive, and intimidating challenges.

### ***A. Baseless Challenges***

Many voter challenges are based on inadequate or false information. A major reason why challengers' claims are often unfounded is that private citizens do not typically have the same training or resources as election officials to accurately identify ineligible voters. As a result, they tend to rely on flawed methods for choosing which voters to challenge.

In recent elections, for instance, challengers have sought to use foreclosure lists and “voter caging” operations to target voters for residency-based challenges. Neither of these methods, however, provides a valid basis for proving that a voter is ineligible or lacks residency in an election district. Foreclosure lists do not provide a reliable justification for residency-based challenges since state and federal laws allow many tenants to remain in their homes even after the property has been foreclosed.<sup>86</sup> Caging lists are similarly unreliable since they are based on the flawed assumption that a piece of returned mail from a voter's registration address proves that the voter does not live at that address.<sup>87</sup> These error-prone methods for identifying ineligible voters — even when undertaken in good faith — can disrupt the smooth administration of elections and undermine legitimate voters' access to the ballot box.

### ***B. Discriminatory Challenges***

Challengers often target certain communities of voters — typically voters of color, student voters, and voters with disabilities.<sup>88</sup> These challenges are sometimes based on discriminatory stereotypes about a voter's citizenship status, residency, or mental competence. Voters with Spanish surnames or whose first language is not English, for instance, have been targeted for citizenship challenges.<sup>89</sup> Similarly, student voters who leave campus during vacations have faced blanket residency challenges and voters with certain physical disabilities have been challenged on competency grounds.<sup>90</sup> As with other types of baseless challenges, discriminatory challenges like these highlight the need for states to impose stricter evidentiary requirements on challengers.

### ***C. Disruptive Challenges***

When challengers become overly aggressive, they can disrupt the voting process, cause delays, and wreak chaos inside the polls on Election Day. Disruptive challengers can also distract poll workers and may even need to be removed from the polling place by law enforcement officials, which only exacerbates the disorder that voters will encounter at that voting location.<sup>91</sup> Even when challengers are not deliberately disruptive, their actions can nevertheless interfere with the voting process at the polls. Allowing untrained private citizens to contest voter eligibility inside the polling place in this way inevitably creates the risk of disruption.

## ***D. Intimidating Challenges***

Many voters, particularly first-time voters, can be intimidated by challengers inside the polling place.<sup>92</sup> Challengers who confront voters directly, question them about their voting qualifications, or disseminate threatening or misleading information about election fraud penalties often contribute to a charged atmosphere inside the polls that can leave many voters apprehensive about casting their ballots.<sup>93</sup> Intimidating challenges, like other kinds of disruptive challenges, illustrate the risks that are inherent in permitting untrained private citizens to contest voter eligibility at the polls during an election.

## ***E. Recent Challenger Controversies, 2000-2012***

The Brennan Center interviewed election officials and examined numerous reports of challenger-related disputes and controversies from recent election cycles. The following examples demonstrate how the types of challenges outlined above often yield problems for voters and election officials.

### **Challenging Voters of Color**

- In May 2011, poll-watchers affiliated with two local tea party groups in Southbridge, Mass., reportedly targeted Latino voters for challenges during a primary election.<sup>94</sup> Local election officials said that dozens of challenges were filed, leaving several voters feeling intimidated.<sup>95</sup> The environment was so tense that some local polling place officials even declined to work at the following election “after feeling stressed by the outside groups during the primary.”<sup>96</sup> The dispute ultimately prompted state election officials to issue new regulations governing voter challenges.<sup>97</sup>
- The Ohio Republican Party announced a plan shortly before the 2004 presidential election to station 3,500 challengers in selected voting precincts across the state.<sup>98</sup> Under their proposed plan, 97 percent of first-time voters in majority-black precincts would have encountered challengers at the polls compared to just 14 percent of first-time voters in majority-white precincts.<sup>99</sup> The controversial challenge plan prompted multiple lawsuits and garnered national media attention before party officials decided to abandon it on Election Day.<sup>100</sup>
- In 2004, three residents of Atkinson County, Ga., filed blanket pre-election challenges against more than three-quarters of the registered Latino voters in their county, alleging that the voters were not U.S. citizens.<sup>101</sup> One resident even asked the county elections board for a list of voters with Spanish surnames before filing challenges against most of them.<sup>102</sup>
- During a 2004 primary election in Bayou La Batre, Ala., poll-watchers targeted Asian-American voters for citizenship and residency-based challenges.<sup>103</sup> The challengers were appointed by a white city council member who was running against the first Vietnamese-American candidate to contend seriously for local office.<sup>104</sup> The incumbent council member was candid about his



campaign's strategy, explaining that "we figured if they couldn't speak good English, they possibly weren't American citizens."<sup>105</sup> Dozens of eligible voters were ultimately challenged, leading to delays and confusion at the polls.<sup>106</sup>

### **Challenging Student Voters**

- Political operatives in upstate New York have long targeted college students for challenges at the polls, even though state law grants them the right to vote in New York.<sup>107</sup> In 2003, hundreds of students at Skidmore College were challenged during a mayoral election in Saratoga Springs that was ultimately decided by less than a hundred votes.<sup>108</sup> More recently, in 2009, students at Vassar and Bard Colleges in Dutchess County faced a series of residency-based challenges on Election Day.<sup>109</sup>
- In 2008, the Montana Republican Party filed pre-election challenges against more than 6,000 voters based on change-of-address information party officials obtained from the postal service.<sup>110</sup> Many of the voters challenged were service members or college students who were eligible to vote in Montana but sought to have their mail forwarded to the address where they were stationed or attending school.<sup>111</sup> The party later abandoned the challenge effort but only after it was denounced by prominent Republican elected officials, including Montana's Secretary of State and Lieutenant Governor.<sup>112</sup>
- In 2007, more than two dozen Bethel College students were challenged when they showed up to vote during a city council election in Mishawaka, Ind.<sup>113</sup> All of the challenges were brought by a single Democratic poll-watcher on behalf of the district's incumbent, whose opponent in the race was a popular Bethel College professor.<sup>114</sup>
- Hundreds of Dartmouth University students were subjected to residency-based challenges in Hanover, N.H., during the 2002 midterm elections.<sup>115</sup> The town's chief election official later described the incident at a hearing before the state senate, noting that the rash of challenges "caused complete chaos" at the polls.<sup>116</sup> The problems arose, she said, because "some people want to challenge college students so that they don't vote."<sup>117</sup>

### **Challenging Low-Income Voters**

- Two months before the 2008 general election, political party officials in Macomb County, Mich., reportedly announced a plan to bring residency-based challenges against voters whose homes had been foreclosed.<sup>118</sup> Although party officials later abandoned the plan to avoid a potential lawsuit,<sup>119</sup> their initial plan would have likely had a disproportionate impact on low-income voters and voters of color since these communities have faced higher rates of foreclosure actions in recent years.<sup>120</sup>

- In 2008, an Indiana state court ordered Marion County election officials to reject any voter challenges they received that were based “solely on information pertaining to foreclosure or eviction.”<sup>121</sup> The order arose from a lawsuit that the local NAACP filed after a local political party official announced that the party might use foreclosure lists to challenge voters on Election Day.<sup>122</sup>

### **Challenging Voters with Disabilities**

- During the 2010 midterm elections, witnesses observed volunteer poll-watchers targeting voters who lived at a psychiatric hospital in Burrillville, R.I., and questioning their eligibility to vote.<sup>123</sup> The poll-watchers reportedly offered no proof to substantiate their challenges and pressured poll workers to ask impermissible questions of the voters.<sup>124</sup> The incident ultimately prompted a local police investigation and led state election officials to seek new regulations governing polling place conduct.<sup>125</sup>
- In 2004, campaign organizers in Cuyahoga County, Ohio, trained and recruited poll-watchers to challenge any people with disabilities who attempted to vote without their legal guardian present.<sup>126</sup> The plan prompted protests from disability rights advocates.<sup>127</sup>

These incidents highlight the shortcomings of many states’ current procedures for deciding voter challenges and illustrate the need for challenger law reform. The following sections of this report describe these deficiencies in greater detail and outline specific recommendations for reform.

## V. SHORTCOMINGS OF EXISTING CHALLENGER LAWS

Many of the problems that challengers have caused during recent elections stem from shortcomings in states' existing challenger laws. By addressing these deficiencies, states can better protect voters and election officials against the threat of baseless, discriminatory, disruptive, and intimidating challenges.

The Brennan Center conducted a 50-state survey of existing challenger rules and procedures in order to identify specific areas in need of reform. This analysis identified three common features of states' current challenger laws that can hinder election administration and open up the process to potential abuse, permitting challengers inside the polling place during an election, allowing people to make challenges without sufficient proof to support their allegations, and failing to adequately protect lawful voters against unfounded challenges to their rights.

### *A. Permitting Challengers Inside the Polls*

Thirty-nine states currently allow private citizens to challenge voters inside the polls.<sup>128</sup> In these states, election officials are under immense time pressure to decide challenges quickly in order to avoid voting delays.<sup>129</sup> As a result, they can be denied a full opportunity to thoroughly review every challenge and to verify the challenger's allegations — a critical step given how frequently untrained citizens err in trying to identify ineligible voters.<sup>130</sup> By allowing challenges to be made inside the polls, states are inevitably forced to choose between having a thorough but lengthy process for deciding challenges or having an expedited process that prevents careful review of all the evidence.<sup>131</sup>

The same time constraints that force election officials to decide polling place challenges quickly can also hinder voters' efforts to defend themselves against these challenges. Voters rarely receive advance notice that they will be challenged and, as a result, are often denied a fair opportunity to establish their voting qualifications at the polls. In Illinois, for instance, voters challenged at the polls must produce two forms of identification (or a witness known personally by the precinct's election judges) to establish their qualifications before they can vote.<sup>132</sup> Since these voters have no way of knowing ahead of time whether they will be challenged at the polls, they can easily be caught off-guard and without the requisite documentation on Election Day.

Even in states with less onerous requirements for overcoming a challenge, voters who are challenged at the polls are still often forced to respond to challenges on the spot, without notice, and before an election official has even examined the challenger's claims. Twenty-two states currently require challenged voters to respond to polling place challenges immediately — often by answering a poll worker's questions or taking an oath — even before an election official has first assessed the validity of the challenge.<sup>133</sup> Forcing voters to respond to challenges in this way — and, at the same time, requiring election officials to decide these challenges immediately — raises tensions inside the polls and creates the potential for delays.

## ***B. Inadequate Proof Requirements for Challengers***

Many states allow private citizens to challenge voters without providing reliable evidence to substantiate their allegations. Of the 39 states that allow polling place challenges, only 15 require poll challengers to provide some documentation to support their claim that the challenged voter is ineligible.<sup>134</sup> Some states, like South Carolina and Virginia, even allow citizens to make poll challenges based on the mere *suspicion* that a voter might be unqualified.<sup>135</sup> These low evidentiary burdens open the door to baseless challenges on Election Day.

Similarly, of the 28 states that permit pre-election challenges, only eight currently require challengers to produce some initial documentary evidence of a voter's ineligibility (beyond a brief written statement alleging some disqualifying characteristic).<sup>136</sup> This problem is exacerbated by the fact that only a small handful of states give election officials sufficient time before an election to conduct a complete review of challenges to assess their validity. Although 11 states currently enforce a "quiet period" before Election Day during which election officials will not review any pre-election challenges, most states do not.<sup>137</sup> One state, Florida, even *requires* pre-election challenges to be submitted during the 30 days immediately before Election Day, virtually ensuring that election officials will have to review challenges during the busiest part of the election season.<sup>138</sup> Receiving challenges so soon before an election can place significant burdens on election officials. As one county election clerk in Montana told a local newspaper in 2008 after receiving hundreds of partisan challenges just one month before the presidential election, "[w]e're swamped. . . . [I]t is just very frustrating right now to get this kind of reaction from either party and have to deal with it."<sup>139</sup>

## ***C. Limited Protections for Challenged Voters***

In many states, challenger laws offer only limited protections for challenged voters to ensure that the challenge process does not hinder eligible voters' access to the ballot box. Among states that permit polling place challenges, for example, 22 states require challenged voters to respond to every challenge filed against them, even before an election official has had an opportunity to reject the challenge if it is groundless.<sup>140</sup> This procedure can needlessly delay legitimate voters subjected to frivolous challenges at the polls.<sup>141</sup>

Likewise, in 16 states, voters are notified about pre-election challenges even before an election official has vetted any of the challenger's claims.<sup>142</sup> In 7 of these states, challenged voters are actually asked to respond to those unconfirmed claims on or before Election Day, typically either at a hearing or with some written affirmation of their qualifications.<sup>143</sup> Since election officials in these states do not screen the challenges before asking the voter to respond, eligible voters can be subjected to unnecessary administrative proceedings and asked to defend their voting rights. Only 7 states' statutes identify a clear process for ensuring that pre-election challengers first satisfy some threshold standard — such as "probable cause," in California's case<sup>144</sup> — before election officials ask any voter to respond to a challenge.<sup>145</sup> Clear standards like these would help better protect voters from frivolous challenges and help election officials achieve greater consistency in their challenge decisions.

## **VI. LEGISLATIVE RESPONSES, 2000-2012**

In response to the numerous problems that challengers have caused in recent years, state lawmakers and election officials have taken steps to fill in some of the gaps in their existing challenger rules. The Brennan Center surveyed these efforts by examining the various changes that states have made to their challenger laws since the 2000 election.<sup>146</sup> This analysis reveals that, despite the increased visibility of voter challengers in recent elections, states have in fact been working to rein in challenger activity, particularly inside the polls.

### ***A. Eliminating Polling Place Challengers***

In early 2005, Ohio lawmakers undertook efforts to amend their state's Election Day challenger law. These efforts were spearheaded by election officials and legislators from both parties who, in response to the problems that arose in 2004,<sup>147</sup> wanted to curb poll-watcher and challenger activity at the polls.<sup>148</sup>

In January 2006, Ohio Governor Bob Taft signed a bill into law that eliminated opportunities for private citizens to challenge voters at the polls.<sup>149</sup> The law also reduced the number of poll-watchers that candidates can appoint in an effort to alleviate polling place crowding.<sup>150</sup> As a result of these changes, Ohio law now only permits a handful of private citizens inside each polling place and prohibits them from challenging any voters.<sup>151</sup>

Although Ohio received significant attention for its challenger law amendments, it was not the first state to eliminate citizen poll challengers during the last decade. In 2003, Texas lawmakers also voted to repeal their state's 160-year-old Election Day challenger law.<sup>152</sup> The repeal substantially narrowed the legal authority that poll-watchers and other private citizens could exercise at the polls and, like Ohio's law, ensured that voters could only be challenged by state election officials. Under Texas's old challenger law, voters could be challenged by any "person lawfully in the polling place," including partisan poll-watchers<sup>153</sup> and voters who were challenged under the law were required to furnish proof of identification before they would be permitted to vote.<sup>154</sup> Since challengers themselves were not required to provide any evidence to substantiate their claims,<sup>155</sup> the law was particularly susceptible to abuse.

Alabama joined Ohio and Texas in permanently removing challengers from its polling places in 2006. While Alabama had long prohibited citizens from challenging voters at the polls during state and federal elections, before 2006, it allowed them to do so during local elections. Shortly after Ohio repealed its challenger law, however, Alabama lawmakers voted to eliminate citizen poll challengers in all county and municipal elections.<sup>156</sup> As a result, private citizens can no longer challenge voters at the polls in any elections. While the legislative history for the amendment is no longer available, the change may have been motivated by recent challenger controversies in the state. The amendment was passed less than two years after Asian-American voters were targeted by challengers during a local election in Bayou La Batre — and only one month after the incident was recounted in *USA Today*.<sup>157</sup>

The repeal of Election Day challenger statutes in these states represents an important turning point in the history of voter challenge laws. Ohio and Texas' challenger laws, in particular, were used throughout the nineteenth century to disenfranchise African Americans<sup>158</sup> and, though these statutes had each been amended several times since then, the twenty-first century versions of these laws continued to leave voters vulnerable to discriminatory challenges.<sup>159</sup> Indeed, in the years before these statutes were repealed, disputes over the role of poll challengers — and, specifically, their impact on communities of color — arose regularly in these states.<sup>160</sup> The repeal of these statutes is therefore significant not only because it closed the book on the troubling history of discriminatory poll challenges in these states but also because it eliminated a major barrier to smooth election administration today.<sup>161</sup>

### ***B. Raising Proof Requirements for Challengers***

In addition to the repeal of Election Day challenger laws in Ohio, Texas, and Alabama, several other states have taken steps to restrict challenger activity inside the polls.

Since 2000, for instance, four states and the District of Columbia have raised the evidentiary burdens that polling place challengers must satisfy.<sup>162</sup> Nevada imposed a new “personal knowledge” requirement for all poll challengers in 2007 that was almost identical to the requirement that Maine adopted in 2004.<sup>163</sup> Likewise, Colorado amended its challenger law in 2005 to require that challengers set forth “specific fact[s]” to support every challenge submitted at the polls.<sup>164</sup> In Washington, D.C., a dispute over challenged student voters at Georgetown University<sup>165</sup> prompted city council members in 2000 to require all challengers to affirm that their allegations are made in “good faith” and “based upon substantial evidence.”<sup>166</sup> A similar dispute at a New Hampshire university<sup>167</sup> spurred lawmakers there to pass a law in 2010 requiring challengers to identify the “specific source of the information or personal knowledge” on which their claims are based.<sup>168</sup>

These changes are largely the result of pressure from state and local election officials, who have grown increasingly frustrated with frivolous challenges.<sup>169</sup> Nevada's new “personal knowledge” requirement, for example, was first proposed by the chief election official of the state's largest county, who called on lawmakers to require that all challenges be based on firsthand knowledge.<sup>170</sup> In testimony before the state legislature, he described the thousands of baseless challenges he witnessed during the previous election and explained how the new knowledge requirement would help “remove the possibility of someone just standing in a polling place and blindly challenging every Democrat, Republican, or minority who shows up.”<sup>171</sup>

Besides raising challengers' proof requirements, states are also requiring greater documentation of poll challenges to deter baseless claims. Seven states and the District of Columbia have amended their challenger laws since 2000 to require poll challengers to make their challenges in writing.<sup>172</sup> Another state, New Mexico, recently passed legislation requiring poll workers to document the circumstances surrounding every challenge, including the challenger's name, title, and reason for making the challenge.<sup>173</sup> Since these reforms create a written record of events inside the polls, they help election officials to better monitor challenger activity and review disputes concerning voter eligibility. When New Hampshire lawmakers proposed repealing the state's writing requirement earlier this year, election officials from across the state rallied in unanimous opposition to the proposal and ultimately persuaded the legislature to keep the existing requirement.<sup>174</sup>

In addition to reforming Election Day challenge laws in these ways, states have also been working to strengthen their pre-election challenge laws. Nevada’s 2007 “personal knowledge” requirement applies to both pre-election and Election Day challenges.<sup>175</sup> Utah added a new requirement in 2010 for pre-election challengers to “personally verify the facts and circumstances establishing the basis for [every] challenge.”<sup>176</sup> And Washington revamped its entire pre-election challenger law in 2006 to include a “personal knowledge” rule and a requirement that challengers exercise “due diligence to personally verify the evidence” offered in support of their claims.<sup>177</sup> The 2006 law was a response to an attempt by King County Republicans to remove almost 2,000 voters from the rolls in 2005.<sup>178</sup> The party’s challenges were filed less than a month before a county election, forcing election officials to hold hearings after Election Day and casting doubt on the election’s result.<sup>179</sup> In the end, fewer than 100 of the challenges were upheld.<sup>180</sup>

Incidents like this have led some states to institute or expand the “quiet period” before an election, during which private citizens are barred from challenging any voters. Since 2000, three states — Colorado, Ohio, and Utah — have expanded the length of their quiet periods while Washington imposed one for the first time as part of its 2006 challenger law overhaul.<sup>181</sup> In addition, Texas enacted a new 75-day quiet period in 2003 for any challenges based on residency grounds.<sup>182</sup> These changes help ensure that election officials have adequate time to properly assess pre-election challenges and to minimize the risk that voters are erroneously removed from the rolls.

### ***C. Expanding Protections for Challenged Voters***

States have taken important steps in recent years to better protect voters from unfounded challenges. In 2011, for instance, Montana amended its challenger statute to give local election officials, for the first time, discretion to reject any challenges they deem “insufficient” before they ask the challenged voter for a response.<sup>183</sup> Previously, Montana law required local election officials to seek a response from every challenged voter, regardless of whether or not the official believed the challenge was credible. Lawmakers implemented this change at the behest of state election officials after Republican Party officials sought to challenge thousands of voters just before the 2008 election.<sup>184</sup>

Other states have begun placing more explicit restrictions on who can serve as a challenger and what they can do inside the polls. In 2005, Minnesota amended its challenger statute to expressly prohibit out-of-state residents from challenging voters at the polls.<sup>185</sup> Lawmakers there enacted the change in response to reports that political operatives had flown in from Washington, D.C., the previous year specifically to challenge Minnesota voters during the presidential election.<sup>186</sup> The District of Columbia’s 2000 overhaul of its challenger law included new prohibitions on discriminatory challenges.<sup>187</sup> In 2006, Indiana passed new prohibitions on challenges against student voters while Idaho enacted a new provision barring challengers from “interfere[ing] with the orderly conduct of the election.”<sup>188</sup>

These changes will likely help to reduce the risk of disruptive and intimidating challenges on Election Day. However, they will not eliminate that risk entirely. As long as untrained private citizens are allowed to challenge voters inside the polls, the potential for disruption and intimidation will remain.

## VII. POLICY RECOMMENDATION

State laws must give engaged private citizens a meaningful opportunity to contribute to their election system. But they must also ensure that private citizens cannot disrupt the voting process or undercut election officials' ability to carry out their responsibilities. States can balance these important goals by adopting the following policy recommendations for improving their existing challenger laws:

- **No challenges on Election Day.** Private citizens should not be allowed to challenge voters at the polls and poll-watchers should be expressly prohibited from interacting directly with voters. While election officials should always be permitted to challenge voters on Election Day when they have cause to do so, private citizens should be required to lodge their challenges *before* Election Day so that election officials have sufficient time to properly review and decide every challenge. This system would allow election officials to focus more on their various other responsibilities on Election Day and would help prevent delays and other disruptions at the polls.
- **Challengers must offer reliable evidence to substantiate their allegations.** Both challengers and election officials should be required to provide reliable evidence to support each of their challenges. If a challenger fails to provide proof that a particular voter is ineligible, then any challenge against that voter should be immediately rejected. In order to satisfy this proof requirement, the challenger should be required to meet some clearly defined evidentiary burden — a “clear and convincing” standard, for instance — that requires reliable proof of a voter’s ineligibility. Untrustworthy documentation, such as a non-forwardable mailer that was sent to a voter’s registration address and returned as “undeliverable,” could not be used to satisfy this threshold burden. In addition to these proof requirements, state law should also expressly prohibit anyone from knowingly filing a challenge based on false information. These safeguards would help protect voters against baseless challenges.
- **Challenged voters must be allowed to contest challenges before Election Day.** Once an election official has determined that a particular challenge has merit, the official should promptly notify the challenged voter. This notice should include a written copy of the challenge and give the voter a meaningful opportunity to address the challenger’s allegations. Specifically, challenged voters should be given a reasonable amount of time to respond to the challenge by mail, at the relevant election official’s office, or at the polls on Election Day. Voters challenged specifically on residency grounds should be given the opportunity to update their registration address. State law should make clear that challengers — not voters — always bear the burden of proof when election officials make determinations about voter eligibility. This way, eligible voters would not run the risk of losing their right to vote if they were challenged on the basis of a simple error in their registration.

Several states have already adopted some of these safeguards<sup>189</sup> but further reforms are necessary to prevent future abuses of challenger laws. The Brennan Center is available to assist lawmakers, advocates, and election administrators in implementing these recommendations and developing state-specific policy proposals for improving challenger laws in their jurisdiction.<sup>190</sup>

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In addition to the recommendations outlined above, the Brennan Center also encourages states to use available technologies and databases to modernize their voter registration systems.<sup>191</sup> This simple, cost-saving reform offers states a more permanent and comprehensive system for improving the accuracy of their voter rolls than do citizen-initiated challenges to individual voters' eligibility. For more information on voter registration modernization, including model legislation, please visit the Brennan Center's website.<sup>192</sup>

## ENDNOTES

- <sup>1</sup> Battleground states, in particular, have seen a recent spike in challenger and poll-watcher activity during presidential election years. *See, e.g.*, ROBIN CARNAHAN, MO. SEC'Y OF STATE, VOTERS FIRST: AN EXAMINATION OF THE 2008 STATE AND FEDERAL ELECTIONS IN MISSOURI 14 (2009), *available at* [http://www.sos.mo.gov/elections/VotersFirst/2008/A\\_NarrativeTOC.pdf](http://www.sos.mo.gov/elections/VotersFirst/2008/A_NarrativeTOC.pdf) (noting that “voter reports as well as news stories suggest challengers and watchers were more common [in Missouri] in the 2008 election cycle than in the past”); Garrett Therloff, *Election Authority May Shift*, TAMPA TRIBUNE, Feb. 17, 2005, at 1 (noting that Florida’s voter challenge process “was established in 1895 and largely forgotten until Republicans revived it last year, announcing that poll watchers would have names of people to challenge”); Susan Greene & Erin Cox, *It’s a Race To Get Poll Watchers in Position; Thousands of Applications Are in*, DENVER POST, Nov. 2, 2004, at A13 (describing the large number of poll-watchers in place in Colorado before the 2004 election and quoting a congressional candidate who stated, “Even I was shocked by the number”); Michael Moss, *Big G.O.P. Bid To Challenge Voters At Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, at A1, *available at* <http://www.nytimes.com/2004/10/23/politics/campaign/23vote.html> (“Ohio election officials said they had never seen so large a drive to prepare for Election Day challenges.”).
- <sup>2</sup> *See* Democratic Nat’l Comm. v. Republican Nat’l Comm., 673 F.3d 192, 196 (3d Cir. 2012), *available at* <http://electionlawblog.org/wp-content/uploads/rncvdcnc.pdf>.
- <sup>3</sup> *See, e.g., id.* at 213 (noting that “[w]ithout the enforcement of the Decree provisions, these voter-challenge lists that are racially-targeted, in intent or in effect, could result in the intimidation and deterrence of a number of voters”); Mont. Democratic Party v. Molloy, 581 F. Supp. 2d 1077, 1083 (D. Mont. 2008) (finding that “if the State’s procedure for evaluating voter challenges allows a county election official to conclude that any voter [whom the executive director of the Montana Republican Party] has targeted on the basis of change-of-address information cannot vote, or that the elector has to prove anything before he or she is allowed to vote, the State would then be in clear violation of federal law.”).
- <sup>4</sup> Ambreen Ali, *Parties Contest Election-Monitoring Techniques*, ROLL CALL (Nov. 29, 2011, 12:00am), [http://www.rollcall.com/issues/57\\_65/Parties-Contest-Election-Monitoring-Techniques-210564-1.html](http://www.rollcall.com/issues/57_65/Parties-Contest-Election-Monitoring-Techniques-210564-1.html).
- <sup>5</sup> *See* Alison Knezevich, *Group Alleges Voter-Roll Problems*, BALTIMORE SUN, June 23, 2012, at 1A, *available at* [http://articles.baltimoresun.com/2012-06-26/news/bs-md-election-group-20120622\\_1\\_id-laws-government-issued-photo-voter-fraud](http://articles.baltimoresun.com/2012-06-26/news/bs-md-election-group-20120622_1_id-laws-government-issued-photo-voter-fraud) (“More than 30 states have groups that use True the Vote’s model, said Catherine Engelbrecht, the initiative’s founder and president.”); Pam Fessler, *Tea Party Spawns New Effort Against Voter Fraud*, NPR NEWS (Mar. 13, 2012), <http://www.npr.org/2012/03/13/148518795/tea-party-spawns-new-effort-against-voter-fraud> (“True the Vote trains the state activists and gives them the software and databases they use to check their local registration rolls.”).
- <sup>6</sup> The original list of challenged voters did not identify any voter by race. The Brennan Center examined the list of challenged voters submitted to the board of elections and compared the names and registration numbers of the voters on that list to the names and registration numbers of voters in Wake County’s voter registration database. This analysis revealed that a clear majority of the voters on the challenge list were identified in the county-wide voter registration database as non-white. *See generally* Nicolas Riley, *A Lesson From North Carolina on Challengers*, BRENNAN CENTER FOR JUSTICE (July 2, 2012), [http://www.brennancenter.org/blog/archives/a\\_lesson\\_from\\_north\\_carolina\\_on\\_challengers/](http://www.brennancenter.org/blog/archives/a_lesson_from_north_carolina_on_challengers/) (describing the challenge effort and highlighting safeguards in North Carolina’s challenger law that prevent pre-election challenges from proceeding without reliable evidence).
- <sup>7</sup> Jennifer Wig, *Wake Rejects Most Voter Challenges*, RALEIGH PUBLIC RECORD (June 27, 2012), <http://www.raleighpublicrecord.org/news/2012/06/27/wake-rejects-most-voter-challenges/>.
- <sup>8</sup> *See infra* Section V.B (describing the number of states that require poll challengers to provide documentation to support their allegations).
- <sup>9</sup> 10 ILL. COMP. STAT. 5/17-10 (describing polling place challenge procedures); 10 ILL. COMP. STAT. 5/17-23 (authorizing poll-watchers to challenge voters).

- <sup>10</sup> 10 ILL. COMP. STAT. 5/17-10 (“In addition to such an affidavit, the person so challenged shall provide to the judges of election proof of residence by producing two forms of identification showing the person’s current residence address . . . or the person shall procure a witness personally known to the judges of election, and resident in the precinct (or district), or who shall be proved by some legal voter of such precinct or district, known to the judges to be such [in order to verify the challenged person’s qualifications].”).
- <sup>11</sup> See *infra* Sections IV.B & IV.E.
- <sup>12</sup> See *infra* Section III.F.
- <sup>13</sup> See *infra* Section III.
- <sup>14</sup> *Women Voting Up-State*, N.Y. TIMES, Jan. 6, 1918, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9C0CE0DD133FE433A25755C0A9679C946996D6CF> (“A special excise election in Lisle today is the first opportunity afforded women for exercising their right of franchise. There was a blanket challenge for all women voters.”).
- <sup>15</sup> See *infra* Section V.A.
- <sup>16</sup> See *infra* Section V.B.
- <sup>17</sup> See, e.g., Jenny Deam, *The Clique That Never Grows Up*, DENVER POST, Apr. 18, 2006, at F-01 (describing teacher complaints about overzealous PTA members who sometimes come into classrooms and disrupt school); Katherine Marsh, *Playing Police*, LEGAL AFF., Jul./Aug. 2004, at 16, available at [http://www.legalaffairs.org/issues/July-August-2004/termsofart\\_marsh\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/termsofart_marsh_julaug04.msp) (noting that “police view citizens who confront criminals not as fellow enforcers of the law but as meddlers — and as potential victims”).
- <sup>18</sup> See generally *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 612 (D.N.J. 2009), *aff’d*, 673 F.3d 192, 196 (3d Cir. 2012) (“Some voters — especially in minority districts where the legacy of racism and history of clashes between the population and authorities has given rise to a suspicion of police and other officials — may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified, especially if the verification process becomes confrontational.”).
- <sup>19</sup> See Jo Becker, *GOP Challenging Voter Registrations*, WASH. POST, Oct. 29, 2004, at A05, available at <http://www.washingtonpost.com/wp-dyn/articles/A7422-2004Oct28.html>. See generally Dale Smith, Comment, *Preserving Rights or Perpetuating Chaos: An Analysis of Ohio’s Private Challengers of Voters Act and the Sixth Circuit’s Decision in Summit County Democratic Central and Executive Committee v. Blackwell*, 74 U. CIN. L. REV. 719, 719-23 (2005) (providing a timeline of events for the 2004 Ohio challenger disputes).
- <sup>20</sup> See *infra* Section V.
- <sup>21</sup> Compare COLO. REV. STAT. ANN. § 1-9-201(2) (“[C]hallenges may be made by watchers or any eligible elector of the precinct.” (emphasis added)), with VT. STAT. ANN. tit. 17, § 2564 (“Each organized political party, each candidate on the ballot not representing an organized political party, and each committee supporting or opposing any public question on the ballot shall have the right to have not more than two representatives outside the guardrail for the purpose of observing the voting process and challenging the right of any person to vote.”).
- <sup>22</sup> Compare ARIZ. REV. STAT. § 16-591 (“Any qualified elector of the county may orally challenge a person offering to vote as not qualified.”), with COLO. REV. STAT. ANN. § 1-9-202 (“Each challenge shall be made by written oath [and] . . . [n]o oral challenge shall be permitted.”).
- <sup>23</sup> Although many states allow private citizens to challenge absentee ballots, this report does not focus on absentee ballot challenges for two reasons: First, absentee voters who are challenged rarely have an opportunity to contest these challenges and, second, only a minority of states permit absentee ballot challenges in the first place. See generally Peter K. Schalestock, *Monitoring of Election Processes by Private Actors*, 34 WM. MITCHELL L. REV. 563, 588-90 (2007) (discussing

absentee ballot challenges and noting that fewer states allow private citizens to challenge absentee voters than allow them to challenge non-absentee voters).

- <sup>24</sup> See ALASKA STAT. § 15.15.210; 10 ILL. COMP. STAT. 5/17-10; ARIZ. REV. STAT. ANN. § 16-592(A); ARK. CODE ANN. § 7-5-312(h); COLO. REV. STAT. ANN. § 1-9-203; CONN. GEN. STAT. ANN. § 9-232C; DEL. CODE ANN. tit. 15, §§ 4936, 4937(c); FLA. STAT. ANN. § 101.111; HAW. REV. STAT. § 11-25(a); IDAHO CODE ANN. § 34-1111; IND. CODE ANN. § 3-10-1-9; IOWA CODE ANN. §§ 49.79-80; KY. REV. STAT. ANN. § 117.245(2); LA. REV. STAT. ANN. § 18:565; ME. REV. STAT. ANN. tit. 21-A, § 673; MD. CODE, ELEC. LAW, § 10-312(c); MASS. GEN. LAWS ANN. ch. 54, § 85A; MICH. COMP. LAWS ANN. § 168.729; MINN. STAT. ANN. § 204C.12(4); MISS. CODE ANN. § 23-15-571; MO. REV. STAT. § 115.429(2); MONT. CODE ANN. § 13-13-301; NEB. REV. STAT. ANN. §§ 32-927-932; N.H. REV. STAT. ANN. §§ 659:27, 659:27-a, 666:4; N.J. STAT. ANN. §§ 19:7-1, 19:15-18.2; N.M. STAT. ANN. § 1-12-20; N.Y. ELEC. LAW §§ 8-504(1)-(2); NEV. REV. STAT. ANN. § 293.303(2); N.C. GEN. STAT. ANN. § 163-88; N.D. CENT. CODE ANN. § 16.1-05-06; 25 PA. STAT. ANN. §§ 3050(d), 3051, 296; R.I. GEN. LAWS ANN. § 17-19-22; S.C. CODE ANN. §§ 7-13-810, -830; S.D. CODIFIED LAWS § 12-18-10; TENN. CODE ANN. § 2-7-123; UTAH CODE ANN. § 20A-3-105.5(2); VT. STAT. ANN. tit. 17 § 2564; VA. CODE ANN. § 24.2-651; WIS. STAT. ANN. § 6.925. Georgia allows challenges to be made on Election Day but only at the board of registrars' office. See GA. CODE ANN. § 21-2-230.
- <sup>25</sup> See, e.g., Suzette Hackney & Kathleen Gray, *Election 2008: State Elects To Combat Allegations About Possible Suppression of Voters*, DETROIT FREE PRESS, Oct. 13, 2008, at 1 (describing a local election official in Michigan who received a call from a voter who “said she was terrified that she would be pulled out of line at the polls and embarrassed in front of neighbors”).
- <sup>26</sup> See, e.g., Shawne K. Wickham, *Lanyers Gear Up for Nov. 2 Battles*, UNION LEADER, Oct. 31, 2004, at A1 (“[Hanover town clerk Julia] Griffin said of the 900 Dartmouth students who tried to register that day, ‘well over 600’ were challenged, leading to long lines, and frustrated voters and officials.”). In addition to causing delays, overzealous poll-watchers and challengers can also induce stress among election officials. See, e.g., Kristen Searer, *Election Horror Stories May Spur Changes*, LAS VEGAS SUN (Dec. 2, 2004, 11:05am), <http://www.lasvegassun.com/news/2004/dec/02/election-horror-stories-may-spur-changes/> (describing “poll workers who dissolved into tears after dealing with aggressive poll watchers”). For these reasons, some states require challenged voters to wait until all other voters in line have cast their ballots before an election official will review the challenge in order to avoid polling place delays. See, e.g., MICH. COMP. LAWS ANN. § 168.728 (“If at the time a person proposing to vote is challenged, there are several persons awaiting their turn to vote, said challenged person shall stand to one side until after unchallenged voters have had an opportunity to vote, when his case shall be taken up and disposed of.”).
- <sup>27</sup> ARIZ. REV. STAT. ANN. § 16-552; CAL. ELEC. CODE § 14240(c); COLO. REV. STAT. ANN. § 1-9-101; DEL. CODE ANN. tit. 15, § 2012; FLA. STAT. ANN. § 101.111(1)(c); GA. CODE ANN. § 21-2-229; HAW. REV. STAT. § 11-25(a); 10 ILL. COMP. STAT. ANN. 5/4-12; 10 ILL. COMP. STAT. ANN. 5/5-15; IOWA CODE ANN. § 48A.14; MD. CODE ANN., ELEC. LAW § 3-602; MASS. GEN. LAWS ANN. ch. 51, § 48; MICH. COMP. LAWS ANN. § 168.512; MINN. STAT. ANN. § 201.195; MISS. CODE ANN. § 23-15-63; MONT. CODE ANN. § 13-13-301; N.Y. ELEC. LAW § 5-220; NEV. REV. STAT. ANN. § 293.547; N.C. GEN. STAT. ANN. § 163-85; OHIO REV. CODE ANN. § 3503.24; 25 PA. STAT. ANN. § 1329; R.I. GEN. LAWS ANN. § 17-9.1-28; S.C. CODE ANN. § 7-5-230; TEX. ELEC. CODE ANN. §§ 16.091-095; UTAH CODE ANN. § 20A-3-202.3; VA. CODE ANN. § 24.2-429; WASH. REV. CODE ANN. §§ 29A.08.810-850; W. VA. CODE ANN. § 3-2-28; WIS. STAT. ANN. § 6.48. In addition, Idaho allows private citizens to make registration challenges but only during an election. See IDAHO CODE ANN. §§ 34-431 to -432.
- <sup>28</sup> See NEV. REV. STAT. § 293.547(1); N.C. GEN. STAT. ANN. § 163-85(a).
- <sup>29</sup> American elections did not begin to use the secret ballot until 1888, decades after most states enacted their first challenger laws. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 115 (rev. ed. 2008) (noting that the “first American experiment with the Australian [i.e., secret] ballot” occurred in Louisville, KY). The secret ballot helped eliminate fraud not only by reducing vote-buying opportunities but also by forcing states to print their own ballots in order to preserve the anonymity of voters. Previously, political parties would print their own ballots and distribute them to their supporters, thereby making it impossible for voters to keep their political preferences anonymous. Many historians believe that secret-ballot laws eliminated a major source of election fraud. See John F. Reynolds & Richard L. McCormick, *Outlawing “Treachery”: Split*

*Tickets and Ballot Laws in New York and New Jersey, 1880-1900*, 72 J. AM. HIST. 835, 858 (1986) (“Hoping to eliminate fraudulent tickets . . . , the reformers achieved their aim of state-printed tickets [through the adoption of a secret-ballot law].”).

- <sup>30</sup> See Keyssar, *supra* note 29, at 121-22 (describing the rise of absentee voting and noting that “absentee voting was rare before 1860); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345, 1350-51 (2003) (“Swayed again by the moral equation of the duty to serve and the right to vote, wanting to keep troops in the field, and concerned with the partisan effect of soldiers’ absence, many states enacted absentee voting laws for the first time [during the Civil War].”).
- <sup>31</sup> See generally Harvey Boulay & Alan DiGaetano, *Why Did Political Machines Disappear?*, 12 J. URB. HIST. 25, 25-49 (1985) (discussing various causes for the decline of machine politics after the 1940s).
- <sup>32</sup> Indeed, in-person voter fraud is virtually nonexistent in modern elections. See JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD 6* (2007), available at <http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf> (concluding from a national survey of reported voter fraud incidents that in-person voter fraud is “an occurrence more rare than getting struck by lightning”).
- <sup>33</sup> The colony of Rhode Island and Providence Plantations, for instance, enacted one of the first challenger laws in North America when it amended its royal charter in 1742 to permit people to challenge any voter whose qualifications they had “cause to doubt.” Act of Nov. 22, 1742, R.I. & Providence Plantations Royal Charter 252, 252-53 (Franklin 1744) (on file with the Massachusetts Historical Society and Gale Catalog’s *Making of Modern Law: Primary Sources* online database).
- <sup>34</sup> Act of Mar. 26, 1781, 1781 N.Y. Laws (ch. 36) 355, 355-56 (Weed, Parsons & Co. 1886), available at <http://books.google.com/books?id=0N8TAAAAYAAJ&ots=g53Z4436EH&dq=Weed%20Parsons%20New%20York%20laws%201781&pg=PA355#v=onepage&q&f=false> (allowing “any elector” to challenge any voter whom he suspected had “not taken an active and decisive part in favor of the United States in the present war, against the king of Great Britain and his adherents”).
- <sup>35</sup> See, e.g., FRENISE A. LOGAN, *THE NEGRO IN NORTH CAROLINA, 1876-1894*, at 55 (1964) (“The wide, almost autocratic powers granted to the registrars and judges of elections [during the 1876-77 legislative session in North Carolina], the residence requirements, and the right of one voter to challenge another — all of these pointed to the intent of the framers to disenfranchise or reduce the number of Negro voters.”). See also *infra* Sections III.A-F (describing the history of challenger laws in several states).
- <sup>36</sup> See, e.g., LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 52-54 (2003) (describing how politicians in Georgia “responded to the abolition of the white primary by orchestrating challenges to black voters for allegedly being improperly registered and thus ineligible to vote”). See also *infra* Sections III.A-F (describing the history of challenger laws in several states).
- <sup>37</sup> See generally RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 124-37 (2004) (describing how, during the mid-1800s, polling place disputes about a challenged voter’s racial identity arose very rarely and only at the “margin inhabited by those whose ancestry left them with ambiguous features”).
- <sup>38</sup> In fact, private citizens who do challenge voters based solely on these characteristics today would likely run afoul of state, local, or federal law. See, e.g., D.C. CODE § 1-1001.09(d)(2) (“[A] voter shall not be challenged solely on the basis of characteristics or perceived characteristics not directly related to the challenged voter’s status as a registered qualified elector, including race, color, religion, sex, personal appearance, sexual orientation, gender identity or expression, matriculation status, political affiliation, or physical disability.”); Op. Tex. Att’y Gen., LO-88-125, a t3n.2 (Nov. 7, 1988), available at <https://www.oag.state.tx.us/opinions/opinions/47mattox/lo/1988/pdf/lo1988125.pdf> (“The routine challenge of Hispanic voters’ citizenship status would, in my opinion, violate the [federal Voting Rights Act].”). See also *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 196 (3d Cir. 2012) (upholding a 30 year-old consent decree that prohibits the Republican National Committee from using challengers to target voters in minority voting precincts).

- <sup>39</sup> See *The Howell Code Adopted by the First Legislative Assembly*, ch. 24, § 20-24, 1865 Ariz. Territory Code 172, 174 (Prescott 1865) (amended 1875), available at [http://books.google.com/books?id=4aMvAQAAAMA&ots=8b\\_LclNm2e&dq=Howell%20Code%20Arizona%201865&pg=PA174#v=onepage&q&f=false](http://books.google.com/books?id=4aMvAQAAAMA&ots=8b_LclNm2e&dq=Howell%20Code%20Arizona%201865&pg=PA174#v=onepage&q&f=false) (“Any person offering to vote may be challenged as unqualified by the inspector or either of the judges, or by any legal voter.”).
- <sup>40</sup> See *id.* The challenger statute was amended in 1875 to include a specific set of grounds for challenging voters at the polls. Law of Feb. 9, 1875, § 32, 1877 Ariz. Territory Code (ch. 31) 241 (amended 1887). These challenge grounds were amended repeatedly prior to Arizona’s admission into the United States.
- <sup>41</sup> Act of June 24, 1912, § 20, 1912 Ariz. Sess. Laws (ch. 83) 258, 270-71 (McNeil Co. 1912), available at <http://books.google.com/books?id=H8gqAAAAYAAJ&pg=RA1-PA270#v=onepage&q&f=false> (allowing poll challenges to be made “upon the ground that the party challenged cannot read the Constitution of the United States in the English language”). The literacy provision of the challenger law was formally repealed in 1970.
- <sup>42</sup> See DAVID R. BERMAN, *REFORMERS, CORPORATIONS, AND THE ELECTORATE: AN ANALYSIS OF ARIZONA’S AGE OF REFORM* 92 (1992) (quoting contemporary witnesses who described Arizona’s literacy test as an effort to eliminate “the ignorant Mexican vote”); see also *The Legislature*, COCONINO SUN (Flagstaff, Ariz.), Feb. 19, 1909, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn87062055/1909-02-19/ed-1/seq-1/> (“Mr. Hamilton introduced a bill in the Council Thursday, which is ostensibly to regulate voting and challenging voters, but the real purpose of which is to prohibit the large Mexican population from voting.”). Newspaper accounts from this period suggest that Mexican voters were targeted for challenges even before the literacy provision was enacted. See *Democratic Primaries: The Contest in Globe Rivalled [sic] the General Election in Interest*, ARIZ. SILVER BELT, Aug. 28, 1902, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84021913/1902-08-28/ed-1/seq-1/> (describing how election officials targeted Mexican voters while “[f]oreigners of other nationalities . . . were as a rule, not challenged”).
- <sup>43</sup> DAVID R. BERMAN, *ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT* 76 (1998) (“Anglos sometimes challenged minorities at the polls and asked them to read and explain ‘literacy’ cards. Intimidators hoped to discourage minorities from standing in line to vote.”) See also *Apache Cnty. v. United States*, 256 F. Supp. 903, 909 (1966) (describing the results of a Justice Department investigation that found that “in 1964 an Apache County official up for re-election, upon learning that a number of Indians intended to vote for his opponent, arranged for a challenge to voters at the polls based on their inability to read the Constitution in English”).
- <sup>44</sup> Act of May 18, 1970 (H.B. 4), § 70, 1970 Ariz. Sess. Laws 533, 574 (amending ARIZ. REV. STAT. § 16-921).
- <sup>45</sup> Act of March 11, 1845, § 4, 1845 Fla. Terr. Acts & Res. 10, 11 (Bartlett 1845), available at [http://books.google.com/books?id=mwM4AAAIAAJ&dq=Acts%20of%20the%20Legislative%20Council%20of%20the%20Territory%20of%20Florida%20\(1845\)&pg=PA11#v=onepage&q&f=false](http://books.google.com/books?id=mwM4AAAIAAJ&dq=Acts%20of%20the%20Legislative%20Council%20of%20the%20Territory%20of%20Florida%20(1845)&pg=PA11#v=onepage&q&f=false) (limiting voting rights to every “free white male [citizen] of the age of twenty-one years and upwards”). The 1845 law permitted “any legally qualified elector” to challenge another voter at the polls. *Id.* § 10, 1845 Fla. Terr. Acts & Res. 10, 13, available at [http://books.google.com/books?id=mwM4AAAIAAJ&dq=Acts%20of%20the%20Legislative%20Council%20of%20the%20Territory%20of%20Florida%20\(1845\)&pg=PA13#v=onepage&q&f=false](http://books.google.com/books?id=mwM4AAAIAAJ&dq=Acts%20of%20the%20Legislative%20Council%20of%20the%20Territory%20of%20Florida%20(1845)&pg=PA13#v=onepage&q&f=false).
- <sup>46</sup> For more on the Democratic takeover of state power in Florida and its implication for African Americans’ rights, see generally JOE M. RICHARDSON, *AFRICAN AMERICANS IN THE RECONSTRUCTION OF FLORIDA, 1865-1877*, at 225-40 (Univ. Alabama Press rev. ed. 2008) (1965).
- <sup>47</sup> Act of Feb. 27, 1877, § 7, 1877 Fla. Acts & Res. (ch. 3021) 64, 71-72 (Dyke 1877), available at <http://books.google.com/books?id=kAA4AAAIAAJ&dq=editions%3ADB9xqkFdQ0wC&pg=PA72#v=onepage&q&f=false> (requiring that every challenged voter “produce two qualified electors of the election district in which he offers to vote, who shall be personally known to at least two of the inspectors” and can swear to the challenged voter’s qualifications).

<sup>48</sup> *Id.*

- <sup>49</sup> See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 94 (1974) (explaining how white Democrats in Florida worked to prevent African Americans from serving as local election officials, even in majority-black counties, throughout the post-Reconstruction period).
- <sup>50</sup> Act of Feb. 27, 1877, § 1, 1877 Fla. Acts & Res. (ch. 3021) 64, 67 (Dyke 1877), available at <http://books.google.com/books?id=kAA4AAAAIAAJ&dq=editions%3ADB9xqkFdQ0wC&pg=PA67#v=onepage&q&f=false> (requiring that county commissioners appoint “three intelligent and discreet electors of such county, who can read and write, as inspectors of election for the polling place or precinct in each election district”).
- <sup>51</sup> See, e.g., Pippa Holloway, “*A Chicken-Stealer Shall Lose His Vote*”: *Disfranchisement for Larveny in the South, 1874-1890*, 75 J. SOUTHERN HIST. 931, 931 (2009) (describing how Democrats would use newly enacted criminal disenfranchisement laws as a basis for challenging black voters in Florida). Local media coverage of Florida elections in this period reveals a broader pattern of discriminatory enforcement of polling place rules. See, e.g., *Fraudulent Voting Will Be Prosecuted*, PENSACOLA JOURNAL, June 6, 1905, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn87062268/1905-06-06/ed-1/seq-1/> (“Colored voters who find it convenient to get blind or crippled on election day will therefore take warning [that they will not receive special assistance from election inspectors].”).
- <sup>52</sup> Act of [Exact Date of Enactment Unknown], 1851, §§ 16-17, 1851 Rev. Stat. Minn. Terr., 2d Sess. 44, 47 (Wilkinson 1851), available at <http://books.google.com/books?id=SI9HAQAAIAAJ&dq=revised%20statutes%20territory%20of%20minnesota&pg=PA47#v=onepage&q&f=false> (“If any person offering to vote shall be challenged as unqualified, by any judge or clerk of election, or by any other person entitled to vote at the same poll, the board of judges shall declare to the person so challenged, the qualification of an elector [and administer to that person an oath affirming his voting qualifications].”).
- <sup>53</sup> For a detailed account of the political battles that ultimately led to black voting rights in Minnesota in 1868, see generally William D. Green, *Minnesota’s Long Road to Black Suffrage, 1849-1868*, 56 MINN. HIST. 68, 68-84 (1998).
- <sup>54</sup> Act of Mar. 12, 1878, § 15, 1878 Minn. Gen. Laws (ch. 84) 133, 135-36 (Ramaley & Cunningham 1878), available at [http://books.google.com/books?id=\\_0g4AAAAIAAJ&pg=PA135#v=onepage&q&f=false](http://books.google.com/books?id=_0g4AAAAIAAJ&pg=PA135#v=onepage&q&f=false).
- <sup>55</sup> *Id.* § 16, available at [http://books.google.com/books?id=\\_0g4AAAAIAAJ&pg=PA136#v=onepage&q&f=false](http://books.google.com/books?id=_0g4AAAAIAAJ&pg=PA136#v=onepage&q&f=false) (“In addition to such affidavit, the person so challenged shall produce a witness personally known to the judges of election, and resident in the precinct or district, or who shall be proved by some legal voter of such precinct or district, known to the judges to be such, who shall take the oath [to affirm the challenged voter’s qualifications].”).
- <sup>56</sup> *Id.* § 19 (prohibiting election judges from accepting the votes of challenged voters who refuse to complete an affidavit or fail to produce a witness).
- <sup>57</sup> Specifically, the challenger law only applied only to “cities of over twelve thousand (12,000) inhabitants,” *id.*, which, in the 1870s, would have only included Minneapolis and St. Paul. See FRANCIS A. WALKER & CHAS. W. SEATON, CENSUS OFFICE, U.S. DEP’T OF INTERIOR, STATISTICS OF THE UNITED STATES AT THE TENTH CENSUS 223-33 (1880), available at [http://www2.census.gov/prod2/decennial/documents/1880a\\_v1-10.pdf](http://www2.census.gov/prod2/decennial/documents/1880a_v1-10.pdf) (to view the full document as a zip file, visit the following link: [http://www2.census.gov/prod2/decennial/documents/1880a\\_v1.zip](http://www2.census.gov/prod2/decennial/documents/1880a_v1.zip)).
- <sup>58</sup> See, e.g., *Who’ll Be Sheriff: That Was the Game That Was Played for Last Night*, ST. PAUL DAILY GLOBE, Sept. 14, 1880, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn83025287/1880-09-14/ed-1/seq-1/> (describing how a group of twenty-five black men were targeted for challenges during an 1880 primary election in St. Paul). Beyond the discriminatory application of the new challenger law, the new procedures also appear to have led to more general confusion among election officials about how to administer the new procedures. In 1884, the mayor of Minneapolis, Albert Ames, published an open letter to the city attorney requesting guidance on whether election judges were allowed to ask a challenged voter wait until all other voters in the polling place had cast their ballots before he could defend himself against the challenge. *Challenging Voters*, ST. PAUL DAILY GLOBE, Apr. 1, 1884, at 6, available at <http://chroniclingamerica.loc.gov/lccn/sn90059522/1884-04-01/ed-1/seq-8/> (re-printing the exchange between Minneapolis Mayor Albert Ames and City Attorney Judson Cross).

- <sup>59</sup> See Act of Apr. 15, 1803, § 15, 1803 Ohio Acts 1st Sess. (ch. 24) 76, 80 (Laning Co. 1901) (on file with HeinOnline Session Laws Library).
- <sup>60</sup> Act of Apr. 16, 1868, § 1, 1868 Ohio Gen. & Loc. Laws 1st Sess. 97, 97 (L.D. Myers & Bro. 1868) (on file with HeinOnline Session Laws Library) (“[I]t shall be the duty of the judges of election to challenge any person offering to vote at any election held under any law of this state, having a distinct and visible admixture of African blood.”).
- <sup>61</sup> See OHIO CONST. OF 1802, art. IV, § 1 (“In all elections, all white male inhabitants above the age of twenty-one years, having resided in the State one year next preceding the election, and who have paid or are charged with a State or county tax, shall enjoy the right of an elector.”); OHIO CONST. OF 1851, art. V, § 1 (“Every white male citizen of the United States, of the age of twenty one years, who shall have been a resident of the State one year next preceding the election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.”).
- <sup>62</sup> See *Monroe v. Collins*, 17 Ohio St. 665, 692 (Dec. 1867 Term) (holding that the 1868 challenge law violated the state constitution because it could result in lawful white voters being challenged and disenfranchised).
- <sup>63</sup> *Political Crooks*, ST. PAUL DAILY GLOBE, Aug. 9, 1879, at 2 (describing the testimony of one witness who said that, in his ward, an “[African-American] Republican is nearly always challenged, even old citizens sometimes”), available at <http://chroniclingamerica.loc.gov/lccn/sn83025287/1879-08-09/ed-1/seq-2/>.
- <sup>64</sup> *Victory: A Mighty Nation Rises Up and Shakes off Its Shackles* (subsection: *Ohio*), ST. PAUL DAILY GLOBE, Nov. 5, 1884, at 5, available at <http://chroniclingamerica.loc.gov/lccn/sn90059522/1884-11-05/ed-1/seq-5/> (describing the “refusal of the bystanders at the polls, many of whom were armed with clubs, to permit colored men to vote”); *The Other Side: Lot Wright Shows How The Negroes Were Frightened from the Polls*, FORT WORTH DAILY GAZETTE, Jan. 16, 1885, at 5, available at <http://chroniclingamerica.loc.gov/lccn/sn86064205/1885-01-16/ed-1/seq-5/> (describing how numerous African American voters were challenged, and one voter attacked, during a recent Cincinnati election).
- <sup>65</sup> Act of Feb. 5, 1844, § 7, 1844 Tex. Gen. Laws 111, 112-13 (Gammel Book Co. 1898), available at <http://texashistory.unt.edu/ark:/67531/metaph6726/m1/1028/>.
- <sup>66</sup> Act of May 11, 1846, § 13, 1846 Tex. Gen. Laws 209, 212 (Gammel Book Co. 1898), available at <http://texashistory.unt.edu/ark:/67531/metaph6726/m1/1522/>; Act of March 16, 1848, § 13, 1848 Tex. Gen. Laws 120, 123 (Gammel Book Co. 1898) (codified as amended at 1879 Tex. Rev. Civ. Stat. art. 1692), available at <http://texashistory.unt.edu/ark:/67531/metaph6728/m1/127/>.
- <sup>67</sup> See generally LAWRENCE D. RICE, *THE NEGRO IN TEXAS, 1874-1900*, at 113-39 (1971) (describing the “sundry means” used by Texas lawmakers to undermine African Americans’ voting rights in the post-Reconstruction period).
- <sup>68</sup> The 1891 law only applied to cities of population ten thousand or greater. Act of March 30, 1891, § 1, 1891 Tex. Gen. Laws 47, 47 (codified as amended at 1895 Tex. Rev. Civ. Stat. arts. 1736 & 393), available at <http://texashistory.unt.edu/ark:/67531/metaph6733/m1/51/>. At the time the law was enacted, Texas had only ten cities with populations over 10,000: Dallas, San Antonio, Galveston, Houston, Fort Worth, Austin, Waco, Laredo, Dennison, and El Paso. Alicia E. Rodriguez, *Disenfranchisement in Dallas: The Democratic Party and the Suppression of Independent Political Challenges in Dallas, Texas, 1891-1894*, 108 SW. HIST. Q. 43, 48 & n.22 (2004).
- <sup>69</sup> *Id.* (“The judges of election shall refuse to accept such vote of such elector unless in addition to his own oath, he proves by the oath of one well known resident of the ward, that he is a qualified voter at such election and in such ward.”).
- <sup>70</sup> The week after the new challenger law was passed, the Dallas city attorney wrote a letter to the editor of a local newspaper to argue that the law “abridges, impedes, and necessarily delays the full exercise of the right [to vote].” A.P. Wozencraft & M. Trice, *The New Election Law: Opinion of the City Attorney and His Assistant on its Constitutionality*, DALLAS MORNING NEWS, Apr. 6, 1891, at 8.



- <sup>71</sup> Rodriquez, *supra* note 69, at 45, 48-50 (noting that “strong circumstantial evidence supports the view that the law was proposed and enacted to help Democrats regain control of the mayor’s office in Dallas”); Patrick G. Williams, *Suffrage Restriction in Post-Reconstruction Texas: Urban Politics and the Specter of the Commune*, 68 J. SOUTHERN HIST. 31, 57 (2002).
- <sup>72</sup> Act of March 30, 1891, § 2, 1891 Tex. Gen. Laws 47, 47 (codified as amended at 1895 Tex. Rev. Civ. Stat. arts. 1736 & 393), available at <http://texashistory.unt.edu/ark:/67531/metaph6733/m1/51/> (“The fact that all municipal elections will be held on the first Tuesday in April, and the near approach of the close of the session creates an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this act take effect from and after its passage.”).
- <sup>73</sup> Rodriquez, *supra* note 69, at 50-51 (noting that the challenged voters “fit the profile of men supporting the [independent mayoral candidate’s] challenge to the Democratic party [sic], and thus their race and class made them targets”). This was a significant number of voters since the election itself was decided by less than 800 votes. *Id.* at 51. See also *Texas Elections*, FORT WORTH GAZETTE, April 8, 1891, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn86071158/1891-04-08/ed-1/seq-1/> (noting that, during the 1891 Dallas mayoral election, “[t]he negro vote was nearly all for Connor and many of those votes were challenged and kept out”).
- <sup>74</sup> Act of May 15, 1905, §§ 40, 59, 1905 Tex. Gen. Laws 520, 530, 534-35 (codified as amended at 1911 Tex. Rev. Civ. Stat. art. 2923-24, 2978), available at <http://texashistory.unt.edu/ark:/67531/metaph6695/m1/1405/>. State lawmakers also amended the Texas’s challenger statute to reflect the fact that the 1905 law created a new distinction between party-appointed “challengers,” party-appointed “supervisors,” and state-appointed “election judges.” See *id.* at 537 (§ 73) (“When a person offering to vote shall be objected to by an election judge or a supervisor or challenger, the presiding judge shall examine him upon an oath touching the points of such objection, and if such person fails to establish his right to vote to the satisfaction of the majority of the judges, he shall not vote.”).
- <sup>75</sup> Historians have documented how various parts of the 1903 Terrell Election Law and its 1905 amendments were designed to target black voters. See KOUSSER, *supra* note 50, at 208 (1974) (“[The law] provided for a noncumulative poll tax to be paid six months before the election . . . Chiefly to allow counties to conduct white primaries, the county committees of each party were authorized to prescribe additional qualifications for voting in their primaries.”); McKen Carrington, *In Struggle Against Jim Crow, Lulu White and the NAACP by Merline Pitre*, 26 THURGOOD MARSHALL L. REV. 107, 115 (2000) (book review) (“In Texas, the Terrell Election laws effectively thwarted the Fifteenth Amendment rights of Texas African Americans.”) One well-known provision of the 1905 amendments, for instance, empowered political party leaders to impose racial restrictions on voting in local primary elections. Specifically, the provision authorized the county executive committee of each political party to set its own qualifications for party membership, allowing them to legally exclude black citizens. Act of May 15, 1905, § 103, 1905 Tex. Gen. Laws 520, 543 (codified as amended at 1911 Tex. Rev. Civ. Stat. art. 3093), available at <http://texashistory.unt.edu/ark:/67531/metaph6695/m1/1411/>. This provision is widely credited with giving rise to state-sanctioned “white primaries” at the county level. See DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 85 (2003) (discussing the discriminatory purpose of the new poll tax restriction); RICE, *supra* note 68, at 85; KOUSSER, *supra* note 50, at 208. Another provision of the Terrell Election Law required that every voter pay his own poll taxes — a measure intended to prevent political operatives from paying poll taxes for black voters who otherwise could not afford the tax. See Act of May 15, 1905, § 27, 1905 Tex. Gen. Laws 520, 527 (codified as amended at 1911 Tex. Rev. Civ. Stat. art. 2947), available at <http://texashistory.unt.edu/ark:/67531/metaph6695/m1/1395/>; HINE, *supra* note 76, at 85 (discussing the discriminatory purpose of the new poll tax restriction); RICE, *supra* note 68, at 136 (same).
- <sup>76</sup> See HINE, *supra* note 76, at 85; KOUSSER, *supra* note 50, at 208. Since Democrats controlled nearly every facet of Texas politics in this era, the exclusion of black voters from Democratic primaries effectively excluded them from all meaningful political participation in the state. See KOUSSER, *supra* note 50, at 208-09 (noting that the “combined GOP-Populist percentage [of Texas voters] dropped to 8 percent” in 1904 and “did not attract as many as one eligible voter in ten” in any gubernatorial or presidential election between 1904 and 1910).
- <sup>77</sup> Act of May 11, 1870, §§ 33-34, 1869-70 Va. Acts (ch. 76) 78, 85 (Goode 1870) (repealed and re-enacted in 1904; current version at VA. CODE ANN. § 24.2-651), available at <http://books.google.com/books?id=IH1RAAAAYAAJ&pg=PA85#v=onepage&q&f=false>.

- <sup>78</sup> Although the Reconstruction period continued through the mid-1870s in most other former Confederate states, Reconstruction ended much sooner in Virginia. See Thomas R. Morris & Neil Bradley, *Virginia, in QUIET REVOLUTION IN THE SOUTH* 271, 272 (Chandler Davidson & Bernard Grofman eds., 1994) (“Reconstruction ended for Virginia in early 1870, and, from the perspective of Virginia traditionalists, the state had been ‘redeemed’ in 1869 from the prospect of rule by blacks and their radical Republican allies, who had controlled the [1867-68 constitutional convention].”). The challenger law was enacted less than a month after the state legislature passed a law requiring election officials to keep separate voter registration lists for black and white voters. Act of April 12, 1870, § 3, 1869-70 Va. Acts 55, 56 (Goode 1870) (repealed and reenacted in 1904), available at <http://books.google.com/books?id=IH1RAAAAYAAJ&pg=PA56#v=onepage&q&f=false>. Historians believe that the segregated poll book requirement was intended to suppress the black vote “by limiting through technical delays the number of blacks who could vote in the allotted time or allowing local registrars to ‘lose’ the black voter list.” See Morris & Bradley, *supra* at 272.
- <sup>79</sup> Act of May 11, 1870, §§ 33-34, 1869-70 Va. Acts 78, 85 (Goode 1870) (repealed and re-enacted in 1904; current version at VA. CODE ANN. § 24.2-651), available at <http://books.google.com/books?id=IH1RAAAAYAAJ&pg=PA85#v=onepage&q&f=false>. Remarkably, the statute’s language remains largely unchanged today, with only minor differences between the 1870 version of the statute and the version still in force. Compare *id.* (“Any elector may, and it shall be the duty of election judges to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter.”), with VA. CODE ANN. § 24.2-651 (“Any qualified voter may, and the officers of election shall, challenge the vote of any person who is listed on the pollbook but is known or suspected not to be a qualified voter.”).
- <sup>80</sup> See CHARLES E. WYNES, *RACE RELATIONS IN VIRGINIA, 1870-1902*, at 12-14 (1961) (describing the political landscape in Virginia that led to the adoption of a poll tax and the expansion of criminal disenfranchisement to certain petty crimes via constitutional amendment in 1876).
- <sup>81</sup> *Id.* at 10-14.
- <sup>82</sup> See, e.g., *Where Voting Is Not Free: Results of Some Investigations by Two Nebraska Representatives*, OMAHA DAILY BEE, Nov. 14, 1893, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn99021999/1893-11-14/ed-1/seq-5/> (describing how Democratic challengers in Richmond, VA, would challenge African-American voters, even those whom they knew be qualified, in order to cause delays at the polls in majority-black precincts); *Jackson Ward: Wholesale Robbery — Republicans Counted Out — Contest to Be Made*, RICHMOND PLANET, June 6, 1896, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84025841/1896-06-06/ed-1/seq-1/> (“The Democrats had sent out challengers, and every colored man’s vote was contested [in one Richmond ward].”); *Republicans Triumphant: Sad Day for Bryanites*, RICHMOND PLANET, Nov. 7, 1896, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84025841/1896-06-06/ed-1/seq-1/> (noting that “white men from other wards were sent out to challenge the colored voters, and otherwise hinder and delay” voting in Richmond, VA). See also Holloway, *supra* note 52, at 932 (describing how African-American voters in Virginia were sometimes accused of having past felony convictions for petty crimes and challenged on that basis).
- <sup>83</sup> The state’s Election Day challenger statute was re-enacted in January of 1904. See Act of Jan. 11, 1904, §§ 126-27, 1902-3-4 Va. Acts 922, 934 (O’Bannon 1904) (current version codified at VA. CODE ANN. § 24.2-651), available at <http://books.google.com/books?id=qARAAAAAYAAJ&dq=editions%3ALCCN80644883&lr&pg=PA934#v=onepage&q&f=false>.
- <sup>84</sup> See *The Virginia Election: Convention Proposition Carried — To Disfranchise Negroes — Odd Features of the Voting*, N.Y. TIMES, May 25, 1900, at 1, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F50E10F8345811738DDDAC0A94DD405B808CF1D3> (“The question of calling a constitutional convention in Virginia, mainly for the purpose of disfranchising the Negro voter, seems to have been settled in the election to-day [by majority vote of the electorate].”). During the convention, the delegates themselves were open about their intentions to use the new constitution as a tool for disenfranchising African Americans. As Senator Carter Glass stated, “That, exactly, is what this Convention was elected for — to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical

strength of the white electorate.” REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA: HELD IN THE CITY OF RICHMOND, JUNE 12, 1901 TO JUNE 24, 1901, at 3076-77 (Hermitage Press 1906). Because of the lengthy record of discriminatory statements such as Senator Glass’s, historians often refer to the 1901-02 convention as the “disfranchising convention.” See, e.g., KOUSSER, *supra* note 50, at 79 (referring to the 1901-02 convention as the “disfranchising convention”).

<sup>85</sup> Virginia’s poll tax was initially incorporated into the state’s constitution in 1876, see WYNES *supra* note 81, at 12-14, but was re-incorporated into the state’s new constitution during the 1901-02 convention and ultimately took effect beginning in 1904. See VA. CONST. of 1902, art. II, §§ 18, 20, 21, 38.

<sup>86</sup> See, e.g., Protecting Tenants at Foreclosure Act of 2009, §§ 701-04, Pub. L. No. 111-22, 123 Stat. 1632, 1660-63 (creating new temporary protections for certain tenants residing in foreclosed properties). See also Eloisa Rodriguez-Dod, *Stop Shutting the Doors on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL’Y 243, 245-65 (2010) (noting that many foreclosures affect renters and describing recent state and federal legislation to protect the rights of tenants to remain in foreclosed properties). For more information on the potentially harmful consequences of voter challenges based on foreclosure lists, see generally FAIR ELECTIONS LEGAL NETWORK, LOSE YOUR HOME, KEEP YOUR VOTE: HOW TO PROTECT VOTERS CAUGHT UP IN FORECLOSURE 1-3 (2008), available at [http://fairelectionsnetwork.com/webfm\\_send/14](http://fairelectionsnetwork.com/webfm_send/14) (describing how “[f]oreclosure disproportionately affects minority homeowners and, thus, minority voters”).

<sup>87</sup> For more on “voter caging” and why it is an unreliable means of identifying ineligible voters, see generally JUSTIN LEVITT & ANDREW ALLISON, BRENNAN CENTER FOR JUSTICE, A GUIDE TO VOTER CAGING 1-7 (2007) (“Voter caging is the practice of sending mail to addresses on the voter rolls, compiling a list of the mail that is returned undelivered, and using that list to purge or challenge voters registrations on the grounds that the voters on the list do not legally reside at their registered addresses.”). Caging tactics have historically been used to target voters of color. See generally TERESA JAMES, PROJECT VOTE, CAGING DEMOCRACY: A 50-YEAR HISTORY OF PARTISAN CHALLENGES TO MINORITY VOTERS, 12-20 (2007) (describing major caging operations across the United States over the past several decades).

<sup>88</sup> See, e.g., Mary Shanklin, *Poll Watchdogs Keep Eye on You*, ORLANDO SENTINEL, Oct. 26, 2008, at A1 (describing reports of a poll-watcher who was taking down names of all voters who appeared to have disabilities during early voting in Florida before the 2008 general election); Jamie Thompson & Adam Smith, *Polls Bulge as Voters File in Early*, ST. PETERSBURG TIMES, Oct. 31, 2004, at 1B (reporting that a majority of predominantly black and Latino early voting precincts in three Florida counties had GOP poll-watchers compared to only a minority of predominantly white early voting precincts in those same counties); Stephen Deere, *Several Students’ Votes Challenged; Some in Clark County Unaware Their Ballot Was Contested*, ARK. DEMOCRAT-GAZETTE, Nov. 6, 2002, at 14 (describing how several students at Ouachita Baptist University were challenged at the polls during an election in Arkadelphia, AR); Niraj Warikoo, *Complaints of Bias at the Polls Spur Changes in Hamtramck*, DETROIT FREE PRESS, Aug. 8, 2000, at 2B (describing how Arab and Bengali Americans were targeted by challengers during a local election in Hamtramck, MI, prompting an investigation by the Justice Department). For more examples of discriminatory challenges, see *infra* Section IV.E.

<sup>89</sup> See Jim Camden, *Man Says Votes from Illegal Immigrants*, SPOKESMAN-REVIEW, Mar. 31, 2005, at B3, available at <http://www.spokesman.com/stories/2005/mar/31/man-says-votes-from-illegal-immigrants/> (describing one challenger in Washington State who “obtained a list of people who registered to vote when they obtained or renewed a driver’s license, then culled the list for names ‘that appear to be from outside the United States,’ particularly those that appeared to be Hispanic or Asian” to decide whom to challenge). See also *infra* Section IV.E (providing additional examples of discriminatory challenges based on stereotypes).

<sup>90</sup> See *infra* Section IV.E.

<sup>91</sup> In 2004, for example, Native American voters on a reservation in Minnesota were subjected to a series of unfounded challenges to their voting eligibility by a challenger who ultimately had to be escorted away from the polls by police. Mark Brunswick & Pat Doyle, *The Scene; Tension Prompts Disputes at Some Poll Sites*, STAR TRIBUNE, Nov. 3, 2004, at 1B (quoting one witness who said that some voters left the polls without voting because they were delayed or intimidated by the rash of challenges).

- <sup>92</sup> See, e.g., *id.* at 1B (“In northern Minnesota, tribal police escorted a GOP poll watcher off the Red Lake Indian Reservation after election judges complained that he had harassed them and intimidated voters.”).
- <sup>93</sup> See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 213 (3d Cir. 2012) (“When confronted with such targeted voter-challenge lists, some eligible voters may choose to refrain from voting instead of waiting for the verification of their own eligibility or that of others ahead of them in line.”).
- <sup>94</sup> *Election Workers Get State Training Session*, WORCESTER TELEGRAM & GAZETTE, May 6, 2011, at B2 (noting that the “groups were accused by town officials of intimidating Hispanic and mentally challenged voters.”).
- <sup>95</sup> Brian Lee, *Durant: No Tea Party Fundraising*, WORCESTER TELEGRAM & GAZETTE, May 5, 2011, at B1 (“The [Southbridge town] clerk said she saw that people felt intimidated or uncomfortable as they were being asked for identification.”).
- <sup>96</sup> Brian Lee, *Another Close One; Durant Ousts Alicea from 6th Seat*, WORCESTER TELEGRAM & GAZETTE, May 11, 2011, at A1 (describing the additional precautions taken by election officials after the challenger disputes at the previous election).
- <sup>97</sup> *Id.*
- <sup>98</sup> James Dao & Adam Liptak, *G.O.P. in Ohio Can Challenge Voters at Polls*, N.Y. TIMES, Nov. 2, 2004, at A1, available at <http://www.nytimes.com/2004/11/02/politics/campaign/02ohio.html?pagenanted=1> (describing the party’s plan to “place thousands of people inside polling places to challenge the eligibility of voters”).
- <sup>99</sup> Order Granting Plaintiffs’ Motion for Temporary Restraining Order, at 3, *Spencer v. Blackwell*, No. C-1-04-738 (S.D. Ohio Nov. 1, 2004).
- <sup>100</sup> See, e.g., Becker, *supra* note 19, at A05, available at <http://www.washingtonpost.com/wp-dyn/articles/A7422-2004Oct28.html> (“[C]ivil rights groups and labor unions, which are backed by the Democratic Party, also charged that GOP plans to put challengers in thousands of precincts nationwide on Election Day are race-based.”). For a detailed summary of the 2004 Ohio challenger litigation and surrounding controversy, see Smith, *supra* note 19, at 719-23 (2005).
- <sup>101</sup> See Pam Fessler, *Hispanic Voter Registrations Challenged in Georgia*, NPR NEWS (Oct. 27, 2004), <http://www.npr.org/templates/story/story.php?storyId=4129390> (quoting a county election official who said that 95 of the county’s 123 voters with Hispanic surnames were challenged).
- <sup>102</sup> See Robert A. Kengle, *Voting Rights Issues in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367, 410 (2008) (describing how “Spanish-surnamed registered voters had been mass-challenged in Long County prior to the 2004 primary election and in Atkinson County prior to the 2004 general election”); Tyche Hendricks, *Coalition of Latino Groups Sounds Alarm over Intimidation of Voters*, S.F. CHRON., Oct. 27, 2004, at A-13, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/10/27/MNGLE9H2RJ1.DTL>.
- <sup>103</sup> SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 74-76 (2006).
- <sup>104</sup> *Id.* at 75 (explaining that the town had a growing Vietnamese-American population).
- <sup>105</sup> *Id.* at 75-76.
- <sup>106</sup> *Id.* See also DeWayne Wickham, *Why Renew Voting Rights Act; Ala. Town Provides Answer*, USA TODAY, Feb. 23, 2006, at 13A, available at [http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm) (“The challengers [during the 2004 election] complained that the Asian-American voters were not citizens, had criminal records or didn't live in Bayou La Batre.”).
- <sup>107</sup> See Tessa Melvin, *Polling Place for Students Stirs Harrison Dispute*, N.Y. TIMES, Mar. 30, 1986, at 11WC (describing disputes arising out of challenges lodged against student voters at SUNY-Purchase).

- <sup>108</sup> Kenneth C. Crowe, *Mayoral Rivals Remain Hopeful*, TIMES UNION, Nov. 6, 2003, at B1; Ashley Hahn, *An Education in Intimidation*, METROLAND ONLINE (Nov. 13, 2003), [http://metroland.net/back\\_issues/vol\\_26\\_no46/newsfront.html](http://metroland.net/back_issues/vol_26_no46/newsfront.html) (describing a rise in the number of challenged ballots cast during the election and noting that the challenged ballots “came mostly from Skidmore College’s voting district, where 300 student voters were challenged”).
- <sup>109</sup> Larry Hertz, *Homeless, Student Voters Challenged*, POUGHKEEPSIE JOURNAL, Nov. 5, 2009, at 5A (“Disputes involving voting by homeless people and college students may have been addressed by judges Tuesday, but the same issues are bound to come up in the future, Dutchess County election officials said.”); Mary Huber, *Politics Strain Relations Between Students, Poughkeepsie*, MISCELLANY NEWS (Sept. 14, 2011, 3:09pm), <http://www.miscellanynews.com/2.1578/politics-strain-relations-between-students-poughkeepsie-1.2627656#.T4wah9n4IyV> (noting that many students “accused poll watchers of voter intimidation”). See also Jonathan Becker, Associate Dean of Bard College, Letter to the Editor, *Students’ Voting Rights Violated*, POUGHKEEPSIE JOURNAL, Dec. 4, 2009, at A12 (noting that “[t]apes from the polling site illustrate that Republican officials challenged students without even inquiring where they currently live”).
- <sup>110</sup> Chelsi Moy & Justin Post, *Montana GOP Challenges Voter Eligibility*, MTSTANDARD.COM (Oct. 1, 2008, 11:00pm), [http://mtstandard.com/news/state-and-regional/montana-gop-challenges-voter-eligibility/article\\_d27c7157-371d-5cac-9578-52b0d75dd8bc.html](http://mtstandard.com/news/state-and-regional/montana-gop-challenges-voter-eligibility/article_d27c7157-371d-5cac-9578-52b0d75dd8bc.html).
- <sup>111</sup> *Mont. Democratic Party v. Molloy*, 581 F. Supp. 2d 1077, 1079 (D. Mont. 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MDP-Order-10-10-08.pdf> (noting that the challengers’ “theory must be that such voters might compromise the democratic process by going off to college or serving in the military overseas, and forwarding their mail to their new location or to a family member”).
- <sup>112</sup> See Matthew Brown, Assoc. Press, *Montana Dems Drop Voter Challenge Lawsuit*, MTSTANDARD.COM (Oct. 10, 2008, 11:00pm), [http://mtstandard.com/news/state-and-regional/montana-dems-drop-voter-challenge-lawsuit/article\\_ecca34ad-0a42-514f-8b69-d4795ae8c745.html?mode=story](http://mtstandard.com/news/state-and-regional/montana-dems-drop-voter-challenge-lawsuit/article_ecca34ad-0a42-514f-8b69-d4795ae8c745.html?mode=story) (noting that the challenges were withdrawn after a major public outcry); John Bohlinger, Mont. Lt. Gov., Op-Ed, *Republicans Crossed the Line with Voter Purge Attempt*, MTSTANDARD.COM (Oct. 4, 2008, 11:00pm), [http://mtstandard.com/news/opinion/article\\_e0f53cc5-ddb4-5bc3-a42b-e82d567567e7.html](http://mtstandard.com/news/opinion/article_e0f53cc5-ddb4-5bc3-a42b-e82d567567e7.html) (“I urge party elders to take action and promptly withdraw this outrageous effort to challenge the eligibility of legitimate voters, and to call for the removal any Republican Party employees responsible for this.”).
- <sup>113</sup> Katie Cunningham, *Bethel Students Intimidated at Polls*, BETHEL BEACON, Nov. 9, 2007, at 1-2, available at <http://hoosierpundit.blogspot.com/2007/11/more-on-dem-intimidation-of-student.html> (noting that many students “were surprised to encounter challengers” at the polls and that “[s]ome claim they were intimidated during the process”); YaShekia Smalls, *Dems Retain a Majority in Mishawaka*, SOUTH BEND TRIBUNE, Nov. 7, 2007, at B1, available at [http://articles.southbendtribune.com/2007-11-07/news/26797398\\_1\\_democratic-party-3rd-district-democratic-majority](http://articles.southbendtribune.com/2007-11-07/news/26797398_1_democratic-party-3rd-district-democratic-majority); Yonika Willis & May Lee Johnson, *Mishawaka Votes Challenged*, SOUTH BEND TRIBUNE, Nov. 7, 2007, at B1, available at [http://articles.southbendtribune.com/2007-11-06/news/26826574\\_1\\_provisional-ballot-voting-inspector-turnout](http://articles.southbendtribune.com/2007-11-06/news/26826574_1_provisional-ballot-voting-inspector-turnout) (“Many of those with challenged votes are Bethel College students.”).
- <sup>114</sup> See Willis & Johnson, *supra* note 114, at B1.
- <sup>115</sup> See Wickham, *supra* note 26, at A1 (quoting the Hanover town manager and clerk’s recollection that “well over 600” Dartmouth students were challenged at the polls); Omar Sacirbey, *Student Voters Stalled*, VALLEY NEWS, Nov. 6, 2002, available at <http://archive.fairvote.org/righttovote/sacirbey.htm> (describing how “challenges to the voting eligibility of hundreds of Dartmouth students caused long delays in voting yesterday and angered students and non-students alike”).
- <sup>116</sup> *An Act Relative to Challenges to Voters: Hearing on H.B. 1301 Before the S. Comm. on Pub. & Mun. Affairs*, 2012 Gen. Ct., Apr. 3 (N.H. 2012) (statement of Marilyn Williams Black, Moderator, Town of Hanover), audio recording of hearing available at [http://www.gencourt.state.nh.us/Senate/committees/committee\\_details.aspx?cc=S27](http://www.gencourt.state.nh.us/Senate/committees/committee_details.aspx?cc=S27) (describing the problems caused by challenges of Dartmouth students at the polls). See also Marilyn Williams Black, Op-Ed, *Leave Voter Challenge Law Alone*, CONCORD MONITOR, Apr. 12, 2012, available at

<http://www.concordmonitor.com/article/322563/leave-voter-challenge-law-alone?CSAuthResp=1334589086%3Alq3saj8erl061so549njbhhnt6%3ACsUserId|CSGroupId%3Aapproved%3ACE1C4D8806B4B195F3F0DE395C0B95BC&CSUserId=94&CSGroupId=1> (“Despite our efforts, we’ve had problems in the past with out-of-state challengers disrupting the process in an attempt to prevent college students from voting.”).

<sup>117</sup> *An Act Relative to Challenges to Voters: Hearing on H.B. 1301 Before the S. Comm. on Pub. & Mun. Affairs*, 2012 Gen. Ct., Apr. 3 (N.H. 2012) (statement of Marilyn Williams Black, Moderator, Town of Hanover), *audio recording of hearing available at* [http://www.gencourt.state.nh.us/Senate/committees/committee\\_details.aspx?cc=S27](http://www.gencourt.state.nh.us/Senate/committees/committee_details.aspx?cc=S27) (describing the problems caused by challenges of Dartmouth students at the polls).

<sup>118</sup> Eartha Jane Melzer, *Lose Your House, Lose Your Vote*, MICH. MESSENGER (Sept. 10, 2008, 6:42am), <http://michiganmessenger.com/4076/lose-your-house-lose-your-vote>. See also Andrew Keh, *Foreclosures Could Pose Trouble on Election Day*, N.Y. TIMES, Sept. 2, 2010, at A24, available at <http://www.nytimes.com/2010/09/02/us/politics/02voting.html> (recounting the controversy surrounding foreclosure-based challenge plans in Michigan during the 2008 election).

<sup>119</sup> Chisun Lee, *Mich. Foreclosure-Based Challenge Ends in Political, Not Legal, Agreement*, PROPUBLICA (Oct. 21, 2008, 11:29am), <http://www.propublica.org/article/mich-foreclosure-based-voter-challenge-ends-in-political-not-legal-agreement>.

<sup>120</sup> See generally DEBBIE GRUENSTEIN BOCIAN, WEI LI, CAROLINA REID, AND ROBERTO G. QUERICA, CENTER FOR RESPONSIBLE LENDING, *LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 18* (2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf> (“Although the majority of foreclosures have affected white borrowers, African-American and Latino borrowers are almost twice as likely to have lost their homes to foreclosure as non-Hispanic whites.”).

<sup>121</sup> *Herring v. Marion Cnty. Election Bd.*, No. 49D11-0810-MI-047860 (Marion Cnty. Super. Ct. Oct. 24, 2008), available at [http://www.naacpldf.org/files/case\\_issue/Herring%20v%20Marion%20County%20Order.pdf](http://www.naacpldf.org/files/case_issue/Herring%20v%20Marion%20County%20Order.pdf) (entering an order pursuant to an agreement between the county election board and the local NAACP).

<sup>122</sup> See Kevin O’Neal, *NAACP Suit Filed To Protect Voters; Talks Under Way To Assure Foreclosure Lists Won’t Be Used*, INDIANAPOLIS STAR, Oct. 24, 2008, at 1; Brendan O’Shaughnessy & Heather Gillers, *Dems Set To Fight for Foreclosed Voters; GOP Won’t Rule Out Using Residency To Challenge a Ballot*, INDIANAPOLIS STAR, Oct. 3, 2008, at 1.

<sup>123</sup> Ed Fitzpatrick, *Disabled Voters Should Not Be Held to Different Criteria*, PROVIDENCE JOURNAL, Dec. 28, 2010, at 4 [hereinafter *Different Criteria*] (describing witness reports of the incident that were included in a letter sent by disability rights advocates to election officials); Ed Fitzpatrick, *Disability Law Group Probes Stance Taken by Poll Watchers*, PROVIDENCE JOURNAL, Nov. 16, 2010, at 4 [hereinafter *Group Probes Stance*] (describing complaints that poll workers were pressured by poll-watchers to ask voters impermissible questions about their voting qualifications).

<sup>124</sup> Fitzpatrick, *Group Probes Stance*, *supra* note 124, at 4

<sup>125</sup> Philip Marcelo, *Elections Board To Consider New Voter-ID Rules*, PROVIDENCE JOURNAL, Feb. 22, 2012, at 3 (describing a proposal by election officials to amend state regulations governing polling place conduct and noting that the “plan comes in response to an issue of alleged voter intimidation in Burrillville in 2010, when Republican poll watchers apparently challenged the voting ability of some persons with disabilities”); Fitzpatrick, *Different Criteria*, *supra* note 124, at 4 (“The state Board of Elections has asked the state police to investigate whether poll watchers violated election law in Burrillville on Election Day.”).

<sup>126</sup> Michael Moss, *Big G.O.P. Bid To Challenge Voters at Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, at A1, available at <http://www.nytimes.com/2004/10/23/politics/campaign/23vote.html> (quoting a campaign operative who explained that the party’s “recruits will be taught how to challenge mentally disabled voters who are assisted by anyone other than their legal guardians”); Mary Otto, *Advocates Encourage, Protect Disabled Voters*, WASH. POST, Oct. 31, 2004, at C04, available at <http://www.washingtonpost.com/wp-dyn/articles/A12367-2004Oct30.html> (“In Ohio, for instance, local Republican Party activists pledged last week to challenge mentally disabled voters not accompanied by a legal guardian.”).

<sup>127</sup> See Otto, *supra* note 127, at C04 (“The plan provoked a protest from disabled advocates, who have said state law protects voters from such challenges”).

<sup>128</sup> See ALASKA STAT. § 15.15.210; 10 ILL. COMP. STAT. 5/17-10; ARIZ. REV. STAT. ANN. § 16-592(A); ARK. CODE ANN. § 7-5-312(h); COLO. REV. STAT. ANN. § 1-9-203; CONN. GEN. STAT. ANN. § 9-232C; DEL. CODE ANN. tit. 15, §§ 4936, 4937(c); FLA. STAT. ANN. § 101.111; HAW. REV. STAT. § 11-25(a); IDAHO CODE ANN. § 34-1111; IND. CODE ANN. § 3-10-1-9; IOWA CODE ANN. §§ 49.79-80; KY. REV. STAT. ANN. § 117.245(2); LA. REV. STAT. ANN. § 18:565; ME. REV. STAT. ANN. tit. 21-A, § 673; MD. CODE, ELEC. LAW, § 10-312(c); MASS. GEN. LAWS ANN. ch. 54, § 85A; MICH. COMP. LAWS ANN. § 168.729; MINN. STAT. ANN. § 204C.12(4); MISS. CODE ANN. § 23-15-571; MO. REV. STAT. § 115.429(2); MONT. CODE ANN. § 13-13-301; NEB. REV. STAT. ANN. §§ 32-927-932; N.H. REV. STAT. ANN. §§ 659:27, 659:27-a, 666:4; N.J. STAT. ANN. §§ 19:7-1, 19:15-18.2; N.M. STAT. ANN. § 1-12-20; N.Y. ELEC. LAW §§ 8-504(1)-(2); NEV. REV. STAT. ANN. § 293.303(2); N.C. GEN. STAT. ANN. § 163-88; N.D. CENT. CODE ANN. § 16.1-05-06; 25 PA. STAT. ANN. §§ 3050(d), 3051, 296; R.I. GEN. LAWS ANN. § 17-19-22; S.C. CODE ANN. §§ 7-13-810, -830; S.D. CODIFIED LAWS § 12-18-10; TENN. CODE ANN. § 2-7-123; UTAH CODE ANN. § 20A-3-105.5(2); VT. STAT. ANN. tit. 17 § 2564; VA. CODE ANN. § 24.2-651; WIS. STAT. ANN. § 6.925. Georgia allows challenges to be made on Election Day but only at the board of registrars’ office. See GA. CODE ANN. § 21-2-230.

<sup>129</sup> In addition to the time pressures of deciding challenges quickly, election officials are also often under pressure to prevent aggressive poll-watchers and challengers from causing disorder at the polls. See, e.g., Searer, *supra* note 26 (describing “poll workers who dissolved into tears after dealing with aggressive poll watchers”).

<sup>130</sup> See *supra* Section IV.A (describing how citizen challengers often rely on inaccurate or unreliable methods for identifying ineligible voters); Karen Blackstone, Note, *Full and Fair Elections: Political Party Representatives and State Law*, 4 GEO. J.L. & PUB. POLY 213, 220 (2006) (“Challengers do not have the necessary resources to investigate, prior to election day, questionable registrations, and it is unreasonable to expect them to have personal knowledge of every voter in their precinct, particularly if they are operating as challengers away from their home precinct.”).

<sup>131</sup> Compare MICH. COMP. LAWS §§ 168.727-29 (requiring that, for every challenge made at the polls, election officials wait until all unchallenged voters in the polling place have cast their ballots before informing the challenged voter of his or her rights, recording identifying information for both the challenger and the challenged voter, documenting the reasons for the challenge, tendering an oath to the challenged voter, and questioning the voter about his or her voting qualifications), with FLA. STAT. § 101.111 (requiring challenged voters to cast a provisional ballot and denying them the opportunity to defend against challenges at the polls).

<sup>132</sup> 10 ILL. COMP. STAT. 5/17-10 (“In addition to such an affidavit, the person so challenged shall provide to the judges of election proof of residence by producing two forms of identification showing the person’s current residence address . . . or the person shall procure a witness personally known to the judges of election, and resident in the precinct (or district), or who shall be proved by some legal voter of such precinct or district, known to the judges to be such [in order to verify the challenged person’s qualifications].”).

<sup>133</sup> See ALASKA STAT. § 15.15.210 (requiring challenged voters to complete a declaration affirming their qualifications); 10 ILL. COMP. STAT. 5/17-10 (oath and identification or witness); ARIZ. REV. STAT. ANN. § 16-592(A) (affidavit and possibly examination); ARK. CODE ANN. § 7-5-312(h) (affirmation); COLO. REV. STAT. ANN. § 1-9-203 (examination); CONN. GEN. STAT. ANN. § 9-232C (signature); IDAHO CODE ANN. § 34-1111 (oath); IND. CODE ANN. § 3-10-1-9 (oath or written affidavit); KY. REV. STAT. ANN. § 117.245(2) (written oath); MD. CODE, ELEC. LAW, § 10-312(c) (identification or affirmation); MICH. COMP. LAWS ANN. § 168.729 (oath and examination); MINN. STAT. ANN. § 204C.12(4) (signature and possible examination); MO. REV. STAT. § 115.429(2) (confirmation of identity); N.C. GEN. STAT. ANN. § 163-88 (oath and examination); NEB. REV. STAT. ANN. §§ 32-927-932 (oath and possible examination); N.Y. ELEC. LAW §§ 8-504(1)-(2) (oath and possible examination); NEV. REV. STAT. ANN. § 293.303(2) (oath or affirmation); 25 PA. STAT. ANN. §§ 3050(d), 3051, 296 (witness, oath, or affidavit, depending on challenge grounds); TENN. CODE ANN. § 2-7-123 (oath); UTAH CODE ANN. § 20A-3-105.5(2) (identification); VA. CODE ANN. § 24.2-651 (explanation of rights and possible examination); WIS. ADMIN. CODE GAB § 9.02(3) (oath or affirmation).

<sup>134</sup> Two states — Montana and North Carolina — require the poll challenger to produce actual affirmative evidence of the voter’s ineligibility. *See* MONT. CODE ANN. § 13-13-301(1) & MONT. ADMIN. R. 44.3.2109(2) (requiring challenges to be rejected unless the challenger has proven that a voter is ineligible by a “preponderance of the evidence”); N.C. GEN. STAT. ANN. § 163-90.1(b) (“No challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated.”). Thirteen other states require the challenger to produce an affidavit but do not require any additional proof from the poll challenger beyond his or her word that the challenge is valid. *See* ARK. CODE ANN. § 7-5-312(h); COLO. REV. STAT. § 1-9-202; FLA. STAT. ANN. § 101.111(1); IND. CODE ANN. § 3-11-8-21; IOWA CODE ANN. § 49.79; KY. REV. STAT. ANN. §§ 117.245(2) & 117.316(2); ME. REV. STAT. ANN. tit. 21-A, § 673(1); MD. CODE, ELEC. LAW, § 10-312; MINN. STAT. ANN. § 204C.12(2); N.H. REV. STAT. ANN. § 659:27-a; N.J. STAT. ANN. § 19:15-18.2; NEV. REV. STAT. ANN. § 293.303(1); VA. CODE ANN. § 24.2-651.

<sup>135</sup> *See* VA. CODE ANN. § 24.2-651 (“Any qualified voter may, and the officers of election shall, challenge the vote of any person who is listed on the pollbook but is known or *suspected* not to be a qualified voter.” (emphasis added)); S.C. CODE ANN. § 7-13-810 (“[A]ny elector or qualified watcher may, challenge the vote of a person who may be known or *suspected* not to be a qualified voter.” (emphasis added)).

<sup>136</sup> *See* CAL. ELEC. CODE § 14240(c) (requiring election officials to determine whether any allegations of voter ineligibility that they receive are “accompanied by evidence constituting probable cause to justify or substantiate a challenge”); COLO. REV. STAT. ANN. § 1-9-101(1)(a) (“The written challenge shall state the precinct number, the name of the challenged registrant, the basis for such challenge, the facts supporting the challenge, and some documentary evidence to support the basis for the challenge, and shall bear the signature and address of the challenger.”); MONT. CODE ANN. § 13-13-301(1) (allowing challenges to be made by “filling out and signing an affidavit stating the grounds of the challenge and providing any evidence supporting the challenge to the election administrator or, on election day, to an election judge”); MONT. ADMIN. R. 44.3.2109(2), *available at* <http://mtrules.org/gateway/ruleno.asp?RN=44.3.2109> (“Any challenge made under this rule shall be decided in favor of the challenged elector, unless it is demonstrated by a preponderance of the evidence that the challenged elector should not be permitted to vote.”); N.C. GEN. STAT. ANN. § 163-85(d) (“The burden of proof shall be on the challenger [and] . . . [i]f the challenger presents evidence and if the board finds that probable cause exists that the person challenged is not qualified to vote, then the board shall schedule a hearing on the challenge.”); N.Y. ELEC. LAW § 5-220(1) (requiring challengers to submit an affidavit identifying the reasons for the challenge as well as the factual basis and sources of information for his or her allegations); R.I. GEN. LAWS ANN. § 17-9.1-28 (requiring pre-election challengers to submit an affidavit “setting forth evidence that would create a reasonable cause to suspect that the challenged voter is not in fact eligible”); UTAH CODE ANN. § 20A-3-202.3(1) (requiring pre-election challengers to provide a signed statement that contains the basis for the challenge, a description of facts and circumstances to support the allegations, and an affirmation that the challenger exercised due diligence in verifying the allegations); WASH. REV. CODE ANN. § 29A.08.810(3) (requiring challengers to submit a signed affidavit containing the factual basis for his or her allegations and “swearing that, to his or her personal knowledge and belief, having exercised due diligence to personally verify the evidence presented, the challenged voter either is not qualified to vote or does not reside at the address given on his or her voter registration record”). Four other states’ statutes require that pre-election challengers affirm that their claims are based on “personal knowledge” but, unlike the statutes identified above, do not require challengers to actually identify the source or basis of that knowledge. *See* 10 ILL. COMP. STAT. ANN. 5/4-12; 10 ILL. COMP. STAT. ANN. 5/5-15; MINN. STAT. ANN. § 201.195(1); NEV. REV. STAT. ANN. § 293.547(2); TEX. ELEC. CODE ANN. § 16.092.

Several other states require pre-election challengers to submit a written statement identifying the grounds for contesting the voter’s qualifications but these requirements are generally very limited in scope. *See, e.g.*, HAW. REV. STAT. § 11-25(a) (“The challenge shall be in writing, setting forth the grounds upon which it is based, and be signed by the person making the challenge.”); MICH. COMP. LAWS ANN. § 168.512 (“Any elector of the municipality may challenge the registration of any registered elector by submitting to the clerk of that municipality a written affidavit that such elector is not qualified to vote, which affidavit shall specify the grounds upon which the challenged elector is disqualified.”); WIS. STAT. ANN. § 6.48(1)(a) (requiring that the challenger submit “an affidavit stating that the elector is not qualified to vote and the reasons therefor”).

<sup>137</sup> COLO. REV. STAT. ANN. § 1-9-101(1)(a) (requiring that pre-election challenges be submitted at least 60 days before an election in order to be adjudicated by Election Day); 10 ILL. COMP. STAT. ANN. 5/4-12 (13 days for counties with under 500,000 people); 10 ILL. COMP. STAT. ANN. 5/5-15 (13 days for counties with over 500,000 people); IOWA CODE ANN. § 48A.14(1) (70 days, except for newly registered voters, who may always be challenged within 20 days of



registering); MASS. GEN. LAWS ANN. ch. 51, § 48 (14 days in a city, 4 days in a town); NEV. REV. STAT. ANN. § 293.547(1); N.C. GEN. STAT. § 163-85(a); OHIO REV. CODE ANN. § 3503.24(A) (20 days); TEX. ELEC. CODE ANN. § 16.0921(c) (75 days but only for residency-based challenges); UTAH CODE ANN. § 20A-3-202.3(1)(a) (21 days before the start of early voting); VA. CODE ANN. § 24.2-429 (60 days for November general elections, 30 days for other elections); WASH. REV. CODE ANN. § 29A.08.820(1) (45 days, except for newly registered voters, who may always be challenged within 10 days of registering); R.I. ADMIN CODE § 23-1-9:1, *available at* <http://sos.ri.gov/documents/archives/regdocs/released/pdf/BOE/Kwall-17-9.1-28challenge%20voter%20reg%20final.pdf> (20 days).

<sup>138</sup> FLA. STAT. § 101.111(1)(c) (“[A] challenge in accordance with this section may be filed in advance with the supervisor of elections no sooner than 30 days before an election.”). Although Nevada similarly requires pre-election challenges to be filed less than 30 days before an election, its challenger statute still imposes a quiet period of 25 days before Election Day. *See* NEV. REV. STAT. ANN. § 293.547(1).

<sup>139</sup> Moy & Post, *supra* note 111, *available at* [http://mtstandard.com/news/state-and-regional/montana-gop-challenges-voter-eligibility/article\\_d27c7157-371d-5cac-9578-52b0d75dd8bc.html](http://mtstandard.com/news/state-and-regional/montana-gop-challenges-voter-eligibility/article_d27c7157-371d-5cac-9578-52b0d75dd8bc.html) (quoting the Butte-Silver Bow clerk and recorder).

<sup>140</sup> *See* ALASKA STAT. § 15.15.210 (requiring challenged voters to complete a declaration affirming their qualifications); 10 ILL. COMP. STAT. 5/17-10 (oath and identification or witness); ARIZ. REV. STAT. ANN. § 16-592(A) (affidavit and possibly examination); ARK. CODE ANN. § 7-5-312(h) (affirmation); COLO. REV. STAT. ANN. § 1-9-203 (examination); CONN. GEN. STAT. ANN. § 9-232C (signature); IDAHO CODE ANN. § 34-1111 (oath); IND. CODE ANN. § 3-10-1-9 (oath or written affidavit); KY. REV. STAT. ANN. § 117.245(2) (written oath); MD. CODE, ELEC. LAW, § 10-312(c) (identification or affirmation); MICH. COMP. LAWS ANN. § 168.729 (oath and examination); MINN. STAT. ANN. § 204C.12(4) (signature and possible examination); MO. REV. STAT. § 115.429(2) (confirmation of identity); N.C. GEN. STAT. ANN. § 163-88 (oath and examination); NEB. REV. STAT. ANN. §§ 32-927-932 (oath and possible examination); N.Y. ELEC. LAW §§ 8-504(1)-(2) (oath and possible examination); NEV. REV. STAT. ANN. § 293.303(2) (oath or affirmation); 25 PA. STAT. ANN. §§ 3050(d), 3051, 296 (witness, oath, or affidavit, depending on challenge grounds); TENN. CODE ANN. § 2-7-123 (oath); UTAH CODE ANN. § 20A-3-105.5(2) (identification); VA. CODE ANN. § 24.2-651 (explanation of rights and possible examination); WIS. ADMIN. CODE GAB § 9.02(3) (oath or affirmation).

<sup>141</sup> The potential for polling place disruptions is even greater in states that allow poll challengers themselves to participate in questioning the challenged voter about his or her qualifications. ALASKA STAT. § 15.15.210 (allowing citizen challengers to question voters at the polls “if the questioner has good reason to suspect that the questioned person is not qualified”); IOWA CODE ANN. § 49.80(2) (“The precinct election official may permit the challenger to participate in such questions [of the challenged voter].”); N.J. STAT. ANN. § 19:15-18 (granting the challenger “the power and right to ask all questions which are suitable and necessary to determine [the challenged voter’s] right.”).

<sup>142</sup> ARIZ. REV. STAT. ANN. § 16-552(E); COLO. REV. STAT. ANN. § 1-9-101(1)(a); DEL. CODE ANN. tit. 15, § 2012; 10 ILL. COMP. STAT. ANN. 5/4-12; FLA. STAT. ANN. § 101.111(1)(c); GA. CODE ANN. § 21-2-229(b); HAW. REV. STAT. § 11-25(a); 10 ILL. COMP. STAT. ANN. 5/5-15; MICH. COMP. LAWS ANN. §§ 168.512, .509cc; IOWA CODE ANN. § 48A.15; N.Y. ELEC. LAW § 5-220(1); 25 PA. STAT. ANN. § 1329(c); S.C. CODE ANN. § 7-5-230; VA. CODE ANN. § 24.2-429; W. VA. CODE ANN. § 3-2-28(b); WIS. STAT. ANN. § 6.48(1)(a).

<sup>143</sup> DEL. CODE ANN. tit. 15, § 2012 (requiring that, for every registration challenge filed, “the registration officer . . . administer to the person so challenged an oath or affirmation.”); 10 ILL. COMP. STAT. ANN. 5/4-12; 10 ILL. COMP. STAT. ANN. 5/5-15 (requiring all challenged voters to appear for a hearing to determine their eligibility); MICH. COMP. LAWS ANN. §§ 168.512, .509cc (“If within the 30-day period the person challenged shall fail to appear and be sworn or to file an affidavit, or if his statements do not show him to be a qualified elector of the municipality, the clerk shall forthwith cancel his registration.”); 25 PA. STAT. ANN. § 1329(c) (“An individual who is challenged must respond to the challenge affidavit . . . in a written statement sworn or affirmed by the individual. The challenged individual must produce such other evidence as may be required to satisfy the registrar or commissioner as to the individual’s qualifications as a qualified elector.”); VA. CODE ANN. § 24.2-429 (requiring city and county registrars to schedule a hearing on every challenge and to cancel the registration of any challenged voter who fails to appear for such a hearing); W. VA. CODE ANN. § 3-2-28(b) (“Upon the receipt of a challenge, the clerk of the county commission shall mail a notice of challenge to the registrant, setting forth that the voter’s registration will be canceled if the voter

does not appear in person during business hours at the clerk's office within a period of thirty days from the mailing of the notice and present evidence of his or her eligibility.”); WIS. STAT. ANN. § 6.48(1)(a) (requiring election officials to hold a hearing for every pre-election challenge they receive and requiring the challenged voter to appear at the hearing).

<sup>144</sup> See CAL. ELEC. CODE § 14240(c).

<sup>145</sup> CAL. ELEC. CODE § 14240(c) (“If any member of a precinct board receives, by mail or otherwise, any document or list concerning the residence or other voting qualifications of any person or persons, with the express or implied suggestion, request, or demand that the person or persons be challenged, the board member shall first determine whether the document or list contains or is accompanied by evidence constituting probable cause to justify or substantiate a challenge.”); MASS. GEN. LAWS ANN. ch. 51, § 48 (“[T]he registrars shall examine into such [challenge] and, if satisfied that there is sufficient ground therefor, they shall summon the person complained of to appear before them at a certain place and time before the next primary or election or town meeting to answer to the matters set forth in the complaint.”); MONT. CODE ANN. § 13-13-301(3) (allowing election administrators to reject any challenges “without need for further information” if they deem the challenger’s claims “insufficient”); N.C. GEN. STAT. ANN. § 163-85(d) (“When a challenge is made, the county board of election shall schedule a preliminary hearing on the challenge, and shall take such testimony under oath and receive such other evidence proffered by the challenger as may be offered.”); UTAH CODE ANN. § 20A-3-202.3(2)(a) (“If the challenge is not in the proper form or if the basis for the challenge does not meet the requirements of this part, the election officer may dismiss the challenge and notify the filer in writing of the reasons for the dismissal.”); WASH. REV. CODE ANN. § 29A.08.840(1) (“If the challenge is not in proper form or the factual basis for the challenge does not meet the legal grounds for a challenge, the county auditor may dismiss the challenge and notify the challenger of the reasons for the dismissal.”); R.I. ADMIN. CODE § 23-1-9:1, available at <http://sos.ri.gov/documents/archives/regdocs/released/pdf/BOE/Kwall-17-9.1-28challenge%20voter%20reg%20final.pdf> (“Any challenge not in conformance with this regulation will be returned to the challenger.”).

<sup>146</sup> This section focuses on changes enacted since 2000 because many election officials and commentators attribute the recent rise in poll-watcher and challenger activity to the spike in the public’s distrust of the election system after the Florida recount fiasco. See, e.g., Jason Belmont Conn, *Of Challengers and Challenges*, 37 U. TOL. L. REV. 1021, 1021-22 (2006) (explaining that the disputed 2000 presidential election likely led to a rise in the number of challengers at the polls in subsequent elections); Greene & Cox, *supra* note 1, at A-13 (“Because of widespread scrutiny of election procedures since the 2000 presidential race, poll watchers will plant themselves at precincts from the time they open at 7 this morning [Election Day 2004] until the time they close at 7 p.m.”). See also R. Michael Alvarez, Thad E. Hall, & Morgan Llewellyn, *Are Americans Confident Their Ballots Are Counted?* 70 J. POL. 754, 754 (2008) (noting that “questions persist about the degree of confidence and trust that American citizens and voters have in their electoral process, given that problems again arose in the 2004 presidential election . . . and in the recent 2006 midterm election”); Ray Martinez, III, *Greater Impartiality In Election Administration: Prudent Steps Toward Improving Voter Confidence*, 5 ELECTION L.J. 235, 239 (2006) (“[T]he problems in election administration, particularly since 2000 . . . have adversely affected the opinions of many Americans regarding the fundamental fairness of our electoral process.”); Richard L. Hasen, *Beyond The Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 942-43 (2005) (“In 1996, about 9.6% of the public . . . thought the manner of conducting the most recent presidential election was ‘somewhat unfair’ or ‘very unfair.’ The number skyrocketed to 37% of the public . . . in 2000 following the Florida debacle.”).

<sup>147</sup> See *supra* Section IV.B; Dao & Liptak, *supra* note 99, at A1 (“The battle over Election Day challenges has been most intense in Ohio, not only because the race here is so close and so vital to President Bush and Senator John Kerry, but also because the Republican Party has announced larger and more aggressive plans to challenge voters here than in other states.”).

<sup>148</sup> See Editorial, *Paper Tiger Caged: Blackwell’s Reversal of Edict on Voting Machines Will Speed Needed Changes*, COLUMBUS DISPATCH, Apr. 24, 2005, at 6D [hereinafter *Paper Tiger*] (describing a Republican-drafted bill that would limit the number of partisan poll-watchers permitted inside the polling place as a “response to worries in the past election that polling places would be crowded by partisan challengers to voters’ eligibility”); Mark Niquette, *Take Politics out of the Voting Process, Democrats Say*, COLUMBUS DISPATCH, Mar. 3, 2005, at 10C (describing how Democratic legislators

planned to introduce legislation to eliminate Election Day challengers “in response to problems that surfaced during the election last fall in Ohio”).

- <sup>149</sup> See Act of Jan. 31, 2006 (H.B. 3), § 1, 2006 Ohio Laws 5552, 5677 (codified as amended at OHIO REV. CODE ANN. § 3505.20) (effective since May 2, 2006), *available at* [http://www.legislature.state.oh.us/BillText126/126\\_HB\\_3\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText126/126_HB_3_EN_N.html).
- <sup>150</sup> Prior to 2006, candidates were allowed to appoint two representatives to each polling place — one to serve as a “witness” and one to serve as a “challenger.” The 2006 legislation, however, limited each candidate to only one “observer” (without the authority to challenge voters) per precinct. See H.B. 3, at § 1, 126th Gen. Assemb. (effective since May 2, 2006), *available at* [http://www.legislature.state.oh.us/BillText126/126\\_HB\\_3\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText126/126_HB_3_EN_N.html). See also *Paper Tiger*, *supra* note 149 (describing an early version of the 2006 legislation that would limit the number of partisan poll-watchers permitted inside the polling place as a “response to worries in the past election that polling places would be crowded by partisan challengers”).
- <sup>151</sup> H.B. 3, at § 1 (codified as amended at OHIO REV. CODE ANN. § 3505.20). A provision of Ohio’s new challenger statute, governing challenges made by election officials against naturalized citizen voters, was struck down as unconstitutional in 2006. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 824 (N.D. Ohio 2006)). However, the fundamental change that the 2006 legislation made to the state’s challenger law — namely, the prohibition on private citizen challenges inside the polls — remains in effect today.
- <sup>152</sup> Act of June 22, 2003 (H.B. 1549), at § 57, 2003 Tex. Law Serv. ch 1315 (Vernon’s) (effective since Jan. 1, 2004), *available at* <http://www.legis.state.tx.us/billlookup/Text.aspx?LegSess=78R&Bill=HB1549>. For more on the history of Texas’s Election Day challenger law prior to its repeal, see *supra* Section III.E.
- <sup>153</sup> TEX. ELEC. CODE § 63.010(a) (LexisNexis 2002) (repealed 2003). See also TEX. ELEC. CODE §§ 33.001-005 (authorizing local political party organizations, candidates, and referendum campaign committees to appoint poll-watchers to observe the conduct of an election).
- <sup>154</sup> TEX. ELEC. CODE § 63.010(d) (LexisNexis 2002) (repealed 2003).
- <sup>155</sup> See TEX. ELEC. CODE § 63.010 (LexisNexis 2002) (repealed 2003).
- <sup>156</sup> Act of Mar. 29, 2006 (H.B. 479), § 1, 2006 Ala. Laws Act 496, 501-02 (codified as amended at ALA. CODE § 11-46-38) (repealing a provision that permitted “[a]ny qualified elector of a ward” to challenge other voters in the same ward during an election).
- <sup>157</sup> See Wickham *supra* note 107, at 13A, *available at* [http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm).
- <sup>158</sup> See *supra* Section III.
- <sup>159</sup> Ohio’s challenger statute, for instance, did nothing to block a state political party from developing a challenge plan that targeted minority voting precincts in 2004. See *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 531 (2004) (citing an expert who observed that one party’s plan to station challengers in precincts across the state would result in 97% of first-time African-American voters facing challengers on Election Day compared to just 14% of first-time white voters), *rev’d on other grounds*, *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).
- <sup>160</sup> Disputes over discriminatory voter challengers in Ohio garnered national attention in 2004. See *supra* Section IV.E. In Texas, voter challengers were routinely the subject of election-related controversies — often involving allegations of discrimination — prior to the repeal of the state’s Election Day challenger statute in 2003. See Salatheia Bryant, *Turnout Strong for Tight Race; Complaints Leveled by Voters, Monitors*, HOUS. CHRON., Dec. 2, 2001, at A11 (“Disputes that arose involved the rights and limitations of poll watchers, confusion over polling locations and interpretation of affidavits of voter challenge, a process designed to resolve disputes over voter eligibility.”); R.A. Dyer, *Reno Asked To Look into Poll Hostility; Stockman Supporters Accused of Intimidation*, HOUS. CHRON., Dec. 4, 1996, at A29 (quoting an attorney who

observed that one candidate’s “poll watchers appear to be targeting challenges toward African-American voters”); Peter Applebome, *Battle for Hispanic Voters in Texas Intensifies*, N.Y. TIMES, Oct. 30, 1988, at 31 (quoting a civil rights attorney who said that “new directives giving increased powers to poll watchers to challenge questionable voters and verify registration changed their role from observers to ‘quasi police’”).

<sup>161</sup> Although Ohio, Texas, and Alabama were the only states to repeal their Election Day challenger statutes in recent years, they were not the only states to consider the idea. In 2011, the North Dakota House of Representatives passed House Bill 1447, which would have eliminated poll challengers from state elections. H.B. 1447, § 7, 62d Leg. Assemb. (N.D. 2011), available at <http://www.legis.nd.gov/assembly/62-2011/documents/11-0688-04000.pdf>. The bill, which also included new identification requirements for in-person voting, failed to pass the North Dakota Senate before the end of the legislative session.

<sup>162</sup> No state, during this period, has lowered the evidentiary burden that challengers must satisfy.

<sup>163</sup> See Act of May 6, 2004 (H.P. 1418, L.D. 1916), § B-6, 2004 Me. Legis. Serv. ch. 688 (codified as amended at ME. REV. STAT. tit. 21-A, § 673(1)(A)), available at <http://www.mainelegislature.org/ros/LOM/LOM121st/15Pub651-700/Pub651-700-139.htm#TopOfPage> (“A voter may challenge another voter only upon personal knowledge or a reasonably supported belief that the challenged voter is unqualified.”); Act of June 13, 2007 (A.B. 569), § 27, 2007 Nev. Stat. 2580, 2588-90 (codified as amended at NEV. REV. STAT. § 293.303), available at [http://www.leg.state.nv.us/statutes/74th/Stats200721.html#CHz478\\_zABz569](http://www.leg.state.nv.us/statutes/74th/Stats200721.html#CHz478_zABz569) (requiring challengers to submit a written affidavit, signed under penalty of perjury, affirming that the challenge is based on the challenger’s “personal knowledge”).

<sup>164</sup> Act of June 6, 2005 (S.B. 05-206), § 41, 2005 Colo. Sess. Laws 1427, 1455 (codified as amended at COLO. REV. STAT. § 1-9-202), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2005a/sl\\_310.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/sl2005a/sl_310.pdf).

<sup>165</sup> See Assoc. Press, *Poll Challenge Upsets D.C. Student Voter*, DESERET NEWS, Dec. 16, 1996, at A4, available at <http://news.google.com/newspapers?id=-PNYAAAAIBAJ&sjid=TfMDAAAAIBAJ&dq=brian-o-connor%20georgetown%20challenges%20voter&pg=3297%2C4145957>.

<sup>166</sup> Act of Dec. 22, 2000 (Act 13-538), § 2, 2000 D.C. Laws 13-251 (West) (codified as amended at D.C. CODE § 1-1001.09). The District’s new challenger law also included explicit prohibitions on discriminatory challenges (“[A] voter shall not be challenged solely on the basis of characteristics or perceived characteristics not directly related to the challenged voter’s status as a registered qualified elector, including race, color, religion, sex, personal appearance, sexual orientation, matriculation status, political affiliation, or physical handicap.”). *Id.*

<sup>167</sup> See Paola Singer, *How, Not Who, May Be Obstacle for Youth Vote*, NEWSDAY, Oct. 23, 2009, available at <http://inside.bard.edu/cflc/projects/American%20Presidency/BushKerry/How.htm> (describing reports of challenges to student voters at Dartmouth in 2002); Sacirbey, *supra* note 116, available at <http://archive.fairvote.org/righttovote/sacirbey.htm> (noting that “challenges to the voting eligibility of hundreds of Dartmouth students caused long delays in voting yesterday and angered students and non-students alike”).

<sup>168</sup> Act of July 23, 2010 (H.B. 1477), § 366:5, 2010 N.H. Laws ch. 366 (codified as amended at N.H. REV. STAT. ANN. § 569:27-a), available at <http://www.gencourt.state.nh.us/legislation/2010/HB1477.html> (requiring challengers to provide “the specific source of the information or personal knowledge” on which every challenge is based).

<sup>169</sup> See, e.g., Hertz, *supra* note 110, at 5A (noting that Dutchess County, NY, election officials anticipated future disputes over challenges to homeless voters and student voters); Dan McKay, *Poll Workers Get Ready for Anything: Voting Tips*, ALBUQUERQUE JOURNAL, Oct. 31, 2004, at B1 (quoting a county election official who predicted that the large number of poll challengers expected on Election Day would create a “touchy situation” for poll workers); Steven G. Vegh, *Proof of Fraud Still Being Collected, Group Says; The Election Day Behavior of the Anti-Gay Rights Group Has Sparked an Effort To Tighten Rules for Challenging Voters*, PORTLAND PRESS HERALD, Nov. 21, 1995, at B1 (describing the Maine Secretary of State’s efforts to tighten restrictions on challenger activity).

Election officials have also helped beat back potentially harmful changes to state challenger laws. Earlier this year, an association of town clerks in New Hampshire successfully rallied opposition to defeat a bill that would have repealed the state’s current requirement that poll challenges be made in writing. See *An Act Relative to Challenges to*

*Voters: Hearing on H.B. 1301 Before the S. Comm. on Pub. & Mun. Affairs*, 2012 Gen. Ct., Apr. 3 (N.H. 2012) (statements of Reps. Kathleen Hoelzel & James Belanger, Members, N.H. House of Representatives), *audio recording of hearing available at* [http://www.gencourt.state.nh.us/Senate/committees/committee\\_details.aspx?cc=S27](http://www.gencourt.state.nh.us/Senate/committees/committee_details.aspx?cc=S27) (describing the difficulties that local election officials face in deciding oral challenges and noting that election officials from thirty-eight towns across New Hampshire favor the writing requirement). *See also* Kevin Landrigan, *Bill Letting Anyone Contest Voters Dies*, NASHUA TELEGRAPH, Apr. 3, 2012, *available at* <http://www.nashuatelegraph.com/newsstatenewengland/955883-227/bill-letting-anyone--contest-voters-dies.html>.

<sup>170</sup> *See Hearing on A.B. 569 Before the Assemb. Comm. on Elections, Procedures, Ethics, & Constitutional Amendments*, 2007 Leg., 74th Sess. (Nev. 2007) (testimony of Larry Lomax, Registrar of Voters, Clark County), *available at* <http://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/EPE/Final/742.pdf>. The legislature adopted the knowledge requirement shortly after hearing.

<sup>171</sup> *Id.* Lomax offered similar testimony at a subsequent legislative hearing before a committee of the Nevada Senate, explaining that, without the proposed affidavit requirement, “there are no restrictions placed upon someone issuing a challenge. . . . Right now, if I challenge you as not being a citizen, you would have to fill out an oath affirming you are a citizen. The challenger does not have to do anything.” *Hearing on A.B. 569 Before the Sen. Comm. on Leg. Operations & Elections*, 2007 Leg., 74th Sess. (Nev. 2007) (testimony of Larry Lomax, Registrar of Voters, Clark County), *available at* <http://www.leg.state.nv.us/Session/74th2007/Minutes/Senate/LA/Final/1178.pdf>. For more on the mass challenges filed in Nevada before the 2004 election, see Erin Neff, *Challenge to 17,000 Voters Blocked*, LAS VEGAS REVIEW-JOURNAL, Oct. 12, 2004, at B3 (describing a “late challenge to 17,000 Democratic voters in Clark County” that was ultimately blocked by election officials).

<sup>172</sup> *See* Act of July 23, 2010 (H.B. 1477), § 366:5, 2010 N.H. Laws ch. 366 (codified as amended at N.H. REV. STAT. ANN. § 569:27-a), *available at* <http://www.gencourt.state.nh.us/legislation/2010/HB1477.html> (requiring challengers to complete a signed affidavit identifying the challenger’s name, contact information, party affiliation, grounds for making the challenge, and source of information supporting the challenge); Act of Apr. 22, 2008 (H.F. 2620), § 87, 2008 Iowa Acts ch. 1115 (codified as amended at IOWA CODE § 49.79), *available at* [http://www.legis.state.ia.us/IACODE\(select the “2009-1993” link under “Iowa Acts” heading and search for Chapter 1115 of the 2008 volume of Iowa Acts\) \(requiring challengers to complete and sign a written form that includes the challenger’s contact information and a statement affirming that the challenger understands the penalties for submitting a challenge containing false challenge\); Act of June 13, 2007 \(A.B. 569\), § 27, 2007 Nev. Stat. 2580, 2588-90 \(codified as amended at NEV. REV. STAT. § 293.303\), \*available at\* \[http://www.leg.state.nv.us/statutes/74th/Stats200721.html#CHz478\\\_zABz569\]\(http://www.leg.state.nv.us/statutes/74th/Stats200721.html#CHz478\_zABz569\) \(allowing challenges to be initiated orally but adding a new requirement that challengers submit an affidavit, signed under penalty of perjury, affirming that the challenge is based on the challenger’s “personal knowledge”\); Act of Mar. 15, 2007 \(S.B. 1034\), § 1, 2007 Va. Acts ch. 375 \(codified as amended at VA. CODE ANN. § 24.2-651\), \*available at\* <http://lis.virginia.gov/cgi-bin/legp604.exe?071+ful+CHAP0375> \(requiring challengers to complete and sign a written form identifying the basis for the challenge and affirming that the challenger understands the penalties for voter harassment and intimidation\); Act of June 3, 2005 \(H.F. 1481\), 2005 Minn. Sess. Law Serv. ch. 156, art. 6, § 46 \(West\) \(codified as amended at MINN. STAT. ANN. § 204C.12\), \*available at\* <https://webrh12.revisor.leg.state.mn.us/laws/?id=156&doctype=Chapter&year=2005&type=0> \(requiring challengers to complete and sign a written form that identifies the ground for the challenge, provides the challenger’s contact information, and contains a statement that the form was completed under oath\); Act of June 3, 2003 \(H.P. 334, L.D. 426\), § 2, 2003 Me. Legis. Serv. ch. 395 \(codified as amended at ME. REV. STAT. tit. 21-A, § 673\), \*available at\* \[http://www.mainelegislature.org/ros/LOM/LOM121st/8Pub351-400/Pub351-400-44.htm#P1351\\\_271409\]\(http://www.mainelegislature.org/ros/LOM/LOM121st/8Pub351-400/Pub351-400-44.htm#P1351\_271409\) \(requiring challengers to complete and sign an affidavit setting forth the grounds for the challenge, the source of information on which the challenge is based, the challenger’s contact information, and a statement that the affidavit was completed under oath\); Act of May 22, 2003 \(S.B. 432\), § 2, 2003 Md. Laws 2705, 2712-13 \(codified as amended at MD. CODE ANN., ELEC. LAW § 10-312\), \*available at\* <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000799/html/am799--2712.html> \(requiring challengers to provide the reasons for making the challenge “in writing, under penalty of perjury”\); Act of Dec. 22, 2000 \(Act 13-538\), § 2, 2000 D.C. Laws 13-251 \(West\) \(codified as amended at D.C. CODE § 1-1001.09\) \(requiring challengers to sign an affidavit under penalty of perjury stating the basis for the challenge\).](http://www.legis.state.ia.us/IACODE(select the “2009-1993” link under “Iowa Acts” heading and search for Chapter 1115 of the 2008 volume of Iowa Acts) (requiring challengers to complete and sign a written form that includes the challenger’s contact information and a statement affirming that the challenger understands the penalties for submitting a challenge containing false challenge); Act of June 13, 2007 (A.B. 569), § 27, 2007 Nev. Stat. 2580, 2588-90 (codified as amended at NEV. REV. STAT. § 293.303), available at)

- <sup>173</sup> Act of Apr. 7, 2011 (S.B. 403), § 91, 2011 N.M. Laws ch. 137 (codified as amended at N.M. STAT. ANN. § 1-12-21), available at <http://www.nmlegis.gov/Sessions/11%20Regular/final/SB0403.pdf> (“When a challenge is interposed, the judges or election clerks shall enter the word ‘CHALLENGED’ under the notation headings in the signature rosters, along with the reason for the challenge, the time the challenge was made and the name and title of the person interposing the challenge.”).
- <sup>174</sup> At a 2012 hearing before a committee of the New Hampshire State Senate, several local election officials explained how the writing requirement makes it easier for them to decide challenges at the polls and also helps prevent indiscriminate challenges. See, e.g., *An Act Relative to Challenges to Voters: Hearing on H.B. 1301 Before the S. Comm. on Pub. & Mun. Affairs*, 2012 Gen. Ct., Apr. 3 (N.H. 2012) (statements of Reps. Kathleen Hoelzel & James Belanger, Members, N.H. House of Representatives), audio recording of hearing available at [http://www.gencourt.state.nh.us/Senate/committees/committee\\_details.aspx?cc=S27](http://www.gencourt.state.nh.us/Senate/committees/committee_details.aspx?cc=S27) (describing the difficulties that local election officials face in deciding oral challenges and noting that election officials from thirty-eight towns across New Hampshire favor the writing requirement). Of course, the writing requirement is not always a perfect deterrent to frivolous challenges, which is why greater safeguards are often required. See, e.g., *Scolaro v. D.C. Bd. of Elections & Ethics*, 691 A.2d 77, 81 (D.C. 1997) (noting that challengers prepared several hundred identical challenge forms prior to a local election and that nearly all of the challenge forms “contained the same preprinted ground for challenge”).
- <sup>175</sup> Act of June 13, 2007 (A.B. 569), § 27, 2007 Nev. Stat. 2580, 2588-90 (codified as amended at NEV. REV. STAT. § 293.303(a)), available at <http://leg.state.nv.us/statutes/74th/Stats200721.html#Stats200721page2588>.
- <sup>176</sup> Act of Mar. 23, 2010 (S.B. 53), § 4, 2010 Utah Laws ch. 83 (codified as amended at UTAH CODE ANN. § 20A-3-202.3(4)(b)(i)), available at <http://le.utah.gov/~2010/bills/sbillenr/sb0053.pdf> (requiring that the challenger prove “by clear and convincing evidence, that the basis for challenging the voter's right to vote is valid”).
- <sup>177</sup> See Act of Mar. 29, 2006 (S.B. 6362), § 4, 2006 Wash. Sess. Laws 1483, 1485-86 (codified as amended at WASH. REV. CODE § 29A.08.810), available at <http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/2006pam2.pdf>.
- <sup>178</sup> See Gregory Roberts, *Challenging the GOP Challenge in King County*, SEATTLE POST-INTELLIGENCER, Nov. 15, 2005, at B2.
- <sup>179</sup> See Gregory Roberts, *Most GOP Challenges on Voters Tossed*, SEATTLE POST-INTELLIGENCER, Nov. 28, 2005, at B2.
- <sup>180</sup> See *id.*
- <sup>181</sup> See Act of Mar. 23, 2010 (S.B. 53), § 4, 2010 Utah Laws Ch. 83 (codified as amended at UTAH CODE ANN. § 20A-3-202.3(1)(a)), available at <http://le.utah.gov/~2010/bills/sbillenr/sb0053.pdf> (expanding quiet period from 2 days before “voting commences” to 21 days before early voting begins); Act of Mar. 29, 2006 (S.B. 6362), § 5, 2006 Wash. Sess. Laws 1486, 1487 (codified as amended at WASH. REV. CODE § 29A.08.820(1)), available at <http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/2006pam2.pdf> (instituting quiet period of at least 10 days before an election for challenges to voters registered within 60 days of an election and 45 days before an election for challenges to all other registered voters); Act of Jan. 31, 2006 (H.B. 3), § 1, 2006 Ohio Laws 5552, 5655 (codified as amended at OHIO REV. CODE ANN. § 3503.24), available at [http://www.legislature.state.oh.us/BillText126/126\\_HB\\_3\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText126/126_HB_3_EN_N.html) (expanding quiet period from 11 to 20 days prior to an election); Act of Mar. 31, 2000 (H.B. 1097), § 1, 2000 Colo. Legis. Serv. Ch. 98 (codified as amended at COLO. REV. STAT. § 1-9-101(1)(a)), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2000/sl\\_98.htm](http://www.state.co.us/gov_dir/leg_dir/olls/sl2000/sl_98.htm) (expanding quiet period from 45 to 60 days).
- <sup>182</sup> Act of June 20, 2003 (S.B. 197), § 1, 2003 Tex. Law Serv. ch. 1166 (Vernon’s) (codified as amended at TEX. ELEC. CODE ANN. § 16.0921), available at <http://www.legis.state.tx.us/tlodocs/78R/billtext/pdf/SB00197F.pdf#navpanes=0> (“The registrar may not deliver a confirmation notice resulting from a [residency challenge] filed after the 75th day before the date of the general election for state and county officers until after the date of that election. This subsection does not apply to a person who registers after the 75th day and prior to the 30th day before the general election for state and county officers.”).

<sup>183</sup> Act of Apr. 21, 2011 (H.B. 91), § 43, 2011 Mont. Laws 906, 928 (codified as amended at MONT. CODE ANN. 13-13-301(3)), available at <http://data.opi.mt.gov/bills/2011/sesslaws/ch0242.pdf>.

<sup>184</sup> See *Hearing on H.B. 91 Before the S. Comm. on State Admin.*, 2011 Leg., 62d Sess., Feb. 9 (Mont. 2012) (statement of Linda McCulloch, Mont. Sec’y of State), audio recording of hearing available at <http://leg.mt.gov/css/bills/11BillCentric.asp?BillNumber=HB91> (noting that “House Bill 91 is a product of the Secretary of State’s review and compilation over the past two years of election laws that need cleaning up” and was crafted with the technical advice of local election officials). See also *supra* Section IV.E (describing the mass challenge effort by the Montana Republican Party in 2008).

<sup>185</sup> Act of June 3, 2005 (H.F. 1481), 2005 Minn. Sess. Law Serv. ch. 156, art. 6, § 42 (West) (codified as amended at MINN. STAT. ANN. § 204C.12), available at <https://webhr12.revisor.leg.state.mn.us/laws/?id=156&doctype=Chapter&year=2005&type=0>.

<sup>186</sup> See Dane Smith, *Inside Talk*, STAR TRIB., May 22, 2005, at 2B (noting that the challenger law reform efforts were prompted by “reports that political operatives from Washington, D.C., and elsewhere were flown into the state on Election Day and challenged or intimidated voters”); Dane Smith, *Election Laws; A Package of Revisions*, STAR TRIB., Mar. 22, 2005, at 5B (“Donna Whitefeather, a get-out-the-vote activist, and LuAnn Crowe, an election judge on the Red Lake Indian Reservation, say that a Republican operative from Washington, D.C., improperly challenged so many Indian voters at the reservation on Election Day that the challenger eventually was removed by tribal police.”).

<sup>187</sup> Act of Dec. 22, 2000 (Act 13-538), § 2, 2000 D.C. Laws 13-251 (West) (codified as amended at D.C. CODE § 1-1001.09) (“Notwithstanding paragraph (1) of this subsection, a voter shall not be challenged solely on the basis of characteristics or perceived characteristics not directly related to the challenged voter’s status as a registered qualified elector, including race, color, religion, sex, personal appearance, sexual orientation, matriculation status, political affiliation, or physical handicap.”).

<sup>188</sup> Act of Mar. 24, 2006 (H.E.A. No. 1011), § 4, 2006 Ind. Legis. Serv. P.L. 164-2006 (West) (codified as amended at IND. CODE ANN. § 3-5-4.5-2), available at <http://www.in.gov/legislative/bills/2006/PDF/HE/HE1011.1.pdf> (prohibiting challenges made “solely on the basis of: (1) enrollment in an educational institution; or (2) registration to vote at an address that is housing provided for students by the educational institution”); Act of Mar. 15, 2006 (H.B. 672), § 1, 2006 Idaho Sess. Laws 213, 214 (codified as amended at IDAHO CODE ANN. § 34-304), available at <http://legislature.idaho.gov/legislation/2006/H0672.html#billtext>.

<sup>189</sup> Ohio, Texas, and Alabama, for instance, all repealed their Election Day challenger statutes in the last decade. See *supra* Section V.A. Several other states have recently moved to raise the evidentiary burdens placed on challengers by requiring them to better substantiate their allegations. See *supra* Section V.B. States like Rhode Island and North Carolina expressly prohibit challengers from using returned mail as proof of a voter’s ineligibility. R.I. GEN. LAWS § 17-15-26 (“The return as undeliverable of a mailing sent to the voter by someone other than the state board or local board shall not, standing alone, constitute reasonable cause [for a challenge.]”); N.C. GEN. STAT ANN. § 163-88 (“A letter or postal card mailed by returnable mail and returned by the United States Postal Service purportedly because the person no longer lives at that address or because a forwarding order has expired shall not be admissible evidence in a challenge heard under this section.”). States frequently impose criminal penalties on people who file challenges based on false information. See, e.g., IOWA CODE ANN. § 39A.3(1)(a)(4) (making it a misdemeanor to file any “challenge containing false information”). Finally, many states give challenged voters an opportunity to respond to challenges within a reasonable period of time, either by mail or in person, prior to Election Day. See, e.g., MICH. COMP. LAWS § 168.512 (“The challenged elector may within 30 days appear before the clerk and answer the questions and take the oath required of persons challenged on the same grounds at election, or in lieu of appearing in person the challenged elector, within a like period of time, may elect to file with the clerk an affidavit setting forth specifically his qualifications as an elector of the municipality and answering the grounds of the challenge.”).

<sup>190</sup> To view the proposed challenger legislation that the Brennan Center submitted earlier this year to the Connecticut General Assembly, for instance, please visit *Testimony Submitted to the Joint Committee on Government Administration and Elections of Connecticut*, BRENNAN CENTER FOR JUSTICE (Mar. 2, 2012), [http://www.brennancenter.org/content/resource/testimony\\_submitted\\_to\\_the\\_joint\\_committee\\_on\\_government\\_administration\\_and/](http://www.brennancenter.org/content/resource/testimony_submitted_to_the_joint_committee_on_government_administration_and/).

<sup>191</sup> For a summary of the Brennan Center’s voter registration modernization proposal, see WENDY WEISER, MICHAEL WALDMAN, & RENEE PARADIS, *VOTER REGISTRATION MODERNIZATION: POLICY SUMMARY* (2009), available at [http://brennan.3cdn.net/b75f13413388b2fccc\\_ym6bn112.pdf](http://brennan.3cdn.net/b75f13413388b2fccc_ym6bn112.pdf).

<sup>192</sup> See generally *Voter Registration Modernization: VRM in the States*, BRENNAN CENTER FOR JUSTICE (last visited June 26, 2012, 6:00pm), [http://www.brennancenter.org/content/pages/voter\\_registration\\_modernization\\_states](http://www.brennancenter.org/content/pages/voter_registration_modernization_states) (summarizing the administrative and fiscal benefits that states have enjoyed after implementing procedures to modernize their voter registration systems). For model state legislation, see WENDY WEISER, JUSTIN LEVITT, & ADAM SKAGGS, BRENNAN CENTER FOR JUSTICE, *COMPONENTS OF A BILL TO MODERNIZE THE VOTER REGISTRATION SYSTEM* (2010), available at [http://brennan.3cdn.net/1c55262dffdd1f04f\\_xpm6bhja5.pdf](http://brennan.3cdn.net/1c55262dffdd1f04f_xpm6bhja5.pdf).