

## **Background and Supporting Material**

October 27, 2010

### **Slide 1 – Voting Challenges 2010**

#### **Slide 2 – A decade after Florida 2000**

It is now a full decade since the Florida election fiasco of 2000, and our voting system still does not work as it should.

In 2006, we saw a new wave of voter suppression laws and practices across the country that affected millions of eligible voters—especially minority, low-income, student, and older voters. For a presentation on challenges and developments relating to the 2006 elections, see

[http://www.brennancenter.org/content/resource/cast\\_out\\_new\\_voter\\_suppression\\_strategies\\_2006\\_and\\_beyond](http://www.brennancenter.org/content/resource/cast_out_new_voter_suppression_strategies_2006_and_beyond).

In 2008, the biggest obstacle to the franchise was problems with the voter registration system. For a presentation on challenges and developments relating to the 2008 elections, see

[http://www.brennancenter.org/content/resource/challenges\\_to\\_the\\_vote\\_2008](http://www.brennancenter.org/content/resource/challenges_to_the_vote_2008). (All of the Brennan Center's annual presentations on voting are available here:

[http://www.brennancenter.org/content/resource/annual\\_trends\\_in\\_voting\\_rights](http://www.brennancenter.org/content/resource/annual_trends_in_voting_rights).)

Today, we will discuss the biggest voting challenges in 2010 that create a risk of large-scale voter disenfranchisement.

#### **Slide 3 – Voting problems can affect outcomes**

Voting matters: it's a fundamental right. It also matters because lost votes can affect election outcomes.

In 2008, many races were decided by a tiny number of votes—far fewer votes than those potentially lost. Among the closest races were the Minnesota Senate race, which was won by 225 votes, the Louisiana Fourth District and Virginia Fifth District U.S. House races, which were won by 350 and 727 votes, respectively, and the Missouri presidential race, which was won by only 3,903 votes. The numbers were close in other races as well. In the presidential race, the margin of victory was 11,723 votes in Montana and

14,177 votes in North Carolina. The close 2008 senate race in Alaska had a margin of only 3,953 votes. Other close house races in Alabama, Louisiana, and Ohio had margins of 1,790, 1,814, and 2,311 votes respectively. *See generally* CNN Election Tracker, available at <http://www.cnn.com/ELECTION/2008>.

This year, many races are polling within a 1% margin. For the recent poll results and aggregates, see [http://www.realclearpolitics.com/epolls/latest\\_polls/elections](http://www.realclearpolitics.com/epolls/latest_polls/elections).

#### **Slide 4 – Three main threats in 2010**

The 3 main threats to the franchise we see this year come from:

1. Voter registration problems;
2. So-called “ballot security” operations by political operatives; and
3. Voting machine glitches.

#### **Slide 5 – Voter registration**

#### **Slide 6 – Voter registration remains #1 barrier to voting**

In 2010, as in the last few elections, the ramshackle voter registration system remains the single biggest barrier to voters. It relies on paper; voters are wrongly purged or denied registration; and they have too few opportunities to register, among other things. For more detailed information on problems with our voter registration system, see Wendy R. Weiser, Michael Waldman, and Renée Paradis, *Voter Registration Modernization*, (Brennan Center 2009), available at [http://brennan.3cdn.net/b75f13413388b2fcc\\_ynm6bn112.pdf](http://brennan.3cdn.net/b75f13413388b2fcc_ynm6bn112.pdf); Myrna Perez, *Voter Purges* (Brennan Center 2008), available at [http://brennan.3cdn.net/5de1bb5cbe2c40cb0c\\_s0m6bqskv.pdf](http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf); Wendy Weiser, Justin Levitt, and Ana Munoz, *Making the List* (Brennan Center 2006), available at [http://brennan.3cdn.net/96ee05284dfb6a6d5d\\_j4m6b1cjs.pdf](http://brennan.3cdn.net/96ee05284dfb6a6d5d_j4m6b1cjs.pdf).

This adds up. In 2008, around 3 million people tried to vote and could not because of voter registration problems. Millions more were thwarted by registration deadlines and residency requirements. *See* R. Michael Alvarez et al., 2008 Survey of the Performance of American Elections – Final Report: Executive Summary 5 (2005), available at <http://www.vote.caltech.edu/drupal/files/report/2008%20Survey%20of%20the%20Performance%20of%20American%20Elections%20Executive%20Summary.pdf>; Voter Registration: Assessing Current Problems: Hearing Before the H. Comm. on Rules & Admin., 111<sup>th</sup> Cong. 10 (Mar. 11, 2009) (testimony of Stephen Ansolabehere, Prof., Harvard Univ.), available at [http://rules.senate.gov/public/?a=Files.Serve&File\\_id=9756364e-0cd6-4322-bd34-65257213eeba](http://rules.senate.gov/public/?a=Files.Serve&File_id=9756364e-0cd6-4322-bd34-65257213eeba).

## Slide 7 – Fewer registration efforts in 2010

Two new trends in this election cycle could worsen the problem.

First, there are far fewer efforts to register voters this year than in recent election years. Voter registration drives typically play an important role, registering millions, especially the poor. In 2004, for example, a handful of voter registration groups registered 10 million voters.

For the past four years, there has been a wave of new laws and public attacks aimed at registration groups. It goes beyond ACORN. Laws the Brennan Center challenged in Florida, Ohio, and New Mexico shut down virtually all voter registration drives in those states until they were overturned. For more information, see [http://www.brennancenter.org/content/section/category/voter\\_registration](http://www.brennancenter.org/content/section/category/voter_registration). In Florida, even the major political parties say that they are still unable to mount registration drives this year because the law still makes it too onerous. See Jesse Zwick, *With Voting Rights Groups Reeling, New Registrations Decline*, WASHINGTON INDEPENDENT, Oct. 15, 2010.

And, unfortunately, most states are not picking up the slack. Far too many states still do not register voters at public assistance agencies or update registration addresses, as they are required to do under the federal Motor Voter law (the National Voter Registration Act of 1993 or the “NVRA”).

Brennan Center research suggests that a significant number of states do not comply, in whole or in part, with address change requirements of NVRA. Along with the League of Women Voters, the Center sent letters to officials in California, Illinois, Massachusetts, Missouri, Nevada, New York, and Oregon, notifying them of their non-compliance with federal law. We are working with several states to remedy this problem.

In addition, many states do not comply with the federal law’s mandate to register voters at public assistance agencies. For more information, see Lisa J. Danetz, *Expanding Voter Registration for Low-Income Ohioans: The Impact of the NVRA*, Demos (June 2010), available at <http://www.demos.org/publication.cfm?currentpublicationID=FB9A8098-3FF4-6C82-5F838C495624637A>. As a result of this noncompliance, voter registration applications from public assistance agencies fell 62 percent from the initial implementation in 1995-1996 to the latest reporting period, 2007-2008. See Brenda Wright, “*Poverty and Political Participation: Overcoming the Registration Barrier*,” ACS Blog, September 27, 2010.

These violations are especially problematic in light of recent figures from the U.S. Census Bureau which show that poverty rates are at a 15-year high. *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, U.S. Census Bureau, September 2010; Erik Eckholm, *Recession Raises Poverty Rate to a 15-Year High*, N.Y. TIMES, September 16, 2010.

The Department of Justice recently issued guidance on the NVRA, which we hope will result in greater compliance. Assistant Attorney Tom Perez said that the Voting Section has sent investigatory letters to seven states, but there have been no public lawsuits filed. Assistant Attorney General Tom Perez, Testimony Before U.S. Senate Judiciary Committee, April 2010.

### **Slide 8 –Net effect: fewer voters registering in 2010**

Because of these trends, we expect to see a drop in registration rates over past midterm elections. Already, virtually every jurisdiction with available data shows a dramatic drop. Registrations are down 25% in Ohio, 27% in Florida, and a whopping 43% in Wisconsin.

- **Florida:** From January through August 2006, 370,190 Floridians registered to vote, compared to 267,933 in the same period this year. Source: Florida Division of Elections, *Voter Registration Statistics*, <http://election.dos.state.fl.us/NVRA/reports.shtml>.
- **Indiana:** From January through October 19, 2006, 175,235 Indiana citizens registered to vote, compared to 113,893 for the same period in 2010, for a decline of 35%. Source: Email from Indiana Elections Division official, 10/19/10 (on file with Brennan Center).
- **Maryland:** From January through September 2006, 155,114 Maryland citizens registered to vote, compared to 121,814 in the same period this year, for a decline of 20%. Source: Maryland State Board of Elections, *Voter Registration Statistics*, [http://www.elections.state.md.us/voter\\_registration/statistics.html](http://www.elections.state.md.us/voter_registration/statistics.html).
- **North Carolina:** In 2006, 311,127 North Carolina citizens registered to vote, compared to 222,696 through the end of August this year. Source: Email from North Carolina State Board of Elections official, 10/19/10 (on file with Brennan Center).
- **Ohio:** From January 2005 through November 2006, 896,053 Ohioans registered to vote, compared to 671,642 from January 2009 through October 20, 2010. Source: Email from Ohio state election official, 10/20/10 (on file at the Brennan Center).
- **Tennessee:** From January 2006 through June 2006, 111,417 Tennesseans registered, compared to 92,611 registrants during the same period in 2010 (down 17% from 2006). Source: Tennessee Department of State Elections Division, *Election Statistics*, <http://www.tn.gov/sos/election/data/index.htm>.
- **Wisconsin:** From January through October 19, 2006, 181,977 Wisconsin citizens registered to vote, compared to 103,258 during the same period this year. Source: Telephone interview with Wisconsin Government Accountability Board official, 10/18/10 (on file with Brennan Center).
- **Clark County, Nevada** showed a smaller drop than other jurisdictions, dropping from 89,401 registrations from January through October 2006 to 86,863 for the same period in 2010, for a drop of about 3%. Source: Email from Clark County, Nevada election official, 10/11/2010 (on file with Brennan Center). The county

might have experienced greater drops had the state not introduced online registration, known to boost registration rates, in September 2010. Before that, in August 2010, the county's registration figures were lagging more than 5% behind the 2006 figures.

There is one exception: California. But California is also one of the few states where there have been strong voter registration drives this year, a dramatic increase in naturalizations when backlogs were cleared, and major steps to increase registrations at public assistance agencies. California registration numbers from January to July 2006 were 890,019, compared to 1,067,689 from January to July 2010. See California Secretary of State Elections Division, *Voter Registration & Participation Statistics*, [http://www.sos.ca.gov/elections/elections\\_u.html](http://www.sos.ca.gov/elections/elections_u.html).

### **Slide 9 – Impact of foreclosure crisis**

The second trend this year that could exacerbate problems is the foreclosure crisis.

In 2008, party operatives in Michigan and Ohio threatened to challenge all voters whose properties had foreclosure filings, saying that their registrations had outdated addresses. Fortunately, both major parties agreed to forego such challenges, after a lawsuit and much controversy.

Since then, the number of foreclosures has skyrocketed and is at an all-time high, including in states with tight races.

When our Brennan Center report, [\*Foreclosures: a Crisis in Legal Representation\*](#), was released in 2009, nearly 2,900 families lost their home each day. Melanca Clark, *Foreclosures: A Crisis in Legal Representation*, (Brennan Center 2009); Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution*, March 6, 2009. In the next four years, continuing foreclosures could mean the loss of 8.1 million homes. Clark, *supra*. Real estate data company RealtyTrac reported that a record number of homeowners lost their homes to banks in August 2010 and projects over 3 million foreclosure filings this year. Press Release, "[Foreclosure Activity Increases 4 Percent in August](#)," RealtyTrac, September 16, 2010.

According to RealtyTrac, Nevada, Florida, Arizona and California had the highest state foreclosure rates in August. In Nevada, nearly 6 percent of houses (one in 17) faced foreclosure filings in the first half of 2010, giving Nevada the nation's highest foreclosure rate despite decreasing foreclosure activity—filings were down 6% from January-June 2009. Idaho, Utah, Georgia, Michigan, Illinois and Hawaii were the other states with the highest rates of foreclosure.

As a legal matter, the vast majority of people facing foreclosure are still entitled to vote from their registration addresses. As a practical matter, we expect to see serious problems, because of widespread confusion and misapplication of the law.

That's the bad news.

### **Slide 10 – The good news - reform momentum**

There is also good news. States have also started modernizing their voter registration systems, automating the process at DMVs and adding online registration. Most of the states to have adopted these reforms did so in the past two years.

A recent Brennan Center report, [\*Voter Registration in a Digital Age\*](#), provides detailed information about the steps states across the country have taken toward a more modern voter registration system. See Christopher Ponoroff, Ed. Wendy Weiser, [\*Voter Registration in a Digital Age\*](#), (Brennan Center 2010). The report's findings are also described in this presentation:

[http://www.brennancenter.org/content/resource/voter\\_registration\\_for\\_the\\_21st\\_century](http://www.brennancenter.org/content/resource/voter_registration_for_the_21st_century).

The report finds three main benefits of modernization:

- **Increased registration rates**
  - Registration rates at DMVs doubled in Washington and Kansas, increased even more in Rhode Island, and increased seven-fold in South Dakota after the states automated the voter registration system at DMVs.
  - After Arizona introduced online and automated registration, registration rates for 18-24 year-old citizens rose from 28 to 53 percent.
- **More accurate and secure rolls**
  - A 2009 survey of incomplete and incorrect registrations in Maricopa County, Arizona found that electronic voter registrations are as much as five times less error-prone than their paper-based counterparts.
- **Substantial savings for states**
  - Upgrades to the voter registration system are surprisingly inexpensive to implement, ranging from no additional cost to several hundred thousand dollars. This is immediately offset by enormous savings.
  - Maricopa County, AZ, saved over \$450,000 in 2008 alone. The cost to the county of processing an electronic registration is 3¢, compared to 83¢ for a paper registration.
  - Delaware saved over \$200,000 annually from completing its automation process.
  - Washington saved over \$120,000 in 2008 in Secretary of State's office alone, and far more in each of its counties.

### **Slide 11 – The good news - reform momentum**

This map displays the states that have registered their systems in the past two years.

## **Slide 12 – Reform increase registration rates**

Automated and online registration dramatically increase voter registration rates. For detailed charts of increased registration rates after reforms were adopted, see Christopher Ponoroff, Ed. Wendy Weiser, [\*Voter Registration in a Digital Age\*](#) (Brennan Center 2010).

## **Slide 13 – The good news: some states improved compliance with voter registration laws**

There's more good news. Since the last election, several states have started complying with their obligation to register voters at public assistance agencies, largely in response to litigation or threats of litigation. In Ohio, for example, monthly registration rates at these agencies shot up to over 17,000 a month, compared to less than 1,800 before. The registration figures before and after compliance are discussed in Lisa J. Danetz, [\*Expanding Voter Registration for Low-Income Ohioans: The Impact of the NVRA\*](#), (Demos June 2010).

Still, we expect that voter registration problems will continue to plague millions of Americans.

## **Slide 14 – “Ballot Security” Operations**

Even if voters make it onto the rolls for Election Day, their votes could still be threatened by political operatives mounting “ballot security operations.”

We are especially worried this year about large-scale efforts by political operatives to challenge voters at the polls or take other steps purportedly to keep out ineligible voters. This is happening to an extent we have not seen in years, and it raises significant risks for voters.

## **Slide 15 – Risk of vote suppression**

There is nothing intrinsically wrong with investigating and preventing voter fraud, however small a problem that is. But privately-run efforts to police the voting process often use tactics that suppress *legitimate* votes. We are concerned with the following tactics:

- Voter challenges and caging
- Voter intimidation
- Deceptive practices and voter misinformation

Ballot security operations often use tactics that result in vote suppression.



## **Slide 16 – Voter challenges threaten eligible voters**

Election Day voter challenges are when someone standing in the polling place targets voters and formally challenges their eligibility. This typically launches an inquiry by poll workers, which could end up denying votes. It also could disrupt the polling place and create long lines.

One reason for concern is that challenge operations often use highly unreliable information to target voters.

For example, last election, a Montana political party challenged 6,000 voters based on returns from a non-forwardable mailing. As it turns out, most people on the list were eligible students and military personnel who had temporarily forwarded their mail. This is a common basis for challenges called caging. Flawed “no match” lists are another frequent source of challenge threats, as in Ohio and Wisconsin in 2008. For more information on these and other challenge and caging operations in 2008, see Wendy Weiser & Margaret Chen, *Voter Suppression Incidents 2008* (Brennan Center 2008), available at [http://www.brennancenter.org/content/resource/voter\\_suppression\\_incidents](http://www.brennancenter.org/content/resource/voter_suppression_incidents).

These kinds of challenges threaten mainly *eligible* voters. For more on the ways in which caging and challenges based on unreliable information threaten eligible voters, see Justin Levitt & Andrew Allison, *A Guide to Voter Caging* (Brennan Center 2007), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_49608.pdf](http://www.brennancenter.org/page/-/d/download_file_49608.pdf).

## **Slide 17 – Voter challenges often discriminatory**

Those most at risk of disenfranchisement tend to be African-American and other minority voters, who have frequently been targeted in past challenge operations.

For example, a thwarted challenge program in Ohio in 2004 appeared to be targeted mainly at African American voters. A federal judge found that under the planned challenge operation, “14% of new voters in a majority white location will face a challenger... but 97% of new voters in a majority African-American voting location will see such a challenger.” *Spencer v. Blackwell*, No. 1-04-738-SJD, Order of November 1, 2004.

Another notorious example of the discriminatory application of challenge operations is a voter caging operation implemented by the Republican National Committee in 1986. As a part of this operation, non-forwardable mailings were sent to 350,000 voters registered in heavily African-American districts in Louisiana. See Chandler Davidson et al., *Republican Ballot Security Programs: Vote Protection Or Minority Vote Suppression or Both?* 17 (2004), available at [http://www.votelaw.com/blog/blogdocs/GOP\\_Ballot\\_Security\\_Programs.pdf](http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf); People For The Am. Way Found. & NAACP, *The Long Shadow Of Jim Crow: Voter Intimidation And Suppression In America Today* (2004), available at [http://www.pfaw.org/pfaw/dfiles/file\\_462.pdf](http://www.pfaw.org/pfaw/dfiles/file_462.pdf); Jon Margolis, *GOP Agrees To Limits On Ballot Security Plan*, CHICAGO TRIB., July 24, 1987,



At C6). An internal memorandum to the RNC’s southern regional political director described the effect of the caging program on the upcoming Senate race in Louisiana: “*I know this race is really important to you. I would guess that this program will eliminate at least 60-80,000 folks from the rolls. . . . If it’s a close race, which I’m assuming it is, this could keep the black vote down considerably.*” Martin Tolchin, *G.O.P. Memo Tells of Black Vote Cut*, N.Y. TIMES, Oct. 25, 1986, at 17. Ultimately, 30,000 letters— most addressed to African-Americans— were returned undelivered and turned over to election officials with a request to purge the voters from the rolls; the letters were also compiled onto a list for investigation by law enforcement and for challenge at the polls. Thomas B. Edsall, *Ballot Security Effects Calculated*, WASH. POST, Oct. 24, 1986, at A1. A Louisiana state court judge enjoined the program, finding that the clear intent was to remove blacks from the voting rolls. *Id.*

For more information on challenge operations, please visit our website:  
<http://www.brennancenter.org/content/section/category/challenges>.

### **Slide 18 – Voter intimidation and deceptive practices**

The risk of vote suppression is especially pronounced when “ballot security” operations actively intimidate voters, such as when challengers dress as police officers and threaten voters, or when they distribute false or misleading information—as has often happened in recent elections. Past examples of misinformation include:

- Texas 2008: An email widely circulated before the election falsely warned voters that a straight-party vote would not register a vote for president. In fact, if a voter using Texas ballots separately records a vote for president after voting straight-party, the vote for president will be deselected and will not count. Gilda Daniels, *Voter Deception*, 43 IND. L. REV. 343, 364–65 (2010).
- Virginia 2008: A flyer purportedly from the Board of Elections instructed Democrats to vote on November 5<sup>th</sup>. A copy is available at <http://thinkprogress.org/2008/10/27/phony-va-election-flier>.
- Wisconsin 2004: the “Milwaukee Black Voters League,” an organization that does not exist, distributed a flyer warning people found guilty of any infraction, including traffic tickets, to stay away from the polls or face possible imprisonment. The flyer read: “If you’ve already voted in any election this year, you can’t vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can’t vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.” See Nat’l Network on Election Reform, *Deceptive Practices And Voter Intimidation 1*, available at <http://Www.Nationalcampaignforfairelections.Org/Page/-/Deceptive%20practices%20network%20issue%20paper.pdf> (describing practices directed at minority communities).

- Ohio 2004: A flyer falsely attributed to the Franklin County Board of Elections informed voters that Republicans were to vote on Tuesday and Democrats on Wednesday (National Campaign For Fair Elections, *Examples Of Deceptive Flyers 2004*, 1, 3, available at [http://lccr.3cdn.net/f51ce1b593630cc86c\\_a7m6b9axu.pdf](http://lccr.3cdn.net/f51ce1b593630cc86c_a7m6b9axu.pdf)).
- Maryland 2002: Anonymous fliers were posted in some African-American neighborhoods with the heading “URGENT NOTICE.” The fliers listed the wrong date for Election Day and warned that parking tickets and overdue rent had to be paid before voting. Howard Libit & Tim Craig, “Allegations Fly As Election Day Nears,” *Baltimore Sun*, Nov. 4, 2002; Eric Siegel, “Amid Stir, Voters Stream To Polls,” *Baltimore Sun*, Nov. 6, 2002.

These practices are effective in keeping out eligible voters. Given the heightened tensions and rhetoric this year, we are worried about intimidation this year.

### **Slide 19 – Threatened “ballot security” operations 2010**

This election cycle, there has been a significant increase in mobilization around so-called “ballot security” efforts—where political operatives and private citizens take it upon themselves to police the voter rolls and voting booths. In states across the country—and especially where there are hotly contested races or immigration debates—there is increased attention to voter fraud and organized campaigns supposedly designed to target such fraud. This is happening to a degree we have not seen in years.

For example, the Michigan GOP website describes a plan to post over 3,600 challengers in precincts polling less than 35% Republican. And an Illinois Senate candidate claims to be planning the largest “voter integrity program” the state has seen for 15 years.

These plans aren’t limited to political parties, as they have been in the past. In many cases, local Tea Party organizations are spearheading efforts. Tea Party groups in New Mexico, Texas, Wisconsin, and Michigan have hosted challenger trainings. Groups in Arizona and California have called for members to act as watchdogs. These states bear monitoring.

For a collection on news articles and sources about ballot security efforts this year, please visit: [http://www.brennancenter.org/challenges/media\\_2010](http://www.brennancenter.org/challenges/media_2010).

### **Slide 20 – Challenges in Wisconsin 2010**

One state with a lot of recent activity is Wisconsin. A challenge against more than 60,000 registered voters in Milwaukee has already been filed—and rejected. Billboards warning against voter fraud have popped up all across Milwaukee.

Documents recently uncovered by a local political group describe a large-scale voter caging and challenge plan organized by a local Tea Party group, the state GOP, and Americans for Prosperity. See Save Wisconsin's Vote 2010, at <http://www.onewisconsinnow.org/swv2010/swvhome.html> (last accessed Oct, 11, 2010).

Americans for Prosperity is one of the large 501(c)(4) groups that has generated media coverage because of the considerable funds it has amassed from secret sources to spend in this year's elections.

The following details discussed during the coalition meeting reflect the in-depth planning behind the challenge operation:

- The Republican Party of Wisconsin will use its "Voter Vault" state-wide voter file to compile a list of voters in targeted Wisconsin communities.
- Operatives are particularly focused on voters in urban areas and university towns.
- Americans for Prosperity will send mailings to these voters indicating the voter must call and confirm their registration information, and telling them if they do not call the number provided they could be removed from the voter lists.
- The Tea Party organizations will recruit and place individuals as official poll workers in selected municipalities in order to be able to make the challenges as official poll workers.
- On Election Day, operatives will rely on postcards that are returned as undeliverable to challenge voters at the polls, utilizing law enforcement, as well as attorneys trained and provided by the RPW, to support their challenges.

The State Republican Party responded that while the Party had discussed voter fraud prevention tactics, it did not participate in mailings for the purpose of creating a caging list. A spokesman for Americans for Prosperity gave conflicting accounts of the group's involvement— first denying any involvement and later acknowledging collaboration with local tea parties. Mary Spicuzz, [Liberal Group Accuses Conservatives of a Voter Suppression Plot](#), WISCONSIN STATE J. POLITICS BLOG, Sept. 20, 2010; Jason Stein, [Liberal Group Alleges Tape Reveals Plan to Challenge Voters](#), THE JOURNAL SENTINEL, Sept. 20, 2010.

While it seems unlikely that this operation will go forward now, we are worried that this may be the tip of an iceberg.

### **Slide 21 – Regulatory Flaws**

Wisconsin has fairly strong voter protections to minimize risks from ballot security operations, but other states do not—as Kristen can discuss.

Much of what we are worried about is illegal under federal and state laws. But neither poll workers nor the public get any clear information on what is allowed and what is not. Instead, there too few constraints, too much discretion, and too little enforcement of prohibitions. Specifically:

### Election Officials Do Not Sufficiently Enforce the Laws

- A number of federal and state laws prohibit common techniques of vote suppression, but ballot security operations tend to be insufficiently policed. Voter intimidation and other illegal vote suppression activities are rarely prosecuted. For instance, only four lawsuits have ever been brought under 11(b) of the Voting Rights Act, which prohibits voter intimidation, by the Department of Justice (Gilda Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 364–65 (2010)).

### Election Guidelines and Poll Worker Manuals Do Not Clarify What Constitutes Illegal Conduct

- A variety of federal and state laws prohibit discriminatory or intimidating conduct at the polls, or conduct that interferes with the free exercise of the vote. For instance, the Voting Rights Act prohibits state officials from using discriminatory “standards, procedures, or practices,” 42 U.S.C. § 1971(a)(2)(A), and section 241 of the United States Criminal Code prohibits agreements to interfere with a person’s right to vote, 18 U.S.C. § 241 (carrying penalties of fines and imprisonment up to ten years). Nevertheless, such prohibitions are not made explicit in state administrative guidelines of poll worker or challenger manuals.

### Regulations do not sufficiently limit challengers and give too much discretion to election officials

- Many states have unclear or overly broad challenge laws that make it easier for discriminatory, intimidating, and unreliable challenges to occur. For instance, some states’ regulations specify neither the burden of proof required in order for a challenge to be mounted, nor the standard under which challenges are resolved. In such cases, election officials are left to fill the gap in determining when a challenger has met his or her burden in proving that a voter is ineligible to vote. The New Mexico Code, for example, specifies neither a burden of proof for a challenger to bring a challenge, nor a standard under which challenges are affirmed by election judges. If a challenge is affirmed by 2 election judges and a presiding judge, the challenged voter’s vote is not counted. NM. Stat. § 1-12-22(A).
- Many states allow any electors to challenge the eligibility of voters on Election Day. In Wisconsin, for example, any elector may challenge a person offering to vote “whom the elector knows or suspects is not a qualified elector.” Wis. Stat. § 6.925. In Colorado, likewise, “challenges may be made by watchers or any eligible elector of the precinct.” Colo. Rev. Stat. § 1-9-201. Such provisions also create a risk of frivolous challenges by private enforcers of election laws.
- Even where state statutes provide protection from frivolous or discriminatory challenges, administrative guidelines may not sufficiently clarify such protections. For example, Arizona laws set forth that when a voter is challenged, there is a presumption of proper registration that can be rebutted only by clear and convincing evidence. Ariz. Rev. Stat. § 16-121.01. However, the Arizona Election Procedures Manual which lays out the challenge procedures for election officials makes no mention of the clear and convincing standard. Office of

If we want to minimize the threat of vote suppression, this has to change.

### **Slide 22 – Voting Machines**

The last major threat we see is voting machine problems.

### **Slide 23 – Advancements in voting technology over the past decade**

We have made significant progress in voting machine technology over the past decade.

- Federal and State governments have invested billions in new voting equipment
- Advancements in technology helped contribute to a recovery of approximately 1 million lost votes from 2000 to 2004. Charles Stewart III, *Residual Vote in the 2004 Election* (Caltech/MIT Voting Technology Project, VTP Working Paper No. 2.3, 2005).
- Ballot Marking Devices and other advances in technology have allowed for disabled voters to vote privately and independently for the first time in their lives.
- Post Election Audits of counties using machines with voter-verifiable paper records are critical for detecting ballot-counting errors, discouraging fraud and improving the security and reliability of electronic voting machines.

### **Slide 24 – Problems persist**

But problems persist, generating headlines each election. New York's primary election fiasco is the most recent example. *See, e.g.,* Matthew Lysiak and Adam Lisberg, [\*Mayor Bloomberg calls voting machine errors at city polling places a 'royal screwup'\*](#), N.Y. DAILY NEWS, September 14, 2010; David Chen, [\*Before Vote, City Officials Fretted About New System\*](#), N.Y. TIMES, Sept. 15, 2010; Michael Howard Saul, *Machines' Debut Is a 'Royal Screw-Up'*, WALL STREET JOURNAL, Sept. 15, 2010.

### **Slide 25 – Repetition of previous problems**

Many problems that crop up now are problems we have seen before—on the very same machines but in different jurisdictions.

- In March 2008, for example, the voting system in Butler County, Ohio dropped votes from its tally server, losing at least 1,000 votes. It was later discovered that the same problem had occurred four years earlier in DuPage County, Illinois, on the same machines, but no one told Butler County.
- Orange County, Florida experienced a nearly 5% undervote rate for U.S. Senate and Governor's race in the 2006 general election – the highest undervote rates in the state. Investigation identified the problem as the optical scan machine's

inability to read certain types of gel ink. The same problem had been identified in Napa County, California in 2004 on the same machines, but no one reported the problem to Florida.

- New York is last state to adopt the use of electronic voting machines. New York chose to adopt for a great number of its districts the ES&S DS 200 machines, and to have those programmed with a major usability flaw which would dramatically increase the number of ballots mistakenly cast with “overvotes.” Instead of automatically rejecting an overvoted ballot, New York’s machine will display a confusing message that makes it easy for voters to cast a ballot with errors and unlikely that they will correct the ballot so that their vote will count. This same flaw was present in voting machines in thirteen Florida counties in 2008. A study by the Florida Fair Election Commission revealed that voters in those counties were up to 14 times more likely to overvote than those using machines without this flaw. See Mary K. Garber, Florida Fair Elections Center, Examining Florida’s High Invalid Vote Rate in the 2008 General Election (2009), available at [www.ffec.org/documents/Invalid\\_Vote\\_Report\\_Revised\\_23June2009.pdf](http://www.ffec.org/documents/Invalid_Vote_Report_Revised_23June2009.pdf).

For an extensive catalog of these sorts of repeat problems, see Lawrence Norden, *Voting System Failures: A Database Solution* (Brennan Center 2010), available at [http://www.brennancenter.org/content/resource/voting\\_system\\_failures\\_a\\_database\\_solution/](http://www.brennancenter.org/content/resource/voting_system_failures_a_database_solution/).

### **Slide 26 – No mandatory Disclosure as with other products**

Repeat problems can be avoided. But unlike in other industries, voting machine manufacturers are generally *not* required to report system failures to any federal agency, and no agency has authority to investigate problems and complaints or to seek fines against manufacturers who fail to disclose them. Election officials therefore do not become aware of avoidable problems with their voting machines.

As a result, we expect to see voting machine problems similar to those we have seen before.

### **Slide 27 – Problems compounded by state budget woes**

All of these problems are exacerbated by state budget crises, which are already affecting elections. This means that election officials may not have enough resources to process registrations properly, to protect against vote suppression, and to put in place effective back-up plans for machine failures.

### **Slide 28 – What can be done?**

What can be done? Each of these threats has a clear legislative solution. For more information, see Voter Registration Modernization: Collected Reports and Papers (Wendy Weiser, ed., Brennan Center 2009); Lawrence Norden, *Voting System Failures:*

*A Database Solution* (Brennan Center 2010), available at [http://www.brennancenter.org/content/resource/voting\\_system\\_failures\\_a\\_database\\_solution/](http://www.brennancenter.org/content/resource/voting_system_failures_a_database_solution/); see generally [http://www.brennancenter.org/content/pages/election\\_reform](http://www.brennancenter.org/content/pages/election_reform).

In the short term, we need public education, monitoring, and vigilance to ensure that these threats do not create major problems for voters or interfere with the operation of the election.

**Slide 29 – Conclusion**