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Testimony of

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Regarding

Legislative Trends in Election Administration

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On behalf of the Brennan Center for Justice at NYU School of Law, I want to thank you for the opportunity to speak with you today.

My name is Adam Skaggs, and I am counsel at the Brennan Center. The Brennan Center is a non-partisan public policy and legal advocacy organization that focuses on fundamental issues of democracy and justice. Among other things, we promote policies that ensure fair and accurate elections and that maximize citizen enfranchisement and participation in the electoral process. The Brennan Center works to remove barriers to voting while ensuring that the integrity of our elections is protected, based on the belief that electoral integrity is advanced when all eligible citizens are able to participate in elections.

Our work toward these goals has included extensive research and the publication of studies and reports; assistance to state and federal policy makers and advice on electoral legislation; and — when it has been necessary — litigation to protect the fundamental right to vote. We have tracked legislative proposals at the federal and state level, supporting bills that strike an appropriate balance in broadening access to the franchise while protecting electoral integrity — and opposing bills that discourage or prevent participation while failing to meaningfully address real threats to our election system.

I have been asked today to discuss recent legislative trends in the areas of voting rights and election administration. This is a particularly timely request: according to the

National Conference of State Legislatures, nearly 1,200 bills relating to voting rights and election administration have been introduced in state legislatures thus far in the current sessions.¹ Both the U.S. Senate and House have held hearings on voter registration this year, and Congress has also seen the introduction of bills pertaining to registration reform.² Such a high volume of proposed legislation may seem surprising at first blush, given that 2009 is an off-election year.

But it should come as no surprise. Last year, we witnessed a level of interest in voting and participation in the national election that was unprecedented in recent years. Indeed, the Nonprofit Voter Engagement Network's report on voter turnout in the 2008 election confirmed that voter participation last year reached a peak unseen for four decades, as the turnout rates returned to levels not seen since the 1960s.³ That report noted that the growth in voter turnout here in Illinois was 4.3%, representing more than 225,000 additional persons who voted in 2008, compared with 2004.⁴

That level of participation is a very positive development for those who, like the Brennan Center, believe that increased citizen participation in our electoral system is good for democracy. But this increased participation did not come easily, and there were attempts across the country to suppress voting.⁵ For example, thousands of voters were in danger of being wrongfully purged from the voter rolls based on imprecise and unreliable attempts to match voting records against other databases.⁶ Misinformation campaigns targeted communities across the country with attempts to stop voting through intimidation and confusion. And lawsuits filed on the eve of the election in states like Ohio and Wisconsin threatened hundreds of thousands of voters with the risk that they would be purged from the voter rolls, challenged at the polls, or forced to vote provisional ballots.⁷ Fortunately, the majority of these attempts to stop voting were turned back — either by the

¹ See National Conference of State Legislatures, *The Canvass: States and Election Reform*; at <http://www.ncsl.org/programs/legismgt/elect/2009ElectionsLegislation.htm>.

² See Press Release: Rep. Lofgren Introduces Online Voter Registration Bill: Bill Would Allow Voters to Register and Update Registrations Online, Mar. 26, 2009, *available at* http://www.lofgren.house.gov/index.php?option=com_content&task=view&id=512&Itemid=89.

³ See Michael McDonald, *America Goes to the Polls: A Report on Voter Turnout in the 2008 Election* (Nonprofit Voter Engagement Network, 2009).

⁴ See *id.* at 7.

⁵ See generally Wendy R. Weiser & Margaret Chen, *Voter Suppression Incidents 2008*, at http://www.brennancenter.org/content/resource/voter_suppression_incidents/.

⁶ See generally Testimony of Wendy R. Weiser before the U.S. Election Assistance Commission, March 17, 2009, at http://www.brennancenter.org/content/resource/wendy_weiser_before_the_eac/.

⁷ See *Ohio Republican Party v. Brunner*, No. 08-CV-913 (S.D. Ohio, filed Sept. 26, 2008), decided in *Brunner v. Ohio Republican Party*, 555 U.S. __ (Oct. 17, 2008); *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-4085 (Wisc. Circ. Ct., Dane County, filed Sept. 10, 2008), decided in *id.* (Oct. 23, 2008).

courts or by officials responding to public outcry — and the 2008 election was largely successful.

The same themes so evident in the 2008 election — attempts to suppress voting on the one hand, contrasted with efforts to extend the franchise and maximize participation — are reflected in the substantial number of election administration bills currently pending in state legislatures across the country. Fortunately, numerous states have taken up bills that are likely to expand the number of American citizens who are able to participate in our elections — for example, through modernizing voter registration, streamlining access to ballots for military and overseas voters, and expanding early voting. But other states are considering punitive measures that would prevent citizens from casting ballots that count — particularly indigent and elderly Americans, and voters of color. Perhaps the most egregious example of such legislation is a comprehensive election administration bill introduced in Florida at the eleventh hour of the legislative session, which, as the New York Times observes, will “make it harder for eligible voters, especially those from minorities and those who are poor, to register and vote.”⁸ But Florida is not alone.

Time constraints make it impossible for me to comment on all the pending legislation, but I will provide an overview of the most common proposals — including proposals that threaten the right to vote and undermine democracy and those which are good for voters, election administrators and our democratic system. And I will be happy to answer any questions.

First, the bad news:

I. Bills Are Pending In Numerous States That Would Erect Unnecessary Obstacles to Voting — Without Corresponding Benefits.

Unfortunately, there is an abundance of anti-voter legislation pending in legislatures across the country. Three types of legislation that would suppress voter turnout without justification have been most prominent: voter identification, or “voter ID” bills, proof of citizenship requirements, and restrictions on voter registration drives.

A. Voter Identification

The Brennan Center has exhaustively researched the impact of voter identification legislation and the incidence of the only type of voter fraud that voter ID bills have the potential to address — the impersonation of registered voters at the polls. And our research has conclusively established that impersonation fraud rarely, if ever occurs:⁹ more Americans are struck by lightning each year,¹⁰ and there are far, far more reports of UFOs

⁸ See Editorial: Suppressing the Vote in Florida, N.Y. Times, Apr. 18, 2009; see also Editorial: GOP Power Grab Is an Affront to Voters, St. Petersburg Times, Apr. 19, 2009.

⁹ See Justin Levitt, *The Truth About Voter Fraud* (2007), available at <http://www.brennancenter.org/content/resources/truthaboutvoterfraud/>.

¹⁰ See, e.g., Ronald L. Holle, *Lightning Deaths by State, 1997 to 2006* (2007), at http://lightningsafety.noaa.gov/stats/1997-2006_Fatalities+Rates.pdf.

each year than incidents of impersonation fraud.¹¹ But while there is no credible evidence that impersonation fraud occurs with any frequency, reliable evidence proves that photo ID bills erect hurdles that prevent real, actual citizens from voting.¹² The citizens affected are predominantly elderly and indigent voters, and citizens from minority communities.

Despite the fact that voter ID bills make it difficult or impossible for underrepresented citizens to participate in the electoral process — while “addressing” a problem that seldom, if ever, occurs — numerous states have taken up voter ID bills this term. Among them are Alabama, Idaho, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee, Texas and Utah.¹³ Many of these voter ID proposals have prompted heated partisan disputes — for example, in South Carolina members of the Legislative Black Caucus and House Democrats staged a walkout when Republican legislators forced movement on a photo ID bill, and in Oklahoma, Democratic Governor Brad Henry vetoed voter ID after it passed a Republican-controlled legislature.¹⁴ Utah’s governor, by contrast, signed Utah’s photo ID bill on March 20, making Utah the latest state to require voters to present a photo ID before voting.

B. Proof of Citizenship

During the 2007-2008 legislative sessions, lawmakers in 19 states proposed legislation that conditioned eligibility to register to vote on providing documentary proof of citizenship.¹⁵ None of these bills became law, but the threat of such punitive legislation remains: during the current sessions, such legislation has been proposed in 12 states.¹⁶ In many of these states, the proof of citizenship bills have died in committee, but in Georgia, a proof of citizenship bill passed the Assembly and is awaiting the governor’s signature.¹⁷

Proof of citizenship bills are misguided and unnecessary. Any requirement that citizens present documentary proof of citizenship when registering to vote would impose significant burdens that would fall on real citizens, particularly the elderly — without meaningfully addressing voter fraud. The Brennan Center has shown that millions of

¹¹ See, e.g., UFO Casebook, Breaking UFO News Reports, at <http://www.ufocasebook.com/>.

¹² See Justin Levitt, Fast Facts on the Impact of Photo ID: The Data, Apr. 2008, available at http://www.brennancenter.org/page/-/Democracy/_%20ID-related%20stats.pdf.

¹³ See M. Mindy Moretti, Electionline Weekly: Voter ID Bills Make Their Way Through Statehouses, Apr. 2009, at http://www.pewcenteronthestates.org/report_detail.aspx?id=50932.

¹⁴ See *id.*

¹⁵ See Brennan Center for Justice, States Where Bill Requiring Proof of Citizenship to Register and/or Vote Was Introduced in the Most Recent Session (2008), at <http://tinyurl.com/cajm7m>.

¹⁶ See Brennan Center for Justice, States Where Bill Requiring Proof of Citizenship to Register and/or Vote Was Introduced in the Most Recent Session (2009), at <http://www.brennancenter.org/page/-/2009-2010Session%20-%206.pdf>.

¹⁷ See Mary Lou Pickel, *Citizenship Proof for Voter Registration Passes General Assembly*, Atlanta Journal-Constitution, Apr. 3, 2009.

Americans lack documentary proof of citizenship,¹⁸ and that requiring such documentation to register will prevent real voters from becoming registered.¹⁹

These findings have been borne out in the lone state to implement proof of citizenship to date: Arizona. In the first 21 months that Arizona's proof-of-citizenship was in effect, it blocked the registrations of approximately 20,000 Arizonans.²⁰ This despite the fact that the overwhelming evidence — both in Arizona and nationwide — shows that there is no significant problem of ineligible non-citizens attempting to intentionally defraud the electoral process. Like voter ID requirements, proof of citizenship bills are a costly measure that will freeze eligible Americans out of the electoral process — without meaningfully addressing the real threats to electoral integrity.

C. *Restrictions on Third Party Voter Registration Efforts*

At least four states are contemplating bills that would restrict the ability of third party groups to conduct voter registration drives.²¹ These sorts of registration drives often involve non-profit, non-partisan groups that seek to register voters outside supermarkets or in churches; voters without driver's licenses, lower-income voters, and voters from communities of color are disproportionately likely to be registered by such third party registration efforts.

Proposals in Nevada, New Mexico, Washington and Florida would impose onerous penalties on third party registration activities — either by requiring groups to pre-register all volunteers with the state, strictly limiting the amount of time groups had to submit their completed registration forms, or imposing criminal penalties on volunteers who seek to sign up voters. The most punitive of these proposals is contained in an eleventh hour election bill that Florida Republicans introduced in the legislature; fortunately, Republican governor Charlie Crist has made it clear that he has serious reservations with this anti-voter legislation — and would consider vetoing the bill if it passed the legislature.²²

¹⁸ See Brennan Center, *Citizens without Proof*, available at http://www.brennancenter.org/content/resource/citizens_without_proof_a_survey_of_americans_po_ssession_of_documentary_proo.

¹⁹ See Brennan Center, *Policy Brief on Proof of Citizenship*, available at http://www.brennancenter.org/content/resource/policy_brief_on_proof_of_citizenship/.

²⁰ See *Gonzalez v. Arizona*, Order; Findings of Fact and Conclusions of Law, No. CV-06-1268, at 14 (D. Ariz. Aug. 20, 2008) (“Gonzalez Order”), available at <http://tinyurl.com/csvwf8>.

²¹ See Erin Ferns, *Election Legislation 2009: Threats & Opportunities Assessment*, Project Vote, Mar. 9, 2009.

²² See Alex Leary, *Crist Doesn't Like Elections Bill*, Miami Herald, Apr. 20, 2009.

II. Legislation Currently Pending in Congress and Numerous States Would Benefit Voters and Election Officials and Increase Participation.

In contrast to the anti-voter legislation proposed in numerous states, other policymakers have introduced a range of bills that will expand access to the franchise and streamline election administration — bringing benefits to both voters and election officials.

A. Adoption or Expansion of Early Voting

Twenty-three states offered some sort of early voting in the 2008 election, and millions of Americans cast their ballots before November 4th. Early voting provides options for voters who may find it difficult to take time off on Election Day, and it means fewer lines and a more efficient process on Election Day. Given the popularity — and success — of early voting, it is no surprise that 14 states that do not currently offer early voting have bills pending to adopt it.²³ Nine states that currently do offer early voting are currently considering bills that would expand it.²⁴

B. Same Day Registration

Eight states — Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming — currently offer full systems of Election Day registration. In these states, if a voter has not registered, or if the voter has moved and not submitted a change of address update, the voter may register and vote simultaneously, ordinarily after providing documentation of her identity and residence. In Maine and Montana, voters may register on Election Day at the registrar's office; in the other six states (and in several Maine jurisdictions), voters may register and vote at the regular polling place. Two additional states offer a more limited form of same-day registration. North Carolina offers same-day registration and voting during a period of early voting, but does not permit registration on Election Day itself. Ohio offers same-day registration during a five-day period just before the registration deadline, when voters may register and simultaneously cast an in-person absentee ballot.

This year, 16 states have legislation pending that would implement Election Day registration, while a bill has been introduced in New Hampshire that would repeal it.²⁵ Election Day registration has been repeatedly shown to increase voter turnout,²⁶ and in 2008, the four states with the highest turnout rates (and five of the top six) were all Election Day registration states.²⁷ When implemented properly, Election Day registration can

²³ See *National Conference of State Legislatures, The Canvass: States and Election Reform*; at <http://www.ncsl.org/programs/legismgt/elect/2009ElectionsLegislation.htm>.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See Steven Carbo & Brenda Wright, Demos, *Expanding the Vote: The Practice and Promise of Election Day Registration*, Jan. 2002, available at <http://www.demos.org/pubs/The%20Promise%20and%20Practice%20of%20Election%20Day%20Registration.pdf>

²⁷ See Nonprofit Voter Engagement Network, *Voter Turnout 2008*, available at <http://www.nonprofitvote.org/voterturnout2008#statetrends>.

expand registration and voting by groups that traditionally participate at disproportionately low levels, without threatening to undermine electoral integrity.

C. Military and Overseas Voting Reform

Earlier this year, the Pew Center on the States issued a report²⁸ that brings into sharp focus an inexcusable situation facing American troops overseas: because of logistical delays involved in receiving and submitting ballots, troops are often unable to submit their ballots in time to have their votes count. The report concluded that 16 states and the District of Columbia simply don't provide an opportunity for military personnel stationed overseas to have their votes counted.

In response to the unique challenges facing military and other overseas voters, Representatives Carolyn Maloney and Michael Honda introduced H.R. 1739 in the U.S. House of Representatives; the bill would streamline the registration and voting process and increase the likelihood that overseas and military votes will count. And the National Conference of State Legislatures has observed that, at the state level, there is a "noticeable trend this year in efforts to facilitate voting for military and other overseas voters," with 28 bills pending in 15 states – including Alabama, Connecticut, Florida, Maine, Missouri, Oregon, Virginia, and Washington.²⁹ Many of the pending bills would authorize electronic transmission of blank ballots, either by e-mail or fax, to speed the process of getting absentee ballots to overseas voters — an important step in overcoming the challenges of timing that 32 states have adopted

Though Illinois is, fortunately, not one of the states that provide insufficient time for military voters overseas to vote, it also does not authorize electronic transmission or submission of absentee ballots.³⁰ Such a reform would be an important step in guaranteeing that Illinois citizens living overseas, whether or not in uniform, would have a meaningful opportunity to vote.

D. On-Line (Internet) Registration

As they seek to modernize voter registration systems, numerous policy makers have proposed legislation that would permit on-line voter registration. A federal bill to do this was recently introduced in the House by Representative Zoe Lofgren.³¹ Similar legislation has been proposed in numerous statehouses, including in Colorado, Indiana, Nevada, New York, Oregon, Tennessee and Virginia. Though on-line registration is not a panacea — after all, not all Americans have regular access to a networked computer — it is an important step in bringing the American system of voter registration up to date.

²⁸ Pew Center on the States, *No Time to Vote; Challenges Facing America's Overseas Military Voters*, Jan. 2009 ("No Time to Vote").

²⁹ See National Conference of State Legislatures, *The Canvass: States and Election Reform*; at <http://www.ncsl.org/programs/legismgt/elect/2009ElectionsLegislation.htm>.

³⁰ See *No Time to Vote* at 2, 9.

³¹ See Press Release: Rep. Lofgren Introduces Online Voter Registration Bill: Bill Would Allow Voters to Register and Update Registrations Online, Mar. 26, 2009, available at http://www.lofgren.house.gov/index.php?option=com_content&task=view&id=512&Itemid=89.

III. Voter Registration Modernization

This brings me to the broadest challenge facing those who believe that the American people deserve a twenty-first century election administration process: modernizing voter registration. Some of the reforms I have already discussed — like adopting a system of same day or Election Day registration — are important elements of a modern registration system. But a fully functioning system should go beyond Election Day registration.

The need for modernizing voter registration is an acute one: non-partisan studies of the 2008 election have established that problems with our outdated elections system persist — and cost millions of Americans the right to vote last year. That is the conclusion reached by the Cooperative Congressional Election Study, which was presented to the U.S. Senate Rules Committee last month by Professor Stephen Ansolabehere of M.I.T. and Harvard.³² The CCES Study concluded that, in spite of the historically high turnout in the 2008 election, nearly 80 million eligible Americans did not vote. Of these, the study determined that 2 to 3 million voters were prevented from voting because of registration problems, and another 2 to 4 million were discouraged from voting because of other administrative problems. Another 9 million couldn't cast valid ballots because residency rules or registration deadlines prevented them from doing so.

Jonah Goldman, Director of the National Campaign for Fair Elections at the Lawyers' Committee for Civil Rights under Law, confirmed the conclusions of the CCES Study. He explained to the Rules Committee that extensive data compiled by the non-profit, non-partisan Election Protection coalition demonstrated that problems with the process of voter registration prevent more eligible citizens from voting than any other phase of the election administration process.³³ The Rules Committee's Chair, Senator Charles Schumer, summarized the problems with voter registration effectively: "In the 21st century people shouldn't be denied their constitutional right to vote because of problems caused by an antiquated voter registration system that was set up in the 19th century by the Whig Party."³⁴

Modernizing our system of voter registration system is readily achievable, and the Brennan Center has put forth a policy proposal that outlines the components of a registration system that takes advantage of modern technology to ensure that administrative errors do not disenfranchise citizens.³⁵ An effective system includes three basic components:

³² See Testimony of Stephen Ansolabehere to the U.S. Senate Rules Committee, Mar. 11, 2009, available at <http://tinyurl.com/d6yp88>.

³³ See Testimony of Jonah Goldman to the U.S. Senate Rules Committee, Mar. 11, 2009, available at <http://tinyurl.com/ccto2e>.

³⁴ See *Senate Committee Hearing Examines Flaws in Voter Registration System*, Talking Points Memo, Mar. 11, 2009, at <http://tinyurl.com/agueeu>.

³⁵ See Wendy R. Weiser, Michael Waldman and Renée Paradis, *Modernizing Voter Registration*, Oct. 31, 2008, available at http://www.brennancenter.org/content/resource/universal_voter_registration_draft_summary/.

- *First*, a modern voter registration system must include a program of automatic registration, in which the government assumes the duty of compiling a complete and accurate voter registration list. The most effective means to achieve automatic registration is for election officials to compile voter registration rolls using pre-existing government lists, including the existing voter rolls as well as other government lists like motor vehicle records. Voters should have the ability to opt-out of the system, but opt-in should not be required. Because the list would be automatically generated from a variety of sources, there should be a robust process for purging duplicate records, along with robust protections against erroneous purges.
- *Second*, a modern voter registration system must include a mechanism for “permanent voter registration,” so that once voters are registered, their addresses will be updated when they move and they will stay on the rolls. This way, once a voter is registered for the first time, she stays registered.
- *Finally*, a modern voter registration system must include a safety net of fail-safe procedures, because even the most effective system of automatic and permanent registration will miss some voters. Through a fail-safe mechanism like Election Day registration, eligible voters whose names do not appear on the voter rolls or whose information is not up to date will be correct the rolls and vote on the same day.

A modern registration system will create voter rolls that are as comprehensive as possible well in advance of Election Day and provide a fail-safe mechanism if an eligible voter shows up at the polls and isn’t found on the rolls. It will get election officials out of the data entry business, and make it unnecessary for them to process the millions of antiquated, hand-written paper forms they currently handle — which are often submitted in the very last days of the election cycle, straining administrative resources when election officials are most busy. And it will prevent voters from being disenfranchised because of administrative errors, mishandled or lost paper forms, and other data entry mistakes.

Such a system is routine in other countries, and because of various legal and technological developments, it is now achievable here. Indeed, all the elements of a modern registration system are either in place or under consideration in various states across the country. Minnesota is currently considering adopting a program of automatic voter registration, under which any eligible voter who signs up for a driver’s license or state identification card will be automatically added to the voter rolls.³⁶ Eight states — Florida,³⁷ Delaware,³⁸ Oregon,³⁹ Maryland,⁴⁰ Ohio,⁴¹ Colorado,⁴² Washington⁴³ and South

³⁶ See Nick Busse, *Automatic Voter Registration*, Minnesota House of Representatives Session Weekly, Mar. 27, 2009, available at <http://tinyurl.com/d3h5k9>.

³⁷ See Fla. Stat. Ann § 101.045(2)(a)(2008) (“An elector who moves from the precinct in which the elector is registered may be permitted to vote in the precinct to which he or she has moved his or her legal residence, provided such elector completes an affirmation...”).

³⁸ See Del. Code Ann. Tit. 15 §§ 2047(1), 4937 (2008).

Dakota⁴⁴ — have in place some system of permanent registration under which a voter who is registered to vote in the state may cast a ballot that counts on Election Day, even if she has moved and not yet updated her address with election officials. And, as noted earlier, eight states currently have some system of Election Day registration in place, and many more are considering adopting the policy.

There are no technical or legal impediments to implementing a system of modernized voter registration in Illinois, as these other states' experiences attest. And there are numerous and powerful policy reasons for doing so. I would urge you to lead the Prairie State in taking the lead on this fundamentally important issue.

Thank you for the opportunity to speak with you today. I am happy to answer any questions.

³⁹ See, e.g., Voting in Oregon Guide at 5, *available at* . http://www.uhavavote.org/votingguide/Voting_in_Oregon_Guide.pdf; see also email from Dave Franks, HAVA and Centralized Voter Registration Manager, to Brennan Center (Mar. 24, 2009) (on file with Brennan Center).

⁴⁰ See Md. Code Ann. § 11-303 (2008).

⁴¹ See Ohio Rev. Code Ann. § 3503.16(C)(2008) (stating that any elector moving from one county to another within the state on or prior to election day who is not otherwise registered to vote in the county to which he has moved may vote consistent with the entirety of the statute).

⁴² See Colo. Rev. Stat. § 1-8.5-107(2)(a)(2008) (“A registered elector who moves from the county in which the elector is registered to another county in the state . . . but fails to register to vote in the new county of residence before the close of registration may complete and emergency registration form at the office of the county clerk and recorder . . . or may cast a provisional ballot at a polling place”); *id.* § 1-2-217.5 (2008) (describing emergency registration at the office of the county clerk or recorder).

⁴³ See Wash. Rev. Code § 29A.08.430 (2008).

⁴⁴ See South Dakota Combined Laws § 12-18-7.1(2008).