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FOR JUSTICE

Ballot Security and Voter
Suppression: Information
Citizens Should Know

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INTRODUCTION

“Ballot security” is an umbrella term for a variety of practices that are carried out by political operatives and private groups with the stated goal of preventing voter fraud. Far too often, however, ballot security initiatives have the effect of suppressing eligible votes, either inadvertently or through outright interference with voting rights.

There is nothing intrinsically wrong with investigating and preventing voter fraud, despite the fact study after study shows that actual voter fraud is extraordinarily rare.¹ But democracy suffers when anti-fraud initiatives block or create unnecessary hurdles for eligible voters; when they target voters based on race, ethnicity, or other impermissible characteristics; when they cause voter intimidation and confusion; and when they disrupt the voting process.

Unfortunately, historically and in recent elections, “ballot security” operations have too often had these effects. One federal court recently found that ballot security operations planned or conducted in recent years have largely threatened legitimate voters.² As the court found, not only have such initiatives often targeted eligible voters for disenfranchisement, but they also disrupt polling places, create long lines, and often cause voters to feel intimidated.³ These effects are disproportionately felt in areas with large concentrations of minority or low-income voters, where such operations have typically been directed.

This election season, there has been a marked increase in efforts to organize “ballot security” initiatives and otherwise to mobilize activists to police against voter fraud. Political groups and activists across the country have been pouring substantial resources into such programs, and are encouraging and training their members and private citizens to serve as voter challengers or poll watchers and to take steps to deter or prevent voter fraud. This is occurring to an extent we have not seen in years.⁴ Based on past experience, there is a significant risk that ballot security operations will result in vote suppression and voter intimidation during the November 2010 elections, regardless of whether or not this is their intended result.

This paper addresses four types of conduct that often accompany ballot security initiatives:

- **Voter challenges:** formal challenges lodged by political operatives or private citizens to the eligibility of persons presenting themselves to vote, either at the polls or prior to Election Day;
- **Voter caging:** efforts to identify and disenfranchise improperly registered voters solely on the basis of an undeliverable mailing;

¹ In fact, Americans are more likely to be struck by lightning than to commit voter fraud. JUSTIN LEVITT, THE BRENNAN CENTER FOR JUSTICE, THE TRUTH ABOUT “VOTER FRAUD” 3, 23 (2007), available at http://www.brennancenter.org/page/-/d/download_file_38347.pdf (various studies of voter fraud in Missouri, New Jersey, and Wisconsin revealed voter fraud rates of 0.0003%, 0.0004%, and 0.0002%, respectively).

² Democratic Nat’l Comm. v. Republican Nat’l Comm., 671 F. Supp. 2d 575, 610–13 (D.N.J. 2009) (“DNC v. RNC”) (comparing the effects of voter fraud and ballot security initiatives on the integrity of modern elections, and concluding “the risks created by poorly-designed ballot security initiatives, undertaken with the ostensible purpose of safeguarding against fraud, are a greater threat to the electoral process than the in-person fraud they are meant to prevent”); *id.* at 612 (“it is all but certain that anti-fraud initiatives . . . will result in the disenfranchisement of many individuals whose eligibility is not in question.”).

³ *Id.*

⁴ See generally “Ballot Security” Operations, BRENNAN CENTER FOR JUSTICE (Oct. 10, 2010), http://www.brennancenter.org/content/resource/ballot_security_operations/.

- **Voter intimidation:** conduct that intimidates or threatens voters into voting a certain way or refraining from voting; and
- **Deceptive practices:** the dissemination of misleading information regarding the time, place, or manner of an election.

Because this conduct has the potential to interfere with the lawful exercise of the franchise, it is important for everyone involved in the process to have a clear understanding as to what is permissible and what is not permissible conduct. Specifically, voters should be armed with the knowledge that federal and state law afford protections against ballot security efforts when they are discriminatory, intimidating, deceptive, or when they seek to disenfranchise voters on the basis of unreliable information. Those who participate in ballot security programs should take care to ensure that their initiatives do not encroach upon the rights of eligible voters and run afoul of state and federal laws.

Voters who experience or witness any of the discriminatory, intimidating, or deceptive conduct discussed below should immediately report the problem to election authorities and, when appropriate, to law enforcement authorities. Voters should also call 1-866-OUR-VOTE, a non-partisan voter protection hotline; trained volunteers will be able to provide assistance and take steps to ensure that you can exercise your right to vote. Voters should also report the offensive conduct to the Voting Section of the United States Department of Justice by calling (800) 253-3931.

VOTER CHALLENGES

What is a voter challenge?

A number of states permit political party representatives or registered voters to challenge other voters' right to cast a ballot, either on or prior to Election Day. This typically leads to an inquiry, which may result in challenged voters losing their ability to cast ballots that count. Voter challenge laws are defended as a means to prevent voter fraud. At times, however, they can be misused and harm otherwise eligible voters.

When are challenges a problem?

Voter challenges are a problem when they are used in a discriminatory manner, when they are used to intimidate voters, and when they are based on unreliable data.

(1) Discriminatory Challenges

Discrimination at the polls, including challenges to voters selected in whole or in part based on their race, ethnicity, national origin, or any related characteristic, is illegal.⁵ Federal laws—including the U.S. Constitution, the Civil Rights Act, and the Voting Rights Act of 1965—protect the right to vote from discrimination by state officials. They also prohibit any individuals, whether or not they are state actors, from conspiring to mount challenges in a discriminatory manner.⁶ When state officials

⁵ *DNC v. RNC*, 671 F. Supp. at 602 (D.N.J. 2009) (affirming that private individuals violate federal law when they “attempt[] to prevent qualified voters from casting their ballots through . . . screening mechanisms based in whole or in part on their ethnicity”).

⁶ U.S. CONST. amend. XIV & XV, 42 U.S.C. § 1983 (prohibits anyone acting under color of law from depriving any individual of his or her constitutional rights, including his or her rights to vote and to equal protection of the laws); 42 U.S.C. § 1971(a)(2)(A) (“No person acting under color of law shall—(A) in determining whether

give effect to discriminatory challenges mounted by private persons, they may violate voters' right to equal protection of the law, regardless of whether they themselves have a discriminatory purpose.⁷ Individuals could also be held criminally liable if they conspire to deprive voters of their federally-protected rights to vote and to be free from discrimination.⁸

Although state election laws differ widely as to who can challenge a voter's eligibility; when and under what grounds a challenge may be mounted; and the standards and procedures that govern how a challenge is resolved, most states' laws similarly prohibit discrimination in the voting context.⁹

Here are examples of discriminatory challenges that should not be permitted and that could violate federal or state law:

- Challenges based in whole or in part upon race, national origin, appearance, surname, language, or religion.
- Challenges based in whole or in part upon the racial or ethnic composition of a precinct or polling place, or upon mailings targeted at individuals living in precincts with large concentrations of minorities.
- Challenges targeting precincts based on factors such as the political affiliation of a district or polling place, if those factors are strongly correlated with racial or ethnic background.

Here are examples from recent years of alleged incidents of discriminatory challenges:

- Under a voter challenge plan in 2004 in Ohio, 14 percent of new voters in majority White locations would face challengers while 97 percent of new voters in majority Black locations would face challengers.¹⁰
- In Florida in 2004, a list of "ineligible voters" was allegedly created by targeting students at Edward Waters, a historically black college.¹¹
- In 2004, residents of Atkinson County, Georgia made blanket challenges to most of the Hispanic voters in their precinct, alleging they were not U.S. citizens. One resident even asked the board

any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote."); 42 U.S.C. § 1985(3) (providing cause of action if "two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws").

⁷ *Cf.* *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁸ 18 U.S.C. §§ 241 & 242 (carrying penalties of fines and imprisonment up to ten years).

⁹ For example, New Mexico makes it a misdemeanor to "interfer[e] with in any manner the conduct of an election or with a . . . voter . . . in the performance of his duties." N.M. STAT. § 1-20-20. Ohio provides a private cause of action against harassment in violation of election law, which includes "improper practice[s] or attempt[s] tending to obstruct, intimidate, or interfere with an elector in registering or voting." OHIO REV. CODE ANN. § 3501.90.

¹⁰ Order Granting Plaintiffs' Motion for Temporary Restraining Order at 3, *Spencer v. Blackwell*, No. C-1-04-738 (S.D. Ohio Nov. 1, 2004).

¹¹ Suzanne Charlé, *Blocking the Black Vote in Jacksonville*, *The Nation*, Nov. 2, 2004, at <http://www.alternet.org/story/20379/>.

of elections for the names of every voter with a Hispanic name, and went on to challenge most of them.¹²

- In Washington State, a man challenged the voting credentials of hundreds of voters in 2004, claiming they were illegal immigrants. He stated that he created the list by looking for names that appeared foreign, eliminating names that “clearly sounded American-born, like John Smith or Powell.”¹³

(2) Intimidating Challenges

Because challenges can involve confrontations between prospective voters and persons who may be clothed with authority, they present a risk of voter intimidation. As discussed in the “voter intimidation” section below, conduct that has the purpose or effect of intimidating voters violates federal criminal law. While state laws vary widely as to the protections they provide voters from abuses of the challenge process, most states provide voters protection from voter intimidation and coercion in addition to that provided by federal law.¹⁴

Here are some examples of intimidating conduct in the challenge process:

- Direct confrontation of prospective voters by challengers or poll watchers;
- The use of insulting, offensive, or threatening language or raised voices;
- The use of law enforcement or other official attire by poll watchers or challengers.¹⁵

(3) Challenges Based on Unreliable Data

Because challenges have the potential to disenfranchise voters, they should be based on actual and reliable evidence. Challenges that target voters based on unreliable information are improper and may violate state or federal laws.

Many states require challenges to be based on “clear and convincing evidence” or otherwise reliable information.¹⁶ Challenges that are based on information that does not reliably indicate voter eligibility may be impermissible under these laws. To the extent state officials knowingly uphold challenges based on unreliable information, they may also run afoul of the Voting Rights Act or other federal laws.¹⁷

¹² See Teresa James, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters* 23, Sept. 2007, at http://www.projectvote.org/images/publications/Voter%20Caging/Caging_Democracy_Report.pdf.

¹³ Jim Camden, *Man says votes from illegal immigrants*, The Spokesman-Review, Mar. 31, 2005, at <http://www.spokesman.com/stories/2005/mar/31/man-says-votes-from-illegal-immigrants/>.

¹⁴ For instance, Ohio provides a cause of action to voters against any conduct “tending to obstruct, intimidate, or interfere with an elector in registering or voting at a place of registration or election.” OHIO REV. CODE ANN. § 3501.90 (LexisNexis 2010). In Texas, it is a class A misdemeanor for a person to influence a voter not to vote by means of coercion. TEX. PENAL CODE ANN. § 36.03. In Wisconsin, an elector who abuses the right to challenge “may be subject to sanctions” and election inspectors have the right to remove from the polling place individuals who disrupt polling operations. WIS. STAT. § 741(3).

¹⁵ See *DNC v. RNC*, 671 F. Supp. 2d at 580–81, 590 (describing forms of voter intimidation, including as part of the challenge process).

¹⁶ See, e.g. ARIZ. REV. STAT. § 16-121.01 (Arizona statute requiring clear and convincing evidence to rebut a presumption that a voter is properly registered).

¹⁷ 42 U.S.C. § 1971(a)(2)(B) (prohibits “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State

Here are some examples of challenges based on unreliable data that should not be permitted and that could violate state or federal law:

- **Discriminatory challenges.** Challenges based on race, ethnic group, surname, appearance or related characteristics are not only discriminatory, but unreliable bases upon which to mount a challenge.
- **No-match lists.** Under the Help America Vote Act (“HAVA”), states are required to match voters’ registration information against records in existing government databases. When a match is not found, the voter is required to present some form of identification before voting for the first time. Study after study demonstrates that match failures are almost always the result of typos and list flaws.¹⁸ In other words, an unsuccessful match not in any way a reliable indicator of a person’s ineligibility to vote. Challengers based on “no match” lists should not be permitted and, if mounted, should be denied.
- **Foreclosure lists.** Some challenges may target voters who have received foreclosure notices or whose properties appear on lists of foreclosure filings. These, too, are notoriously unreliable indicators of voter ineligibility. People who receive foreclosure notices are frequently able to resolve their issues and remain in their homes, and most of those who do move remain eligible to vote in their old polling places under federal and state law.¹⁹
- **Voter caging.** As we discuss below, so-called “voter caging” campaigns that compile lists of voters to whom mailings were sent and returned as undeliverable are also unreliable indicators of voter ineligibility.

Here are some examples from recent years of challenges based on unreliable data that could violate state or federal law:

- In 2004 in Florida, members of a political party created a list of “ineligible voters” by using a state felon list document known to be filled with errors.²⁰
- In 2008 in Michigan, Ohio, and Illinois, political party officials announced plans to target voters whose homes had been subject to foreclosure proceedings and who were still registered at their foreclosed home addresses.²¹

law to vote in such election”); *see generally* Washington Ass’n of Churches v. Reed, 492 F.Supp.2d 1264 (W.D. Wash. 2006); Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004); Condon v. Reno, 913 F. Supp. 946 (D.S.C. 1995); *see also* 42 U.S.C. § 1983 (providing a cause of action against any person acting under color of state law who deprives another person of a federally protected right).

¹⁸ A study by the Wisconsin Government Accountability Board found that even after their matching system was greatly improved, 10 percent of all voters were not successfully matched, and that most non-matches were largely attributable to name variations and typographical errors with driver license numbers, rather than voter ineligibility or fraud. *See A Report of the Government Accountability Board: A Statistical Analysis of HAVA Checks in Wisconsin August 6, 2008 through January 4, 2009*, Jan 15, 2009.

¹⁹ 42 U.S.C. § 1973gg-6(e) (describing circumstances under which registrants who move are entitled to vote “notwithstanding [their] failure to notify the registrar” of their address change”). Additionally, the vast majority of Americans who move do so within the same county. *See* U.S. Census Bureau, American Factfinder: Residence 1 Year Ago by Age in the United States; 2006 American Community Survey, *available at* <http://tinyurl.com/btwbne>.

²⁰ Suzanne Charlé, *Blocking the Black Vote in Jacksonville*, The Nation, Nov. 2, 2004, *at* <http://www.alternet.org/story/20379/>.

²¹ Eartha Jane Melzer, *Lose Your House, Lose Your Vote*, Michigan Messenger, Sept. 10, 2008, *at* <http://michiganmessenger.com/4076/lose--your-house-lose-your-vote>.

- In 2008 in Montana, political party officials challenged the registrations of more than 6,000 voters based on unreliable change-of-address information. A federal court found that the challenges were frivolous and that it would violate federal law for the state to burden voters as a result.²²

VOTER CAGING

What is Voter Caging?

“Voter caging” refers to the practice of sending mail marked “do not forward” to addresses found on voter rolls, compiling a list of mail that is returned to the sender as undeliverable, and then using that list to purge voter rolls or challenge voters’ eligibility on the grounds that they do not reside at the address under which they are registered. Although supporters of the practice claim it prevents voter fraud, voter caging can sometimes result instead in the targeting of voters based on their race, national origin, or political affiliation, and the disenfranchisement of large numbers of voters who are eligible and properly registered.²³

When is Voter Caging a Problem?

Voter caging lists become a problem when they are used by state officials or private challengers as the sole basis to purge voters from the rolls or challenge voters as ineligible. The federal “Motor Voter” Act prohibits state officials from relying on undeliverable mailings to purge voter rolls.²⁴ Additionally, federal courts have stepped in to prohibit voter caging campaigns that are racially targeted.²⁵ When a challenger uses a voter caging list to challenge the ineligibility of voters, he or she attempts to accomplish indirectly what the state is explicitly prohibited from doing—disenfranchising a voter based solely on an undelivered mailing. If a state accepts the invitation and upholds a

²² *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1081 (D. Mont. 2008) (noting that “[v]oters might be intimidated, confused, or even discouraged from voting upon receiving notice that their right to vote – the most precious right in a government of, by, and for the people – has been challenged).

²³ For instance, a regional political party director wrote an internal memorandum in 1986 suggesting that the likely effect of a voter caging program would be to “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.” Justin Levitt & Andrew Allison, *Reported Instances of Voter Caging* 3, Brennan Center for Justice, June 2007, available at http://www.brennancenter.org/page/-/d/download_file_49609.pdf (citing Martin Tolchin, *G.O.P. Memo Tells of Black Vote Cut*, N.Y. TIMES, Oct. 25, 1986, at 17; Thomas B. Edsall, *Ballot Security Effects Calculated*, WASH. POST, Oct. 24, 1986, at A1).

²⁴ 42 U.S.C. 1973gg-6(d)(1)(B)(i)-(ii) (a state may not remove a registered voter from the voter rolls on the basis of an undeliverable mailing unless the voter has failed to vote in at least two federal election cycles).

²⁵ *DNC v. RNC*, No. 81-3876 (D.N.J. Nov. 1, 1982) (consent order); *DNC v. RNC.*, No. 86-3972 (D.N.J. July 27, 1987) (settlement stipulation and order of dismissal); *United States v. Republican Party of North Carolina*, No. 92-161-CIO-5F (E.D.N.C. Feb. 27, 1992).

challenge on these grounds, the state would likely violate federal law.²⁶ Some states also explicitly prohibit the use of voter caging lists as the sole basis of a challenge.²⁷

Voter caging is a notoriously unreliable method of determining a voter's eligibility, as there are numerous reasons why a voter's mail may be returned unopened even though the voter provided accurate information to election officials. For example, a voter who is a student away from college, or is a member of the armed forces, may be temporarily away from his or her permanent address; a voter may receive mail at a permanent mailing address rather than his or her residential voting address; and mail may be lost, misrouted, or otherwise not delivered by the postal service, through no fault of the voter.²⁸ Sometimes the voter rolls themselves suffer from typos that are not the fault of voters. For example, in Milwaukee in 2004, a review of voter fraud allegations found that one-fifth of allegedly invalid addresses were instead the result of data entry errors in the voter rolls.²⁹

Additionally, voter caging campaigns frequently target voters based on race, ethnic group, national origin, or political affiliation. Such campaigns may violate federal civil rights laws prohibiting discriminatory targeting for the reasons stated above.³⁰

In recent years voters across the country have discovered evidence of several improper or illegal voter caging campaigns.³¹ Some examples include:

- In 2004, a political party sent non-forwardable mail to approximately 130,000 voters in Philadelphia. The party compiled a list of 10,000 names with undelivered mailings and threatened to send 1,000 challengers to precincts with predominantly African-American populations to challenge voters based on that list.³²
- In Ohio in 2004, voter caging campaigns threatened to challenge more than 30,000 voters in precincts with large minority populations on the basis of returned mail alone.³³

²⁶ See *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1083 (D. Mont. 2008) (“But, if the State’s procedure for evaluating voter challenges allows a county election official to conclude that any voter [the challenger] 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”); *Cf. Smith v. Allwright*, 321 U.S. 649, 765 (1944) (“This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.”) (citation omitted).

²⁷ For instance, California law prohibits a piece of undeliverable mail from being “accepted or used as evidence upon which to initiate a challenge as to residency by any member of the precinct board unless other evidence or testimony is also presented.” CAL. ELEC. CODE § 14241 (2010).

²⁸ The Brennan Center has documented several additional reasons why mail is returned as undeliverable despite the fact that the voter rolls contain a voter’s permanent address. See Justin Levitt & Andrew Allison, *A Guide to Voter Caging*, June 29, 2007, at http://www.brennancenter.org/content/resource/a_guide_to_voter_caging/.

²⁹ See *Wisconsin, 2004*, BRENNAN CENTER FOR JUSTICE, http://www.truthaboutfraud.org/case_studies_by_state/wisconsin_2004.html (last visited Oct. 21, 2010) (analyzing allegations of voter fraud in Wisconsin).

³⁰ See discussion *supra* pp. 3-4 (“Discriminatory Challenges”).

³¹ The Brennan Center has documented several reported instances of voter caging and potentially illegal voter purges. See Wendy Weiser & Margaret Chen, *Voter Suppression Incidents 2008*, BRENNAN CENTER FOR JUSTICE, at http://www.brennancenter.org/content/resource/voter_suppression_incidents; Justin Levitt & Andrew Allison, *supra* note 23, at 3

³² See Levitt & Allison, *supra* note 23, at 3, available at http://www.brennancenter.org/page/-/d/download_file_49609.pdf.

³³ *Id.*

- In 2008, Michigan removed more than 1,400 voters from its rolls on the basis of undeliverable mailings. A federal court found the practice to violate federal law and ordered the state to restore the vote to the rolls.³⁴

VOTER INTIMIDATION

What is Voter Intimidation?

Voter intimidation encompasses a wide range of conduct that is intended to or that has the effect of coercing voter behavior. Voter intimidation in the United States was at its worst in the decades following the Civil War and through the turn of the 20th century. Violence and threats were systematically used in the South to prevent African Americans from voting.³⁵ Today voter intimidation usually takes more subtle forms, but it continues to suppress the vote of racial and ethnic minorities. Voters, challengers, and watchers should watch out for ballot security tactics that cross over, even inadvertently, into intimidating conduct.

When is Voter Intimidation a Problem?

Federal laws prohibit all persons from engaging in conduct that is intended to, *or has the effect of*, intimidating voters.³⁶ When two or more persons agree to undertake such a challenge, they may be criminally liable under Section 241 of the Civil Rights Act, which imposes fines and imprisonment of up to ten years.³⁷ It is also impermissible to intimidate any person lawfully transporting individuals to the polling place or assisting individuals to read or cast ballots.

Some examples of illegal voter intimidation include:

- Verbal or physical confrontation of voters by persons dressed in official-looking uniforms.³⁸
- Physical intimidation, such as standing or hovering close to voters as they attempt to vote.
- Flyers threatening jail time or other punitive action against persons who vote.³⁹
- Direct confrontation or questioning of voters, or asking voters for documentation when none is required.⁴⁰

³⁴ See Wendy Weiser & Margaret Chen, *supra* note 31.

³⁵ See, e.g., Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 346–47 (2010) (citing Rayford W. Logan, *The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson* 91 (Da Capo Press 1997) (1954)).

³⁶ See 42 U.S.C. § 1973i(b) (“no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote”); 42 U.S.C. § 1971(b) (prohibits intimidating any other person “for the purpose of interfering with the right of such other person to vote or to vote as he may choose”).

³⁷ 18 U.S.C. § 241.

³⁸ See Farhad Manjoo, *Voter Terrorism*, Salon, Sept. 21, 2004, at <http://www.salon.com/news/feature/2004/09/21/intimidation> (describing an incident in Philadelphia in which a political campaign sent men in suits holding clipboards and wearing lapel pins with official-looking insignia into parts of the city with large African-American populations to intimidate voters and deliver misinformation about voting requirements).

³⁹ In 2004 in Wisconsin, a flyer claiming to have been issued by the “Milwaukee Black Voters League,” a nonexistent organization, threatened black voters with jail time if they or their family members had ever been convicted of anything. See Daniels, *supra* note 35, at 353.

- Vandalism of polling places.
- Use of Police Officers to threaten or intimidate voters.⁴¹
- Photographing or videotaping voters in an effort to intimidate them.
- Threats made by an employer to the job, wages, or benefits of an employee if he or she does not vote in a particular manner.
- Any other conduct that might cause voters to believe they may face legal or other problems if they attempt to exercise their right to vote.

VOTER MISINFORMATION OR DECEPTIVE PRACTICES

What are Deceptive Practices?

In some cases, political groups or lone individuals acting anonymously engage in the dissemination of misleading information regarding the time, place, or manner of an election, identification requirements, voter eligibility, or the presence and activities of law enforcement near a polling site. The misleading information can be in the form of flyers that are posted or distributed in a neighborhood, or increasingly through use of email and the internet. These tactics are aimed at suppressing the vote of racial and linguistic minorities, as well as the elderly and disabled.⁴²

Some examples of deceptive tactics in recent years include:

- In 2002 in Louisiana, flyers in an African American neighborhood inaccurately told voters they would be able to vote three days after the election.⁴³
- In 2004 in Ohio, flyers in Franklin County told voters that due to heavy voter registration, Republicans should vote on Tuesday and Democrats should vote on Wednesday.⁴⁴
- In 2006 in Virginia, voters living in areas with large minority populations received calls incorrectly reporting that their polling places had changed.⁴⁵
- In 2008 in Virginia, a flier that was purportedly from the State Board of Elections was posted in the Hampton Roads area stating that Republicans vote on Tuesday, November 4th, and

⁴⁰ In Arkansas, poll watchers singled out African American voters to ask them for photo identification. See People For the American Way, *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today* 7, at <http://www.pfaw.org/sites/default/files/thelongshadowofjimcrow.pdf> (hereinafter *The Long Shadow of Jim Crow*).

⁴¹ In 2008, there were reports in Michigan of police officers scanning lines of voters for persons with outstanding warrants. Project Vote, *Voter Intimidation and Caging*, Feb. 2010, at <http://www.projectvote.org/images/publications/2010%20Issues%20in%20Election%20Administration/2010%20Legislative%20Brief%20-%20Voter%20Intimidation%20and%20Caging.pdf>. In South Carolina, a state representative mailed brochures to Black voters, claiming that law enforcement agents would be at election sites. He warned voters, “this election is not worth going to jail.” *The Long Shadow of Jim Crow*, *supra* note 38 at 9–10.

⁴² See Daniels, *supra* note 35, at 349.

⁴³ See *The Long Shadow of Jim Crow*, *supra* note 40, at 7.

⁴⁴ See Daniels, *supra* note 35, at 343.

⁴⁵ See *id.* at 348.

Democrats vote on Wednesday, November 5th. The Virginia State Police determined that flier was an “office joke” and not intended to deceive voters.⁴⁶

- In 2008 in Philadelphia, fliers posted near Drexel University incorrectly warned that police officers would be at polling places looking for individuals with outstanding arrest warrants or parking tickets.⁴⁷

When is Voter Deception a Problem?

Efforts to mislead or deceive voters are always a problem and are never permitted. Persons who commit voter deception interfere with the free exercise of the elective franchise of others, and may violate several federal and state laws that prohibit interference with the elective franchise of others.⁴⁸ To the extent voter deception intimidates and deters voters from voting, such practices violate prohibitions on voter intimidation discussed above. Additionally, many states’ laws specifically punish various forms of deceptive practice.⁴⁹

⁴⁶ Julian Walker, *Phony Flier Says Virginians Vote on Different Days*, THE VIRGINIAN PILOT, Oct. 28, 2008, at <http://hamptonroads.com/2008/10/phony-flier-says-virginians-vote-different-days>; Julian Walker, *Officials Find Source of Fake Election Flier, Won’t Press Charges*, THE VIRGINIAN PILOT, Nov. 3, 2008, at <http://hamptonroads.com/2008/11/officials-find-source-fake-election-flier-wont-press-charges>.

⁴⁷ See Wendy Weiser & Margaret Chen, *supra* note 31.

⁴⁸ See, e.g., 42 U.S.C. § 1985(3) (providing cause of action if “two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”).

⁴⁹ For instance, Virginia imposes criminal penalties for “knowingly communicating false election information to a registered voter.” Wisconsin prohibits “false representation[s] pertaining to a candidate or referendum,” and Florida, Illinois, Kansas, and Minnesota broadly punish voter deception. See Daniels, *supra* note 35 at 369–70 (discussing state statutes that penalize deceptive practices).