

**BRENNAN
CENTER
FOR JUSTICE**

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**Subcommittee on the Constitution
Judiciary Committee**

**Statement of
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Mr. Chairman and the Members of the Subcommittee on the Constitution:

On behalf of the Brennan Center for Justice,¹ I thank you for providing me the opportunity to present testimony at this important hearing. Both the U.S. Department of Justice and Congress play critical roles in ensuring free, fair, and secure elections in America.

A recent study I co-authored, *Voting Law Changes in 2012*, documents the record number of bills introduced and passed this past year that restrict access to voting.² Make no mistake: these sweeping voting law changes raise grave concerns. Many of these new statutes were enacted in states covered by the Voting Rights Act's Section 5. These states must demonstrate that new voting laws do not improperly impact minority citizens. The U.S. Department of Justice has the duty to review those laws. The Justice Department has appropriately exercised its obligation to assure that these states follow the Voting Rights Act. It has enforced the clear dictates of law—nothing more, nothing less. The Department can and should do more to affirmatively enforce critical federal statutes protecting opportunities for voter registration. Congress, too, should step forward to modernize our ramshackle voter registration system.

¹ The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on issues of democracy and justice. Among other things, we seek to ensure fair and accurate voting procedures and systems, and to maximize the participation of eligible American citizens in elections. We have done extensive work on a range of issues relating to voting rights, including work to modernize our voter registration system, remove unnecessary barriers to voter participation; make voting machines more secure and accessible; defend the federal Voting Rights Act; and expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel states to comply with their obligations under federal law and the Constitution. This testimony is submitted on behalf of a Center affiliated with New York University School of Law, but does not purport to represent the school's institutional views on this topic.

² WENDY R. WEISER & LAWRENCE NORDEN, *VOTING LAW CHANGES IN 2012* (2011), available at http://brennan.3cdn.net/d16bab3d00e5a82413_66m6y5xpw.pdf.

Common sense, nonpartisan reforms could add all eligible voters to the rolls while cutting costs, reducing errors, and curbing any chance for fraud. We should move past partisan “voting wars” and bring our systems into the 21st Century.

In my testimony today, I will focus on: (1) the recent state legislative developments affecting voting and elections, including laws requiring government-issued photo ID to vote; (2) the impacts of the new laws, including those that are being examined by the Department of Justice and the courts; (3) the Department’s efforts to enforce federal voting laws; and (4) the need for additional steps to improve the election system for all eligible Americans.

I. New Laws Restricting Voting in the States

For decades, our nation has expanded the franchise and knocked down old barriers to full electoral participation. The last two years have seen an abrupt change in course, with a wave of state laws and legislation that create new restrictions on voting access. These laws take many forms—from eliminating election-day registration, to restricting voter registration drives by community groups, to reducing the number of days for early voting and limiting the number of days for voter registration.

As of today, during the 2011-12 legislative sessions, twenty-four (24) laws and executive actions restricting access to the polls were passed, and at least seventy-four (74) measures are still pending in state legislatures across the country.

The restrictions fall into five major categories: (1) requirements that voters provide specific kinds of government-issued photo ID to vote or have their votes counted; (2) requirements to provide documentary proof of citizenship in order to register and vote; (3) new restrictions on voter registration; (4) cutbacks on the availability of early and absentee voting; and (5) actions permanently depriving previously incarcerated citizens of their right to vote. Here is an overview of recent state legislation impacting voting rights, grouped by subject area:

a. Restrictive Photo ID

By far the most common election-related legislation introduced and passed in 2011 and thus far in 2012 is legislation requiring voters to produce certain forms of photo ID to vote. Prior to 2011, only two states had imposed strict photo ID requirements.³ During the 2011 and 2012 legislative sessions, however, seven states have passed strict “no-photo, no-vote” voter ID laws for citizens who vote in person;⁴ and three of those extended the new photo ID requirements to

³ Those states are Indiana and Georgia. See WEISER & NORDEN, *supra* note 2, at 4; Brennan Center for Justice, *2012 Voting Law Changes: Passed and Pending Legislation That has the Potential to Suppress the Vote*, available at http://brennan.3cdn.net/1f40bff8cb538f751a_88m6b5rob.pdf.

⁴ Alabama, Kansas, South Carolina, Tennessee, Texas, Pennsylvania, and Wisconsin. Tennessee, however, allows certain voters without ID to cast a regular ballot after swearing an affidavit of identity at the polls. See WEISER & NORDEN, *supra* note 2, at 6-7; Brennan Center for Justice, *2012 Voting Law Changes: Passed and Pending Legislation That has the Potential to Suppress the Vote*, available at http://brennan.3cdn.net/1f40bff8cb538f751a_88m6b5rob.pdf.

absentee voters.⁵ Mississippi similarly adopted a strict photo ID requirement for all voters via a ballot measure to amend the state constitution. Rhode Island passed a photo ID law that allows voters without ID to cast a ballot that will count if their identities are later verified by signature match.⁶

Overall, thirty-four (34) states saw bills introduced requiring photo IDs for voting. Of the states that do not have voter ID laws, only three—Oregon, Vermont and Wyoming—did not consider voter ID legislation this year or last. In five states, governors' vetoes prevented photo ID legislation from becoming law.⁷ In Minnesota, voters will consider a ballot initiative to require photo ID for voting in November 2012; and Missouri voters may also consider a voter ID ballot initiative, depending on the resolution to a legal challenge.

In addition, Virginia's legislature recently sent a voter ID bill to Republican Governor Bob McDonnell, who just last week stated that he would not sign the law unless the legislature softened the requirement to present a photo ID in order to cast a ballot. His proposed amendments included an expansion of the list of acceptable IDs, an increase in the time voters have to provide the required ID, and a proposal to count the provisional ballots of voters who lack the required identification after signature verification.⁸

b. Proof of Citizenship

At least seventeen (17) states saw legislation introduced that would require documentary proof of citizenship in order to register or vote. Very few official documents actually establish citizenship: birth certificates, naturalization certificates, and passports are among the rare examples. Proof of citizenship laws passed this past year in Alabama, Kansas, and Tennessee. Alabama⁹ and Kansas¹⁰ will require all new voter registration applicants to produce documentary proof of citizenship, while Tennessee¹¹ will require individuals flagged by state officials as potential non-citizens to produce such documentation. Until this year, only two states (Arizona, through its controversial Ballot Proposition 200, and Georgia) had passed proof of citizenship laws, and only one (Arizona) had such a requirement in effect.¹² In contrast, all other states rely

⁵ Kansas, Texas, and Wisconsin. *See* WEISER & NORDEN, *supra* note 2, at 6.

⁶ *Id.*

⁷ Minnesota, Missouri, Montana, New Hampshire and North Carolina. *See id.* at 5 n.17.

⁸ Matthew Ward, *Virginia Governor Seeks to Soften Voter ID Legislation*, CHICAGO TRIBUNE, Apr. 10, 2012, available at www.chicagotribune.com/news/sns-rt-us-usa-voterid-virginiabre83a03b-20120410,0,479433.story.

⁹ S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011), available at <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles/SB256-int.pdf>.

¹⁰ H.B. 2067, 2011 Sess. (Kan. 2011), available at http://www.kslegislature.org/li/b2011_12/year1/measures/hb2067/.

¹¹ S.B. 352, 107th Gen. Assemb., 2011 Sess. (Tenn. 2011), available at <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0352>.

¹² ARIZ. REV. STAT. §§ 16-152(A)(23), 16-166 (2011).

on the affidavit signed by a new registrant, under penalty of perjury, swearing that she is a U.S. citizen and that she meets all other voting eligibility requirements.

c. Making Voter Registration Harder

At least sixteen (16) states saw bills introduced to end highly popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities. Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote. Ohio and Maine, meanwhile, eliminated same-day voter registration, used by tens of thousands in 2008 alone, although the people of Maine voted to restore same-day voter registration,¹³ and Ohio's law is now being challenged by ballot referendum in November 2012.¹⁴

Florida, Illinois, and Texas passed laws restricting voter registration drives and other community-based voter registration activity. Florida enacted a law which effectively shut down registration drives that previously registered hundreds of thousands of citizens in that state.¹⁵ Florida's new law now requires that groups and individuals who wish to help voters register first pre-register with the state, submit within 48 hours every voter registration application received, continually submit extensive forms and reports, and keep track of every voter registration application they distribute.¹⁶ While Texas law had already required private citizens to be deputized by a local election official before they could register anyone to vote, the new law now requires these individuals to complete certain training requirements, which may include a final exam, before they can help register any new voters.¹⁷

d. Reducing Early and Absentee Voting

At least nine (9) states saw bills introduced to reduce their early voting periods, and four tried to reduce absentee voting opportunities. Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting. These cutbacks were proposed in spite of the fact that early voting was used by nearly one-third of all voters in 2008.¹⁸ Five states—Florida, Georgia, Ohio, Tennessee, and West Virginia—enacted laws that shortened the

¹³ Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS, Nov. 8, 2011, available at <http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/>.

¹⁴ WEISER & NORDEN, *supra* note 2, at 25-26. Because the law's challengers met the requirements to put the law before voters on the ballot, Ohio's new law will not be in effect in 2012.

¹⁵ H.B. 1355, 114th Reg. Sess. (Fla. 2011), available at <http://www.flsenate.gov/Session/Bill/2011/1355>; H.B. 1570, 82d Leg., Reg. Sess. (Tex. 2011), available at <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB01570F.pdf#navpanes=0>.

¹⁶ WEISER & NORDEN, *supra* note 2, at 21.

¹⁷ *Id.*

¹⁸ R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS 12 (2009), available at <http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf>.

early voting period.¹⁹ In the law that will be put before voters this November, Ohio cut the state's previous early voting period of thirty-five days and eliminated early voting on Saturday afternoon and Sunday.²⁰ Florida shortened the early voting period from two weeks to one, and eliminated voting on the Sunday before Election Day.²¹

e. Making it Harder to Restore Voting Rights

Governors Terry Branstad of Iowa and Rick Scott of Florida both issued executive actions reversing previously adopted policies of restoring voting rights to citizens with past felony convictions.²² In Iowa, 80,000 citizens in the last six years had their voting rights restored under this now reversed policy.²³ In Florida, about 150,000 citizens had their rights restored between 2007 and 2010. In fact, up to one million people could have benefited from the practice reversed by Governor Scott and his clemency board; based on the prior rates of restoration, we estimate that approximately 100,000 Floridians would have had their voting rights restored by 2012 but for that executive action.²⁴

¹⁹ H.B. 1355, 2011 Leg. Sess. (Fla. 2011), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1355er.docx&DocumentType=Bill&BillNumber=1355&Session=2011; H.B. 92, 2011 Gen. Assemb. (Ga. 2011), *available at* <http://www.legis.ga.gov/Legislation/20112012/116254.pdf>; H.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_194_PS_N.html; S.B. 772, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), *available at* <http://www.capitol.tn.gov/Bills/107/Bill/SB0772.pdf>; S.B. 581, 80th Leg., 1st Sess. (W. Va. 2011), *available at* http://www.legis.state.wv.us/Bill_Text_HTML/2011_SESSIONS/RS/pdf_bills/sb581%20ENR.pdf.

²⁰ H.B. 194, 129th Gen. Assemb., Reg. Sess. § 3509.01(B) (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_194_PS_N.html. The Ohio Secretary of State has interpreted another law that passed in 2011, H.B. 224, to end the period of in-person absentee voting at 6 PM on the last Friday before Election Day and thereby eliminate the last weekend of early voting prior to the election for all but uniformed and overseas absentee voters. Under this interpretation, one challenged by some Ohio legislators and voting rights groups, early voting on this last weekend will be eliminated regardless of the outcome of the November referendum.

²¹ 2011 FLA. LAWS 40, *available at* http://laws.flrules.org/files/Ch_2011-040.pdf; *see also* Justin Levitt, *A Devil in the Details of Florida's Early Voting Law*, ELECTION LAW BLOG (May 23, 2011), *available at* <http://electionlawblog.org/?p=18296>.

²² IOWA EXEC. ORDER NO. 42 (July 4, 2005), *available at* http://brennan.3cdn.net/563fe831695be5a1fa_nwm6bvbik.pdf (repealed by Gov. Branstad); FLA. PAROLE COMM'N, RULES OF EXECUTIVE CLEMENCY (Mar. 9, 2011), *available at* https://fpc.state.fl.us/PDFs/clemency_rules.pdf.

²³ WEISER & NORDEN, *supra* note 2, at 34.

²⁴ *See id.* at 34-35, 37 n. 1.

South Dakota recently passed a law imposing further restrictions on voting by citizens with past felony convictions by disenfranchising persons on probation.²⁵ This new law adds to the state's existing requirement that an individual complete any term of imprisonment or parole before his or her voting rights can be restored.

II. The Impact of the New Voting Laws

The new laws significantly alter the rules by which many Americans register and vote, placing new restrictions on the ways citizens can register and requiring more administrative steps in order to vote. In October, the Brennan Center estimated that these changes will make it harder for five million eligible Americans to vote.²⁶ To put that number in perspective, it is larger than the margin of victory in two of the last three presidential elections.

The litany of new state voting laws will have a disproportionately large impact on certain voters—especially the young, students, the elderly, minorities, women, low-income, and disabled voters. The new laws hit these groups hardest for multiple reasons. Some are less likely to have access to the type of documentation required by the new laws, or lack documentation with a current name or address. And some may rely on methods of voting and registration eliminated or restricted by the laws at higher levels than the general population. Below is some statistical evidence of how each of these groups may be especially affected by particular laws that have been passed.

a. The Impact of Photo ID Laws

Before examining the data concerning the impact of the new photo ID laws, it is worth noting that not all photo ID laws are created equal. Photo ID laws in place before the 2011 and 2012 legislative sessions were by and large less restrictive than the current crop of ID laws in three key ways: they accepted more forms of ID; they provided more exemptions and failsafe options for those without conforming IDs;²⁷ and they made it easier for voters without photo IDs

²⁵ H.B. 1247, 2012 Leg. Sess. (S. Dak. 2011), *available at* <http://legis.state.sd.us/sessions/2012/Bill.aspx?Bill=1247>.

²⁶ See WEISER & NORDEN, *supra* note 2, at 37 n.1 (explaining basis of estimate). That figure continues to change, as states continue to pass new laws and as courts and voters reject some previously-enacted laws and as restricting voting.

²⁷ For example, in Florida, voters who do not have photo ID can vote a provisional ballot that will count if the signature on the envelope matches that on their registration record. In Michigan and Louisiana, voters without ID can vote a regular ballot after swearing an affidavit of identity at the polls. Indiana's photo ID law provides three categories of exceptions to the strict voter ID requirement: one for the indigent, a second for those with religious objection to being photographed, and a third for those living in state-licensed facilities that serve as their precinct's polling place. Voters seeking to claim an exemption from the law based upon a religious objection or based upon their status as an indigent voter must go to the polls on Election Day and cast a provisional ballot. Within 10 days following the election, the voter must visit the county election office and affirm that the religious or indigence exemption applies. In Georgia, if a voter does not have a photo ID, she may go to the county registrar within three days and obtain a free photo ID and the provisional ballot will be counted.

to obtain such IDs, through affirmative education and outreach and, in Indiana's case, by having far greater citizen access to ID-issuing offices. In contrast, for example, unlike in Indiana and Georgia, the new South Carolina and Texas laws exclude state-issued employee photo IDs, and the new laws in Kansas and Wisconsin provide *no* mechanism for *any* voters without photo ID to vote a ballot that would count at the polls. Unfortunately, this means that there is a far higher likelihood that lack of ID will prevent citizens in these states from voting.

As the Brennan Center published in our report, *Citizens Without Proof*, based on a national survey conducted by the Opinion Research Corporation, 11% of voting-age Americans do not have the kinds of current government-issued photo ID required by the most restrictive new identification laws passed this past year.²⁸ The numbers are far worse for specific populations. For example, 18% of 18-24 year-old citizens and 18% of citizens 65 or older lack current government-issued photo IDs.²⁹ Among African Americans, approximately one in four do not possess such ID.³⁰ And according to another study, 78% of African-American men aged 18-24 in Milwaukee County, Wisconsin do not have a driver's license.³¹

Other independent empirical studies have come to the same conclusions. For instance, the 2001 Commission on Election Reform co-chaired by former Presidents Carter and Ford found that between 6 and 11 percent of voting-age citizens lack driver's licenses or alternate state-issued photo IDs.³² A 2008 survey of registered voters in eighteen states found that 8% lack a valid, state-issued photo ID with their current address.³³ A 2007 Indiana survey found that over 13% of registered Indiana voters lack a valid Indiana driver's license or an alternate Indiana-issued photo ID, and that state residents with only a high-school degree are 9.5% less likely to have access to valid photo ID than college graduates.³⁴ A 2009 Indiana study found that

²⁸ BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF* (2006), *available at* http://www.brennancenter.org/content/resource/citizens_without_proof_a_survey_of_americans_possessing_on_of_documentary_proof/; *see also* WENDY WEISER, KEESHA GASKINS & SUNDEEP IYER, 'CITIZENS WITHOUT PROOF' STANDS STRONG, Sept. 8, 2011, at http://www.brennancenter.org/content/resource/citizens_without_proof_stands_strong/ (responding to a recent attempt to criticize this study).

²⁹ *Id.*

³⁰ *Id.*

³¹ JOHN PAWASARAT, *THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 3* (2005), *available at* <http://www4.uwm.edu/eti/barriers/DriversLicense.pdf>.

³² THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, *TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS* (2001), *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/election2000/electionreformrpt0801.pdf>.

³³ LORRIE FRASURE ET AL., *2008 COLLABORATIVE MULTI-RACIAL POST-ELECTION SURVEY: COMPARATIVE MULTI-RACIAL SURVEY TOPLINES 24* (2008), *available at* <http://cmpstudy.com/assets/CMPS-toplines.pdf>.

³⁴ MATT A. BARRETO, STEPHEN A. NUNO, & GABRIEL R. SANCHEZ, *VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENT OF LATINO, BLACK AND ASIAN VOTERS* (2007), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_50884.pdf.

81.4% of all white eligible citizens had access to a driver's license, compared to only 55.2% of black eligible citizens.³⁵ A 2006 national survey sponsored by the Center on Budget and Policy Priorities found that 8.9% of African-Americans born in the U.S. do not have a passport or birth certificate available.³⁶ And a 2007 regression analysis of data from the Georgia Secretary of State and the Georgia Department of Driver Services determined that, compared to white voters, black voters were over three times more likely to lack photo ID.³⁷

Data provided by Texas and South Carolina to the Department of Justice confirm that a substantial number of eligible voters who are already registered—and an even greater proportion of minority voters—lack the IDs required by the new state laws. As the Department of Justice recently noted, Texas's data showed that the number of *registered* voters in the state who do not have a driver's license or a comparable non-driver's photo ID ranges from 603,892 to 795,955, and Hispanic registered voters are between 46.5% and 120% more likely than white voters to lack such ID.³⁸ (The state did not provide data about African-American voters.) According to South Carolina's data, 239,333 registered voters do not have state-issued driver's or non-driver's IDs, 81,393 of whom are minorities, and minorities were almost 20% more likely than white voters to lack DMV-issued photo IDs.³⁹

A number of the new photo ID laws are drafted in a way that makes it more difficult for voters of color and younger voters to qualify. For example, South Carolina, Texas, and Tennessee explicitly exclude state-issued student photo IDs from the list of acceptable identification,⁴⁰ and Wisconsin included requirements that Wisconsin State University's student IDs did not meet (at least at the time of enactment).⁴¹ Texas and Tennessee, despite not allowing state student IDs, do allow the use of concealed-carry handgun permits to vote. This legislative choice disproportionately harms African Americans, who are under-represented among concealed-carry handgun permit holders and over-represented among students. For instance,

³⁵ Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, PS: POLITICAL SCIENCE AND POLITICS 111 (January 2009), available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf.

³⁶ ROBERT GREENSTEIN, LEIGHTON KU & STACEY DEAN, SURVEY INDICATES HOUSE BILL COULD DENY VOTING RIGHTS TO MILLIONS OF U.S. CITIZENS 1 (2006), available at <http://www.cbpp.org/files/9-22-06id.pdf>.

³⁷ M.V. HOOD III & CHARLES S. BULLOCK, III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 Am. Politics Research, no. 4, July 2008 at 555-579, available at <http://apr.sagepub.com/content/36/4/555.abstract>.

³⁸ Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, 3, available at http://brennan.3cdn.net/fe6a21493d7ec1aafc_vym6b91dt.pdf.

³⁹ Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to C. Havird Jones, South Carolina Assistant Deputy Attorney General, Dec. 23, 2011, available at http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

⁴⁰ See WEISER & NORDEN, *supra* note 2, at 8.

⁴¹ *Id.*

African Americans make up 16.9% of the Texas public university student population,⁴² but received less than 7.7% of the state's concealed-carry permits in 2010.⁴³

Racial minorities will also frequently face greater obstacles to obtaining the newly required documentation. For example, acceptable forms of identification under the Texas law can be obtained at driver's license offices. Approximately one-third of Texas counties, however, do not have a driver's license office, and Latinos in these counties are significantly less likely to have common photo IDs. According to the most recent data Texas provided to the Justice Department, 14.6% of Latinos in counties without driver's license offices do not have either a driver's license or a personal identification card, compared with 8.8% of non-Latinos.⁴⁴ Latino households are also less likely to have access to a vehicle, making it harder for Latinos to travel the distance to the closest driver's license office.

These impacts translate into real consequences for real people.⁴⁵ Dorothy Cooper, a 96-year-old African-American woman in Tennessee, illustrates what can happen to women when the names on their birth certificate do not match the married names on their registration records: she was reportedly denied a free ID card and told she could not vote at her polling place, as she had in almost every election in the last 75 years.⁴⁶ In the state's recent primaries, 285 voters reportedly cast provisional ballots because they did not have photo IDs.⁴⁷ In South Carolina, it has been reported that husband-and-wife physicians who have been registering their patients to

⁴² U.S. CENSUS BUREAU, *2009 American Community Survey*, available at http://www.census.gov/acs/www/data_documentation/data_main/ (demonstrating significance at the 5% level, using a Z test for a single sample proportion) (data obtained by creating a custom table from the 2009 American Community Survey one-year estimates in the U.S. Census Bureau's Data Ferrett).

⁴³ TEX DEP'T OF PUBLIC SAFETY, CONCEALED HANDGUN LICENSING BUREAU, INFORMATION BY RACE/SEX, available at http://www.txdps.state.tx.us/administration/crime_records/chl/PDF/2010Calendar/ByRace/CY10RaceSexLicAppIssued.pdf.

⁴⁴ See Letter from Thomas E. Perez, Ass't Attorney General, Civil Rights Div., Dep't of Justice, to Keith Ingram, Dir. of Elections, Tex. Sec'y of State, Mar. 12, 2012; see also Sundee Iyer, *Unfair Disparities in Voter ID*, BRENNAN CENTER BLOG, Sept. 13, 2011, available at http://www.brennancenter.org/blog/archives/the_accessibility_of_texas_dlo_locations/ (Latino voters make up about 33% of Texas citizen voting age population but more than 60% of those who live more than 20 miles from a state driver's license office).

⁴⁵ For additional stories of individuals affected by voter ID laws, see Lawyers' Committee for Civil Rights Under Law, *Think Getting "Free" ID is Easy? Think Again!*, at <http://www.lawyerscommittee.org/page?id=0046>; Think Progress, *Nine People Denied Voting Rights By Voter ID Laws*, at <http://thinkprogress.org/justice/2012/03/22/449243/report-nine-people-denied-voting-rights-by-voter-id-laws/>; Justin Levitt, Testimony Before Senate Committee on the Judiciary, Sept. 8, 2011, at <http://www.judiciary.senate.gov/pdf/11-9-8LevittTestimony.pdf>.

⁴⁶ Ansley Haman, *96 Year Old Chattanooga Resident Denied Voting ID*, CHATTANOOGA TIMES-FREE PRESS, Oct. 5, 2011, available at <http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/>.

⁴⁷ Daniel Potter, *Voter ID Law Triggers 285 Provisional Ballots; Not All Count*, WPLN NEWS, Mar. 9, 2012, available at <http://wpln.org/?p=34932>.

vote for the past 29 years are unable to help many of their patients register to vote, even though they have offered to pay for IDs, because many of their patients do not have birth certificates.⁴⁸

In contrast to the claims of many photo ID supporters, photo ID laws risk depressing voter turnout. Indeed, the most rigorous empirical study to date,⁴⁹ recently described in the leading journal of political science methodology, *Political Analysis*,⁵⁰ concludes that the strictest forms of voter ID requirements reduce turnout among registered voters. And contrary to the claims of some,⁵¹ there is no evidence that photo ID laws increase turnout. At a time when Hispanic voting rates, as well as raw numbers, went up sharply up in neighboring states, Hispanic turnout in Georgia went up much less than in sister states without a photo ID requirement in effect. In fact, adjusting for growth in the voting-age Hispanic citizen population, the increase in Hispanic votes cast between 2006 and 2010 was over 250% greater in North Carolina than in Georgia. Similarly, the increase in black turnout in North Carolina was 129.7% greater than the increase in black turnout in Georgia between 2006 and 2010.⁵²

b. Photo ID Laws Do Not Improve Election Integrity

Photo ID laws also fail to meaningfully improve the security of our elections system. The only problem they have the potential to address is in-person impersonation fraud, and study after study confirms that problem to be exceedingly rare, and far rarer than the disenfranchisement caused by photo ID requirements.

⁴⁸ Dawn Hinshaw, *S.C. Husband-and-Wife Doctor Couple at Center of Voting Rights Movement*, THE SUN TIMES, July 18, 2011, available at <http://www.thesunnews.com/2011/07/18/2283993/sc-husband-and-wife-doctor-couple.html>.

⁴⁹ R. MICHAEL ALVAREZ, DELIA BAILEY, & JONATHAN N. KATZ, THE EFFECT OF VOTER IDENTIFICATION LAWS ON TURNOUT (Oct. 2007), available at http://brennan.3cdn.net/c267529e2bb704e85d_u0m6ib08s.pdf.

⁵⁰ R. Michael Alvarez, Delia Bailey, & Jonathan N. Katz, *An Empirical Bayes Approach To Estimating Ordinal Treatment Effects*, POLITICAL ANALYSIS 26-30 (2010), available at http://brennan.3cdn.net/a5782740e4185414a8_snm6bhfwg.pdf.

⁵¹ For example, as Hans von Spakovsky stated on PBS NEWSHOUR (March 14, 2012): “In fact, the turnout of African-Americans and Hispanics, for example, in Georgia *went up significantly* in the state in the two federal elections held since [voter ID was instituted].”

⁵² Data on voter turnout by race in North Carolina were extracted from the November 2006 and November 2010 state voter history files, available at <ftp://www.app.sboe.state.nc.us/enrs/>. Data on voter turnout by race in Georgia were extracted from the voter turnout reports produced by the Georgia Secretary of State’s Office; the reports are available at http://sos.georgia.gov/elections/voter_registration/Turnout_by_demographics.htm. Hispanic population growth adjustments were calculated by indexing the rate of voting-age Hispanic citizen population growth in North Carolina to the rate of voting-age Hispanic citizen population growth in Georgia; population growth data were obtained from the Current Population Survey’s Voting and Registration Supplement, available at <http://www.census.gov/hhes/www/socdemo/voting/>.

These laws are justified by wild charges of massive voter fraud. A leading proponent, John Fund, for example, has published a book entitled *Stealing Elections: How Voter Fraud Threatens Our Democracy*.⁵³ But as Heritage Foundation fellow Hans von Spakovsky told *The New York Times*:

“The left always says that people who are in favor of this claim there is massive fraud,” said Mr. von Spakovsky, of the Heritage Foundation. “No, I don’t say that. I don’t think anybody else says that there is massive fraud in American elections....”⁵⁴

For several years, the Brennan Center has studied claims of voter fraud in order to distinguish unfounded and exaggerated tales of fraud from reliable, verified claims of election misconduct. Our analytic method was published in a monograph entitled *The Truth about Voter Fraud*, which catalogs the recurrent methodological flaws that lead to allegations of voter fraud, and debunks baseless — though often repeated — reports of voter fraud.⁵⁵ In our research we have found virtually no fraud of the type that a photo ID requirement could fix. To the contrary, allegations of voter fraud typically prove baseless upon inspection. A recent example occurred in South Carolina, where state election officials proved that what had appeared to be voting in the name of dead people was actually just mistakes in list matching and clerical errors.⁵⁶ There is little to no reliable evidence of any in-person impersonation fraud in the country. Again, this form of fraud is *the only* misconduct that photo ID laws address.

Other available studies also show that the incidence of in-person voter impersonation is extraordinarily rare. Between October 2002 and September 2005, as part of a high-priority national effort to investigate and enforce laws against voter fraud, the Department of Justice brought 38 cases; of those, only one conviction involved impersonation fraud.⁵⁷ In a

⁵³ JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (Encounter Books, 2d ed., 2008).

⁵⁴ Michael Cooper, *New State Rules Raising Hurdles at Voting Booth*, THE NEW YORK TIMES, Oct. 2, 2011, Page A1, available at <http://www.nytimes.com/2011/10/03/us/new-state-laws-are-limiting-access-for-voters.html?sq=hans%20von%20spakovsky&st=cse&scp=2&pagewanted=all>.

⁵⁵ JUSTIN LEVITT, *THE TRUTH ABOUT VOTER FRAUD* (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>.

⁵⁶ Officials in the state’s motor vehicle department had claimed that 950 dead people allegedly voted in recent elections. The state’s Election Commission examined 207 of those alleged instances and found no evidence of potential fraud in 197, and insufficient evidence to make a determination in the remaining 10. See Pam Fessler, *In South Carolina, New Report Finds No Evidence of ‘Dead’ Voters*, NPR, Feb. 23, 2012, at <http://www.npr.org/blogs/itsallpolitics/2012/02/23/147295537/in-south-carolina-new-report-finds-no-evidence-of-dead-voters>; see also Justin Levitt, *New report of potential “dead voters” in South Carolina ... and it’s not even Halloween*, ELECTION LAW BLOG, Jan. 12, 2012, at <http://electionlawblog.org/?p=27864>.

⁵⁷ U.S. Department of Justice, Criminal Division, Public Integrity Section, “Election Fraud Prosecutions and Convictions; Ballot Access and Voting Integrity Initiative, October 2002 – September 2005,” available at <http://cha.house.gov/media/pdfs/DOJdoc.pdf>.

comprehensive examination of the 9,078,728 votes cast in Ohio's 2002 and 2004 general elections, a total of four were found to be fraudulent meriting legal action by the Board of Elections and County Prosecutors; there is no evidence that any of the four convictions could have been prevented by a photo ID law.⁵⁸ A comprehensive analysis of the 2004 Washington gubernatorial election revealed 6 cases of possible double voting and 19 cases of alleged voting in the name of deceased individuals out of a total 2,812,675 ballots cast; the rate of ineligible voting that thus might have been remedied by ID requirements was 0.0009%.⁵⁹ In an extensive study searching for voter fraud in all 50 states, Barnard political scientist Lorraine Minnite concluded that deliberate instances of voter fraud are extremely rare.⁶⁰

Efforts to document the existence of impersonation voter fraud typically come up empty. After reviewing reams of papers filed by supporters of Indiana's voter ID law in 2007, the U.S. Supreme Court identified only one proven case of impersonation fraud in recent decades, and one infamous historic example from 1868.⁶¹ The Brennan Center's comprehensive review of all alleged voter fraud incidents submitted to the Court in that case showed that only a handful of allegations that could possibly have involved impersonation fraud and only one proven case that could possibly have been prevented by an ID requirement.⁶² Similarly, a website recently put up by the Republican National Lawyers Association attempts to gather information about voter fraud prosecutions and convictions in all fifty states over the past decade.⁶³ The information collected on that website, however, shows only *two potential* cases of impersonation voter fraud, one by mail and one whose facts could not be determined. Instead, the site lists cases of potential double voting, potential non-citizen voter registration or voting; potential voter registration fraud; potential absentee ballot fraud; potential vote buying; and potential voting from the wrong residence.⁶⁴ None of these forms of fraud would be addressed by a photo ID requirement at the polls.

⁵⁸ COHHIO and League of Women Voters Ohio, *Let the People Vote: A Joint Report on Election Reform Activities in Ohio* (June 14, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH-MotionforPI-10-14-08-ExE.pdf>.

⁵⁹ *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005).

⁶⁰ LORRAINE MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

⁶¹ *Crawford v. Marion County Election Board*, 533 U.S. 181, 195 nn. 11, 12 (2007).

⁶² JUSTIN LEVITT, ANALYSIS OF ALLEGED FRAUD IN BRIEFS SUPPORTING CRAWFORD RESPONDENTS (Dec. 2007), at http://brennan.3cdn.net/45b89e6d14859b0f8e_i2m6bhcv9.pdf.

⁶³ See Republican National Lawyers Association, Voter Fraud: The Evidence, at <http://www.rnla.org/votefraud.asp>,

⁶⁴ Specifically, the site lists 25 cases of potential double voting, 25 cases of potential non-citizen voter registration or voting; 47 cases of potential voter registration fraud; 32 cases of potential absentee ballot fraud; 72 cases of potential vote buying; 57 cases of voting from the wrong residence; 28 cases of potential voting by unqualified voters; 13 other cases of specific but non-ID related fraud; and 2 cases of unspecified fraud. *Id.*

Some claim the low incidence of evidence of voter impersonation fraud is because it is so difficult to detect.⁶⁵ In truth, there are multiple means to discover in-person impersonation fraud, all of which might be expected to yield more reports of such fraud, if it actually occurred with any frequency. An individual seeking to commit impersonation fraud must, at a minimum, present himself at a polling place, sign a pollbook, and swear to his identity and eligibility. There will be eyewitnesses: pollworkers and members of the community, any one of whom may personally know the individual impersonated, and recognize that the would-be voter is someone else. There will be documentary evidence: the pollbook signature can be compared, either at the time of an election or after an election, to the signature of the real voter on a registration form, and the real voter can be contacted to confirm or disavow a signature in the event of a question.⁶⁶ There may be a victim: if the voter impersonated is alive but later arrives to vote, the impersonator's attempt will be discovered by the voter. (If the voter impersonated is alive and has already voted, the impersonator's attempt will likely be discovered by the pollworker; if the voter impersonated is deceased, it will be possible to cross-reference death records with voting records, as described above, and review the actual pollbooks to distinguish error from foul play.) If the impersonation is conducted in an attempt to influence the results of an election, it will have to be orchestrated many times over, increasing the likelihood of detection.

It is telling that there have been only a handful of potential instances of impersonation fraud among the hundreds of millions of ballots cast during a period when investigating voter fraud was expressly deemed a federal law enforcement priority,⁶⁷ and when private entities were equipped and highly motivated to seek, collect, and disseminate such reports. Every year, there are far more reports of UFO sightings.⁶⁸ The scarcity of reports of in-person impersonation fraud, in this context, is itself meaningful.

c. The Impact of Proof of Citizenship Laws

Nationwide, at least 7% of voting-age Americans do not have ready access to proof of citizenship documentation, according to our 2006 study.⁶⁹ Based on this, the Brennan Center estimates that well over half a million citizens may not have the necessary proof of citizenship documentation now required in Kansas and (in some cases) Tennessee, and that will be required

⁶⁵ See, e.g., *Crawford v. Marion County Election Board*, 472 F.3d 949, 953 (7th Cir. 2007).

⁶⁶ It is no answer that the individual may have submitted a fraudulent registration form in a fictitious name, presumably outside of the presence of an election official, before arriving in person to vote in that fictitious name. Federal law already contemplates this hypothetical and unlikely possibility, by providing that any registrant new to the jurisdiction who submits a registration form by mail must at some point, and through a broad range of means, offer reliable proof of his identity before voting. 42 U.S.C. § 15483(b).

⁶⁷ See Dep't of Justice, Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative, July 26, 2006, http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html; Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

⁶⁸ See, e.g., UFO Casebook, Breaking UFO News Reports, <http://www.ufocasebook.com/>.

⁶⁹ CITIZENS WITHOUT PROOF, *supra* note 28.

in Alabama, to register to vote.⁷⁰ New proof of citizenship requirements may especially harm women, who are much less likely to have updated proof of citizenship documents that reflect their current legal name. According to our 2006 study, one third of voting-age women do not have access to proof of citizenship with their current legal name.⁷¹

Citizens with low income may also have difficulty complying with proof of citizenship requirements. At least 12% of citizens earning less than \$25,000 lack ready access to proof of citizenship documentation.⁷² Moreover, such documentation can be prohibitively expensive for the poorest citizens; for example, birth certificates cost between \$15 and \$25.⁷³ Other documents, such as certificates of naturalization, can cost hundreds of dollars.⁷⁴ Although Alabama and Kansas provide for free birth certificates if needed in order to register, Tennessee does not. Moreover, Alabama and Kansas' free birth certificates will not help those born out of state.

d. The Impact of New Voter Registration Restrictions

New laws restricting voter registration drives will result in far less community-based voter registration activity, which will have disparate impacts on minority voters.

Florida's former Republican Governor Charlie Crist has called the new law in Florida "a step backward," explaining that "creating barriers to voter registration or access to the polls is contrary to our democratic ideals."⁷⁵ Though it has been in effect for only a short time, the impacts of the new Florida law's onerous burdens are already clear. Multiple groups, whose charitable missions revolve around protecting and expanding the franchise, have ceased or significantly curtailed voter registration activities throughout the state out of fear that they will be unable to comply with the law's requirements and thus be subject to fines, crippling civil and criminal penalties, and devastating reputational harm. Community registration groups who have in the past brought thousands of new voters onto Florida's rolls have explained the law's impacts to their work:

⁷⁰ The citizen voting age population of the states is around 9 million, and approximately 7% of citizens do not have proof of citizenship documentation. CITIZENS WITHOUT PROOF, *supra* note 28.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Texas Vital Statistics – Birth Certificates*, TX. DEP'T OF STATE HEALTH SERVS., http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm (\$22); *Ordering Birth Certificates*, KAS. DEP'T OF HEALTH AND ENV'T, http://www.kdheks.gov/vital/birth_howto.html (\$15); *Vital Records*, GA. DEP'T OF PUB. HEALTH, <http://health.state.ga.us/programs/vitalrecords/birth.asp> (\$25).

⁷⁴ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=a936cac09aa5d010VgnVCM10000048f3d6a1RCRD>.

⁷⁵ Charlie Crist, *Florida Laws Erect Barriers to Voter Participation*, TAMPA BAY TIMES, April 10, 2012, *available at* <http://www.tampabay.com/opinion/columns/article1224203.ece>.

- Deirdre Macnab, President of the League of Women Voters of Florida [LWVF], explained: “As a result of the new Law, LWVF has ordered a statewide cessation of voter registration until the Law is enjoined or limited in such a way as to substantially reduce the organizational and financial risk to the League, its members, and volunteers... The local Leagues operate on a decentralized model with an all-volunteer force, which has successfully registered tens of thousands of Floridians to vote over the last 72 years without incident. The 48-hour requirement would require LWVF and its local Leagues to dramatically revise their procedures in a manner that would require volunteers to become detailed timekeepers and create strict schedules to ensure that forms were handed in before the clock strikes 48 hours—and do all this under the ticking time bomb of civil penalties and fines.” Moreover, “[m]any LWVF volunteers are elderly and depend on others for transport. They may have a particularly hard time meeting the 48-hour deadline.”⁷⁶
- Rock the Vote’s [RTV] President Heather Smith stated, “RTV is extremely concerned that the Law will make it exceedingly difficult to encourage student volunteerism with us. The Law now requires each ‘registration agent’ to sign a sworn form detailing severe felony penalties that result from false registration. While we train our volunteers to ensure no one falls afoul of these laws, introducing a student to civic participation and volunteerism via a list of felony penalties, in turn signed under felony penalty of perjury, is intimidating and scary for many students. The nature of the required form will lead to fewer students who are willing to participate in and volunteer in RTV’s voter registration activity, particularly on a spontaneous basis.” Likewise, Ms. Smith affirms that “[T]here is no question that we will have to drastically cut back, or perhaps discontinue, our registration efforts in Florida. We have already suspended our Democracy Class program [a voter registration training module for high school teachers] and our in-person voter registration work in the state of Florida since the Law’s passage.” The cessation of RTV’s Democracy Class in Florida is particularly significant because RTV has “had to turn down requests from individuals and teachers in Florida to collaborate on voter registration activity due to the Law’s burdensome new requirements.”

The new restrictions on voter registration drives will disproportionately harm minority and young voters. In Florida, for example, African Americans and Latinos registered to vote through voter registration drives at twice the rate as white voters in 2004 and 2008.⁷⁷

⁷⁶ Brennan Center for Justice, Testimony before Congressional Field Hearing, New State Voting Laws II: Protecting the Right to Vote in the Sunshine State, January 27, 2012, *available at* http://www.brennancenter.org/content/resource/new_state_voting_laws_ii_protecting_the_right_to_vote_in_the_sunshine_state/.

⁷⁷ Letter from Lee Rowland, Democracy Counsel, Brennan Center for Justice & Mark A. Posner, Senior Counsel, Lawyers’ Comm. for Civil Rights Under the Law, to Chris Herren, Chief, Voting Section, U.S. Dep’t. of Justice 12 (July 15, 2011), *available at* http://brennan.3cdn.net/4713a8395c96f48085_p7m6iv6sh.pdf; U.S. Census Bureau, Current Population Survey (Nov. 2010).

Community-based voter registration drives typically register significant numbers of citizens to vote in Florida and elsewhere. Those numbers are significantly higher for communities of color. As of 2010 in Florida, 10% of African-American registered voters and 12% of Hispanic registered voters in Florida were registered through drives, compared to only 5.3% of non-Hispanic white registered voters.⁷⁸ Similarly, African Americans and Latinos registered to vote through voter registration drives at approximately twice the rate of white voters in 2004 and 2008.

Unsurprisingly, during its consideration by the legislature, the law was strongly opposed by minority leaders in Florida. And, because of its disparate impact, numerous civil rights organizations and individuals (including several represented by the Brennan Center) have intervened in *Florida v. United States* to illustrate how the law harms minority voters.⁷⁹

e. The Impact of Early Voting Changes

Minority voters will also bear the brunt of new laws restricting early voting. In 2008, a large number of African-American churches in Florida and Ohio organized successful “souls to the polls” drives, whereby churchgoers were provided free rides to the polls for early voting on Sunday. In Florida, 33% of citizens who voted early on the Sunday before Election Day were African American, even though African Americans make up only 13% of the citizen voting age population.⁸⁰ Additionally, 24% were Latino, even though Latinos make up only 16% of the citizen voting age population.⁸¹ Now, Florida has eliminated voting on the Sunday before the election, and Ohio has passed a law eliminating Sunday voting entirely.

f. The Impact of Laws Making It Harder to Restore Voting Rights

Actions to prevent the restoration of voting rights to previously incarcerated citizens will prevent tens and possibly hundreds of thousands from being able to vote and disproportionately hit minorities the hardest. A total of 5.3 million American citizens are not allowed to vote because of a criminal conviction, even though 4 million of those have completed their sentences.⁸² A disproportionately high number of these citizens are African American and Latino. Nationwide, 13% of African-American men have lost the right to vote, a rate that is seven times the national average.⁸³ Latinos are also incarcerated at higher rates than Whites;

⁷⁸ *Id.*

⁷⁹ A letter by the Brennan Center and the Lawyers’ Committee for Civil Rights Under Law further detailing these racial impacts, which was submitted to the Justice Department in opposition to the preclearance of the Law on behalf of the National Council of La Raza and the League of Women Voters of Florida, is available at http://brennan.3cdn.net/3463b136d6b952b158_6nm6ii1sn.pdf.

⁸⁰ Rowland & Posner, *supra* note 77.

⁸¹ *Id.*

⁸² JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 76 (2006).

⁸³ SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 1 (Mar. 2011), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=15.

Latinos represent 21% of the prison population despite representing only 16.3% of the total U.S. population.⁸⁴ The new South Dakota law expanding disenfranchisement to voters on probation is likely to have a disproportionate impact on the state's Native American voters, who make up 8.8% of the state's population and 26.8 % of the state prison population.⁸⁵

By reversing the policy of restoring voting rights to previously incarcerated individuals, states exacerbate existing disparities in the criminal justice system by keeping a population with a disproportionately high number of minority voters off the voter rolls.

III. The Role of the Department of Justice in Enforcing Federal Protections of the Right to Vote

The Department of Justice, through its Voting Rights Section, plays a critical role in the monitoring and enforcement of laws protecting the right to vote, including the seminal Voting Rights Act of 1965, the National Voter Registration Act of 1993 (NVRA or "Motor Voter" Law), the Help America Vote Act of 2002 (HAVA), and the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), as amended by the 2010 Military and Overseas Voter Empowerment Act (MOVE Act).

The significant bulk of the Department's recent voting rights enforcement actions have been taken under UOCAVA and the MOVE Act to enforce the rights of military and overseas voters. According to the Department's website, it has filed 8 cases and reached 10 settlements since 2009 to enforce UOCAVA and the MOVE Act.⁸⁶ In contrast, the Department brought only two enforcement actions to enforce the states' obligations to offer voter registration services at public service and disability agencies under the NVRA's Section 7, and only one more over the past decade.⁸⁷ The Department's other enforcement actions since 2009 include 6 cases and 2 settlements under the language minority provisions of the Voting Rights Act, one case under Section 2 of the Voting Rights Act, which protects against the illegal dilution of minority votes, and one under the Voting Rights Act's rules against voter intimidation.⁸⁸ In addition, the Department has considered thousands of voting changes submitted for preclearance by states and

⁸⁴ BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 (2010) 27, *available at* http://felonvoting.procon.org/sourcefiles/usdojbsj_prisoners_2009.pdf; Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 3, *available at* www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

⁸⁵ ACLU VOTING RIGHTS PROJECT, VOTING RIGHTS IN INDIAN COUNTRY 45 (Sept. 2009), *available at* <https://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf>.

⁸⁶ U.S. Department of Justice, *Cases Raising Claims Under the Uniformed and Overseas Citizens Absentee Voting Act*, *available at* http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#wi_uocava12.

⁸⁷ U.S. Department of Justice, *Cases Raising Claims Under the National Voter Registration Act*, *available at* http://www.justice.gov/crt/about/vot/litigation/recent_nvra.php#louisiana.

⁸⁸ U.S. Department of Justice, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, *available at* <http://www.justice.gov/crt/about/vot/litigation/caselist.php>.

localities covered under Section 5 of the Voting Rights Act,⁸⁹ and it has raised objections to a handful of those voting changes (17 listed on the Department’s website).⁹⁰

a. Enforcement of Section 5 of the Voting Rights Act

The Voting Rights Act of 1965 is widely regarded as the most effective federal civil rights statute of the 20th Century, and was reauthorized by Congress in 2006 with overwhelming support. Under Section 5 of the Act, certain jurisdictions with a history of discriminatory voting practices must demonstrate—either to a three-judge federal court or the Department of Justice—that changes to their voting laws do not have a retrogressive impact on minority voters, a process known as preclearance. Under Section 5, these states bear the burden of demonstrating that their voting laws have neither the purpose nor effect of harming the state’s minority voters. When jurisdictions submit voting changes to the Department of Justice for preclearance, the Department is obligated to assess the evidence submitted by those jurisdictions and to determine whether they have met their burden of showing that those changes have no discriminatory purpose and no discriminating effect. When jurisdictions file preclearance actions in federal court, the Department is the defendant in those actions.

Although the Department has considered thousands of requests for preclearance of voting changes over the past three and a half years, it has only considered three so far relating to the new laws restricting voting:

- In June of 2011, South Carolina sought preclearance from the Justice Department for its new voter ID law requiring voters to produce government-issued photo ID at the polls. The Department rejected the state’s request, in part because the state’s own data demonstrated that “minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by [the] new requirements.”⁹¹
- Similarly, the state of Texas submitted its new photo ID law to the Department of Justice in July 2011, seeking preclearance for the State’s photo ID law. The Department objected to preclearance, among other reasons, because the state’s own data showed that

⁸⁹ U.S. Department of Justice, *Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended*, available at <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (listing all Section submissions and actions by date).

⁹⁰ U.S. Department of Justice, *Section 5 Objection Determinations*, available at http://www.justice.gov/crt/about/vot/sec_5/obj_activ.phpv.

⁹¹ Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep’t. of Justice, to C. Havird Jones, South Carolina Assistant Deputy Attorney General, Dec. 23, 2011, available at http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

a Hispanic voter is between 46.5 and 120 percent more likely than a non-Hispanic voter to lack the main state-issued photo IDs.⁹²

- The state of Florida withdrew an administrative preclearance request from the Department of Justice, and filed a federal lawsuit in the District of Columbia in 2011 before the Department had issued an opinion on provisions of the state's new law that restricts early voting and voter registration. After reviewing all evidence provided by the state, the Department has taken the position in court papers that Florida has not met its burden of showing that recent restrictions on voting and voter registration were passed with neither the intent nor the effect of harming minority voters.⁹³

In each of these cases, which are now being considered by three-judge panels of the District of Columbia,⁹⁴ the Department properly found that states have failed to meet their burden under the Voting Rights Act that the laws at issue do not harm minority voters. What is more, in none of these cases have the states at issue offered evidence of the existence of an actual problem these new legal restrictions were supposedly designed to address. South Carolina, for instance, did not submit “any evidence or instance of either in-person voter impersonation or any other type of fraud that is not already addressed by the state’s existing voter identification requirement and that arguably could be deterred by requiring voters to present only photo identification at the polls.”⁹⁵

These findings reflect not the Department’s opinions or views of the underlying policies, but rather the Department’s analysis of whether the states have made the required showing under federal law. It bears noting that the Department of Justice under the last Administration, although it controversially precleared Georgia’s photo ID law over the recommendations of staff analysts, raised an objection to Michigan’s closure of a DMV branch office in part because that would make it more difficult for minority citizens served by that office to obtain the photo IDs required by the state’s voting laws.⁹⁶ As the Department noted in its recent letter to Texas, minorities in Texas similarly have less access to ID-issuing offices.⁹⁷

⁹² Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep’t. of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, *available at* http://brennan.3cdn.net/fe6a21493d7ec1aafc_vym6b91dt.pdf.

⁹³ *Florida v. United States*, Case No. 1:11-cv-01428 (D.D.C. Mar. 2, 2012) at Dkt. 83 (joint status report filed by Department of Justice and Defendant-Intervenors, noting that the United States’ position is that the State has not met its burden, to demonstrate that the law’s provisions are entitled to preclearance under Section 5 of the Voting Rights Act).

⁹⁴ The Brennan Center is counsel to intervening defendants in each of those cases.

⁹⁵ Letter from Thomas E. Perez to C. Havird Jones, *supra* note 91.

⁹⁶ Letter from Grace Chung Becker, Acting Assistant Attorney General, U.S. Dep’t of Justice, to Brian DeBano and Christopher Thomas, Dec. 26, 2007, *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122607.php.

⁹⁷ *See* Letter from Thomas E. Perez to Keith Ingram, *supra*, note 92.

In addition to enforcing Section 5, the Department has been forced to defend its constitutionality in a number of lawsuits. Six states and local jurisdictions launched a facial attack on the Voting Rights Act, arguably the most successful piece of civil rights legislation in our nation's history. Shelby County, Alabama; Kinston, North Carolina; and the states of Arizona, Florida, Georgia, and Texas have all recently engaged in litigation asking that a key provision of the Voting Rights Act be found unconstitutional. The Brennan Center, along with other groups, has intervened in these cases, and argues, among other things, that Section 5 continues to serve a compelling and critical need in today's America. Indeed, the impact of the recent voting laws on minority voters detailed above demonstrates that Section 5 continues to play a vital role in safeguarding voting rights.

b. Enforcement of the NVRA

While the Department of Justice has been actively enforcing several federal voting laws, there have been few actions to enforce the National Voter Registration Act—and Section 7 of the NVRA in particular. Section 7 is designed to increase the number of registered voters on the rolls by providing voter registration opportunities for individuals who access services at public assistance agencies. This law is a critical protection to ensure that millions of low-income citizens have opportunities to register to vote. Enforcement of Section 7 has been far too rare, especially considering the hugely successful outcomes of such enforcement.

According to a report from Dēmos and Project Vote, despite overwhelming evidence of state noncompliance with the NVRA and repeated urging from civil rights groups and members of Congress, the Department of Justice has made little public effort to enforce the statute.⁹⁸ Yet when Section 7 is enforced, via privately-filed lawsuits or administrative action by the Department of Justice, the results are stunning, and voter registration rates at targeted agencies increase dramatically. For example, as the Dēmos and Project Vote report details, “[a]fter adopting plans in 2004 to improve agency-based registration, Iowa experienced an increase in the number of voter registrations by 700 percent over the previous presidential election cycle and an astounding 3,000 percent over the previous year.”⁹⁹ Similar results were seen in Maryland, North Carolina, and Tennessee after those states were targeted for enforcement advocacy by civil rights groups.¹⁰⁰

The positive results of NVRA Section 7 compliance demonstrate that enforcement of this statute could produce extremely positive results for voters, particularly low-income voters served by that section. Similar benefits could be achieved by ensuring full compliance with Section 5 of the statute, which requires states to provide voter registration opportunities and to update voter

⁹⁸ DOUGLAS R. HESS AND SCOTT NOVAKOWSKI, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 13 (2008), *available at* http://projectvote.org/images/publications/NVRA/Unequal_Access_Final.pdf.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 8-9.

registration records at motor vehicle offices. We recommend that the Department put a renewed emphasis on ensuring the states' compliance with the NVRA.

IV. Improving the Voter Registration System

Rather than simply rely on the Department of Justice's enforcement of the NVRA, Congress should work to pass new legislation to improve our voter registration system to make it more secure and accessible to all eligible voters. Congress has a role to set minimum standards for the states to follow in registering voters for federal elections. Modernizing our voter registration systems will not only make the voter rolls more complete and accurate and save money, it will also further curb the small potential for voter fraud.

Our current voter registration system is outmoded, costly, and rife with error. Despite technological advances, the system still relies largely on handwritten paper forms, and places the onus of registering on the voter rather than state officials. A recent study by the Pew Center on the States found that about 50 million eligible Americans are not captured by the current voter registration system and 1 in 8 voter registration records contains significant inaccuracies.¹⁰¹

As the Brennan Center has previously documented, registration-related problems are the biggest obstacle voters face each election season.¹⁰² Our current voter registration system was not designed for a mobile society where one in six Americans moves every year. Of the 57 million citizens who were not registered to vote in 2000, one in three was a former voter who had moved but failed to register. Unsurprisingly, registration problems alone kept up to 3 million eligible Americans from voting in 2008.¹⁰³

There is an emerging bipartisan consensus that we need to modernize our voter registration system. Experts, election officials, and policy-makers have urged a common-sense, cost-efficient way to update our outmoded, voter-initiated, paper-based registration system.¹⁰⁴ The proposed plan would simplify the registration process and bring 50 to 65 million eligible Americans into the electoral process. At the same time, it would ease burdens on election officials and make our voting system less susceptible to fraud and less expensive for taxpayers. Legislation to modernize voter registration would automate the registration process at places like departments of motor vehicles and social service agencies and would ensure that voter records

¹⁰¹ PEW CENTER ON THE STATES, INACCURATE, COSTLY, AND INEFFICIENT, Feb. 2012, at http://www.pewcenteronthestates.org/uploadedFiles/Pew_Upgrading_Voter_Registration.pdf.

¹⁰² See WENDY WEISER, MICHAEL WALDMAN & RENEE PARADIS, VOTER REGISTRATION MODERNIZATION (2009), at http://www.brennancenter.org/content/resource/voter_registration_modernization/.

¹⁰³ R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS – FINAL REPORT: EXECUTIVE SUMMARY 5 (2009), available at <http://www.vote.caltech.edu/drupal/files/report/2008%20Survey%20of%20the%20Performance%20of%200American%20Elections%20Executive%20Summary.pdf>.

¹⁰⁴ See generally WEISER ET AL., *supra* note 102.

are accurate and up to date. This type of reform would both improve the system and obviate concerns about under-enforcement of the voting laws.

Four key components are necessary to modernize our voter registration system:

- *Automated Registration:* States should automatically register consenting eligible citizens to vote when they interact with other state agencies, using existing databases and without relying on paper forms. The states' experience with automated registration to date make clear that this reform dramatically improves the voter registration system, increasing voter registration rates, reducing error, and reducing costs.¹⁰⁵ States have typically recouped the costs of this upgrade within a year or so, and have reaped ongoing savings.¹⁰⁶
- *Portable Registration:* Once an eligible citizen is on a state's voter rolls, she should remain registered and her records move with her so long as she continues to reside in that state. Voters should remain permanently registered unless they move between states.
- *Online Registration:* Studies show that online registration is more secure and cost-effective than paper. The federal government can encourage the development of a system that permits voters to submit and update their voter registration online.
- *Safety Net:* To ensure accurate rolls and that voters are not disenfranchised by registration errors, states should allow eligible citizens to register or correct their registrations up to and on Election Day.

A modernized voter registration system benefits voters, election officials, and the integrity of our voting systems. Our current registration system demands an enormous amount of time, money, and effort from local officials. Excessive clerical work also distracts from the planning and supervision necessary to ensure a sound Election Day. This overburdened registration process exacerbates other problems on Election Day, leading to long lines, chaotic polling locations, and overwhelmed volunteers. Voter registration modernization will free up resources and allow election officials to concentrate on important pre-election preparations to ensure elections run smoothly, rather than processing a surge of registration forms typically received a week or two before Election Day. Key reforms can make the system work better for election administrators and the voters they serve.

In addition, the current patchwork of voter registration laws and procedures leaves the system vulnerable to fraud and tampering. Voter registration modernization leverages existing

¹⁰⁵ The benefits states have achieved by automating the voter registration process at motor vehicle offices are documented at length in CHRISTOPHER PONOROFF, VOTER REGISTRATION IN A DIGITAL AGE (Wendy Weiser, ed. 2010), available at http://www.brennancenter.org/content/resource/voter_registration_in_a_digital_age/, and BRENNAN CENTER FOR JUSTICE, VOTER REGISTRATION FOR THE 21ST CENTURY (2010), at http://www.brennancenter.org/content/resource/voter_registration_for_the_21st_century/.

¹⁰⁶ *Id.*

and reliable government information to update the voter rolls, increasing their accuracy and reliability. These are common-sense reforms that meaningfully achieve the goal of increasing election security while also expanding the franchise.

States that have implemented key modernization reforms have enjoyed increased registration rates, cost savings, and fewer registration errors.¹⁰⁷ Many states have successfully implemented components of a modernized voter registration system, with support from a broad and bipartisan array of elected officials and election administrators:

- *Automated registration:* 17 states and the District of Columbia have partially or fully automated the voter registration process at motor vehicle offices (Arizona, Arkansas, California, Delaware, Washington D.C., Florida, Georgia, Kansas, Kentucky, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and Washington). Of those, 11 and the District of Columbia are fully paperless.
- *Portable registration:* 16 states and the District of Columbia have portable or permanent voter registration: Colorado, Delaware, Washington D.C., Idaho, Iowa, Maine, Maryland, Minnesota, Montana, New Hampshire, North Carolina, Ohio, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. That number includes the 8 states that accomplish portable registration using Election Day or same-day registration.
- *Online registration:* 10 states have implemented online registration (Arizona, Colorado, Delaware, Indiana, Kansas, Louisiana, Nevada, Oregon, Utah, and Washington). That number includes one state (Nevada) that has online registration only in its largest county, which covers more than 70% of the state population. That number does not include California, which passed a law requiring online registration but has not yet put it in place, and other states that are in the process of developing online systems.

These measures have been adopted and supported by a broad bi-partisan group of state officials.¹⁰⁸ They both increase voter registration rates and decrease the potential for fraud—while significantly cutting costs. They are worthy of serious consideration by Congress and could go a long way to creating more secure and accessible elections for all Americans.

¹⁰⁷ *See id.*

¹⁰⁸ See WENDY WEISER, CHRISTOPHER PONOROFF & NHU-Y NGO, MODERNIZING VOTER REGISTRATION: MOMENTUM IN THE STATES (Mar. 2009), at http://www.brennancenter.org/content/resource/vrm_state_momentum/.