

Justin Levitt
Associate Professor of Law
213.736.7417
justin.levitt@lls.edu

Testimony of
Professor Justin Levitt,
Loyola Law School, Los Angeles

Before the
United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

New State Voting Laws: Barriers to the Ballot?

September 8, 2011

Chairman Durbin, Ranking Member Graham, and distinguished Members of the Subcommittee, thank you for inviting me to speak here today.

My name is Justin Levitt; I teach constitutional law and election law at Loyola Law School, in Los Angeles.¹ I have had the privilege to practice election law as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and to have their votes counted. My work 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 jurisdictions to comply with their obligations under federal law and the Constitution.

I now focus on research and scholarship, confronting the structure of the election process while closely observing and rigorously documenting the factual predicates of that structure. I have paid particular attention in recent years to claims of voter fraud, and to policies purporting to protect against fraud. I have collected allegations of fraud cited by state and federal courts, bipartisan federal commissions, political parties, state and local election officials, authors, journalists, and bloggers. I have analyzed these allegations at length, to distinguish those which are supported from those which have been debunked; furthermore, I have created and published a methodology for investigating future claims, to separate the legitimate from the mistaken or overblown. With the support of the Brennan Center for Justice at NYU School of Law, I have published a monograph reflecting this analysis, entitled “*The Truth About Voter Fraud*,” which compiled for the first time the recurring methodological flaws behind the allegations of widespread voter fraud that are frequently cited but often unsupported.² Brennan Center

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

² Justin Levitt, *The Truth About Voter Fraud* (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>.

colleagues and I have similarly examined claims of voter fraud in *amicus* briefs filed with courts around the country, including cases at the appellate level and with the Supreme Court.³

I have also analyzed, in detail, the effect of policies and laws that contribute to the burdens on eligible citizens as they attempt to exercise the franchise. I attempt to bring reliable data to bear on the effort to assess the nature and magnitude of the impact of new election rules. In helping to quantify the impact of these rules, I have helped to conduct surveys and sophisticated statistical analyses; I have collected affidavits and anecdotes; and I have conducted in-depth review of voter registration forms and voter registration rolls, line by line. It is in this role as researcher and scholar, grounded in reliable data, that I appear before you today.

I thank you for holding this hearing — and for providing the opportunity to discuss some of the new state voting laws and their effects on eligible American citizens. As has been repeatedly recognized, voting, the right preservative of all other rights,⁴ “is of the most fundamental significance under our constitutional structure.”⁵ And so it is vital that this body closely examine regulations of the franchise to ensure that this most fundamental of rights is never unduly burdened. Only then can there be assurance that elections are conducted with the integrity necessary for the public to rely on their results. Less than two miles from the new memorial to Dr. Martin Luther King, Jr., and within a few weeks of its opening, it is a worthy endeavor indeed to continue his work striving to ensure that all citizens, regardless of race, ethnicity, or social status, are able to participate fully in our representative democracy.

Unfortunately, a spate of recent state regulations seem headed in the wrong direction. These laws exact real burdens on real Americans, making it more difficult for citizens to exercise their rights to vote. Crucially, these burdens are not only real but unnecessary, which renders them suspect as a matter of constitutional law, and fundamentally flawed as a matter of public policy. Not only do they make it more difficult for Americans to vote, but they do so without any meaningful benefit. Indeed, in several circumstances, the new laws are directly counterproductive.

Although there are several types of state laws or policies that deserve attention, I would like to focus my remarks today on three particular types of restrictions that together demonstrate

³ Brief of the Brennan Center for Justice *et al.* as *Amici Curiae* Supporting Petitioners, *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008) (“Brennan Center Brief”); Brief of Brennan Center for Justice at NYU School of Law as *Amicus Curiae* in Support of Plaintiffs-Appellants and Reversal, *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007); Brief *Amicus Curiae* of the Brennan Center for Justice at NYU School of Law in Support of Plaintiffs/Appellants and Reversal, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007); Brief of Brennan Center for Justice at NYU School of Law as *Amicus Curiae* in Support of Plaintiffs/Appellees and Affirmance, *ACLU of N.M. v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); Brief of Brennan Center for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Plaintiffs-Appellants and Reversal, *Common Cause/Georgia v. Billups*, 554 F. 3d 1340 (11th Cir. 2009); Brief of Brennan Center for Justice at N.Y.U. Law School as *Amicus Curiae* in Support of Plaintiffs-Appellees and Affirmance, *Common Cause/Georgia v. Cox*, Case No. 05-15784-G (11th Cir. Jan. 14, 2006); Brief of Brennan Center for Justice at NYU School of Law as *Amicus Curiae* in Support of Plaintiffs’ Motion for Summary Judgment, *ACLU of N.M. v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007).

⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁵ *Crawford v. Marion County Election Bd*, 553 U.S. 181, 210 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

the breadth of the concern. The first involves new limits on the ability to help citizens register to vote. The second involves new limits on citizens' ability to cast ballots before election day. And the third involves new limits on citizens' ability to establish their identity at the polls on election day itself. Getting on the rolls, early voting, and voting on election day: all have been subject to new, and unjustified, limits.

RESTRICTIONS ON REGISTRATION

First, there have recently been renewed efforts to restrict the ability of citizens to offer their colleagues assistance in registering to vote. These efforts are exemplified by troublesome provisions of HB 1355, which was passed in Florida earlier this year, and is at present still subject to preclearance under section 5 of the Voting Rights Act.⁶

HB 1355 is Florida's latest in a series of attempts to restrict voter registration over the past few years; its earlier efforts were also highly controversial, and challenged in court by organizations including the Brennan Center for Justice at NYU School of Law, Advancement Project, the NAACP, and the League of Women Voters.⁷ In 2005, ostensibly concerned by organizations withholding registration forms that they collected, the legislature imposed, *inter alia*, substantial restrictions on organizations conducting voter registration drives. These restrictions included substantial fines, with both individual and organizational liability, for each and every form delivered to elections officials more than 10 days after the form was completed.⁸ The fine structure was sufficiently severe to cause the nonpartisan League of Women Voters — concerned citizens volunteering their time to help other eligible citizens register to vote — to stop its Florida voter registration activity for the very first time in the organization's 67-year history.

In subsequent litigation, a federal court rightly recognized that voter registration drives entail core political speech, protected by the First Amendment and inextricably intertwined with efforts to “persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions.”⁹ And it rightly recognized that undue efforts to restrict registration drives impermissibly limit both political speech and association. The court explained that Florida had not “provided any evidence[,]

⁶ Fla. Laws ch. 2011-40 (H.B. 1355).

⁷ Though not discussed in testimony today, Florida practices precluding voter registration in the event of minor errors on registration forms were challenged in *Diaz v. Cobb*, 541 F.Supp.2d 1319 (S.D. Fla. 2008), and *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008); Florida's error-laden practices for purging the registrations of voters based ostensibly on disenfranchising convictions were challenged in *NAACP v. Harris*, Case No. 01-0120 (S.D. Fla.).

⁸ *League of Women Voters of Florida v. Cobb*, 447 F.Supp.2d 1314, 1322 (S.D. Fla. 2006).

⁹ *Id.* at 1333.

much less an explanation,” supporting the need for its fine structure — and preliminarily enjoined the implementation of this portion of the law.¹⁰

One year later, the legislature enacted an amended law; the new law retained the 10-day deadline, but substantially reduced and capped total fines, and exempted organizations from fines due to situations beyond their control. The new law was challenged, and upheld based on the more tailored regulatory structure — and based on the fact that the law did not place any direct preconditions on the protected activity of conducting a voter registration drive.¹¹

HB 1355 marks a severe step backward on both fronts flagged by the courts: it is no longer reasonably tailored to any existing problem, and imposes serious obstacles to organizations as preconditions of conducting voter registration drives. It requires any person — any individual or group — to fill out an official state form before offering to help distribute, collect, and submit the registration form of anyone other than immediate family; this registration includes the name, address, and sworn declaration of every single individual soliciting or collecting registration forms, whether employee or casual volunteer.¹² Groups may not offer to collect and turn in a single form until they have been issued a number by the state; individuals who are not working with organized groups are subject to the same requirements. The law requires that every individual and group account monthly for every registration form used by any volunteer, including blank forms simply printed off of public websites; county election officials have new *daily* reporting requirements.¹³ And without any indication that the ten-day deadline was insufficient to compel the prompt return of completed forms, the deadline has now become just 48 hours, with any waiver for circumstances beyond the organization’s control now solely in the hands of the Secretary of State, a partisan elected official.¹⁴

It is worth restating what the new law requires. Before offering to touch a voter registration form from anyone other than a family member, citizens volunteering their time must wait for permission from the government. In addition to tracking each and every registration form, blank or complete, a volunteer collecting a registration form must ensure that it is delivered to county officials within 48 hours, or face substantial fines issued or waived at the discretion of a partisan official.

These are stark limitations of, and penalties on, fundamental public engagement. They are the most restrictive provisions in the country, though recent legislation in Texas has some similar hallmarks.¹⁵ They should draw the ire of observers and policymakers across the political

¹⁰ *Id.* at 1338.

¹¹ *League of Women Voters of Florida v. Browning*, 575 F.Supp.2d 1298, 1321-22 (S.D. Fla. 2008).

¹² Proposed rules — not yet final — would narrow the statute’s application from “any” assistance with voter registration to soliciting for collection or collecting voter registration applications. Proposed Rule 1S-2.042(2)(b), (3). If adopted, such a rule would limit, but not remove, the unconstitutional application of the law. Fla. Stat. §§ 97.021(37); 97.0575.

¹³ Fla. Stat. § 97.0575(2); Proposed Rule 1S-2.042(5), (7)(c).

¹⁴ Fla. Stat. § 97.0575(3).

¹⁵ 2011 Tex. Law ch. 507 (H.B. 1570) (amending Tex. Election Code §§ 12.006, 13.031, 13.047).

spectrum. Indeed, far *less* onerous regulations of political campaign spending in Florida were recently challenged as severe constitutional burdens by the Institute for Justice.¹⁶

Given its burdens, the law will have some predictable effects — few of which increase the reliability of the registration system in any meaningful respect. Instead, the law has caused both Democracia USA, one of the larger civic engagement organizations in Florida dedicated to empowering the Latino electorate, and the League of Women Voters, a nonpartisan civic engagement enterprise of unparalleled lineage, to declare a halt to all voter registration activity within the state.¹⁷

When voter registration drives are unable to offer their assistance, citizens lose one vital means to ensure that they are properly registered to vote — not merely new registrants, but also the 14% of Floridians who move within the state and need to re-register.¹⁸ Moreover, the population impacted by such restrictions is not evenly distributed. According to the U.S. Census Bureau's Current Population Survey,¹⁹ minority citizens disproportionately register and re-register through voter registration drives: while 6% of non-Hispanic white voters reported registering through a voter registration drive in 2008, twice as many — 12% of Hispanic voters and 13% of non-Hispanic African-American voters²⁰ — reported registering through a drive.²¹ Statistics from non-presidential years are similarly lopsided. In 2006, 8% of non-Hispanic white voters reported registering through a voter registration drive, compared to 11% of Hispanic voters and 11% of non-Hispanic African-American voters; in 2010, 6% of non-Hispanic white voters reported registering through a voter registration drive, compared to 14% of Hispanic voters and 12% of non-Hispanic African-American voters.²²

¹⁶ A motion for summary judgment is currently pending in federal court. *Worley v. Roberts*, Case No. 4:10-cv-00423 (N.D. Fla.).

¹⁷ Letter to Chris Herren from Lee Rowland & Mark Posner, July 15, 2011, at 14-15, at <http://www.scribd.com/doc/60105826/Florida-HB-1355-Sec-5-Comment-Letter>; Lizette Alvarez, *Florida Passes Bill to Limit 3rd-Party Voter Registration*, N.Y. TIMES, May 5, 2011.

¹⁸ U.S. Census Bureau, 2005-2009 American Community Survey, tbl. B07003, at <http://1.usa.gov/nh33ls>.

¹⁹ Data were retrieved using the U.S. Census Bureau's DataFerrett application, <http://dataferrett.census.gov/run.html>, for the Current Population Survey, Nov. 2006, Nov. 2008, and Nov. 2010.

²⁰ The figures in each year are substantially similar — a few tenths of a percentage, but not enough difference to register when rounded to whole numbers — for all African-American voters, Hispanic and non-Hispanic.

²¹ The statistics include all registered voters who reported registering to vote in a particular manner. This tally may overrepresent the true total in certain ways — for example, by excluding voters who did not know how they were registered, but may have been registered through a source other than a voter registration drive. This tally also likely underrepresents the true total in certain ways — for example, the figures for voter registration drives do not include voters who reported registering through the mail (19% of registrants in 2008), or at a school, hospital, or on campus (4% of registrants in 2008), both of which were likely to involve, at least in part, non-governmental individuals or entities assisting with the registration process. And both Hispanic voters and African-American voters reported using both of these latter categories (mail and school/hospital/campus) at higher rates than non-Hispanic white voters.

²² Although the self-reporting captured in the Current Population Survey may raise some concerns about the accuracy of the data as an absolute matter — not all voters are accurately able to articulate the method by which they became registered to vote — there does not appear to be reason to expect systematic bias in the *relative* rates at which individuals report that they were registered through voter registration drives.

What is particularly galling to many is that the new restrictions on civic participation put Florida's League of Women Voters out of the voter registration business unnecessarily. That is, there is no compelling public policy need for such prerequisite burdens on informal voter registration drives on campuses, in houses of worship, and in the many other circumstances in which individuals assist their fellow citizens without first creating a bureaucratic documentation, reporting, and tracking apparatus. Florida already had legal provisions requiring voter registration forms to be delivered in timely fashion.²³ Florida already had legal provisions vigorously defended in court as ensuring the accuracy of registration form information.²⁴ Florida already had legal provisions penalizing any intentional wrongdoing in the registration process.²⁵ The new regulations impose a burden out of proportion to their incremental benefit.

Indeed, the new regulations might well *increase* the expense to election officials. Only the most formally structured voter registration drives will, practically, be able to comply with the advance documentation requirement; less formal citizen organizations will find it prohibitively impractical to ensure that volunteers at bake sales have submitted sworn paperwork before they offer to help send in a neighbor's voter registration form. Many of these formally structured drives have historically conducted quality assurance, reviewing forms for errors or suggestions of impropriety, and flagging those forms for election officials to expedite processing. The 48-hour time limit on returning forms, however, will seriously constrain organizational ability to conduct centralized quality review. Instead, rational organizations seeking to forego liability will likely curtail centralized quality assurance in favor of speedy delivery, shifting processing and error-correction costs unnecessarily to the county supervisors.

RESTRICTIONS ON EARLY VOTING

Second, there have recently been efforts to limit opportunities for citizens to cast valid ballots in advance of Election Day. Here too, Florida's HB 1355 provides an example.

At least since 1998, Florida has allowed electors to vote ballots in-person before Election Day.²⁶ Such votes could originally be cast as soon as absentee ballots were available, on any day that the county supervisor's office was open. Beginning in 2004, the state limited its early voting period to two weeks, beginning on the 15th day before an election, and ending on the day before Election Day; the next year, the legislature eliminated early voting on the Monday before an election.²⁷ Jurisdictions were required to offer early voting for 8 hours per weekday, and 8 hours in the aggregate per weekend — 96 early-voting hours total — but had discretion to apportion those weekend hours as they chose.

²³ Fla. Stat. § 97.0575(3) (2010).

²⁴ Fla. Stat. § 97.053(6).

²⁵ Fla. Stat. §§ 104.011; 104.012; 104.0615.

²⁶ Fla. Laws ch. 98-129, § 17 (C.S.S.B. No. 1402).

²⁷ Fla. Laws ch. 2004-252, § 13 (C.S.S.B. No. 2346); Fla. Laws ch. 2005-277, § 45 (H.B. 1567).

HB 1355 would change the early voting schedule again, restricting local authority. The new early vote period would run from Saturday (10 days before Election Day) to Saturday (3 days before Election Day), with 6-12 voting hours per day.²⁸ If county supervisors choose to offer the maximum permissible early vote schedule under HB 1355, voters would continue to have 96 total early-voting hours.

The allocation of these hours, however, represents a significant change for the worse. The most significant restriction is that jurisdictions would no longer have the option to offer early voting on the Sunday before Election Day.²⁹ This was an option that several counties offered in the past, as a service to their constituents, many of whom work long hours during the week, are more available on the weekend, and are most energized just before Election Day. The list of jurisdictions choosing to offer early voting on the Sunday before Election Day in the past includes the state's largest, most urban, and most diverse counties. In 2008, Bradford, Broward, Dixie, Duval, Jackson, Miami-Dade, Palm Beach, Pinellas, Sarasota, and Seminole counties offered early voting on the Sunday before Election Day; in 2010, Bradford, Charlotte, Clay, Duval, Manatee, Miami-Dade, Palm Beach, Pinellas, Sarasota, and Seminole counties offered early voting on that Sunday.³⁰ Under HB 1355, they do not have this latitude.

The change has a direct impact on a particularly notable form of mobilization in Florida: many houses of worship, particularly in minority communities, encourage their congregations in nonpartisan fashion to discharge their civic obligations after fulfilling their spiritual ones. So after Sunday morning church services, many congregants would travel to the polls, in the counties that offered Sunday voting. After HB 1355, this is no longer an option.

As with the restriction on registration drives, the elimination of early voting on the Sunday before the election does not fall evenly on the population as a whole. In the past, minority citizens disproportionately voted on the final Sunday before Election Day.³¹ In 2008, for example, African-Americans represented 13% of the total voters, and 22% of the early voters, but 31% of the total voters on the final Sunday; Hispanic citizens represented 11% of the total voters, and 11% of the early voters, but 22% of the total voters on the final Sunday. Notably, the pattern is similar in 2010: African-Americans represented 12% of the total voters, and 13% of the early voters, but 23% of the voters on the final Sunday; Hispanics represented 9% of the total voters, and 8% of the early voters, but 16% of the voters on the final Sunday.

²⁸ Fla. Stat. § 101.657(1)(d).

²⁹ Georgia's new law (HB 92) has a similar effect: it closes early voting on the Friday before Election Day. Ga. Code § 21-2-385(d). In this respect, Ohio's new law (HB 194) is even more restrictive: it precludes early voting on *any* Sunday during the early voting period. Ohio Stat. § 3509.01(B)(3) (2011).

³⁰ Data were retrieved from county Early Voting Reports, available at <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>.

³¹ In order to determine the race and ethnicity of early voters by day, I retrieved the individual early vote information from county Early Voting Reports, at <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>, and matched voters' unique registration numbers to the registration records on Florida's voter file, which list self-reported race and ethnicity. The percentages listed below represent conservative estimates of the impact on minority voters: voters of unknown race or ethnicity were treated for purposes of this analysis as white. If any such citizens were actually minority voters, the relevant percentages would be correspondingly higher.

Voters on the final Sunday before the election were also predictably newer voters. In 2008, first-time Florida voters were 12% of the electorate but 22% of the final Sunday voters. And they continued this pattern; in 2010, voters casting a ballot for the first or second time were 13% of the electorate, but 17% of the final Sunday voters.

As above, the costs of eliminating the final Sunday from early voting far exceed the potential benefits, because restricting county flexibility in this fashion has no appreciable upside. Before HB 1355, counties had the option to offer early voting on the final Sunday before Election Day *if they wished*. If county constituents used Sunday voting, if offering Sunday voting increased convenience, if Sunday voting offered a logistical means to ease excessive lines on Election Day, if Sunday voting were cost-effective, county supervisors were authorized to decide for themselves to open early voting stations. If Sunday voting were not cost-effective for the electorate of a particular county, the supervisors could opt to use the weekend time exclusively on Saturday instead. HB 1355 removes that flexibility, forcing the counties to shut their early-voting doors on Sunday whether they would prefer to do otherwise or not. For counties that had previously offered Sunday voting because they found it worthwhile, HB 1355 only increases expense and inconvenience.

RESTRICTIONS AT THE POLLS

Third, there have recently been renewed efforts to limit opportunities for citizens to cast a valid ballot at the polls, most notably in the form of new restrictions on how those citizens may demonstrate their identity. In 2011, four states — Kansas,³² Tennessee,³³ Texas,³⁴ and Wisconsin³⁵ — passed new restrictive laws requiring most citizens to show particular types of government-issued photo identification cards in order to cast a ballot at the polls that can be counted. The Texas law is still subject to preclearance under the Voting Rights Act.

Substantial misinformation surrounds this new spate of restrictive voter identification laws, and so I devote disproportionate space to the issue below. Though it may not be possible to clarify all of the relevant misinformation in the context of this testimony, it is worth addressing a few of the more substantial and oft-repeated myths.

³² 2011 Kan. Laws ch. 56, § 11 (H.B. 2067) (amending Kan. Stat. § 25-2908).

³³ 2011 Tenn. Laws ch. 323, §§ 1, 7 (S.B. 16) (amending Tenn. Code § 2-7-112).

³⁴ 2011 Tex. Laws ch. 123, §§ 9, 14 (S.B. 14) (amending Tex. Election Code §§ 63.001, 63.0101).

³⁵ 2011-12 Wis. Laws Act 23, §§ 1-2 (2011 A.B. 7) (amending Wis. Stat. § 5.02).

The Current Identification Landscape

Before 2011, only two states in the country — Indiana³⁶ and Georgia³⁷ — required government-issued photo identification in order to cast a ballot at the polls that can be counted. The five additional states mentioned above represent disturbing additions, but they remain, together, only a small minority of jurisdictions.

Instead, the vast majority of states allow legitimate citizens a broader set of options to prove their identity, without sacrificing any appreciable measure of security. The alternatives range from signature comparisons, to sworn affidavits, to identification documents like utility bills, bank statements, employee IDs, and the like.³⁸ Some of these other states ask those without government-issued photo identification to vote provisional ballots, which can be further investigated if there arises additional doubt about a voter's identity; these provisional ballots, however, can be counted without requiring the voter to provide the same photo identification card that she could not produce at the polls.³⁹ And all of these identification provisions are layered atop the considerable security safeguards of the federal Help America Vote Act of 2002 (“HAVA”), which requires that each of a jurisdiction's first-time voters registering by mail have her identity confirmed — either by verifying her social security digits or driver's license number against reliable lists, or by presenting reliable documentation from a long and inclusive menu — before her ballot may be counted.⁴⁰

These other 43 states offer alternatives for a reason. They recognize that there are some legitimate, eligible American citizens who do not possess government-issued photo identification

³⁶ Ind. Code §§ 3-5-2-40.5; 3-11-8-25.1.

³⁷ Ga. Code § 21-2-417.

³⁸ In 2011, Alabama passed a new law requiring either photo identification or sworn voucher by two election officials; it is not clear whether the voucher provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. Ala. Laws Act 2011-673 (H.B. 19). It also appears unclear under current Alabama law whether voters without the required photo identification may cast provisional ballots that may be counted, and under what circumstances they will likely be counted. *See, e.g.*, Ala. Code § 17-10-2 (referring to particular voter identification provisions, but not those newly requiring a photo identification card). It does not appear that H.B. 19 has yet been submitted for preclearance under the Voting Rights Act.

South Carolina also passed a new law in 2011, requiring photo identification in many circumstances. 2011 S.C. Laws Act 27 (H.B. 3003). The new law allows voters to submit an affidavit in lieu of the preferred photo identification, if the voter “suffers from a reasonable impediment that prevents the elector from obtaining photograph identification,” whereupon the voter will submit a provisional ballot deemed valid unless there are grounds to believe that the affidavit is false. *Id.* § 5 (amending S.C. Code § 7-13-710(D)(1)(b), (D)(2)); Op. S.C. Att’y Gen. to Marci Andino, Exec. Dir., S.C. Election Comm’n, Aug. 16, 2011, available at <http://www.scag.gov/wp-content/uploads/2011/08/andino-m-os-9319-8-16-11-Photo-ID-Voter-ID-legislation.pdf>. It is not clear whether this provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. H.B. 3003 is still subject to preclearance under the Voting Rights Act; on August 29, 2011, the Department of Justice requested more information, including more information about the operation of this “reasonable impediment” provision. Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., Dep’t of Justice, to C. Havird Jones, Jr., Esq., S.C. Asst. Deputy Att’y Gen., Aug. 29, 2011, available at <http://media.charleston.net/2011/pdf/dojvoterid08292011.pdf>.

³⁹ *See, e.g.*, Fla. Stat. § 101.048(2)(a).

⁴⁰ 42 U.S.C. § 15483(b).

cards. And they do not wish to make it unduly difficult for these citizens to exercise the most fundamental right in our constitutional order.

The Harm of Restrictive Identification Rules

There is no question that government-issued photo identification makes many common practices easier. Those who do not have such ID are likely to find it more difficult to take advantage of many of the privileges of modern society. It is true, for example, that you have to show photo identification to buy full-strength Sudafed.⁴¹ It is also deeply beside the point. No American ever gave her life for the fundamental right to buy decongestants.

There is also no question that most eligible citizens have government-issued photo identification. It is likely that each of the individuals attending today's hearing has some form of government-issued photo identification. But the right of the franchise — and the responsibility to ensure its continued reasonable access — is not limited to the individuals attending today's hearing, or even to the majority of the American public. Voting is a fundamental right for more than just most of us. It is a right that must be zealously safeguarded for every eligible American citizen.

It is, concededly, difficult to pin down the precise number of eligible American citizens who do not have the identification required by the most restrictive states above. But of the three methods that have been used, two are substantially less reliable. First, some commentators have compared the number of records maintained on state Department of Motor Vehicles systems to the number of voting-age citizens reported by the Census Bureau.⁴² Such comparisons are laden with error, including duplicate driver's licenses (commercial and non-commercial), expired licenses, and the impact of the 2% of Americans each year who move between states, often without canceling their motor vehicle record in the state that they have left.⁴³

Second, other commentators have attempted to assess the number of eligible citizens without the required identification by analyzing turnout: examining past voting patterns, and trying to extrapolate the degree to which change in participation for any given election is due to the impact of particular identification laws.⁴⁴ These studies' methods vary, and there are

⁴¹ Lizette Alvarez, *G.O.P. Legislators Move to Tighten Rules on Voting*, N.Y. TIMES, May 29, 2011 (“‘If you have to show a picture ID to buy Sudafed, . . . you should show a picture ID when you vote,’ Gov. Nikki Haley said this month when she signed the bill into law in South Carolina, using a common refrain among Republicans.”); Opinion, Kris W. Kobach, *The Case for Voter ID*, WALL ST. J., May 23, 2011 (“Carrying a photo ID has become a part of American life. You can’t . . . buy full-strength Sudafed over the counter without one.”).

⁴² Kobach, *supra* note 41.

⁴³ See U.S. Census Bureau, Current Population Survey, Geographical Mobility: 2009 to 2010 tbl. 1, at <http://www.census.gov/hhes/migration/data/cps/cps2010.html>.

⁴⁴ See, e.g., Opinion, Hans A. von Spakovsky, *ID Laws Ensure Election Integrity*, USA TODAY, June 12, 2011; see also Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POLITICAL SCIENCE & POLITICS 121 (2009); John R. Logan & Jennifer Darrah, *The Suppressive Effects of Voter ID Requirements on Naturalization and Political Participation*, Jan. 2, 2008; Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis* (Inst. of Pub. Pol’y, Univ. of Mo., Report 10-2007, 2007); R.

substantial differences in the results. But more fundamentally, the basic approach is flawed. For example, it is conceptually incomplete: even if turnout provided an accurate assessment of the impact on past voters, it would cover only the impact on *past voters*, without any assessment at all of the impact on eligible Americans who have not yet participated but have every right to participate in the future.

Moreover, even if turnout provided the right measure of impact, we're not yet able to mine it for useful information on the question presented. It is exceedingly difficult to interpret a few years of turnout data to parse the impact of any given legal change. For example, proponents often cite the change in turnout — particularly minority turnout — in Georgia and Indiana before strict ID laws (in 2004) and after strict ID laws (in 2008), as evidence that ID laws do not impose any substantial impediment.⁴⁵ But those proponents also often fail to note that both Georgia and Indiana were newly battleground states in 2008, with a minority candidate at the top of a major-party ticket for the very first time. Under those circumstances, any reasonable observer would have expected extraordinary increases in minority turnout, with or without ID laws. And under those circumstances, it is difficult to know whether a 19% increase in turnout⁴⁶ reflects an 15% increase because of the 2008 election with a 4% increase because of ID laws, or a 30% increase because of the 2008 election and an 11% decrease because of ID laws ... or any other combination of causal responsibility.

This is a specific example of a general problem: in any given election, turnout may be affected by the competitiveness of high-profile races, candidate quality, fundraising and campaign spending, the media environment, the presence or absence of salient ballot measures, the efforts of mobilization groups on the ground, other legal restrictions or policies that facilitate access, and a host of other conditions, including the weather on Election Day. Without thousands of data points to account for all of the other factors that could instead be driving turnout up or down, it is unreliable to draw conclusions about the impact of identification rules by looking at how many people vote in a given election.⁴⁷

Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (Caltech Soc. Sci. Working Paper No. 1267, 2007), at http://www.brennancenter.org/dynamic/subpages/download_file_50882.pdf; David B. Mulhausen, Ph.D., & Keri Weber Sikich, *New Analysis Shows Voter Identification Laws Do Not Reduce Turnout*, Sept. 10, 2007, at <http://www.heritage.org/Research/Reports/2007/09/New-Analysis-Shows-Voter-Identification-Laws-Do-Not-Reduce-Turnout>; Jason D. Mycoff et al., *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (2007), at http://www.brennancenter.org/dynamic/subpages/download_file_50900.pdf; John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud have on Voter Participation Rates*, Aug. 18, 2006, at <http://ssrn.com/abstract=925611>; Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002, June 28, 2006; *see generally* Brief of R. Michael Alvarez et al. as Amici Curiae in Support of Petitioners, at 10-14, *Crawford v. Marion County Election Board*, Nos. 07-21, 07-25 (U.S. Nov. 13, 2007) (reviewing such studies).

⁴⁵ *See, e.g.*, Opinion, Hans A. von Spakovsky, *Voter ID Was a Success in November*, WALL ST. J., Jan. 30, 2009.

⁴⁶ This was Georgia's increase from 2004 to 2008, as reflected by the United States Election Project, *Voter Turnout, Turnout 1980-2010.xls*, at <http://elections.gmu.edu/Turnout%201980-2010.xls>.

⁴⁷ *See* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification — Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009).

Instead of comparing motor vehicle records to Census numbers, or reading the uncertain tea leaves of turnout, there is another methodology to determine how many eligible citizens have the sort of identification documents required by the most restrictive state laws: ask them. There have been several surveys asking eligible Americans about the documentation they possess, with some varying conclusions.

Some of this research surveys either registered voters or actual voters — as explained in the discussion of turnout, above, such numbers understate the impact of strict identification requirements, because they do not include eligible Americans who may participate in the future. A 2008 survey found that 4.9% of registered voters responding nationwide did not have current government-issued photo identification; an additional 3.1% of respondents did not have current government-issued photo identification listing their full legal name (rather than, for example, a nickname or maiden name).⁴⁸ Another 2008 survey found that 5.7% of registered voters nationwide did not have a current valid driver's license or passport; an additional 1.1% of respondents had those documents, but not listing their full legal name.⁴⁹ (The same survey found that 4.7% of respondents had no valid driver's license or passport, but did have other government-issued photo identification; the survey did not inquire whether this latter ID was current.)⁵⁰ Still another 2008 survey found that 1.2% of registered voters in Indiana, Maryland, and Mississippi did not have any government-issued photo identification, but did not inquire whether the subjects' ID was current or reflected the same name on the registration rolls.⁵¹ A 2007 survey found that 13.3% of registered voters in Indiana did not have a current government-issued photo identification card; an additional 3% of respondents did not have current identification listing their full legal name.⁵² A 2006 survey found that 12% of actual midterm voters in California, New Mexico, and Washington did not have a valid state driver's license, but did not inquire whether the subjects had a non-driver's government-issued photo identification card.⁵³

Other research surveys voting-age American citizens, whether currently registered or not. A 2007 survey found that 16.1% of voting-age citizens in Indiana did not have current government-issued photo identification; an additional 2.8% of respondents did not have current

⁴⁸ 2008 Collaborative Multi-Racial Post-Election Study (CMPS), questions D21-D21A, at <http://cmpstudy.com/>; Matt A. Barreto, *New Empirical Evidence on Access to Photo ID* (visited Sept. 6, 2011), at http://faculty.washington.edu/mbarreto/research/voterid_090611.pdf; *see also* Gabriel R. Sanchez *et al.*, *The Disproportionate Impact of Photo-ID Laws on the Minority Electorate*, May 24, 2011, at <http://latinodecisions.wordpress.com/2011/05/24/the-disproportionate-impact-of-stringent-voter-id-laws/>.

⁴⁹ Email from Charles Stewart III, MIT, to Justin Levitt, Loyola Law School (Sept. 6, 2011, 13:27 PST); R. Michael Alvarez *et al.*, *2008 Survey of the Performance of American Elections, Final Report*, at <http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf>.

⁵⁰ *Id.*

⁵¹ Robert A. Pastor *et al.*, *Voting and ID Requirements: A Survey of Registered Voters in Three States*, 40 AM. REV. PUB. ADMIN. 461 (2010).

⁵² Matt A. Barreto *et al.*, *The Disproportionate Impact of Voter-ID Requirements on the Electorate — New Evidence from Indiana*, 42 PS: POLITICAL SCIENCE & POLITICS 111, 113 (2009).

⁵³ Matt A. Barreto *et al.*, *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.

identification listing their full legal name.⁵⁴ And a 2006 survey found that 11% of voting-age citizens nationwide did not have current government-issued photo identification.⁵⁵

Each of the above surveys appears reliable. Some of the variance can be explained by the difference in the questions asked (e.g., whether particular forms of identification are specified, or whether the identification is identified as current) or the difference in the target population; some of the variance may simply reflect differences from state to state. Additional variance may simply reflect the natural variability inherent in surveys, which are estimates and subject to different weighting schemes and margins of uncertainty. Further reliable surveys — both national and state-specific — would be welcome.

But it is important to note that even choosing the most conservative estimate — a survey targeting registered voters in select states, rather than the electorate as a whole — 1.2% of registered voters do not have the identification required by the most restrictive states. Even this substantially conservative result amounts to an impact reaching more than two million registered voters if applied nationwide.⁵⁶ And the larger estimates show an impact reaching more than twenty-two million voting-age citizens.⁵⁷

Moreover, every study to have examined the issue has found that those without government-issued photo identification are not evenly spread across the electorate. Just as the surveys differ in their overall assessment of the magnitude of the problem, they differ in their assessment of magnitude of the disparate impact. But the available data clearly show that those without government-issued photo identification are more likely to be nonwhite, more likely to be either younger voters or seniors, more likely to be from low-income households, and more likely to have less formal education.⁵⁸ And while I am not aware of a reliable measurement of the incidence of government-issued photo identification among persons with disabilities, there is reason to be concerned that they, too, are less likely to have the identification required by the most restrictive states.

These impacts are both substantial and statistically significant. For example, one 2008 survey found that while 3.7% of responding white registered voters nationwide did not have current valid government-issued photo identification, 7.3% of Latino voters and 9.5% of

⁵⁴ Barreto et al., *supra* note 52, at 113.

⁵⁵ See Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification 3* (2006), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf.

⁵⁶ See U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2007-2008*, at 29 (2009), *available at* <http://www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202007-2008.pdf> (reporting at least 174,101,505 active registered voters as of the 2008 general election).

⁵⁷ See U.S. Census Bureau, 2006 American Community Survey tbl. B05003 (reporting 206,287,902 voting-age citizens as of the 2006 survey period).

⁵⁸ See sources cited *supra* notes 48-53.

African-American voters lacked this ID.⁵⁹ And among voting-age citizens rather than registered voters, a 2006 national survey found that 8% of white citizens but 16% of Latino voting-age citizens and 25% of African-American voting-age citizens do not have current, valid, government-issued photo identification.⁶⁰ While other studies differ in the precise magnitude of these (and other) differential ID rates, all show a substantial effect, with historically underrepresented groups much less likely to have current government-issued photo identification.

These statistics are not merely important for their reflection of the status quo, but for their reflection of significant impact into the future. It often takes ID to get ID. For example, most native-born citizens in Arkansas seem to require an official copy of a birth certificate to get a government-issued photo identification card⁶¹ ... and seem to require government-issued photo identification to get an official copy of a birth certificate.⁶²

Even without this sort of vicious loop, those without current government-issued photo identification often face some difficulty in procuring it. All states of which I am aware require documentation to procure state-issued identification. Even when the identification card itself is offered free of charge, an individual without identification must collect this documentation, which involves time and expense, and travel (without driving) to a government office open during limited (working) hours, which involves time and expense. Official copies of birth certificates cost between \$7 and \$30 depending on the state, with a median of \$15; expedited processing will cost more.⁶³ A passport costs at least \$55, and a replacement naturalization certificate costs \$345.⁶⁴

Moreover, some eligible citizens will simply not be able to procure the requisite underlying documentation, no matter how much they are able to spend or how much time they are able to take. Just three weeks ago, South Carolina's Attorney General recognized, in a formal opinion interpreting the state's new identification law, that there are legitimate electors

who have a valid reason, beyond their control, which would prevent them from obtaining a Photo ID. One such reason which is obvious is that there are numerous South Carolinians, generally over age 50, who do not have a birth certificate. A primary cause is that, decades ago, many babies were

⁵⁹ See sources cited *supra* note 48.

⁶⁰ Brennan Center for Justice, *supra* note 55.

⁶¹ See Arkansas Driver Services, Frequently Asked Questions, at <http://www.dfa.arkansas.gov/offices/driverServices/Pages/FAQ%27s.aspx#e>.

⁶² See Arkansas Dep't of Health, Birth Records, Frequently Asked Questions, at <http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/BirthRecords.aspx>.

⁶³ National Center for Health Statistics, Where to Write for Vital Records, June 21, 2011, at <http://www.cdc.gov/nchs/w2w/w2w.pdf>.

⁶⁴ U.S. Dep't of State, Passport Fees, at http://travel.state.gov/passport/fees/fees_837.html; U.S. Citizenship and Immigration Services, Form N-565, Application for Replacement Naturalization/Citizenship Document, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextoid=a910cac09aa5d010VgnVCM10000048f3d6a1RCRD>.

not born in hospitals, but were delivered by midwives and thus no birth certificates were obtained. See, “Many Face Fight to Prove Identity,” *The State*, July 19, 2011. In addition, persons with disabilities also might be unable to obtain a Photo ID.⁶⁵

These eligible Americans have names. Dr. Brenda Williams, of Sumter, South Carolina, has recently been attempting to assist some of her patients in getting the government-issued photo identification required by South Carolina’s new law. Her comments to the Department of Justice show that she has spent hundreds of dollars helping her patients attempt to get the necessary ID.⁶⁶ And still some have been stymied. For example, Dr. Williams wrote to the Department of Justice about Mrs. Naomi Gordon and her brother, Mr. Raymond Rutherford.⁶⁷ Mrs. Gordon’s first name was apparently misspelled “Llnoie” by a midwife; a midwife also apparently misspelled Mr. Rutherford’s first name “Ramon.” The misspellings appear on both of their birth certificates; Mr. Rutherford has the particular difficulty of possessing a birth certificate with an incorrect spelling and a Social Security card with a correct spelling. They have been told that they have to have their names changed through the courts before they will be able to get government-issued photo identification; neither has yet been able to procure the appropriate ID.

Nora Elze, in Savannah, Georgia, is 88, and has been married for 65 years.⁶⁸ But because the name on her birth certificate (her maiden name) and the name on her out-of-state ID (her married name) don’t match, she has to produce a 65-year-old marriage license in order to get government-issued photo identification. At last report, she had not found the license, and had not been able to acquire the necessary identification.

In 2008, at least ten retired nuns in South Bend, Indiana, all citizens in their 80s or 90s, were reportedly turned away from the polls because they did not have current government-issued photo identification. One of the nuns noted that “many others among the 137 retired sisters living at the Congregation of the Sisters of the Holy Cross convent were dissuaded from voting upon learning that several had been turned away.”⁶⁹

Royal Masset, former political director of the Texas Republican Party, discussed a personally relevant situation in the press:

⁶⁵ Op. S.C. Att’y Gen. to Marci Andino, Exec. Dir., S.C. Election Comm’n, Aug. 16, 2011, at <http://www.scag.gov/wp-content/uploads/2011/08/andino-m-os-9319-8-16-11-Photo-ID-Voter-ID-legislation.pdf>.

⁶⁶ See, e.g., Email from Dr. Brenda Williams to Chief, Voting Section, re File #2011-2495 (Aug. 14, 2011, 15:44 ET).

⁶⁷ See, e.g., Email from Dr. Brenda Williams to Chief, Voting Section, re File #2011-2495 (Aug. 14, 2011, 18:59 ET).

⁶⁸ See JoAnn Merrigan, *Savannah Woman Told She Needs Proof of Marriage to Get Driver’s License*, WSAV, Aug. 29, 2011.

⁶⁹ Greg Gordon, *Retired Nuns Blocked from Voting in Indiana*, CONTRA COSTA TIMES, May 6, 2008; Deborah Hastings, *New ID Law Keeps Nuns From Voting*, SOUTH BEND TRIBUNE, May 7, 2008; Meghan Ashford-Grooms & Ciara O’Rourke, *Nuns Couldn’t Cast Ballots, But They Were Given Other Options*, AUSTIN AMERICAN-STATESMAN, Feb. 5, 2011.

I was a big fan of voter ID until the federal government declared my mother Aimee dead. The reason I've not been heavily involved in the political arena for the last three years is because I've been taking care of my 91-year-old mother who is a complete invalid but is very much alive. [¶] I found there was no way of proving her alive. Invalid 91 year olds do not have driver's licenses, passports, employment badges, gun permits & etc. Since I'm taking care of her in my home she has no bills with her name and address. I can't even get her a birth certificate since she lacks the ID necessary for a notary to verify. Under HB 218 my mother, who is a registered voter in Austin, cannot vote in Texas. Anyone who says all legal voters under this bill can vote doesn't know what he is talking about. And anyone who says that a lack of IDs won't discriminate against otherwise legal minority voters is lying.⁷⁰

Agnes Cowan and her husband lost many of their personal documents in a fire, including her husband's veterans' ID card.⁷¹ At 81 in 2008, and confined to a wheelchair, Ms. Cowan said that it was virtually impossible for her to cobble together replacement documentation in order to get a government-issued photo ID before Georgia's 2008 primary election, making it the first major election that Ms. Cowan had missed in 63 years.

Among the Indiana citizens prevented from voting a valid ballot in 2007 was 61-year old Republican Valerie Williams. Ms. Williams brought her telephone bill, a Social Security letter, and an expired state driver's license to the polls — but she did not have the current government-issued photo ID that Indiana required. Her provisional ballot was never counted.⁷²

In 2006, Eva Steele was an Arizona resident; her son was an Army reservist deployed in Iraq.⁷³ Her disabilities left her in a wheelchair and unable to drive. “‘I don't have a driver's license,’ she said. ‘I don't get utility bills. I've never had a passport. I don't have property tax statements. All I did was raise my children and teach them to be good citizens and to vote. And now I'm the one who's on the outside looking in.’”⁷⁴

Mary Wayne Montgomery Eble was 92 and on oxygen in 2008, living on a family farm outside Rockport, Indiana.⁷⁵ She had no driver's license because she could not see well enough to drive; she did not know if she had a birth certificate, because she was born at home.

⁷⁰ *A Republican, His Mother, and Voter ID*, HOUSTON CHRONICLE BLOG, Apr. 24, 2007, at <http://blog.chron.com/texaspolitics/2007/04/a-republican-his-mother-and-voter-id/>.

⁷¹ Denise Dillon, *Elderly Couple Loses ID in Fire, Fear They Can't Vote*, FOX 5 ATLANTA, July 14, 2008, at http://electionlawblog.org/wp-content/uploads/20080714-GA_cowan.pdf.

⁷² Ian Urbina, *Voter ID Laws Are Set to Face a Crucial Test*, N.Y. TIMES, Jan. 7, 2008.

⁷³ E.J. Montini, *A Soldier's Mother is Denied Her Right to Vote and to Speak*, ARIZ. REPUBLIC, Aug. 13, 2006; Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006.

⁷⁴ Montini, *supra* note 73.

⁷⁵ Associated Press, *ID Laws Spur Voting Legal Battle*, USA TODAY, Jan. 23, 2008.

Chris Conley, a 50-year-old veteran of the Navy and Marines, tried to vote in Indiana's 2008 primary, but his Veterans Administration photo ID card did not have an expiration date, and therefore did not meet the state requirements.⁷⁶

Birdie Owen was displaced from Louisiana after Hurricane Katrina, where her birth certificate was lost in the storm. Without a birth certificate, she found herself unable to get a state-issued photo identification card in Missouri.⁷⁷

The stories above represent just a selection of the reports of individuals — real American citizens — without government-issued photo identification. Reliable statistics indicate that there are many others.

The Lack of Justification for Restrictive Identification Rules

As with the other restrictions discussed above, the heavy costs on Mrs. Gordon and other eligible American citizens are not justified by any substantial benefit. Laws preventing citizens from proving their identity at the polls by anything other than certain government-issued photo identification cards are often justified by the need to prevent election fraud. Here too, there appear to be particularly pernicious misconceptions.

Requirements to present certain identification at the polls provide even theoretical protection against only one form of fraud: someone who arrives at the polls and pretends to be someone else. As explained in more detail below, and as I have described extensively in previous publications and official testimony,⁷⁸ all of the available evidence demonstrates that the incidence of any fraud that identification rules could prevent is extraordinarily rare. Though it does occur, there are only a handful of recent accounts, even fewer of which have been substantiated. During this same period, hundreds of millions of ballots have been cast. The most notable significance of the incidents that have surfaced is how rare they appear to be.⁷⁹

⁷⁶ Nick Werner, *Voter ID Causes Some Problems*, STAR-PRESS (Muncie, Ind.), May 9, 2008.

⁷⁷ Robin Carnahan, *Elections Can't Really be Fair, Free and Accurate if Eligible Voters Can't Vote*, HUFFINGTON POST, May 9, 2008.

⁷⁸ See, e.g., Levitt, *supra* note 2; *In Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*, 110th Cong. (Mar. 12, 2008), at http://brennan.3cdn.net/02f93775d26a119ad0_dam6iyw3s.pdf; *Hearing on S.B. 14 Before the H. Select Comm. on Voter Identification and Voter Fraud*, 82d Leg. (Tex. Mar. 1, 2011); *Hearing on S.B. 362 Before the H. Comm. on Elections*, 81st Leg. (Tex. Apr. 6, 2009), at http://brennan.3cdn.net/6672fa43792018edac_jpm6bxb6c.pdf; *Hearing Before the H. Comm. on Elections*, 80th Leg. (Tex. Jan. 25, 2008), at <http://www.house.state.tx.us/fx/av/committee80/80125a13.ram>; see also Brennan Center for Justice, Investigator's Guide to "Voter Fraud" (2006), at http://www.brennancenter.org/content/resource/investigators_guide_to_voter_fraud/.

⁷⁹ I have arrived at this conclusion through a focus on evidence: extensive research of reports, citations, and claims of fraud, in popular and scholarly publications, and in documents provided to and produced by public and private investigations. I have prioritized more recent claims, and particularly claims purporting to reveal in-person impersonation fraud. My review and analysis spans thousands of accounts, including every single assertion of fraud in the most comprehensive collection of claims of in-person impersonation fraud to date: the citations presented to the Supreme Court in the *Crawford v. Marion County Election Board* case. See, e.g., Justin Levitt, Analysis of

In order to assess the incidence of fraud that identification rules could possibly prevent, it is first necessary to cut through a large amount of noise. Some reports or allegations of fraud are simply mislabeled; the substance of a newspaper story simply does not support a headline claim of “fraud.”⁸⁰ Other reports claim fraud but instead reveal straightforward administrative errors, or administrative practices that concern some, but are not errors at all.⁸¹

Some of these reports actually do present worrisome evidence of fraud — but not any sort of fraud that identification rules could prevent. Instead, they allege schemes involving fraudulent absentee ballots;⁸² or absentee voters who have been coerced;⁸³ or conspiracies to buy votes;⁸⁴ or efforts to tamper with ballots or machines or counting systems.⁸⁵ There are occasional reports of double-voting, by individuals voting in their own names and without appropriating another’s identity.⁸⁶ There are occasional schemes of insider complicity and/or forgery;⁸⁷ when pollworkers and officials are willing to break the law, or miscreants are willing to forge documents, additional requirements for pollworkers to review official documentation cannot prevent the wrongdoing. It is impossible to stop local bosses intent on breaking the law by giving them a new law to break.

Alleged Fraud in Briefs Supporting *Crawford* Respondents (2007), at <http://www.truthaboutfraud.org/pdf/CrawfordAllegations.pdf>.

⁸⁰ See, e.g., Megan Matteucci, *Riverdale Suit Alleges Election Fraud*, ATLANTA J.-CONST., Nov. 20, 2007; Sandy Coleman, *Randolph Petition Claims Voter Fraud*, BOSTON GLOBE, May 21, 2006, at 5.

⁸¹ See, e.g., Laurel Walker & Patrick Marley, *Waukesha Canvass Gets OK*, MILWAUKEE J.-SENTINEL, Apr. 20, 2011; Dave Umhoefer, *New Nickolaus Accusations Unfounded*, MILWAUKEE J.-SENTINEL, Aug. 11, 2011; Grand Jury Report Regarding the Election of Nov. 2, 2010, Saguache County, Colo. (2011); Michelle Hillen, *Recount of Runoff Reverses 1st Result*, ARK. DEMOCRAT-GAZETTE, June 20, 2006.

⁸² See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138, 1144-46 (Ind. 2004); *In re The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170 (Fla. Ct. App. 1998).

⁸³ See, e.g., Anastasia Hendrix, *City Workers: We Were Told To Vote, Work for Newsom*, S.F. CHRONICLE, Jan. 15, 2004; Matthew Purdy, *5 Bronx School Officials Are Indicted in Absentee Ballot Fraud*, N.Y. TIMES, Apr. 25, 1996.

⁸⁴ See, e.g., Beth Musgrave, *Three Sentenced in Bath Vote Fraud*, LEXINGTON HERALD-LEADER, Sept. 25, 2007; Nicklaus Lovelady, *Investigation Into Vote Fraud in Benton County Nets 14th Arrest*, MISS. CLARION-LEDGER, Aug. 31, 2007; Tom Searls, *Six To Learn Fate in Lincoln Vote Buying Case*, CHARLESTON GAZETTE (W.Va.), May 3, 2006, at 1C; Michael E. Ruane, *FBI’s Sham Candidate Crawled Under W. Va.’s Political Rock*, WASH. POST, Dec. 2, 2005, at A1.

⁸⁵ See, e.g., John M. Glionna, S.F., *State Wade Into Vote Count Controversy*, L.A. TIMES, Nov. 21, 2001.

⁸⁶ See, e.g., Criminal Complaint, *Wisconsin v. Gunka*, Case No. 2010ML005173 (Wis. Circuit Ct., Milwaukee County Mar. 8, 2010).

⁸⁷ See, e.g., Eva Ruth Moravec, *Woman, 81, Jailed in Vote-Fraud Case*, SAN ANTONIO EXPRESS-NEWS, Oct. 5, 2010; Hans A. von Spakovsky, *Where There’s Smoke, There’s Fire: 100,000 Stolen Votes in Chicago* (Heritage Foundation Legal Memorandum No. 23), Apr. 16, 2008; *United States v. Brown*, 494 F. Supp. 2d 440, 486 n.73 (S.D. Miss. 2007), *aff’d*, 2009 WL 485709 (5th Cir. 2009); Michael Cass, *Poll Worker Indicted in Vote Probe*, THE TENNESSEAN, Dec. 20, 2007; Manny Garcia & Tom Dubucq, *Unregistered Voters Cast Ballots in Dade: Dead Man’s Vote, Scores of Others Were Allowed Illegally, Herald Finds*, MIAMI HERALD, Dec. 24, 2000; Grand Jury Report, *In the Matter of Confidential Investigation R84-11* (N.Y. Sup. Ct., Kings County, 1984).

There are also reports of fraudulent registration forms, though they involve rogue workers hoping to cheat nonprofit organizations out of an honest effort to register real citizens.⁸⁸ These forms are usually subject to the safeguards of HAVA, which flags potentially invalid registration forms for further security measures before a corresponding ballot can be cast.⁸⁹ I am aware of no recent substantiated case in which such registration fraud has resulted in a fraudulent vote.

The above forms of fraud do, sadly, exist. They are real, legitimate concerns, though fortunately not as common as media attention may make them appear. They should be both prevented and punished, where doing so does not exact an even greater cost to the system and to legitimate electors therein. But extreme limits on the ways in which individuals prove their identity at the polls do nothing to address them. Using restrictive identification rules to prevent this fraud is like amputating a foot to get rid of the flu.

In addition to the noise created by allegations of fraud that identification rules cannot possibly prevent, noise has been generated by sloppy science. Some reports purport to reveal evidence of fraud based on attempts to match registration rolls to other government sources, like registries of the deceased, but these reports often betray familiar, and significant, methodological flaws. One particularly common error is the seemingly straightforward assumption that individuals with the same name and date of birth are the same person. As Professor Michael McDonald and I have demonstrated, elementary statistics confirms that in any substantial pool, it is quite common to find two different individuals who share the same name and date of birth.⁹⁰ When comparing one list of millions of voters to another list of millions of ineligible individuals, it should not be surprising to find hundreds of perfect “matches” that actually represent different individuals, known to record-linkage experts as “false positives.” The incidence of such matches reveals statistics at work, not fraud.

The Negligible Fraud that Restrictive Identification Rules Could Possibly Prevent

In sum, my research confirms that there are hundreds of reports of alleged fraud, in thousands of elections, with millions of ballots cast. Yet after wading through the unreliable and irrelevant reports categorized above, only a handful of reports remain that even allege, much less substantiate, instances of fraud that increased identification requirements at the polls could prevent.⁹¹

Even fewer of these allegations stand up to real scrutiny. Indeed, careful investigation has more often than not debunked, not confirmed, allegations of impersonation fraud at the polls.

⁸⁸ See, e.g., Todd C. Frankel, *8 Charged in StL Voter Fraud*, ST. LOUIS POST-DISPATCH, Dec. 21, 2007; Keith Ervin, *Felony Charges Filed Against 7 in State's Biggest Case of Voter-Registration Fraud*, SEATTLE TIMES, July 26, 2007; Carlos Campos, *Bogus Voter Forms Pop Up in Fulton*, ATLANTA J.-CONST., Oct. 21, 2004.

⁸⁹ 42 U.S.C. § 15483(b); see also *supra* text accompanying note 40.

⁹⁰ Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008).

⁹¹ Other scholars' thorough research confirms these conclusions. See, e.g., LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

One notorious and recurring example is a 2000 investigative report in the Atlanta Journal-Constitution, claiming that “the actual number of ballots cast by the dead” was “5,412 in the past 20 years.”⁹² The article has been favorably cited by an Assistant U.S. Attorney General,⁹³ a Governor,⁹⁴ a state Secretary of State,⁹⁵ and several state Attorneys General,⁹⁶ among others.

This article did not, however, actually reveal 5,412 ballots cast by the dead, much less 5,412 instances of in-person impersonation fraud.⁹⁷ Instead, it revealed 5,412 matches of Social Security death records to voting records. And it further revealed that these matches are flawed. The reporter acknowledged that death records contain errors, listing people as dead who are actually alive, but apparently did not investigate how many of the 5,412 identified ballots suffered from this error. The reporter also acknowledged that voter records contain errors, reflecting data entry mistakes and those who sign the wrong line of a pollbook, but apparently could not or did not investigate how many of the 5,412 identified ballots suffered from this error. The reporter neither acknowledged nor apparently accounted for the statistical likelihood that a record of John Smith dying and a record of John Smith voting might in fact reflect different “John Smith”s with the same date of birth.⁹⁸ Finally, the reporter did not indicate how many of these 5,412 ballots were cast in person, rather than absentee.

Indeed, the article identified only one individual concretely alleged to have been the victim of in-person impersonation fraud. It cited the case of “[Alan Jay] Mandel, the tobacco shop owner, whose voter certificate was signed at the polls by someone after his death.”⁹⁹ Repeated the reporter, “[S]omebody *definitely* signed his name on a voter certificate on Nov. 3, 1998.”¹⁰⁰

This allegation, though amounting to only one concrete allegation of in-person impersonation fraud in approximately twenty million votes over 20 years,¹⁰¹ would nevertheless

⁹² Jingle Davis, *Even Death Can't Stop Some Voters*, ATLANTA J.-CONST., Nov. 6, 2000.

⁹³ Letter from William E. Moschella, U.S. Assistant Attorney General, to Christopher S. Bond, U.S. Senator (Oct. 7, 2005), at http://www.justice.gov/crt/about/vot/misc/ga_id_bond_ltr.php.

⁹⁴ Darryl Fears & Jonathan Weisman, *Georgia Law Requiring Voters to Show Photo ID Is Thrown Out*, WASH. POST, Sept. 20, 2006, at A6.

⁹⁵ Brief of State Respondents, at 2, *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008).

⁹⁶ Brief of Texas *et al.* as *Amicus Curiae* Supporting Respondents, at 8, *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008).

⁹⁷ Over twenty years and approximately 20 million votes cast, even if all 5,412 ballots had in fact been fraudulent, the overall rate of fraud would have been 0.027%. Secretary of State Cathy Cox, *The 2000 Election: A Wake-Up Call For Reform and Change* 11 n.3 (2001), available at http://www.sos.state.ga.us/acrobat/elections/2000_election_report.pdf. In reality, many of these ballots are likely attributable to clerical error, data error, or statistical coincidence.

⁹⁸ Indeed, if the voter voted in several elections over the twenty-year span reflected in the voter history, each such mismatch would likely account for several “false positive” ballots. Thus, the 5,412 identified ballots might reflect far fewer matched — or mismatched — voters.

⁹⁹ Davis, *supra* note 92.

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ Cox, *supra* note 97, at 11 n.3.

be disturbing — if it were true. Further investigation, however, proved the allegation false. The signature (and voter certificate) in question belonged to Alan J. Mandell (with two “I”s), who was very much alive and eligible in 1998, but whose vote was mistakenly recorded in the name of Alan Jay Mandel (with one “I”).¹⁰²

Investigation as thorough as the investigation into the vote of Mr. Mandel/Mandell is rare. Nevertheless, when researchers do expend the effort to follow through on initial allegations of in-person impersonation fraud, they often find those allegations to be unwarranted. A 2008 investigation of 48 purported “dead voters” in Dallas, for example, revealed only clerical error, voter mistake, and confusion; of all the cases investigated, “none involved a fraudulently cast vote.”¹⁰³ A 2007 investigation of approximately 100 “dead voters” in Missouri revealed that every single purported case was properly attributed either to a matching error, a problem in the underlying data, or a clerical error by elections officials or voters.¹⁰⁴ Likewise, after compiling a list of potential “dead voters” in New York state, a Poughkeepsie journalist investigated seven local cases — and found that seven out of seven reflected clerical errors or other mistakes, not fraud.¹⁰⁵ An investigation in Hawaii in 1999, after reviewing precinct pollbooks and calling allegedly deceased citizens, similarly found that not one of 170 potential “dead voters” actually reflected fraud.¹⁰⁶

The most prominent recent examination of voter fraud — the evidence presented to the Supreme Court in *Crawford v. Marion County Election Board*¹⁰⁷ — precisely fits the overall pattern that I have described above. There were many claims of wrongdoing and irregularity, but few that even alleged the sort of fraud that in-person identification rules could possibly prevent, and a tiny portion, if any, that substantiated the allegations.

The *Crawford* case is often said to have validated laws requiring photo identification at the polls. It did no such thing. In *Crawford*, the fractured court rejected the plaintiffs’ challenge to the law as overbroad, in light of the limited evidence in the record on the extent of the law’s burdens.¹⁰⁸ That is, without solid proof of burden in the record, Indiana’s asserted justifications were deemed legally sufficient to sustain the law against the particular facial challenge that was

¹⁰² Jingle Davis, *State Plans to Update Voter Lists*, ATLANTA J.-CONST., Feb. 10, 2001, at 4H; Cox, *supra* note 97, at 11 n.3.

¹⁰³ Rudolph Bush, *Vote Fraud Review Comes Up Empty*, DALLAS MORNING NEWS, Dec. 14, 2008.

¹⁰⁴ Steve Chamraz, “The Dead List” Backstory . . . , News 4 Daily Briefing, May 7, 2007, at http://www.beloblog.com/KMOV_Blogs/n4dailybriefing/2007/05/the_dead_list_backstory.html.

¹⁰⁵ John Ferro, *Deceased Residents on Statewide Voter List*, POUGHKEEPSIE J., Oct. 29, 2006.

¹⁰⁶ Waite David, *Review Turns Up No Signs of Fraud*, HONOLULU ADVERTISER, Mar. 16, 1999, at A1.

¹⁰⁷ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

¹⁰⁸ *Id.* at 188-89, 200-03 (Stevens, J.). Part of the difficulty is that the case was a pre-enforcement challenge, brought before Indiana’s law was put into effect and therefore without direct evidence of past harm. *See generally* Justin Levitt, *Crawford—More Rhetorical Bark than Legal Bite?*, May 2, 2008, at http://www.brennancenter.org/blog/archives/crawford_more_rhetorical_bark_than_legal_bite/.

lodged. The Court did not issue a blanket statement declaring restrictive identification laws to be legal. And it certainly did not validate ID laws as a matter of good policy.¹⁰⁹

The policy decision, instead, starts with the rationale for such a law. Because the Supreme Court represented such a high-profile forum, it provided the most prominent focal event to date for supporters of an identification law to justify their support by showing their rationale to be real. *Crawford* was a national stage for those who believe in-person impersonation fraud to be a legitimate concern to present their proof. In the case, the lower courts cited several media accounts that, the courts claimed, reflected reports of in-person impersonation fraud.¹¹⁰ In the Supreme Court, respondents and *amici* supporting respondents added citations to more than 250 reports, encompassing decades of elections.¹¹¹

I thoroughly examined each and every one of these citations.¹¹² The evidence of in-person impersonation fraud was strikingly sparse. The vast majority of cited reports reflected either allegations that could not possibly be related to in-person impersonation fraud and which an identification law could not possibly fix (*e.g.*, absentee ballot problems, vote-buying schemes, or ballot tampering), or allegations that did not mention whether the alleged wrongdoing was committed in-person or through more susceptible absentee ballots.¹¹³ Two reports involved single votes that were the product of official pollworker misconduct or forged documentation, which also could not be prevented by laws requiring pollworkers to examine documentation.¹¹⁴ Two reports involved unsuccessful attempts to vote in the name of another.¹¹⁵

¹⁰⁹ Indeed, six Justices recognized that restrictive ID laws might unduly burden some eligible voters, particularly poor and elderly citizens. *Crawford*, 553 U.S. at 199 (Stevens, J.); *id.* at 209-22 (Souter, J., dissenting); *id.* at 237-39 (Breyer, J., dissenting).

¹¹⁰ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006); *see also id.* at 793-94; *Crawford v. Marion County Election Board*, 472 F.3d 949, 953 (7th Cir. 2007).

¹¹¹ Brief of State Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief for the United States as *Amicus Curiae* Supporting Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of the American Unity Legal Defense Fund as *Amicus Curiae* Supporting Affirmance, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of Democrat and Republican Election Professionals as *Amici Curiae* in Support of Affirmance, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of *Amicus Curiae* Evergreen Freedom Foundation in Support of Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief for Lawyers Democracy Fund as *Amicus Curiae* in Support of the Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of United States Senators Mitch McConnell *et al.* as *Amici Curiae* in Support of Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of the Republican National Committee as *Amicus Curiae* Supporting Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of Texas *et al.* as *Amicus Curiae* Supporting Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); Brief of Washington Legal Foundation, as *Amicus Curiae* in Support of Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

¹¹² Levitt, *supra* note 79; Justin Levitt, *Crawford—Just the Facts*, Apr. 30, 2008, at http://www.brennancenter.org/blog/archives/just_the_facts/.

¹¹³ Levitt, *supra* note 79, at 2.

¹¹⁴ Cass, *supra* note 87 (discussing one incident in Tennessee in 2007); Garcia & Dubucq, *supra* note 87 (discussing one incident in Florida in 2000).

¹¹⁵ Madeline Friedman, *Anatomy of Voter Fraud*, HOBOKEN REPORTER, July 1, 2007 (discussing one attempt in New Jersey in 2007); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 292 & n.70 (1996) (*citing* Doug

That left, since 2000, nine allegations of votes that might have involved votes cast by individuals impersonating others, which identification rules might have prevented. There is also an alternative explanation for each of the nine votes: either pollworker error or voter confusion might have caused a different, legitimate elector to sign the wrong line of the pollbook, or a data entry error might have caused an elector's voter record to register a vote for an election when no corresponding voter ever signed in at the polls.¹¹⁶ There are plentiful reports of similar mistakes, with fathers confused for sons, and vice versa.¹¹⁷ Investigation of the pollbooks themselves could distinguish fraud from error, but in my research to date, I have not been able to find any evidence that the necessary investigation was undertaken.

This evidence is remarkable. There have been allegations of impersonation at the polls. But they are notable for their rarity. In the most prominent forum to date for collecting such allegations, proponents of these rules cited nine votes since 2000 that were caused either by fraud that in-person identification rules could possibly stop. . . or by innocent mistake. During the same period, 400 million votes were cast, in general elections alone.¹¹⁸ Even assuming that each of the nine votes were fraudulent, that amounts to a relevant fraud rate of 0.000002 percent. Americans are struck and killed by lightning more often.¹¹⁹ And every year, there are far more reports of UFO sightings.¹²⁰

Some have claimed that the incidence of alleged in-person impersonation fraud is extremely low because in-person impersonation fraud is difficult to detect.¹²¹ This is distinct from the issue of whether in-person impersonation fraud is difficult to prosecute: littering clearly exists, but is difficult to address through the criminal justice system, because the wrongdoer is not easily identified. Here, not only are there virtually no prosecutions of in-person impersonation fraud, but there are even strikingly few reports of potential impersonation. It is as if individuals were complaining about littering, but could find no garbage in the street. For those believing in impersonation at the polls, the answer is that this sort of fraud is simply difficult to detect.

Haaland and Doug Swordstrom, A Report on Election Law Irregularities: California 16th Senate District 10 (1995)) (discussing one attempt in California in 1994).

¹¹⁶ Levitt, *supra* note 79, at 2.

¹¹⁷ See Will Garvey, *My Opportunity for Voter Fraud*, LINCOLN TRIBUNE, July 20, 2011 (revealing that a vote ostensibly cast in the name of Will Garvey IV was actually cast by his father, Will Garvey III); Michael Mayo, *Determined Voters Tackle the Obstacles and Triumph*, FT. LAUDERDALE SUN-SENTINEL, Nov. 5, 2008 (revealing that a vote ostensibly cast in the name of Michael Curry was actually cast by his son, Michael Curry, Jr.); see also Davis, *supra* note 102 (revealing that a vote ostensibly cast in the name of Alan J. Mandel was actually cast by Alan J. Mandell (with two "l"s); *supra* text accompanying notes 103-106.

¹¹⁸ United States Election Project, *supra* note 46.

¹¹⁹ Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Service, *Lightning Safety: Medical Aspects of Lightning*, at <http://www.lightningsafety.noaa.gov/medical.htm> (last visited Sept. 6, 2011); Ron Holle, *Lightning Fatalities by State, 2001-2010* (2011), at http://www.lightningsafety.noaa.gov/stats/01-10_deaths_by_state.pdf.

¹²⁰ See, e.g., UFO Casebook, *Breaking UFO News Reports*, at <http://www.ufocasebook.com/>.

¹²¹ See, e.g., Crawford v. Marion County Election Board, 472 F.3d 949, 953 (7th Cir. 2007).

In truth, there are multiple means to discover in-person impersonation fraud, all of which should yield many more reports of such fraud, if it actually occurred with any frequency. An individual seeking to commit in-person 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.¹²² 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.¹²³ 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 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.

As in all law enforcement, none of these detection mechanisms are perfect. Yet in hundreds of millions of ballots cast, they have yielded only a handful of potential instances of in-person impersonation fraud, precisely during a period when investigating voter fraud was expressly deemed a federal law enforcement priority,¹²⁴ and when private entities were equipped and highly motivated to seek, collect, and disseminate such reports.¹²⁵ The phone should have been ringing off the hook, but instead there was barely a whisper.

A more logical explanation for the extraordinary rarity of reported impersonation fraud at the polls is that such fraud is extraordinarily rare. It is an extremely inefficient means to influence an election. For each act of in-person impersonation fraud in a federal election, the perpetrator risks 5 years in prison and a \$10,000 fine under federal law, in addition to penalties under state law.¹²⁶ In return, the perpetrator gains at most one incremental vote. It is sensible that few individuals believe such a trade-off worthwhile.

¹²² See *Crawford v. Marion County Election Board*, 553 U.S. 181, 226-29 (2008) (Souter, J., dissenting).

¹²³ 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).

¹²⁴ See Dep't of Justice, Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative, July 26, 2006, at 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.

¹²⁵ See, e.g., Republican National Committee, You Can't Make This Up!, at <http://web.archive.org/web/20080709002402/http://www.gop.com/ycmtu.htm>.

¹²⁶ 42 U.S.C. § 1973i(c).

Balancing Costs and Benefits

In weighing the costs and benefits of restrictive identification rules, the limited incidence of any fraud that these rules could prevent is significant. Because most American citizens have the identification required, the number of eligible voters without ID is relatively small. But even the most conservative estimates of impact show that the “cure” of restrictive identification is — mathematically — half a million times worse than the ostensible disease. Even if only 1.2% of registered voters do not have the required identification, burdening 1.2% of the voters in order to address an 0.000002% fraud rate simply does not add up. Put differently, burdening more than two million registered voters to address nine potential fraudulent votes seems a particularly poorly tailored response. It is true that the outcome of a close election could hang in the balance¹²⁷ — indeed, in one 2010 Indiana school board race, a tie vote with one provisional ballot cast by a voter without the requisite identification, it already has.¹²⁸ This calculus shows precisely why it is so foolish to erect a real barrier to millions of real citizens in order to increase existing protections against an unlikely hypothetical. It is like amputating a foot in order to prevent a potential hangnail.

Indeed, preliminary evidence indicates that restrictive identification rules may have *already* prevented more individuals from voting than any incidence of fraud to justify the impact. The evidence submitted in *Crawford* cited nine potentially fraudulent votes — nationwide and over seven years — that strict identification rules might have prevented. The individual stories above¹²⁹ represent just some of the individual stories of citizens without government-issued photo identification, more than nine of whom have already been prevented from casting valid ballots due solely to restrictive identification laws. And there are many more. In just one Indiana county, in just one off-cycle limited-turnout election in 2007, 32 voters cast ballots that could not be counted because of Indiana’s new restrictive identification law; fourteen of these voters had previously voted in at least ten elections.¹³⁰ In the 2008 presidential primary election, approximately 321 Indiana ballots seem to have been rejected because of the identification law;¹³¹ in the general election, 902 Indiana ballots seem to have been rejected because of the identification law.¹³² Similarly, in a 2007 off-cycle Georgia election, 33 voters’ ballots were rejected because of that state’s new, restrictive identification law,¹³³ and in the 2008 presidential

¹²⁷ See Opinion, Hans A. von Spakovsky, *ID Laws Ensure Election Integrity*, USA TODAY, June 12, 2011.

¹²⁸ Christin Nance Lazerus, *School Race Hinges on Voter’s ID*, GARY POST-TRIBUNE, May 14, 2010; Bill Dolan, *Lake Ridge School Officials Asked to Break Candidate Tie*, NWI.COM, May 25, 2010; Carmen M. Woodson-Wray, *Glen Johnson’s Credentials Not Good Enough for Lake Ridge School Board*, GARY CRUSADER, June 12, 2010.

¹²⁹ See *supra* text accompanying notes 66-77.

¹³⁰ Brief for Respondent Marion County Election Board at 8-10, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

¹³¹ Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J. L. & POL. 475 (2008).

¹³² Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana’s 2008 General Election*, 25 J. L. & POL. 329 (2009).

¹³³ Shannon McCaffrey, *Votes of Some Who Lacked Photo ID in November Didn’t Count*, THE LEDGER-ENQUIRER (Columbus, Ga.), Jan. 29, 2008.

primary, 254 Georgian ballots were rejected because of the new law.¹³⁴ It is impossible to know how many other voters without the proper identification came to the polls but did not cast provisional ballots (which would not have counted without identification), or how many declined to make the trip to the polls in the first instance (which would have been futile).¹³⁵ And though it is theoretically possible that each and every one of the provisional ballots listed in this paragraph represented a fraudulent vote, there is no further evidence to support that conclusion.

Despite their demonstrated impact on many American citizens, some seek to justify overly restrictive identification laws by claiming that they will at least increase public confidence in the election process. Even if the unfounded fears of the many were sufficient justification to burden the constitutional rights of the few, however,¹³⁶ a careful study cited in the *Harvard Law Review* casts serious doubt on the validity of such assertions. The data show no support for the notion that requiring identification will increase voter confidence; the study found no statistically significant correlation between the rate at which citizens were asked to produce photo ID and their perception that either voter fraud generally, or voter impersonation in particular, exists.¹³⁷ Apparently, those who are inclined to believe that elections are, by and large, secure will continue to believe that they are secure — and those who are inclined to believe that elections are, by and large, insecure will continue to believe that they are insecure — no matter what the identification regime. Restrictive identification laws do not, in short, appear to make citizens feel more secure about their elections.

Finally, in addition to the negligible benefits of the most restrictive laws requiring government-issued photo identification, it is worth noting real costs of the policy, even beyond the cost to legitimate citizens who do not have the necessary identification. Indeed, as with the registration and early-vote policies reviewed above, the new laws may well be *counterproductive*. For example, Georgia and Wisconsin have both dramatically limited the identification that citizens may use to vote at the polls, but also offer no-excuse absentee voting

¹³⁴ Robert A. Simms, Ga. Deputy Sec’y of State, Testimony Before the U.S. Senate Comm. on Rules and Admin.: In-Person Voter Fraud: Myth and Trigger for Disenfranchisement? 5, Mar. 12, 2008; *see also* Shannon McCaffrey, *More Than 400 Voters Lacked Photo IDs in Feb. 5 Primary*, THE LEDGER-ENQUIRER (Columbus, Ga.), Feb. 14, 2008 (reporting 296 voters without ID casting provisional ballots that were not counted).

¹³⁵ In limited-turnout local elections in 2008 in Palm Beach, Florida, 14 voters cast provisional ballots because they did not have photo identification with them. William Kelly, *Three-Vote Margin Spurs Palm Beach Mayoral Ballot Recount Saturday*, PALM BEACH DAILY NEWS, Feb. 18, 2009. The mayoral election was decided by 3 votes. *Id.* Florida, however, allows provisional ballots cast without photo identification to be counted if there is no evidence of fraud. If Florida had been operating under the law in Georgia or Indiana — or the states that have joined Georgia and Indiana this year — those ballots might well have made the difference in the election.

¹³⁶ *But see, e.g.*, *Weinschenk v. Missouri*, 203 S.W.3d 201, 218-19 (Mo. 2006) (“[I]f this Court were to approve the placement of severe restrictions on Missourians’ fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights. . . . The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.”).

¹³⁷ Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder*, 121 HARV. L. REV. 1737 (2008). This research also reveals no support for the notion that the potential for in-person impersonation fraud will cause voters to refrain from voting. The study found no statistically significant correlation between the perception that impersonation fraud exists and the propensity to turn out to vote. *Id.*

without the dramatic ID restrictions.¹³⁸ While the comparative freedom of absentee voting may be seen by some to mitigate the burden on voters without government-issued photo identification,¹³⁹ it will also predictably drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns. That is, a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.

There is also a monetary cost associated with restrictive identification laws, and that cost can be substantial. As the Brennan Center has documented, courts approving restrictive identification requirements have required not only that the state offer free identification cards to eligible citizens who do not otherwise have the necessary ID, but also that the state prepare an education campaign sufficient to warn the electorate that their votes will not count absent the required identification.¹⁴⁰ These requirements amount to a real fiscal impact of millions of dollars. To produce just 168,000 identification cards in Indiana, the state estimated a \$1.3 million dollar cost, with additional revenue loss of \$2.2 million, which exceeds the Indiana Election Division's total budget for the 2009-2010 fiscal year — even before accounting for any education costs.¹⁴¹ And a more comprehensive fiscal note in Missouri estimated the costs of a photo ID law at \$6 million for the first year, with about \$4 million in recurring costs.¹⁴² Moreover, increasing any restrictions at the polls — identification or otherwise — will likely lead to an increase in the number of voters needing to cast provisional ballots. These ballots must be printed, collected, and processed, all of which leads to increased cost (and increased uncertainty in the event of a close election). In tight budgetary times, these costs weigh heavily on the ledger.

CONCLUSION

This testimony reviews several new state laws impacting the voting process before and on Election Day. There are others of concern as well, beyond the scope of my testimony today — including repeals of election-day registration and repeals of practices easing the restoration of civil rights for those who have been convicted. As a theoretical matter, none of above policies make it impossible to vote. Neither did the poll tax, when it was in place. But in practice, these barriers increase the burdens to eligible citizens of exercising the franchise. More disturbing, the restrictions are unnecessary and unjustified, and even potentially counterproductive. Our most fundamental constitutional right deserves better.

¹³⁸ Ga. Code §§ 21-2-380-81, 21-2-417. In contrast, the new laws in Kansas and Wisconsin also sharply restrict the documentation that absentee voters may use to prove their identity. Kan. Stat. §§ 25-1122, 25-2908(h); Wis. Stat. §§ 5.02(6m), (16c), 6.79(2), 6.85-87.

¹³⁹ *But see* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 23-24 (2010) (arguing that absentee ballots should not be considered substitutes for the ability to vote in person).

¹⁴⁰ *See* Vishal Agraharkar *et al.*, *The Cost of Voter ID Laws: What the Courts Say* (2011), at http://www.brennancenter.org/content/resource/the_cost_of_voter_id_laws_what_the_courts_say/.

¹⁴¹ *Id.* at 1-2.

¹⁴² *Id.* at 1.

These developments are worth monitoring federally, perhaps through the congressional oversight relationship with the Department of Justice, particularly to the extent that the issues above present serious concerns under the Voting Rights Act. But even beyond a vigilant federal eye, there are steps that Congress can take to further ensure that voting rights for all are preserved and strengthened. Such steps involve meaningful solutions to real problems, where the benefits of legislative correction exceed any costs to the system.

The Deceptive Practices and Voter Intimidation Prevention Act, last introduced in the House of Representatives in 2009¹⁴³ and last introduced in the Senate in 2007,¹⁴⁴ represents one example; the bill would have prevented individuals from disseminating basic misinformation about, inter alia, the times, dates, and conditions of elections with the intent to disenfranchise. The Caging Prohibition Act, last introduced in the House of Representatives in 2011¹⁴⁵ and last introduced in the Senate in 2009,¹⁴⁶ is another example; the bill would prevent the misuse of unreliable information to prevent an individual from voting, based on that information alone. And I remain convinced that federal legislation could productively assist the task of transforming our paper-based, error-laden, and increasingly expensive voter registration system from the 19th-century system causing mischief in each election cycle, into the 21st-century system we deserve.

I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.

¹⁴³ H.R. 97, 111th Cong. (2009).

¹⁴⁴ S. 453, 110th Cong. (2007).

¹⁴⁵ H.R. 107, 112th Cong. (2011).

¹⁴⁶ S. 528, 111th Cong. (2009).