



TO: Senate Government Oversight and Reform Committee &
House State Government and Elections Committee

FROM: American Civil Liberties Union of Ohio

DATE: May 10, 2011

RE: SB 148 & HB 194 Opponent Testimony

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Senators and Representatives:

The American Civil Liberties Union of Ohio (“ACLU of Ohio”) is the Ohio Affiliate of the national ACLU, with hundreds of thousands of members nationwide and over 30,000 members and supporters across Ohio. The ACLU and ACLU of Ohio are non-profit, non-partisan membership organizations devoted to protecting basic civil rights and civil liberties for all Americans and all Ohioans. The ACLU of Ohio has been involved in various aspects of protecting voters’ rights, from educating the public about their right to vote to defending that right in court.

While there are some provisions of SB 148 and HB 194 that we support, the overall effect of both bills will be to restrict voting for thousands of Ohioans.

A. THREE CHANGES THAT ARE THE MOST HARMFUL TO OHIO VOTERS

1. Severe Cuts to Early and Absentee Voting

Under SB 148 and HB 194, early voting time will be cut in half or more and early voting locations restricted. These proposals to sharply curtail mail-in absentee and in-person early voting will place a heavy burden on voters’ access to cast a ballot at the time, location and manner that is most convenient. It will likely lead to a return of long lines on Election Day.

This legislation takes away local control from counties to design early voting programs that meet the demand of the communities they serve. Counties will be forbidden to set up off-site early voting locations, send absentee applications to all voters or pay postage. Proponents suggest there is an Equal Protection problem if some counties have free postage or absentee applications sent to all while other counties do not. The problem is that the ‘solution’ proposed in this legislation codifies a race to the bottom. Rather than raising all counties up to the same level, this drags everyone down.



Five years ago this legislature expanded early voting, which has been an overwhelming success. A pair of changes enacted in 2006 expanded early voting options – including no-fault absentee voting, in-person early voting, and allowing Boards of Elections (BOEs) to set up satellite early vote centers. *See* 2005 HB 234 (eff. 1-27-2006) and 2006 HB 3 (eff. 5-2-2006). These changes were made to address the long lines from 2004, voter demand for increased early voting options, and BOE demand for greater flexibility. If we truly want to improve access, we should build on this success rather than undermine it.

2. Prohibit Poll Workers from Helping Voters

Poll workers are there to help voters navigate the process for casting their ballot, ensure rules are followed and election day runs smoothly – yet this legislation compels the very opposite. Poll workers cannot do their job effectively if they are prohibited from answering questions or providing directions to voters. Poll workers should be required – as they are under current law – to direct voters to their proper precinct, provide instruction on how to fill out provisional and absent ballot envelopes, assist voters who may be unable to complete forms on their own, and answer voter questions. Why else would we expend scarce taxpayer dollars on training and paying poll workers? Ohio should not pass legislation that tells poll workers not to do their job.

While proponents assert that removing the prospect of poll worker error will reduce election day problems and lawsuits, the opposite is true. Poll workers will not be allowed to direct voters to the correct precinct or help them fill out forms correctly, both of which are required for a ballot to be counted. This will lead to more ballots that are not counted, and likely more lawsuits.

3. Use of Full 9-Digit Social Security Number

Under a provision included in SB 148, voters will be asked to provide their full Social Security Number instead of only the last four digits. There are serious legal and practical concerns with using full 9-digit Social Security Numbers for voting. Courts have invalidated other states' use of full Social Security Numbers for voting under the Privacy Act and Voting Rights Act. In addition, there are inherent privacy risks to collecting this data on numerous voting forms. Labeling it confidential is not sufficient to overcome these risks. Recent history is replete with examples of private data being compromised – lost or stolen laptops, missing discs, people snooping on computers when they should not. Ohioans should not have to risk identity theft in order to vote.

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B. ADDITIONAL HARM TO VOTERS

1. Shift Responsibility off of Election Officials and onto Voters

Many of the changes proposed in SB 148 and HB 194 shift responsibility for fair elections off of taxpayer-paid election officials, whose job it is to administer elections, and onto the voters, who have a constitutional right to vote.

a. Presumption of Voter Error

HB 194 seeks to create a new section of the Revised Code: RC 3501.40. This section creates a presumption in any legal proceeding or administrative review that any error is the voter's fault and not the election officials' fault.

The effects of this shift could be far reaching, indeed. It carries the potential to apply to all election officials – i.e., Secretary of State (SOS), SOS staff, BOE board members, BOE directors and staff, election judges and poll workers. And it could be applied to all matters of election administration under Title XXXV of the Revised Code – e.g., processing voter registrations, purging voter rolls, approving petitions, issuing absentee ballots, issuing and counting provisional ballots, etc.

This provision essentially makes voters guilty until proven innocent, by assuming that all errors are voters' errors.

b. Disregard Voter Intent

SB 148 and HB 194 instruct election officials to disregard voter intent if a ballot is marked twice, also known as the "double bubble" issue.

The "double bubble" issue comes up if a voter marks more than one choice, or too many choices, for one race. The most common example is where a voter fills in the bubble for their candidate and then also writes in their name, but it also could include stray marks or smudges on paper ballots that the scanner recognizes as overvotes. Under current law, the BOE evaluates these technical overvotes and will count the vote if the voter's intent is clear. Under both bills, all overvoted races will not be counted, even if voter intent is clear.

This is a step backwards. If voter intent is clear, the vote should be counted.

2. Statewide Voter Registration Database

Both SB 148 and HB 194 propose several changes to the Statewide Voter Registration Database (SWVRD). While maintaining accurate voter rolls is

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important, it is essential that protections are in place to ensure that eligible voters are not accidentally purged and that voters' private information is secured.

a. Data Sharing Jeopardizes Voter Privacy

Both pieces of legislation seek to expand data sharing. Currently, the state is required under the federal Help America Vote Act (HAVA) to compare the SWVRD against Bureau of Motor Vehicles (BMV) and Social Security Administration (SSA) databases.

This legislation proposes expanding data sharing to include inter-agency data sharing, for example with the Department of Job and Family Services (DJFS), and perhaps even inter-state data sharing, with any number of unspecified data bases in other states.

Inter-agency and Inter-state data sharing, expressly including confidential info, raises serious privacy concerns. It increases the likelihood of private data being lost or misplaced, hacked, improperly used, or inadvertently released. It likely oversteps the legal authority under which the government collects and uses the info in the first place, and, in doing so, violates the privacy of the constituent. For example, under HB 194, RC 3503.15(A)(2) provides that the SOS would have access to agency data from the department of job and family services, including otherwise confidential info. That means that the SOS would have access to info on whether an individual registered voter owed child support or was receiving unemployment. How is that information in any way relevant to being a qualified voter?

Ohio can avoid these privacy and data security problems by limiting data sharing to the two data bases required under HAVA, namely, the BMV and SSA.

b. Mismatches Between Voter Records and other Databases Cannot be a Basis to Automatically Disqualify or Challenge

Both bills require the Secretary of State to adopt rules for addressing mismatches between the SWVRD and BMV (and presumably other database) records (RC 3503.15(D)). It also requires that the SWVRD, presumably including mismatch info, be continuously made available to BOEs (RC 3503.15(A)(1)).

The language of these two provisions is insufficient to protect voters. The code should provide parameters for rulemaking to ensure that mismatches will not be automatically purged or marked for challenge. There are many reasons that a mismatch could occur without implicating the eligibility of a voter – such as data entry errors, use of an abbreviated name or nickname, or out of date records. All

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databases have an error rate; for example, the Social Security Administration database has a 4% error rate. Federal law prohibits purging a voter from the voter rolls due to typographical or other technical errors that are beyond their control.

The code should explicitly state that under no circumstances should a mismatch alone form the basis for purging a voter from the SWVRD or for marking a voter's registration record that could subject them to challenge at the next election. The statute should provide some boundaries to guide the SOS's rulemaking to ensure that the SOS and/or BOEs must take steps to resolve mismatches without disenfranchising the voter.

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3. Changes to Provisional Balloting Rules Will Increase the Number of Provisional Ballots that are Invalid

Streamlining Ohio's provisional voting rules to eliminate confusion and provide greater clarity is a laudable goal. However, increased clarity should not come at the expense of eligible voters being disenfranchised – either by not being allowed to cast a ballot or not having that ballot counted.

a. Right Polling Place, Wrong Precinct

This provision of the legislation will both increase the number of voters who are forced to cast a provisional ballot and reduce the number of provisional ballots that are counted.

Prohibiting poll workers from directing voters to correct precinct will increase the number of provisional ballots cast, because voters will not know that they are voting in the wrong precinct. And then if they do vote provisionally in the wrong precinct, this legislation says those provisional ballots will not be counted.

If we truly want to reduce the number of provisional ballots cast and maximize the number of ballots counted, then poll workers should be required to direct voters to the correct precinct. If voters are in the correct precinct, then fewer will have to vote provisionally. Also, to ensure all eligible votes are counted, the Revised Code should adopt the U.S. Sixth Circuit Court of Appeals ruling in *Hunter* that top-of-ticket races should be counted if a voter was sent to the wrong precinct.



b. Elimination of 10-Day Validation Period

The ten-day validation period provides opportunity for the voter to provide missing information or address problems that could not be resolved on Election Day. Although rarely used, it provides a useful safety net for voters and BOEs.

c. New Restrictions on Voter Affirmation

The proposed changes to voter affirmations raise a couple of concerns. The legislation specifies that provisional voters who refuse to execute an affirmation will not have their ballot counted, and yet it also says that poll workers cannot help the voter fill out the affirmation.

This is counter-intuitive. If poll workers are not allowed to help voters fill out the affirmation, then there is an increased likelihood that affirmations will not be filled out properly. This could be especially problematic for voters with disabilities, who need assistance filling out such forms, and federal law requires that disabled voters receive the needed assistance.

Furthermore, the legislation adds that even if election officials are able to determine that the provisional voter was eligible to cast a ballot, the provisional ballot will not be counted without a properly filled out affirmation. Refusing to count a ballot of an eligible voter raises serious constitutional questions.

C. CONCEPTS WE SUPPORT THAT IMPROVE OHIO ELECTIONS SYSTEM

Several proposals made in SB 148 and HB 194 seek to modernize Ohio's election system. To the extent that these proposals will be enacted and implemented in keeping with constitutional principles, and that they expand access to eligible Ohio voters, they are good steps forward.

- **Online Voter Registration & Updates** – Providing an online system for Ohioans to register to vote or update their name and address on their registration improves access for voters and should be enacted. We are concerned that the online registration provision in HB 194 is too restrictive, because it is limited to change of name and requires that all information matches BMV records. To make online registration as accessible as possible, it should allow new registrations as well as name and address changes.
- **Electronic Poll Books** – The proposal to move to electronic poll books is a much needed update to Ohio elections. Electronic poll books will ensure that poll workers have the most current information on Election Day. However, even good technology can have its drawbacks. Therefore, we urge the

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legislature and Secretary of State to ensure that adequate data privacy and security checks be in place.

- **Changes to Bring the Ohio Revised Code in Line with Federal Law, to Comply with Court Decisions, and Elimination of Out-of-Date References**
– Title XXXV of the Revised Code is full of out-of-date references to technology such as punch-cards that are no longer used, to sections of the Code that have been declared unconstitutional by the courts, and various internal inconsistencies. Eliminating out-of-date and invalid sections of the Code will eliminate confusion and improve election administration.

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In conclusion, while there are some reforms proposed in SB 148 and HB 194 that are valuable, we are concerned that the overall effect of the proposed legislation will be to restrict the right to vote of countless eligible voters. We urge this legislature not to rush to pass imperfect legislation for the sake of action alone. Rather, we urge this legislature to take the time and craft reforms that will both improve the integrity of the system and improve access for voters. Therefore, we urge you not to pass SB 148 and HB 194 in their current forms.