



TO: The Honorable Dick Durbin, Chairman
The Honorable Lindsey Graham, Ranking Member
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

FROM: Christine Link, Executive Director
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RE: ACLU Statement on Ohio Voting Legislation for Senate Field
Hearing: "New State Voting Laws III: Protecting the Right to
Vote in America's Heartland"

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I. Introduction

The American Civil Liberties Union (ACLU), an organization of over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, commends the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights for focusing public attention on Ohio — one of the states that have recently enacted laws severely restricting the fundamental right to vote for millions of Americans.

The American Civil Liberties Union of Ohio ("ACLU of Ohio") is the Ohio Affiliate of the national ACLU, with 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. Over the last decade, the ACLU of Ohio has litigated several issues, including:

- Challenged the use of punch card ballots after documenting that voters who used this system — predominantly African American and urban voters — were more likely to be disfranchised than those who used optical scan or electronic voting systems;¹
- Successfully challenged a provision of state law that would allow poll workers to demand the citizenship papers of naturalized citizens when they cast their vote;² and,

¹ *Stewart v. Blackwell*, No. 05-3044 (6th Circuit filed April 21, 2006)

² *Boustani v. Blackwell*, No. 1:06CV2065 (Federal District Court for Northern Ohio, Judge Christopher A. Boyko, filed August 29, 2006)

- Filed a lawsuit against the use of central count optical scan ballots in Cuyahoga County because voters who used this technology were unable to check for accuracy and correct potential mistakes on their ballots leading to more ballots in low-income and African American precincts discarded because of these errors.³

II. Voting changes enacted in Ohio House Bill 194 in 2011

The Ohio General Assembly passed HB 194 on June 29, 2011, and the bill was to go into effect for the November 2011 general election. The ACLU of Ohio opposed a variety of provisions in HB 194, all of which threatened to disfranchise more Ohioans. Among the most troubling of HB 194's provisions include severe cuts to early voting, changes in how poll workers may assist voters, and new rules for casting provisional ballots that would not favor voters. These changes would most affect voters who are financially disadvantaged, African American, elderly, students, and disabled.

A. CHANGES THAT ARE THE MOST HARMFUL TO OHIO VOTERS

1. Severe Cuts to Early and Absentee Voting

In 2006, the Ohio General Assembly 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.⁴ These changes were made to address the long lines voters encountered at polling places in the 2004 presidential election. For instance, students at Kenyon College, in Knox County, Ohio waited as long as 10 hours to cast their vote.⁵ Once early voting was made widely available, many more Ohioans cast their votes by mail or early in-person. For example, in 2004, early voting only accounted for 10.6% of votes cast, but they accounted for 29.7% in 2008.⁶ This led to a reduction of voters casting ballots on Election Day, creating shorter lines and allowing county BOEs to consolidate polling locations and save resources.⁷

Under HB 194, early voting time was drastically reduced. Mail-in absentee voting was slashed from 35 days before the election to only 21 days. In-person early voting was limited from 35 days to only 16 days before Election Day. BOEs were also prohibited from conducting early in-person voting the weekend before Election Day. Voting on the weekend before the election was particularly popular in urban counties, and many African American churches created “Souls to

³ *ACLU of Ohio Foundation v. Brunner*, No. 1:08-cv-00145 (Federal District Court for Northern Ohio, Judge Kathleen O'Malley, filed February 8, 2008)

⁴ See 2005 HB 234 (eff. 1-27-2006) and 2006 HB 3 (eff. 5-2-2006).

⁵ Adam Cohen, *No One Should Have to Stand in Line for 10 Hours to Vote*, NEW YORK TIMES, August 25, 2008, available at <http://www.nytimes.com/2008/08/26/opinion/26tue4.html>

⁶ *A Study of Early Voting in Ohio Elections*, Ray C. Bliss Institute of Applied Politics, University of Akron, 2010, available at <http://www.uakron.edu/bliss/research/archives/2010/EarlyVotingReport.pdf> [hereinafter Bliss].

⁷ *Franklin Co. Board of Elections Consolidates Voting Precincts*, WCMH, June 24, 2011, available at http://www.wcmhblogs.com/ohiovotes/comments/franklin_co._board_of_elections_consolidates_voting_precincts/.

the Polls” programs that brought entire congregations to BOEs to vote early.⁸ In 2008, voters in Stark and Summit counties waited in lines that snaked around their early voting locations to cast their early ballots.⁹

In addition, Ohio law previously allowed local BOEs to establish satellite locations for voters to cast in-person early ballots, but HB 194 mandated that voters could only cast these ballots at the BOE office. For voters in rural areas or those without transportation, this restriction makes it more difficult for them to cast an in-person early ballot.

Finally, HB 194 also prohibited BOEs from mailing absentee ballot applications to all registered voters. Since 2008, a handful of Ohio counties mailed these applications to all voters in order to encourage additional absentee voting. Proponents of the restriction suggested there is an equal protection problem if some counties send absentee applications to all voters, while other counties do not. However, this logic turns the Equal Protection Clause of the Fourteenth Amendment on its head and codifies a race to the bottom. Rather than raising all counties up to the same level and affording all citizens better access to early voting, this drags everyone down.

Data provides a glimpse into what groups of Ohioans are most likely to utilize early voting. Women were overwhelmingly more likely to vote early, by margins of 62.1% to 48.8%.¹⁰ Similarly, voters who are aged 65 or older were more likely to vote early than other age group.¹¹ In terms of income, voters who earned less than \$35,000 per year were more likely to vote early, while voters who made between \$35,000-\$99,000 were more likely to vote on Election Day. Wealthy voters who earned over \$100,000 were equally likely to vote early or on Election Day.¹² Finally, there was also a difference in terms of education level. Poorly educated voters are less likely to vote overall, but those who have some education beyond high school, but not a college degree were more likely to vote early, while college educated people tended to vote on Election Day.¹³

These restrictions on mail-in absentee and in-person early voting sharply curtail voters’ ability to access the ballot at the time, location and manner that is most convenient to them. The net result would likely be a return of long lines on Election Day. As was evidenced in Ohio in 2004, these long lines tend to occur in a few places:

- Communities with colleges, such as Kenyon College in Knox County that experienced lines lasting over 10 hours;
- High population counties, such as Columbus in Franklin County, where an estimated 15,000 voters left polling places without casting their ballots;¹⁴ and,

⁸ *Take Your Souls to the Polls*, AMERICAN CIVIL LIBERTIES UNION, available at <http://www.aclu.org/voting-rights/take-your-souls-polls-voting-early-ohio>.

⁹ *Thousands Voting Early to Avoid Long Lines*, AKRON BEACON JOURNAL, Stephanie Warsmith and Katie Byard, November 2, 2008, available at <http://www.ohio.com/news/thousands-voting-early-to-avoid-lines-1.109468>.

¹⁰ Bliss, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Long Lines at the Polls Violate Equal Protection and Require Judicial and Legislative Action*, UNIVERSITY OF ST. THOMAS LAW JOURNAL, Boe M. Piras, Volume 6, Issue 3: 2009.

- Communities with people of color — in Ohio in 2004, white Ohio suburbanites waited an average of 22 minutes to vote, while urban African Americans waited on average 3 hours and 15 minutes.¹⁵

Long lines will mean more minority, financially disadvantaged, young, and elderly voters who will be kept from the ballot as our polling places grind to a halt.

2. Allows Poll Workers Discretion to Choose Which Voters to Direct to the Correct Precinct

Poll workers are there to help voters navigate the process for casting their ballot, and to ensure rules are followed and Election Day runs smoothly — yet HB 194 compels the very opposite. HB 194 removed the requirement that poll workers direct voters to their proper precinct, leaving it to their discretion. This would likely exacerbate Ohio’s already troubling use of provisional ballots.

In 2002, Congress enacted the Help America Vote Act (HAVA), which required the states to implement a system of provisional voting. A voter not listed on the precinct rolls can nevertheless cast a ballot that will ultimately be counted if his or her eligibility was later confirmed.¹⁶ The law requires a voter to sign an affirmation that he or she is registered to vote in “the jurisdiction in which the individual desires to vote” and is “eligible to vote in that election.”¹⁷ A provisional ballot may be rejected for a variety of specific reasons, most obviously if election officials confirm the voter is not registered in the state at all. Provisional ballots may also be rejected if they are cast in a precinct other than the one in which the voter is registered.

Ohio has been plagued with some of the nation’s highest wrong-precinct rejection rates. According to the Advancement Project, in the 2006 general election, 46 percent of the provisional ballots cast in Ohio (approximately 10,610) were rejected for being cast in the wrong precinct.¹⁸ In 2008, 14,335 provisional ballots were discarded in full because they had been cast in the wrong precinct. About half of these rejections — 7,522 provisional ballots — occurred in just four of Ohio’s largest counties: Cuyahoga (3,423), Franklin (1,139), Hamilton (1,767), and Lucas (1,193).¹⁹ Similarly, in 2010, 45% of provisional ballots were rejected because they were cast in the wrong precinct.²⁰

Some polling places contain just one precinct, but others contain multiple, which substantially increases the potential for voter confusion. HB 194 would remove the mandate to direct voters

¹⁵ *Id.*

¹⁶ 42 U.S.C. § 15482.

¹⁷ *Id.* § 15482(a)(1)-(2).

¹⁸ The Advancement Project, PROVISIONAL VOTING: FAIL-SAFE VOTING OR TRAPDOOR TO DISENFRANCHISEMENT? (Sept. 2008), at 12, http://www.advancementproject.org/sites/default/files/Provisional-Ballot-Report-Final-9-16-08_1.pdf.

¹⁹ OHIO SUMMIT REPORT, at 45 (citing Ohio Sec’y of State, Election Results, General Election 2008, Provisional Ballot Statistics, <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>).

²⁰ See Ohio Sec’y of State Website, Provisional Ballots Statistics for November 2, 2010 General Election, available at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results.aspx>.

to the correct precinct, but it does not *forbid* assistance in this context—it just makes it voluntary. This means that a poll worker could lawfully assist some voters, but decline to assist others. This raises the strong possibility that some voters in some counties or polling locations will have assistance casting their ballots, while others will have less assistance or none. Voters who receive no assistance would appear to be more prone to cast their ballots in the wrong precinct and see them rejected. The Constitution forbids such unequal and arbitrary treatment.

While proponents assert that removing the prospect of poll worker error will reduce Election Day problems and lawsuits, the opposite is true. With a greater number of Ohioans facing possible disfranchisement, this will lead to more ballots that are not counted, and likely more lawsuits.

B. ADDITIONAL HARM TO VOTERS

1. Shift Responsibility from Election Officials to Voters

Many of the changes in HB 194 shift responsibility for fair elections off of election officials, whose job it is to administer elections, and onto the voters, who have a fundamental right to vote.

a. Presumption of Voter Error

HB 194 forms a new section of the Ohio 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. It carries the potential to apply to all election officials — i.e., the Secretary of State (SOS), SOS staff, BOE 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 Ohio 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 voter errors.

b. Disregard Voter Intent

HB 194 instructs 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. Prior to the passage of HB 194, Ohio law required the BOE evaluate these technical overvotes and count the vote if the voter's intent was clear. Under HB 194, all overvoted races will not be counted, even if voter intent is clear.

2. Statewide Voter Registration Database

HB 194 made several changes to the Statewide Voter Registration Database (SWVRD). While maintaining accurate voter rolls is 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

Currently, the state is required under HAVA to compare the SWVRD against the Bureau of Motor Vehicles (BMV) and Social Security Administration (SSA) databases.

HB 194 expands data sharing to include inter-agency data sharing, for example with the Ohio Department of Job and Family Services (DJFS), and perhaps even inter-state data sharing, with any number of unspecified databases in other states.

While including other agencies in activities such as voter registration and education may be positive, allowing information to be shared between agencies, raises serious privacy concerns. Without strong privacy protections in place, it may increase the likelihood of private data being lost or misplaced, hacked, improperly used, or inadvertently released. It may also allow election officials access to information that has no relevancy to the voter's registration. For example, under HB 194, RC 3503.15(A)(2) provides that the SOS would have access to agency data from the DJFS, including otherwise confidential information. That means that the SOS would have access to information on whether an individual registered voter owed child support or was receiving unemployment—information that is not relevant to a voter's eligibility. Ohio can avoid these privacy and data security problems by limiting data sharing to the two databases 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

HB 194 requires the Secretary of State to adopt rules for addressing mismatches between the SWVRD and BMV records — and possibly other databases. It also requires that the SWVRD, presumably including mismatch info, be continuously made available to BOEs.

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 databases have an error rate; for example, the Social Security Administration database has a 4% error rate.²¹ Federal law prohibits purging a voter from the voter rolls due to typographical or other technical errors that are beyond their control.

²¹ Office of Inspector Gen., Soc. Sec. Admin, Congressional Response Report: Accuracy of the Social Security Administration's Numident File, A-08-06-26100, Appendix D (Dec. 18, 2006) ["Inspector General Report on SSA Database"], available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-08-06-26100.pdf>.

However, the language of HB 194 leaves the door open for many Ohio voters to be erroneously purged from the voter rolls or challenged at their polling location at the next election.

3. Additional 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 disfranchised — either by not being allowed to cast a ballot or not having that ballot counted.

a. Elimination of 10-Day Validation Period

Prior to HB 194's passage, Ohioans who cast a provisional ballot had 10 days to provide missing information or cure address problems that could not be resolved on Election Day. Although rarely used, it provides a useful safety net for voters and BOEs.

b. New Restrictions on Voter Affirmation

HB 194 specified 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 counterintuitive. 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.²²

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 completed affirmation. Refusing to count a ballot of an eligible voter raises serious constitutional questions.

III. Referendum on Ohio House Bill 194

Civil and voting rights advocates across Ohio expressed deep concern over the passage of HB 194. Almost immediately, a grassroots campaign to hold a referendum on the law began and was supported by the ACLU of Ohio, League of Women Voters Ohio, and National Association for the Advancement of Colored People Ohio. Petition gatherers were coordinated by a coalition called Fair Elections Ohio. According to the state constitution, petition gatherers must collect valid signatures from 6% of registered Ohio voters who cast a ballot in the most recent gubernatorial election, and these signatures must represent at least 3% of voters in the most recent gubernatorial election in 44 of the state's 88 counties.²³

²² 42 USC § 15301, et seq.

²³ Ohio Constitution, Article 2, Sections 1a-g.

By November 2011, Fair Elections Ohio delivered over half a million signatures to the Secretary of State — well over the required 231,147 for the referendum. As a result, HB 194 did not go into effect for the November 2011 election or the March 2012 primary election. The Ohio Constitution requires that referendums be voted on during general elections, meaning the issue will be put to voters in November 2012.

A. PASSAGE OF OHIO HOUSE BILL 224 AND CUTS TO EARLY VOTING

In the weeks following HB 194's passage, voting rights advocates aggressively circulated petitions to put the legislation under referendum. Sensing that HB 194 would be placed under referendum, and all of its provisions neutralized, legislators in the Ohio General Assembly amended another proposed bill, HB 224. HB 224 originally only addressed absentee voting rules for overseas and military voters, but was amended to reinforce the elimination of early in-person voting on the weekend before the election that was passed in HB 194.

IV. Repeal of HB 194

On January 26, 2012, Secretary of State Jon Husted publicly called on the Ohio General Assembly to repeal HB 194 and avoid a voter referendum. In March 2012, state Senator Bill Coley (R-Middletown) proposed Ohio Senate Bill 295 to repeal HB 194. However, the move caused controversy because it included an additional provision that would again reinforce the ban on early voting the weekend before the election. After HB 194 was placed under referendum, officials were unsure if early in-person voting was still prohibited because of the passage of HB 224. The repeal legislation would clarify the discrepancy — but not in favor of voters, effectively ending successful early voting programs during the weekend before the election like “Souls to the Polls.”

SB 295 was passed by the Ohio Senate, and was headed for passage in the Ohio House on April 25, 2012. However, Fair Elections Ohio approached legislators at the eleventh hour offering a deal to withdraw the referendum from the ballot if the legislators set all voting laws back to pre-HB 194 — including full restoration of early voting. Officials are currently negotiating the deal, and it remains unknown if there will be a compromise or not.

V. Additional Election Law Changes Prior to November 2012

State Senator Bill Coley, who sponsored the repeal legislation, and other state legislative leaders have suggested that they prefer to address the restoration of early voting the weekend before Election Day through additional legislation that would make other changes to election laws before November 2012.

The ACLU strongly opposes the passage of any additional voting laws, other than to reset all election laws to the pre-HB 194 status. With Ohio law in constant flux over the past year and a half, voters would be ill-served by additional changes so soon before the next election. It is not difficult to imagine that the average Ohioan would be confused about their voting rights. In addition, it would be challenging to train poll workers and other election officials on these changes, leaving the proper administration of the election in question. Confusion for both voter

and poll worker is a recipe for disfranchisement and other constitutional problems. Given the highly charged and partisan atmosphere that often infects debates over election legislation, additional changes to election laws should not occur until after the November 2012 election.

VI. Recommendations

In addition, to the changes we recommend above at the state level, Congress should take the following actions:

- Require more uniformity in federal voting policies and procedures to reduce confusion regarding practices that are determinative of whether individuals are allowed to vote, and whether their votes are counted. We applaud Congress' efforts in the Help America Vote Act to create uniform standards, but more is required. For example, in federal elections, legislation should address such practices as the length and timing of early voting periods (for those states that provide early voting), circumstances under which provisional ballots may be required, and procedures for determining when to count provisional ballots.
- Congress should encourage the Department of Justice to consider litigation under Section 2 of the Voting Rights Act against the State of Ohio if provisions of HB 194 are enacted that will disadvantage racial and language minorities, and against any other states that adopt voting provisions that have similar effect.
- Congress must continue to provide the Department of Justice and other federal entities with the resources and support they need in order to enforce the laws that guarantee Americans broad and nondiscriminatory access to the ballot and ensure that a citizen's vote will be counted.

Conclusion

The right to vote is fundamental to our democracy. Unfortunately, Ohio is a prime example of the havoc that is wreaked when access to the ballot box is left up to the partisan whims of legislators. Election laws should always seek to facilitate voting and not make it more difficult to cast a ballot. Not only is disfranchisement an affront to our core liberties, the denial of the vote has a ripple effect on so many more issues critical to all Americans. We commend the Subcommittee for examining Ohio's recent voter suppression legislation and hope it may be instructive in ways to protect the rights of all voters.