

## GOVERNMENT-ISSUED PHOTO IDENTIFICATION AND PROOF OF CITIZENSHIP REQUIREMENTS FOR VOTERS

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### *I. Introduction*

For the past six years, legislators, election administrators, advocates, and academics have struggled with what type of identification voters should show before they vote or before they register. Most of the discussion has centered on the wisdom of requiring voters to show government-issued photo identification before they vote and requiring voters to show proof of citizenship before they register. The antecedents of the debate are in the chaos surrounding the 2000 election. By the 2004 presidential election, many states had some voter identification requirements and the Congress passed the first national voter identification provision through the Help America Vote Act.<sup>1</sup> State requirements were relatively inclusive by either allowing voters to show an expansive array of photo or nonphoto identification or allowing voters without identification to sign an affidavit attesting to their identity.<sup>2</sup> HAVA requires identification for first-time voter registrants who registered by mail. There were no states that required voter registrants or voters to provide documents providing their citizenship.<sup>3</sup>

Since the 2004 election the drum has continued to beat to convince Congress and the states to enact laws requiring government-issued photo identification and documentary proof of citizenship for voter registration.<sup>4</sup> Proponents of restrictive identification provisions say they are necessary to prevent voter fraud and provide voters with confidence that they are voting in fraud-free elections.<sup>5</sup> Conversely,

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there is significant opposition to these laws because of the dearth of evidence of the existence of voter impersonation and noncitizen voting, the type of fraud prevented by these laws.<sup>6</sup> Additionally, these laws will result in the disenfranchisement of some eligible voters.<sup>7</sup> Opponents argue that these laws are pursued because of the potential political impact that they have.<sup>8</sup> This suspicion is compounded by where politicians come down on this issue; in nearly every case, Republicans have sponsored these provisions while Democrats have opposed.<sup>9</sup> Photo identification requirements have been enacted in Georgia, Indiana, Missouri, and Albuquerque, New Mexico, and documentary proof of citizenship requirements now exist in Arizona; Congress and several states have considered similar measures and declined to adopt them. Each photo identification requirement or proof of citizenship law has been challenged in court, primarily on grounds that these laws constitute a poll tax, that they violate the fundamental right to vote under the Equal Protection Clause of the 14th Amendment, and that they violate state constitutional provisions.<sup>10</sup> In September 2007, the Supreme Court granted a writ of certiorari in the challenge to the Indiana law. The Court's expected decision in spring 2008 will certainly influence what happens going forward.

This article will recount the state of the law regarding voter identification as of 2004, discuss the arguments that proponents and opponents of the government-issued photo identification and proof of citizenship laws have made, survey the studies and data on the subject, recap the federal legislative developments, and analyze the legal challenges to the government-issued photo identification and proof of citizenship laws that have been passed.

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## *II. State of the Law as of 2004*

Prior to the 2004 election, many states had adopted some form of required identification for voters, but no state required photo identification without providing a voter without the requisite identification a regular ballot after signing an affidavit attesting to his or her identity.<sup>11</sup> With a few exceptions, these laws were not challenged in court.<sup>12</sup> In addition, no state required voter registrants to provide proof of citizenship. The Department of Justice's administration of Section 5 of the Voting Rights Act, the identification requirements for mail-in registrants under the Help America Vote Act, and existing federal and state criminal provisions for voter fraud provided the framework for identification requirements.

### **A. DEPARTMENT OF JUSTICE ENFORCEMENT OF SECTION 5 OF THE VOTING RIGHTS ACT**

Under Section 5 of the Voting Rights Act,<sup>13</sup> jurisdictions with a history of voting discrimination<sup>14</sup> must demonstrate to the Department of Justice or the District Court of the District of Columbia that any change they intend to make related to voting does not

have the purpose or effect of discriminating against minority voters.<sup>15</sup> If the jurisdiction cannot meet the legal standard, it cannot implement the proposed voting change.<sup>16</sup>

In 1994, Louisiana passed implementing legislation for the National Voter Registration Act of 1993 that included a provision that “first-time voters who register by mail in order to identify themselves at the polls present a current driver’s license or other picture identification card.”<sup>17</sup> Louisiana submitted this “proposed” law to the Department of Justice for preclearance. Under the proposed law, voters subject to this law who did not show photo identification would not have their vote counted. The existing law required identification but not photo identification.<sup>18</sup> The Department of Justice blocked implementation of the photo identification law. According to DOJ’s analysis, because African Americans were four to five times as likely as whites not to have photo identification, the law would have a discriminatory effect on minority voters.<sup>19</sup>

## B. THE HELP AMERICA VOTE ACT

As the country recovered from the 2000 election debacle that threw the presidential outcome into the hands of the Supreme Court, Congress deliberated its response. The result was the 2002 passage of the Help America Vote Act, the most sweeping federal legislative foray into the mechanics of elections in history.<sup>20</sup>

The law touches nearly every aspect of election administration, including establishing, for the first time, a federal identification requirement. The result of a compromise, Section 303(b) of HAVA requires first-time voters who register by mail to provide identification before they cast a ballot.

The identification requirement is actually exceedingly narrow; it only applies to *first-time* voters who *register by mail*. Moreover, if the personal identifying information submitted on a mail in registration form is later verified against a state database, that voter need not show identification at the polls.<sup>21</sup>

Conversely, the list of acceptable identification is very broad. According to HAVA, a voter can produce current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. A first-time voter who registers by mail and votes absentee may provide a copy of any of the aforementioned forms of identification.<sup>22</sup> HAVA, however, creates a floor, not a ceiling, allowing states to impose stricter identification requirements.<sup>23</sup>

## C. CRIMINAL VOTING FRAUD STATUTES

Before the recent wave of activity to impose voter identification and proof of citizenship requirements on the electoral process, the problems of voter fraud were addressed, at least at a federal level, by federal proscriptions on voter fraud. There are a number of federal statutes that address various kinds of election-related fraud, many of which are felonies carrying multiple-year penalties.<sup>24</sup>

Broadly, 18 U.S.C. § 241,<sup>25</sup> which makes conspiracies to intimidate or threaten another person in the exercise of a constitutional right or a federally guaranteed right illegal and punishes them with up to ten years' imprisonment, has been used to combat a broad range of election misconduct.<sup>26</sup>

Specifically, the Voting Rights Act has been amended to prevent certain types of election misconduct.<sup>27</sup> Although it primarily covers federal elections,<sup>28</sup> the prohibitions in the Voting Rights Act cover many of the actions that form the rhetorical basis of the fight over voter identification. In addition to preventing one from providing false information about key registration information, it also criminalizes vote-buying schemes and conspiracies to vote illegally.<sup>29</sup> These prohibitions carry with them punishments of up to five years' imprisonment. Another section of the Voting Rights Act makes it illegal to vote more than once.<sup>30</sup> Courts have found that this provision includes punishing voting in the name of deceased, ineligible, or absentee voters and also carries with it a penalty of up to five years in prison.<sup>31</sup>

In addition, states typically have a set of statutes criminalizing various forms of voter fraud. For example, in Georgia any person who commits the following offenses can be charged with a felony and punished by prison terms (ranging from one- to ten-year maximums) and fines (ranging from \$10,000 to \$100,000 maximums): (1) registers as an elector while knowing that he or she is not eligible to vote, registers under a name different than his or her own, or knowingly gives false information when registering as an elector;<sup>32</sup> (2) willfully inserts a fictitious name, false figure, false statement, or other fraudulent entry on a voter registration card, electors list, voter's certificate, affidavit, oath, or other election document;<sup>33</sup> (3) willfully prepares or presents "to any poll officer a fraudulent voter's certificate not signed by the elector whose certificate it purports to be";<sup>34</sup> (4) votes when knowing that he or she is not a qualified elector;<sup>35</sup> or votes more than once in the same election.<sup>36</sup>

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### *III. Arguments Made by Proponents and Opponents on the Need for More Restrictive Identification and Proof of Citizenship Requirements*

Since 2004, state legislatures across the country have debated, and sometimes passed, identification and proof of citizenship requirements that are more restrictive than the pre-2004 laws. Congress has also grappled with these issues as well.<sup>37</sup> The most restrictive provisions require voters to show only current and valid government-issued photo identification that has certain required information such as a date of birth and an expiration date, and imposes the further requirement that voters prove their citizenship status before their registrations can be accepted.

While the details of the various provisions contemplated by the Congress and state legislatures vary, the arguments for and against the provisions remains consistent. The discussion over whether to impose government-issued photo identification

requirements for voting or proof of citizenship requirements for voter registration boils down to a debate of whether these requirements protect or undercut the integrity of the elections. Proponents believe that the requirements protect the integrity of elections by reducing voter fraud whereas opponents believe that these provisions undercut the integrity of elections because they needlessly take elderly, poor, and minority voters out of the electoral process.

### A. ARGUMENTS MADE BY PROPONENTS

Proponents of imposing government-issued voter identification and proof of citizenship requirements argue that they are needed to inspire confidence in the electoral process. As the National Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker opined in its recommendation that states impose restrictive identification and proof of citizenship requirements: “There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election.”<sup>38</sup>

Proponents argue that elections without strict identification requirements are left open to widespread voter fraud.<sup>39</sup> Specifically, since the national political discussion has increasingly focused on immigration, advocates for proof of citizenship for registration and voter identification at the polls have attempted to link the issues by suggesting that the current dominant system of voter identification (the signature match) is insufficient in keeping noncitizens, and more particularly undocumented immigrants, away from the polls.<sup>40</sup> While the dominant arguments for voter identification and proof of citizenship are, for the most part, framed generally (i.e., preventing fraud or preventing voter fraud) occasionally proponents argue more specifically, and accurately, that voter identification will prevent ineligible voters at the polls from impersonating valid registrants.

Moreover, proponents suggest that the disenfranchising impact of requiring identification to vote cannot possibly be significant because of the ubiquity of identification in other parts of American life. Renting a movie, buying tobacco and alcohol, and boarding a plane, among other daily activities, require identification. Proponents argue our electoral system should have similar safeguards.

While proponents largely have focused on this general, “common sense” argument, there are a few specific examples they have raised,<sup>41</sup> including the following:

**1. Sanchez–Dornan.** In 1996 Loretta Sanchez challenged Rep. Bob Dornan, the incumbent in California’s 49th congressional district. As polls closed, the race remained tight as it had throughout the day. When the ballots were counted, Sanchez came out on top by fewer than 1,000 votes. Later, accusations began flowing that Hermandad Mexicana Nacional, a liberal nonprofit, had registered a significant number of noncitizens who voted in the election. Rep. Dornan immediately challenged the outcome as the result of ineligible noncitizens going to the polls and voting.<sup>42</sup>

Rep. Sanchez was seated, but the House Oversight Committee investigated to determine if her victory resulted from illegal voting. The committee ended up with a majority report, which found that nearly 700 noncitizens had cast a ballot in the election.<sup>43</sup> A minority report further investigated that number and found that most of those alleged to have voted illegally had no intention to defraud the system, but instead were on a path to citizenship and believed that they were eligible voters.<sup>44</sup> After 13 months, the full House of Representatives voted to drop the challenge because Sanchez's margin of victory was greater than the majority report's finding of illegal voting.<sup>45</sup>

**2. *Ritzzy the Dog, Superman, and Inflated Voter Registration Rolls.*** In his persistent advocacy for stricter identification requirements, Sen. Christopher “Kit” Bond (R-MO) frequently trots out (sometimes literally) the case of Ritzzy Mekler. It appears that in 2000 Ritzzy was on the St. Louis voter rolls. Ritzzy is a springer spaniel. According to Bond, Ritzzy and her four-legged counterparts make frequent appearances on the nation's voter rolls together with Superman, Mickey Mouse, and more than a fair share of Michael Jordans.<sup>46</sup> According to Sen. Bond, the 2000 St. Louis voting rolls had 247,135 voters registered out of a population of 258,532 eligible voters (more than 95 percent).<sup>47</sup> Proponents of imposing strict voter identification provisions point to the Ritzzy example and similar stories across the country as a basis for imposing strict identification requirements on voters.<sup>48</sup>

## B. ARGUMENTS MADE BY OPPONENTS

Opponents contend that there is virtually no evidence that the voter fraud prevented by identification and proof of citizenship requirements exist, whereas there is evidence that imposing restrictive voter identification requirements will disenfranchise eligible voters, disproportionately from traditionally disenfranchised groups (such as poor, minority, young, and elderly voters).<sup>49</sup> Practically, vote fraud that is effective in influencing the outcome of elections requires the ability to manipulate a significant number of ballots, which is why successful schemes to manipulate election outcomes involve a few people manufacturing a significant number of votes in a short period of time.<sup>50</sup> According to opponents of voter identification and proof of citizenship, the constitutional protection of the right to vote trumps hypothetical concerns over voter fraud. Opponents point out that there are few examples of noncitizens voting, noting the severe penalties if one gets caught—including deportation, loss of benefits, heavy fines, and prison time.<sup>51</sup> Opponents argue a similar cost-benefit analysis to contradict allegations of rampant multiple voting and voter impersonation: The cost is high both in penalties and because of the sophistication and secrecy necessary to put together a successful fraud campaign; and the benefit is low, because individual voters are limited in the number of fraudulent votes they can deliver. Moreover, fraudulent voter registrants rarely show up to cast a ballot.<sup>52</sup>

Poll workers will be unlikely to let vote without question someone who signs a poll book as “Mickey Mouse.”<sup>53</sup> Instead, opponents argue, manipulation of elections is perpetrated in a more institutional fashion, through decisions made by election officials<sup>54</sup> and other, more sophisticated tactics.

Another source of opposition to voter identification and proof of citizenship requirements is the fear that these provisions will be implemented in a discriminatory way. In part because the nation’s poll workers lack sufficient training and oversight, these provisions are frequently enforced selectively against minority voters.<sup>55</sup>

Specifically, opponents of voter identification and proof of citizenship requirements point to a few key election irregularities that, at first blush, appear to indicate significant fraud, but on further examination grow out of a less nefarious foundation.

**1. New Jersey 2005.** In September 2005, less than two months before the New Jersey gubernatorial election, the state’s Republican Party chairman asked state officials to investigate what he said was “evidence of people voting twice in the same election, dead people registered to vote, tens of thousands registered more than once in New Jersey and hundreds of thousands registered in New Jersey and in other states.”<sup>56</sup>

According to a consultant hired by the New Jersey GOP, over 10,000 voters were suspected of multiple voting—some accused of voting twice in New Jersey and some accused of voting once in New Jersey and once in another state. According to the accusations, nearly 5,000 deceased New Jerseyans cast ballots in the previous election.

The Brennan Center for Justice investigated the allegations and found that, most likely, the cause of the irregularities was not as insidious as the allegations suggested. Instead, the group found that the overwhelming majority of the allegations were more likely explained as different people with the same names, mistakes in data entry, and poor matching protocols that the New Jersey GOP applied to the voter registration rolls and the death lists. According to the Brennan Center, it is likely that only eight voters voted twice.<sup>57</sup>

**2. Wisconsin 2004.** Amidst widespread allegations of voting fraud in the Milwaukee area during the 2004 presidential election, the Milwaukee Police Department, Milwaukee County District Attorney’s Office, Federal Bureau of Investigation, and the United States Attorneys Office formed a task force to investigate what voting irregularities occurred during that election and how widespread they were.<sup>58</sup> The task force found some evidence of double voting, voting in names of people who probably did not vote or voting in possibly fake names; however, the list of suspected fraudulent voters was rather small<sup>59</sup> and the confidence that even this small number actually represented criminal activity was on shaky ground.<sup>60</sup> The report also

found that registration drives turned in 65 registrations of voters who did not exist, although the report found no evidence that these voters actually voted and, instead, came to the conclusion suggested above, that voter registration workers were trying to defraud the registration drives they were working for in order to collect more money. The report also found that widespread administrative failures likely led to the irregularities that, at first blush, seemed to suggest voter fraud. These irregularities included data entry errors that put multiple voters at the same address and poll workers not administering poll checks and same-day registration effectively.<sup>61</sup>

**3. Washington Gubernatorial Election.** The 2004 gubernatorial election in Washington State ended with the closest margin in a statewide competition in American history.<sup>62</sup> After the recounts provided for under Washington State election code, the Democratic candidate, Christine Gregoire, led her Republican challenger, Dino Rossi, by 129 votes. Litigation ensued, with each side claiming that irregularities and voter fraud gave its opponent more votes than he or she deserved.<sup>63</sup> While the majority of the debate centered on the number of ineligible voters with felony convictions that cast ballots in the election, there were allegations that double voting and voting by dead voters had contributed to the exceedingly close vote totals. After exhaustive litigation, however, the judge found that out of the millions of votes cast in the election, 19 votes were tabulated in the name of deceased voters and six voters had voted twice.<sup>64</sup> Moreover, further investigation showed that at least some of the deceased voters had died after casting an absentee ballot, and some ballots were cast by loved ones with no malicious intention, but to honor the deceased voters' choice in the election.<sup>65</sup>

**4. Department of Justice Efforts.** Since the beginning of the George W. Bush administration, the Justice Department began bringing cases alleging that voter registration fraud was corrupting the electoral process and pledging to make enforcement of fraud prevention statutes more of a priority.<sup>66</sup> During that time, despite increasing resources and shifting the focus of election misconduct investigations and enforcement from systemic problems that will likely have an affect on the outcomes of elections to individual cases of election crimes,<sup>67</sup> there have been very few successful prosecutions and convictions for voter fraud.<sup>68</sup>

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#### *IV. Studies on the Impact of Voter Identification and Voter Fraud*

Despite no conclusive study on the subject, investigations into the impact of voter identification and proof of citizenship have consistently found that about 10 percent of voting-age citizens (around 20 million people) lack a government-issued photo ID.<sup>69</sup> The contentious debate over the appropriate role of voter identification in the election process has produced a number of studies attempting to empiri-

cally clear up both the mystery of what impact, if any, voter identification has on disenfranchisement and what impact, if any, voter fraud has on election outcomes. While there has been no single study that has put the debate to rest, a number of studies provide helpful insight.<sup>70</sup>

#### **A. EAC VOTER FRAUD AND VOTER INTIMIDATION STUDY**

In 2006, the Election Assistance Commission (EAC), which was set up by HAVA, commissioned two reports pursuant to Section 241 of HAVA; one combined research and reporting on voter fraud and voter intimidation and the second report was designed to research the impact of voter identification on turnout and make recommendations for best practices relating to identification.<sup>71</sup>

The EAC Fraud and Intimidation Report surveyed the available research, interviewed leading experts on voting issues, compiled an exhaustive review of available press reports on the subjects, and consulted a bipartisan working group of experts on issues related to voter fraud and voter intimidation.<sup>72</sup> While the report submitted to the EAC called for more research to answer the questions presented with finality, there were some common themes that emerged from the preliminary research. First, although the authors found evidence that there was fraud in obtaining voter registrations (ineligible voters submitted registration forms, fictitious voters submitted registration forms, etc.) those registrations did not result in ineligible voters at the polling place. Second, the report found that absentee voting is most susceptible to voter fraud. Third, the report found that voter intimidation is still a problem throughout the country. Finally, the report found no evidence that non-citizens vote regularly.<sup>73</sup>

In its study of voter identification laws, the authors of the EAC report found that increased voter identification provisions may have some impact on voter turnout and that that impact falls disproportionately on minority communities. While this report also admitted to not being comprehensive, “[t]he statistical analysis suggests that stricter voter ID requirements can be associated with lower turnout. . . . Without a better understanding of the incidence of vote fraud and its relationship to voter ID, for now best practice for the states may be to limit requirements for voter identification to the minimum needed to prevent duplicate registration and ensure eligibility.”<sup>74</sup>

#### **B. OTHER STUDIES**

Other studies found a similarly strong indication that voter identification laws have a disproportionate impact on traditionally disenfranchised voters. In Georgia, African Americans and Latinos are roughly twice as likely as whites to lack a driver’s license or other state-issued photo ID.<sup>75</sup> Twenty-five percent of registered Georgians have no driver’s license or current government-issued photo identification.<sup>76</sup> Researchers at the University of Wisconsin at Milwaukee found that only 22 percent

of African American males in the city of Milwaukee between 18 and 24 years old had a driver's license. The same study found that whites were twice as likely to have driver's licenses as African Americans.<sup>77</sup> The Brennan Center for Justice at New York University Law School conducted a national survey asking respondents about their access to identification documents. Based on the results of the survey, the Brennan Center estimated that 13 million individuals do not have access to citizenship documents and that nearly 12 percent of voting-age citizens earning under \$25,000 a year do not have access to a birth certificate, a passport, or naturalization papers.<sup>78</sup> Additionally, it was estimated that more than 20 million individuals, disproportionately from minority communities, do not have government-issued photo identification.<sup>79</sup>

In Indiana, the Washington Institute for the Study of Ethnicity and Race found that about 13 percent of registered Indiana voters lack an Indiana driver's license or an alternate Indiana-issued photo ID.<sup>80</sup> To dig deeper, households that are less likely to have an automobile, and consequently less likely to have licensed drivers, are disproportionately low income and disproportionately minority.<sup>81</sup>

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## V. *Federal Legislative Efforts to Introduce More Restrictive Requirements*

Advocates for stricter identification and proof of citizenship requirements began a campaign to reform laws at the federal and state level after the 2000 election, pointing to the 2000 Missouri Senate race in which Sen. John Ashcroft was narrowly defeated by Gov. Mel Carnahan, who just days before the election died in a plane crash. During that election, vast voting irregularities in the city of St. Louis caused the St. Louis Circuit Court to issue an order extending polling hours. According to advocates for identification, the irregularities, coupled with the extended hours, led to enough ineligible voters casting ballots to sway the election in favor of Carnahan.<sup>82</sup>

Although the veracity of the fraud claims is in serious doubt,<sup>83</sup> the rhetoric that came out of the chaos of that election took hold. At the federal level, the deliberations over the Help America Vote Act were characterized by differing priorities. Some involved with the deliberation advocated for making the bill a vehicle to increase requirements for identification, while others preferred to target the bill on the issues exemplified by the 2000 election debacle. In the end, the compromise discussed above in Part II was reached.

Despite its genesis in the 2000 election, the recent effort to expand the use of voter identification and proof of citizenship hit its stride in 2004 and 2005. Starting in 2004, legislatures across the country began introducing and passing restrictive voter identification requirements.<sup>84</sup> Strengthening the legislative efforts was the announcement in September 2005 endorsing the imposition of strict identification requirements for voting purposes by the Commission on Federal Election Reform

chaired by Jimmy Carter and James Baker.<sup>85</sup> Despite the fact that the commission's recommendation came over a dissent by three commissioners<sup>86</sup> and that it was both specific and heavy with caveats requiring the other commission recommendations to be implemented before the identification recommendation,<sup>87</sup> advocates for restrictive voter identification requirements took the pronouncement as a clarion call reinvigorating the efforts to pass these provisions.

In addition to the state legislation, the 109th Congress also began considering strict identification and proof of citizenship requirements. Starting with the introduction of the Voter Protection Act of 2005, introduced in the Senate by Sen. Christopher "Kit" Bond of Missouri and Sen. Mitch McConnell of Kentucky, a slew of new measures were introduced that proposed strict identification requirements for all federal elections. The Voter Protection Act of 2005 would amend the HAVA identification provision to require all voters in federal elections to show "current and valid" photo identification before voting. Consequently, the amendment would remove the expansive list of identification acceptable under HAVA for first-time voters and impose the same government-issued photo identification requirement on them.<sup>88</sup> Finally, the bill attempted to circumvent critics' assertions that the identification requirements imposed an unconstitutional poll tax<sup>89</sup> by authorizing the Election Assistance Commission to permit grants to states to issue free identification. The bill did not, however, mandate that states provide free identification.<sup>90</sup>

In both the House of Representatives and the Senate a few bills followed the lead of the Voter Protection Act of 2005 by proposing strict voter identification laws in federal elections.<sup>91</sup> These bills were sponsored by Republican members of Congress and were, in large measure, a reaction to bills introduced by their Democratic counterparts that removed restrictions or addressed documented election irregularities that would have expanded the franchise by making registration easier or streamlining election administration. Most of these bills saw little, if any, action beyond their introduction.<sup>92</sup> Two provisions, however, made considerable progress through the legislative process.

#### **A. SEN. MCCONNELL'S AMENDMENT TO THE COMPREHENSIVE IMMIGRATION ACT OF 2006**

In May 2006, the Senate was consumed with debate over how to reform the nation's immigration laws. The issue took center stage as proponents and opponents of a bipartisan compromise battled over the ideological foundations and the specific nuances of an increasingly complicated legislative effort. Sen. McConnell, a longtime advocate of increasing voter identification restrictions, offered an amendment that would require every voter to show a "Real ID" before voting beginning in 2008.<sup>93</sup> Passed without any legislative debate (either in committee or on the floor) in May 2005 as an amendment to an emergency appropriation bill funding the wars in Afghanistan and Iraq and relief for the devastating tsunami in the South

Pacific, Real ID will impose on states, beginning in May 2008,<sup>94</sup> a new regime of issuing identification that will be used for all federal activities including boarding a plane or entering a federal government building. States must set up extensive new procedures mandating that only certain identification be used as supporting documents to issue a Real ID, requiring extensive verification and document retention requirements on supporting documentation and requiring interoperable databases so states can check information against other states' databases, among other requirements.

The amendment was offered on the floor on May 22, 2006. After debate, a motion to table the amendment was made that failed along party lines, with Democrats voting to table the motion and all but two Republicans voting against the motion; however, the next vote on the floor was a vote for cloture on the underlying Comprehensive Immigration Act of 2006 and not a vote on the amendment. The result was that the amendment was defeated on procedural grounds—because Sen. McConnell's proposed amendment did not amend any provision in the current bill, it became nongermane and could not be offered as an amendment after cloture.

## B. FEDERAL ELECTION INTEGRITY ACT OF 2006

In September 2006, the Committee on House Administration, which has jurisdiction over many election-related issues, began deliberating on Rep. Henry Hyde's Federal Election Integrity Act of 2006, which would impose strict government-issued photo identification requirements before a voter casts a ballot.<sup>95</sup> Unlike previous bills, this bill specifically required that acceptable "government-issued photo identification" only includes identification that required the bearer to prove citizenship in order to obtain the ID.

The bill had provisions requiring states to provide free voter IDs (which could not be used for purposes other than voting) to individuals who attested that they could not afford the identification. There was no provision, however, for indigent voters to obtain underlying documentation for free. After the bill was tweaked during the committee process, it was sent to the floor, where it passed the House of Representatives on a nearly party line vote.<sup>96</sup> The bill did not progress through the Senate.

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## VI. *Case Law on Photo Identification and Proof of Citizenship Requirements in Registering and Voting*

The photo identification requirements for in-person voting that were adopted through legislation or a referendum in Georgia, Indiana, Missouri, and Albuquerque, New Mexico, in 2005 and 2006 have all been challenged legally.<sup>97</sup> In addition, Arizona's Proposition 200, which requires voter registrants to provide proof of citizenship, was also challenged after it was passed by voters in November 2004.

The following discussion of the cases focuses on the two primary legal theories that plaintiffs' attorneys have advanced in these cases: that a mandatory photo identification requirement or documentary proof of citizenship requirement constitutes an undue burden on the fundamental right to vote in violation of the Equal Protection Clause of the 14th Amendment and an unconstitutional poll tax under the 24th Amendment and 14th Amendments to the United States Constitution. In addition, with respect to the Arizona proof of citizenship requirement for voter registrants, there is discussion of plaintiffs' contention that it violates the National Voter Registration Act.

### A. FUNDAMENTAL RIGHT TO VOTE

In the 1960s, the United States Supreme Court made clear that there is a constitutionally protected right to vote:

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted.<sup>98</sup>

This right to vote is contained within the Equal Protection Clause under the 14th Amendment. Over the next decade the Supreme Court found that several state laws had the effect of denying the right to vote of particular individuals, including a Texas law that denied the right to vote to members of the armed services who lived in another state before enlistment,<sup>99</sup> a New York law that denied the right to vote in certain school districts to individuals that did not own property or have children going to public school,<sup>100</sup> and a Tennessee law that required voter registrants to be residents of the state for a year and the county for three months before the election.<sup>101</sup> In all three cases, the Supreme Court imposed a strict scrutiny test—the law had to be necessary to achieve a compelling interest—and the defendants failed to meet their burden.<sup>102</sup>

The Tennessee case, *Dunn v. Blumstein*, is particularly instructive because the state's lead justification for the law was that it would "INSURE PURITY OF BALLOT BOX,"<sup>103</sup> the same justification made for the government-issued photo identification and proof of citizenship laws. Though the Supreme Court acknowledged that preventing voter fraud "is a legitimate and compelling goal," it also held that "it is impossible to view durational residency requirements as necessary to achieve that state interest."<sup>104</sup> The Supreme Court found that although durational residency requirements would prevent some people who were not residents from voting, the law was "crude" because it also excluded many legitimate residents.<sup>105</sup> Moreover, the court found that the durational residency requirement was not the least restrictive alternative because of several existing Tennessee laws criminalizing voter fraud,

including one for registering to vote illegally, as well as a law allowing voters to be challenged at the polls for not being eligible.<sup>106</sup>

In *Burdick v. Takushi*,<sup>107</sup> the Supreme Court refined the standard for analyzing fundamental right to vote claims. It rejected the petitioner's contention that any voting regulation would be subjected to strict scrutiny. Instead it adopted a "more flexible standard":<sup>108</sup> the "character and magnitude of the asserted injury" to the right to vote is balanced against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."<sup>109</sup> The Supreme Court stated that when the right to vote is "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"<sup>110</sup> In contrast, when the law imposes "'reasonable, discriminatory restrictions'" on the right to vote "the State's regulatory interests are generally sufficient to justify" the restrictions."<sup>111</sup> In the case before it, the Supreme Court applied the lower level of scrutiny to a Hawaii law banning write-in ballots and found the law constitutional.<sup>112</sup>

The *Burdick* test has been interpreted by courts applying it to government-issued photo identification and proof of citizenship laws in various ways. Some courts have interpreted *Burdick* to require a two-level test: a law is either severe, and subject to strict scrutiny, or subject to a lower level of scrutiny that sometimes is akin to a rational basis test. Other courts characterize the test as a sliding-scale, balancing test. Perhaps even more importantly, courts have valued the right to vote in comparison to the state's regulatory interests very differently. Where a court values the right to vote such that it requires the state to justify a photo identification or proof of citizenship statute because it is likely to prevent some people from voting, the law is likely to fail because the evidence of voter impersonation and noncitizen voting is minimal. On the other hand, where a court views the state as having a great deal of latitude to introduce facially neutral, "antivoter fraud" legislation regardless of the proof of need, the law will usually be upheld.

## B. POLL TAX

In 1964, the 24th Amendment to the United States constitution was ratified. Section 1 of the Amendment states:

The right to citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied by the United States or any State by reason of failure to pay any poll tax or any other tax.<sup>113</sup>

The next year the Supreme Court decided the seminal case under the 24th Amendment, *Harman v. Forssenius*.<sup>114</sup> In *Harman*, the state of Virginia had a \$1.50 annual poll tax that a voter needed to pay at least six months before a state or federal election

in order to vote.<sup>115</sup> In anticipation of the passage of the 24th Amendment, Virginia amended its laws in 1963 to allow voters in federal elections to submit a notarized or witnessed certificate of residency at least six months before the election.<sup>116</sup>

The Supreme Court held that the Virginia law violated the 24th Amendment. It stated that “a state may not impose a penalty upon those who exercise a right guaranteed by the Constitution.”<sup>117</sup> It further found that “the Twenty-fourth Amendment does not merely insure that the franchise shall not be ‘denied’ by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be ‘denied or abridged’ for that reason.”<sup>118</sup> The Court also stated that the 24th Amendment was like the 15th Amendment in that it “‘nullifies sophisticated as well as simple-minded modes’ of impairing” voting rights and that “[i]t hits onerous procedural requirements which effectively handicap exercise of the franchise’ by those claiming the constitutional immunity.”<sup>119</sup> The Court found that the Virginia law “unquestionably erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax.”<sup>120</sup> The Court found that when a law was found to be a poll tax, as in Virginia, it violated the 24th Amendment regardless of justification:

The requirement imposed upon those who reject the poll tax method of qualifying would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax. For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban.<sup>121</sup>

Accordingly, the court struck down the Virginia law for federal elections.

The next year the Supreme Court held that the Virginia’s \$1.50 annual poll tax for state elections violated the Equal Protection Clause in *Harper v. Virginia Board of Elections*.<sup>122</sup> The Court “conclude[d] that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”<sup>123</sup> The state contended the argument that because the state could exact fees for other license, a tax on voting was constitutional as long as the tax was the same for everybody.<sup>124</sup> In response, the Court stated that the state’s authority was limited to fixing qualifications and “wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”<sup>125</sup>

In the cases discussed below, the central issue regarding the poll tax has been whether certain fees and costs that voters without the required documentation have to expend in order to obtain the documentation constitute a poll tax. The first level is fees for obtaining the required identification itself; the second level is

the fees associated with obtaining documentation that is necessary to obtain the identification (for example, an individual may have to pay for a birth certificate that is needed to obtain a driver's license or nonoperator license). The third level is the practical costs, such as transportation and time, expended in order to obtain the identification. No consensus has emerged, but courts are the most likely to find that the first level of costs constitutes a poll tax and the least likely to find that the third level of costs constitutes a poll tax.

### C. DISCUSSION OF CHALLENGED LEGISLATION AND REFERENDA

**1. Georgia.** Prior to 2005, Georgia had an identification requirement for voters that required voters to show one of 17 types of identification, or if they did not have the identification, to complete an affidavit attesting to their identity.<sup>126</sup> In 2005, the Georgia General Assembly dramatically changed the law in Act 53. Act 53 required voters to provide one of six types of photo identification and no longer allowed for the affidavit option if voters did not have identification.<sup>127</sup> At the same time, Act 53 expanded the availability of absentee voting to all eligible voters.<sup>128</sup>

The passage of Act 53 was controversial. Members of Georgia's black legislative delegation staged a walkout.<sup>129</sup> Secretary of State Cathy Cox vehemently opposed the voter identification provision for two reasons: (1) it was unnecessary because Georgia had not experienced any problems with in-person voter fraud and (2) the law would disenfranchise many eligible voters.<sup>130</sup> The General Assembly voted almost entirely along partisan lines.<sup>131</sup>

Because Georgia's history of discrimination resulted in special coverage, before the state could implement the law it needed to seek preclearance approval from the Department of Justice pursuant to Section 5 of the Voting Rights Act.<sup>132</sup> Under the then-existing standard, Georgia had to show that the change in the identification provision was not adopted with the purpose or did not have the effect of worsening the position of African American voters.<sup>133</sup> The Department of Justice granted preclearance—though later it was revealed that the career staff working on the Section 5 submission had recommended that DOJ deny preclearance approval.<sup>134</sup>

A broad-based coalition filed suit in federal court and sought preliminary relief.<sup>135</sup> The coalition proceeded primarily on two grounds: (1) the identification provision was a poll tax because it required individuals who did not have an accepted identification to pay for identification (\$20 for five years and \$35 for ten years) unless they claimed indigency in an affidavit; and (2) the identification provision unduly burdened the fundamental right to vote under the 14th Amendment.

The district court granted the plaintiffs' motion for preliminary injunction on both the poll tax and fundamental right to vote grounds.<sup>136</sup> Regarding the poll tax, the court found that "the fee waiver affidavit runs afoul of the *Twenty-Fourth Amendment*" because a voter without identification "must pay the \$20 fee or sign

the fee waiver affidavit, which may require the voter to swear or affirm to facts that simply are not true in order to avoid the \$20 fee.”<sup>137</sup>

With respect to the fundamental right to vote claim, the district court found that the photo ID requirement imposed a severe burden:

Given the fragile nature of the right to vote, and the restrictions discussed above, the Court finds that the Photo ID requirement imposes “severe” restrictions on the right to vote. In particular, the photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of photo ID for whom obtaining a photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia’s elderly, poor, and African-American voters from voting. For those citizens, the character of their injury—the loss of the right to vote—is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.<sup>138</sup>

The court went on to find that Georgia did not meet its burden of satisfying strict scrutiny. Moreover, the court did not find that Georgia’s justification met the lower level of scrutiny because there were no demonstrated instances of in-person voter fraud, whereas no identification was required for absentee voters, though there had been documented instances of absentee voter fraud.<sup>139</sup>

The Georgia legislature passed a new photo identification law in 2006 that the Department of Justice precleared. The law and its implementing regulations contained three significant changes: (1) it created a new form of photo identification that voters without a driver’s license or nonoperator identification could obtain, a Georgia voter registration card, (2) it required each county to provide at least one site in the county that would issue the cards for free; and (3) it set forth the requirements for obtaining the card.<sup>140</sup> In lieu of a photo identification, the voter’s registration application, among other things, could suffice as sufficient identification to obtain a card under the implementing regulations.<sup>141</sup> The plaintiffs amended their complaint to reflect the change in the law and filed a motion for preliminary injunction seeking to enjoin the law for the July 18, 2006, primary and the run-off elections. The plaintiffs again relied predominantly on poll tax and fundamental right to vote claims. At the hearing, the secretary of state testified that an analysis done for her office showed that a higher percentage of African American and elderly registered voters did not have a driver’s license or nonoperator identification.<sup>142</sup> The plaintiffs submitted a number of declarations of registered voters who swore that the 2006 ID law would negatively affect their ability to vote.<sup>143</sup>

The district court ruled in the defendant’s favor on the poll tax claim, holding that the availability of the free voter identification card in the 2006 law cured the deficiency in the 2005 law even if some voters would incur costs of obtaining identification, such as a birth certificate, to comply with the 2005 law.<sup>144</sup> The court

found in plaintiff's favor on the fundamental right to vote claim as it applied to the July 18, 2006, election. The court held that the 2006 law imposed a severe burden on the fundamental right to vote for much the same reasons as the 2005 law. It found that the availability of the free voter identification cards did not alleviate the burden because of the practical difficulty the affected voters would have in getting the identification in time for the July 18, 2006, election.<sup>145</sup> The court also found that the state failed to show that requiring the identification was necessary to prevent voter fraud because the requirement did not address the type of electoral fraud that had existed in Georgia and because of the existence of less restrictive alternatives.<sup>146</sup> The district court later preliminarily enjoined implementation of the law for a September 2006 election.

Meanwhile, a concurrent challenge to the 2006 law was filed in state court on the grounds that it violated the state constitution. The state court first granted a temporary restraining order enjoining the law<sup>147</sup> and later permanently enjoined the 2006 law.<sup>148</sup> The state trial court found that the Georgia constitution "guarantees the right to vote to all residents of Georgia who are (1) citizens of the United States, (2) at least 18 years of age, (3) who meet the minimum residency requirements prescribed by the General Assembly, and (4) who have registered to vote."<sup>149</sup> The court found that because the 2006 law denied the right to vote to some voters who met the four qualifications, it violated the Georgia constitution.<sup>150</sup> The state appealed to the Georgia Supreme Court. On June 11, 2007, the Georgia Supreme Court reversed the trial court on the ground that the sole remaining plaintiff lacked standing.<sup>151</sup> The court did not reach the merits of the Georgia constitutional claim.

After the Georgia Supreme Court decision, the federal challenge to the 2006 law proceeded to trial in August 2007. Although the federal district court had preliminarily enjoined the disputed law on the fundamental right to vote, it found in defendants' favor at trial.<sup>152</sup> The court first found that all of the plaintiffs lacked standing.<sup>153</sup> Nevertheless, the court went onto to address the merits and found that the 2006 law did not violate the fundamental right to vote.<sup>154</sup> The court found that the named plaintiffs did not have standing because they testified that they would be able to go to the registrar's office and obtain identification from the registrar if necessary.<sup>155</sup> The court then rejected the organizational standing arguments of the NAACP (the other organizational plaintiffs dismissed themselves). The court found that the Georgia NAACP president's testimony that his predecessor told him there were several members of the NAACP who did not have identification was inadequate to establish standing on behalf of the NAACP members.<sup>156</sup> It also rejected the argument that the NAACP had standing in its own right because it would have to reallocate resources to educate its members about the photo ID requirement. The court stated that a decision to reallocate resources is an injury of the NAACP's own making and would not be sufficient to confer standing. In doing so, the court stated

that NAACP's reliance for its standing "in its own right" theory on the United States Supreme Court's decision in *Havens Realty Corp. v. Coleman*<sup>157</sup> and a subsequent 11th Circuit decision was misplaced because those cases involved Fair Housing Act claims and were not applicable to other claims.<sup>158</sup> The standard adopted by the district court for standing makes it difficult in practice to find a plaintiff who could establish standing because the person would have to be able to travel to federal court to testify but also have to credibly testify that he or she would not be able to travel to a county voter registration in order to obtain an identification.<sup>159</sup>

With respect to the merits, the court stated that it was applying the "Burdick, sliding-scale test."<sup>160</sup> The court found that plaintiffs failed to produce admissible evidence showing a severe burden. It found that because the individuals that testified on behalf of plaintiffs stated that they could obtain the free identification at the voter registrar's office or could vote absentee, the burden on these voters was not severe. On a macro level, the plaintiffs relied on analyses comparing the list of the registered voters to a list of individuals that had a Georgia driver's license or nonoperator identification. Georgia's match of these lists as of June 2007 found that almost 200,000 registered voters did not have a Georgia driver's license or nonoperator identification. Plaintiffs' analysis using 2006 data showed that minority voters were about twice as likely as white voters to not have a Georgia driver's license or nonoperator identification and that elderly voters were about twice as likely to not have a Georgia driver's license or nonoperator identification as the nonelderly.<sup>161</sup> The court discounted these analyses on the grounds that they were not reliable (though both sides had used them), that they did not show how these voters did not have access to transportation in order to receive an identification from the voter registrar, and that there was no demonstration of how many of these voters lacked the other forms of acceptable identification.<sup>162</sup> Accordingly, the court found that the burden of the law was not severe and so did not apply strict scrutiny.<sup>163</sup>

The court instead applied a rational basis analysis.<sup>164</sup> The court found that under rational basis analysis, the state need not demonstrate that there had been previous instances of in-person voter fraud and that the Georgia legislature had wide latitude to determine that requiring photo identification was an appropriate measure to combat voter fraud.<sup>165</sup>

In upholding the 2006 law at trial, the court distinguished its decisions to preliminarily enjoin the 2005 law and 2006 law. It stated that the 2006 law was different in that it did allow voters to get a free voter identification issued by the voter registrar in their county of the Department of Drivers Services, and that its earlier preliminary injunctions of the 2006 law were predicated on concerns that not enough had been done to educate voters about the identification law.<sup>166</sup>

On October 2, 2007, plaintiffs filed a notice of appeal of the district court's decision.<sup>167</sup>

**2. Indiana.** In 2005, Indiana passed a law that requires voters who vote in person to provide a photo identification issued by the United States or the State of Indiana that contains the voter's name and is either unexpired or had not expired at the time of the most recent general election.<sup>168</sup> Voters who do not have acceptable identification when they vote are permitted to cast a provisional ballot, which is counted if within the second Monday after the election, the voter appears at the county clerk or county election board and provides acceptable identification or signs an affidavit attesting to his or her identity and to his or her indigency or religious objection to being photographed.<sup>169</sup> Absentee voters who vote by mail do not have to provide identification—a voter must meet one of ten qualifications to vote absentee.<sup>170</sup>

Two sets of plaintiffs brought federal challenges to Indiana's voter identification law, and the plaintiffs and defendants both filed for summary judgment.<sup>171</sup> The district court granted the defendants' motion for summary judgment. With respect to plaintiffs' fundamental right to vote claim, the court found that strict scrutiny was not warranted because, according to the court, the plaintiffs "failed to submit: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote."<sup>172</sup> The plaintiffs had submitted an expert report that estimated that as many as 989,000 registered voters did not have a photo identification issued by the Bureau of Motor Vehicles, but the court did not consider the report in its determinations because the court found the report "utterly incredible and unreliable."<sup>173</sup>

The court then went on to find that the Indiana photo voter identification law was reasonably justified. The court stated that "in examining an election regulation aimed at combating fraud, courts are well-advised to pay additional deference to the legislative judgment because 'the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not legislatively interfere unless strongly convinced that the legislative judgment is grossly awry."<sup>174</sup> In applying this "grossly awry" standard, the court did not find it significant that the defendants had conceded that they were "not aware of any incidents or persons attempting to vote, or voting, at a polling place with fraudulent or otherwise false identification,"<sup>175</sup> because, according to the court, "the state is not required to produce such documentation prior to enactment of the law."<sup>176</sup>

The court also found that the law was not a poll tax because Indiana residents who do not wish to drive can receive a free photo identification card from the Bureau of Motor Vehicles.<sup>177</sup> The court rejected the plaintiffs' argument that the costs associated with obtaining the BMV identification, such as the cost of obtaining a birth certificate, could constitute a poll tax.<sup>178</sup>

The plaintiffs appealed the district court's decision to the Seventh Circuit, where it was affirmed by a 2–1 vote.<sup>179</sup> Both opinions focused on the fundamental right to vote claim. Judge Posner, writing for the majority, stated that “a strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger.”<sup>180</sup> In Judge Posner's view, not only does a voter identification statute deny the right to vote of voters who do not have identification but it protects the right to vote because “voting fraud impairs the right to vote of legitimate voters by diluting their vote.”<sup>181</sup> Judge Posner stated that the record of the legitimate voters who are disenfranchised by the statute is “slight” and that “a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote.”<sup>182</sup> Though he acknowledged that there was no record of voter impersonation in Indiana, he hypothesized that “the absence of prosecutions is explained by the endemic under-enforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending the voting impersonator.”<sup>183</sup> He concluded that “the details of the elections must be left to the states.”<sup>184</sup>

Judge Evans dissented. He stated that the Indiana voter identification should be subjected to strict scrutiny, or what he called “strict scrutiny light,” and struck down “as an undue burden on the fundamental right to vote.”<sup>185</sup> He stated that “the real problem is that this law will make it significantly more difficult for some eligible voters” to vote and that “this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof.”<sup>186</sup> He compared this to the scant evidence of voter impersonation at the polls—“where is the justification for this law? Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table? I think not.”<sup>187</sup>

The appellants petitioned to have the entire Seventh Circuit hear the case en banc. The Seventh Circuit denied the petition.<sup>188</sup> Judge Wood dissented along with three other judges.<sup>189</sup> The dissent stated that “when there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny.”<sup>190</sup> The dissent also indicated that complete deprivations of the right to vote, like a photo identification requirement, are “severe” injuries to the voters affected and require strict scrutiny review, as compared to “minor obstacles,” such as a 28-day registration deadline, which do not.<sup>191</sup> The dissent stated that remand was appropriate because the state's justification for the law—that it would prevent fraud at the polling place—was a disputed question of fact precluding summary judgment because “if the burden on voting is great and the benefit for the asserted state interest is small as an empirical matter, the law cannot stand.”<sup>192</sup>

The appellants petitioned the United States Supreme Court for a writ of certiorari and certiorari was granted on September 25, 2007.<sup>193</sup> The Supreme Court is likely to hear argument during the 2007–08 term.

**3. Arizona.** Prior to the 2004 election, an individual living in Arizona could register to vote if the individual filled out a registration form, provided the identifying information in the form, and signed a statement attesting, among other things, that the individual was a citizen over the age of 18, and acknowledging that executing a false registration was a class 6 felony.<sup>194</sup> When arriving at the polls, the voter was required to announce his or her name and sign the signature roster.<sup>195</sup>

In the November 2004 election, Arizona voters passed Proposition 200, the Arizona Taxpayer and Protection Act. The proposition included findings that “illegal immigration is causing hardship to the state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status.”<sup>196</sup> In addition to some changes in Arizona welfare law, Proposition 200 created new registration and voting requirements. Arizona law now requires that new applicants for voter registration show proof of citizenship,<sup>197</sup> and that voters who vote on Election Day provide one form of photo identification that contains the voter’s name and address or two pieces of nonphoto identification that contain the voter’s name and address.<sup>198</sup> Arizona is the only state that requires an identification that contains the voter’s address.<sup>199</sup> The Arizona secretary of state issued procedures for proof of identification at the polls that set forth, among other things, what types of identification were acceptable,<sup>200</sup> the process for voters who did not have identification,<sup>201</sup> and special procedures for Native American voters.<sup>202</sup> In contrast, there is no identification requirement for voters who vote by early voting; instead, election officials check the signature on the affidavit contained within the early ballot envelope with the signature on the voter’s registration form.<sup>203</sup> All Arizona voters are eligible to vote early either by mail or at on-site locations determined by the county recorder.<sup>204</sup>

In 2006, three cases filed by different groups of plaintiffs, the Gonzalez plaintiffs, the Inter-Tribal Council of Arizona (ITCA) plaintiffs, and the Navajo Nation plaintiffs, filed complaints in United States District Court seeking to enjoin implementation of the Arizona proof of citizenship requirements for voter registration and/or the identification requirements for Election Day voters under a variety of theories. The cases were consolidated.<sup>205</sup>

The Gonzalez plaintiffs, joined by the ITCA plaintiffs, sought a temporary restraining order prohibiting Arizona county recorders from requiring applicants who completed the Federal Mail-In Form to provide proof of citizenship. The plaintiffs relied on (1) the language of the National Voter Registration Act (NVRA), which mandated the Federal Mail-In Form; (2) the legislative history of the NVRA; and (3) a letter from the Election Assistance Commission (EAC), the agency responsible for developing the Federal Mail-In Form, to Arizona’s secretary of state, stating that Arizona’s decision not to accept the Federal Mail-In Form absent documentation of citizenship violated the NVRA.<sup>206</sup> The language of the NVRA specifies that states “shall accept and use the mail voter registration application proscribed by the

U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for federal office.”<sup>207</sup> The legislative history on this issue was particularly clear: The NVRA bill originally passed by the Senate had a provision stating that nothing in the NVRA prevented states from asking for documentation of citizenship, whereas the bill passed originally by the House did not have such a provision. In the Senate/House conference to resolve differences, the provision was taken out. The conference report stated that proof of citizenship requirements for the Federal Mail-In Form were “not necessary or consistent with the purpose of [the NVRA].”<sup>208</sup> The EAC relied on both foregoing authorities in the letter.<sup>209</sup> Nonetheless, the district court denied the motion. It found that no review of the legislative history and the agency interpretation was needed because “[p]laintiffs have not shown that the requirements of Proposition 200 conflict with the plain language of the NVRA.”<sup>210</sup>

The ITCA and Gonzalez plaintiffs then sought a preliminary injunction on two other claims—the Equal Protection fundamental right to vote claim and the poll tax claim (the plaintiffs also included the NVRA in the motion)—and the court held an evidentiary hearing on these claims in August 2006.<sup>211</sup> The evidence included (1) the defendants’ acknowledgement that more than 20,000 registration forms had been rejected at the time of the hearing because the applicants did not provide proof of citizenship,<sup>212</sup> (2) documentation of the costs required to obtain the required proof of citizenship or identification for individuals that did not have the required documents,<sup>213</sup> and (3) the nonexistent evidence of voter impersonation and sparse evidence of noncitizen registration and voting in Arizona.<sup>214</sup> The district court denied plaintiffs’ motion on September 11, 2006, but did not issue its findings until October 11, 2006. The district court concluded that “‘plaintiffs have shown a possibility of success on the merits’ of some of their arguments but the Court ‘cannot say at this stage of the litigation they have shown a strong likelihood.’”<sup>215</sup>

After the district court issued its decision denying the motion but before it issued its findings, the ITCA and Gonzalez plaintiffs appealed the decision, and moved the Ninth Circuit to stay implementation of the polling place identification requirements of Proposition 200 until it could decide the merits of plaintiffs’ motion, which would have effectively enjoined Proposition 200 for the November 2006 election. The Ninth Circuit granted plaintiffs’ motion.<sup>216</sup> The defendants appealed to the United States Supreme Court to vacate the stay and the Supreme Court did so in a per curiam opinion.<sup>217</sup> The Supreme Court stated that it was not expressing any opinion on the merits of the motion or the case. It vacated the stay because of “the imminence of the election,” “the inadequate time to resolve the factual disputes,” and the Ninth Circuit’s lack of explanation as to how the district court erred.<sup>218</sup> The Supreme Court also recognized the underlying competing interests. It stated that “[c]onfidence in the integrity of the electoral process is essential to the functioning of our participatory democracy,” while also stating that “the

possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges."<sup>219</sup> In a concurring opinion, Justice Stevens stated that "[a]t least two important factual issues remain largely resolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements."<sup>220</sup>

The merits of the ITCA and Gonzalez plaintiffs' motion for preliminary injunction as to the proof of citizenship requirement were subsequently heard by the Ninth Circuit.<sup>221</sup> The Ninth Circuit concluded that

the district court did not abuse its discretion in denying injunctive relief with respect to [the proof of citizenship] requirement, because the limited record before us does not establish that the balance of hardships and likelihood of success on the merits of plaintiffs' claims justify an injunction at this stage of the proceedings. The litigation remains pending at the district court. There, final resolution of the scope of the appropriate permanent relief can be determined on the basis of a fully developed record, and well before the next general election in 2008.<sup>222</sup>

Upon remand, Arizona moved for summary judgment on some of the plaintiffs' claims including the NVRA and poll tax claims. The court granted the defendants' motion. Relying on the Ninth Circuit opinion, the court disposed of the NVRA claim in one paragraph. It found that the "language of the NVRA 'does not prohibit documentation requirements.'"<sup>223</sup> Again relying on the Ninth Circuit opinion, the district court disposed of the poll tax claim in a paragraph. It stated that the Proposition 200 is not a poll tax because "voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They only have to provide proof of citizenship."<sup>224</sup> The undue burden claim was not part of the summary judgment motion and discovery in the case continues.

**4. Missouri.** In 2002, after allegations of voter fraud in Missouri in the November 2000 election and the passage of HAVA, the Missouri state legislature passed an identification statute that required voters to show one of several different types of photo or nonphoto identification.<sup>225</sup> Missouri Secretary of State Matt Blunt, who was elected governor in November 2004, "described Missouri's elections in 2002 and 2004 to then-Governor Bob Holden as 'two of the cleanest and most problem free elections in recent history.'"<sup>226</sup> Nonetheless, the Missouri state legislature enacted a new statute in 2006 that would become permanent on November 1, 2008. The statute required in-person voters to present unexpired photo identification issued by Missouri or the federal government that contains the voter's name as listed in the voter registration records.<sup>227</sup> The law contained exceptions for individuals born before 1941, individuals with disabilities, or people who, on religious grounds, objected to a picture being taken of them.<sup>228</sup> In addition, Missouri allowed

individuals who provided proper documentation to obtain a nondriver photo identification free of charge.<sup>229</sup> For elections before November 1, 2008, a “transitional” law would be in place that would allow voters without the required identification to cast a provisional ballot if they signed an affidavit attesting to their identity and presented one of a number of permitted forms of identification.<sup>230</sup> The provisional ballot would be counted if the signature of the affidavit matched the signature on file with the election authority.<sup>231</sup>

A group of Missouri voters filed an action challenging the constitutionality of the Missouri law under the Missouri and United States constitutions. The trial court found that the identification law violated the Missouri constitution.<sup>232</sup> The court found that

[t]he photo ID burden placed on the voter may seem minor or inconsequential to the mainstream of our society for whom automobiles, driver licenses, and even passports are a natural part of everyday life. However, for the elderly, the poor, the under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable, and it is those very people outside the mainstream of society who are the least equipped to bear the costs or navigate the many bureaucracies necessary to obtain the required documentation.<sup>233</sup>

By a 6–1 vote, the Missouri Supreme Court held, in a per curiam opinion, that the Missouri statute violates Missouri’s equal protection clause and “Missouri’s constitutional guarantee of the right of its qualified, registered citizens to vote.”<sup>234</sup> The Missouri Supreme Court found that the right to vote under the Missouri Constitution is more expansive than under the United States Constitution because the right to vote is explicitly mentioned,<sup>235</sup> though the analysis it applied was akin to the *Burdick* analysis. The Missouri Supreme Court found that the photo identification law was a “substantial burden” on the right to vote, and thus was subject to strict scrutiny.<sup>236</sup> The court based its determination on the number of registered voters who did not have Missouri driver’s licenses or photo identification as calculated from analyses by the Office of the Secretary of State (240,000) and the Department of Revenue (169,415) and the monetary costs associated with obtaining the identification needed to obtain a driver’s license or nonoperator identification as well as the practical costs involved in getting the identification.<sup>237</sup> The court stated that under federal law, all fees that impose financial burdens are impermissible as a poll tax, and the same would be true under Missouri law.<sup>238</sup> The court then found that the statute failed to survive strict scrutiny. It held that photo identification was not necessary because the earlier 2002 requirements had been sufficient to prevent the limited amount of voter impersonation fraud that existed prior to 2002.<sup>239</sup>

Justice Limbaugh dissented on the grounds that the court did not need to decide whether the permanent law was constitutional because it would not go into effect until November 1, 2008, and that the transitional law was constitutional.<sup>240</sup>

**5. Albuquerque, New Mexico.** In 2005, New Mexico passed a law requiring voters to show one of numerous photo and nonphoto identifications in order to vote in person for state and federal elections.<sup>241</sup> There was no similar requirement enacted for municipal elections. Through an October 4, 2005, voter referendum, the City of Albuquerque enacted a requirement that in-person voters must show a photo identification that contains their name.<sup>242</sup> Voters without photo identification are allowed to cast a provisional ballot if they sign an affidavit attesting to their identity and provide their date of birth and last four numbers of their social security card, but those ballots are not counted unless the voter supplies the required photo identification to the election official or signs an affidavit stating that the voter has a religious objection to taking a photograph.<sup>243</sup> The charter provision also stated that photo identification cards would be issued by the City Clerk free of charge if the voter showed at least two of several types of identification or signed an affidavit attesting to his or her identity.<sup>244</sup>

Three organizations and three individuals challenged the Albuquerque photo identification law. On cross-motions for summary judgment, the district court found that the law violated the Equal Protection Clause.<sup>245</sup> The court applied the *Burdick* test, which it characterized as an “intermediate” scrutiny “sliding-scale” balancing test.<sup>246</sup> The court found that the law imposed a “significant burden on the right to vote”<sup>247</sup> because

[p]laintiffs have shown that surprise or confusion about the photo ID requirement and the bureaucratic hurdles it imposes is likely to discourage—if not disenfranchise—a significant number of Albuquerque voters who appear at a polling place to vote on the next municipal election day, especially given the lack of clarity or definition in the text of the amendment itself, the absence of any specific plans for voter-education efforts to be undertaken by the City, and the fact that the City’s photo ID requirement differs significantly from the identification requirements that voters have experienced in past elections.”<sup>248</sup>

On the other side of the balance, the court found that *Burdick* requires a jurisdiction to identify a precise interest justifying the law, and not a generalized interest, and in this case the precise interest was in preventing voter impersonation fraud, not other types of voting fraud.<sup>249</sup> The court found “there is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past municipal elections.”<sup>250</sup> It also found that not requiring identification for absentee voters presented a “significant opportunity for circumventing the fraud-prevention requirement” in the voter ID law, and “tends to undermine Defendant’s argument that the amendment effectively targets the goal of preventing future instances of voter impersonation fraud.”<sup>251</sup> In addition, it found that the voter identification requirements contained in HAVA and under New Mexico law for state elections were less restrictive alternatives.<sup>252</sup>

The defendants have appealed the trial court's ruling to the Tenth Circuit Court of Appeals.<sup>253</sup>

The foregoing cases demonstrate that the courts deciding whether a government-issued photo identification or proof of citizenship law violates the fundamental right to vote or constitutes a poll tax have adopted a range of approaches that affect voters' rights. This reflects both the vagueness of the *Burdick* test (i.e., when does a burden become a "severe" burden?) and the differing views that various courts have on individual constitutional rights as opposed to a state's legislative prerogatives. Where courts highly value the right to vote and demand that jurisdictions provide a showing of the need for these laws, the challenge will likely succeed because of the dearth of evidence of voter impersonation or noncitizen voting. Conversely, where courts are deferential to the decisions of legislators or voters and view voting as more of a privilege that can be regulated substantially than a right that can be impeded only with justification, challenges will likely fail. The upcoming decision and reasoning of the Supreme Court's disposition of *Crawford v. Marion County Election Board* is likely to go a long way in determining how the balance between the right to vote and state legislative prerogatives are balanced.

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## VII. Conclusion

The issue of whether government-issued voter identification laws and proof of citizenship laws are constitutional and appropriate has raged among advocates, Congress and state legislatures, and the courts. In each forum, there have been dramatically divergent views on the issue. The upcoming Supreme Court decision in *Crawford v. Marion County Election Board* will likely provide substantial clarification of the constitutional issue as it applies to government-issued photo identification. Regardless of the outcome of the *Crawford* case, we should expect that the debate over whether these measures are appropriate will continue in the years to come.

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## Notes

1. See Help America Vote Act, 42 U.S.C. §15301; compare ELECTIONLINE.ORG, ELECTION REFORM BRIEFING: VOTER IDENTIFICATION (2002), available at <http://www.electionline.org/Portals/1/Publications/Voter%20Identification.pdf> [hereinafter ELECTION REFORM BRIEFING], with Election line.org, Voter ID Laws, available at <http://www.electionline.org/Default.aspx?tabid=364>.

2. See ELECTION REFORM BRIEFING, *supra* note 1.

3. See *id.*

4. See *supra* note 1.

5. See, e.g., JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004); *Assessing the Conduct of the 2006 Mid-Term Elections: Hearing Before the U.S. Election Assistance Commission* (2006) (statement of Mark F. (Thor) Hearne II).

6. See generally Brief for the Lawyers' Committee for Civil Rights Under Law, Service Employees International Union, American Federation of State, County and Municipal Employees, Common Cause, Jewish Council for Public Affairs, and National Council of Jewish Women as *Amici Curiae* in Support of Petitioners, *Crawford v. Marion County Election Bd.*, et al., Nos. 07-21 and 07-25 (U.S. Nov. 13, 2007) [hereinafter Lawyers' Committee Brief].

7. *Id.*

8. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."); Kristen Mack, *In Trying to Win, Has Dewhurst Lost a Friend?*, HOUSTON CHRONICLE, May 17, 2007 ("Among Republicans it is an 'article of religious faith that voter fraud is causing us to lose elections,' [Royal] Masset [former Texas Republican Party political director] said. He doesn't agree with that, but does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote.").

9. See *infra* note 131 and accompanying text; *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006) ("This litigation is a result of a partisan legislative disagreement that has spilled out of the state house into the courts.").

10. See *infra* notes 97 to 253 and accompanying text.

11. See EAGLETON INSTITUTE OF POLITICS & MORITZ COLLEGE OF LAW, 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, PUBLIC LAW 107-252, at 9 & App. A (2006), available at [http://www.eac.gov/clearinghouse/docs/eagletons-draft-voter-id-report/attachment\\_download/file](http://www.eac.gov/clearinghouse/docs/eagletons-draft-voter-id-report/attachment_download/file) (last visited Aug. 20, 2007) [hereinafter EAGLETON INSTITUTE REPORT].

12. See *id.* at App. B.

13. 42 U.S.C. § 1973c (2007).

14. Congress adopted a formula contained within Section 4 of the Act, 42 U.S.C. § 1973b, that was designed to capture these jurisdictions. The list of covered jurisdictions can be found at 28 C.F.R. pt.55 App. A (2007).

15. 42 U.S.C. § 1973.

16. *Id.*

17. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Sheri Marcus Morris, Assistant Attorney General, State of Louisiana (Nov. 21, 1994).

18. *Id.*

19. *Id.* at 2.

20. Help America Vote Act, 42 U.S.C. § 15301.

21. 42 U.S.C. § 15483(b)(3)(B).

22. 42 U.S.C. § 15483(b)(2).

23. 42 U.S.C. § 15484.

24. For a detailed discussion on the role of current federal statutes on election related fraud, see generally CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELEC-

TION OFFENSES 37–57 (7th ed. 2007), available at <http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf>.

25. 18 U.S.C. § 242 has also been applied to voting. That statute is much like § 241, but has a color of law requirement.

26. See, e.g., *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Haynes*, 977 F.2d 583 (6th Cir. 1992); *United States v. Morando*, 454 F.2d 167 (5th Cir. 1972).

27. See 42 U.S.C. s.1973i(c).

28. Many of the prohibitions in the Voting Rights Act have been read to consolidated federal and nonfederal election. See *DONSANTO & SIMMONS*, *supra* note 24, at 42–44.

29. 42 U.S.C. § 1973i(c).

30. See 42 U.S.C. § 1973i(e).

31. *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985); *United States v. Smith*, 231 F.3d 800 (11th Cir. 2000).

32. GA. CODE ANN. § 21-2-561 (2007).

33. GA. CODE ANN. § 21-2-562 (2007).

34. GA. CODE ANN. § 21-2-566 (2007).

35. GA. CODE ANN. § 21-2-571 (2007).

36. GA. CODE ANN. § 21-2-572 (2007).

37. See *infra* notes 82 to 96 and accompanying text.

38. COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS; REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 18, (Center for Democracy and Election Management, American University, Sept. 2005).

39. See JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004) [hereinafter *STEALING ELECTIONS*]; *Assessing the Conduct of the 2006 Mid-Term Elections: Hearing Before the U.S. Election Assistance Commission* (2006) (statement of Mark F. (Thor) Thorne II).

40. See *Hearing on Non-Citizen Voting Before House Admin. Comm.*, 109th Cong. (2006) (statement of Patrick Rogers).

41. See *STEALING ELECTIONS*, *supra* note 39.

42. See B. Drummond Ayres, Jr., *After Days of Counting, Dornan Race Too Close to Call*, N.Y. TIMES, Nov. 14, 1996.

43. *Dismissing the Election Contest Against Loretta Sanchez: Report of the Committee on House Oversight on H.R. 355 Together with Minority Views*, H.R. DOC. NO. 105-416 (1998).

44. *Id.*

45. *Id.* at 1025.

46. See Robert Pear, *Bill to Overhaul System of Voting is Seen in Danger*, N.Y. TIMES, Sept. 7, 2002; *Assessing the Conduct of the 2006 Mid-Term Elections: Hearing Before the Election Assistance Commission* (2006) (statement of Mark F. (Thor) Hearne II).

47. 109 CONG. REC. S8692 (daily ed. Aug. 2, 2001) (statement of Sen. Bond).

48. See *id.*; *STEALING ELECTIONS*, *supra* note 39, at 24–25. But see *infra* notes 49–68 and accompanying text suggesting that these registrations do not lead to ineligible voters at the polling place.

49. See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 148–67 (2006); TOVA ANDREA WANG, *WHERE'S THE VOTER FRAUD?* (2006); LORRAINE C. MINNITE, PH.D., *THE POLITICS OF VOTER FRAUD* (2007).

50. See DONSANTO & SIMMONS, *supra* note 24, at 101. For a discussion of the steps necessary to commit the type of voter fraud prevented by these provisions, see *Lawyers' Committee Brief*, *supra* note 6, at 10).

51. See *supra* notes 24–36 and accompanying text for a discussion of criminal penalties for voter fraud.

52. See Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, A01.

53. For a detailed response to allegations of voter fraud, see Brennan Center for Justice, *The Truth About Fraud: Case Studies by Issue*, [www.truthaboutfraud.org/case\\_studies\\_by\\_issue](http://www.truthaboutfraud.org/case_studies_by_issue).

54. Recent examples include the flawed purge list used by Florida in 2000 and 2004 to match ineligible voters with felony convictions to the voter registration rolls and a number of questionable directives made by Ohio Secretary of State Kenneth Blackwell in the 2004 presidential elections. See ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA* 210–13 (2005).

55. See ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *THE ASIAN AMERICAN VOTE: REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION* (2005), available at [http://www.aaldef.org/articles/2005-04-20\\_67\\_TheAsianAmeric.pdf](http://www.aaldef.org/articles/2005-04-20_67_TheAsianAmeric.pdf).

56. Mitchel Maddux, *GOP Calls for Probe of State's Election Rolls*, THE (BERGEN COUNTY, N.J.) RECORD, Sept. 16, 2005.

57. See Brennan Center for Justice, *The Truth About Fraud: New Jersey, 2004*, [http://www.truthaboutfraud.org/case\\_studies\\_by\\_state/new\\_jersey\\_2005.html](http://www.truthaboutfraud.org/case_studies_by_state/new_jersey_2005.html).

58. See JAMES FINCH, NANETTE HEGERTY, E. MICHAEL McCANN & STEVEN M. BISKUPIC, *PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD* (May 10, 2005), available at <http://www.wispolitics.com/1006/electionfraud.pdf>.

59. See *id.* at 2. According to the report, the list of suspected fraudulent voters was around 100 out of over 250,000 votes cast.

60. See *id.*

61. *Id.*

62. Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U.L. REV. 353, 369 (2005).

63. Court's Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), available at [www.seattleweekly.com/2005-06-08/news/borders-et-al-v-king-county-et-al.php?page=full](http://www.seattleweekly.com/2005-06-08/news/borders-et-al-v-king-county-et-al.php?page=full).

64. *Id.*

65. See Gene Johnson, *Two Plead Guilty to Voting Twice in 2004 General Election*, Associated Press, June 2, 2005; Keith Ervin, *6 Accused of Casting Multiple Votes*, SEATTLE TIMES, June 22, 2005.

66. See United States Department of Justice, Fact Sheet: Protecting Voting Rights and Preventing Election Fraud, available at [http://www.usdoj.gov/opa/pr/2002/November/02\\_at\\_641.htm](http://www.usdoj.gov/opa/pr/2002/November/02_at_641.htm).

67. See U.S. ELECTION ASSISTANCE COMM. ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY app. 3, at 4 (Dec. 2006).

68. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

69. See COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 73 n.22 (2005); BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (Nov. 2006), available at <http://www.vote.caltech.edu/VoterID/CitizensWithoutProof.pdf> [hereinafter CITIZENS WITHOUT PROOF]; *Verification of Identity*, in TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM, sec. VI (Aug. 2001), available at [http://www.tcf.org/Publications/electionreform/full\\_tf\\_report.pdf](http://www.tcf.org/Publications/electionreform/full_tf_report.pdf)

70. In addition, in Section VI, *infra*, there is discussion of the evidence presented in each case on these issues.

71. Controversy surrounded the development of these reports and their eventual release. For more information see Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, A01.

72. As discussed *id.*, the EAC commissioned two consultants—one with a progressive background, one with a conservative background, to draft the report. The report turned in by the consultants was later changed by EAC staff. Compare JOB SEREBROV & TOVA WANG, VOTING FRAUD AND VOTER INTIMIDATION: REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON PRELIMINARY RESEARCH AND RECOMMENDATIONS, Draft Report (not adopted by U.S. Election Assistance Commission), available at [http://graphics8.nytimes.com/packages/pdf/national/20070411voters\\_draft\\_report.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070411voters_draft_report.pdf), with U.S. ELECTION ASSISTANCE COMM'N., ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY (Election Assistance Commission, Dec. 2006). These changes were controversial and were the subject of a House Committee hearing. The report submitted by the consultants includes all of the research they compiled, while the final report omits major portions of that research.

73. See *id.*

74. *Presentation to the U.S. Election Assistance Commission: Summarizing a Report on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002 Public Law 107-252 Submitted on June 28, 2006*, by The Eagleton Institute of Politics, Rutgers, The State University of New Jersey and The Moritz College of Law, The Ohio State University, Thomas O'Neill and Tim Vercellotti, Testimony to EAC, Feb. 8, 2007 (like the EAC Fraud Report, the EAC did not endorse the findings of this report).

75. M. V. HOOD III & CHARLES S. BULLOCK, III, WORTH A THOUSAND WORDS? AN ANALYSIS OF GEORGIA'S VOTER IDENTIFICATION STATUTE 15 (2007).

76. See *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1311 (N.D. Ga. 2006).

77. JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1, 11 (June 2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

78. See CITIZENS WITHOUT PROOF, *supra* note 69.

79. *Id.*

80. See Matt A. Barreto, et al., Washington Institute for the Study of Ethnicity and Race, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, at Table 1.1b (Wash. Inst. for the Study of Ethnicity & Race, Working Paper, 2007), available at [http://depts.washington.edu/uwiser/documents/Indiana\\_voter.pdf](http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf).

81. U.S. Census Bureau, Tenure by Vehicles Available by Age of Householder (2000), available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-geo\\_id=D&-ds\\_name=D&-lang=en&-mt\\_name=DEC\\_2000\\_SF3\\_U\\_H045](http://factfinder.census.gov/servlet/DTable?_bm=y&-geo_id=D&-ds_name=D&-lang=en&-mt_name=DEC_2000_SF3_U_H045) (10 percent of American households have no available automobile while 24 percent of African American and 17 percent of Latino households have no automobile); IND. DEPT. OF TRANSP. MARKET RESEARCH PROJECT, 3.0 ENVIRONMENTAL JUSTICE PERSPECTIVES 3–36, available at [http://www.in.gov/indot/files/market\\_section3.pdf](http://www.in.gov/indot/files/market_section3.pdf) (noting that, while over 90 percent of Indiana households have access to at least one automobile, one in four below-poverty Indiana households lack access to an automobile).

82. 109 CONG. REC. S8692 (daily ed. Aug. 2, 2001) (statement of Sen. Bond).

83. See Brennan Center for Justice, *The Truth About Fraud: Missouri, 2000*, [http://www.truthaboutfraud.org/case\\_studies\\_by\\_state/missouri\\_2000.html](http://www.truthaboutfraud.org/case_studies_by_state/missouri_2000.html).

84. See *e.g.*, MLL 168.823; H1408 (Miss. 2007); H 218 (Tex. 2006).

85. See COMM'N ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS; REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 18 (Sept. 2005).

86. See *id.* at 88.

87. See Jimmy Carter and James A. Baker III, Editorial, *Voting Reform Is in the Cards*, N.Y. TIMES, Sept. 23, 2005.

88. Voter Protection Act of 2005, S. 414, 109th Cong. (2005).

89. See *infra* Section VI for a discussion regarding opinions on whether government issued photo identification requirements for voters constitute a poll tax.

90. Voter Protection Act of 2005, S. 414, 109th Cong. (2005).

91. See Valuing Our Trust in Elections Act, H.R. 2250, 109th Cong. (2005); Verifying the Outcome of Tomorrow's Elections Act, H.R. 3910, 109th Cong. (2006).

92. Neither of these bills made it out of committee.

93. Amendment by Sen. McConnell to the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

94. The Real ID Act has an implementation date of May 2008, although regulations issued by the Department of Homeland Security in 2007 has extended the deadline. Sen. McConnell's amendment would have imposed Real ID before the implementation date by requiring it for voting starting in January 2008.

95. See Federal Election Integrity Act of 2006, H.R. 4844, 109th Cong. (2006).

96. The bill passed 228–196 with all but three Republicans voting for it and all but four Democrats voting against.

97. This case discussion in this article focuses on cases involving challenges to legislative enactments or voter referenda that require photo identification for in person voters or require voter registrants to provide documentary proof of citizenship. There are other cases

involving identification requirements since 2005 not covered here. For example, in Michigan, the Michigan Supreme Court issued an advisory opinion stating that Michigan's law, which requires voters to provide photo identification or sign an affidavit averring that they do not have photo identification, is facially constitutionally valid. The law had been originally enacted in 1996 and reenacted in 2005, but had not been enforced because of a 1997 Michigan Attorney General's opinion that the law violated Equal Protection Clause of the United States Constitution. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 2007 Mich. LEXIS 1582 (Mich. July 18, 2007). In addition, in Mississippi, the Mississippi Democratic Party filed suit arguing that Mississippi's "open" primary system, which allowed any registered voter to vote in the Democratic Primary, violated the First Amendment. The federal district court granted the Democratic Party's motion for summary judgment but ordered remedies not requested by the Democratic Party, including requiring the Mississippi State Legislature to pass legislation by spring 2007 that would include a photo identification requirement for voters in primary elections. *Mississippi State Democratic Party v. Barbour*, 2007 U.S. Dist. LEXIS 41908 (N.D. Miss. June 8, 2007); 2007 U.S. Dist. LEXIS 52141 (N.D. Miss. July 17, 2007). The court's decision resulted in a now-pending appeal not only from the defendants, but from the plaintiffs, as well as the Mississippi NAACP and the Mississippi Republican Executive Committee, both of which sought intervention after the court's order.

98. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (citations omitted).
99. *Carrington v. Rash*, 380 U.S. 89 (1965).
100. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).
101. *Dunn v. Blumstein*, 405 U.S. 330 (1972).
102. *Carrington*, 380 U.S. at 96–97, *Kramer*, 395 U.S. at 627–33, *Dunn*, 405 U.S. at 342–60.
103. 405 U.S. at 345.
104. *Id.*
105. *Id.* at 351.
106. *Id.* at 353.
107. *Burdick v. Takushi*, 504 U.S. 428 (1992).
108. *Id.* at 434.
109. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).
110. *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).
111. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789 (1983)).
112. *Id.* at 440.
113. U.S. Const. amend XXIV, § 1.
114. *Harman v. Forssenius*, 380 U.S. 528 (1965).
115. *Id.* at 530–31.
116. *Id.* at 531–32.
117. *Id.* at 540.
118. *Id.*
119. *Id.* at 540–41 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).
120. *Id.* at 541.
121. *Id.* at 542.
122. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

123. *Id.* at 666.
124. *Id.* at 668.
125. *Id.* at 670.
126. GA. CODE ANN. §21-2-417(a) (2004). The acceptable forms of identification were
  1. A valid Georgia driver's license;
  2. A valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification;
  3. A valid United States passport;
  4. A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
  5. A valid employee identification card containing a photograph of the elector and issued by any employer of the elector in the ordinary course of such employer's business;
  6. A valid student identification card containing a photograph of the elector from any public or private college, university, or postgraduate technical or professional school located within the State of Georgia;
  7. A valid Georgia license to carry a pistol or revolver;
  8. A valid pilot's license issued by the Federal Aviation Administration or other authorized agency of the United States;
  9. A valid United States military identification card;
  10. A certified copy of the elector's birth certificate;
  11. A valid social security card;
  12. Certified naturalization documentation;
  13. A certified copy of court records showing adoption, name, or sex change;
  14. A current utility bill, or a legible copy thereof, showing the name and address of the elector;
  15. A bank statement, or a legible copy thereof, showing the name and address of the elector;
  16. A government check or paycheck, or a legible copy thereof, showing the name and address of the elector; or
  17. A government document, or a legible copy thereof, showing the name and address of the elector.
127. The acceptable forms of identification under the 2005 law were
  1. A Georgia driver's license that was properly issued by the appropriate state agency;
  2. A valid Georgia identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector;
  3. A valid United States passport;

4. A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
5. A valid United States military identification card, provided that such identification card contains a photograph of the elector; or
6. A valid tribal identification card containing a photograph of the elector.

GA. CODE ANN. §21-2-417(a) (2005).

128. GA. CODE ANN. §21-2-380 (2005).

129. Tom Baxter and Jim Galloway, *View of Past Closed in Walkout*, ATLANTA J. CONST., Mar. 15, 2005, at B4.

130. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1332–33 (N.D. Ga. 2005).

131. In the Georgia House, 89 Republicans and two Democrats voted for Act 53 and 72 Democrats and three Republicans voted against it. In the Georgia Senate, 31 Republicans and one Democrat voted for Act 53 and 18 Democrats and two Republicans voted against it. *Id.* at 1331.

132. *See supra* notes 13–15 and accompanying text.

133. Prior to the decision in *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000), the Department of Justice had interpreted the purpose prong of Section 5 to bar any voting change that had the purpose of discriminating against minority voters. In *Bossier II*, the Supreme Court interpreted the Section 5 purpose prong to bar only changes that would put minorities in a worse position prior to the change. When President Bush and Congress reauthorized the temporary provisions of the Voting Rights Act in July 2006, it restored the purpose prong to the pre-*Bossier* standard. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 §§2, 5, 120 Stat. 557–78, 580–81 (2006).

134. Dan Eggen, *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005, at A1.

135. *Common Cause/Georgia*, 406 F. Supp. 2d 1326.

136. *Id.* at 1376.

137. *Id.* at 1370 (emphasis in original).

138. *Id.* at 1365–66.

139. *Id.* at 1366.

140. *Common Cause/Georgia*, 439 F. Supp. 2d at 1306–11.

141. *Id.* at 1310.

142. *Id.* at 1311.

143. *Id.* at 1312–13.

144. *Id.* at 1354–55.

145. *Id.* at 1349–50.

146. *Id.* at 1350–51.

147. *Lake v. Perdue*, No. 2006CV119027 (Fulton Co. Sup. Ct. Ga., July 7, 2006).

148. *Lake v. Perdue*, No. 2006CV119027 (Fulton Co. Sup. Ct. Ga., Sept. 19, 2006).

149. *Id.* at 13.
150. *Id.* at 14.
151. *Lake v. Perdue*, 2007 Ga. Lexis 433, at \*5-6 (Ga. June 11, 2007).
152. *Common Cause/Georgia v. Billups*, 2007 U.S. Dist. LEXIS 68950 (N.D. Ga. Sept. 6, 2007).
153. *Id.* at \*111.
154. *Id.* at \*134.
155. *Id.* at \*107.
156. *See id.* at \*105.
157. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
158. *Common Cause/Georgia*, 2007 U.S. Dist. LEXIS 68950, at \*106-08.
159. Indeed, the district court rejected the admissibility of affidavits of individuals who stated that they did not have identification. *Id.* at \*43.
160. *Id.* at \*119.
161. *Id.* at \*74-75; *see also* note 74 and accompanying text. Dr. Hood was an expert hired by plaintiffs whose expert testimony regarding the racial and age analysis of a 2006 match performed by him was rejected by the court on *Daubert* grounds. A race and age analysis of the 2007 match done by Georgia, however, shows the same disparate impact on minority and elderly voters. The race and age analyzes are possible because this information is contained on Georgia's voter registration form.
162. *Common Cause/Georgia*, 2007 U.S. Dist. LEXIS 68950, at \*121-22.
163. *Id.* at \*129-130.
164. *Id.* at \*132.
165. *Id.* at 131-34.
166. *Id.* at 125-27.
167. Notice of Appeal, *Young v. Billups*, No. 05-EV-201 (N.D. Ga.).
168. IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2; 3-11-8-25.1 (2007).
169. IND. CODE §§ 3-11.7-5.-2.5, 3-11-8-23, 3-11-8-25.1 (2007).
170. IND. CODE §§ 3-11-10-1.2. The qualifications for voting absentee are
1. The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.
  2. The voter will be absent from the precinct of the voter's residence on election day because of service as:
    - a. a precinct election officer under IND. CODE § 3-6-6;
    - b. a watcher under IND. CODE § 3-6-8, IND. CODE § 3-6-9, or IND. CODE § 3-6-10;
    - c. a challenger or pollbook holder under IND. CODE § 3-6-7; or
    - d. a person employed by an election board to administer the election for which the absentee ballot is requested.
  3. The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.
  4. The voter is a voter with disabilities.

5. The voter is an elderly voter.
6. The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.
7. The voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.
8. The voter is eligible to vote under IND. CODE §3-10-11 or IND. CODE §3-10-12.
9. The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.
10. The voter is an address confidentiality program participant (as defined in IND. CODE §5-26.5-1-6).  
IND. CODE §3-11-10-24.
171. *Indiana Democratic Party v. Rokita*, 485 F. Supp. 2d 775, 786 (S.D. Ind. 2006).
172. *Id.* at 822.
173. *Id.* at 803.
174. *Id.* at 825 (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1133 (7th Cir. 2004)).
175. *Id.* at 792–93.
176. *Id.* at 826.
177. *Id.* at 827.
178. *Id.*
179. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007).
180. *Id.* at 952.
181. *Id.*
182. *Id.* at 951.
183. *Id.* at 953.
184. *Id.* at 954.
185. *Crawford*, 472 F.3d at 954 (Evans, J., dissenting).
186. *Id.* at 955.
187. *Id.*
188. *Crawford v. Marion County Election Bd.*, 484 F.3d 436 (7th Cir. 2007) (en banc).
189. *Id.* at 437 (Wood, J., dissenting).
190. *Id.*
191. *Id.* at 438.
192. *Id.* at 439.
193. *Crawford v. Marion County Election Bd.*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (*cert. granted*).
194. ARIZ. REV. STAT. §16-152 (2004).
195. ARIZ. REV. STAT. §16-579 (2004).
196. 2004 Arizona Ballot Propositions, Proposition 200, at 1.
197. Under Proposition 200, an applicant can prove citizenship by providing the number of a driver's license or nonoperating license issued after October 1, 1996, that indicates that the applicant is a citizen; a photocopy of the applicant's birth certificate; a photocopy

of a passport; the applicant's United States naturalization documents or the number of the certificate of naturalization; other documents established under the Immigration Form and Control Act of 1986, or the applicant's Bureau of Indian Affairs (BIA) card number, tribal treaty card number, or tribal enrollment number. ARIZ. REV. STAT. §16-479 (2007). BIA and tribal treaty cards that include identification number of individual tribal members do not exist. ITCA's Plaintiffs Motion for Preliminary Injunction, at 4. Registered voters who move to Arizona from out-of-state or from another Arizona county must provide proof of citizenship; registered voters who move within an Arizona county do not. ARIZ. REV. STAT. §16-479 (2007).

198. ARIZ. REV. STAT. §16-579 (2007).

199. See EAGLETON INSTITUTE REPORT, *supra* note 11, at App. A.

200. The following forms of photo identification are acceptable: (1) valid Arizona driver license; (2) valid Arizona nonoperating identification license; (3) tribal identification card or other form of tribal identification; and (4) valid United States federal, state, or local government issued identification. The following forms of nonphoto identification are acceptable: (1) utility bill of the elector dated within 90 days of the election; (2) bank or credit union statement that is dated within 90 days of the date of the election; (3) valid Arizona Vehicle Registration; (4) Indian Census Card; (5) property tax statement of the elector's residence; (6) tribal enrollment card or other form of tribal identification; (7) vehicle insurance card; (8) Recorder's Certificate; and (9) valid United States federal, state, or local government-issued identification, including a voter registration card issued by the county recorder. ARIZONA SECRETARY OF STATE, ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 113-14 (2006).

201. Voters who did not bring identification to the polls cast conditional provisional ballots that are not counted unless the voter brings the required identification to the "county recorder's office by 5:00 PM on the fifth business day after a general election that includes an election for federal office or 5:00 PM on the third business day after any other election." *Id.* at 120.

202. Native American voters are treated differently in one instance—voters who present one form of tribal identification that contains the name of the voter are provided with a provisional ballot that is counted if the signature in the affidavit on the provisional ballot envelope matches the signature on the voter's registration form.

203. ARIZ. REV. STAT. §16-548.

204. ARIZ. REV. STAT. §16-541.

205. See *Gonzalez v. Arizona*, 2006 U.S. Dist. LEXIS 76638, at \*5 (D. Ariz. Oct. 11, 2006).

206. See Joinder in *Gonzalez' Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause*, *Gonzalez v. Arizona*, No. 2006-CIV-01268 (D. Ariz. 2006).

207. 42 U.S.C. §1973gg-7(a)(2).

208. Joint Conference Committee Report on the National Voter Registration Act of 1993, H. Rep. No. 103-66 (1993).

209. Letter from Thomas R. Wilkey, Executive Director, U.S. Election Assistance Commission, to Jan Brewer, Arizona Secretary of State (Mar. 6, 2006).

210. *Gonzalez v. Arizona*, No. 2006-CIV-01268, slip. op. at 13 (D. Ariz. June 19, 2006).

211. The Navajo Nation plaintiffs filed a separate motion for preliminary injunction on the polling place identification requirements. The district court denied this motion.

212. ITCA Plaintiffs' Reply in Support of Motion for Preliminary Injunction, at 2, *Gonzalez v. Arizona*, No. 2006-CIV-01268 (D. Ariz. 2006). The number of rejected forms is now greater than 30,000. ITCA Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment, at 4, *Gonzalez v. Arizona*, No. 2006-CIV-01268 (D. Ariz. 2007).

213. ITCA Plaintiffs' Motion for Preliminary Injunction, at 11–21, *Gonzalez v. Arizona*, No. 2006-CIV-01268 (D. Ariz. 2006).

214. *Id.* at 21–22.

215. *Gonzalez*, 2006 U.S. Dist LEXIS 76638, at \*16 (quoting *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919).

216. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 6–7 (2006).

217. *Id.* at 5.

218. *Id.* at 7–8.

219. *Id.* at 7.

220. *Id.* at 8 (Stevens, J., concurring).

221. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

222. *Id.* at 1047.

223. *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, slip op. at 2 (D. Ariz. Aug. 28, 2007) (quoting *Gonzalez*, 485 F.3d at 1050).

224. *Id.*, slip op. at 3 (quoting *Gonzalez*, 485 F.3d at 1049).

225. Under the 2002 statute, voters had to provide one of the following:

1. Identification issued by the state of Missouri, an agency of the state, or a local election authority of the state;
2. Identification issued by the United States government or agency thereof;
3. Identification issued by an institution of higher education, including a university, college, vocational, and technical school, located within the state of Missouri;
4. A copy of a current utility bill, bank statement, government check, paycheck, or other government document that contains the name and address of the voter;
5. Driver's license or state identification card issued by another state; or
6. Other identification approved by the secretary of state under rules promulgated pursuant to subsection 3 of this section or other identification approved by federal law. Personal knowledge of the voter by two supervising election judges, one from each major political party, shall be acceptable voter identification upon the completion of a secretary of state-approved affidavit that is signed by both supervisory election judges and the voter that attests to the personal knowledge of the voter by the two supervisory election judges. The secretary of state may provide by rule for a sample affidavit to be used for such purpose.

MO. REV. STAT. § 115.427.1 (2005).

226. *Weinschenk v. State of Missouri*, 203 S.W.3d 201, 210 (Mo. 2006).

227. MO. REV. STAT. § 115.427.1 (2006).

228. MO. REV. STAT. § 115.427.4 (2006).

229. MO. REV. STAT. § 115.427.7 (2006).
230. MO. REV. STAT. § 115.427.13 (2006).
231. *Id.*
232. *Weinschenk v. State of Missouri*, No. 06AC-CC00656 (Cole Co. Cir. Ct., Sept. 14, 2006).
233. *Id.* at 9.
234. *Weinschenk*, 203 S.W.3d at 204.
235. *Id.* at 212.
236. *Id.* at 215.
237. *Id.* at 206, 212–15.
238. *Id.* at 213–14.
239. *Id.* at 217.
240. *Id.* at 222.
241. The statute setting forth the identification requirements reads as follows:  
As used in the Election Code [N.M. STAT. ANN. § 1-1-1 (1978)], “required voter identification” means any of the following forms of identification as chosen by the voter:
- A. a physical form of identification, which may be:
    - (1) an original or copy of a current and valid photo identification with or without an address, which address is not required to match the voter’s certificate of registration or a voter identification card; or
    - (2) an original or copy of a utility bill, bank statement, government check, paycheck, student identification card or other government document, including identification issued by an Indian nation, tribe or pueblo, that shows the name and address of the person, the address of which is not required to match the voter’s certificate of registration; or
  - B. a verbal or written statement by the voter of the voter’s name, year of birth and unique identifier; provided, however, that the statement of the voter’s name need not contain the voter’s middle initial or suffix.
- N.M. STAT. ANN. § 1-1-24.
242. *Albuquerque, N.M., City Charter*, art. XIII, § 14 (Oct. 4, 2005).
243. *Id.*
244. *Id.*
245. *ACLU of New Mexico v. Santillanes*, 2007 Lexis 17087, at \*6–7 (D.N.M. Mar. 6, 2007).
246. *Id.* at \*72–78.
247. *Id.* at \*96.
248. *Id.* at \*96–97 (parenthetical omitted).
249. *Id.* at \*98–99.
250. *Id.* at \*100.
251. *Id.* at \*105.
252. *Id.* at \*111–12.
253. *Notice of Appeal, ACLU of New Mexico v. Santillanes*, No. 05-1136 (D.N.M.).