



## **TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS SEPTEMBER 17, 2004**

Good morning, my name is Courtenay Strickland. Thank you for the opportunity to address the Commission. I am the Voting Rights Project Director of the American Civil Liberties Union (ACLU) of Florida and a founding member of the Miami-Dade Election Reform Coalition. My testimony here builds in part on testimony offered on behalf of the Florida Equal Voting Rights Project by JoNel Newman on January 11, 2001 and by Charles Elsesser and Howard Simon on June 20, 2002. The Florida Equal Voting Rights Project was a collaborative effort of the ACLU of Florida, Florida Legal Services and the Florida Justice Institute. I served as its coordinator.

In January 2001, JoNel Newman testified that Florida's voting problems were of two kinds. "First, not every eligible elector who went to the polls to cast a vote was permitted to do so. Second, not all votes cast by eligible electors were counted." These two problems continue to lie at the crux of all voting irregularities in Florida. Prior to the failed primary elections in South Florida on September 10, 2002, many believed that the latter problem – making sure votes cast were accurately counted – would be solved by the new technology that had been put into place. The subsequent problems with both the technology and management of Direct Recording Equipment (DRE) voting machines have since called that into question.

But the persistent issue across Florida elections since 2000, even in elections for which vote-counting has gone smoothly, has been vote suppression due to a compendium of policies and procedures often unrelated to technology. November 2000 taught us that voting policies and procedures that, if taken singly, might result in relatively small numbers of votes lost, can combine to create significant disfranchisement of large numbers of eligible voters. That was the case in November 2000 with faulty implementation of voter identification policies, precinct rolls that failed to show the voter roll for the full county, busy phone lines at the offices of Supervisors of Elections, inadequate language assistance at the polls, precincts that were moved at the last minute, and a host of other "little" problems. The November 2000 election taught us that even the seemingly smallest voting policy, practice, procedure, or problem must be scrutinized in order to prevent widespread disfranchisement.

Here, I have chosen four types of vote suppression that currently threaten to wrongly strip eligible voters, particularly voters within minority communities, of their ability to exercise their most fundamental right in a democracy. For each type of vote suppression, I make recommendations whenever possible for the best way to avoid potential injustice in upcoming and future elections.

## I. Florida's Voting and Civil Rights Ban Against People with Felony Convictions

The first and most egregious type of vote suppression in Florida is one with which the Commission is already familiar – the mass disfranchisement of more than 600,000 citizens in our state on the basis of a past felony conviction.<sup>1</sup> The disproportionate racial impact of this ban is hard to overstate. Nearly one in three African American men in Florida's voting age population have been stripped of their right to vote.<sup>2</sup> New figures from a study produced by the Mexican American Legal Defense and Educational Fund show that nearly 120,000 Latinos in Florida have lost their most fundamental right in a democracy, and that Latinos constitute over 12% of the total number of persons disfranchised by Florida's voting ban.<sup>3</sup> Worse still, upon conviction of a felony in Florida, one loses not only the right to vote, but also the right to hold certain state job licenses, which directly impacts persons' ability to support their families, pay their taxes, and act as productive citizens through meaningful employment.

The job license issue highlights the fact that Florida's voting and civil rights ban impacts not only the person convicted of the crime but also that person's spouse, children, and ultimately the community as a whole when people suffer grave economic consequences and are relegated to the status of ghost citizenship. Additionally, from this massive injustice, codified in our state constitution in 1868 (the constitution Florida had to adopt in order to be readmitted into the United States after the Civil War), flow additional voting irregularities that disproportionately impact those in minority communities – namely the illegal removal from Florida voting rolls of eligible voters who have been erroneously marked as felons who have not had their rights restored.

Because the commission has already received a complete briefing on both Florida's felon purge and the underlying voting and civil rights ban, the topic will be left to the question and answer time. Nonetheless, the ACLU of Florida would recommend the following concrete solutions:

- In the short term, the Governor and the Cabinet, sitting as the Board of Executive Clemency, should amend the Rules of Executive Clemency to make the process of restoration of civil and voting rights virtually automatic for those completing their sentences. In addition, the Legislature together with the Governor should also allocate additional funding to ensure that the applications currently awaiting review are processed expeditiously.
- In the long term, this voting ban needs to be removed from Florida's state constitution. The Legislature should pass a resolution placing a state constitutional amendment on the ballot for the voters to vote on. Because this

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<sup>1</sup> Expert report by University of Minnesota sociologist Christopher Uggen on the disproportionate racial impact of Florida's voting ban. The report is part of the court record in the *Johnson v. Bush* lawsuit challenging Florida's voting ban. The figures cited are as of December 2000.

<sup>2</sup> *Ibid.*

<sup>3</sup> "Diminished Voting Power in the Latino Community: The Impact of Felony Disfranchisement Laws in Ten Targeted States". A report by MALDEF, a collaborative partner in the Right to Vote Campaign. December 2003.

has failed to occur over the past several years, ballot initiative petitions are now being circulated to accomplish this goal. Support for that ballot initiative is crucial. Restoration of the most fundamental right in a democracy – the right to vote – should not lie in the hands of politicians, as is currently the case in Florida.

## II. Implementation of Provisional Balloting

As was reported by Charles Elsesser in his June 20, 2002 testimony before the commission, the Florida Legislature passed legislation in 2001 allowing voting by provisional ballot when it is not possible to determine if a voter is registered. The Florida Equal Voting Rights Project testimony from that time stated, “While as a general matter provisional ballots should be seen as a progressive step, the standards in this legislation for disqualifying provisional ballots could result in numerous minority voters being disqualified from voting solely due to their use of provisional ballots.” The standards referred to Florida Statute 101.048, which states, “If it is determined that the person voting the provisional ballot was not registered or entitled to vote **at the precinct** [emphasis added] where the person cast a vote in the election, the provisional ballot shall not be counted and the ballot shall remain in the envelope containing the Provisional Ballot Voter's Certificate and Affirmation and the envelope shall be marked ‘Rejected as Illegal’.”

The rejection as illegal of all of portions of provisional ballots (including races for which anyone in any precinct would have been qualified to vote, such as President, U.S. Senate or statewide ballot questions) cast in the wrong precinct robs the provisional ballot of its ability to correct one of the problems it was intended to address, namely, when a voter arrives in the wrong precinct and cannot be directed to the correct one. Worse, without proper training to instruct poll workers to direct people to their proper precinct, the provisional balloting process threatens to mislead voters into thinking that they are participating in American democracy by casting a ballot when in fact they are actually being disfranchised.

Our June 2002 testimony pointed out that poor people, and consequently, the minority population, are more likely to move than the non-Hispanic White population, and that the majority of moves among Blacks and Latinos are within their present county of residence. Thus, such voters remain legally registered to vote within their counties of residence, but may find that they must vote in a new precinct. Areas with rapidly changing populations, which often have disproportionate numbers of minority voters, also have the largest numbers of new precincts and precinct boundary changes. In both scenarios, voters who show up at their old precinct may encounter difficulties in determining their correct precinct, and poll workers may find it easier to give the person a provisional ballot, not realizing that in doing so, the elector will be disfranchised. Unfortunately, these fears have played out largely as we expected in 2002, as you will see below.

At the time this legislation was first introduced as part of the proposals in the Florida Election Reform Act of 2001, the Florida Equal Voting Rights Project urged legislators to allow provisional ballots to count in all the races for which the person would have otherwise qualified. The only objection heard at the time to eliminating the correct precinct requirement was that doing so would allow voters to drop into any precinct in their county and try to vote. While the

need to preserve participation in local elections is certainly a valid concern, voters wishing to drop into any precinct and vote now have ample opportunity to do so through the early voting process, which makes it unlikely that such problems would occur on a widespread basis on Election Day.

During the time the legislation was being considered, some comments were also made that the certification deadline was too tight to allow Supervisors of Elections, without the benefit of the correct precinct requirement, to determine which races to count on each provisional ballot.<sup>4</sup> Even if this claim were true, our democracy should not be so addicted to speed, fueled by accelerated certification deadlines, in obtaining results that we are willing to forfeit participation of qualified electors or otherwise compromise the final tallies.

Data from elections that have occurred since implementation of provisional balloting confirms our concerns that the correct precinct requirement has disfranchised significant numbers of voters. The ACLU of Florida made public records requests to 15 Florida counties, eight of whom responded, for information on provisional balloting for various elections during 2002 through 2004. The information sent by the eight counties concerning various elections during that time period indicated that out of a total of 1,220 provisional ballots cast, 584 were accepted and 636 were rejected. Of those rejected, 122 were rejected because the voter cast the provisional ballot in the wrong precinct. That number amounted to 19.2% of all the provisional ballots that were rejected, or 10% of the total number of provisional ballots cast. That means some 10% of those casting provisional ballots probably left the polling place feeling as if they had voted when in fact their ballots were merely rejected as illegal.

Figures from four counties reporting on the September 2002 primary election indicated that the provisional ballots rejected due to being voted in the wrong precinct constituted 20.1% of all the provisional ballots rejected. In addition, figures reported from the November 2002 general election show that provisional ballots rejected because they were voted in the wrong precinct amounted to 18.9% of all provisional ballots rejected and 11.4% of total provisional ballots cast. In the March 2004 Presidential Preference Primary, with four counties reporting, provisional ballots rejected because they were voted in the wrong precinct amounted to 17.6% of all rejected provisional ballots and 12.5% of all provisional ballots cast. In the August 2004 primary, with four counties reporting, 13.7% of all rejected provisional ballots were rejected because they were voted in the wrong precinct and 8.6% of all provisional ballots cast were discarded as illegal for that reason.

The correct precinct requirement becomes hard to justify when there are figures showing that as much as 12.5% of all provisional ballots cast may be rejected as illegal because they were voted in the wrong precinct. Exacerbating this already evident problem are two basic phenomena – 1) as mentioned above, Florida’s certification deadline may act as a deterrent to counting all the votes cast on provisional ballots in the races for which the voter would have otherwise qualified even if in the wrong precinct, and 2) since the November 2000 election, it has been clear that voters often do not receive, or do not receive in a timely manner, the information they need in order to know where to vote on Election Day, particularly

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<sup>4</sup> See Florida Statute 102.141 concerning certification deadlines.

in areas, often minority communities, where people move frequently in the same county, or where population shifts result in frequent precinct changes.

The latter was clearly evident in the recent August 31, 2004 primary election. The ACLU participated with People for the American Way Foundation and other groups in implementing an Election Protection program outside several key precincts throughout Florida. The program included a hotline through which voters or would-be voters could register complaints. Nearly 300 calls were received from voters across the state of Florida. The largest number of calls came from voters who needed assistance locating their polling place (some of the reasons for this will be touched upon later in this report). The highest number of calls directly to the ACLU office also concerned polling place location. It is clear that voters, for a variety of reasons, are often unsure of where their proper polling place is located. If turnout is high in November, the temptation to give provisional ballots to people who arrive in the wrong polling place, rather than taking the time to find out those persons' correct precincts, may likewise be high.

In addition, hundreds of precinct lines in Florida have changed since 2000 – a factor that no doubt contributes to voter confusion about where to vote. In Miami-Dade County, the number of precincts since 2000 has jumped from 614 to 744. In Broward County, over 125,000 voters have been affected by precinct changes this year. In Leon County, two-thirds of the precinct lines have changed since the 2000 election. Precinct changes and subsequent failure by elections officials to provide adequate and timely information about where to vote have already disfranchised voters in the past. To base the provisional balloting system on the precinct in which the eligible voter is standing guarantees that qualified electors will lose the right to vote.

The ACLU of Florida, as part of the non-partisan Voter Protection Coalition, is also supporting litigation currently underway to strike down the requirement that a voter be in his or her correct precinct in order for the provisional ballot to count. On August 17, 2004, several statewide labor unions filed a lawsuit<sup>5</sup> challenging the Florida statute that requires elections officials to throw out provisional ballots cast by voters in the wrong precincts. The groups maintain that this requirement is an unconstitutional violation of the right to vote because it disfranchises voters who are eligible to vote in county, state, and national elections.

The American Federation of State, County and Municipal Employees Union (AFSCME) Council 79, AFL-CIO and SEIU/Local 1199 are asking the court to strike down the law and order Secretary of State Glenda Hood to change the provisional balloting rules before the November 2004 election. They argue the Florida statute spelling out rules for provisional ballots violates the Florida Constitution because it determines who is an “eligible voter” based

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<sup>5</sup> *American Federation of Labor and Congress of Industrial Organizations; American Federation of State, County and Municipal Employees, AFL-CIO; Service Employees International Union; Florida Public Employees Council 79, AFSCME, AFL-CIO; and SEIU 1199 Florida v. Glenda Hood, in her official capacity as Secretary of State of the State of Florida; Ion Sancho, in his official capacity as Leon County Supervisor of Elections and member of the Leon County 2004 Fall Election Canvassing Board; and Augustus D. Aikens and Jane Sauls in their official capacities as members of the Leon County 2004 Fall Election Canvassing Board*

on the precincts assigned by elections officials, rather than by the county of residence. Article VI, Section 2 of the Florida Constitution guarantees every citizen of the United States who is at least 18 years of age and who is a permanent resident of the state the right to vote in the county where they reside subject only to proper registration in that county.

The solutions to Florida's poor implementation of provisional balloting are largely the same as we suggested at the time the original legislation was proposed:

- The language of the statute governing provisional balloting should be amended to take out references to the requirement that the provisional ballot be cast in the correct precinct, and to allow for the counting of the voter's choices in all races which the person was a qualified elector.
- If it is later determined that Florida's certification deadline is a barrier to implementation of the above form of provisional balloting (additional research should be conducted to confirm whether this is in fact the case), consideration should be given to moving the certification deadline in order to allow for an accurate counting of all the choices made in races in which electors were qualified to vote.

The threat of poorly implemented provisional balloting looms not only over Florida, but also over other states as well. The Help America Vote Act (HAVA), passed by Congress in 2002, mandated provisional ballots to prevent properly registered voters from being turned away from the polls because of clerical errors with registration lists and other problems that came to light in the 2000 elections. An estimated 1.5 to 3 million voters nationwide were unable cast a ballot in the 2000 presidential election due to registration problems. But, at least 16 states across the country responded to HAVA by passing laws restricting access to these ballots, raising new questions about whether the ballots will be counted at all.

### **III. Implementation of Florida's Voter Identification Requirement**

In Florida, a voter cannot be turned away from the poll solely for failure to provide proper identification. The only exception to this rule is for first-time voters who registered by mail and did not provide proper identification to the Supervisor of Election prior to Election Day.<sup>6</sup> For all other voters who fail to provide proper identification at the polls, poll workers should be instructed to ask such individuals to sign an affidavit verifying their name and address, as outlined in Florida Statute 101.043(2), and then such persons should be allowed to vote normally. Poll workers should be instructed NOT to give such voters a provisional ballot.

Despite the above procedure, the voter ID requirement has a long history of suppressing the votes of many throughout our state. According to Florida Equal Voting Rights Project testimony from January 11, 2001, in the November election it was reported to us that voters were turned away from the polls because they did not have photo identification such as a Florida driver's license. Allowing properly registered voters without ID to fill out an affidavit and then vote normally did not happen consistently. (Prior to the passage of the HAVA, there

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<sup>6</sup> Florida Statute 101.043(3).

was no exception for first-time voters who registered by mail and did not provide proper identification to the Supervisor of Elections prior to Election Day.)

In 1998, the State Division of Elections left it up to each county to decide what forms of photo identification were acceptable, and then instructed counties not to enforce the requirement because the Justice Department had not precleared the list of acceptable forms of voter identification from the preclearance counties. Our public records requests after November 2000 further revealed that confusing signage, such as “Photo ID Required”, with no reference to the affidavit process, served as shorthand instructions for both voters and poll workers alike and led many to believe that without an ID, voting was simply not possible.

More recently, in the March 2004 elections, the ACLU received a complaint from a Lee County voter about signs mandating voter identification that were posted in precincts in that county. Signs posted that give the impression that ID is required are at best a partial statement of Florida law. Such signs have turned people away from the polls in the past. To continue to allow the posting of such signs without any reference to an alternative process for those who arrive without ID is to continue to repeat the mistakes of 2000. Having poll workers standing outside polling places, as was also reported in Lee County in 2002, saying things like, “Get photo ID out, you need photo ID,” to people as they wait in line furthermore misleads voters into thinking they should turn back rather than trying to vote that day.

Problems with faulty implementation of the voter ID requirement also extended into the August 31, 2004 primary election. Election Protection received complaints of Floridians being wrongly turned away from the polls for failure to provide photo ID, being asked too aggressively for ID, and/or not being informed of their right to sign an affidavit.

Of course, as with most of Florida’s past voting irregularities, minority communities will once again disproportionately shoulder the disfranchisement that results from faulty implementation of the voter ID requirement. The poor, the elderly, and people within minority communities are less likely to have the necessary ID, or may be less likely to bring it with them to the polling place, such as in the case of elderly voters who are being driven to the polling place by others. For persons who may be getting a ride to the polls or whose job may allow them only one opportunity to go to the polls that day, being told that they need to go home to get their ID is a denial of the precious right to vote.

The surest way to prevent such unnecessary disfranchisement in 2004 is to:

1. refrain from the posting of such signs whenever possible,
2. train poll workers in the affidavit process,
3. clearly mark in the county-wide voter database available at each polling place the names of first-time voters who registered by mail and did not provide ID to the Supervisor of Elections prior to election day, and

4. refrain from the use of provisional ballots for voters who could otherwise sign an affidavit and vote normally.

The ACLU plans to make further inquiries into the nature of ID-related signage to be posted in Florida polling places, whether at the behest of the state and/or by counties themselves, in order to find out whether the planned signage is misleading as was the signage of the past. In the meantime, elections officials can best safeguard the right to vote by:

- instructing all poll workers that no voter is to be turned away from the polls solely for failure to provide proper identification, with the only exception being for first-time voters who registered by mail and did not provide proper ID to the Supervisor of Elections prior to Election Day, and
- clearly identifying in the county-wide voter database available at each polling place any first-time voters who registered by mail and did not provide ID to the Supervisor of Elections prior to election day in order to ensure that only the voters who fall within this exception are provided with provisional ballots and that all other properly registered voters without ID are allowed to vote a normal ballot after completing an affidavit.

#### **IV. Delayed Processing of Voter Registration Applications and/or Delayed Mailing of Registration Cards**

Delays in registering voters and/or in sending out voter registration cards threaten to disfranchise those who arrive at the polls on Election Day. If registrations are not processed in a timely manner, individuals may find that their names are not on the rolls on Election Day. If registration cards are not expeditiously mailed, then electors may be unsure of their proper precinct and may be at risk of voting by provisional ballot when they should have been able to vote normally.

In addition to reports the Voter Protection Coalition has received from its voter registration partners concerning lengthy delays in the voter registration process, voter registration activists in Miami-Dade County report consistently encountering delays in the mailing of voter registration cards to newly registered voters. One activist reported that approximately two of every ten new registrants, or 20%, never receive their cards. These individuals are in fact registered to vote, but often have to complete an additional form in order to receive a voter registration card. According to reports from our Miami-Dade Election Reform Coalition partners, an eight week delay in receiving the card is not uncommon.

In Miami-Dade County, preparation and mailing of voter registration cards is contracted out to a private corporation. Every week or two weeks, a disc is sent to the company with a list of names of voters who need registration cards. It appears that names are either being left off the disc or left off by the company when the cards are prepared.

Failure to receive a voter registration card can have several detrimental effects on new voters:

1. The individuals may be unsure of whether their voter registration application was processed and may not know whether they are on the voter rolls.
2. Many voters are under the impression that one must have a voter registration card in order to vote. Not having a card in hand can intimidate new voters who may not have gone through the process before, thus creating a chilling effect on Election Day turnout.
3. Without a voter registration card, it is difficult for a new voter to know the correct precinct in which to vote. In Miami-Dade, individuals have been told to call the Elections Department in order to receive this information, but it is clear that the Elections Department is already exceptionally busy. One questions how all such calls will be fielded on Election Day.
4. Failure to receive a voter registration card in a timely fashion may lead individuals to fill out duplicate applications, thus increasing the workload on Supervisors of Elections and further lessening the ability to respond to inquiries about polling place location, etc.

Both the processing of voter registration applications and the mailing of voter registration cards must be undertaken in a timely manner in order to prevent disfranchisement of eligible voters.

## **Conclusion**

One of the primary lessons learned from the November 2000 election is that misguided policies and procedures that appear to affect only a small number of electors can in fact work together to create widespread disfranchisement. The same is true of the policies and procedures noted above. Just as Florida's voting and civil rights ban against people with past felony convictions leads to the unjust removal of eligible voters from the rolls through the state and county purge processes, so too does faulty implementation of the voter ID requirement often lead to the issuing of a provisional ballot, which may be rejected if the voter is in the wrong precinct. Similarly, delays in mailing voter registration cards to new voters may cause them to show up at the wrong precinct, where again, without proper poll worker instruction, the voter may receive a provisional ballot that will not count because under Florida law it will be discarded as "illegal". Florida elections officials must devote time and energy to changing these policies and practices that together threaten to suppress the vote of large segments of the population, and particularly those within minority communities. Our democracy depends upon it.