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Testimony in Opposition to H.B. 159

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State Government and Elections Committee
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Introduction

I am a Professor of Law at The Ohio State University's Moritz College of Law, and Associate Director of the *Election Law @ Moritz* project, a group of scholars that provides nonpartisan information, analysis, and commentary on matters of election law and policy. I am co-author of the casebook *Election Law: Cases and Materials*, and numerous articles in the field of election law and voting rights. I am also the co-editor of *Election Law Journal*, the only peer-reviewed publication in the field. This testimony is offered solely on my own behalf, not on behalf of any other individuals or entities with which I am associated.

I regret that I am unable to appear at today's committee hearing in person, because I am out of town. This bill was introduced on Tuesday of last week, and this hearing was not made public until Friday afternoon, by which time it was not possible to alter my travel plans.

It is impossible to formulate a comprehensive analysis of the serious problems raised by HB 159 in the short time since this bill's introduction. Yet that sort of analysis is exactly what a fair deliberative process demands, especially when it comes to legislation affecting the fundamental constitutional right to vote.

Even a preliminary analysis of this bill, however, makes clear that HB 159 would do much harm and no good. It would be a terrible mistake – one that will haunt our state for years to come – if this bill were enacted into law. Simply put, HB 159 would make it more difficult for eligible citizens to vote and have their votes counted, while doing nothing to promote electoral integrity.

In 2004, Ohio earned an unfortunate reputation for making it difficult for eligible citizens to vote.¹ If enacted, this bill would be more harmful than any of the decisions from that period that have so tarnished our state's election system in the eyes of election scholars and the American public. The remarks that follow provide background on voter identification, debunk the arguments in favor of the bill, and anticipate the legal claims that will surely follow if this bill is enacted into law.

¹For a detailed account of the 2004 election controversies, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005).

HB 159 Will Not Advance Its Stated Goal of Promoting Election Integrity, But Will Only Make It More Difficult for Eligible Citizens to Vote.

For some people, requiring government-issued photo ID to vote seems like a “common sense” solution to the problem of voting fraud. But the harder one looks at the evidence, the more clear it becomes that the problem is greatly exaggerated and that the solution is completely illusory.

A bit of history is helpful. In 2005, the Ohio legislature enacted a bill that imposed stricter ID requirements than federal law. Broadly speaking, it required in-person voters to present either photo ID or nonphoto ID with their name and current address. While there was not much evidence at the time that these requirements were needed, the 2005 law does not appear to have prevented many people from voting. That is because the vast majority of citizens have one of the permitted forms of ID, which include utility bills, bank statements, and government documents with the voter’s name and current address. Any negative impact was further ameliorated by the fact that it included mechanisms to accommodate the few who do not have one of the permitted forms of identification. Unfortunately, HB 159 would eliminate the safeguards for voters that the 2005 law created.

Even though the 2005 law was much less onerous than HB 159, it still triggered years of litigation, culminating in a consent decree last year in *Northeast Ohio Coalition for the Homeless v. Brunner (NEOCH)*.² If this new bill passes, it will destabilize the rules yet again – and undoubtedly result in several more years of litigation, just as election officials and poll workers have become familiar with the existing requirements, as clarified through the *NEOCH* case.

The claim that this bill is needed to ensure election integrity is belied by the facts. I have closely studied Ohio’s election system for the past eight years, and am not aware of a proven case of in-person voter impersonation fraud – that is, a voter going to the polls pretending to be someone he or she is not. If there are any incidents of in-person voter impersonation in Ohio, they are extremely rare. Yet that is the *only* type of fraud that a government-issued photo ID requirement can even hope to address. The bill will do nothing about mail voting fraud, double voting, people registered in the wrong place, or any other form of illegal voting.

The only documented case of impersonation I could find in recent Ohio elections involved *absentee voting* by a mother pretending to be her daughter.³ This is not surprising. The few people who attempt voter impersonation aren’t likely to risk criminal prosecution by showing up at the polling place; they are much more likely to vote by mail.

Though supporters may cite ACORN as justification for HB 159, the bill will do nothing about the

²The consent decree and other documents from this case are available on our website: <http://moritzlaw.osu.edu/electionlaw/litigation/NEOCHv.Blackwell.php>.

³Dean Narciso, *2 Ballots Coast Woman \$1,000 Plus Probation*, COLUMBUS DISPATCH, Mar. 29, 2009.

phony registration forms that this now-defunct group was accused of submitting. To the extent they cite ACORN in support of HB 159, supporters blur the distinction between registration fraud and voting fraud. Mickey Mouse's name may have appeared on a registration form, but he did not show up to vote.

Put simply, HB 159 is a solution in search of a problem. As explained below, it would make the real problems with our election system much worse.

HB 159 Is Tailored to Suppress Voting by Citizens Who Are Already Underrepresented in the Electorate.

The evidence demonstrates that many eligible citizens do not have the types of ID that the bill would require. While it is hard to say exactly how many will be discouraged from voting, we do know that some segments of the population will be especially hard hit – particularly young, elderly, disabled, and minority voters. These groups are much less likely to have the type of ID that Ohio's new bill would mandate.

The bill would require those who vote in person on election day to present one of four forms of government-issued ID: a driver's license, a state ID issued by the registrar of motor vehicles, a military ID, or a U.S. passport. Absentee voters are not bound by this requirement, with a big exception: Those who cast absentee ballots *in person* are required to present one of the required forms of ID. Students of election fraud will recognize that this is exactly backwards. While voting fraud is rare, most documented incidents involve *mail-in* absentee ballots. This raises serious questions about the motivation behind the bill, given that Democrats are more likely to cast in-person absentee ballots.

One of the bill's sponsors has claimed that eight other states require photo ID. That is misleading. The statement is apparently based on the National Conference of State Legislatures website of states that require *or request* photo ID.⁴ A close look at those laws reveals that only two states – Indiana and Georgia – refuse to count the votes of those who lack photo ID, as Ohio's bill appears to require. The other states allow voters to sign an affidavit declaring their eligibility and will count their ballots even if they do not have government-issued photo ID.

The many factors that affect turnout make it hard to pin down the precise impact of the laws in Georgia and Indiana. But the available evidence makes clear that its burden will not fall evenly on all citizens. Rather, it will strike hardest against those groups who are already underrepresented in the electorate – specifically, minority voters, people with disabilities, those who are elderly, and

⁴NCSL, *Voter Identification Requirements*, Nov. 22, 2010, available at <http://www.ncsl.org/default.aspx?tabid=16602>.

poorer citizens.⁵ Studies from various states have documented that African American and Latino voters are much less likely to have a driver's license than White voters. This is probably because members of these groups, statistically speaking, are less likely to drive or own a car.

The bill will also have negative impact on younger voters. Ohio's bill conspicuously leaves out student ID – even from a state university – as an acceptable form of voter identification. These voters will no longer be able to present a utility statement or bank statement, and an as-yet unknown number will be impeded from voting. It is difficult to escape the conclusion that suppressing college students' votes is one of the unspoken goals of this proposed legislation.

If Enacted, HB 159 Will Be Vulnerable to Legal Challenges Under Federal and State Law, and Will Precipitate Several More Years of Litigation.

Voting rights advocates can be expected to challenge HB 159 if it becomes law, and they have a strong chance of succeeding. In practical terms, a requirement of government-issued photo ID functions like the poll tax struck down by the U.S. Supreme Court in *Harper v. Virginia Board of Elections*.⁶ Although there is a provision to provide free ID to indigent voters, many voters will not have the documents needed to get state ID handy – and may have to pay for them. There is also the unnecessary burden that the law would impose on voters lacking ID, who will now have to stand in one line at the BMV only to stand in another at the polls on election day. This amounts to a tax on the voter's time, the modern-day equivalent of the disenfranchising practice the Supreme Court struck down in *Harper*.

The bill's proponents can be expected to argue that it's modeled on Indiana's law, which the U.S. Supreme Court upheld in *Crawford v. Marion County Board of Elections*.⁷ But for several reasons, supporters of HB 159 should not draw much comfort from *Crawford*. There was no majority opinion, and the lead opinion by Justice Stevens was extremely narrow. The decision only involved a facial challenge, leaving open the possibility that the law might be struck down as applied to specific voters or groups – like the nuns who were later turned away for having outdated IDs.⁸

⁵M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555 (2008); Matt Barreto, Stephen Nuno & Gabriel Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black, and Asian Voters*, Sept. 1, 2007, available at http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf; John Pawasarat, *The Driver's License Status of the Voting Age Population in Wisconsin*, available at <http://www.inclusionist.org/files/wistatusdrivers.pdf>.

⁶383 U.S. 663 (1966).

⁷553 U.S. 181 (2008).

⁸*Nuns with Dated ID Turned Away at Ind. Polls*, AP, May 6, 2008, available at http://www.msnbc.msn.com/id/24490932/ns/politics-decision_08/.

Crawford's lead opinion relied heavily on the fact that those challenging the Indiana law failed to come up with evidence showing a serious burden on voters. It is not at all clear that Ohio will implement its law so as to accommodate voters of limited means as Indiana did. If Ohio's bill passes, the lawyers challenging it will surely do their homework and take the time to develop stronger evidence of its negative impact on eligible voters. It will help their case if the legislature rushes the bill through with scant evidence of voter impersonation fraud.

There is also the possibility of a state constitutional challenge to Ohio's ID bill, if it becomes law. When Missouri passed a comparable photo ID law, that state's supreme court struck it down under that state's constitution.⁹ It is difficult to believe that our state supreme court will overlook the utter lack of evidentiary justification for HB 159.

Yet another potential claim is for race discrimination under Section 2 of the Voting Right Act. Section 2 is not limited to *intentional* race discrimination, which is notoriously hard to prove. It also bars a voting law or practice that has discriminatory effects – specifically, one that “results in” the denial or abridgement of the right to vote on account of race. Cases under Section 2 tend to be factually complicated, relying on a combination of statistical, historical, and anecdotal evidence of race discrimination. With further factfinding, there is a good chance that those challenging the law will be able to mount a successful challenge under Section 2.¹⁰

Conclusion

If HB 159 passes, it will cast a long shadow over the 2012 presidential election, in which Ohio is again likely to be pivotal. It will undoubtedly sow confusion for Ohio voters and poll workers alike, many of whom have just gotten used to current ID rules. It will result in a major increase in the number of provisional ballots cast, which will in turn increase the likelihood of post-election disputes over the result.¹¹ It will increase both headaches and administrative costs for counties that run elections and the bureau of motor vehicles, at a time when they are watching every penny. It will undoubtedly result in years of litigation. Most important, the bill will make it more difficult for eligible citizens to vote. Its passage would be yet another embarrassment for our state election system.

In sum, HB 159 is the worst election bill that I have seen in eight years of studying Ohio's election system. This committee should reject it outright.

⁹*Weinschenk v. Missouri*, 203 S.W. 3d 201 (2006).

¹⁰Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S. CAR. L. REV. 689 (2006).

¹¹For additional discussion, see Daniel P. Tokaji, *Are Election Reforms Increasing the Margin of Litigation?*, June 21, 2005, available at <http://moritzlaw.osu.edu/electionlaw/comments/2005/050621.php>.