

BRENNAN

CENTER

FOR JUSTICE

Ballot Security and
Voter Suppression: What It Is
and What the Law Says

By Wendy Weiser and Vishal Agraharkar

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S DEMOCRACY PROGRAM

The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

ACKNOWLEDGEMENTS

The Brennan Center gratefully acknowledges the Democracy Alliance Partners, Educational Foundation of America, The Ralph and Fanny Ellison Charitable Trust, Ford Foundation, Anne Gumowitz, Irving Harris Foundation, The Joyce Foundation, The JPB Foundation, Mitchell Kapor Foundation, John D. and Catherine T. MacArthur Foundation, Mertz Gilmore Foundation, Open Society Foundations, Rockefeller Family Fund, the State Infrastructure Fund, the Lawson Valentine Foundation, the William B. Wiener Jr. Foundation, and Nancy Meyer and Marc Weiss for their generous support of our voting work.

The authors especially thank Nicolas Riley, who provided invaluable assistance to update this paper for 2012.

ABOUT THE AUTHORS

Wendy Weiser directs the Democracy Program at the Brennan Center for Justice at NYU School of Law, a non-partisan think tank and public interest law center. She founded and directed the center's Voting Rights and Elections Project, coordinating litigation, research, and advocacy efforts to enhance political participation and prevent voter disenfranchisement across the country. Her work and the work she directed protected the voting rights of hundreds of thousands of citizens in 2006, 2008, and 2010.

She has authored a number of nationally-recognized publications and articles on voting rights and election reform; litigated ground-breaking voting rights lawsuits; testified before both houses of Congress and in a variety of state legislatures; and provided policy and legislative drafting assistance to federal and state legislators and administrators across the country. She is a frequent public speaker and media contributor on democracy issues.

She has appeared on *CNN*, *Fox News*, *Democracy Now!*, and *NPR's Morning Edition*, *All Things Considered*, and *Diane Rehm Show*, among other outlets; her political commentary has been published in the *New York Times*, *Roll Call*, *the Hill*, *Foreign Affairs*, *Huffington Post*, and elsewhere; and she is frequently quoted by the *New York Times*, the *Washington Post*, the *National Journal*, *Politico*, and other news outlets across the country. Previously, she directed the center's Fair Courts Project, which seeks to preserve a fair and impartial judiciary. She also served as an Adjunct Professor at NYU School of Law, where she taught the Brennan Center Public Policy Advocacy Clinic.

Prior to joining the Brennan Center, Ms. Weiser was a senior attorney at NOW Legal Defense and Education Fund, where she worked on issues of access to the courts and domestic violence, a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison, and a law clerk to Judge Eugene H. Nickerson in the United States District Court for the Eastern District of New York. She received her J.D. from Yale Law School and her B.A. from Yale College.

Vishal Agraharkar

Vishal Agraharkar serves as counsel for the Brennan Center's Democracy Program. He also previously served as Pro Bono Counsel for the Democracy Program, where his work focused on voting rights and elections. Prior to joining the Brennan Center, he clerked for the Honorable Helene N. White of the Sixth Circuit Court of Appeals.

Vishal received his J.D. (2010) from Columbia Law School, where he was Editor-in-Chief of *A Jailhouse Lawyer's Manual*. He was also a summer associate at Debevoise & Plimpton LLP, and interned at the Department of Justice Civil Rights Division and the Texas Civil Rights Project.

Vishal received his B.A. (2005) from Williams College, where he majored in Political Science.

I. INTRODUCTION

“Ballot security” is an umbrella term for a variety of practices that are carried out by political operatives and private groups with the stated goal of preventing voter fraud. Far too often, however, ballot security initiatives have the effect of suppressing eligible votes, either inadvertently or through outright interference with voting rights.

There is nothing intrinsically wrong with investigating and preventing voter fraud, despite the fact study after study shows that actual voter fraud is extraordinarily rare.¹ But democracy suffers when anti-fraud initiatives block or create unnecessary hurdles for eligible voters; when they target voters based on race, ethnicity, or other impermissible characteristics; when they cause voter intimidation and confusion; and when they disrupt the voting process.

Unfortunately, ballot security operations have too often had these effects, both historically and in recent elections. A federal appeals court recently found that ballot security operations planned or conducted in recent years have by and large threatened legitimate voters.² The court’s opinion indicates that not only do such initiatives often target eligible voters for disenfranchisement, but they also tend to disrupt polling places, create long lines, and cause voters to feel intimidated.³ Moreover, these effects are often felt disproportionately in areas with large concentrations of minority or low-income voters, where such operations have typically been directed.⁴

While little came of these efforts in the 2010 election, there is reason to believe that similar efforts will pose a renewed threat to voters in 2012. Over the past year, political groups and activist organizations across the country have been pouring substantial resources into anti-voter fraud programs and encouraging their members to serve as voter challengers and poll watchers next year.⁵ For example, in 2011, a Houston-area organization called “True The Vote” announced its plan to recruit and train one million volunteers nationally to monitor the polls during the 2012 general election.⁶ Although the group’s own poll-watching efforts in Harris County, Texas, drew scrutiny in 2010 after witnesses complained that the group’s members were harassing voters in communities of color,⁷ the organization has nevertheless moved forward with plans to support local activists’ poll-watching and voter challenge efforts in other states in 2012. This summer, activists in Maryland who had been inspired by True The Vote’s efforts, challenged hundreds of voters in Baltimore and Prince George’s counties and announced their plans to “fan out to the polls” this November.⁸

With the spate of harsh new voting restrictions that many states have enacted over the past two years,⁹ groups like these have gained a broader platform for promoting their views.¹⁰ These developments suggest that there is a significant risk that ballot security operations will result in vote suppression and voter intimidation during the November 2012 elections, regardless of whether or not this is their intended result.

Accordingly, this paper, which was originally released just before the 2010 election, has been updated for use in 2012. It addresses four types of conduct that often accompany ballot security initiatives:

- **Voter challenges:** formal challenges lodged by political operatives or private citizens to the eligibility of persons presenting themselves to vote, either at the polls or prior to Election Day;
- **Voter caging:** efforts to identify and disenfranchise improperly registered voters solely on the basis of an undeliverable mailing;
- **Voter intimidation:** conduct that intimidates or threatens voters into voting a certain way or refraining from voting; and
- **Deceptive practices:** the dissemination of misleading information regarding the time, place, or manner of an election.

Because this conduct has the potential to interfere with the lawful exercise of the franchise, it is important for everyone involved in the process to have a clear understanding as to what is and what is not permissible conduct. Specifically, voters should be armed with the knowledge that federal and state law afford protections against ballot security efforts that are discriminatory, intimidating, deceptive, or that seek to disenfranchise voters on the basis of unreliable information. Those who participate in ballot security programs should take care to ensure that their initiatives do not encroach upon the rights of eligible voters and run afoul of state and federal laws.

Voters who experience or witness any of the discriminatory, intimidating, or deceptive conduct discussed below should immediately report the problem to election authorities and, when appropriate, to law enforcement authorities. Voters should also call 1-866-OUR-VOTE, a non-partisan voter protection hotline; trained volunteers will be able to provide assistance and take steps to ensure that you can exercise your right to vote. Voters should also report the offensive conduct to the Voting Section of the United States Department of Justice by calling 1-800-253-3931.

II. VOTER CHALLENGES

What Is a Voter Challenge?

Forty-six states permit political party representatives or registered voters to challenge a voters' right to cast a ballot, either on or prior to Election Day. This typically leads to an inquiry, which may result in challenged voters losing their ability to cast ballots that count. Voter challenge laws are defended as a means to prevent voter fraud. At times, however, they can be misused and harm otherwise eligible voters.

When Are Challenges a Problem?

Voter challenges are a problem when they are used in a discriminatory manner, when they are used to intimidate voters, and when they are based on unreliable data.

1. Discriminatory Challenges

Discrimination at the polls, including challenges to voters selected in whole or in part based on their race, ethnicity, national origin, or any related characteristic, is illegal.¹¹ Federal laws — including the U.S. Constitution, the Civil Rights Act, and the Voting Rights Act of 1965 — protect the right to vote from discrimination by state officials. They also prohibit any individuals, whether or not they are state actors, from conspiring to mount challenges in a discriminatory manner.¹² When state officials give effect to discriminatory challenges mounted by private persons, they may violate voters' right to equal protection of the law, regardless of whether they themselves have a discriminatory purpose.¹³ Individuals could also be held criminally liable if they conspire to deprive voters of their federally-protected rights to vote and to be free from discrimination.¹⁴

Although state election laws differ widely as to who can challenge a voter's eligibility; when and under what grounds a challenge may be mounted; and the standards and procedures that govern how a challenge is resolved, most states' laws similarly prohibit discrimination in the voting context.¹⁵

Here are examples of discriminatory challenges that should not be permitted and that could violate federal or state law:

- Challenges based in whole or in part upon race, national origin, appearance, surname, language, or religion.
- Challenges based in whole or in part upon the racial or ethnic composition of a precinct or polling place, or upon mailings targeted at individuals living in precincts with large concentrations of minorities.
- Challenges targeting precincts based on factors such as the political affiliation of a district or polling place, if those factors are strongly correlated with racial or ethnic background.

Here are examples from recent years of alleged incidents of discriminatory challenges:

- Under a voter challenge plan in 2004 in Ohio, 14 percent of new voters in majority-white voting precincts would face challengers while 97 percent of new voters in majority-black locations would face challengers.¹⁶
- In 2004, Native American voters on one Minnesota reservation were subjected to a series of unfounded challenges to their voting eligibility. One challenger ultimately had to be escorted away from the reservation by police.¹⁷

- In Florida in 2004, a list of “ineligible voters” was allegedly created by targeting students at Edward Waters, a historically black college.¹⁸
- In 2004, residents of Atkinson County, Georgia, made blanket challenges to most of the Hispanic voters in their precinct, alleging they were not U.S. citizens. One resident even asked the board of elections for the names of every voter with a Hispanic surname, and went on to challenge most of them.¹⁹
- In Washington State, a man challenged the voting credentials of hundreds of voters in 2004, claiming they were illegal immigrants. He stated that he created the list by looking for names that appeared foreign, eliminating names that “clearly sounded American-born, like John Smith or Powell.”²⁰
- In May 2011, challengers in Southbridge, Massachusetts, reportedly targeted Latino voters and voters with disabilities during a primary election.²¹ Local election officials said that dozens of challenges were filed, leaving several voters feeling intimidated.²²

2. Intimidating Challenges

Because challenges can involve confrontations between prospective voters and persons who may be clothed with authority, they present a risk of voter intimidation. As discussed in the voter intimidation section below, conduct that has the purpose or effect of intimidating voters violates federal criminal law. While state laws vary widely as to the protections they provide voters from abuses of the challenge process, most safeguard voters from intimidation and coercion in addition to that provided by federal law.²³

Here are examples of intimidating conduct in the challenge process:

- Direct confrontation of prospective voters by challengers or poll watchers;²⁴
- The use of insulting, offensive, or threatening language or raised voices;
- The use of law enforcement or other official attire by poll watchers or challengers.²⁵

3. Challenges Based on Unreliable Data

Because challenges have the potential to disenfranchise voters, they should be based on actual and reliable evidence. Challenges that target voters based on unreliable information are improper and may violate state or federal laws.

Many states require challenges to be based on “clear and convincing evidence” or otherwise reliable information.²⁶ Challenges that are based on information that does not reliably indicate voter eligibility may be impermissible under these laws. To the extent state officials knowingly uphold challenges based on unreliable information, they may also run afoul of the Voting Rights Act or other federal laws.²⁷

Here are some examples of challenges based on unreliable data that should not be permitted and that could violate state or federal law:

- **Discriminatory challenges.** Challenges based on race, ethnic group, surname, appearance or related characteristics are not only discriminatory, but unreliable bases upon which to mount a challenge.²⁸
- **No-match lists.** Under the Help America Vote Act, states are required to match voters' registration information against records in existing government databases. When a match is not found, the voter is required to present some form of identification before voting for the first time. Study after study demonstrates that match failures are almost always the result of typos and list flaws.²⁹ In other words, an unsuccessful match is not a reliable indicator of a person's ineligibility to vote. Challenges based on "no match" lists should not be permitted and, if mounted, should be denied.
- **Foreclosure lists.** Some challenges may target voters who have received foreclosure notices or whose properties appear on lists of foreclosure filings. These, too, are notoriously unreliable indicators of voter ineligibility. People who receive foreclosure notices are frequently able to resolve their issues and remain in their homes, and most of those who do move remain eligible to vote in their old polling places under federal and state law.³⁰ Moreover, challenges based on foreclosure lists may have a discriminatory impact on voters of color because of racial disparities in foreclosure rates.³¹
- **Voter caging.** As we discuss below, so-called voter caging campaigns that compile lists of voters to whom mailings were sent and returned as undeliverable are also unreliable indicators of voter ineligibility.³²

Here are some examples from recent years of challenges based on unreliable data that could violate state or federal law:

- In 2004 in Florida, members of a political party reportedly created a list of "ineligible voters" by using a state felon list document known to be filled with errors.³³
- In 2008, political party officials in Michigan announced plans to target voters whose homes had been subject to foreclosure proceedings and who were still registered at their foreclosed home addresses.³⁴ Party officials in Ohio announced a similar plan.³⁵ These efforts were ultimately blocked in both states.³⁶
- In 2008 in Montana, political party officials challenged the registrations of more than 6,000 voters based on unreliable change-of-address information. A federal court found that the challenges were frivolous and violated federal law.³⁷

III. VOTER CAGING

What is Voter Caging?

“Voter caging” refers to the practice of sending mail marked “do not forward” to addresses found on voter rolls, compiling a list of mail that is returned to the sender as undeliverable, and then using that list to purge voter rolls or challenge voters’ eligibility on the grounds that they do not reside at the address under which they are registered. Although supporters of the practice claim it prevents voter fraud, voter caging can sometimes result instead in the targeting of voters based on their race, national origin, or political affiliation, and the disenfranchisement of large numbers of voters who are eligible and properly registered.³⁸

When is Voter Caging a Problem?

Voter caging lists become a problem when they are used by state officials or private challengers as the sole basis to purge voters from the rolls or challenge voters as ineligible. The federal Motor Voter Act prohibits state officials from relying on undeliverable mailings to purge voter rolls.³⁹ Additionally, federal courts have stepped in to prohibit voter caging campaigns that are racially targeted.⁴⁰ When a challenger uses a voter caging list to challenge the ineligibility of voters, he or she attempts to accomplish indirectly what the state is explicitly prohibited from doing — disenfranchising a voter based solely on an undelivered mailing.⁴¹ The challenger may therefore be helping the state to violate federal law.⁴² Some states also explicitly prohibit the use of voter caging lists as the sole basis of a challenge.⁴³

Voter caging is a notoriously unreliable method of determining a voter’s eligibility, as there are numerous reasons why a voter’s mail may be returned unopened even though the voter provided accurate information to election officials. For example, a voter who is a student away at college, or is a member of the armed forces, may be temporarily away from his or her permanent address; a voter may receive mail at a permanent mailing address rather than his or her residential voting address; and mail may be lost, misrouted, or otherwise not delivered by the postal service, through no fault of the voter.⁴⁴ Sometimes the voter rolls themselves suffer from typos that are not the fault of voters. For example, in Milwaukee in 2004, a review of voter fraud allegations found that one-fifth of allegedly invalid addresses were instead the result of data entry errors in the voter rolls.⁴⁵

Additionally, voter caging campaigns frequently target voters based on race, ethnic group, national origin, or political affiliation. Such campaigns may violate federal civil rights laws prohibiting discriminatory targeting for the reasons stated above.⁴⁶

In recent years voters across the country have discovered evidence of several improper or illegal voter caging campaigns.⁴⁷ Some examples include:

- In 2004, a political party sent non-forwardable mail to approximately 130,000 voters in Philadelphia.⁴⁸ The party compiled a list of 10,000 names with undelivered mailings and

threatened to send 1,000 challengers to precincts with predominantly African-American populations to challenge voters based on that list.⁴⁹

- In Ohio in 2004, voter caging campaigns threatened to challenge more than 30,000 voters in precincts with large minority populations on the basis of returned mail alone.⁵⁰
- In 2008, Michigan removed more than 1,400 voters from its rolls on the basis of undeliverable mailings. A federal court found the practice to violate federal law and ordered the state to restore the voters to the rolls.⁵¹

IV. VOTER INTIMIDATION

What is Voter Intimidation?

Voter intimidation encompasses a wide range of conduct that is intended to or that has the effect of coercing voter behavior. In the United States this tactic was at its worst in the decades following the Civil War and through the turn of the 20th century. Violence and threats were systematically used in the South to prevent African Americans from voting.⁵² Today, voter intimidation usually takes more subtle forms, but it continues to suppress the vote of racial and ethnic minorities. Voters, challengers, and poll watchers should watch out for ballot security tactics that cross over, even inadvertently, into intimidating conduct.

When is Voter Intimidation a Problem?

Federal laws prohibit all persons from engaging in conduct that is intended to, *or has the effect of*, intimidating voters.⁵³ When two or more persons agree to undertake such a challenge, they may be criminally liable under Section 241 of the Civil Rights Act, which imposes fines and imprisonment of up to ten years.⁵⁴ It is also impermissible to intimidate any person lawfully transporting individuals to the polling place or assisting individuals to read or cast ballots.

Some examples of illegal voter intimidation include:

- Verbal or physical confrontation of voters by persons dressed in official-looking uniforms.⁵⁵
- Physical intimidation, such as standing or hovering close to voters as they attempt to vote.
- Flyers threatening jail time or other punitive action against persons who vote.⁵⁶
- Direct confrontation or questioning of voters, or asking voters for documentation when none is required.⁵⁷
- Vandalism of polling places.⁵⁸
- Use of police officers to threaten or intimidate voters.⁵⁹

- Photographing or videotaping voters in an effort to intimidate them.
- Threats made by an employer to the job, wages, or benefits of an employee if he or she does not vote in a particular manner.⁶⁰
- Any other conduct that might cause voters to believe they may face legal or other problems if they attempt to exercise their right to vote.⁶¹

Recent Developments

Over the past two years, private citizen groups have grown increasingly active in mobilizing volunteers and enlisting them to serve as poll watchers and challengers on Election Day. This raises the possibility that voters will feel intimidated by the growing presence of private citizens at the polls, especially when the poll watchers and challengers are not members of the communities in which they serve.⁶²

One of these groups, a Houston-area organization known as True The Vote, is currently leading a nationwide campaign to recruit volunteer poll watchers for the 2012 election. In both March 2011 and April 2012, the group held a national summit to raise awareness about its efforts and to teach activists from around the country how to recruit and train volunteers to serve as poll watchers.⁶³ The group's efforts have raised concerns among some Texans⁶⁴ about the potential for voter intimidation in 2012, particularly since volunteer poll watchers affiliated with the group were reportedly seen harassing voters in predominantly minority voting precincts during the 2010 election.⁶⁵ While no criminal charges were ultimately filed against the group, its actions nevertheless illustrate the kind of voter anxiety and disorder that an active poll watcher presence can create on Election Day.⁶⁶

Over the past few months, the organization has been training local activists in dozens of states and supporting their efforts to recruit poll watchers and challenge voters.⁶⁷ Earlier this year, for instance, a North Carolina group with ties to True The Vote tried to challenge over 500 voters on the rolls in Wake County, almost all of which were rejected by local election officials for lack of evidence.⁶⁸ The same group has since lodged hundreds of challenges in three other counties across the state.⁶⁹

Recent actions by citizen groups like these may increase the likelihood of voter intimidation by encouraging potentially dangerous or obstructive behavior by poll watchers. For instance, in 2010, a Minnesota group ran television and radio advertisements offering a \$500 reward to any person who uncovered voter fraud during the election.⁷⁰ The ads ran the week before Election Day and also warned listeners that "surveillance teams" would be observing voters at the polls.⁷¹ Ads like these have raised concerns about their potential to discourage voter turnout since many voters may be nervous about encountering teams of aggressive monitors at the polls, especially when the monitors represent an opposing political party.⁷² In addition, these ads may incentivize more forceful investigation tactics by poll watchers. In either case, the result can be harmful to democratic participation.

V. VOTER MISINFORMATION OR DECEPTIVE PRACTICES

What are Deceptive Practices?

In some cases, political groups or lone individuals acting anonymously engage in the dissemination of misleading information regarding the time, place, or manner of an election, identification requirements, voter eligibility, or the presence and activities of law enforcement near a polling site. The misleading information can be in the form of flyers that are posted or distributed in a neighborhood, or increasingly through use of email and the internet.⁷³ These tactics are aimed at suppressing the vote of racial and linguistic minorities, as well as the elderly and disabled.⁷⁴

Some examples of deceptive tactics in recent years include:

- In 2004 in Ohio, flyers in Franklin County told voters that due to heavy voter registration, Republicans should vote on Tuesday and Democrats should vote on Wednesday.⁷⁵
- In 2006 in Virginia, voters living in areas with large minority populations received calls incorrectly reporting that their polling places had changed.⁷⁶
- In 2008 in Virginia, a flyer that was purportedly from the State Board of Elections was posted in the Hampton Roads area stating that Republicans vote on Tuesday, November 4th, and Democrats vote on Wednesday, November 5th. The Virginia State Police determined that flyer was an “office joke” and not intended to deceive voters.⁷⁷
- In 2008 in Philadelphia, flyers posted near Drexel University incorrectly warned that police officers would be at polling places looking for individuals with outstanding arrest warrants or parking tickets.⁷⁸
- In 2010, two dozen Spanish-speaking voters in Los Angeles, California, received Spanish-language robocalls and mailers instructing them to vote on the day after Election Day.⁷⁹
- In 2010, before the polls closed on Election Day, the manager of a Republican gubernatorial campaign in Maryland reportedly ordered more than 100,000 robocalls to Democratic voters, falsely informing them that the Democratic gubernatorial candidate had already won the election.⁸⁰ Local prosecutors later alleged the calls were part of a deliberate effort to suppress voters in African-American voting districts.⁸¹

When is Voter Deception a Problem?

Efforts to mislead or deceive voters are always a problem and are never permitted. Persons who commit voter deception interfere with the free exercise of the elective franchise of others, and may violate several federal and state laws that prohibit such interference.⁸² To the extent voter deception intimidates and deters voters from voting, such practices violate prohibitions on voter intimidation discussed above. Additionally, many states' laws specifically punish various forms of deceptive practices.⁸³

ENDNOTES

- ¹ In fact, Americans are more likely to be struck by lightning than to commit voter fraud. Justin Levitt, Brennan Center for Justice, *The Truth About “Voter Fraud”* 3, 23 (2007), available at http://www.brennancenter.org/page/-/d/download_file_38347.pdf (various studies of voter fraud in Missouri, New Jersey, and Wisconsin revealed voter fraud rates of 0.0003%, 0.0004%, and 0.0002%, respectively in recent elections).
- ² *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 196-99 (3d Cir. 2012) (“DNC v. RNC”) (summarizing the effects of certain “ballot security” operations attempted between 1981 and 2008). The lower court in the case previously concluded that “it is all but certain that anti-fraud initiatives . . . will result in the disenfranchisement of many individuals whose eligibility is not in question.” 671 F. Supp. 2d 575, 612 (D.N.J. 2009).
- ³ 671 F. Supp. 2d at 612-13.
- ⁴ *Id.* at 612 (“Some voters—especially in minority districts where the legacy of racism and history of clashes between the population and authorities has given rise to a suspicion of police and other officials—may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified, especially if the verification process becomes confrontational.”).
- ⁵ See Ambreen Ali, *Parties Contest Election-Monitoring Techniques*, ROLL CALL (Nov. 29, 2011), http://www.rollcall.com/issues/57_65/Parties-Contest-Election-Monitoring-Techniques-210564-1.html?pos=opolh (describing one organization that “has raised \$140,000 and has already provided election-monitoring training to tea party groups in 30 states”).
- ⁶ Ali, *supra* note 5. See also Pam Fessler, *Tea Party Spawns New Effort Against Voter Fraud*, NPR NEWS (Mar. 13, 2012), <http://www.npr.org/2012/03/13/148518795/tea-party-spawns-new-effort-against-voter-fraud> (describing True The Vote’s recruiting efforts in 2012).
- ⁷ Dave Fehling, *Harris County Attorney Investigates Allegations of Voter Intimidation at the Polls*, KHOU.COM (Oct. 21, 2010, 9:48pm), at <http://www.khou.com/news/local/Harris-County-Attorney-addresses-allegations-of-voter-intimidation-at-polls-105362988.html> (“The Harris County Attorney on Tuesday said it is investigating some credible, if somewhat one-sided, complaints of minority voter harassment.”); Chris Moran, *New Voter Intimidation Complaints Surface at Harris Polls*, HOUSTON CHRONICLE, Oct. 21, 2010, at <http://www.chron.com/news/houston-texas/article/New-voter-intimidation-complaints-surface-at-1709902.php> (noting that “the complaints have come from polling locations in high-minority areas”); Joe Holley, *Some Harris County Early Voters Upset by Poll Watchers*, HOUSTON CHRONICLE, Oct. 18, 2010, at <http://www.chron.com/news/houston-texas/article/Some-Harris-County-early-voters-upset-by-poll-1705867.php>.
- ⁸ Alison Knezevich, *Maryland Group Alleges Voter-Roll Problems*, BALTIMORE SUN, June 23, 2012, at 1A, at http://articles.baltimoresun.com/2012-06-26/news/bs-md-election-group-20120622_1_id-laws-government-issued-photo-voter-fraud.
- ⁹ See generally Wendy Weiser & Lawrence Norden, *Voting Changes in 2012* (2011) (describing the swath of new state legislation introduced and enacted in 2011 and explaining how these “new laws could make it significantly harder for more than five million eligible voters to cast ballots in 2012”), available at <http://www.brennancenter.org/content/resource/voting-law-changes-in-2012>. See also *2012 Summary of Voting Law Changes*, BRENNAN CENTER FOR JUSTICE (June 28, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting-law-changes/ (summarizing restrictive state voting laws enacted during the 2011-12 legislative session).
- ¹⁰ See, e.g., Emily Schultheis, *Voter ID Laws Could Swing States*, POLITICO (July 30, 2012, 4:41am), <http://www.politico.com/news/stories/0712/79103.html> (quoting one True The Vote founder’s support for voter ID legislation); Knezevich, *supra* note 8 (profiling a Maryland poll-watching organization and noting that the “group has ties to a tea party organization in Texas and advocates for voter ID laws”).

- ¹¹ *DNC v. RNC.*, 673 F.3d at 213 (upholding a 30-year consent decree barring the RNC from filing discriminatory challenges and noting that “[w]ithout the enforcement of the Decree provisions, these voter-challenge lists that are racially-targeted, in intent or in effect, could result in the intimidation and deterrence of a number of voters”).
- ¹² U.S. CONST. amend. XIV & XV, 42 U.S.C. § 1983 (prohibits anyone acting under color of law from depriving any individual of his or her constitutional rights, including his or her rights to vote and to equal protection of the laws); 42 U.S.C. § 1971(a)(2)(A) (“No person acting under color of law shall—(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.”); 42 U.S.C. § 1985(3) (providing cause of action if “two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”).
- ¹³ *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986).
- ¹⁴ 18 U.S.C. §§ 241 & 242 (carrying penalties of fines and imprisonment up to ten years).
- ¹⁵ For example, New Mexico makes it a misdemeanor to “interfer[e] with in any manner the conduct of an election or with a . . . voter . . . in the performance of his duties.” N.M. STAT. § 1-20-20. Ohio provides a private cause of action against harassment in violation of election law, which includes “improper practice[s] or attempt[s] tending to obstruct, intimidate, or interfere with an elector in registering or voting.” OHIO REV. CODE ANN. § 3501.90.
- ¹⁶ Order Granting Plaintiffs’ Motion for Temporary Restraining Order at 3, *Spencer v. Blackwell*, No. C-1-04-738 (S.D. Ohio Nov. 1, 2004).
- ¹⁷ Mark Brunswick & Pat Doyle, *The Scene; Tension Prompts Disputes at Some Poll Sites*, STAR TRIBUNE, Nov. 3, 2004, at 1B (quoting one witness who said that some voters left the polls without voting because they were delayed or intimidated by the rash of challenges).
- ¹⁸ Suzanne Charlé, *Blocking the Black Vote in Jacksonville*, THE NATION, Nov. 2, 2004, at <http://www.alternet.org/story/20379/>.
- ¹⁹ See Teresa James, Project Vote, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters* 23 (2007), at http://www.projectvote.org/images/publications/Voter%20Caging/Caging_Democracy_Report.pdf. See also Robert A. Kengle, *Voting Rights Issues in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367, 410 (2008) (describing how “Spanish-surnamed registered voters had been mass-challenged in Long County prior to the 2004 primary election and in Atkinson County prior to the 2004 general election”).
- ²⁰ Jim Camden, *Man Says Votes from Illegal Immigrants*, SPOKESMAN-REVIEW, Mar. 31, 2005, at <http://www.spokesman.com/stories/2005/mar/31/man-says-votes-from-illegal-immigrants/>.
- ²¹ *Election Workers Get State Training Session*, WORCESTER TELEGRAM & GAZETTE, May 6, 2011, at B2 (noting that the “groups were accused by town officials of intimidating Hispanic and mentally challenged voters.”).
- ²² Brian Lee, *Durant: No Tea Party Fundraising*, WORCESTER TELEGRAM & GAZETTE, May 5, 2011, at B1 (“The [Southbridge town] clerk said she saw that people felt intimidated or uncomfortable as they were being asked for identification.”).
- ²³ For instance, Ohio provides a cause of action to voters against any conduct “tending to obstruct, intimidate, or interfere with an elector in registering or voting at a place of registration or election.” OHIO REV. CODE ANN. § 3501.90. In Texas, it is a class A misdemeanor for a person to influence a voter not to vote by means of coercion. TEX. PENAL CODE ANN. § 36.03. In Wisconsin, an elector who abuses the right to challenge “may be subject to sanctions” and election inspectors have the right to remove from the polling place individuals who disrupt polling operations. WIS. STAT. § 741(3).

- ²⁴ In 2010, for example, local election officials and media outlets in St. Louis, Missouri, received reports of “aggressive” challengers staffing the polls. See Jo Mannies, *St. Louis County Reports A Few Aggressive Republican ‘Challengers,’* ST. LOUIS BEACON (Nov. 2, 2010, 11:06am CST), <http://www.stlbeacon.org/issues-politics/31-Elections/105990-st-louis-county-reports-a-few-aggressive-republican-challengers>.
- ²⁵ See *DNC v. RNC*, 671 F. Supp. 2d at 580–81, 590 (describing forms of voter intimidation, including as part of the challenge process).
- ²⁶ See, e.g. ARIZ. REV. STAT. § 16-121.01 (Arizona statute requiring clear and convincing evidence to rebut a presumption that a voter is properly registered).
- ²⁷ 42 U.S.C. § 1971(a)(2)(B) (prohibits “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election”). See generally *Washington Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006); *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004); *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995); see also 42 U.S.C. § 1983 (providing a cause of action against any person acting under color of state law who deprives another person of a federally protected right).
- ²⁸ Some jurisdictions prohibit these discriminatory challenges in explicit terms. See, e.g., D.C. CODE § 1-1001.09(d)(2) (“[A] voter shall not be challenged solely on the basis of characteristics or perceived characteristics not directly related to the challenged voter's status as a registered qualified elector, including race, color, religion, sex, personal appearance, sexual orientation, gender identity or expression, matriculation status, political affiliation, or physical disability.”).
- ²⁹ A study by the Wisconsin Government Accountability Board found that, even after making significant improvements to their matching system, 10 percent of all voters were not successfully matched, and that most non-matches were largely attributable to name variations and typographical errors with driver license numbers, rather than voter ineligibility or fraud. See Kevin Kennedy & Nathaniel E. Robinson, Wisconsin Gov’t Accountability Board, *A Statistical Analysis of HAVA Checks in Wisconsin August 6, 2008 through January 4, 2009*, at 3-4 (2009), available at <http://elections.state.wi.us/docview.asp?docid=15857&locid=47>.
- ³⁰ 42 U.S.C. § 1973gg-6(e) (describing circumstances under which registrants who move are entitled to vote “notwithstanding [their] failure to notify the registrar” of their address change”). Additionally, the vast majority of Americans who move do so within the same county. See 2010 American Community Survey, U.S. Census Bureau, *American Factfinder: Geographic Mobility by Selected Characteristics in the United States*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_S0701&prod_Type=table.
- ³¹ See Debbie Gruenstein Bocian, Wei Li, Carolina Reid, and Roberto G. Querica, Center for Responsible Lending, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures* 18 (2011) (“Although the majority of foreclosures have affected white borrowers, African-American and Latino borrowers are almost twice as likely to have lost their homes to foreclosure as non-Hispanic whites.”), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>.
- ³² Because of its unreliability as a tool for determining voter ineligibility, some jurisdictions have banned the practice of using returned mail as a basis for challenging voters at the polls on Election Day. See, e.g., N.C. GEN. STAT. § 163-88 (“A letter or postal card mailed by returnable mail and returned by the United States Postal Service purportedly because the person no longer lives at that address or because a forwarding order has expired shall not be admissible evidence in a challenge heard [on Election Day].”).
- ³³ Charlé, *supra* note 18; Chris Davis, Matthew Doig, and Victor Hull, *GOP Says It Will Challenge Voters Based on Felon List*, SARASOTA HERALD-TRIBUNE, Nov. 2, 2004, at A1 (“Florida Republicans announced Monday that they will move forward with a plan that could stop thousands of convicted felons from participating in today's election.”), available at <http://www.heraldtribune.com/article/20041102/NEWS/411020446>.

- ³⁴ Eartha Jane Melzer, *Lose Your House, Lose Your Vote*, MICHIGAN MESSENGER, Sept. 10, 2008, at <http://michiganmessenger.com/4076/lose--your-house-lose-your-vote>.
- ³⁵ David G. Savage, *Ohio Battle Brews over Voter Rolls*, L.A. TIMES, Sept. 20, 2008, at <http://articles.latimes.com/2008/sep/20/nation/na-voters20>.
- ³⁶ Chisun Lee, *Mich. Foreclosure-Based Challenge Ends in Political, Not Legal, Agreement*, PROPUBLICA, Oct. 21, 2008, at <http://www.propublica.org/article/mich-foreclosure-based-voter-challenge-ends-in-political-not-legal-agreemen>; Ben Adler, *Ohio Secretary of State Prevents Vote Caging*, POLITICO, Sept. 13, 2008, at <http://www.politico.com/news/stories/0908/13415.html>.
- ³⁷ *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1081 (D. Mont. 2008) (noting that “[v]oters might be intimidated, confused, or even discouraged from voting upon receiving notice that their right to vote—the most precious right in a government of, by, and for the people—has been challenged”).
- ³⁸ For instance, a regional political party director wrote an internal memorandum in 1986 suggesting that the likely effect of a voter caging program would be to “eliminate at least 60–80,000 folks from the rolls. . . . If it’s a close race, which I’m assuming it is, this could keep the black vote down considerably.” Justin Levitt & Andrew Allison, Brennan Center for Justice, *Reported Instances of Voter Caging* 3 (2007), available at http://www.brennancenter.org/page/-/d/download_file_49609.pdf (citing Martin Tolchin, *G.O.P. Memo Tells of Black Vote Cut*, N.Y. TIMES, Oct. 25, 1986, at 17; Thomas B. Edsall, *Ballot Security Effects Calculated*, WASH. POST, Oct. 24, 1986, at A1).
- ³⁹ 42 U.S.C. 1973gg-6(d)(1)(B)(i)-(ii) (a state may not remove a registered voter from the voter rolls on the basis of an undeliverable mailing unless the voter has failed to vote in at least two federal election cycles).
- ⁴⁰ *DNC v. RNC*, No. 81-3876 (D.N.J. Nov. 1, 1982) (consent order); *DNC v. RNC*, No. 86-3972 (D.N.J. July 27, 1987) (settlement stipulation and order of dismissal); *United States v. Republican Party of North Carolina*, No. 92-161-CIO-5F (E.D.N.C. Feb. 27, 1992).
- ⁴¹ See *Eaton*, 581 F. Supp. 2d at 1081 (finding that the NVRA is violated when a challenger “attempt[s] to accomplish what the Act prohibits the State of Montana from doing – ensuring the accuracy of voter rolls less than 90 days before an election on the sole basis of change-of-address information,” and rejecting as illegal state guidelines that seemingly required voters challenged on such bases to provide additional information).
- ⁴² *Cf. Smith v. Allwright*, 321 U.S. 649, 765 (1944) (“This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.”) (citation omitted).
- ⁴³ For instance, California law prohibits a piece of undeliverable mail from being “accepted or used as evidence upon which to initiate a challenge as to residency by any member of the precinct board unless other evidence or testimony is also presented.” CAL. ELEC. CODE § 14241. See also N.C. GEN. STAT. § 163-88 (“A letter or postal card mailed by returnable mail and returned by the United States Postal Service purportedly because the person no longer lives at that address or because a forwarding order has expired shall not be admissible evidence in a challenge heard [on Election Day].”).
- ⁴⁴ The Brennan Center has documented several additional reasons why mail is returned as undeliverable despite the fact that the voter rolls contain a voter’s permanent address. See Justin Levitt & Andrew Allison, Brennan Center for Justice, *A Guide to Voter Caging* 3-6 (2007), available at http://www.brennancenter.org/content/resource/a_guide_to_voter_caging/.
- ⁴⁵ See *Wisconsin, 2004*, BRENNAN CENTER FOR JUSTICE, http://www.truthaboutfraud.org/case_studies_by_state/wisconsin_2004.html (last visited Oct. 21, 2010) (analyzing allegations of voter fraud in Wisconsin).

- ⁴⁶ See discussion *supra* pp. 4-5 (“Discriminatory Challenges”).
- ⁴⁷ The Brennan Center has documented several reported instances of voter caging and potentially illegal voter purges. See Wendy Weiser & Margaret Chen, *Voter Suppression Incidents 2008*, BRENNAN CENTER FOR JUSTICE (Nov. 3, 2008), http://www.brennancenter.org/content/resource/voter_suppression_incidents; Levitt & Allison, *supra* note 38, at 3, available at http://www.brennancenter.org/page/-/d/download_file_49609.pdf.
- ⁴⁸ Jo Becker, *GOP Challenging Voter Registration*, WASHINGTON POST, Oct. 29, 2004, at A05, available at <http://www.washingtonpost.com/wp-dyn/articles/A7422-2004Oct28.html>.
- ⁴⁹ See Levitt & Allison, *supra* note 38, at 3, available at http://www.brennancenter.org/page/-/d/download_file_49609.pdf.
- ⁵⁰ *Id.*
- ⁵¹ See Weiser & Chen, *supra* note 47.
- ⁵² See, e.g., Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 346-47 (2010) (citing Rayford W. Logan, *The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson* 91 (Da Capo Press 1997) (1954)).
- ⁵³ See 42 U.S.C. § 1973i(b) (“[N]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.”); 42 U.S.C. § 1971(b) (prohibits intimidating any other person “for the purpose of interfering with the right of such other person to vote or to vote as he may choose”).
- ⁵⁴ 18 U.S.C. § 241.
- ⁵⁵ See Farhad Manjoo, *Voter Terrorism*, SALON, Sept. 21, 2004, at <http://www.salon.com/news/feature/2004/09/21/intimidation> (describing an incident in Philadelphia in which a political campaign sent men in suits holding clipboards and wearing lapel pins with official-looking insignia into parts of the city with large African-American populations to intimidate voters and deliver misinformation about voting requirements).
- ⁵⁶ In 2004 in Wisconsin, a flyer claiming to have been issued by the “Milwaukee Black Voters League,” a nonexistent organization, threatened black voters with jail time if they or their family members had ever been convicted of anything. See Daniels, *supra* note 52, at 353.
- ⁵⁷ In Arkansas, poll watchers singled out African American voters to ask them for photo identification. See People for the American Way, *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today* 7, at <http://www.pfaw.org/sites/default/files/thelongshadowofjimcrow.pdf> (hereinafter “*The Long Shadow of Jim Crow*”).
- ⁵⁸ A handful of polling places in Santa Cruz, CA, were vandalized on the morning of the 2008 general election and delayed the opening of the polls at certain locations. *Vandalism Reported in Four Locations on Election Day, Doors Glued Shut*, SANTA CRUZ SENTINEL, Nov. 4, 2008, at http://www.santacruzsentinel.com/ci_10896866?source=most_emailed.
- ⁵⁹ In 2008, there were reports in Michigan of police officers scanning lines of voters for persons with outstanding warrants. Project Vote, *Voter Intimidation and Caging* (2010), available at <http://www.projectvote.org/images/publications/2010%20Issues%20in%20Election%20Administration/2010%20Legislative%20Brief%20-%20Voter%20Intimidation%20and%20Caging.pdf>. In South Carolina, a state representative mailed brochures to Black voters, claiming that law enforcement agents would be at election sites. He warned voters, “this election is not worth going to jail.” *The Long Shadow of Jim Crow*, *supra* note 57 at 9-10.

- ⁶⁰ The week before the 2010 general election, for example, a restaurant owner in Ohio attached a letter to his restaurant employees' paychecks, telling them that their raises and benefits would be cut unless "the right people are elected." Sabrina Eaton, *GOP Paycheck Politicking Gives Heartburn to Canton Area McDonald's Workers*, CLEVELAND PLAIN-DEALER, Oct. 29, 2010, at http://www.cleveland.com/open/index.ssf/2010/10/gop_paycheck_politicking_gives.html. The restaurant owner later apologized for the letter. *Id.*
- ⁶¹ Earlier this year, for instance, a South Asian-American storeowner in North Bergen, NJ, alleged that local police official threatened to create trouble for his business if the storeowner refused to remove a particular campaign poster from his store's window. *North Bergen Challenger Group Calls for Investigation of Voter Intimidation and Harassment by Town Employees; Call for Sacco To Stop Hiding Under His Desk*, POLITICKERNJ (May 2, 2011, 4:47pm EST), <http://www.politickernj.com/47295/north-bergen-challenger-group-calls-investigation-voter-intimidation-and-harrasment-town-empl> (describing surveillance video of the incident replayed on local news station).
- ⁶² Some commentators have noted that when poll watchers and challengers are not members of the community in which they serve, their presence can make voters feel nervous or tense. See Abby Rapoport, *Voter Intimidation in Houston? The View from Acres Homes*, TEXAS OBSERVER, Oct. 29, 2010 (describing voters who felt "very uncomfortable" voting in the presence of numerous poll watchers from outside the community), available at <http://www.texasobserver.org/floor-play/inside-one-harris-county-polling-station>. See also Demōs & Common Cause, *Voting in 2010: Ten Swing States* 54 (2010) ("[T]he requirement that challengers be registered voters of the precinct in which they are making a challenge is helpful . . . because it increases the likelihood that challenges will be made based on actual personal knowledge."), available at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SwingStates2010_reportfinal.pdf.
- ⁶³ See *A Nationwide Movement and Election Integrity Effort Is Born*, TRUE THE VOTE (last visited Nov. 29, 2011), <http://www.truethevote.org/news/a-nationwide-movement-and-election-integrity-effort-is-born>.
- ⁶⁴ See, e.g., Geoff Berg, *True The Vote Trues Neither Voting Nor Truth*, HOUSTON CHRONICLE PARTISAN GRIDLOCK BLOG (Nov. 15, 2011, 2:34pm CST), <http://blog.chron.com/partisangridlock/2011/11/true-the-vote-trues-neither-voting-nor-truth>; Glenn W. Smith, *Right-Wing Voter Suppression Effort Caught Using Doctored Photo*, HUFFINGTON POST (Sept. 6, 2010, 11:43am EST), http://www.huffingtonpost.com/glenn-w-smith/right-wing-voter-suppress_b_706550.html.
- ⁶⁵ See Holley, *supra* note 7; Moran, *supra* note 7.
- ⁶⁶ One African-American candidate running for judge in Harris County said that the poll watchers' presence in mostly African-American precincts during the 2010 election gave "the impression of intimidation." Fehling, *supra* note 7. See also *DNC v. RNC*, 671 F. Supp. 2d at 612 ("Some voters—especially in minority districts where the legacy of racism and history of clashes between the population and authorities has given rise to a suspicion of police and other officials—may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified, especially if the verification process becomes confrontational.").
- ⁶⁷ See Fessler, *supra* note 6 (describing True The Vote's recruitment efforts); Knezevich, *supra* note 10 (describing one Maryland organization with ties to True The Vote).
- ⁶⁸ Jennifer Wig, *Wake Rejects Most Voter Challenges*, RALEIGH PUBLIC RECORD (June 27, 2012), <http://www.raleighpublicrecord.org/news/2012/06/27/wake-rejects-most-voter-challenges/>. See also Nicolas Riley, *A Lesson From North Carolina on Challengers*, BRENNAN CENTER FOR JUSTICE (July 2, 2012), http://www.brennancenter.org/blog/archives/a_lesson_from_north_carolina_on_challengers/ (describing the challenge effort and placing it in historical context).
- ⁶⁹ *Dome: Voter-Fraud Watchdogs Say Wake Dead Still on Voter List*, RALEIGH NEWS & OBSERVER (Jul. 30, 2012, 5:13am), <http://www.newsobserver.com/2012/07/30/2229794/dome-voter-fraud-watchdogs-say.html>.

- ⁷⁰ Pam Fessler, *Efforts To Prevent Voter Fraud Draw Scrutiny*, NPR.ORG (Oct. 26, 2010), at <http://www.npr.org/templates/story/story.php?storyId=13082279>.
- ⁷¹ To listen to the radio ad, visit mmajoritydotorg, *Election Integrity Watch – Vinnie Ad*, YOUTUBE (Oct. 21, 2010), http://www.youtube.com/watch?v=83bl7Z3xuZE&feature=player_embedded.
- ⁷² See Fessler, *supra* note 70.
- ⁷³ Nichole Rustin-Paschal, *Online Behavioral Advertising and Deceptive Campaign Tactics: Policy Issues*, 19 WM. & MARY BILL RTS. J. 907, 913 (2011) (“In an increasingly information-based society, deceptive campaigns will likely be launched in ways that take advantage of tools provided by web-based technologies for communicating and organizing.”). See also Electronic Privacy Information Center, *E-Deceptive Campaign Practices Report 2010: Internet Technology & Democracy 2.0*, at 5 (2010) (“The increasing vitality of Internet-based communications to engage voters, and the concomitant governance challenges associated with the Internet, require voters to be aware of new ways in which their votes might be suppressed.”), available at http://epic.org/privacy/voting/E_Deceptive_Report_10_2010.pdf.
- ⁷⁴ See Daniels, *supra* note 52, at 349.
- ⁷⁵ See *id.* at 343.
- ⁷⁶ See *id.* at 348.
- ⁷⁷ Julian Walker, *Phony Flier Says Virginians Vote on Different Days*, VIRGINIAN PILOT, Oct. 28, 2008, at <http://hamptonroads.com/2008/10/phony-flier-says-virginians-vote-different-days>; Julian Walker, *Officials Find Source of Fake Election Flier, Won't Press Charges*, VIRGINIAN PILOT, Nov. 3, 2008, at <http://hamptonroads.com/2008/11/officials-find-source-fake-election-flier-wont-press-charges>.
- ⁷⁸ See Weiser & Chen, *supra* note 47.
- ⁷⁹ Ian Urbina, *Reports of Intimidation and Electronic Problems Surface at Polls across the U.S.*, N.Y. TIMES, Nov. 2, 2010, at <http://www.nytimes.com/2010/11/03/us/politics/03voting.html>; Associated Press, *Group: Robocalls Gave Spanish-Speaking Voters Late Polling Date*, CBS LOS ANGELES (Nov. 2, 2010, 3:44pm), <http://losangeles.cbslocal.com/2010/11/02/group-robocalls-gave-spanish-speaking-voters-late-polling-date>.
- ⁸⁰ Julie Scharper & Justin Fenton, *Democrats Denounce Robocalls Telling Voters To ‘Relax,’* BALTIMORE SUN, Nov. 2, 2010, at http://articles.baltimoresun.com/2010-11-02/news/bs-md-phony-robocalls-20101102_1_voter-apaty-robocalls-illegal-campaign-tactics; Ryan J. Reilly, *Cardin Asks DOJ To Review Election Day Robocalls in MD*, TPM MUCKRAKER (Nov. 4, 2010, 3:22pm EST), http://tpmmuckraker.talkingpointsmemo.com/2010/11/cardin_asks_doj_to_review_election_day_robocalls_i.php.
- ⁸¹ Luke Broadwater, *Prosecutors: GOP ‘Robocall’ Plan To Suppress Black Votes Hatched on Hectic Election Day*, BALTIMORE SUN, Nov. 29, 2011, at http://www.baltimoresun.com/news/maryland/politics/bs-md-shurick-trial-20111129_0,7728782.story.
- ⁸² See, e.g., 42 U.S.C. § 1985(3) (providing cause of action if “two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”).
- ⁸³ For instance, Virginia imposes criminal penalties for knowingly communicating false election information to a registered voter. VA. CODE ANN. § 24.2-1005.1(A) (“It shall be unlawful for any person to communicate to a registered voter, by any means, false information, knowing the same to be false, intended to impede the voter in the exercise of his right to vote.”). Wisconsin similarly prohibits “false representation[s] pertaining to a candidate or referendum.” WIS. STAT. § 12.05. A handful of other states, including Florida, Illinois, Kansas, and Minnesota, also broadly punish voter deception. See Daniels, *supra* note 52, at 369-71 (discussing state statutes that penalize deceptive practices).

STAY CONNECTED TO THE BRENNAN CENTER

Sign up for our electronic newsletters at www.brennancenter.org/signup and visit our **Election 2012 page** at www.brennancenter.org/election2012.

Latest News | Up-to-the-minute info on our work, publications, events, and more.

Voting Newsletter | Latest developments, state updates, new research, and media roundup.

Legal Services | Weekly civil legal aid and access-to-justice news summaries from across the country.

Fair Courts | Comprehensive news roundup spotlighting judges and the courts.

Twitter | www.twitter.com/BrennanCenter

Facebook | www.facebook.com/BrennanCenter

NEW AND FORTHCOMING BRENNAN CENTER PUBLICATIONS

Voting Law Changes in 2012

Wendy R. Weiser and Lawrence Norden

The Challenge of Obtaining Voter Identification

Keesha Gaskins and Sundeep Iyer

Better Design, Better Elections

Lawrence Norden with Whitney Quesenberry and David C. Kimball

Transparency for Corporate Political Spending: A Federal Solution

David Earley and Ian Vandewalker

Donor Diversity Through Public Matching Funds

Elisabeth Genn, Sundeep Iyer, Michael J. Malbin, and Brendan Glavin

Democracy & Justice: Collected Writings, Volume V

Brennan Center for Justice

National Survey: Super PACs, Corruption, and Democracy

Brennan Center for Justice

Voter Registration Modernization: A National Reform Proposal

Wendy R. Weiser and Jonathan Brater

For more information, please visit www.brennancenter.org.

BRENNAN
CENTER
FOR JUSTICE

at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646-292-8310
www.brennancenter.org