

BRENNAN

CENTER

FOR JUSTICE

VOTING LAW CHANGES:
ELECTION UPDATE

Wendy Weiser and Diana Kasdan

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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.

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She is also the co-author of *Voting Law Changes in 2012*, a comprehensive roundup of all state legislative action in 2011 on voting rights, focusing on new laws as well as state legislation that has not yet passed or that failed. 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.

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Prior to joining the Brennan Center, Ms. Kasdan was a senior staff attorney at the ACLU Reproductive Freedom Project where she litigated a variety of constitutional and civil rights cases in federal and state courts across the country. Ms. Kasdan also developed and led the Project's nationwide advocacy campaign to promote state legislation restricting the use of restraints on pregnant inmates and to improve correctional policies regulating the conditions and care of pregnant women.

Ms. Kasdan graduated *magna cum laude* from New York University School of Law where she was inducted into The Order of the Coif, was an Arthur Garfield Hay Civil Liberties Fellow, a recipient of the George P. Foulk Memorial Award for Distinguished Scholarship and the Ann Petluck Poses Award for Outstanding Contribution to the Immigrant Rights Clinic, and served as a notes editor for the *NYU Law Review*. Following law school, Ms. Kasdan clerked for the Honorable Nicholas G. Garaufis of the United States District Court for the Eastern District of New York.

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INTRODUCTION

Our nation was founded on the principle that “all men are created equal.” To fulfill this promise, our voting system should be free, fair, and accessible to all eligible citizens.

A year ago, the Brennan Center issued a study documenting the recent and abrupt reversal of America’s long tradition of expanding voting access. Without national notice, legislators pressed scores of new bills that would make it harder for eligible Americans to vote. This report helped spur much-needed public scrutiny of these laws and their possible impact on our elections.

We estimated that these new laws — which included onerous voter ID laws, cutbacks to early voting, and community-based registration drives — “could make it significantly harder for more than 5 million eligible voters to cast ballots in 2012.” That number reflected the sheer quantity and scope of restrictive legislation already then enacted in 14 states.¹

The drive to curb voting continued beyond October. All told, since January 2011, at least 180 bills were introduced in 41 states. Ultimately, 25 new laws and two executive actions were adopted in 19 states. These states represented 231 electoral votes, or 85 percent of the total needed to win the presidency.² This amounted to the biggest threat to voting rights in decades.

Today, the reality is very different, and far better for voters. The dramatic national effort to restrict Americans’ voting rights was met with an equally dramatic pushback by courts, citizens, the Department of Justice, and farsighted public officials.

What does a survey of the landscape one week before Election Day 2012 now show? Strikingly, nearly all the worst new laws to cut back on voting have been blocked, blunted, repealed, or postponed. Laws in 14 states were reversed or weakened. As a result, new restrictions will affect far fewer than the 5 million citizens we predicted last year. For the overwhelming majority of those whose rights were most at risk, the ability to vote will not be at issue on November 6th.

At the same time, the fight will continue well past November. Courts will examine laws in Wisconsin, Pennsylvania, and elsewhere. Politicians will introduce more bills to limit voting rights. Most significantly, the U.S. Supreme Court will likely hear two major cases that could substantially cut back on legal protections for voters. It has already agreed to hear a challenge, brought by Arizona, that could curb federal power to protect voting rights. The Court likely will also hear a challenge to Section 5 of the Voting Rights Act, which has proven to be a key protection against discriminatory laws, including many of the ones passed in 2011-12.

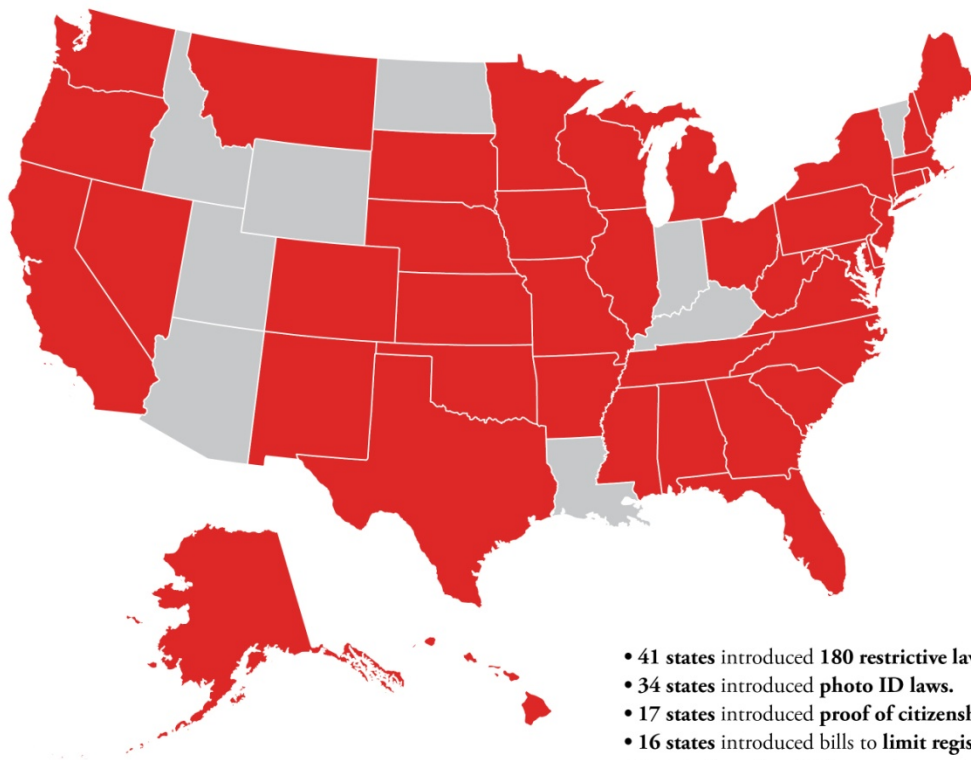
This upcoming legal battle unfolds against the backdrop of the recent struggle over voting rights — and in the wake of a clear demonstration of the vital need for strong laws to protect democracy.

I. SUMMARY OF THE ASSAULT ON VOTING RIGHTS

A. Changes in State Law

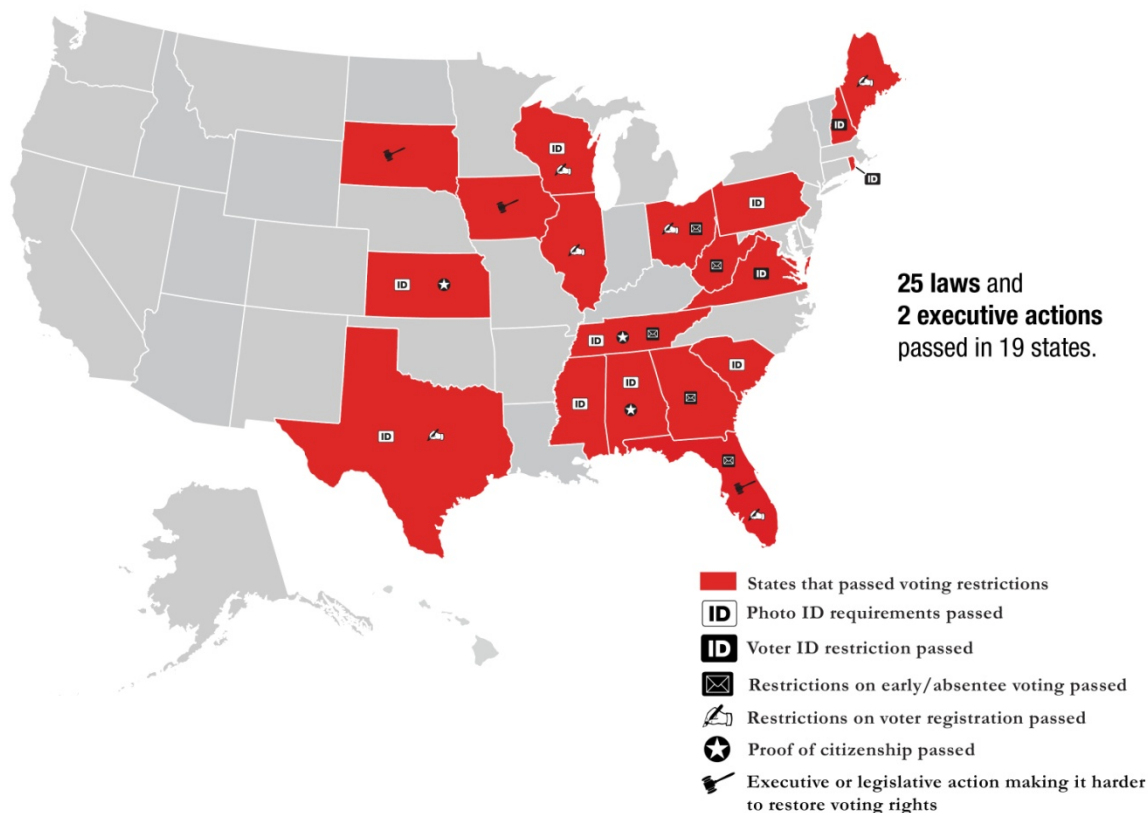
What did these new restrictions look like?

STATES WITH RESTRICTIVE VOTING LEGISLATION INTRODUCED SINCE 2011



Voter ID Laws: The most common new voting law — passed in nine states — was to require voters to show certain government-issued photo IDs to vote.³ Every state already had some form of voter ID requirement in place, at least for new voters and often for all, but these laws were far more stringent. These highly inflexible and restrictive laws allow only select forms of ID, like driver’s licenses and non-driver’s IDs, which 11 percent of voting-age Americans — or 21 million citizens — do not have.⁴ Studies also make clear that those without photo IDs are disproportionately seniors, African-Americans, the poor, students, or people with disabilities. Among older voters, 18 percent do not have the kind of photo IDs required by these laws; for African-Americans, 25 percent; and for low-income voters, 15 percent.⁵ Three additional states passed new voter ID requirements, albeit ones that are less rigid.

STATES THAT PASSED RESTRICTIVE VOTING LAWS



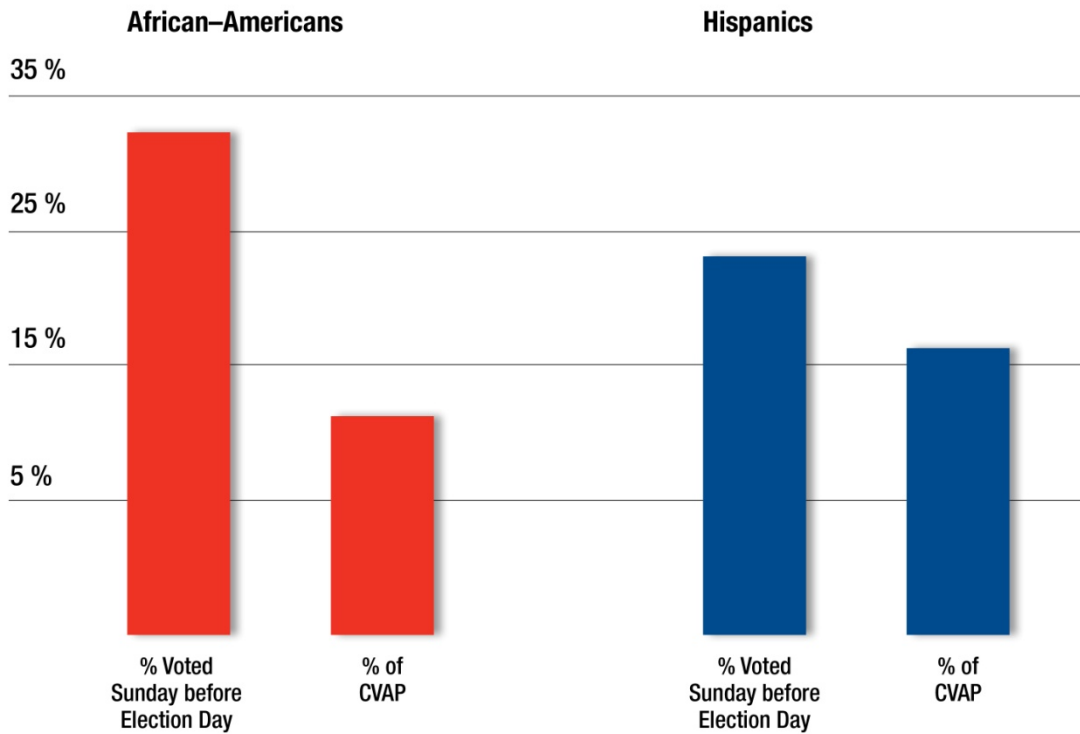
Documentary Proof of Citizenship Laws: Three states passed laws to require documentary proof of citizenship to register or to vote.⁶ These requirements — which at least 7 percent of voting-age Americans do not have⁷ — fall particularly hard on women and low-income citizens. A full one-third of women do not have citizenship documents with their current names and 12 percent of low-income individuals do not have such papers available.⁸

Laws Making Voter Registration Harder: Six states passed various laws making it harder for citizens to register to vote,⁹ but the most common were restrictions on voter registration drives.¹⁰ For example, in Florida, for a full year, onerous new restrictions on drives shut down groups like the League of Women Voters and Rock the Vote. These drives have historically played an extremely important role in getting people registered so they can vote. In both 2004 and 2008, hundreds of thousands of Florida voters registered through drives.¹¹ Once the new law passed, many of those drives ground to a halt and many Floridians lost a key opportunity to sign up. African-American and Latino citizens were especially hurt. Nationally, they register through drives at twice the rate as whites.¹² Elsewhere, new laws eliminated highly-popular Election Day registration,¹³ and made it harder for people who have moved to stay registered to vote.¹⁴

Laws Reducing Early Voting Opportunities: After decades of states expanding early voting, for the first time there were efforts across the country to reduce this method for enhancing voting opportunities.¹⁵ Five states cut back on early voting, and some in ways that were most likely to make it harder for minorities to get to the polls. For example, Ohio and Florida both eliminated early voting on the Sunday before the election — a day on which African-American and Latino churches organized very successful pews to polls drives in 2008.

A full one-third of citizens who voted early on the eliminated Sunday in Florida in 2008 were African-American, even though African-Americans make up only 13 percent of the state's citizen voting-age population.¹⁶

NOVEL THREATS: ENDING SUNDAY EARLY VOTING Florida 2008



Laws Making it Harder to Restore Voting Rights: Three states also made it harder to restore voting rights for persons with past criminal convictions. The governors of Florida and Iowa both issued executive orders reversing prior policies that increased opportunities to restore rights.¹⁷ And South Dakota passed a law to disenfranchise persons who are on probation.

B. Purges and Challenges

The onslaught of new laws was only the start. As legislative sessions wound down, efforts picked up to systematically purge voters from the rolls and challenge the eligibility of registered voters. These efforts continued in the final months leading up to the November election, creating additional — often last-minute and unforeseen — barriers to eligible, registered citizens.

Although regular list maintenance is an important tool for maintaining accurate voter registration lists, far too frequently, after secretive and inaccurate purge programs, eligible voters show up to the polls and discover their names have been removed from the voting lists.¹⁸ Federal law, to some extent, constrains states' list maintenance activities, including by prohibiting systematic efforts to purge the voter rolls within 90 days of a federal election.

Colorado, Florida, and Texas, among other states, began to implement large-scale programs to remove registered voters in the latter part of 2012.¹⁹ These attempts were wildly inaccurate and threatened to throw thousands of eligible citizens off the rolls.

In Texas, in September 2012, a court blocked a last-minute massive purge of nearly 80,000 voters identified as deceased shortly after hundreds of eligible living voters received removal notices.²⁰ In Florida, Secretary of State Ken Detzner announced he had a list of more than 180,000 potential non-citizens on the rolls, necessitating a purge before the election. Under greater scrutiny, though, that list quickly dwindled to just fewer than 3,000 voters targeted for removal. Within weeks of notices going out to those individuals, at least 500 confirmed their citizenship, including Bill Internicola, a 91-year-old World War II veteran who was born in Brooklyn. By the time Florida was done refining its purge program, including the use of a federal data system, it reported only about 200 potential non-citizens on the rolls. These names are still being checked.²¹ This pattern repeated in Colorado. Secretary of State Scott Gessler initially announced there were potentially 11,000 non-citizens on the rolls. That number dropped to just under 4,000, and then down to a list of only 141 people.²² With less than two weeks to the election, Gessler abruptly announced he found an additional 300 potential non-citizens.²³ At the same time, private organizations including True the Vote, Judicial Watch, and local citizen-led groups have threatened or filed lawsuits demanding purging of the voter rolls.²⁴

In addition to purges, there has been an increase in mobilization of political groups to challenge voters at the polls. In nearly every state, antiquated laws known as “challenger laws” allow private individuals to contest the eligibility of a voter either before or on Election Day. The growing use of challenger laws in recent years has exposed abuse that suppresses and intimidates eligible voters.²⁵ This year, True the Vote and other groups have announced large-scale plans to blanket the polls with challengers and poll watchers.²⁶ It is not yet known whether the current challenger plans will materialize on Election Day. Past efforts have targeted communities of color, students, and voters with disabilities. Shortly before the 2004 presidential election in Ohio, for instance, a local political party planned to station 3,500 challengers in select voting precincts. A court found that under this scheme, 97 percent of first-time voters in majority-black precincts would have encountered challengers at the polls compared to just 14 percent of first-time voters in majority-white precincts (see chart on next page).²⁷ Under scrutiny, the controversial plan was abandoned on Election Day.

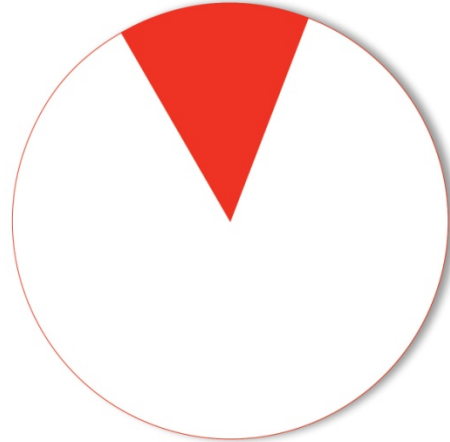
SPENCER v. BLACKWELL

Ohio 2004

97% of new voters in majority African-American precincts to face challenges



14% of new voters in majority White precincts to face challenges



That's the bad news. The good news is that, starting in 2012, this overwhelming series of attacks on voting finally came to a halt.

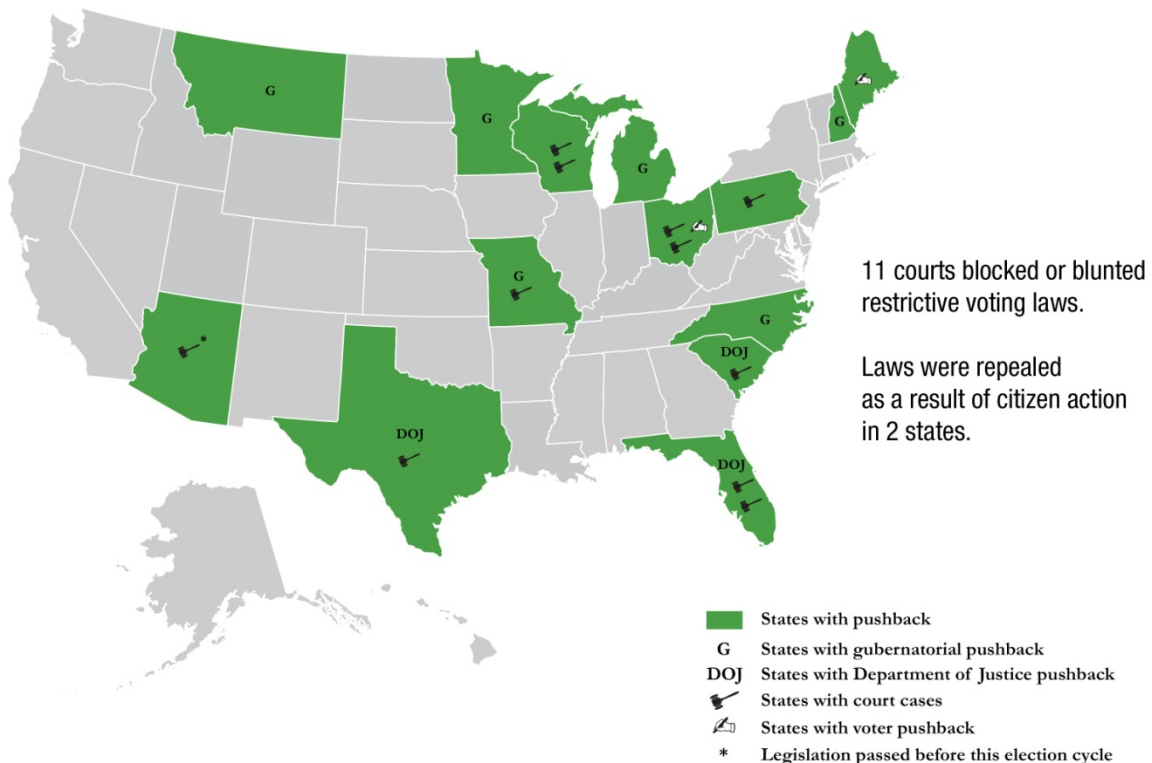
II. THE PUSHBACK

The dramatic national effort to restrict Americans' voting rights was met with an equally dramatic pushback by citizens, voting rights groups (including the Brennan Center), courts, the Department of Justice, and farsighted public officials. This pushback was largely successful: As of the date of this report, restrictive voting measures have been blocked or blunted in 14 states. Specifically, for the 2012 elections:

- Restrictive photo ID requirements have been blocked in Pennsylvania, South Carolina, Texas, and Wisconsin, and vetoed in Minnesota, Missouri, Montana, New Hampshire, and North Carolina;
- Punitive regulations of voter registration drives have been permanently blocked in Florida and vetoed in Michigan;
- Cutbacks to early voting have been blocked in Ohio and mitigated in Florida;
- A law that required documentary proof of citizenship to register to vote has been blocked in Arizona; and
- Laws that would have cut back on voter registration opportunities have been repealed in Maine and Ohio, and vetoed in Montana.²⁸

In the end, the bulk of the most onerous laws that would have made it harder for Americans to vote will *not* be in place for the 2012 elections. Of particular note, most of the voting restrictions adopted in swing states will not be in effect in 2012. By and large, voters have won the battle over voting rights in 2012.

PUSHBACK AGAINST RESTRICTIVE VOTING LAWS



How did this happen? The pushback has taken a variety of forms — from citizen-led repeal efforts, to gubernatorial vetoes, to objections from the Department of Justice, to court cases. The most significant blow to the movement to restrict voting this year has been the dramatic string of legal victories by citizens and voter advocates, mostly in the past few months.

A. Citizen-Led Repeal Efforts

In two states, citizens rallied around referendums to repeal new voting restrictions.

In **Maine**, citizens mobilized against a law passed in June 2011 to eliminate the state’s highly popular practice of Election Day registration, which had been in place for nearly four decades. Political scientists credit Election Day registration with increasing voter turnout by 3 to 6 percent.²⁹ Immediately after the law passed, a broad-based coalition of groups launched a campaign to “repeal” it via ballot initiative. In September 2011, they submitted close to 70,000 signatures (well above the 57,277 needed) to the secretary of state’s office to qualify the measure for a “People’s Veto,” a referendum process that placed a repeal of the newly passed law on the November 2011 ballot.³⁰ On November 8, 2011, citizens in Maine voted 60 percent to 40 percent to restore Election Day registration in the state.³¹

In **Ohio**, citizens similarly organized to oppose an omnibus voting bill that Gov. John Kasich had signed into law in July 2011. The law cut the early voting period, eliminated the state’s *de facto* same day registration week during the early voting period, and barred county boards of election from mailing out return-paid absentee ballots or applications, among other things.³²

Just after the law’s passage, Fair Elections Ohio, a coalition of lawmakers, labor unions, church groups, voting rights advocates, and concerned citizens, led by former Democratic Secretary of State Jennifer Brunner, organized a petition drive to oppose the new law. In Ohio, if a referendum to repeal a law is certified for the ballot, that freezes the law’s provisions until after the election. Ultimately, foes submitted more than 307,000 signatures; after the state board of elections found some of the signatures deficient, they submitted even more.³³ In mid-December 2011, Secretary of State Jon Husted certified the referendum for the November 2012 ballot.³⁴

Reportedly because of the massive mobilization around the issue, on May 8, 2012, Ohio lawmakers voted along party lines to repeal the new election law.³⁵ (Of note, Republicans voted to repeal their own statute, while Democrats wanted the referendum to proceed.) The referendum effort did not cover, and the legislature did not repeal, another newly enacted law that would have cut the state’s early voting period and eliminated early voting the weekend before the election. That was addressed by the courts, as discussed below.

B. Gubernatorial Vetoes and Resistance

In six states, governors vetoed restrictive voting laws that had been passed by state legislatures, and in one more, gubernatorial resistance caused the legislature to soften a new law. Given the consistent partisan divide

over laws making it harder to vote we documented in *Voting Law Changes in 2012*, it is not surprising that all of the vetoes in 2011 were done at the hands of Democratic governors. By 2012, however, perhaps as a result of public pressure, opposition to restrictive voting laws had spread beyond Democrats. In mid-2012, two Republican governors pushed back on new voting restrictions, handing voters additional victories.

1. Voter ID

In rapid succession in May and June of 2011, Democratic governors in Minnesota, Missouri, Montana, New Hampshire, and North Carolina vetoed restrictive laws passed by Republican legislatures that would have required government-issued photo IDs to vote:

- The **Montana** legislature passed H.B. 152 on April 25, 2011, and Gov. Brian Schweitzer vetoed it on May 5, 2011.³⁶
- The **Minnesota** legislature passed S.F. 509 on May 21, 2011, and Gov. Mark Dayton vetoed it on May 26, 2011.³⁷
- The **Missouri** legislature passed S.B. 3 on May 26, 2011, and Gov. Jay Nixon vetoed it on June 17, 2011.³⁸
- The **North Carolina** legislature passed H.B. 351 on June 16, 2011, and Gov. Beverly Perdue vetoed it on June 23, 2011.³⁹
- The **New Hampshire** legislature passed S.B. 129 on June 8, 2011,⁴⁰ and Gov. John Lynch vetoed it on June 27, 2011.⁴¹

In New Hampshire, a second voter ID bill eventually became law. It is far less rigid than the one originally proposed. The original bill (S.B. 129) would have required voters to present a photo ID issued by the U.S. government or the state of New Hampshire, or a driver's license from another state. Voters without acceptable ID would not have had their votes counted unless they returned to a town clerk's office within two and a half days of the election with an acceptable photo ID, a waiver from the secretary of state, or an affidavit of religious exemption. Lynch vetoed this bill, as well as a less restrictive voter ID bill (S.B. 289) introduced in the following session.⁴² On June 27, 2012, however, the state legislature voted with two-thirds majorities to override the veto of the second bill.⁴³

Under the new law, New Hampshire citizens seeking to vote in person in the 2012 general election will now have to show one of a variety of forms of photo ID — including a driver's license, non-driver's ID card, a U.S. armed services ID card, and a student ID card — or else submit an affidavit of identity at the polls. Beginning in September 2013, some of those forms of ID will no longer be accepted, though voters without acceptable IDs will still be able to vote a ballot that will count after executing an affidavit of identity.

In **Virginia**, Republican Gov. Bob McDonnell surprised observers by similarly pushing back on restrictive voter ID bills. In March 2012, Virginia lawmakers passed S.B. 1⁴⁴ and H.B. 9,⁴⁵ which would have required voters to present limited forms of photo IDs at the polls. These bills gave voters without those IDs on Election Day one day to present them to election officials. Rather than signing the bills into law, on April 9, 2012, McDonnell introduced several amendments to soften the bills' requirements and reduce their burdens on voters without IDs. To explain his action, the governor cited a desire “to preserve [the] goal of preventing

illegal voting while promoting voter participation, and making sure we do not stand in the way of legitimate voting” and “to ensure that this legislation complies with the requirements of the Voting Rights Act of 1965.”⁴⁶ The legislature rejected one of the governor’s proposed amendments — to require election officials to count the provisional ballots cast by voters without accepted IDs if their signatures matched those on file with the state — but adopted the remaining amendments.⁴⁷ McDonnell signed the bills into law on May 18, 2012.⁴⁸

Under the new law, Virginians will have to present IDs before voting at the polls, though acceptable IDs include not only photo IDs but also a range of non-photo IDs, including a Virginia voter registration card that is mailed to all registered voters. In his signing statement, McDonnell pledged to “ensure that no voter is overly burdened by the provisions included in this legislation,” and to send “every voter in Virginia a free voter card . . . to ensure they have at least one form of ID to bring with them to the polls.”⁴⁹

2. Voter Registration and Other Restrictions

In two states, governors vetoed bills that would have made it more difficult to register to vote, among other restrictions.

In **Montana**, as in Maine, the new Republican legislature passed a bill on April 5, 2011 that would have eliminated Election Day registration in the state. Democratic Gov. Brian Schweitzer vetoed that bill on April 13, 2011, leaving Election Day registration in place.⁵⁰

In **Michigan**, on July 3, 2012, Republican Gov. Rick Snyder vetoed several controversial bills that would have made it harder to vote.⁵¹ S.B. 754 sought to impose unnecessary administrative burdens on voter registration drives that would have hampered groups seeking to help register voters.⁵² S.B. 803 would have required voters to affirmatively state they were citizens before receiving their ballots at the polling place, even though they already affirmed citizenship when registering to vote.⁵³ Voters who did not affirm their citizenship a second time would be automatically challenged by election officials.⁵⁴ Also vetoed, H.B. 5061 would have required a registered voter to check a repeat citizen affirmation box when applying for an absentee ballot. Failure to do so would have resulted in the voter’s absentee ballot not being counted unless she could specifically affirm her citizenship on Election Day.⁵⁵

C. Pushback in Legislatures

The political pushback against laws making it harder to vote did not only come from governors. In many states where restrictive voting bills were expected to pass, community efforts helped prevent the legislature from passing them in the first place. Overall, in 2011-12, 41 states introduced 180 bills restricting voting. Only 25 of those bills in 19 states eventually passed (and many of those have been blocked since).

Nebraska was one state with a successful legislative pushback. There, legislators introduced a bill (L.B. 239)⁵⁶ to require voters to present government-issued photo IDs to vote, as well as an amended bill that would have let voters also present a voter registration card.⁵⁷ A coalition of approximately two dozen organizations, including Nebraskans for Civic Reform and the Nebraska Association of County Officials, held protests and

rallies to voice their opposition to the bill,⁵⁸ raised public arguments about the negative impact the bill would have on voters and on the state's treasury,⁵⁹ and otherwise lobbied state legislators. The bill's backers could not defeat a filibuster, falling three votes short on March 28, 2012.⁶⁰

D. Department of Justice Resistance

Throughout 2011, the Department of Justice was silent on the wave of restrictive voting laws in the states. The Department's voting rights law enforcement record during that period was also very sparse.⁶¹ But on December 13, 2011, at a speech at the LBJ Library in Austin, Texas, Attorney General Eric Holder for the first time expressed public concerns over the "state-level voting law changes" that Rep. John Lewis (D-Ga.) had condemned as part of "a deliberate and systematic attempt to prevent millions of elderly voters, young voters, students, [and] minority and low-income voters from exercising their constitutional right to engage in the democratic process."⁶² The attorney general said: "It is time to ask: what kind of nation — and what kind of people — do we want to be? Are we willing to allow this era — our era — to be remembered as the age when our nation's proud tradition of expanding the franchise ended?"⁶³

Ten days later, the Justice Department issued a letter objecting to South Carolina's new photo ID law under Section 5 of the federal Voting Rights Act.⁶⁴ Since then, the Department also has objected to restrictive laws in Texas and Florida. It has delayed and may challenge Mississippi's new law, as well. In some cases, it refused to "preclear" changes; in others, it sought to block restrictions in court. In sum, the Department forcefully stepped forward to protect voters' rights.

Under the Voting Rights Act, certain states with a history of discrimination in voting must get approval — or "preclearance" — from the Department of Justice or a federal court in Washington, D.C. before implementing any changes to their voting laws or practices. The Department, in turn, is required to review all state law changes submitted to it for approval, and to object to those changes unless the state can prove they neither have the purpose nor the effect of worsening minorities' position with respect to the franchise.

Based on the information submitted by **South Carolina**, the Department rejected its voter ID law, finding that non-white voters were far more likely than white voters to lack accepted IDs.⁶⁵ This objection prevented South Carolina's law from going into effect — unless and until a court found otherwise. Soon after, the Palmetto State announced it would go to court to fight the Department's determination — and to challenge the constitutionality of a key provision of the landmark Voting Rights Act.⁶⁶ At the Republican presidential primary debate on Martin Luther King Day the next month, Texas Gov. Rick Perry praised South Carolina for being "at war with this federal government" over the Voting Rights Act and the state's voter ID law.⁶⁷ On February 7, 2012, South Carolina filed a lawsuit seeking judicial preclearance of its voter ID law, but omitted its threatened challenge to Section 5 of the Voting Rights Act.⁶⁸ (That provision was nonetheless challenged by a number of other states and jurisdictions.)

While South Carolina's lawsuit was pending, the Department objected to new voting laws from two other states — Texas and Florida — both of which had also filed lawsuits seeking to preclear their laws under the Voting Rights Act. On March 12, 2012, the Department objected to **Texas's** strict photo ID law on the ground that it disproportionately harmed the state's minority voters.⁶⁹ The Department found that, based on

the data supplied by the state, between 604,000 and 795,000 registered Texans lacked IDs that would have been accepted for voting under the new law, and that Latinos were between 46 percent and 120 percent less likely than non-Hispanic voters to have state-issued photo IDs.⁷⁰

In **Florida's** case, the state withdrew its preclearance request before filing its lawsuit in federal court. Nonetheless, as part of the litigation, the Department was required to take a position on whether the voting law changes at issue — new restrictions on voter registration drives, cutbacks to early voting, and new procedures for voters who move to new counties — comported with the Voting Rights Act. On March 20, 2012, the Department said the voter registration and early voting changes did not pass muster because they disproportionately harmed minority voters.⁷¹

In each of these cases, the Department of Justice's determination under Section 5 of the Voting Rights Act was not the final word because all three states brought suit in federal court in Washington, D.C. The Department's role thus switched from decision-maker to litigant. In this capacity, too, the Department played a critical part in blocking these new laws.

While the Department resisted some of the most onerous new voting laws, it did preclear the new voter ID law in New Hampshire, which had been softened after the governor vetoed a more restrictive bill.⁷² (The new law is described in Section III below.) The Department has not yet made a determination with respect to a new voter ID law in **Mississippi**, but as a result of its review and request for additional information, the law will not be in effect for the 2012 elections.

E. Court Victories

By far the most striking pushback against new voting restrictions has come through the courts. Virtually every court to consider a law or policy restricting voting this past year found in favor of the voters. Overall, **11 court decisions in 8 states** blocked or blunted new laws that would have made it harder for eligible Americans to vote.

- **Wisconsin:** In March of this year, two separate state courts blocked Wisconsin's strict new photo ID law on the ground that it violated the state's constitution. One court found the new law unfairly burdened citizens' right to vote under the state constitution,⁷³ and the other found the law was both beyond the legislature's powers and inconsistent with a state constitutional provision setting out the exclusive qualifications for voting.⁷⁴

Although those decisions are still being appealed, the law will not be in effect for the 2012 election. The impact is significant: According to one court's findings, approximately 221,975 eligible voters in Wisconsin do not have IDs that would have been accepted under the new law.⁷⁵ Other estimates are even higher.⁷⁶

- **Missouri:** Also in March 2012, a state court in Missouri blocked an initiative to place a voter ID constitutional amendment on the November 2012 ballot, ruling the language of the ballot initiative was misleading.⁷⁷ Because the Missouri Supreme Court struck down the state's prior photo ID law as

unconstitutional, voters will not have to show photo ID at the polls unless and until the state constitution is amended to require such ID.

- **Arizona:** On April 17, 2012, an expanded panel of the U.S. Court of Appeals for the Ninth Circuit sitting en banc blocked an Arizona law, enacted several years earlier, requiring voters to provide documentary proof of citizenship to register to vote. In a 7-2 decision written by a judge appointed by President George W. Bush, the court found that Arizona's law was inconsistent with the federal Motor Voter law, which requires states to "accept and use" a uniform federal voter registration form, delegates authority to a federal agency over that form, and seeks to streamline the registration process nationally.⁷⁸

As a result of this decision, Arizona's proof of citizenship requirement is currently blocked. While the law was in effect, tens of thousands of voters were denied registration because they did not provide adequate proof of citizenship.⁷⁹ On August 15, 2012, the U.S. Supreme Court agreed to review this decision during the next term.

- **Florida (voter registration drives):** On May 31, 2012, a federal court in Tallahassee preliminarily blocked enforcement of the most onerous provisions of Florida's new law restricting community-based voter registration drives.⁸⁰ The court found the law likely violated the First Amendment and the federal Motor Voter law and noted that "allowing responsible organizations to conduct voter registration drives — thus making it easier for citizens to register and vote — promotes democracy."⁸¹ After the parties reached a settlement agreement, on August 30, 2012, the court issued a final order permanently removing restrictions on community-based voter registration drives.⁸²

While the law was in effect, civic groups across the state — including plaintiffs the League of Women Voters of Florida and Rock the Vote — had completely shut down their voter registration drives. As soon as the law was blocked, drives resumed, registering thousands of Florida voters.⁸³ Registration numbers, which had fallen statewide in the wake of the law, jumped up after the law was enjoined in late May 2012, and August and September were the two months with the highest number of new voter registrations in 2012.⁸⁴

- **Florida (early voting):** In a decision issued on August 16, 2012, a three-judge court in the District of Columbia refused to preclear Florida's new law cutting back on early voting days and hours under the federal Voting Rights Act.⁸⁵ The court found the state had not met its burden of showing that the changes to early voting would not have a racially discriminatory effect on voters in Florida's five counties covered by the Act.⁸⁶

As a result of this decision, Florida submitted an early voting plan for the five covered counties to offer the same number of early voting hours as required by the prior law, which was equivalent to the maximum permitted under the new law.⁸⁷ Most of Florida's largest counties, including Miami-Dade, Broward, Orange, and Palm Beach, also followed suit.⁸⁸ Most Florida voters, therefore, will face the same number of early voting hours as in past elections, but those hours will be spread over fewer days.

- **Texas:** On August 30, 2012, shortly after the Florida decision, another three-judge court in Washington, D.C. rejected Texas’s strict photo ID law under the federal Voting Rights Act.⁸⁹ The court found the state had not met its burden of showing that the law would not have a discriminatory effect against minorities. To the contrary, the court found the evidence showed that the costs of obtaining qualifying ID “will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty.”⁹⁰

This decision means Texas’s voter ID law will not be in effect for the upcoming election or future elections, although the lawsuit continues. (The court is now considering Texas’s argument that the federal law at issue — Section 5 of the Voting Rights Act — is itself unconstitutional.) The impact of this on Texas voters will be substantial, although the number of affected voters is difficult to quantify.⁹¹ According to the original data provided by Texas, more than 604,000 registered voters lack qualifying IDs.⁹²

- **Pennsylvania:** Pennsylvania’s highly restrictive new photo ID law was also blocked in large part by a state court on October 2, 2012.⁹³ The court had originally refused to enjoin the law under the state constitution, crediting the state’s promises that it would be able to get conforming IDs into the hands of all affected voters in time for the election. On September 18, 2012, however, the state Supreme Court, in a 4-2 decision joined by the court’s three Republican members, vacated that decision, finding that the trial court had relied too much on supposition, and that the state’s implementation of a new photo ID law in the short term would violate the state constitution unless “there will be no voter disenfranchisement” as a result of that implementation.⁹⁴ The Court sent the case back to the trial court, which, in turn, issued a temporary order prohibiting the state from disenfranchising voters who do not have photo IDs in 2012.

Under this ruling, the state may still ask voters to present state-issued photo IDs at the polls in November, but it must allow all voters, including those who do not have qualifying IDs, to vote by regular ballot. After November, the injunction will be reconsidered. Although the number of affected voters is disputed, as many as 758,000 registered Pennsylvanians may lack acceptable IDs, according to the Pennsylvania Department of Transportation.⁹⁵ The state itself conceded that at least tens of thousands would be affected.

- **Ohio (early voting).** On October 5, 2012, a federal appellate court — agreeing with the federal district court below — blocked Ohio’s new law that significantly reduced opportunities for in-person early voting.⁹⁶ The suit had been brought by the Obama presidential campaign. Among other things, the new rules prohibited early in-person voting for all citizens except for military service members during the three days before Election Day. The court found the policy violated the U.S. Constitution’s Equal Protection Clause. It held that the state could not justify its refusal to offer all voters the same early-voting opportunity it already provided to military voters. The U.S. Supreme Court rejected Ohio’s request for emergency relief.⁹⁷

As a result Ohio will offer early voting in the last three days before the election. This will significantly benefit Ohio voters, especially African-Americans, who heavily take advantage of early voting. In Ohio's largest county, Cuyahoga, African-American voters accounted for 28.6 percent of the overall vote but cast 77.9 percent of early in-person ballots. Overall, African-Americans were 26 times more likely to vote early than white voters.⁹⁸

- **Ohio (provisional ballots).** Another appellate court decision, issued on October 11, 2012, prohibited Ohio from refusing to count provisional ballots cast in the right polling place but wrong precinct because of poll-worker error.⁹⁹ The Sixth Circuit panel found that it was “fundamentally unfair” to disqualify wrong-precinct ballots caused by poll-worker error, and blocked this policy under both the Due Process and Equal Protection Clauses of the U.S. Constitution.¹⁰⁰ After the case was sent down to the federal district court, the ruling was expanded to cover all wrong-precinct ballots that are the result of poll-worker error, even those cast at the wrong polling place.¹⁰¹

The potential impact of this decision is significant. In 2008, more than 14,000 wrong-precinct provisional ballots were cast in Ohio.¹⁰² A closely disputed judicial race in 2010 turned on the disposition of wrong-precinct provisional ballots.¹⁰³

- **South Carolina:** On October 10, 2012, another three-judge federal court in Washington, D.C. ruled there was not enough time left to implement the state's voter ID law for the 2012 general election without significant disenfranchisement.¹⁰⁴ The court did preclear the requirement for future elections, but it clarified aspects of the law so that it “does not require a photo ID to vote.”¹⁰⁵ Instead, South Carolinians can continue to use their non-photo voter registration card after 2012, so long as the voter signs an affidavit stating the reason for not having obtained a photo ID.¹⁰⁶ The preclearance going forward does not undermine the victory for voters. As Circuit Judge John Bates noted in his concurring opinion, “Act R54 as now pre-cleared is not the R54 enacted in May 2011.”¹⁰⁷ Instead, the law was substantially mitigated both by the state's expansive interpretation of an exception to the photo ID requirement and by the state's efforts to expand access to photo ID.

As a result of this decision, SC voters will not be required to provide photo ID in this year's elections, and going forward, they will have the ability to vote a valid ballot even if they do not have approved photo IDs. This means that the 130,000 registered voters who were found to lack acceptable photo IDs¹⁰⁸ will be able to vote and to have their votes counted.

Taken together, these decisions dismantle the bulk of the most restrictive new voting laws that would have been in place for the 2012 elections. The states that saw restrictive laws blocked or blunted by courts produce half the electoral votes needed to win the presidency. Without the courts, millions of citizens would have found it far harder to vote. This dramatically underscores the importance of the courts in protecting Americans' fundamental right to vote.

These decisions are noteworthy not only for their overall effect on voters but also for the sheer consistency of their results. As noted, almost every court to have considered a law or policy making it harder to vote blocked or mitigated it. There are exceptions. Most notably, a federal appeals court allowed severe restrictions

on voter registration drives in Texas to stand; a state appeals court upheld Tennessee’s voter ID law in October 2012. But voters have won the vast majority of cases, at least for now. This is true despite the fact that the cases involved a variety of different legal claims and theories in different courts across the country.¹⁰⁹ This is true regardless of the political backgrounds of the judges deciding the cases. This overwhelmingly positive outcome stands in contrast to past election cycles, where litigation results have been more mixed.

What accounts for the remarkable string of litigation victories? In part, judges likely were struck by the scope of potential disenfranchisement. Each of the court cases considered — and often sought to quantify — the extent to which the laws at issue could prevent eligible citizens from voting. Where new laws were found to have a disenfranchising effect, they were typically blocked or mitigated to prevent that effect. Courts have also been sensitive to the fact that the wave of new voting restrictions generally runs counter to core principles of American law, which tend to promote democracy and seek to fulfill the promise of political equality espoused in the Declaration of Independence.

The decisions also suggest that courts are uncomfortable with what appears to be a push by some politicians to manipulate rules so certain voters would find it particularly hard to participate. Although no decision found improper motives behind new laws, courts did raise questions about legislators’ purposes. For example, Judge Robert Hinkle in Florida questioned the state’s reason for requiring groups conducting voter registration drives to submit completed forms to state officials within 48 hours of their being signed:

[T]he state has little if any legitimate interest in setting the deadline at 48 hours. The short deadline, coupled with substantial penalties for noncompliance, make voter-registration drives a risky business. If the goal is to discourage voter-registration drives and thus also to make it harder for new voters to register, the 48-hour deadline may succeed. But if the goal is to further the state's legitimate interests without unduly burdening the rights of voters and voter-registration organizations, 48 hours is a bad choice.¹¹⁰

In Pennsylvania, the state Supreme Court raised serious questions during oral argument as to why the state insisted on trying to rush through a last-minute implementation of a new photo ID law before a working apparatus for issuing acceptable IDs was in place.¹¹¹ That concern was reflected in the court’s decision, which referenced the state’s “ambitious effort” to “bring the new identification procedure into effect within a relatively short timeframe.”¹¹²

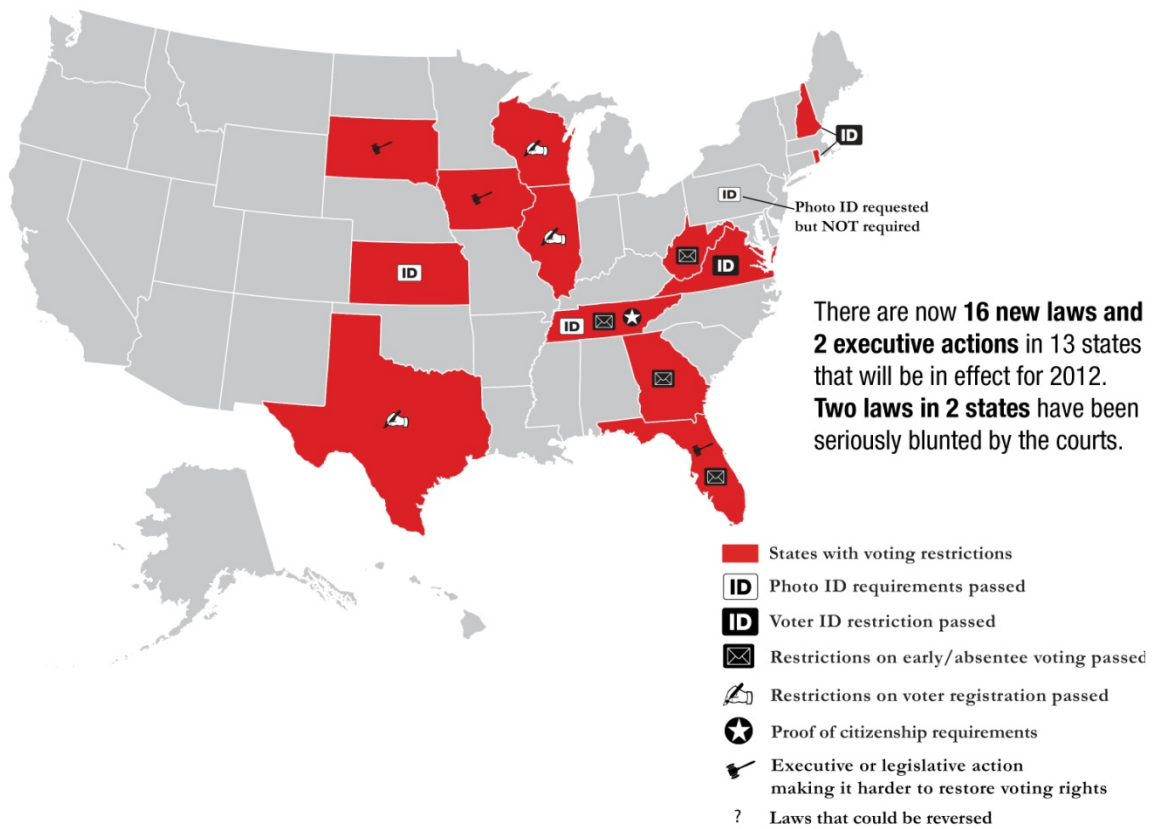
Regardless of the reasons, the results are unmistakable: Voters have largely won the litigation battles of 2012. And, as discussed above, they have successfully fought back new voting restrictions in a variety of other ways as well. The big story of this election cycle, therefore, is not just the massive legislative effort to cut back on voting rights across the country — it is also the massive and surprisingly successful effort by voters to protect their rights. But the job is not yet done.

III. THE DAMAGE DONE

A. New Voting Restrictions In Effect For 2012

Despite these victories, voters are somewhat worse off than they were in 2010. Going into the 2012 election, voters have been saddled with **18 new laws and executive actions in 13 states** that make it harder for eligible citizens to register and to vote.¹¹³ These states account for 165 electoral votes, or 61 percent of the total needed to win the presidency.¹¹⁴ Also, as discussed below, the legal flux surrounding the laws that passed but were blocked or blunted has contributed to increased confusion and uncertainty about election procedures this year. This has the potential to further impact the 2012 election.

RESTRICTIONS STILL IN PLACE FOR 2012 ELECTION



In short — despite the tremendous victories in public squares, statehouses, and courthouses — not all damage has been averted. Following are the remaining voting restrictions that newly apply to millions of eligible citizens.

1. Laws Making It Harder to Register to Vote

Leading up to this election, new rules in four states make registering to vote harder, most notably by tightening the rules for voter registration drives.

- In **Florida**, for most of this election cycle, a new regulatory scheme imposed insurmountable obstacles on community-based groups and large national nonprofits that have registered hundreds of thousands of new voters in Florida for decades. Under the federal court order that blocked the law, drives now have 10 days, instead of just 48 hours, to return forms, and the most onerous of the previously-imposed registration and reporting requirements are no longer in force.¹¹⁵

Unfortunately, by the time the court acted, groups were left with only four months to register new voters before the close of registration. Many of Florida's largest and most well-established nonpartisan voter registration drives were shut down, or severely handicapped, for an entire year.¹¹⁶ During that 12-month period, there were **nearly 100,000 fewer new voter registrations in Florida** than there had been during the same period before the 2008 presidential election, according to our analysis.¹¹⁷ This is a 14 percent decrease in the rate of new registrations from 2008 to 2012. A recent scholarly study of the impact of Florida's restrictions on voter registration found a similar rate of decline in new registrations, noting an even greater drop in new registrations among voters aged 21 and younger.¹¹⁸

- In **Texas**, the new rules cracking down on voter registration drives were particularly harsh. Although Texas already regulated drives more severely than perhaps any other state, it enacted new changes to make its laws even more restrictive. In particular, only residents of Texas who are eligible to vote can participate in voter registration drives.¹¹⁹ This requirement effectively excluded major national voter registration groups from conducting drives in Texas.¹²⁰
- Although **Illinois** also tightened its regulation of voter registration drives, its new rule is not nearly as hurtful as those in Florida and Texas. Voter registration drives participating in the official volunteer system now have less time to return collected applications to election officials.¹²¹ But this reduction in time does not apply to groups only using the national mail-in voter registration form. Nonetheless, participation in the official volunteer system is still common in Illinois because it is mandatory for any drives collecting the state registration forms.¹²²
- **Wisconsin** also made registering to vote harder for new residents of the state. It changed its voter eligibility requirements, by extending the minimum period of residency from 10 to 28 days.¹²³

2. Voter ID

Of the five states enforcing new voter ID laws this November, only two impose strict photo ID requirements. Others afford more flexibility, such as accepting a broader range of IDs or allowing an affidavit of identity.

- In **Kansas and Tennessee**, where the laws are particularly rigid, registered voters will be required to show government-issued photo identification at the voting booth. Of the two, Kansas accepts a considerably broader range of photo IDs than does Tennessee. For example, in addition to a driver's license from *any state*, U.S. passport, or government employee ID, a state student ID card or state public assistance ID card are acceptable.¹²⁴ Voters without acceptable ID may vote a provisional ballot, and in most cases they have six days to present acceptable ID to election officials to ensure their votes are counted.¹²⁵ Tennessee, on the other hand, expressly refuses to accept student IDs from institutions of higher education.¹²⁶ While certain individuals may qualify for the option of executing an affidavit of identity at the polls,¹²⁷ most voters without ID will have to cast a provisional ballot and will have only two business days to provide acceptable ID.¹²⁸ Thus, for the first time in Kansas and Tennessee, eligible citizens who do not have the kind of ID required by these new laws will bear the burden and costs of obtaining it, or else find themselves unable to cast a regular ballot on Election Day.¹²⁹ Others may simply be dissuaded from even registering or going to the polls because they do not have, or cannot readily obtain, the necessary photo ID.
- In contrast, **New Hampshire, Rhode Island, and Virginia** all give voters without photo IDs a variety of options for having their votes counted. New Hampshire and Rhode Island both allow non-photo IDs for 2012 elections and will start having photo ID requirements next year or later. New Hampshire's law will allow election officials to verify voters' identity without strictly requiring one of the forms of ID on the statutory list, and voters without ID may vote after executing an affidavit attesting to their identity.¹³⁰ In Rhode Island, voters who are unable to provide approved photo ID will be allowed to vote a provisional ballot, which will be counted if the signatures on the ballot and the voter's registration match.¹³¹ And in Virginia, the list of acceptable IDs includes documents without a photo that show the voter's name and address, such as a utility bill, bank statement, government check, or paycheck.¹³²

3. Making it Harder to Restore Voting Rights

In three states, hundreds of thousands of citizens with past felony convictions will be left out of this election and will find it difficult or impossible to restore their voting rights in the future.¹³³

- **Florida and Iowa** both reversed prior executive actions that made it easier for citizens with past criminal convictions to restore their voting rights. In 2007, Florida Gov. Charlie Crist streamlined the restoration process, and since then the voting rights of at least 150,000 Floridians were restored.¹³⁴ But since Gov. Rick Scott turned back the rules last year, no voting rights have been restored in Florida.¹³⁵ Similarly in Iowa, although an executive order by then Gov. Tom Vilsack had restored the voting rights of 80,000 persons with past convictions, in 2011, Gov. Terry Branstad revoked that order. Now Iowa permanently disenfranchises all citizens after a criminal conviction.¹³⁶
- In 2012, **South Dakota** passed legislation to deny voting rights to persons with criminal convictions who are on probation. This change compounded existing requirements that already required a person to complete any term of incarceration or parole before the state would restore voting rights.¹³⁷

4. *Reduced Early Voting Opportunities*

This November there will be fewer opportunities to cast a vote early in Florida, Georgia, Tennessee, and West Virginia.¹³⁸ The scope of the reduction differs significantly among these four states, and the outcome of the preclearance case in Florida has helped ameliorate the significant loss of heavily-used early voting days in that state.

In Florida and West Virginia, cuts to early voting were fairly substantial. In **Florida**, in addition to eliminating the first five days of early voting, counties lost the option of opening their polls on the last Sunday before the election. In total, Florida went from an early voting period that could extend up to 14 days, to one that is only eight days long.¹³⁹ The preclearance decision mitigated this somewhat — by ensuring maximum hours were offered in the five jurisdictions covered by the Voting Rights Act.¹⁴⁰ And most large counties have established hours close to the maximum for this election.¹⁴¹ **West Virginia** likewise dropped its early voting period to less than two full weeks, reducing the 17 days previously available to 10 days.¹⁴² The reductions in **Georgia** and **Tennessee** were less severe.¹⁴³

Overall, how well voters will adjust to the loss of early voting days is an open question, but it is undisputed that millions will need to do so. In Florida — which made one of the most dramatic cuts — nearly 1 million voters in 2008 cast their ballots during the days that have been eliminated, which included the last Sunday before Election Day.¹⁴⁴ This will create difficulties and burdens for all Florida voters, but it is black voters who will bear the brunt of constricted access to the polls. In 2008, black voters in Florida used the now-eliminated first week of early voting at nearly twice the rate of white voters, and they relied on the last Sunday at more than three times the rate of white voters.¹⁴⁵

The popularity of early in-person voting among black voters is not unique to Florida. According to the Census Bureau, early in-person voting by African-Americans in southern states nearly tripled from the 2004 to 2008, and was much higher than the rate among white voters in 2008.¹⁴⁶ Scholars expect this trend to continue.¹⁴⁷ Notably, the new state laws reducing early in-person voting are all concentrated in southern states.¹⁴⁸

B. The Collateral Damage: Confusion and Misinformation

In a typical year, confusion and misinformation often mar American elections. This year saw dozens of new rules proposed, enacted, challenged, blocked, repealed, appealed, and postponed — all within months of a major election. Ordinary problems could compound.

Most at risk for confusion: States where voter ID laws were blocked.

In Pennsylvania, for example, under the terms of the court's injunction, voters may only be *asked* to show photo ID at the polls during the November election, but voters without ID can still vote a regular ballot. However, reports — including a legal petition for relief — document that voters were still receiving incorrect information about ID requirements from state and local election officials just weeks before the election. The state's television advertisements telling voters to bring photo ID ran before and after the court's ruling.¹⁴⁹ As

of mid-October, the state Department of Aging was sending mailings to thousands of seniors incorrectly stating, “Voters are required to show photo ID on Election Day.”¹⁵⁰ The Brennan Center discovered similar misinformation on the official websites for two of the state’s largest counties.¹⁵¹ And a state newspaper recently published an article misinforming voters that photo ID was still required.¹⁵² In Texas, election officials sent every voter a card saying photo ID would be required “upon federal approval”¹⁵³ — but never sent a follow up note saying that approval had been denied.

Indeed, even absent inaccurate information directly from the state, it is well documented that voters are frequently asked to show photo identification at the polls when state law does not require it. A leading national study found that at least half of voters were asked for photo ID by poll workers, even in states without ID requirements.¹⁵⁴ Not all voters are asked to show ID. Poll workers ask far more minority voters to show ID than their white counterparts.¹⁵⁵

Voters may also be confused about when they can vote in states that trimmed early voting. In Ohio, whether polls would remain open to all voters on the last three days of the early voting period was the subject of litigation and remained an open question until as late as October 16.¹⁵⁶ As lawsuits unfolded in Florida, it was unclear until September how early voting changes would apply.¹⁵⁷ Moreover, the terms under which Florida’s early voting changes were ultimately precleared require the five counties covered by Section 5 of the Voting Rights Acts to offer the maximum allowed hours each day, for a total of 96 hours of early voting.¹⁵⁸ Other counties, however, are not subject to this requirement. Those counties now have substantial discretion to decide the specific hours they will be open each day.¹⁵⁹ Fortunately, it appears most of the largest counties will offer hours close to the maximum, thus cushioning the blow of lost days.¹⁶⁰ But confusion may persist.

Finally, the eligibility of persons with prior criminal convictions is frequently a point of confusion for voters and election officials alike. Too often, these citizens are not properly informed of their rights, even when they remain eligible to vote (or have regained rights).¹⁶¹ And persons with past convictions who are in fact properly registered to vote have been wrongly purged from the voter lists or challenged at the polls.¹⁶² These problems are of particular concern this year in Florida, Iowa, and South Dakota where, for the first time in 15 years, states have taken actions to roll back rather than restore voting rights.¹⁶³

IV. THE BATTLES TO COME

The national fight over voting rights will continue beyond November. We may be at a high water mark for voter access today. Going forward, we not only have to defend the victories already won, but we also have to stave off additional efforts to cut back on voting rights. The fight will play out in three main arenas: In the courts, in the U.S. Supreme Court, and in statehouses across the country.

A. In the Courts

First and foremost, many of the court victories won before this year's elections are temporary. The final decisions are those blocking Florida's voter registration drive law, mitigating South Carolina's voter ID law, preventing Missouri's photo ID ballot initiative from going onto the ballot, and preventing five Florida counties from implementing reduced early voting hours. All of the other decisions are subject to further review either on appeal or in the same courts. That means the outcomes could change.

These are the cases to watch:

- Both **Wisconsin** state court decisions striking down the state's strict photo ID law are subject to further review by the state appellate courts. The state Supreme Court refused to hear the case on an expedited basis before the election.¹⁶⁴ But both cases are currently before the state Court of Appeals and arguments are expected after the election.¹⁶⁵ (Because the cases are based on claims that the law violates the state constitution, they will not be subject to additional review in the U.S. Supreme Court.)
- Both federal appeals court decisions relating to **Ohio** — covering provisional ballots and early voting — are subject to review by the U.S. Supreme Court. With the support of attorneys general from 15 other states, Ohio asked the Supreme Court for, and was denied, emergency relief from the early voting decision.¹⁶⁶ But Ohio may still file petitions for review in both cases that would be considered on a regular timeline.
- Litigation continues in the federal court case that permanently blocked **Texas's** photo ID law. Although the court already found that Texas cannot justify its new law under Section 5 the federal Voting Rights Act, the Lone Star State has argued that the provision itself is unconstitutional. The court is therefore now considering the constitutionality of that landmark federal law. Both the court's initial ruling on the preclearance and its upcoming ruling on the Voting Rights Act can be appealed to the U.S. Supreme Court.
- Litigation is also ongoing in the state court case that blocked **Pennsylvania's** photo ID law for the 2012 elections. The law is blocked only for the 2012 elections;¹⁶⁷ it will be in effect in future years unless the court decides to permanently block it. Even if the court upholds the law, Pennsylvania's voters will be better off as a result of the litigation. Beforehand, the process to obtain state-issued photo ID in Pennsylvania was, according to the state Supreme Court, "a rigorous one" that was not consistent with principles of "liberal access."¹⁶⁸ Recognizing that, during the course of the litigation,

Pennsylvania created a new form of free state-issued photo ID that is much easier to obtain and will be accepted for voting.¹⁶⁹ That ID was created only at the end of August, so it remains to be seen whether it will significantly mitigate the disenfranchising effect of Pennsylvania’s voter ID law.¹⁷⁰

B. In the U.S. Supreme Court

The high court will hear two major cases next term that could substantially undermine legal protections for voters. The outcome of these cases may affect whether or not voters have any recourse in the courts to challenge discriminatory laws that make it harder for eligible Americans to vote.

The first case, *Gonzalez v. Arizona*, addresses Arizona's law that required individuals to produce documentary proof of their citizenship in order to vote. The Ninth Circuit Court of Appeals found that the state law was inconsistent with the National Voter Registration Act of 1993, a federal statute commonly referred to as “Motor Voter.” It applied a special “preemption” analysis applicable to laws, like Motor Voter, enacted under Congress’s authority under the U.S. Constitution’s Elections Clause. The Supreme Court will consider both how the Motor Voter law works, and when a federal election law preempts a state law. If the Court overreaches, it could threaten Congress’ core power to enact uniform federal election laws.

Although no case is docketed yet, the Supreme Court will likely rule on the constitutionality of Section 5 of the Voting Rights Act next term. This landmark civil rights law is widely acknowledged as being responsible for dismantling Jim Crow. It ensures that every American enjoys an equal opportunity to vote, regardless of race. It is among the few tools citizens have to fight back against discriminatory voting laws. It is also the main reason that voter ID laws in Texas and South Carolina, as well as early voting restrictions in five Florida counties, will not be in effect this election.

Six years ago, Congress voted by overwhelming bipartisan majorities to renew Section 5, saying the law was still needed to prevent discrimination in the voting system. The vote was unanimous in the Senate and 290-33 in the House. President George W. Bush signed it into law. Over the past two years, however, as states were passing laws making it harder to vote, seven states and localities asked courts to invalidate Section 5.¹⁷¹ Of the suits that are still pending, the ones brought by Shelby County in Alabama, Kinston in North Carolina, and the state of Texas are the most likely to reach the Supreme Court. A three-judge federal court in Washington, D.C. upheld the constitutionality of Section 5 in a strong and thorough opinion in the Shelby County case, and the Court is reportedly considering before the election whether to take up that case. Three years ago, in a case brought by a public utility in Northwest Austin, several Justices questioned the continuing constitutional validity of Section 5.¹⁷² That case predated new developments that strengthen the case for the law’s constitutionality, but it nonetheless raises serious concerns.

At stake: One of the most effective legal tools for ensuring equality in the voting process and the most significant bulwark against discriminatory new voting laws. As Judge Bates found in the case blocking South Carolina’s voter ID law, Section 5 plays a vital role in staving off discriminatory voting changes. He explained, “[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive.”¹⁷³

C. In the Statehouses

The past two years saw a sharp spike in harsh new bills to curb voting. This baleful trend was already well underway before 2011, and will likely continue.¹⁷⁴ Indeed, while 25 bills restricting voting passed into law over the past two years, 180 were introduced; and many are expected to come back in the next legislative session. Of particular concern are the nine bills that passed but were vetoed in six states. The battle over voting rights will thus resume in statehouses across the country next year.

CONCLUSION

In the wake of a massive wave of new laws that could have made it harder for millions of Americans to vote this year, voters have largely stood their ground. They have managed successfully to push back against the bulk of the most restrictive new laws, ensuring that far fewer voting restrictions will be in place for the 2012 elections. The most significant assault on voting rights in decades has thus been seriously blunted.

Although the election will soon be over, the fights over voting rights will, unfortunately, continue. Many of the battles won in 2012 will be refought in 2013. Court cases in Pennsylvania, Wisconsin, Texas, and Ohio are ongoing. The U.S. Supreme Court is taking up voting issues. And state legislators across the country are gearing up to introduce new restrictive voting laws. Americans cannot yet rest easy.

But Americans can learn from the battles over voting rights in 2012. We can learn the importance of strong national laws protecting voting rights, like the federal Voting Rights Act and the Motor Voter law, both of which made a big difference this year. We can learn the importance of strong courts to enforce those rights. And we can learn that enough is enough.

It is simply not acceptable to be fighting over vote suppression in 2012. It is not acceptable for politicians to try to fix the rules of the game in a way that makes it harder for some groups of Americans to have their say. Americans deserve a voting system that is free, fair, and accessible, but partisan voting wars threaten that ideal. To move past those wars, we need to focus on reforms that improve the system, not ones that game it. We need to better use technology to achieve that goal. And we particularly need to modernize our voter registration system to enhance both access and integrity.

ENDNOTES

¹ WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 1 & 37 n.1 (2011), available at http://brennan.3cdn.net/92635dda4bc09e8d88_i3m6bjdeh.pdf.

² The Electoral College consists of 538 electors. A majority of 270 electoral votes is required to elect the president. The nineteen states that passed restrictive voting laws and executive actions since the beginning of 2011 account for 231 electoral votes: Alabama (9), Florida (29), Georgia (16), Illinois (20), Iowa (6), Kansas (6), Maine (4), Mississippi (6), New Hampshire (4), Ohio (18), Pennsylvania (20), Rhode Island (4), South Carolina (9), South Dakota (3), Tennessee (11), Texas (38), Virginia (13), West Virginia (5), and Wisconsin (10). For more information, see BRENNAN CENTER FOR JUSTICE, 2012 VOTING LAW CHANGES: PASSED AND PENDING LEGISLATION THAT HAS THE POTENTIAL TO SUPPRESS THE VOTE (2012), available at http://brennan.3cdn.net/b66811a6693907abff_4cm6bneyvp.pdf.

³ Photo ID bills were signed into law in eight states — Alabama, Kansas, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin — and passed by referendum in Mississippi. They were introduced in at least 34 states. See WEISER & NORDEN, *supra* note 1, at 5; see also 2012 VOTING LAW CHANGES, *supra* note 2.

⁴ WEISER & NORDEN, *supra* note 1, at 2; BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF 3 (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

⁵ CITIZENS WITHOUT PROOF, *supra* note 4, at 3.

⁶ Proof of citizenship bills passed in Alabama, Kansas, and Tennessee. See WEISER & NORDEN, *supra* note 1, at 17.

⁷ WEISER & NORDEN, *supra* note 1, at 18; CITIZENS WITHOUT PROOF, *supra* note 4, at 2.

⁸ CITIZENS WITHOUT PROOF, *supra* note 4, at 2.

⁹ Florida, Illinois, Maine, Ohio, Texas, and Wisconsin all passed registration restrictions. See WEISER & NORDEN, *supra* note 1, at 2-3.

¹⁰ Florida, Illinois, and Texas passed restrictions on voter registration drives. See *id.*

¹¹ BRENNAN CENTER FOR JUSTICE, CAST OUT 8 (2006), available at http://brennan.3cdn.net/1d92eef94232a9031_zdm6b6okf.pdf; see also WEISER & NORDEN, *supra* note 1, at 19-20; DIANA KASDAN, STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES 3 (2012), available at http://brennan.3cdn.net/2665c26afb9a4bce_inm6blqw1.pdf.

¹² WEISER & NORDEN, *supra* note 1, at 20 & 48 n.163; KASDAN, *supra* note 11, at 3 & 9 n.21.

¹³ Maine and Ohio both passed laws to end Election Day registration. See WEISER & NORDEN, *supra* note 1, at 25-28. However, in both states these efforts were undone: in Maine citizens organized to repeal the law and in Ohio the legislature reversed itself after citizens organized a referendum to repeal the law. See *infra* Part II; 2012 VOTING LAW CHANGES, *supra* note 2, at 10, 18.

¹⁴ Wisconsin increased its residency requirements to 25 days from 10 days before someone can register to vote, while Florida passed a law barring voters who move between counties from updating their address at the polls. See 2012 VOTING LAW CHANGES, *supra* note 2, at 4, 34.

¹⁵ At least nine states introduced bills to reduce early voting and four tried to reduce absentee voting opportunities. These included Florida, Georgia, Maryland, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin. See WEISER & NORDEN, *supra* note 1, at 29.

¹⁶ *Id.* at 33 & 54 n.273.

¹⁷ *Id.* at 34-35.

¹⁸ See generally MYRNA PÉREZ, VOTER PURGES (2008), available at http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf.

¹⁹ Diana Kasdan, *State Legislatures Wind Down, Purge Programs Pick Up*, BRENNAN CENTER FOR JUSTICE (Aug. 27, 2012), available at <http://www.brennancenter.org/blog/archives/state-legislatures-wind-down-purge-programs-pick-up/>; see also Greg Allen, *World War II Vet Caught Up in Florida's Voter Purge Controversy*, NPR (May 31, 2012), available at <http://www.npr.org/blogs/itsallpolitics/2012/05/31/154020289/world-war-ii-vet-caught-up-in-floridas-voter-purge-controversy>; Sara Burnett, *Suthers Backs Gessler, Asks Homeland Security to Screen Voters*, DENV. POST (July 7, 2012), available at http://www.denverpost.com/breakingnews/ci_21044134/suthers-backs-gessler-asks-homeland-security-screen-voters#ixzz24KJvcs9P; Chris Tomlinson, *Agreement Ends Texas Voter Purge Before Election*, HOUS. CHRON. (Oct. 3, 2012), available at <http://www.chron.com/news/article/Agreement-ends-Texas-voter-purge-before-election-3916744.php>.

²⁰ Cindy George, *Dispute Over 'Dead' Voters in Harris County is Finally Resolved*, HOUS. CHRON. (Sep. 19, 2012), available at <http://www.chron.com/news/houston-texas/article/Dispute-resolved-over-dead-voter-issue-3879081.php>; Chuck Lindell, *State Settles Lawsuit on 'Dead' Voter Purge*, AUSTIN AMERICAN-STATESMAN (Oct. 3, 2012), available at <http://www.statesman.com/news/news/state-regional-govt-politics/state-settles-lawsuit-on-dead-voter-purge/nSSdg/>.

²¹ Marc Caputo, Patricia Mazzei & Anna Edgerton, *Florida Sends Election Departments List of 198 Potential Noncitizens; Some May Have Illegally Voted*, MIAMI HERALD (Sep. 26, 2012), available at <http://www.miamiherald.com/2012/09/26/v-fullstory/3022387/florida-sends-election-departments.html>.

²² Diana Kasdan, *The Nearly Non-Citizen Purges*, BRENNAN CENTER FOR JUSTICE (Sep. 14, 2012), available at <http://www.brennancenter.org/blog/archives/the-nearly-non-citizen-purges/>; see also Mary Winter, *Covering the Search for Noncitizen Voters*, COLUM. JOURNALISM REV. (Oct. 22, 2012), available at http://www.cjr.org/swing_states_project/covering_the_search_for_noncitizen_voters.php?page=all; Ivan Moreno, *CO Elections Chief Moving Fast on Citizens Check*, S.F. CHRON. (July 17, 2012), available at <http://www.sfgate.com/news/article/CO-elections-chief-moving-fast-on-citizens-check-3714047.php#ixzz29yqzsw>; Ivan Moreno, *Colo. Won't Reveal Suspected Ineligible Voters*, S.F. CHRON. (Aug. 21, 2012), available at <http://www.sfgate.com/news/article/Colo-won-t-reveal-suspected-ineligible-voters-3805284.php>; Ivan Moreno, *300 More Suspected Noncitizens on Colorado Voter Rolls in 2nd Round of Checks*, WASH. POST (Oct. 23, 2012), available at http://www.washingtonpost.com/national/apnewsbreak-300-more-suspected-noncitizens-on-colorado-voter-rolls-in-2nd-round-of-checks/2012/10/23/1e06cba0-1d73-11e2-8817-41b9a7aaabc7_story.html.

²³ Moreno, *300 More Suspected Noncitizens on Colorado Voter Rolls in 2nd Round of Checks*, *supra* note 2.

²⁴ Complaint, *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792 (S.D. Ohio Aug. 30, 2012); Complaint, *Judicial Watch, Inc. v. King*, No. 1:12-cv-800 (S.D. Ind. June 11, 2012); Press Release, Brennan Center for Justice, Michigan Secretary of State Must Ensure Transparency, Fairness and Protect Voters' Rights (Oct. 10, 2012), available at <http://www.brennancenter.org/content/resource/michigan-secretary-of-state-must-ensure-transparency-fairness-and-protect-v/>

²⁵ Based on a new analysis of the voter challenger laws in all fifty states, the recent Brennan Center report, VOTER CHALLENGERS, makes the following key findings: challenger laws are susceptible to abuse, historically they have been used to suppress newly franchised groups, and in recent years they have been used to target voters of color, students, and voters with disabilities. NICOLAS RILEY, VOTER CHALLENGERS (2012), available at http://brennan.3cdn.net/9edfc63808b7bf0c09_y5m6iyf3a.pdf. These findings are consistent with an earlier Brennan Center report assessing voter challenges as one component of a broader spectrum of "ballot security" operations carried out by political operatives and private groups and that have the effect of suppressing eligible voters. WENDY WEISER & VISHAL AGRAHARKAR, BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS (2012), available at http://brennan.3cdn.net/49ec3e9f92cd004786_iqm6baoz3.pdf.

²⁶ Nicolas Riley, *Challengers Can Cause Headaches at the Polls*, BRENNAN CENTER FOR JUSTICE (Aug. 31, 2012), available at <http://www.brennancenter.org/blog/archives/challengers-can-cause-headaches-at-the-polls/>; DEMOS & COMMON CAUSE, BULLIES AT THE BALLOT BOX: PROTECTING THE FREEDOM TO VOTE AGAINST WRONGFUL CHALLENGES AND INTIMIDATION (2012), available at <http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf>.

²⁷ RILEY, *supra* note 25 at 39 n.159; Order Granting Plaintiffs' Motion for Temporary Restraining Order at 3, *Spencer v. Blackwell*, No. C-1-04-738 (S.D. Ohio Nov. 1, 2004).

²⁸ Detailed information about each of these laws, including descriptions and dates of passage, can be found in the Brennan Center's report, 2012 VOTING LAW CHANGES, *supra* note 2.

²⁹ R. MICHAEL ALVAREZ & JONATHAN NAGLER, ELECTION DAY VOTER REGISTRATION IN CALIFORNIA 2 (2011), available at <http://www.commoncause.org/atif/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/CA%20EDR%20Report%20-%20FINAL%20APR%202011.pdf>. The research suggests that the positive turnout effects are even higher for some demographic groups, including younger voters, those who have moved, and newly naturalized citizens. *Id.* at 4.

- ³⁰ Jordan Howard, *Maine People's Veto of Voter Registration Law to Be on Ballot*, HUFFINGTON POST (Sep. 9, 2011), available at http://www.huffingtonpost.com/2011/09/09/maine-peoples-veto-voter-registration-ballot-measure_n_955576.html; Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS (Nov. 9, 2011), available at <http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/>.
- ³¹ Glenn Adams, *Maine Voters Restore Election Day Registration*, BOS. GLOBE (Nov. 8, 2011), available at http://www.boston.com/news/local/maine/articles/2011/11/08/maine_voters_decide_on_election_day_registration/; Steve Mistler, *"We Spoke with One Voice:" Mainers Vote to Keep Election Day Registration*, MAINE SUN JOURNAL (Nov. 8, 2011), available at <http://www.sunjournal.com/news/state/2011/11/09/we-spoke-one-voice-mainers-vote-keep-election-day-registration/1112913>.
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- ³³ Joe Guillen, *Another Voter Referendum: Ohio Secretary of State Certifies Signatures to Put Elections Law on Next Year's Ballot*, CLEVELAND.COM (Dec. 9, 2011), available at http://www.cleveland.com/open/index.ssf/2011/12/another_voter_referendum_ohio.html; Dave Harding, *Fair Elections Ohio Delivers 166,148 Additional Petition Signatures for HB194 Referendum*, PROGRESS OHIO (Nov. 22, 2011), available at <http://www.progressohio.org/blog/2011/11/fair-elections-ohio-delivers-166148-additional-petition-signatures-for-hb194-referendum.html>.
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- ³⁵ Joe Guillen, *Ohio House Votes to Repeal Controversial Election Law*, CLEVELAND.COM (May 8, 2012), available at http://www.cleveland.com/open/index.ssf/2012/05/ohio_house_votes_to_repeal_con.html.
- ³⁶ *Detailed Bill Information for H.B. 152*, MONT. LEGISLATURE, [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=152&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=152&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) (last visited Oct. 25, 2012).
- ³⁷ *SF509 Status in Senate for Legislative Session 87*, MINN. LEGISLATURE, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF509&ssn=0&y=2011 (last visited Oct. 25, 2012).
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⁴⁷ Press Release, Va. Gov. Bob McDonnell, Governor McDonnell Signs SB 1 and HB 9 and Issues Executive Order (May 18, 2012), available at <https://www.governor.virginia.gov/news/viewRelease.cfm?id=1263&printpage=Yes>.

⁴⁸ *Id.*

⁴⁹ *Id.*

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⁵¹ Letter from Gov. Rick Snyder to the Michigan Senate (July 3, 2012), available at http://www.michigan.gov/documents/snyder/SBs_754_and_803_letter_391314_7.pdf; Letter from Gov. Rick Snyder to the Michigan Senate (July 3, 2012), available at http://www.michigan.gov/documents/snyder/HB_5061_letter_391313_7.pdf.

⁵² S.B. 754 (Mich. 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2011-SNB-0754.pdf>.

⁵³ S.B. 803 (Mich. 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2011-SNB-0803.pdf>.

⁵⁴ Following the veto of S.B. 803, Michigan Secretary of State Ruth Johnson nevertheless ordered local election officials to put a citizenship check-box on ballot applications. The secretary's directive was applied inconsistently across the state. Because of this, a federal court found that continuing to use the checkbox in the upcoming election would likely violate voters' rights to equal protection and thus prohibited use of the check-box for 2012. Order Granting Plaintiffs' Motion for a Preliminary Injunction, *Brayton v. Johnson*, No. 12-14114 (E.D. Mich. Sept. 7, 2012), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/OrderGrantingPreliminaryInjunction.pdf>.

⁵⁵ H.B. 5061 (Mich. 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billenrolled/House/pdf/2011-HNB-5061.pdf>.

⁵⁶ *Legislative Document LB239*, NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12209 (last visited Oct. 26, 2012).

⁵⁷ Martha Stoddard, *Bill Would Require Photo ID to Cast Vote*, OMAHA WORLD-HERALD (Jan. 8, 2012), available at <http://www.omaha.com/article/20120108/NEWS01/701089899#>.

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⁶⁰ *Filibuster Kills Nebraska Voter ID Measure*, KEARNEY HUB (Kearney, Neb.) (Mar. 29, 2012), available at http://www.kearneyhub.com/news/local/article_99d5f964-79ad-11e1-b6f0-0019bb2963f4.html.

⁶¹ See generally *Civil Rights Division Voting Case List*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/crt/about/vot/litigation/caselist.php> (last visited Oct. 26, 2012) (listing all of the Department of Justice's cases brought under federal voting laws for over a decade).

⁶² U.S. Attorney General Eric Holder, Speech at the Lyndon Baines Johnson Library and Museum (Dec. 13, 2011), available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html>.

⁶³ *Id.*

⁶⁴ Letter from Thomas E. Perez, U.S. Assistant Attorney General, to C. Havird Jones, Jr., Tex. Assistant Deputy Attorney General (Dec. 23, 2011), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/1_122311.php.

⁶⁵ Specifically, the Department found that, according to the data submitted by South Carolina, non-white voters were nearly 20 percent more likely than white voters to lack acceptable IDs, and that approximately 82,000 already-registered non-white voters lacked IDs. *Id.*

- ⁶⁶ Harriet McLeod, *South Carolina to Sue Obama Administration Over Voter ID Law*, REUTERS (Jan. 10, 2012), available at <http://www.reuters.com/article/2012/01/11/us-southcarolina-voterid-idUSTRE80A02520120111>; Richard L. Hasen, *Holder's Voting Rights Gamble*, SLATE (Dec. 30, 2011), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administration_s_risky_voter_id_move_threatens_the_voting_rights_act.html.
- ⁶⁷ See Perry: *South Carolina is at War with this Federal Government*, FOX NEWS (Jan. 16, 2012), available at <http://nation.foxnews.com/gop-debate-south-carolina/2012/01/16/perry-south-carolina-war-federal-government> (transcript of relevant portion of debate).
- ⁶⁸ Complaint, *South Carolina v. United States*, No. 1:12-cv-203 (D.D.C. Feb. 7, 2012).
- ⁶⁹ Letter from Thomas E. Perez, U.S. Assistant Attorney General, to Keith Ingram, Tex. Director of Elections (Mar. 12, 2012), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/1_031212.php.
- ⁷⁰ *Id.*
- ⁷¹ Joint Status Report, *Florida v. United States*, No. 1:11-cv-01428 (D.D.C. Mar. 20, 2012).
- ⁷² Letter from T. Christian Herren, Jr., Chief, Voting Section of the Civil Rights Division of U.S. Department of Justice, to J. Gerald Hebert and Stephen B. Pershing (Sept. 4, 2012).
- ⁷³ *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).
- ⁷⁴ *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669 (Wis. Cir. Ct. Mar. 12, 2012), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Niessruling.pdf>.
- ⁷⁵ *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557, 2012 WL 1020254, at *3 (Wis. Ct. App. Mar. 28, 2012).
- ⁷⁶ JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (2005), available at http://www.brennancenter.org/page/-/d/download_file_50902.pdf.
- ⁷⁷ *Aziz v. Mayer*, No. 11AC-CC00449 (Mo. Cole Co., Div. IV, Mar. 27, 2012).
- ⁷⁸ *Gonzalez v. Arizona*, 677 F.3d 383, 398-403 (9th Cir. 2012) (en banc).
- ⁷⁹ According to the district court, “[b]etween January 2005 and September 2007, the number of applicants in 14 of Arizona’s 15 counties unable (initially) to register to vote because of Proposition 200 was 31,550.” Order; Findings of Fact and Conclusions of Law, *Gonzales v. Arizona*, No. CV-06-1268, at 13 (D. Ariz. Aug. 20, 2008).
- ⁸⁰ *League of Women Voters of Florida v. Browning*, ___ F.Supp.2d ___, No. 4:11-cv-628, 2012 WL 1957793 (N.D. Fla. May 31, 2012).
- ⁸¹ *Id.* at *11.
- ⁸² Permanent Injunction and Order for Entry of Judgment, *League of Women Voters of Florida v. Browning*, No. 4:11-cv-628 (N.D. Fla. Aug. 30, 2012), available at http://www.brennancenter.org/page/-/Democracy/VRE/LWVF_v_Browning_Final_Order.pdf.
- ⁸³ See, e.g., Press Release, League of Women Voters of Florida, League of Women Voters and Rock the Vote Announce Resumption of Voter Registration in Florida (June 6, 2012), available at <http://thefloridavoter.org/files/download/355>.
- ⁸⁴ See *Voter Registration Report Archives*, FL. DIVISION OF ELECTIONS, <http://election.dos.state.fl.us/voter-registration/archives/index.shtml> (last visited Oct. 26, 2012); see also *infra* note 117.
- ⁸⁵ *Florida v. United States*, ___ F.Supp.2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012).
- ⁸⁶ *Id.* at *23.
- ⁸⁷ See Response by the United States to Florida’s Mot. for Judgment, *Florida v. United States*, No. 11-1428 (D.D.C. Sept. 9, 2012).
- ⁸⁸ Notice of County Early Voting Plans, *Brown v. Detzner*, No. 3:12-cv-00852, (M.D. Fla. Sept 14, 2012).
- ⁸⁹ *Texas v. Holder*, ___ F.Supp.2d ___, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012).

⁹⁰ *Id.* at *32.

⁹¹ The federal court found methodological problems with both the plaintiffs' and the defendants' numerical estimates. *Id.* at *17-*26.

⁹² Letter from Thomas E. Perez, U.S. Assistant Attorney General, to Keith Ingram, Tex. Director of Elections (Mar. 12, 2012), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/1_031212.php.

⁹³ *Appelwhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

⁹⁴ *Appelwhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899 (Pa. Sept. 18, 2012).

⁹⁵ Bob Warner, *Voter ID law may affect more Pennsylvanians than previously estimated*, PHILA. INQUIRER, July 5, 2012, available at http://articles.philly.com/2012-07-05/news/32537732_1_voter-id-new-voter-id-cards.

⁹⁶ *Obama for America v. Husted*, No. 12-4055, 2012 WL 4497211 (6th Cir. Oct. 5, 2012), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion_006.pdf.

⁹⁷ Order in Pending Case, *Obama for America v. Husted*, Order List 568 U.S., (U.S. Oct. 16, 2012), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/staydenied.pdf>.

⁹⁸ RUSSELL WEAVER & SONIA GILL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, EARLY VOTING PATTERNS BY RACE IN CUYAHOGA COUNTY, OHIO, 1, 10 (2012), available at http://www.866ourvote.org/newsroom/publications/document/EarlyVoting_Cuyahoga_Report.pdf.

⁹⁹ *Northeast Ohio Coalition for Homeless v. Husted*, ___ F.3d ___, Nos. 12-3916, 12-4069, 2012 WL 4829033 (6th Cir. Oct. 11, 2012).

¹⁰⁰ *Id.* at *13, *20.

¹⁰¹ Associated Press, *Ohio Judge Extends Provisional Ballot Counting*, REVIEW (East Liverpool, Ohio) (Oct. 25, 2012), available at <http://www.reviewonline.com/page/content.detail/id/260611/Ohio-judge-extends-provisional-ballot-counting-.html?isap=1&nav=5038>.

¹⁰² See *Northeast Ohio Coalition for Homeless*, 2012 WL 4829033.

¹⁰³ *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 222 (6th Cir. 2011).

¹⁰⁴ *South Carolina v. United States*, ___ F.Supp.2d ___, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012).

¹⁰⁵ *Id.* at *1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *21 (Bates, J., concurring).

¹⁰⁸ See *id.* at *20 (Kollar-Kotelly, J., concurring).

¹⁰⁹ The winning arguments included several different claims under state constitutions in Wisconsin and Pennsylvania; claims under Section 5 of the federal Voting Rights Act in Texas, South Carolina, and Florida; claims under the First Amendment's right to free speech and association in Florida; claims under the federal Motor Voter law in Arizona; and claims under the U.S. Constitution's Equal Protection and Due Process Clauses in Ohio.

¹¹⁰ *League of Women Voters of Florida v. Browning*, ___ F. Supp. 2d ___, No. 4:11cv628, 2012 WL 1957793 at *4 (N.D. Fla. May 31, 2012).

¹¹¹ See Jan Murphy, *Observers Expect a 3-3 Split Decision from Pa. Supreme Court on Voter ID Law Challenge*, PENNLIVE.COM (Sep. 13, 2012), available at http://www.pennlive.com/midstate/index.ssf/2012/09/observers_expect_a_3-3_split_d.html.

¹¹² *Appelwhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899, at *3 (Pa. Sept. 18, 2012).

¹¹³ Florida, Georgia, Illinois, Iowa, Kansas, New Hampshire, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. 2012 VOTING LAW CHANGES, *supra* note 2.

¹¹⁴ The thirteen states that have passed restrictive voting laws and executive actions with the potential to impact the 2012 election account for 165 electoral votes: Florida (29), Georgia (16), Illinois (20), Iowa (6), Kansas (6), New Hampshire (4), Rhode Island (4), South Dakota (3), Tennessee (11), Texas (38), Virginia (13), West Virginia (5), and Wisconsin (10).

¹¹⁵ See *supra* note 82.

¹¹⁶ The new rules for voter registration drives became effective on May 20, 2011. Florida Division of Elections, May 20, 2011 Emergency Regulations for Third-Party Voter Registration Organizations and Memorandum from Kurt S. Browning to Supervisors of Elections (May 19-20, 2011), available at http://brennan.3cdn.net/bf429fcd66bddff833_ivm6bbswt.pdf. On May 31, 2012, Judge Hinkle issued his order preliminarily blocking the most onerous rules. That order remained in effect while the parties negotiated a settlement and until a final permanent order was entered on August 30, 2012. During this yearlong period, plaintiffs League of Women Voters of Florida, Rock the Vote, and Florida PIRG Education Fund conducted no voter registration drives. And many other nonpartisan groups severely curtailed or delayed their voter registration drive activities. KASDAN, *supra* note 11, at 2 & n.9.

¹¹⁷ An analysis of the Florida Division of Elections monthly reports of new voter registration applications received reveals that from June 1, 2011 through May 31, 2012, there were 597,576 new voter registration applications received. From June 1, 2007 through May 31, 2008, there were 695,589 new voter registrations received. This is a difference of 98,013 registration applications within the same 12 month cycle. Thus, there is a 14 percent decrease in new registrations when comparing the period when HB 1355 was in effect, before the 2012 presidential election, to the same months, when no similar restriction was in place, before the last presidential election. The monthly reports of new registrations, from which these numbers were calculated, are available at <http://election.dos.state.fl.us/voter-registration/archives/index.shtml>.

¹¹⁸ Michael C. Herron and Daniel A. Smith, *House Bill 1355 and Voter Registration in Florida*, Presentation for the 2012 Annual Meeting of the American Political Science Association 20 (Sept. 12, 2012), available at <http://www.dartmouth.edu/~herron/FloridaVoterRegistrationsHB1355.pdf>.

¹¹⁹ TEX. ELEC. CODE ANN. §§ 13.031(d)(3), 11.002(a)(5).

¹²⁰ Complaint, *Voting for America, Inc. v. Andrade*, No. 3:12-cv-44 (S.D. Tex. Feb. 13, 2012).

¹²¹ Illinois lawmakers passed S.B. 1586 on July 5, 2011, which requires deputy registrars to return completed registration materials by first-class mail within two business days or by personal delivery within seven days. 10 ILL. COMP. STAT. 5/4-6.2(c), 5/5-16.2(c), 5/6-50.2(c). Previously, deputy registrars were required to return completed registration materials within seven days of receipt, regardless of the mode of delivery.

¹²² KASDAN, *supra* note 11, at 5, 24 & n.96.

¹²³ WIS. STAT. ANN. §§ 6.02, 6.10(4).

¹²⁴ KAN. STAT. ANN. § 25-2908(h)(1). There are also exemptions for certain disabled persons, active duty service members, and those with a religious objection. *Id.* at § 25-2908(h)(1), (i).

¹²⁵ KAN. STAT. ANN. §§ 25-2908(d), 25-3104.

¹²⁶ TENN. CODE ANN. § 2-7-112(c)(2)(B). There are exceptions for certain individuals who are hospitalized or in nursing homes. *Id.* at § 2-7-112(a)(1).

¹²⁷ Those with a religious objection to being photographed and indigent voters who are unable to pay to obtain ID may execute an affidavit instead. TENN. CODE ANN. § 2-7-112(f).

¹²⁸ TENN. CODE ANN. § 2-7-112(e)(5).

¹²⁹ WEISER & NORDEN, *supra* note 1, at 4 & n.4; see also KEESHA GASKINS & SUNDEEP IYER, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (2012) available at http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf; *Appenbite v. Pennsylvania*, No. 330 M.D. 2012 (Pa. Commw. Ct. Oct. 2, 2012); *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

¹³⁰ N.H. REV. STAT. ANN. § 659:13(I), (II)(g) - (h). The affidavit allows the secretary of state to conduct an investigation after the election concerning such voters' identities. *Id.* at § 659:13(IV).

¹³¹ R.I. GEN. LAWS §§ 17-19-24.2(d), -24.3(b).

¹³² VA. CODE ANN. § 24.2-643(B).

¹³³ WEISER & NORDEN, *supra* note 1, 34-35 (describing executive orders by governors of Florida and Iowa that “returned their state policies to *de facto* permanent disenfranchisement for all citizens convicted of felonies.”); 2012 VOTING LAW CHANGES, *supra* note 2, at 23 (describing South Dakota law passed in July 2012 denying voting rights to persons with criminal convictions who are on probation).

¹³⁴ See Gary Fineout, *Study: Fewer Ex-Felons Back in Prison After Rights Restored*, HERALD TRIBUNE (July 21, 2011), available at <http://politics.heraldtribune.com/2011/07/21/study-fewer-ex-felons-back-in-prison-after-rights-restored/>.

¹³⁵ WEISER & NORDEN, *supra* note 1, at 34-35.

¹³⁶ *Id.*; Iowa Exec. Order No. 42 (July 4, 2005), available at http://brennan.3cdn.net/563fe831695be5a1fa_nwm6bvbiik.pdf.

¹³⁷ S.D. CODIFIED LAWS § 12-4-18.

¹³⁸ 2012 VOTING LAW CHANGES, *supra* note 2, at 29 (describing Florida, Georgia, Tennessee, and West Virginia laws cutting back on early voting periods).

¹³⁹ *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *15-16.

¹⁴⁰ See Response by the United States to Florida’s Mot. for Judgment at 2, *Florida v. United States*, No. 11-1428 (D.D.C. Sept. 5, 2012); see also United States Notice to the Court, *Florida v. United States*, No. 11-1428 (D.D.C. Sept. 12, 2012).

¹⁴¹ Notice of County Early Voting Plans, *Brown v. Detzner*, No. 3:12-cv-00852, (M.D. Fla. Sept 14, 2012).

¹⁴² W. VA. CODE § 3-3-3(a).

¹⁴³ In Georgia, the legislature enacted an “advance voting” period during which voters can cast early ballots, which begins on the fourth Monday prior to each primary or general election and lasts until the Friday immediately prior to the election. Previously, early ballots could be cast at any time after the early ballots had been printed, which had to occur at least 45 days prior to the election. 2012 VOTING LAW CHANGES, *supra* note 2, at 5-6. In Tennessee the early voting period was shortened by two days to thirteen days in presidential primary elections, but no changes were made to the fifteen-day early voting period for general elections. *Id.* at 25-26.

¹⁴⁴ According to data from Florida’s statewide voter registration and voter history file, which was analyzed by Professor Paul Gronke, a leading expert on early voting, 836,224 voters used the first five days of the 14 day-long early voting period and another 78,380 used the last Sunday. Amended Rule 26(a)(2)(B) Expert Report and Declaration of Paul Gronke PhD, Exhibits 9 & 10, *Florida v. United States*, No. 1:11-cv-1428 (D.D.C. May 14, 2012); see also *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *18-19.

¹⁴⁵ In 2008, 15.5 percent of all black voters in Florida used the first five days of early voting, as compared to 9.3 percent of all white voters. And on the last Sunday, 4.21 percent of all black voters voted, as compared to 1.35 percent of white voters. Amended Rule 26(a)(2)(B) Expert Report and Declaration of Paul Gronke PhD, Exhibits 9 & 10, *Florida v. United States*, No. 1:11-cv-1428 (D.D.C. May 14, 2012); see also *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *18 (“African-American voters used the repealed days of early voting at rates nearly *double* those of white voters in 2008.”) (emphasis in original).

¹⁴⁶ See Gronke Report at 10-11, Ex. 4, *supra* note 145.

¹⁴⁷ See *Florida v. United States*, 2012 WL 3538298, at *18; see also Gronke Report, *supra* note 145. The heightened use of early in-person voting among black voters is a pattern identified in Ohio as well. See *supra* note 98 and accompanying text.

¹⁴⁸ Georgia, Florida, Tennessee, and West Virginia.

¹⁴⁹ Nicole Flatow, *Pennsylvania Ads Still Suggest ID Required to Vote*, THINK PROGRESS (Oct. 15, 2012), available at <http://thinkprogress.org/justice/2012/10/15/1010051/pennsylvania-ads-still-suggest-id-required-to-vote/>.

¹⁵⁰ Press Release, ACLU, Judge Asked to Order Commonwealth of Pennsylvania to Stop Misleading Voters About the Need for ID on Election Day (Oct. 19, 2012), available at <http://www.aclu.org/voting-rights/judge-asked-order-commonwealth-pennsylvania-stop-misleading-voters-about-need-id>; Petition for Supp. Inj. to Enforce Court’s October 2, 2012, Order, *Appelwhite v. Pennsylvania*, No. 330 M.D. 2012 (Pa. Commw. Ct. Oct. 2, 2012), available at <http://www.aclupa.org/downloads/Petition101912.pdf>.

¹⁵¹ In a review of election websites for large counties, inaccurate information about the status of the photo ID law was found on the websites for both Delaware County and the City of Philadelphia. Before the Brennan Center contacted election officials in mid October to correct the erroneous information, Delaware County's website include a newsletter instructing voters that "a new state Voter ID law requires all voters to show a valid photo ID to be eligible to vote at the polling place on Nov. 6." (Documentation on file with authors.)

¹⁵² Ian Millhiser, *Pennsylvania Newspaper Owned by Top Right-Wing Funder Falsely Claims ID Is Required to Vote*, THINKPROGRESS, (Oct. 22, 2012), available at <http://thinkprogress.org/justice/2012/10/22/1056351/pennsylvania-newspaper-owned-by-top-right-wing-funder-falsely-claims-id-is-required-to-vote/>.

¹⁵³ See Laura Conaway, *You Do Not Need I.D. To Vote In Texas*, THE MADDOW BLOG, Oct. 26, 2012, at <http://maddowblog.msnbc.com/news/2012/10/26/14700827-you-do-not-need-id-to-vote-in-texas> (reproducing copy of Texas mailing).

¹⁵⁴ Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, PS: POLITICAL SCIENCE, Jan. 2009, at 128 (reporting results from analysis of individual-level data based on nationwide surveys of voters in the 2006 general midterm election and 2008 presidential primary election). Specifically, Ansolabehere finds: "In the 2006 sample, 49% of respondents reported that the poll workers asked them to show photo ID when they voted. In the 2008 sample that figure had risen to 56%. This rate is strikingly high. In 2006 only two states actually required photo identifications; the other Voter ID states allowed poll workers to request ID. In other words, poll workers are using their discretion and asking voters to show photo ID." *Id.*

¹⁵⁵ "In the 2006 general election, 47% of white voters reported being asked to show photo identification at the polls, compared with 54% of Hispanics and 55% of African Americans. In the 2008 Super Tuesday primary states, 53% of whites were asked to show photo ID, compared with 58% of Hispanics and a staggering 73% of African Americans." *Id.*

¹⁵⁶ Ohio Secretary of State, Directive 2012-50 (Oct. 16, 2012) (setting early voting hours), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-50.pdf>; see generally *supra* notes 96-98.

¹⁵⁷ See *supra* note 88.

¹⁵⁸ Section 5 of the Voting Rights Act of 1965 requires certain states and local governments with a history of racially discriminatory voting practices to "preclear" any proposed changes to their voting or election laws with the Department of Justice or a three-judge federal court. The purpose of the preclearance process is to ensure that the changes in election practices do not have a detrimental effect on minority electoral participation and representation.

¹⁵⁹ *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298, at *5 (D.D.C. Aug. 16, 2012) (citing FLA. STAT. § 101.657(d)).

¹⁶⁰ See *supra* note 88.

¹⁶¹ See ERIKA WOOD AND RACHEL BLOOM, DE FACTO DISENFRANCHISEMENT 1 (2008), available at http://brennan.3cdn.net/578d11c906d81d548f_1tm6iigab.pdf.

¹⁶² PÉREZ, *supra* note 18, at 21; WEISER & AGRAHARKAR, *supra* note 25, at 5.

¹⁶³ WEISER & NORDEN, *supra* note 1, at 34; 2012 VOTING LAW CHANGES, *supra* note 2, at 23.

¹⁶⁴ Wisconsin Top Court Won't Hear State Voter-ID Case Quickly, <http://www.businessweek.com/news/2012-09-27/wisconsin-top-court-won-t-hear-state-voter-id-case-quickly>

¹⁶⁵ *Id.*

¹⁶⁶ *Husted v. Obama for America*, No. 12A338, 568 U.S. ___ (Oct. 16, 2012) (order denying application for a stay), available at http://www.supremecourt.gov/orders/courtorders/101612zr_pm02.pdf; Brief of Amici Curiae, Michigan et al., *Husted v. Obama for America*, No. 12A338 (Oct. 12, 2012), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/AmicusMIetal.pdf>.

¹⁶⁷ *Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2102).

¹⁶⁸ *Applewhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899, at *1-*2 (Pa. Sept. 18, 2012).

¹⁶⁹ *Id.*

¹⁷⁰ *Appelwhite*, 2012 WL 4497211, at *2 (noting that fewer IDs than expected had been issued at the five-week mark prior to the election).

¹⁷¹ Those states and localities are: Alaska, Arizona, Georgia, Florida, Texas, Shelby County, Alabama; and Kinston, North Carolina. South Carolina also claimed that Section 5 of the Voting Rights Act was unconstitutional, but it did not directly challenge the law.

¹⁷² *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

¹⁷³ *South Carolina v. United States*, ___ F. Supp. 2d ___, No. 12-203, 2012 WL 4814094, at *21.

¹⁷⁴ See WENDY WEISER, THE BATTLE OVER THE VOTE IN 2012, Lecture Delivered at Pitzer College (May 1, 2012), available at http://www.brennancenter.org/content/resource/the_battle_over_the_vote_in_2012/.

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