



**Testimony of Judith Browne-Dianis
Co-Director of Advancement Project**

**Hearing on Voter Caging and Voter Challenges
Before the Senate Committee on Rules and Administration
(February 27, 2008)**

“Voter caging” is a private, voter challenge device that has historically been used for partisan purposes, often with the pretext of improving the quality of public voter registration lists and ensuring eligibility of newly registered voters. However, the device is often used in a racially discriminatory manner and undermines or obfuscates the work of trained, election officials who have the authority, personnel, and duty to maintain the accuracy of voter registration lists and ensure that only eligible voters remain on the rolls. If left uncontrolled, voter caging permits partisan takeovers of voter eligibility determinations, and thus elections, and at a minimum, causes substantial disruptions of polling place operations on Election Day.

In 2004, the Ohio Republican Party compiled a list of 35,000 newly registered Ohio voters and prepared to challenge persons on the list based on “mail returned to the party.” On behalf of an African-American voter on this caging list in Ohio, Advancement Project intervened in *DNC v. RNC* case originally brought in New Jersey in 1982. The consent decree in that case requires the RNC, nationwide, to refrain from undertaking ballot security activities in polling places or election districts where the racial composition of such districts is a factor in the decision to conduct such activities.

Voter caging and challenges have often been employed to disenfranchise voters of color. In fact, the historical origins of state challenger statutes suggest that the very purpose of those statutes is to interfere with the voting rights of African-Americans. Further, voter caging has a chilling effect on voter participation because eligible voters who are listed on the voter registration rolls, especially inexperienced or newly registered voters, are less likely to vote if they face voter intimidation by challengers who confront them at the polls or if challenges of other voters create confusion, cause disruption, or generate long lines and unnecessary delays on Election Day. Ultimately, determining whether a voter registration applicant is eligible to vote, and whether a registered voter should be purged from the rolls, should be left to state or local election officials. The National Voter Registration Act of 1993 and the Help America Vote Act establish processes for list maintenance and voter registration verification that are more than adequate. These laws should be enforced by election officials and private parties, including political parties, should be prohibited from using all schemes that target minority voters.

Advancement Project is a policy, communication and legal action organization that supports organized communities in their struggles to achieve universal opportunity and a just democracy. Voter protection is a central component of our Power and Democracy program, which supports community-based efforts to increase civic participation, improve election administration, and remove structural barriers to electoral participation in low-income and minority communities.



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(February 13, 2008)**

Chairwoman Feinstein and Members of the Senate Committee on Rules and Administration, my name is Judith Browne-Dianis. I testify today in my capacity as Co-Director of Advancement Project, a non-partisan, national civil rights and racial justice organization. I am honored to appear before you to share Advancement Project's perspective on "voter caging" practices that disrupt elections and prevent eligible voters of color from participating in our democracy.

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My testimony today will focus on voter caging that has been used as a mechanism to disenfranchise of voters of color.

**I. VOTER CAGING AND CHALLENGES TO THE ELIGIBILITY OF
MINORITY VOTERS**

"Voter caging" is a private, voter challenge device that has historically been used for partisan purposes, often with the pretext of improving the quality of public voter registration lists and ensuring eligibility of newly registered voters. However, the device is often used in a racially discriminatory manner and undermines or obfuscates the work of trained, election officials who have the authority, personnel, and duty to maintain the accuracy of voter registration lists and ensure that only eligible voters remain on the rolls. If left uncontrolled, voter caging permits partisan takeovers of voter eligibility determinations, and thus elections, and at a minimum, causes substantial disruptions of polling place operations on Election Day.

A. Background on Voter Caging

“Voter caging” is a partisan, discriminatory method of challenging the eligibility of voters of color. The term derives from the use of politically motivated, direct mailings that are sent to targeted voters. Typically, a political party sends registered mail to the addresses of targeted registered voters. If the mail is returned as undeliverable—because the voter, for example, refuses to sign for it, is not present for the delivery, refuses to accept registered mail, or is homeless—the party adds that voter to what is known as a “caging list.” The party, pursuant to a state challenger statute, then challenges the eligibility of the voters on the “caging list” on the ground that because the registered mail directed to the address was returned as undeliverable, the applicant does not reside at that address and the registration is fraudulent. Once a challenge is made to a voter’s registration, the voter must prove that her registration is valid.

Voter caging and challenges have often been employed to disenfranchise voters of color. The historical origins of state challenger statutes suggest that the very purpose of those statutes is to interfere with the voting rights of African-Americans.¹ In Florida, for example, the state challenge statute, now codified in Fla. Stat. § 101.111, has its roots in Reconstruction Era laws intended to curtail the ability of newly freed slaves to participate in elections. In 1865, the Florida legislature adopted a state constitution that restricted the right to vote and to hold office to white men. Two years later, federal law extended the right to vote to African-American men. And in 1868, after African-American men began to vote in large numbers, the Florida legislature enacted its challenge statute that granted poll watchers the authority to challenge a voter’s registration status. Likewise, in 1859, Ohio enacted a statute permitting challenges to a voter’s registration status if the voter had “visible admixture of African blood.” Challenges continue to be employed in a racially discriminatory manner today.

B. DNC v. RNC

In 1981, the Republican National Committee (“RNC”) sent letters to predominantly African-American neighborhoods in New Jersey and from the letters that were returned as undeliverable, the RNC compiled a list of voters to challenge. On Election Day, the RNC sent off-duty law enforcement officials to the polls and hung posters in heavily African-American neighborhoods warning that violating election laws is a crime.

In response, the Democratic National Committee (“DNC”) filed a federal lawsuit against the RNC in New Jersey. The *DNC v. RNC* lawsuit resulted in the issuance of a consent decree that requires the RNC, nationwide, to refrain from undertaking ballot security activities in polling places or election districts where the racial composition of such districts is a factor in the decision to conduct such activities (“consent decree”).

In 1986, the RNC was found to have violated the consent decree, when it challenged the voter registration status of 31,000 predominantly African-American voters, in Louisiana, to whom the RNC had sent a party mailer which was returned as undeliverable. As a result, in 1987, the consent decree was amended to require the RNC to obtain prior

¹ Advancement Project, *Report to State and Local Officials on the Urgent Need for Instructions for Partisan Poll Watcher* (Oct. 2004) (attached hereto as Ex. 1).

approval for all “ballot security” efforts, which may include “efforts to prevent or remedy vote fraud.”²

C. Voter Caging in 2004

In the months leading up to the 2004 presidential election, voter protection advocates became concerned that a large scale effort would be undertaken to challenge the eligibility of African-American and Latino voters. Advocates were particularly fearful that voters of color would be subject to voter caging and subsequent challenges to their registration.

In October 2004, the Ohio Republican Party (“ORP”) compiled a list of 35,000 newly registered Ohio voters and prepared to challenge persons on the list based on “mail returned to the party.” The mail was sorted according to zip codes. Pursuant to a state statute permitting political parties to station “poll watchers” inside polling places to challenge a person’s right to vote, the ORP registered challengers in five counties in Ohio—in which 73% of all African Americans in the state resided—and targeted precincts with high concentrations of African Americans.

Under then-current law, Ohio required challenges to be filed eleven days before the election and provided hearings on challenges to a voter’s registration. As a result of the ORP’s challenges, Ohio county boards of elections were overwhelmed and unable to conduct all hearings before Election Day. Advancement Project’s coalition partners interviewed local election officials about the ORP’s challenges and were told that officials expected the challenges to result in long lines at the polls, poll worker confusion, and chaos in precincts where large numbers of African-American voters were expected to cast ballots.

Ohio was not the only state in which state Republican parties resorted to caging procedures to challenge voters.³ For example, in Wisconsin, the state Republican Party used U.S. Postal Service software to scrutinize the addresses of over 300,000 registered voters in Milwaukee to determine whether the addresses were valid. After the Republican Party registered 5,600 challenges against Milwaukee voters, the city attorney reviewed the list of challenged voters and found that hundreds of the addresses, claimed by the party to be nonexistent, were actually legitimate.

In Florida, the state Republican Party undertook a caging operation that was similar to the one employed in Ohio. There, the Florida Republican Party sent a non-forwardable mailing to Democratic and African-American voters and compiled the returned mail into a list to challenge voters. Documents filed by the state republican party in five counties

² *Democratic National Committee v. Republican National Committee* (July 27, 1987) (Settlement Stipulation and Order of Dismissal).

³ For a comprehensive discussion of caging operations in 2004, see Project Vote, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters*, 16-20 (Sept. 2007).

indicating their plans to deploy poll watchers revealed that the party stationed its poll watchers disproportionately in predominantly African-American precincts.

D. Motion To Intervene and Reopen the DNC v. RNC case

Four days before the 2004 presidential election, Advancement Project filed a motion to intervene and reopen the *DNC v. RNC* case on behalf of an Ohio voter, Ebony Malone.⁴ Ms. Malone was a newly registered African-American citizen of Cleveland who was on the list of voters to be challenged by the Ohio Republican Party.

The district court granted Ms. Malone's motion to intervene, and on November 1, one day before the election, found that the RNC had violated the consent decree and ordered the RNC to refrain from using its compiled list of voters to challenge those voters. Although the Third Circuit Court of Appeals granted the RNC's motion to stay the lower court's order, the stay was issued so late on Election Day that the district court's order, along with orders issued in other concurrent cases challenging the challenges, resulted in an absence of widespread challenges on Election Day. And Ms. Malone successfully cast a ballot without being challenged.

E. Recent Amendments to State Challenger Statutes

Since 2004, several states have amended their voter challenge laws to expand the rights of challengers and reduce the rights of voters. Current Florida law requires challengers to have only a "good faith belief," rather than personal knowledge, to issue a challenge to a voter.⁵ Ohio voters are no longer entitled to notice and a hearing based on a pre-election challenge.⁶ Instead, the voter's board of elections may render a determination of the voter's registration based solely on records possessed by the board. On a positive note, challengers are no longer permitted in the precincts in Ohio; only poll workers can challenge a voter. In Pennsylvania, partisan poll watchers are no longer required to remain in polling places where they are officially registered; they are now permitted to move within polling places in their specific county. As a result, poll watchers will have a greater capacity to challenge more voters.⁷

F. Conclusion

⁴ *Democratic National Committee v. Republican National Committee*, Civ. Action No. 81-3876 (Oct. 27, 2004) (Complaint in Intervention for Preliminary and Permanent Injunctive and Declaratory Relief).

⁵ Fla. Stat. § 101.111.

⁶ O.R.C. Ann. § 3505.24.

⁷ Compare 2002 Pa. ALS 44 (2002) (restricting poll watchers to one district in a municipality or township in which the watcher is a registered voter) with 25 P.S. 2687 (2007) (poll watchers may serve more than one election district in the county in which the watcher is a registered voter).

Advancement Project supports Congress' proposed bill to prohibit voter caging and voter challenges by private citizens. These tactics should be prohibited first and foremost because they are not necessary for the accomplishment of appropriate list maintenance activities. Instead, they have been employed historically to keep voters of color off the rolls. Further, voter caging has a chilling effect on voter participation because eligible voters who are listed on the voter registration rolls, especially inexperienced or newly registered voters, are less likely to vote if they face voter intimidation by challengers who confront them at the polls or if challenges of other voters create confusion, cause disruption, or generate long lines and unnecessary delays on Election Day.

Determining whether a voter registration applicant is eligible to vote, and whether a registered voter should be purged from the rolls, should be left to state or local election officials. Likewise, all politically-motivated interference by the U.S. Justice Department in state, county, and local list maintenance procedures must be strictly prohibited.

We are pleased that the measures in this proposed bill are consistent with earlier recommendations we proposed to end voter caging and voter challenges. The adoption of this bill will provide important protection for voters and dismantle certain structural barriers to electoral participation in low-income and minority communities. Thank you.

Judith A. Browne, Co-Director, Advancement Project

Judith Browne has an extensive background in civil rights litigation, which includes serving as lead counsel in a lawsuit against the State of Maryland for failure to fully implement the “Motor Voter” Law. In November 2000, Browne investigated civil rights violations after the election in Florida, providing the basis for the *NAACP v. Harris* lawsuit, in which she was counsel. After the 2000 election, Browne worked with several community advocates in Florida to respond to election law reforms. She has provided legal and advocacy training on election-related issues. In 2004, Browne worked to correct problems with the Florida felon purge list, and through Advancement Project’s Clearing the Path for Just Democracy project, has been working to solve voting problems prior to Election Day in nine states.

Browne is a recipient of the distinguished Skadden Fellowship and joined Advancement Project at its inception in 1999, after serving as the Managing Attorney in the Washington, D.C. office of the NAACP Legal Defense & Educational Fund, Inc. At Advancement Project, Browne has directed the Opportunity to Learn Project, and now directs the Strategic Initiatives Project. She has worked closely with community organizations throughout the country to challenge structural inequities by providing legal advice and assistance, communications and political strategies.

Browne is a graduate of Columbia University School of Law and served as a Tobias Simon Eminent Scholar at Florida State University Law School where she taught housing discrimination. She was named one of the “Thirty Women to Watch” by *Essence Magazine*.