

# Congress of the United States

Washington, DC 20515

October 28, 2008

The Honorable Max Maxfield  
Secretary of State of Wyoming  
State Capitol Building, 200 West 24th Street  
Cheyenne, WY 82002-0020

Re: State Preparation for the 2008 Election

Dear Secretary Maxfield:

We are writing to follow-up on the National Association of Secretaries of State's Mid-Year Conference held earlier this year in Grand Rapids, Michigan. During the conference, House Judiciary Chairman Conyers emphasized the importance of federal, state, and local election officials to take preemptive steps to prevent voting problems at the polls during the general election. Since the conference, several voting issues have surfaced across the country ranging from schemes to challenge voters based on their home foreclosure status to allegations of illegal purges of tens of thousands of eligible voters based on undeliverable mail and conflicting database information. With the Presidential election now only one week away, it is critically important for state and local election officials to be particularly vigilant in ensuring that every eligible voter can cast a ballot and have the ballot counted.

Many of the voting problems described in recent media reports have heightened our concerns about the level of attention directed towards resolving potential voting problems before election day. In order to avoid irregularities that have plagued recent elections, we wanted to draw your attention to a number of key issues and relevant legal requirements which are outlined below:

- Purging: Under Section 8 of the National Voter Registration Act (NVRA), election administrators may remove ineligible voters systematically from voter rolls at any time except within 90 days of a federal election. We have received complaints that several states have purged voters within the 90 days of the purge cut-off date in violation of the NVRA. According to a recent *New York Times* article, tens of thousands of eligible voters in at least six states have been removed from the rolls or have been blocked from

registering in ways that may violate federal law.<sup>121</sup> The purpose of the NVRA in part was to increase the number of eligible citizens who register to vote and participate in elections.

- Voter Registration Lists: The Help America Vote Act (HAVA)<sup>122</sup> requires states to implement statewide voter registration databases to ensure updated and accurate registration lists. Many problems exist with voter registration list maintenance, as most states update registration lists against change of address lists, the Department of Motor Vehicles records, the Social Security Administration records, and death and felon records, for example. Rigid matching requirements often result in the erroneous removal of otherwise legitimate voters for clerical errors or incorrect information, misspellings, and hyphenated names, when processing voter registration data. There are reports that some new state registration systems are removing voters when discrepancies surface between their registration information and other official records, often because of errors outside voters' control.<sup>123</sup>
- Caging and Challenges to Voter Eligibility: Section 11(b) of the Voting Rights Act (VRA) prohibits voter intimidation.<sup>124</sup> In 2004, we saw efforts to intimidate minority voters in several states using vote caging schemes. This illegal tactic involves compiling a list of voters' names from which to challenge the voters' eligibility. Typically, such a list is created with mail that is sent to a registered voter and returned as undeliverable. This election season, the practice of 'vote caging' appears to have emerged again. For example, in September, there were media reports of partisan plans to use a list of foreclosed homes as a basis to challenge voters and block them from participating in the November 2008 election.<sup>125</sup> These lists seem to establish a pattern of attempts

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<sup>121</sup> Ian Urbina, *States' Actions to Block Voters Appear Illegal*, N.Y. TIMES, Oct. 9, 2008, at A1.

<sup>122</sup> 42 U.S.C. §§ 15301 *et seq.*

<sup>123</sup> Mary Pat Flaherty, *Thousands Face Mix-ups In Voter Registrations: In New Databases, Many Are Wrongly Flagged as Ineligible*, WASH. POST, Oct. 18, 2008, at A1.

<sup>124</sup> 42 U.S.C. § 1973i(b).

<sup>125</sup> Eartha Jane Mezler, *Lose Your House, Lose Your Vote*, MICH. MESSENGER, Sept. 10, 2008.

to disenfranchise minority voters, which would violate not only Section 11(b), but also Section 2 of the Voting Rights Act.

- Photo Identification Requirements: Several states have adopted photo identification (ID) requirements aimed at combating voter impersonation. The implementation of restrictive polling place photo ID requirements has created additional burdens for voters and has caused significant confusion regarding voting requirements. Data from the U.S. Department of Justice shows that while 196,139,871 votes have been cast in federal elections since October 2002, only 102 individuals have been convicted of federal voter fraud.<sup>126</sup> Most of these convictions were for vote buying or for voter registration fraud, neither of which would be prevented by restrictive ID requirements at the polls. Compounding the problems associated with this issue is the potential inequitable application of the ID requirements by poll workers to minority voters, which underscores the need for proper legal and policy guidance from election administrators.
- Compliance with the Voting Rights Act: Section 5 of the Voting Rights Act blocks the implementation of changes to election practices or procedures in states with a history of voting discrimination until the new procedures have been reviewed by the U.S. Department of Justice or the U. S. District Court for the District of Columbia to ensure that the change will not have a discriminatory impact. There have been several reports<sup>127</sup> indicating that Section 5 covered jurisdictions have failed to obtain approval from the Department of Justice or the U.S. District Court and are implementing uncleared voting changes. The purpose of Section 5 is to identify and prevent proposed voting changes that worsen the position of minority voters. In order to protect the voting rights of all citizens it is important for state and local officials to comply with Section 5.
- Polling Place Operations: As seen in recent elections, the operation of polling places can have a major impact on whether eligible voters are able to cast votes. For example, long lines have the potential to frustrate voters and deter voters who may not have the time or ability to wait in such lines. Polling places should have an adequate number of voting systems and also emergency paper ballots in case of malfunctions or if lines become too long. Polling places should also be accessible and equipped with required

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<sup>126</sup> Department of Justice, *Fact Sheet: the Department of Justice Public Corruption Efforts*, Mar. 27, 2008, available at [http://www.usdoj.gov/opa/pr/2008/March/08\\_ag\\_246.html](http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html).

<sup>127</sup> *Mississippi's Ballot Trick*, N.Y. TIMES, Sept. 11, 2008, at A24.

accessible voting systems for individuals with disabilities.<sup>128</sup> We have received several reports regarding election administrators closing voting precincts and moving them to locations that pose a significant burden on students and other voters who do not have transportation or additional time.

- Provisional Voting: HAVA requires that states make provisional ballots available to any voter whose eligibility is challenged to ensure that voters are not turned away from the polls without casting a vote.<sup>129</sup> Issues have arisen as each locality handles provisional ballots differently, causing confusion and disfranchisement. For example, some jurisdictions will not count a provisional ballot from a voter who voted in the wrong precinct, while others will count the votes for races that apply beyond the jurisdiction (such as the state and federal races) if the ballot was cast in the wrong county. Provisional balloting can and does work in states that have adopted fair standards for the counting of provisional ballots consistent with the controlling provisions in HAVA.
- Voter Intimidation and Deceptive Practices: Efforts to intimidate, threaten, or coerce voters are prohibited under federal law.<sup>130</sup> Voter intimidation can include deceptive practices like communications (mailers, flyers, robocalls, etc.) containing false information about when, where, and how to vote. Deceptive practices, like those that occurred during the 2006 election may well surface again. For example, in Virginia, a fake State Board of Elections flier indicating that Republicans should vote on November 4<sup>th</sup> and Democrats should vote on November 5<sup>th</sup> is being circulated.<sup>131</sup> Reports of deceptive practices deserve a prompt, appropriate response to dispel misinformation and warrant investigation and prosecution of those who have engaged in schemes to suppress voter participation.

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<sup>128</sup> 42 U.S.C. § 15481.

<sup>129</sup> 42 U.S.C. § 15482.

<sup>130</sup> 18 U.S.C. § 594.

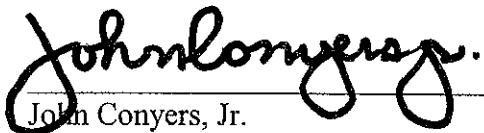
<sup>131</sup> Julian Walker, *Phony Flier Says Virginians Vote on Different Days*, THE VIRGINIAN-PILOT, Oct. 28, 2008.

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“The political franchise of voting” is “a fundamental political right,” because it is preservative of other basic civil and political rights.<sup>12</sup> It is the duty of federal, state, and local governments to promote the exercise of that right and to ensure that all eligible voters have a meaningful opportunity to participate in the political process. We encourage you to do everything within your power to implement procedures that will enhance voter participation.

If you have questions, please contact the Judiciary Committee at (202) 225-3951 or the House Administration Committee at (202) 225-2061. Thank you for your assistance in this matter.

Sincerely,



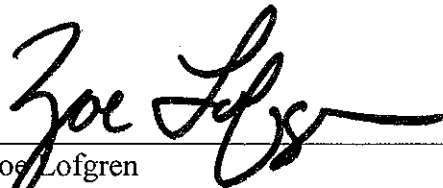
John Conyers, Jr.  
Chairman  
Committee on the Judiciary



Robert Brady  
Chairman  
Committee on House  
Administration



Jerrold Nadler  
Chairman  
Subcommittee on the Constitution, Civil Rights,  
and Civil Liberties



Zoe Lofgren  
Chairwoman  
Subcommittee on Elections

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<sup>12</sup> Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533 (1964) at 561-562.