

# KANSAS HOUSE OF REPRESENTATIVES



## STATE REPRESENTATIVE ANN MAH DISTRICT 53 TESTIMONY HB 2437

Madam Chair and Committee:

I am testifying today in opposition to HB 2437. This bill advances the date for proof of citizenship to register to vote to June 15, 2012. I oppose it for three reasons:

- 1) We cannot manage the changes already before us.
- 2) Implementing HB 2437 will likely violate federal law.
- 3) Implementing HB 2437 will bring grassroots registration to a halt.

We cannot manage the changes already before us.

1. There are many forces at work creating chaos in the 2012 election already. County election officials will have their hands full with redistricting changes. Once the new maps are finalized, county election officials will have to redraw districts, redraw precincts, update voter databases, update maps, determine new voting locations, and send voters updated voter registration cards – before the primary registration cut-off in July. In my district alone there were four precincts split into pieces by the new House map that will have to be redrawn. Voters will be confused enough figuring out who their legislators are, who's running for office, and where to go vote. To lay on top of this the provisional voter registration procedures and massive paperwork trail for county election officials to manage that the Secretary has planned would be an election disaster.
2. There is virtually no money in the budget to implement voter education at the level required by the courts in other states for the voter ID law. (See the Brennan Study attached.) The Secretary's voter education plan is deficient. We started too late in the February election in Wichita, for example, for voters without IDs to get the documents needed to vote. Paid advertising by the Secretary of State's (SOS) office began just two weeks prior to the election. Anyone needing a voter identification card without a birth certificate in hand was just out of luck. And the advertising did not even mention what kinds of IDs were allowed or how to go about getting an ID if one was needed. All the glowing reports by the SOS's office about the election failed to report about those who simply gave up on getting an ID. There is no better plan for the 2012 primary or general election.
3. Advocacy groups will have their hands full just helping folks deal with the voter ID law, let alone a major change in registration requirements. A nursing home supervisor in Peabody is working hard to get her residents the IDs they need to continue voting. She

has 51 residents. About 75% of them vote. But only nine have IDs and only two have the birth certificates needed to get their voter IDs. They come from Kansas, six other states, and Korea. Many have no family contact and she doesn't know where to start to find the birth certificates. They only get \$62 a month stipend, and they're expected to spend most of that on an out-of-state birth certificate? Then even if they can get the documents, they have to travel 15 miles to the next town to the Division of Motor Vehicle (DMV) location. She hates to see her residents lose their right to vote, but she can't spend all the hours necessary to help them get their photo IDs. She is trying to prepare them to lose their vote this year if things don't come together. There will most likely be more citizens in this one nursing home lose their right to vote than all the suspected voter fraud in the 2010 general election. I visited with another nursing home supervisor in Paola with similar concerns. That's just the tip of the iceberg. In visiting with nursing homes and advocacy groups across the state, I am convinced that Kansans who have voted legally in the past will either not be able to vote or will have their votes discarded because of the new voter ID law.

4. Our Topeka Rescue Mission reports that at the Hope (women's) center, about 50% of residents do not have an ID to vote with. In the men's center about 15% of residents do not have an ID. This means that in one location alone, dozens of Kansans will be disenfranchised. If they do not have IDs there is little to no chance they have a birth certificate to even get an ID or register to vote.
5. There are full DMV locations in just 33 Kansas cities. One county has no DMV location and nondriver IDs are not issued at all DMV locations. There is no information being provided to let folks know where to go to get a voter ID or what is needed to get one or that it will be provided for free. In Topeka they are preparing to close the downtown location – the only one accessible by bus in the metro area.
6. There also appears to be confusion on how advance ballot requests are to be handled. In one election office, we were told that they must have a copy of their photo ID included to get an advance ballot mailed out. That is not true. The election commissioner explained that new systems were now in place and that we were given wrong information. Things would be corrected soon after training was completed. Regardless of whether or not this problem continues, it is clear there is still more work to do in training on voter ID (and elections have already been completed) and training on proof of citizenship will be even more complicated.

Implementing HB 2437 will likely violate federal law.

1. The National Voter Registration Act of 1993 (known as the Motor Voter Act) requires states to allow voter registration when qualifying citizens apply for or renew their drivers licenses or apply for social services. In Kansas, new driver applicants are required to bring in proof of citizenship documents and those are being scanned into a database that is supposed to be accessible to the election offices. These new applicants would be able to then register to vote under HB 2437 as they could provide proof of citizenship.
2. However, the DMV is not ready to require renewing drivers to bring in birth certificates and the data connection to allow access to those documents by the election office is not ready. Just last year the Director of Motor Vehicles was telling us that with all of the Real ID activities in 2012, they would not start requiring renewing drivers to bring in citizenship documents until 2013. Thus the reason for the 2013 start date on proof of

citizenship in HB 2067. They told us that it would take a massive education effort to let folks know they had to find their birth certificates to renew their driver's licenses. They were concerned about how long it would take folks born out of state, those with no birth certificates, those in the military, seniors, etc., to find the documents and didn't want to have to turn them away at the DMV. Evidently, the Secretary has persuaded the Department of Revenue that proof of citizenship should be moved up on their agenda and they are working toward having renewing drivers bring in their citizenship papers. But we are not there now and could not possibly be there by June. Even if they started now letting people know about this change, the DMV couldn't let all the drivers due for renewal in June know in time to get what they need to get their renewals on time.

3. Even if the DMV could be ready, married women, adoptees, and transgender Kansans would have to sign an affidavit explaining why their name or sex is different than their birth name/sex. I doubt that the DMV is ready to deal with that affidavit, and requiring voters to make a second trip to the election office to complete their voter registration would violate the spirit of the federal law. In fact, we determined that this particular affidavit has not been developed yet and there are no procedures for any office to deal with it.
4. I'd be interested to know how the DMV is handling naturalization papers for naturalized citizens, which are not to be copied under penalty of law. Is there a plan to have another citizenship marker for these folks in the DMV database? (FYI, Georgia, the only state that is actually doing proof of citizenship right now has been building a citizenship database since 2004. They do not copy documents. They view the documents and put a citizenship marker in their drivers database.
5. Further, when the election office obtains naturalization papers, the person is not registered to vote until the election office has verified citizenship with the US immigration office. There is no telling how many registrations will be denied if that process causes delays.
6. In any case, the same law that required the DMV to provide for voter registration and passing of documents to the election officials also required voter registration when applying for social services. To my knowledge there is NO effort to require those applying for social services to bring in birth certificates or any procedures in place to copy those documents and provide them to the election offices for voter registration.

HB 2437 would bring grassroots voter registration to a halt.

1. HB 2437 should not be approved whether or not the DMV is ready to handle proof of citizenship. Implementing HB 2437 would bring grassroots registration to a halt.
2. Let's say that you go door-to-door or set up a voter registration booth at a mall, church, etc. If HB 2437 was in effect, you could have folks fill out the voter registration form, but that would not complete their voter registration. The potential registrant would have to make an additional trip to the county election office (often in another town) to deliver their birth certificate. This is what the Secretary refers to as "provisional" registration.
3. There is a provision in the law to mail in fax or mail in a copy of your birth certificate, but there is no document to leave with the provisional registrant to let them know where to fax or email or mail or deliver the documents. These methods of delivery would also not apply if the provisional registrant was a woman. Women and transgendered Kansans would have to visit the county election office in person to sign the affidavit explaining

the difference in name. I can't see many people providing a copy of their birth certificate to a stranger at their door or the mall. I also can't see most folks making that second trip to finish their registration. There was a reason the federal government passed laws making it easier to vote, not harder.

4. What is most likely to happen here is that people will believe that by filling out the voter registration form, they are registered to vote. There is no document developed by the Secretary to leave with the provisional registrant to tell them that they are not really registered, or what documents they need to deliver or to what address to deliver them. They will show up in November at the polls believing they are registered only to find out they are not. They could do a provisional ballot, but it would not be counted. One can only imagine what a chilling effect this provisional registration process would have on voter registration and voter turnout.
5. The worst part is that this will continue to be a problem until the DMV captures the citizenship documents of all drivers over the six years after they start asking renewing drivers to bring such documents in. It's no wonder Georgia collected this data for seven years prior to their proof of citizenship law being approved.

#### The bottom line?

1. There is no voter fraud problem to prevent. The notion that illegal aliens are lined up to vote is ridiculous. The last thing they want is to be deported over a voter registration issue. And there's a reason the Secretary is not talking about all the fraud in the 2010 election – there wasn't anything to talk about. Of the 41 "suspected" cases he found, 17 were snowbirds voting in two states. Another 17 were felons who thought they were registered to vote, but weren't. (Their votes were NOT counted. The system worked.) So most of our problem is snowbirds and uninformed jailbirds.
2. Passage of HB 2437 is just a quick trip to federal court. There is a good reason that no state requires registrants to produce a birth certificate. It's a barrier to voting. Going to court to defend a law that is an obvious violation of federal voting law is an unnecessary cost to the taxpayers. One thing our Secretary of State doesn't need is more face time in federal court. His time would be better spent in Kansas helping clean up the mess we've already made with the voter ID law.

I urge you to reject passage of HB 2437.

BRENNAN  
CENTER  
FOR JUSTICE

The Cost of Voter ID Laws:  
What the Courts Say

*By Vishal Agraharkar, Wendy Weiser, and Adam Skaggs*



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Part of the Democracy Program, the Voting Rights and Elections Project works to expand the franchise, to ensure that every eligible American can vote, and that every vote cast is accurately recorded and counted. The Center's staff provides top-flight legal and policy assistance on a broad range of election administration issues including voter registration systems, voting technology, voter identification, statewide voter registration list maintenance, and provisional ballots.

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## INTRODUCTION

Currently, every state in America requires voters to prove their identities before receiving a ballot; different states require different levels of proof. Legislators in states across the country are now promoting bills that would require voters to meet more stringent documentation requirements before voting—including presenting photo identification at the polls on Election Day in order to cast a ballot. While the details of the proposals vary, these bills all would deny the right to vote to some or all citizens who are unable to produce a photo ID. Studies show that as many as 11 percent of United States citizens—mostly older, low-income, and minority citizens—do not have government-issued photo IDs.<sup>1</sup> Under the federal and state Constitutions, states must ensure that there is an accessible and reasonable way for all citizens to vote, including the estimated 33 million citizens who do not have photo IDs.

Based on a comprehensive review of every court case in which a photo ID law has been challenged, this paper examines some of the costs states must incur if they decide to implement photo ID requirements for voters. Previous Brennan Center publications have laid out the reasons why such requirements are bad policy and may be unconstitutional, regardless of the measures discussed below.<sup>2</sup> While the results of lawsuits challenging photo ID laws have been mixed, the case law to date has established several basic principles that must be satisfied under the Constitution:

- *First*, photo IDs sufficient for voting must be available free of charge for all those who do not have them. States cannot limit free IDs to those who swear they are indigent.
- *Second*, photo IDs must be readily accessible to all voters, without undue burden. At a minimum, most states will likely have to expand the number of ID-issuing offices and extend their operating hours to meet this requirement.
- *Third*, states must undertake substantial voter outreach and public education efforts to ensure that voters are apprised of the law's requirements and the procedures for obtaining the IDs they will need to vote.

In addition, some courts may require states to ensure that all the documents required in order to obtain photo IDs are free and easily available to prospective voters. While these measures will not guarantee that a state's voter ID law will be upheld in court (there are a number of constitutional problems with voter ID requirements, as discussed below), failure to include these measures will make it likely that courts will find the law deficient.

All of these measures entail appreciable costs that states must be prepared to incur if they move forward with photo ID requirements. In addition, states adopting photo ID laws must incur all the administrative costs of changing election procedures, including the costs of materials and training for election officials and poll workers across the state. A fiscal note prepared in conjunction with a proposed photo ID law in Missouri estimated a cost of \$6 million for the first year in which the law was to be in effect, followed by recurring costs of approximately \$4 million per year.<sup>3</sup> When Indiana estimated the costs of its photo ID law, it found that, to provide more than 168,000 IDs to voters, the “[t]otal production costs, including man-power, transaction time and manufacturing” was in

excess of \$1.3 million, with an additional revenue loss of nearly \$2.2 million.<sup>4</sup> That estimate apparently did not include a variety of necessary costs, including the costs of training and voter education and outreach. A fiscal note assessing an ID bill in Minnesota estimated at least \$250,000 for the manufacturing costs of providing free ID at only 90 locations across the state, the costs of one training conference for county auditors, and some administrative costs.<sup>5</sup> The estimate included neither the costs of outreach and education, nor any of the significant costs that would be borne by local governments.<sup>6</sup> The note estimated an additional cost of \$536,000 per election if each precinct hired just one additional election judge.<sup>7</sup>

While a few million dollars a year may not sound like a lot, that sum is a significant fraction of states' total election administration budgets. Missouri, for example, spent about \$10.5 million in its 2009 fiscal year;<sup>8</sup> a photo ID requirement would have increased the state's election administration spending by more than 50%, according to the state's own estimate. Indiana's Elections Division spent about \$3.4 million in its 2009–2010 fiscal year,<sup>9</sup> which is roughly equal to the state's estimated costs for photo ID from 2008 to 2010. States are unlikely to receive sufficient federal assistance to meet these costs.<sup>10</sup> In Wisconsin, a nonpartisan association of local election officials expressed concerns about a photo ID bill, in significant part because of the fiscal impact of photo ID requirements on local municipalities and state agencies.<sup>11</sup> And in Iowa, an association of local election officials made up of Republicans and Democrats cited the cost of photo ID laws in publicly registering its opposition to an Iowa photo ID bill.<sup>12</sup>

In a difficult fiscal environment, citizens may reasonably question whether there are more pressing needs on which to spend their tax dollars than photo ID rules, and state legislators should seriously consider whether photo ID laws are worth their considerable costs. In doing so, legislators should consider the myriad other measures already in place in their states to guard against voter fraud—which have been very effective at deterring such fraud<sup>13</sup>—as well as less expensive measures to increase the security of elections, including voter ID laws that allow voters who do not have photo ID to demonstrate their identities at the polls by other means. Legislators who still wish to pursue photo ID requirements for voting must ensure that the laws provide for free photo IDs, ensure that IDs are reasonably accessible to all eligible voters, and include sufficient voter education and outreach programs and poll worker training.

## I. STATE PHOTO ID LAWS MAY BE VULNERABLE TO CONSTITUTIONAL ATTACK

Contrary to popular misconception, state photo ID laws are still vulnerable to constitutional attack.<sup>14</sup> Although a divided U.S. Supreme Court upheld Indiana's photo ID law against a broad or "facial" attack to its constitutionality, the Court made clear that the law could still be challenged by particular groups and individuals burdened by the law. The Court expressly singled out as groups who might bring a successful challenge "elderly persons born out of state," "persons who because of economic or other personal limitations may find it difficult to secure a copy of their birth certificate" or other documents needed for photo ID, homeless people, and people with a religious objection to being photographed.<sup>15</sup>

In addition to leaving the door open to challenges by affected voters, the Court also left the door open to challenges to other photo ID laws that burden voters more than Indiana's. The Court's decision to uphold Indiana's law was based in part on features of the law designed to minimize its disenfranchising effect—including that the law made photo IDs free,<sup>16</sup> ensured that eligible voters without the required ID could still cast ballots that would be counted,<sup>17</sup> and provided another mechanism for elderly people without photo ID to vote.<sup>18</sup> It is likely that any law that lacks these features would fare differently in court. In light of these caveats, the Supreme Court's decision cannot be reasonably read as a constitutional endorsement of photo ID laws. To the contrary, the Court said its decision was largely compelled by the fact that the scant record put before it did not have sufficient evidence of the burdens the law would impose on voters to justify striking down the law.<sup>19</sup> A future lawsuit with a more developed factual record may lead to a different result.

In addition to federal constitutional challenges, photo ID laws may also be vulnerable to lawsuits based on state constitutional rights. A photo ID law passed in Missouri was struck down by the state's supreme court, which found that Missouri's constitution had stronger voter protections than the federal constitution.<sup>20</sup> The Missouri Supreme Court based its decision in part on the costs that voters without ID would have to incur to obtain the documents required to vote and to navigate the state's bureaucracies.<sup>21</sup> The high courts of other states have similarly held that their state constitutions protect voting rights more than federal law.<sup>22</sup>

In light of this case law, states must carefully consider federal and state constitutional constraints before imposing photo ID requirements on voters. Below we outline some of the costs courts will likely require states to incur before implementing photo ID laws.

## II. STATES THAT REQUIRE VOTERS TO PRESENT PHOTO IDS MUST INCUR THE COSTS OF PROVIDING FREE IDS TO ANY VOTERS WHO LACK THEM

### A. Any state that requires photo IDs for voting must provide acceptable IDs free of charge to voters who do not have them

The U.S. Supreme Court has made clear that states seeking to impose photo ID requirements on voters must provide those IDs free of cost to those who do not have them. In upholding Indiana's photo ID law, the Court explicitly said that the fact that most Indiana voters already had ID "would not save the statute . . . if the state required voters to pay a tax or a fee to obtain the new photo identification."<sup>23</sup>

Litigation over a photo ID law in Georgia applied the same principle. The challenged Georgia law established a fee of between \$20 and \$35 for a photo ID card, and included a fee waiver for individuals who swore they were indigent and could not pay the fee.<sup>24</sup> A federal district court blocked the law, finding that the fees turned the law into an unconstitutional poll tax.<sup>25</sup> In response to this court decision, Georgia amended the law to require every county to issue photo IDs free of charge to voters who presented certain identification documents.<sup>26</sup> It was only after this

amendment—and only after the state undertook significant voter education and outreach measures discussed in Part III below—that the court upheld the law.<sup>27</sup>

#### B. States may not condition a voter's receipt of free ID on an oath of indigency

Under the case law, states may not condition a voter's receipt of free ID on the voter's willingness to swear that he or she is indigent and cannot afford to pay for ID. The federal court that blocked the first iteration of Georgia's ID law held that a fee waiver conditioned on a voter's willingness to take an oath of indigency did not save the law from being an unconstitutional poll tax because many voters for whom a fee would pose a burden might be reluctant to take the oath out of embarrassment or because they do not believe they are indigent.<sup>28</sup> When Georgia amended its photo ID law, it replaced the oath of indigency with a more innocuous oath that simply required the voter to state that he or she desired, but did not have, an acceptable identification card.<sup>29</sup> The amended law, without fees or an oath of indigency, was upheld. Indiana's photo ID law similarly provides free IDs to all Indiana citizens who do not have a valid Indiana driver's license without requiring those citizens to take any oath.<sup>30</sup>

#### C. States must be prepared to incur a number of costs to make photo IDs available free of charge

The costs of providing free IDs will vary from state to state depending on how many voters in a given state lack ID. In most cases, providing free IDs will be a recurring cost. Many voters who lack the accepted ID—young and low-income voters, and those who rent rather than own property—are highly mobile, and states will have to bear the costs of re-issuing new IDs for these voters whenever their names or addresses change. States that choose to establish a new voter ID card that differs from the existing driver's license or state identification card will need to pay for the design and equipment that is necessary to make the new voter IDs and distribute ID-making equipment to a range of ID centers.

### III. STATES THAT REQUIRE VOTERS TO PRESENT PHOTO IDs MUST TAKE MEASURES TO MAKE IDs READILY ACCESSIBLE TO VOTERS WHO LACK THEM

In addition to requiring free IDs, the case law establishes that courts will likely strike down photo ID requirements if states do not take adequate steps to ensure that acceptable photo ID is readily accessible to all eligible voters and not unduly burdensome to obtain.<sup>31</sup> Courts assessing the burdens imposed by photo ID laws have placed significant weight on such factors as the time, transportation, and advance planning that are required to obtain ID prior to an election.<sup>32</sup> For most states, making IDs sufficiently accessible will entail significant additional expense.

A. States will need to open new ID-issuing offices, expand office hours, and possibly create mobile ID centers to ensure voters can obtain ID

In many states, existing motor vehicle offices (“DMVs”) are not sufficient to ensure that voter ID cards are readily available to prospective voters, either because existing DMV offices cannot easily be reached by voters who lack private transportation or are disabled, or because they are open only for limited hours.

This issue was explored at length in litigation over Georgia’s law. As discussed above, the first federal court to examine Georgia’s photo ID law struck it down, in part because it found that many potential voters would find it difficult to travel to a Department of Driver’s Services (DDS) center to obtain their ID.<sup>33</sup> The court noted that Georgia’s DDS centers were spaced widely apart, were not located in every county, and were primarily in rural areas where mass transit was unavailable.<sup>34</sup> Although the state put in place a mobile ID center capable of issuing licenses, the court found it unrealistic to expect that only one mobile unit—a bus that was not wheelchair-accessible—would be able to service Georgia’s 159 counties.<sup>35</sup> The court also noted that voters without ID who were forced to vote via provisional ballot could not be expected to travel to election officials’ offices with photo ID within 48 hours—as required under the then-existing law for their votes to count—because many would have difficulty obtaining transportation. Although various organizations and individuals might provide voters with transport to polling places on Election Day, voters who lacked ID would likely find it far more difficult to obtain transportation to DDS service centers to obtain a photo ID.<sup>36</sup>

In amending its photo ID law in 2006, the Georgia legislature realized that it needed to increase the accessibility of free IDs if the law were to withstand a court challenge. It therefore amended the law to require every county registrar to provide at least one location within each county where individuals could receive voter ID. As discussed below, the new law also provided for an education and publicity campaign regarding the new requirements, which required substantial state resources.<sup>37</sup>

The extent of the work necessary to ensure that free voter IDs are adequately accessible will vary from state-to-state, depending on current ID access, and will potentially entail significant personnel, overhead and equipment costs. To expand access to voter IDs, many states, like Georgia, will have to expand the number of DMV offices or establish (and outfit and staff) additional offices where voter IDs may be obtained; incur the costs of keeping those offices open in the evenings or weekends; create mobile ID-issuing centers that can traverse the state and issue IDs to those who have limited mobility or do not have convenient access to an existing ID-issuing center; and/or assist those who need help understanding the law’s requirements. Each of these measures will involve significant expense. Those states that currently do not have easily accessible ID-issuing centers in each county will incur especially high costs.

## B. States may need to pay the costs of obtaining the supporting documents necessary to obtain photo ID

To receive photo ID, voters are typically required to present supporting documents—such as birth certificates—that they may not have, and that require payment to obtain. When a photo ID law forces voters to spend money to obtain documents in order to receive photo ID, the law may fall short of constitutional requirements, at least as applied to those voters. States may therefore have to provide a means for a voter who lacks the required underlying documents to obtain a voter ID—or to offer him or her an exemption from the photo ID law’s requirements. This was the conclusion reached by one state Supreme Court.

In *Weinschenk v. Missouri*, the Missouri Supreme Court considered a challenge under the state constitution to a Missouri photo ID law.<sup>38</sup> Although the law provided free voter ID to Missourians who lacked acceptable ID, and created “mobile processing units” where such ID could be obtained by disabled or elderly voters who were physically unable to obtain ID, the court heard evidence of voters who would be required to pay to obtain birth certificates—which in Missouri cost at least \$15—and other documentation in order to vote.<sup>39</sup> The court struck down the photo ID law, finding that the costs of obtaining secondary documents, which eligible voters who lacked photo ID were required to pay in order to vote, were equivalent to a poll tax.<sup>40</sup> Under the reasoning of the Missouri Supreme Court, if a state does not either exempt voters who would otherwise have to pay for underlying documentation to obtain a nominally free photo ID or absorb those voters’ costs,<sup>41</sup> the state’s ID law would be vulnerable to a constitutional challenge.

## C. States may be required to create exemptions for particular groups of voters for whom photo ID poses particular difficulties

Dicta in the Supreme Court’s decision on Indiana’s photo ID law suggests that states may be required to alleviate the burdens posed by photo ID laws through exemptions for individuals or groups who cannot reasonably obtain ID.<sup>42</sup> Previous state photo ID laws have exempted individuals with physical or mental disabilities, religious objections to being photographed, the elderly, and people residing in nursing homes.<sup>43</sup> Some courts may require states to exempt certain groups of voters even if they have taken other steps to make ID accessible to their voters. Establishing these exemptions will entail additional administrative and personnel costs.

#### IV. STATES THAT REQUIRE VOTERS TO PRESENT PHOTO ID MUST UNDERTAKE PUBLIC EDUCATION AND OUTREACH EFFORTS WELL IN ADVANCE OF ELECTIONS

Before implementing a new photo ID regime, a state will need to conduct aggressive outreach to all voters, to ensure that they understand the new requirements—and that this information is provided to voters lacking ID with sufficient time before an election for those voters to take steps to obtain an ID.<sup>44</sup> These requirements will entail substantial expenditures of state revenue.

Georgia's experience sheds light on the extent of public outreach that may be necessary to pass constitutional muster. As noted above, Georgia passed its 2006 photo ID law to correct some of the problems with the earlier incarnation of its statute. Among other things, the new law provided for an education and publicity campaign regarding the new requirements.<sup>45</sup> Nonetheless, the court once again blocked the law, emphasizing the inadequacy of the voter education efforts, especially given the short period of time (three weeks) between when the rules went into effect and the upcoming primary elections.<sup>46</sup>

The state had developed paid public service announcements (PSAs) for radio stations, and a letter for voters explaining the rules. In finding these efforts inadequate, the court found significant that many of the PSAs ran on off-peak hours and on a radio network with a low number of total listeners, and the letter, which was to be distributed at the polls on primary election day, was “not reasonably calculated to reach the voters who are most likely to lack a Photo ID, many of whom may not appear at the polls or the registrar's office during those times.”<sup>47</sup> However, the court stated that “if the State undertakes sufficient steps to inform voters of the [law's] requirements before future elections, the statute might well survive a challenge.”<sup>48</sup>

Indeed, the same court reversed course and upheld the law the following year. In doing so, the court noted that after the 2006 hearings, the state had made “exceptional efforts to contact voters who potentially lacked valid photo ID” to inform them of the ID requirements, procedures for obtaining a free ID, and the possibility of voting absentee without an ID.<sup>49</sup> The State also developed brochures and postcards to distribute to voters, developed a website about the requirements, and advertised on the Clear Channel radio network and through partnerships with libraries and nongovernmental organizations.<sup>50</sup> Additionally, the photo ID requirement was well covered in the press.<sup>51</sup> The court held that the state's extensive efforts to educate voters well in advance of elections were sufficient to uphold the law.<sup>52</sup>

Other states looking to impose a photo ID requirement should be prepared to undertake a similarly costly effort if they want their laws to survive a court challenge. These costs are likely to include: mailings to all citizens informing them of new ID requirements and how to obtain a voter ID; production of radio and television public service announcements; purchase of airtime to broadcast these public service announcements; purchase of space in newspapers to advertise new voter ID requirements; and website modifications to publicize new voter ID requirements. These costs will be borne by state and local officials and may be similar to the costs of recent campaigns to educate voters about new voting machines.

## V. STATES WILL INCUR ADMINISTRATIVE COSTS TO IMPLEMENT ID REQUIREMENTS

Finally, states that enact voter ID laws will have to incur the administrative costs associated with training officials and poll workers to administer the new requirements, developing new materials, and expanding the use of provisional ballots. Every new election regulation entails basic administrative transition costs to develop new materials and train officials. Expanded poll worker training is particularly important for states that enact photo ID laws, which are too often enforced in a discriminatory manner.<sup>53</sup> In addition to those costs, photo ID laws will require states to deal with the ongoing costs of increased provisional balloting. Even after states ensure that photo IDs are free, readily accessible to all voters, and well publicized, some voters will nevertheless fail to either obtain or bring their ID to the polls on Election Day. Under the Help America Vote Act (“HAVA”), those voters must be given provisional ballots.<sup>54</sup> States with voter ID requirements will see a significant increase in the number of provisional ballots cast, which will lead to substantial additional administrative costs each election.

## VI. CONCLUSION

In short, recent case law suggests that states seeking to adopt photo ID requirements for voters will have to incur substantial costs. Although the costs will vary from state to state, they will likely run into the millions of dollars per state per year and dramatically increase the cost of administering elections. Even if a state incurs these costs, its photo ID requirements may still be vulnerable to successful constitutional challenges; and a state that does not allocate sufficient funds to cover these costs will likely see its law struck down. States should therefore consider whether, in these difficult budgetary times, it is worth the dent in their budgets to introduce a new and controversial election procedure that has not been shown to improve election security. If state legislators do choose to move forward with ill-advised photo ID initiatives, we urge them, at the very least, to ensure that taxpayers are adequately informed of the significant costs necessary to take the measures required by the federal and state constitutions and outlined in this memorandum.



## ENDNOTES

- <sup>1</sup> See, e.g., Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification 3* (2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf). A comprehensive catalog of photo ID studies is available here: [http://www.brennancenter.org/content/resource/research\\_on\\_voter\\_id](http://www.brennancenter.org/content/resource/research_on_voter_id).
- <sup>2</sup> See, e.g., Wendy R. Weiser, Justin Levitt, Catherine Weiss & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform*, BRENNAN CENTER FOR JUSTICE (2005), available at [http://www.brennancenter.org/content/resource/response\\_to\\_the\\_carter\\_baker\\_commission](http://www.brennancenter.org/content/resource/response_to_the_carter_baker_commission); Citizens Without Proof, *supra* note 1; U.S. Supreme Court Briefs In Support Of Petitioners, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), available at [http://www.brennancenter.org/content/resource/crawford\\_v\\_marion\\_county\\_election\\_board](http://www.brennancenter.org/content/resource/crawford_v_marion_county_election_board).
- <sup>3</sup> See Tova Andrea Wang, *Misidentified Priorities*, *The American Prospect* (Jan. 4, 2011), [http://www.prospect.org/cs/articles?article=misidentified\\_priorities](http://www.prospect.org/cs/articles?article=misidentified_priorities) (citing Committee on Legislative Research Oversight Division, *Fiscal Note*, L.R. No.: 4947-25, Bill No.: Truly Agreed To and Finally Passed CCS #2 for HCS for SS #2 for SCS for SB 1014 & 730 (May 12, 2006)).
- <sup>4</sup> *Elections and the Economy*, THE CANVASS: STATES AND ELECTION REFORM (Nat'l Conf of State Legislatures, Denver, CO), Feb. 2011, at 2, available at [http://www.ncsl.org/documents/legismgt/elect/Canvass\\_Feb\\_2011\\_No\\_17.pdf](http://www.ncsl.org/documents/legismgt/elect/Canvass_Feb_2011_No_17.pdf).
- <sup>5</sup> See Secretary of State, *Fiscal Note – 2009-10 Session*, Bill No. H0057-0 (Feb. 3, 2009) [hereinafter *Minnesota Fiscal Note*], at 5-7.
- <sup>6</sup> Those costs include the costs of hiring additional election judges, training local officials, processing voter identification applications, issuing and producing the cards, and receiving returned cards when voters move.
- <sup>7</sup> See *Minnesota Fiscal Note*, *supra* note 5, at 7.
- <sup>8</sup> Missouri Office of Administration, *Secretary of State Financial Summary*, THE MISSOURI BUDGET FISCAL YEAR 2011 HB 12-4 (2011), available at <http://oa.mo.gov/bp/budg2011/Secretary.pdf>.
- <sup>9</sup> Indiana State Budget Committee, *STATE OF INDIANA BUDGET REPORT I-18-19* (2011), available at [http://www.in.gov/sba/files/as\\_2011\\_whole.pdf](http://www.in.gov/sba/files/as_2011_whole.pdf).
- <sup>10</sup> Ruth Greenwood, *Using HAVA Funds for Photo ID Laws is Not as Simple as it Sounds*, FAIR ELECTIONS LEGAL NETWORK BLOG (Feb. 16, 2011, 1:24 AM), <http://fairelectionsnetwork.blogspot.com/2011/02/using-hava-funds-for-photo-id-laws-is.html>.
- <sup>11</sup> *Public Hearing on SB-6* (Jan. 25, 2011) (statement of Diane Hermann-Brown, President, Wisconsin Municipal Clerks Association) (on file with authors).
- <sup>12</sup> See Jennifer Jacobs, *Iowa County Election Officials Oppose Bill to Require Photo ID to Vote*, DES MOINES REGISTER (Feb. 14, 2011), <http://blogs.desmoinesregister.com/dmr/index.php/2011/02/14/iowas-county-elections-officials-oppose-bill-to-require-photo-id-to-vote/> (the Iowa State Association of County Auditors registered its opposition to the Iowa ID bill, with none of its sixty members voting to register in favor of the bill).
- <sup>13</sup> For more information, see Justin Levitt, *The Truth About Voter Fraud*, Brennan Center (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>.
- <sup>14</sup> Those challenging photo ID laws to date have argued that they violate federal or state constitutional protections under a variety of theories: they impose constitutionally unjustified burdens on voters without

photo ID; the differential treatment of voters with and without photo ID violates the Equal Protection Clause of the Fourteenth Amendment; requiring a voter without ID to pay to obtain one violates the Twenty Fourth Amendment's prohibition on poll taxes; and photo ID laws run afoul of various state constitutional protections of the right to vote, which can be stronger than their counterparts in the federal constitution.

<sup>15</sup> Crawford v. Marion County Election Bd., 553 U.S. 181, 199 (2008).

<sup>16</sup> *Id.* at 198.

<sup>17</sup> *Id.* at 199.

<sup>18</sup> *Id.* at 201.

<sup>19</sup> *Id.* at 200–03.

<sup>20</sup> See Weinschenk v. State, 203 S.W.3d 201, 213 (Mo. 2006).

<sup>21</sup> *Id.* at 213–215.

<sup>22</sup> See, e.g., Madison v. State, 163 P.3d 757, 765 (Wash. 2007) (“[t]his court has recognized that the Washington Constitution goes further to safeguard the right to vote than does the federal constitution”); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 500 (Mich. 2007) (“it is apparent that our state constitution affords greater protection against infringements on the right to vote than does the federal constitution”); *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 228 (Md. 2003) (“Article 7 [of the Maryland Declaration of Rights] has been held to be even more protective of rights of political participation than the provisions of the federal Constitution”).

<sup>23</sup> See Crawford, 553 U.S. at 198.

<sup>24</sup> See *Common Cause/Ga. v. Billups (Common Cause I)*, 406 F. Supp. 2d 1326, 1336 (N.D. Ga. 2005) (quoting GA. CODE ANN. § 21-2-417).

<sup>25</sup> See *id.* at 1369–70 (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) (holding the Twenty-fourth Amendment bars the imposition of a material requirement on a voter because of the voter's refusal to pay a poll tax)).

<sup>26</sup> The state also enacted other measures to ameliorate the burdens of the ID requirement and educate voters about the new law. See *Common Cause/Ga. v. Billups (Common Cause III)*, 504 F.Supp.2d 1333, 1343 (N.D. Ga. 2007), *vacated on other grounds*, 554 F.3d 1340 (11th Cir. 2009).

<sup>27</sup> See generally *Common Cause III*, 504 F. Supp. 2d 1333.

<sup>28</sup> *Common Cause I*, 406 F. Supp. 2d at 1369–70. In any event, the court also stated that the fact that the waiver allowed some individuals to “avoid paying the cost for the Photo ID card does not mean that the Photo ID card is not a poll tax.” *Id.*

<sup>29</sup> See *Common Cause III*, 504 F. Supp. 2d at 1343.

<sup>30</sup> See Ind. Code § 9-24-16-10. While the Indiana law does contain an affidavit of indigency, that affidavit only applies to voters who wish to vote without ID. See *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 787 (S.D. Ind. 2006) (citing Ind. Code § 3-11.7-5-2.5(c)).

<sup>31</sup> Cf. Crawford v. Marion County Election Bd., 553 U.S. 181, 199 (2008) (acknowledging that the Indiana law may be subject to a more effective challenge by voters who faced heavy burdens in obtaining ID).

<sup>32</sup> See, e.g. Weinschenk v. State, 203 S.W.3d 201, 214–15 (Mo. 2006) (regarding the time and advance planning required to obtain photo ID, including the several weeks required to obtain underlying documentation such as a birth certificate, as “an ‘onerous procedural requirement which effectively handicap[s]

exercise of the franchise” (quoting *Lane v. Wilson*, 307 U.S. 268 (1939)); *Common Cause/Ga. v. Billups (Common Cause II)*, 439 F. Supp. 2d 1294, 1345 (N.D.Ga. 2006) (“Many voters who do not have driver’s licenses, passports, or other forms of photographic identification have no transportation to a voter registrar’s office or DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain Voter ID cards or Photo ID cards, or cannot travel to a registrar’s office or a DDS service center during those locations’ usual hours of operation because the voters do not have transportation available”).

<sup>33</sup> See *Common Cause I*, 406 F.Supp.2d at 1362 (“Many voters who do not have driver’s licenses, passports, or other forms of photographic identification have no transportation to a DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain licenses, or cannot travel to a DDS service center during the DDS’s hours of operation because the voters cannot take off time from work”).

<sup>34</sup> See *id.* at 1362–63 (N.D. Ga. 2005); see also *Common Cause II*, 439 F. Supp. 2d at 1345 (finding that, even after Georgia amended its photo ID law to require every county’s registrar’s office to provide photo ID, the requirements were nevertheless unduly burdensome on many voters because the registrar’s offices were located in largely rural areas without mass transit); but see *Common Cause III*, 504 F. Supp. 2d at 1377–79, *vacated on other grounds*, 554 F.3d 1340 (11th Cir. 2009) (upholding the Georgia photo ID law as amended after Georgia engaged in significant voter education efforts, and finding that plaintiffs failed at the permanent injunction stage to produce actual evidence of voters who lacked photo ID and transportation).

<sup>35</sup> See *Common Cause I*, 406 F. Supp. 2d at 1363.

<sup>36</sup> See *id.* at 1365. Similarly, a memo written by career staff of the voting rights section of the Department of Justice that recommended against preclearance of the Georgia law under section 5 of the Voting Rights Act mentioned that the provisional ballot system placed “the burden on the voter to bring ID, rather than on the registrar to confirm the elector’s registration. Voters may not have a method of transportation to return to the clerk’s office, as they do on election day when rides to the polls are widely provided, or may not have time off from work to do so”). Robert Berman et al., Section 5 Recommendation Memorandum: August 25, 2005, 42 available at [http://www.washingtonpost.com/wp-srv/politics/documents/dojgdocs39\\_51.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/dojgdocs39_51.pdf) (the recommendations of the career staff were ultimately overruled by political appointees and the law was precleared).

<sup>37</sup> See *infra* text accompanying notes 44–52.

<sup>38</sup> See *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006).

<sup>39</sup> See *id.* at 213.

<sup>40</sup> The Missouri court distinguished the federal court decisions upholding photo ID laws in Indiana and Georgia because, unlike the Missouri plaintiffs, the challengers in those cases “failed to offer specific evidence of voters who were required to bear costs in order to exercise their right to vote.” *Weinschenk*, 203 S.W.3d at 214 (“Plaintiff Weinschenk will have to pay \$12 for her birth certificate; Plaintiff von Glahn, who was asked to pay \$11 for his “free” non-driver’s license required to vote under the statute, will have to pay another \$20 for his birth certificate. Others, like Plaintiff Mullaney, may have to incur more substantial costs for additional documentation because their names have changed since their birth. Additionally, elections officials testified to the substantial number of other otherwise qualified Missouri voters who also must pay a fee in order to vote”). Indeed, in the Indiana litigation, the federal district court’s opinion (eventually affirmed by the Supreme Court in *Crawford*) acknowledged that the fee for obtaining a birth certificate “might plausibly approach being a poll tax.” *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 827 (S.D.Ind. 2006); but see *Gonzalez v. Arizona*, 624 F.3d 1162, 1195–98 (9th Cir. 2010) (holding Arizona’s requirement that voters show ID is not a poll tax in violation of the Twenty-fourth or Fourteenth Amendments, despite the fact that some voters would be required to spend money to obtain documentation).

<sup>41</sup> The fees for such documents can be expensive. For instance, the court in *Weinschenk* found that Missourians born in Missouri or other states must pay between five and thirty dollars to obtain a birth certificate. See *Weinschenk*, 203 S.W.3d at 208. In the case of individuals born to U.S. Citizens while overseas, a situation that is common among military families, proof of citizenship can be far more expensive. See, e.g., Dan Tilkin, *DMV Won't Renew License That Veteran Has Had For 40 Years*, KATU (Dec. 7, 2010), <http://www.katu.com/news/local/111497314.html> (U.S. Citizen born to military veteran stationed abroad was asked to pay \$600 to obtain proof that he was born to a U.S. Citizen while overseas).

<sup>42</sup> See *Crawford*, 533 U.S. at 199–200 (suggesting there may be groups of voters for whom the burden of obtaining ID may not be justified, although upholding the law against a facial attack to its constitutionality).

<sup>43</sup> See MO. ANN. STAT. § 115.427 (West 2010) (providing exemptions for people who have disabilities, religious objections to being photographed, and those born before 1941), *invalidated by* *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006); IND. CODE ANN. § 3-10-1-7.2(e) (West 2010) (exempting voters who reside in state licensed care facilities).

<sup>44</sup> See, e.g., *Common Cause/Ga. v. Billups (Common Cause III)*, 504 F.Supp.2d 1333, 1378 (N.D. Ga. 2007), *vacated on other grounds*, 554 F.3d 1340 (11th Cir. 2009) (stating that the court's earlier rulings striking down the ID law "hinged in large part on the fact that many of the voters who might lack a Photo ID had no real notice of the Photo ID requirement or of how to get a photo ID or vote absentee"); *but see* *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1322 (10th Cir. 2008) (finding that a City's failure to establish plans to inform voters of a new photo ID law was not adequate grounds to invalidate the law).

<sup>45</sup> See *id.* at 1343–45.

<sup>46</sup> See *Common Cause/Ga. v. Billups (Common Cause II)*, 439 F. Supp. 2d 1294, 1345–47 (N.D.Ga. 2006).

<sup>47</sup> See *id.* at 1346.

<sup>48</sup> See *id.* at 1351.

<sup>49</sup> See *Common Cause III*, 504 F.Supp.2d 1333, 1378 (N.D. Ga. 2007).

<sup>50</sup> See *id.* at 1378–80.

<sup>51</sup> See *id.* at 1379.

<sup>52</sup> See *id.* at 1380–82.

<sup>53</sup> See generally Anthony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 Mich. J. Race & L. 1 (2009) (finding the discretion afforded by Photo ID laws may lead to a disproportionate number of people from racial and ethnic minority groups either not having their votes counted at all or being given provisional ballots).

<sup>54</sup> See 42 U.S.C. § 15482(a) (requiring provisional ballots to be given to voters whose names are not on the voter rolls or those whom an election official asserts are not eligible to vote).