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National Commission on Voting Rights
Kansas City Regional Hearing
Submitted by email to: NCVR@lawyerscommittee.org

April 22, 2014

Re: Written Testimony Regarding Challenges to Voting in Iowa

Honorable Commissioners,

Challenges to the exercise of voting rights in Iowa over the last 3-5 years fall into roughly five categories, each briefly described below.

1. Attempted Purge of Suspected Non-Citizens and Suppressive Effect

In July 2012, Iowa Secretary of State Matt Schultz promulgated two regulations affecting voters on an “emergency” basis (meaning that normal notice and public comment periods were not made or provided). The first regulation would have allowed for anyone to challenge to a voter’s qualifications (“Voter Challenge Rule”). The Voter Challenge Rule would have allowed challenges to voters *en mass*, even if made anonymously, for any reason or no reason, with the effect of putting the onus on the voter to prove their qualifications to voting officials. This rule directly conflicted with Iowa law, which requires that in order to initiate a challenge to another voter’s qualifications, the challenger must swear to the truth of their challenge under criminal penalty for knowingly providing false information, and must reside in and be a registered voter in the same county as the challenged voter. The second regulation would have allowed the Secretary of State to cross reference Iowa’s voter rolls with unnamed state and federal databases in order to identify suspected non-U.S. citizens, and on the basis of the results, send letters to those individuals demanding that they provide proof of their U.S. Citizenship within 14 days or face removal from the rolls (“Voter Removal Rule”).

On behalf of the ACLU of Iowa and LULAC of Iowa, we sued the Secretary of State in his official capacity, making 3 claims: (1) that the Secretary of State lacked legal authority to promulgate the rules on an emergency basis; (2) that the Secretary of State lacked legal authority to promulgate the rules on any basis, i.e., using either emergency or regular rulemaking procedures; (3) that the rules would infringe on the voting rights of qualified Iowa voters, with particular harm on Latinos and new U.S. Citizens.

Shortly before the 2012 General Election, we obtained a temporary injunction against the implementation of the emergency rules, insulating the General Election from their effects. As part of that opinion, the Judge found that we had demonstrated a sufficient likelihood of harm to Iowa voters to warrant the injunction. Among other documents submitted to the court, we provided affidavits from new U.S. Citizens which not only demonstrated that Iowa Dept. of Transportation information was not accurate as to their

citizenship status, but that the rule had caused new U.S. Citizens to be fearful about drawing attention of the government or law enforcement to them or their family members. Additionally, affidavits demonstrated that the rules had negatively impacted LULAC of Iowa's voter registration efforts. The Secretary of State voluntarily rescinded the Voter Challenge Rule. However, at the same time, the Secretary initiated normal rulemaking procedures to permanently enact the Voter Removal Rule, allowing the identification, challenge, and removal of registered Iowa voters on account of suspected non-citizenship pursuant to state and federal databases. We stayed our lawsuit during the pendency of the rule-making process, with the proviso that the injunction we obtained in September 2012 would remain in effect to bar the "emergency" Voter Removal Rule from being used. Through the normal rulemaking process, the Voter Removal Rule was changed to specify that the Secretary of State intended to cross reference Iowa's voter rules with the list of foreign nations in possession of driver's licenses through the Iowa Department of Transportation, as well as the federal USCIS SAVE system, to provide that letters be sent by certified mail, and to allow for 30-60 days before initiating the process to remove voters instead of 14 days.

Soon after, the Secretary of State entered into an agreement with USCIS to access the SAVE database, at which point we renewed our lawsuit, incorporating the final adopted Voter Removal Rule. In early March 2014, we won on summary judgment on our claim that the Secretary of State lacked legal authority to promulgate the rule. The victory struck down and nullified the Voter Removal Rule.

In April 2014, the Secretary of State appealed to the Iowa Supreme Court, which appeal is pending. The Voter Removal will remain null and not in effect at least throughout the appeal process, which will occur over the following estimated 6-12 months.

2. Permanent Disenfranchisement of Persons Convicted of "Infamous Crimes"

Iowa is one of three states that permanently disenfranchise persons for felony convictions. This policy has devastating impact on the lives of already marginalized persons seeking to reenter society after a conviction and to rebuild their lives. However, it has even greater impact on people of color. In 2005, the Sentencing Project found that 1 in 4 voting age African American men in Iowa were disenfranchised as a result of Iowa's felony disenfranchisement system. The problem was greatly reduced by a 2005 Executive Order issued by then-Governor Vilsack automatically restoring the right to vote to all persons who had completed their sentences, and establishing a system to automatically restore the right to vote to people completing their sentences in the future. However, in 2011, incoming Governor Branstad issued an Executive Order rescinding the policy of automatic restoration of rights, so that now, people with certain convictions must reapply to the Governor's office for the restoration of their rights. Initially, the Governor would only entertain those applicants who had fully paid their fines, fees, and restitution and who provided a credit check as part of their application; however, following advocacy by the ACLU of Iowa and the Midwest Chapter of the NAACP, the Governor both removed the credit check requirement, and provided that applicants need only be current on their monthly payments, rather than have paid all obligations in full. In the last year, only approximately 40 people applied to have their voting rights restored.

Iowa's state constitution makes all people convicted of "infamous crimes" ineligible to vote and hold public office. From 1916 until last week, in April 2014, the Iowa Supreme Court has interpreted infamous crime to mean any crime that is subject to potential imprisonment for more than a year. That definition included aggravated misdemeanors in Iowa, which are punishable by up to 2 years, as well as felonies. However, in a groundbreaking decision in which the ACLU of Iowa took part, decided last week, *Chiodo v. Panel*, the Iowa Supreme Court overturned those cases. A majority – 5 justices – held that no misdemeanors, including aggravated misdemeanor offenses, are infamous crimes. In addition, a plurality writing the opinion – 3 justices – found that not all felonies are infamous crimes. A seventh justice abstained.

This decision leaves intact an Iowa law defining infamous crime to mean all felonies, but positively impacts tens of thousands of Iowans who have been convicted of aggravated misdemeanors. In addition, it opens the door for future litigation to define infamous crime as excluding many felonies.

3. Criminal Investigation into So-called "voter fraud" and subsequent prosecutions, and use of Help America Vote Act (HAVA) funds

In July 2012 the Iowa Secretary of State allocated \$280,000 of federal Help America Vote Act grant money to hire a special agent within the Iowa Division of Criminal Investigation to investigate voter fraud. The investigation targeted two groups: noncitizens who were registered to vote or actually voted, and people who lost their right to vote on account of criminal convictions whose rights were not restored.

An Iowa state senator requested an audit by the federal body that oversees the use of HAVA money; however, that body, the U.S. Election Assistance Commission, is defunct. The organization is supposed to be comprised of four commissioners nominated by the U.S. president and confirmed by the Senate, but has not had a single commissioner since December 2011. An independent Iowa state audit by Iowa Auditor Mary Mosiman determined that, because the federal HAVA supporting regulations list various uses of the funds that are proper and improper, but do not specifically list a dragnet criminal investigation as either proper or improper, no final determination as to the Secretary's investigation could be made without the U.S. Election Assistance Commission. It did, however, recommend that the Secretary of State come up with a plan to pay back the money in the event that the Commission ever becomes fully staffed and makes a determination that the use of funds was improper. The Secretary of State announced shortly thereafter that he has no intention of paying back funds without a formal finding by the (now defunct) Commission.

The 20-month investigation concluded in February 2014. At that time, charges had been dismissed in 3 cases, 5 had cases resulted in guilty plea to reduced charges and no jail time, 15 cases were pending, and 80 additional cases were referred to prosecutors. No charges have been filed resulting from those 80 referrals. Of the pending cases, no facts indicated intent to violate Iowa election laws.

The targeting of suspected noncitizen voters in Iowa has been intimidating in its tactics and effects. Our office has heard from two individuals investigated on account of

suspected non-citizenship. In both cases, the noticeably armed DCI agent showed up at their homes without notice, having asked family, friends, and neighbors for information relating to the immigration status of the individual, and demanded papers from the individual being investigated proving his or her citizenship.

State Senator Tom Courtney has publically related his experience of door knocking in his district, which has one of the highest proportions of Latinos in Iowa, during the DCI investigation. Many families have mixed immigration status. So, for example, in a single household, one or two members of the family may have U.S. Citizenship, another may be a lawful permanent resident, another have a work or student visa, another be undocumented. He has recounted that in those households, some U.S. Citizens who were eligible to vote were abstaining from the democratic process for fear of exposing their family members to criminal investigation by the Secretary of State and DCI.

In Iowa, "Election Law Fraud" under Iowa Code § 39A.2(1)(b)(3) requires prosecutors to prove that the person acted with knowledge--that she knew she was not qualified, that she knew that she was providing a materially false statement, etc. No one can accidentally commit voter or registration fraud under Iowa law. Yet, in no cases has it been evident or proven that anyone charged was aware that they were not qualified to vote. Rather, in all instances voter confusion about the status of their right to vote was evident.

The facts of the cases show that individuals were, quite understandably, confused about the status of their voting rights following Governor Branstad's January 2011 rescission of a system of automatic restoration of voting rights to persons with convictions of infamous crimes that had been in place since July 2005.

In late March 2014, a jury in Southeast Iowa acquitted the only person who has been brought to trial so far in Iowa. It remains to be seen if prosecutors will go forward with the remaining 14 cases given the controversy surrounding the investigation, prosecutions, and now, the Iowa Supreme Court case *Chiodo v. Panel*, discussed above.

4. Voting by Residents of Long Term Care Facilities

Our office was contacted prior to the 2014 legislative session by residents of the Iowa Veterans Home, who are frustrated with an Iowa law that requires them to vote under the supervision of officials from the county auditor's office. Under current Iowa law, there is an unsupported assumption that all people with long term illnesses, advanced age, or disabilities who reside in a long term care facility are unable to vote free from the undue influence of others.

All other Iowa voters can request an absentee ballot, which they receive in mail or pick up. They then can cast the vote in privacy and return the ballot by mail or physically deliver it by a certain deadline. Iowans who reside in a health care facility, by contrast, are notified of a time when a bipartisan team will come out and oversee voting.

Instead, veterans and others who reside in a health care facility would like the choice: they want to be able to choose whether a team comes to their facility and watches over them

while they vote, or have an absentee ballot delivered by mail and vote in privacy like everyone else.

In the 2014 session, legislators failed to advance the bill in time to meet legislative deadlines.

5. Confusion About the Status of Photo Voter ID and Inadequately Trained Poll Workers

Unlike some of our Midwestern neighbors, Iowa does not have a Voter ID law. However, our office receives communications each election since the Iowa Secretary of State Matt Schultz has advocated for passage of a voter ID law about poll workers who are inadequately trained, who ask voters to provide a photo ID to vote. When we receive these calls, we inform the county auditors about the problem, and they have been quick to call or visit the polling site and remedy the confusion. But the issue is indicative, in our view, of the need to better train poll workers on the law and the importance of their behavior—words and actions—on voters in Iowa. Given the HAVA funds that were instead spent on a criminal investigation into so-called voter fraud, and the Secretary of State's April 2014 announcement that his office would be returning \$200,000 of unspent FY 2013 funds to the Iowa General Fund, it is clear that available resources are not being spent where they are needed to promote access to voting in our state.

Sincerely,



Rita Bettis
Legal Director