

New York Office  
40 Rector Street, 5th Fl.  
New York, NY 10006  
T. (212) 965.2200  
F. (212) 226.7592  
[www.naacpldf.org](http://www.naacpldf.org)



Washington D.C. Office  
1444 Eye St., NW, 10th Fl.  
Washington, DC 20005  
T. (202) 682.1300  
F. (202) 682.1312

May 29, 2014

*By e-mail & postal mail*

The Honorable Jean W. Brown  
Chief Legal Advisor  
Office of the Secretary of State  
P.O. Box 5616  
Montgomery, AL 36103  
[Jean.Brown@sos.alabama.gov](mailto:Jean.Brown@sos.alabama.gov)

Dear Ms. Brown:

The NAACP Legal Defense & Educational Fund, Inc. (LDF)<sup>1</sup> submits the following comments on the Secretary of State's (Secretary) proposed rules (820-2-9.14 and 820-2-9.15) for implementing Code of Alabama, section 17-9-30(e), encompassing the positive identification requirement of the photo voter identification law. Consistent with the concerns that LDF raised in our initial March 3, 2014 letter, attached as Attachment A, we note that the Secretary's proposed rules are *per se* violative of the Voting Rights Act of 1965 ban on specific tests or devices.

As you know, the Voting Rights Act prohibits "any requirement that a person as a prerequisite for voting . . . prove his qualifications by the voucher of registered voters or *members of any other class*."<sup>2</sup> In direct violation of this prohibition, your proposed rules require an otherwise eligible voter, who lacks the accepted photo identification, to prove her/his identity by the voucher of—*i.e.*, a "personal acquaintance with"—a class of election officials.<sup>3</sup> This is the very type of device that Congress banned through a permanent section of the Voting Rights Act.<sup>4</sup>

---

<sup>1</sup> Since its founding in 1940, LDF has been involved in nearly all of the precedent-setting litigation related to securing voting rights for people of color in Alabama and across the country. *See, e.g., Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013) (LDF defending Sections 4(b) and 5 of the Voting Rights Act (VRA)); *Texas v. Holder*, 888 F.Supp.2d 113, 141-44 (D.D.C. 2012) (LDF successfully representing defendant-intervenors in a Section 5 of the VRA lawsuit blocking Texas's photo ID law), *vacated on other grounds*, 133 S. Ct. 2886 (2013) (mem.); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (LDF representing successful defendant-intervenors in a Section 5 of the VRA to block South Carolina's photo ID law).

LDF's Political Participation Group uses legal, legislative, public education, and advocacy strategies to promote the full, equal, and active participation of Black people in America's democracy.

LDF has been a separate entity from the NAACP, and its state branches, since 1957.

<sup>2</sup> 42 U.S.C. § 1973aa(b)(4) (2012).

<sup>3</sup> *See* Proposed Ala. Admin. Code § 820-2-9.15 ("the positive identification must be based on the election official's *personal acquaintance with* the voter that allows the election official to state with certainty and with no doubt or reservation that the voter is who he/she says he/she is.") (emphasis added); *id.* at § 820-2-9.14 ("The term 'positively identified' as used in section 17-9-30 (e) means that the election official is able to establish the identity of the voter based on the election official's *personal acquaintance with* the voter that al-

The Secretary's insistence on administering a prohibited device is deeply disturbing and likely unconstitutional. The racially toxic legislative session in which the photo identification law was passed;<sup>5</sup> the substantial burdens that the law will place on the half-a-million registered voters in Alabama who lack state-issued photo identification;<sup>6</sup> and now the broad discretion that your proposed rules vest in election officials across the State,<sup>7</sup> in tandem, make clear that the State intends to operate both the photo and positive identification requirements as unconstitutional devices to permit racial discrimination. The discriminatory purpose and results of the rules also may be evident given your office's failure to issue a meaningful number of "free" photo

---

lows the election official to state with certainty and with no doubt or reservation that the voter is who he/she says he/she is.") (emphasis added).

<sup>4</sup> 42 U.S.C. § 1973aa(a) (2012).

Congress's ban on "vouching" was meant to eliminate prerequisites to voting which required a person to prove her/his identity by a personal acquaintance with a registered voter or election official. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) ("Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls."); *United States v. Logue*, 344 F.2d 290, 291 (1965) ("The record discloses that of the 386 applications filed by white persons during the period covered by the record, county officials and employees served as supporting witnesses on 342. On the other hand, no one suggested the names of possible supporting witnesses to the Negro applicants and none of their forms were signed by employees of the county."); *United States v. Ward*, 222 F. Supp. 617, 618-19 (W.D. La. 1963) ("Since the time Defendant Katherine Ward took office in January 1955 she has not required identification from applicants whom she knew . . . . Since she knows most of the white people in the parish and very few of the Negroes, this policy alone inevitably operated to discriminate against Negroes."), *rev'd on other grounds*, 349 F.2d 795, 799 (5th Cir.) *modified on rehearing*, 352 F.2d 329 (5th Cir. 1965); *United States v. Manning*, 205 F. Supp. 172, 173 (W.D. La. 1962) ("[The defendant registrar] permits persons known to him to apply for registration without further identification. . . . He requires that Negroes be introduced to him by white persons since he 'knows' very few Negroes.").

<sup>5</sup> The Alabama Legislature that enacted the photo identification law in 2011 included two high-ranking members of the majority party who, a federal court found, had pursued a deliberate scheme "to maintain and strengthen white control of the political system", and who demonstrated a "deep-seated racial animus and a desire to suppress [B]lack votes" by manipulating the turnout in the 2010 elections. *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345-47 (M.D. Ala. 2011). That same 2011 legislature also enacted House Bill 56, a housing law that a federal court later enjoined after finding that "the legislative debate on [House Bill] 56 was laced with derogatory comments about Hispanics" and that the law was likely enacted for a discriminatory purpose. *Central Alabama Fair Housing Center v. Magee*, 835 F. Supp. 2d 1165, 1185-94 (M.D. Ala. 2011).

<sup>6</sup> *See New Photo Voter IDs To Be Available At County Registrars' Offices And From Traveling Van*, The Associated Press, Mar. 10, 2014 ("The secretary of state's office reports that a check of voting records with the state Department of Public Safety shows 20 percent of Alabama's registered voters, or about 500,000 adults, lack a driver's license or non-driver ID issued by the Department of Public Safety."), *available at* [http://blog.al.com/wire/2014/03/new\\_photo\\_voter\\_ids\\_to\\_be\\_avai.html](http://blog.al.com/wire/2014/03/new_photo_voter_ids_to_be_avai.html).

<sup>7</sup> *Cf. Schnell v. Davis*, 336 U.S. 933, *aff'd* 81 F. Supp. 872, 878 (1949) (holding that the Alabama literacy test unconstitutional for vesting election officials with "the power to establish two classes, those to whom they consent and those to whom they do not — those who may vote and those who may not. Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment").

identification cards to the hundreds of thousands of voters in need of them;<sup>8</sup> the continued predominance of white election officials across the State despite Alabama's substantial voter of color population;<sup>9</sup> the appalling recent examples of racial discrimination by such officials;<sup>10</sup> Ala-

---

<sup>8</sup> Your office has issued only about 1,850 "free" photo identification cards. Jim Bennett, *What you need to know about the Alabama photo ID requirement that will be enforced this Election Day*, AL.com (May 26, 2014, 1:19 PM), [http://www.al.com/opinion/index.ssf/2014/05/what\\_you\\_need\\_to\\_know\\_about\\_th.html](http://www.al.com/opinion/index.ssf/2014/05/what_you_need_to_know_about_th.html). Thus, hundreds of thousands of registered voters likely will still be disfranchised under the photo identification law.

LDF also notes that the State has failed to eliminate the substantial financial, time, logistical, and other burdens associated with obtaining photo identification. *See* Keesha Gaskins & Sundeep Iyer, Brennan Center for Justice, *The Challenge of Obtaining Voter Identification* 7 (2012), [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf) ("[I]n 11 contiguous [black belt] counties in Alabama . . . all state driver's license offices are part-time and are open only one or two days per week. More than 135,000 eligible voters live in these 11 counties. Nearly half of them are black, and the black poverty rate is 41 percent."); *see also id.* at 15 (noting that the birth certificate or marriage license needed to obtain "free" photo identification card costs \$15 each in Alabama). For example, the mobile units in Etowah County were senselessly located in cities just six miles apart from both one another and the county courthouse, rather than in cities twenty or more miles away. Editorial, *Our View: Mobile ID Units Misplaced*, *The Gadsden Times*, (March 30, 2014, 6:01 AM), <http://www.gadsdentimes.com/article/20140330/NEWS/140329805?pg=1&tc=pg>. In fact, the Secretary's efforts in Tuscaloosa County are so lacking that free rides are now being offered to voters in need of identification. Jenny Ryan, *Letter: Democrats Offer Rides to Registrar's Office*, *Tuscaloosa News*, (May 15, 2014, 9:34 PM EST), <http://www.tuscaloosanews.com/article/20140515/NEWS/140519825/1291?Title=LETTER-Democrats-offer-rides-to-registrar-8217-s-office>.

<sup>9</sup> Our extensive correspondence with local organizations confirms that, as in the past, Alabama polling places remain dominated by white election officials, even in areas with large communities of color. *See, e.g.*, Consent Judgment and Decree, at ¶¶ 14, 21, 24, *City of Pinson v. Holder*, Case No. 1:12-cv-00255 (D.D.C. April 20, 2012), ECF No. 11, (finding that the City of Pinson—21 percent Black and Latino population—hired only white election officials in recent federal elections), available at [http://www.justice.gov/crt/about/vot/misc/pinson\\_cd.pdf](http://www.justice.gov/crt/about/vot/misc/pinson_cd.pdf); *see Harris v. Siegelman*, 695 F. Supp. 517, 25-29 (M.D. Ala. 1988) ("[T]he State of Alabama has over the last 100 years adopted and enforced . . . a policy of appointing only white poll officials . . .").

<sup>10</sup> *See, e.g.*, Motion for Summary Judgment and Motion for Relief Under Section 3, at ¶¶ 24-29, *Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Aug. 1, 2013), ECF No. 60 (describing recent instances of racial discrimination at polling places in Conecuh County, including incidents where white election officials referred to Black voters as "niggers"); Lawyers Comm. for Civil Rights, *Alabama, in Our Broken Voting System and How to Repair It* 1-2 (2013) (documenting how election officials in Alabama during the 2012 presidential election "erroneously provided [eligible voters with] provisional ballots in situations in which they should have received regular ballots" and how some "eligible voters were not allowed to vote at all"), available at <http://www.866ourvote.org/newsroom/publications/body/EP2012-StateReports-AL.pdf>; Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 POL. SCI. & POL. 127, 128 (2009) (finding that, in Alabama and the other twenty-three states that held presidential primary elections on February 5, 2008, poll officials required 73 percent of Black voters and just 53 percent of white voters to show photo ID before voting—results that held up after controlling for region, state law and other factors), available at [http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/03/voter\\_id\\_will\\_the\\_law\\_suppress\\_voter\\_turnout/Ansolabehere2009.pdf](http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/03/voter_id_will_the_law_suppress_voter_turnout/Ansolabehere2009.pdf); James Blacksher, et al., *Voting Rights in Alabama: 1982–2006* at 19, (July 2006), available at <http://www.protectcivilrights.org/pdf/voting/AlabamaVRA.pdf> (relating an incident where white election officials in Greensboro, Hale County shut the polling place doors on Black people and a Black state Senator to prevent them from voting).

bama's past enforcement of *de jure* segregation;<sup>11</sup> and the State's well-documented history of using similar identification requirements to disfranchise Black and other "undesirable" voters.<sup>12</sup>

In fact, rather than adopting an objective alternative standard, such as those suggested below and in LDF's March letter, the proposed rules are nearly identical to Alabama's past unconstitutional "supporting witness" requirement. Under that now-illegal requirement, an applicant for registration had to produce a supporting witness—usually a white election official—to "affirm that he is acquainted with the applicant."<sup>13</sup> The proposed rules also mirror the discriminatory operation of the infamous Alabama poll tax, whereby white "acquaintances and friends of the tax collector" received poll tax payment waivers, personal notices that taxes were due, or other allowances not afforded to Black people, who were not "acquaintances" of white tax collectors.<sup>14</sup>

If adopted, the proposed rules will resurrect the supporting witness requirement, resulting in the denial of voters of color's equal access to the political process. This disfranchising result is likely because—given existing segregated social patterns in the State, where 71 percent of white people have fewer than five close acquaintances of a different race, with 37 percent of whites having *no* such friends<sup>15</sup>—a requirement that voters of color prove a personal acquaintance with a class composed almost exclusively of white persons remains "inherently discriminatory."<sup>16</sup>

For the above reasons, and those expressed in our March letter, LDF once more urges your office in the strongest possible terms to adopt nondiscriminatory rules which will require

---

<sup>11</sup> See *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1359-60 (M.D. Ala. 1986) (reciting, in detail, the State of Alabama's efforts to segregate and discriminate against Black persons in all eras and areas of their lives—including segregation in schools, parks, and recreational facilities, and discrimination in employment, health care, cultural opportunities, and via anti-miscegenation laws—that continued well into the late 1980s).

<sup>12</sup> Into the present, Alabama's repeated use of prohibited or discriminatory voting devices, including voter identification requirements and literacy tests, and the prevalence of discrimination at polling places in Alabama has necessitated federal intervention. See, e.g., U.S. Dep't of Justice, Civil Rights Division, Voting Section, Section 5 Objections, [http://www.justice.gov/crt/about/vot/sec5/al\\_obj2.php](http://www.justice.gov/crt/about/vot/sec5/al_obj2.php) (listing all objections imposed against Alabama under Section 5 of the Voting Rights Act, including post-1965 objections to literacy tests, poll list signature identification requirements, and voter re-identification requirements, and, since 1992, two statewide and eight local objections); Lawyers Comm. for Civil Rights, Voting Rights Act: Objections and Observers, [http://www.lawyerscommittee.org/projects/section\\_5/](http://www.lawyerscommittee.org/projects/section_5/) (listing fourteen instances between 2006 and 2012 where the U.S. Attorney General has sent federal observers to monitor elections in eight Alabama counties to prevent unconstitutional acts of discrimination at the polls).

<sup>13</sup> *Logue*, 344 F.2d at 291.

<sup>14</sup> *United States v. Alabama*, 252 F.Supp. 95, 104 (M.D. Ala. 1966) ("Since these practices [of waiving some poll tax requirements] are restricted to friends of the tax collectors and since the tax collectors are not on intimate terms with the Negro community, these practices place a greater burden on Negroes than on whites.").

<sup>15</sup> Reuters Polling Explorer, *Close Friends of a Different Race: Filtered to Whites in Alabama*, [http://polling.reuters.com/#!response/D1B\\_2/type/oneshot/filters/RACE :1,DQSTATE:1/dates/20130724-20131217](http://polling.reuters.com/#!response/D1B_2/type/oneshot/filters/RACE :1,DQSTATE:1/dates/20130724-20131217).

<sup>16</sup> *Logue*, 344 F.2d at 292.



election officials to vouch for an individual without photo identification only in one of three limited scenarios: upon a voter *either* having (i) answered simple questions about identifying information in the poll book (*e.g.*, the voter's name and address); (ii) signed an affidavit confirming her/his identity; *or* (iii) produced a form of identification permissible under Alabama's past non-photo voter ID law.<sup>17</sup> Only when a person without photo identification fails to verify her/his identity in one of these three reasonable ways—or when a voter willfully gives officials false information—should the final rule permit election officials to deny him/her a regular ballot.<sup>18</sup>

In the event that the final rules fail to take our concerns into consideration, or otherwise fail to depart meaningfully from the proposed rules, LDF requests a response *in writing* from the Secretary's office by June 6th, 2014, in which the Secretary lays out any legal or factual basis for concluding that the rules do not violate the U.S. Constitution and the Voting Rights Act of 1965.

As always, please feel free to contact us with any questions.

Sincerely,

Deuel Ross  
Assistant Counsel, Political Participation Group  
dross@naacpldf.org

Ryan P. Haygood  
Director, Political Participation Group  
rhaygood@naacpldf.org

NAACP Legal Defense & Educational Fund, Inc.  
40 Rector Street, 5th Floor  
New York, NY 10006  
T: (212) 965-2200  
F: (212) 226-7592

---

<sup>17</sup> *Cf.*, *e.g.*, *South Carolina*, 898 F. Supp. 2d at 32-34 (requiring poll workers to give provisional ballots—that later are counted like regular ballots—to people without acceptable photo identification if they show non-photo registration cards and sign an affidavit citing any truthful reason for not possessing photo identification); La. Revised Stat. § 18:562(A)(2) (2012) (mandating that poll workers give regular ballots to persons without photo identification if they sign an affidavit containing their date of birth and mother's maiden name).

<sup>18</sup> Ala. Code § 17-9-30(e) (2011) (“[A]n individual who does not have valid photo identification in his or her possession at the polls *shall be* permitted to vote if the individual is positively identified . . . .”) (emphasis added). An individual without photo identification who cannot verify his or her identity in these three ways must still be permitted to cast a provisional ballot, which is counted only if the voter returns with the required photo identification before 5:00 PM on the Friday after the election. *Id.* at § 17-9-30(d).

Ltr. to Alabama Secretary of State's Office  
May 29, 2014  
Page 6 of 6



cc (via email): Chris Herren  
Chef, Voting Section  
Civil Rights Division  
U.S. Department of Justice  
chris.herren@usdoj.gov

[Attachment]

# **ATTACHMENT A**

New York Office  
40 Rector Street, 5th Fl.  
New York, NY 10006  
T. (212) 965.2200  
F. (212) 226.7592  
[www.naacpldf.org](http://www.naacpldf.org)



Washington D.C. Office  
1444 Eye St., NW, 10th Fl.  
Washington, D.C. 2005  
T. (202) 682.1300  
F. (202) 682.1312

March 3, 2014

*By e-mail & postal mail*

Hon. Jean W. Brown  
Chief Legal Advisor  
Office of the Secretary of State  
Suite 105-E, State Capitol  
600 Dexter Ave.  
Montgomery, AL 36104  
Jean.Brown@sos.alabama.gov  
(334) 242-7202

Dear Ms. Brown:

On behalf of the Alabama Democratic Conference, Alabama Elmore County Democratic Committee, Alabama Lawyers Association, Alabama State Conference of the NAACP, Greater Birmingham Ministries, Magic City Bar Association, Save OurSelves Movement For Justice and Democracy, The Ordinary People's Society, the Urban League of Alabama, and the 21st Century Youth Leadership Movement, the NAACP Legal Defense and Educational Fund, Inc. (LDF)<sup>1</sup> writes to raise concerns about the Alabama Secretary of State's (SOS) plans to implement the state's voter photo identification (ID) law for the June 2014 primary elections.

In particular, we are deeply troubled by the SOS's failure to provide adequate guidance on the photo ID law's "voucher provision." This provision states that "an individual who does not have valid photo [ID] . . . shall be permitted to vote if the individual is positively identified

---

<sup>1</sup> Since its founding in 1940, LDF has been involved in nearly all of the precedent-setting litigation relating to securing voting rights for people of color in Alabama and across the nation. *See, e.g., South Carolina v. United States*, 898 F. Supp. 2d 30 (D. D.C. 2012); *Dillard v. Baldwin County Comm.*, 694 F. Supp. 836 (M.D. Ala.), *aff'd*, 862 F.2d 878 (11th Cir. 1988) (table); *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988); *Dillard v. Crenshaw County*, 649 F. Supp. 289 (M.D. Ala. 1986), *aff'd*, 831 F.2d 246, 253 (11th Cir.1987); *Coal. for Educ. in Dist. One v. Bd. of Elections of the City of N.Y.*, 370 F. Supp. 42 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Sellers v. Wilson*, 123 F. Supp. 917 (M.D. Ala. 1954); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949); *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946).

Just last year, LDF attorneys argued before the United States Supreme Court in defense of Section 5 of the Voting Rights Act in *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013). LDF also recently successfully litigated a case brought pursuant to Section 2 of the Voting Rights Act against a discriminatory at-large electoral method. *See, e.g., Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1326 (N.D. Ga. 2013) (LDF, on summary judgment, securing a finding of a Section 2 violation in a challenge to at-large elections in the county board of commissioners and the board of education); *see also Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, Civ. A. No. 3:11-CV-123-TCB, 2014 WL 617544, at \*12 (N.D. Ga. February 18, 2014) (the order requiring district voting as a remedy).

As you well know, all of the former Fifth Circuit precedent cited herein dated prior to September 30, 1981 is binding upon the current United States Court of Appeals for the Eleventh Circuit and the federal district courts therein, including those of Alabama. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981) (en banc).



by two election officials as a voter on the poll list who is eligible to vote and the election officials sign a sworn affidavit so stating.”<sup>2</sup> The SOS’s failure to establish how a person without photo ID who is not personally known to two election officials can be “positively identified” will cause the voucher provision to directly conflict with the Voting Rights Act’s (VRA) permanent ban on certain discriminatory tests or devices.<sup>3</sup>

We recognize that the Alabama legislature enacted the voucher provision to help mitigate the substantial burdens that the photo ID law will place on people without acceptable ID,<sup>4</sup> burdens that will disproportionately affect voters of color. According to one estimate, for example, if the photo ID law had been in effect for the 2012 presidential elections, it would have disenfranchised over 31,000 Black voters under age thirty.<sup>5</sup> Accordingly, a standardized voucher provision could provide voters of color and other individuals without photo ID with an important opportunity to cast regular ballots in-person at the polls, and thereby allow the provision to serve its intended purpose of ameliorating the burdens of the photo ID law.

At present, however, the SOS’s inaction in providing guidance has rendered the voucher provision itself dangerously ambiguous and discriminatory. As described below, the ambiguous voucher provision gives election officials “the arbitrary power to accept or reject any prospective elector”<sup>6</sup>—with voter qualifications likely changing from county to county, city to city, polling place to polling place, and from one set of election officials to the next.<sup>7</sup> Therefore, we write to

---

<sup>2</sup> Ala. Code § 17-9-30(e) (2011) (emphasis added).

<sup>3</sup> 42 U.S.C. § 1973aa(a) (2012) (“No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.”).

<sup>4</sup> The SOS office itself estimates that 12,000 voters in Alabama statewide do not possess a photo ID. Barnett Wright, *New Alabama state ID law may pose some problems for Jefferson County*, AL.com Blog (Jul. 17, 2013), [http://blog.al.com/spotnews/2013/07/alabama\\_state\\_id\\_law\\_may\\_pose.html](http://blog.al.com/spotnews/2013/07/alabama_state_id_law_may_pose.html).

<sup>5</sup> Jon C. Rogowski & Cathy J. Cohen, *Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color*, Black Youth Project (Sept. 10, 2012), <http://research.blackyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf>.

The SOS office’s number of 12,000 Alabamian voters without photo ID is a considerable and shocking underestimate. But, whatever the total number, people of color are undoubtedly overrepresented amongst voters without photo ID. See, e.g., Jon C. Rogowski & Cathy J. Cohen, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election* at 5 (Feb. 28, 2013), <http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf> (“Over 85 percent of white youth have a driver’s license, compared with 71.2 percent of Black youth and 67.0 percent of Latino youth.”) [hereinafter *Black and Latino Youth 2012*]; Justin Levitt, Brennan Center for Justice, *Fast Facts on the Impact of Photo ID: The Data*, (2008), available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/\\_%20ID-related%20stats.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/_%20ID-related%20stats.pdf) (summarizing poll data showing that 25 percent of Black voting-age citizens, 16 percent of Hispanic voting-age citizens, and only 8 percent of whites nationwide lack a current government issued photo ID).

<sup>6</sup> *Davis v. Schnell*, 81 F. Supp. 872, 878 (S.D. Ala.), *aff’d*, 336 U.S. 933 (1949).

<sup>7</sup> Cf., e.g., *United States v. Berks County, Pa.*, 277 F. Supp. 2d 570, 580-81 (E.D. Pa. 2003) (holding that the VRA was violated where poll officials “treated Hispanic voters differently than other voters with regard to voter

remind the SOS of Alabama's dark and unfortunate history of using similar voucher requirements to disfranchise Black people, and, going forward, to offer practical examples of regulations that will bring Alabama's voucher provision *into compliance* with the VRA and enable qualified Alabamians to continue to cast ballots that are counted.

***Ambiguous Voucher Requirements Violate the Voting Rights Act***

Under the VRA, “[n]o citizen shall be denied, because of his [or her] failure to comply with any test or device, the right to vote in any Federal, State, or local election . . . .”<sup>8</sup> Though the most well-known of the banned tests or devices is the literacy test,<sup>9</sup> the VRA also prohibits “any requirement that a person as a prerequisite for voting . . . prove his qualifications by the voucher of registered voters or members of any other class.”<sup>10</sup> In the absence of clear SOS guidance, the voucher provision is squarely a prohibited test or device under the VRA. Additionally, because of the past and ongoing existence of racial discrimination in voting and extensive social segregation in Alabama, the undefined voucher provision threatens to enhance rather than mitigate the discriminatory effects of the photo ID law.

As you likely know, the ban on voucher requirements resulted from successful United States Department of Justice litigation in the 1960s that challenged Alabama's “supporting witness” requirement,<sup>11</sup> and Louisiana's preregistration voter ID law,<sup>12</sup> both of which, like under the presently ambiguous voucher provision, required applicants for registration to prove their identity or qualifications through the voucher of either county officials or another voter.<sup>13</sup> For example, Wilcox County, Alabama once required an applicant to produce a registered voter to vouch for the applicant's identity, residency and good character.<sup>14</sup> The former Fifth Circuit struck this requirement down as unconstitutional because of (a) the discriminatory treatment of Black voters under it, insofar as county officials vouched for 88.6 percent of white applicants, but not a single

---

[ID] requirements”); *Coal. for Educ. in Dist. One v. Bd. of Elections of the City of N.Y.*, 370 F. Supp. 42, 51-56 (S.D.N.Y. 1974), *aff'd*, 495 F.2d 1090 (2d Cir. 1974) (holding that the inconsistent and racially discriminatory application of voter ID requirements across different polling places in a single election violated the VRA).

<sup>8</sup> 42 U.S.C. § 1973aa(a) (2012).

<sup>9</sup> *Id.* at § 1973aa(b)(1)-(2).

<sup>10</sup> *Id.* at § 1973aa(b)(4).

<sup>11</sup> *See United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (“The supporting witness must affirm that he is acquainted with the applicant, knows that the applicant is a bona fide resident of the county, and is aware of no reason why the applicant would be disqualified from registering.”).

<sup>12</sup> *See United States v. Manning*, 205 F. Supp. 172, 172-73 (W.D. La. 1962) (“[A]pplicants for registration to vote are required to establish their identities to the satisfaction of the registrar. If the registrar has good reason to believe that an applicant is not the person he represents himself to be, the registrar may require him to establish his identity by producing two credible persons registered to vote in his ward and precinct to identify him under oath.”).

<sup>13</sup> *See Logue*, 344 F.2d at 291; *Manning*, 205 F. Supp. at 172-73.

<sup>14</sup> *See Logue*, 344 F.2d at 291.

Black applicant;<sup>15</sup> and (b) its discriminatory effects, as Black applicants were required to obtain vouchers from a class comprised exclusively of white registered voters.<sup>16</sup> Similarly, in Louisiana, parish registrars would vouch and waive the ID requirement only for people whom they “knew,” and since they knew “most of the white people in the parish and very few of the [Black people], this policy alone inevitably operated to discriminate against [Black people].”<sup>17</sup> Significantly, while the courts did not strike down Louisiana’s voter ID law as discriminatory outright, the courts did require the registrars to accept a larger range of more widely available forms of photo or non-photo ID.<sup>18</sup>

Today, in light of the continued discriminatory treatment of voters of color in Alabama,<sup>19</sup> the prospective discriminatory effects of the photo ID law in general,<sup>20</sup> and the likely discriminatory effects of an ambiguous voucher provision in particular, the broad discretion within the existing provision poses too substantial a risk that it will result in discrimination because of race. Notably, just last month the City of Evergreen was “bailed-in” for preclearance under the VRA because, in 2012, election officials used a capricious and intentionally discriminatory system for determining voter eligibility.<sup>21</sup> In 2004, Asian American voters in Mobile County were systemat-

---

<sup>15</sup> See *id.* at 292 (“The record discloses that of the 386 applications filed by white persons during the period covered by the record, county officials and employees served as supporting witnesses on 342. On the other hand, no one suggested the names of possible supporting witnesses to the Negro applicants and none of their forms were signed by employees of the county.”).

<sup>16</sup> See *id.* at 292-93 (“[T]he voucher requirement, imposing as it does a heavier burden on Negro than white applicants, is inherently discriminatory as applied in a county such as Wilcox. Since there were no Negro voters on the rolls in the county during the period in question, any Negro applicant had to obtain his supporting witness from the ranks of the white population.”).

<sup>17</sup> *United States v. Ward*, 222 F. Supp. 617, 618-19 (W.D. La. 1963), *rev’d on other grounds*, 349 F.2d 795, 799 (5th Cir.) *modified on rehearing*, 352 F.2d 329 (5th Cir. 1965); see also *Manning*, 205 F. Supp. at 173 (striking down as unconstitutional the defendant registrar’s policy of vouching only for people whom he “knew” where he applied this standard “liberally in favor of white persons and arbitrarily with respect to [Black persons]”).

<sup>18</sup> *Ward*, 349 F.2d at 806-07; *Manning*, 205 F. Supp. at 174-75.

<sup>19</sup> See, e.g., Lawyers Comm. for Civil Rights, *Alabama*, in *Our Broken Voting System and How to Repair It* (2013), <http://www.866ourvote.org/newsroom/publications/body/EP2012-StateReports-AL.pdf> (describing how, during the 2012 presidential election, election officials in Alabama were arbitrarily denying eligible voters the right to cast regular or provisional ballots); Lawyers Comm. for Civil Rights, *Voting Rights Act: Objections and Observers*, LawyersCommittee.org, [http://www.lawyerscommittee.org/projects/section\\_5/](http://www.lawyerscommittee.org/projects/section_5/) (last accessed Jan. 4, 2014) (cataloguing how, since 2006, the U.S. Attorney General has sent federal observers to monitor elections in eight Alabama counties to prevent intentional and unconstitutional racial discrimination at the polls).

<sup>20</sup> See, e.g., Keesha Gaskins & Sundeep Iyer, Brennan Center for Justice, *The Challenge of Obtaining Voter Identification* 7 (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf) (“[I]n 11 contiguous [black belt] counties in Alabama . . . all state driver’s license offices are part-time and are open only one or two days per week. More than 135,000 eligible voters live in these 11 counties. Nearly half of them are black, and the black poverty rate is 41 percent.”); see *id.* at 15 (noting that a birth certificate or a marriage license needed to obtain “free” photo ID in Alabama costs \$15 each).

<sup>21</sup> Adam Liptak, *Judge Reinstates Some Federal Oversight of Voting Practices for an Alabama City*, N.Y. TIMES, Jan. 14, 2014, available at <http://mobile.nytimes.com/2014/01/15/us/judge-reinstates-federal-oversight-of->

ically challenged at the polls under a state law that contained a voucher requirement.<sup>22</sup> Two recent national surveys also suggest that election officials in Alabama are already selectively enforcing the existing non-photo ID law in ways that single out and specially burden voters of color.<sup>23</sup> LDF has extensive experience successfully challenging similarly discriminatory polling place practices and provisions in Alabama.<sup>24</sup>

Furthermore, even the good faith administration of Alabama's ambiguous voucher provision can have a discriminatory effect on voters of color, particularly because of the reality that 40 percent of white people in America live totally segregated social lives, with no close acquaintances of another race.<sup>25</sup> In Alabama, roughly 60 percent of white people have fewer than five acquaintances of a different race.<sup>26</sup> This reality is alarming in the context of Alabama's long,<sup>27</sup> well-documented, and ongoing<sup>28</sup> history of discrimination against people of color in the election

---

voting-practices-for-alabama-city.html. *See also* Motion for Summary Judgment and Motion for Relief Under Section 3, at ¶¶ 24-29, *Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Aug. 1, 2013), ECF No. 60 (detailing racial discrimination at polling places in Conecuh County from the 1980s to the 2010s, including incidents where election officials referred to Black voters as “niggers” (citing Barry H. Weinberg and Lyn Utrech, *Problems In America's Polling Places*, 11 Temp. Pol. & Civ. Rts. L. Rev. 401, 408-411, 420-421, 440-441 (2002))).

<sup>22</sup> Leadership Conference on Civil and Human Rights, *Real Stories of the Impact of the VRA: Bayou La Batre, Alabama*, <http://www.civilrights.org/voting-rights/vra/real-stories.html#bayou> (last visited Feb. 3, 2014); *see also* *Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire, Aug. 29, 2004, available at <http://news.google.com/newspapers?nid=1817&dat=20040830&id=cc4dAAAIBAJ&sjid=w6cEAAAIBAJ&pg=6668,5046184>.

<sup>23</sup> *See Black and Latino Youth*, supra note 5, at 1 (finding that, in the 2012 presidential election, 94.3 percent of Black youth, but only 84.3 percent of white youth, in states with voter ID laws said that they were required to show ID before voting); Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 POL. SCI. & POL. 127, 128 (2009), available at [http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/03/voter\\_id\\_will\\_the\\_law\\_suppress\\_voter\\_turnout/Ansolabehere2009.pdf](http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/03/voter_id_will_the_law_suppress_voter_turnout/Ansolabehere2009.pdf) (finding that, in the 2008 Super Tuesday primary elections in which Alabama participated, 73 percent of Black voters and just 53 percent of white voters were required to show photo ID in order to vote—results that held up after controlling for income, education, class, region, state laws, and other factors).

<sup>24</sup> *See, e.g., Harris v. Siegelman*, 695 F. Supp. 517, 25-29 (M.D. Ala. 1988) (enjoining two discriminatory polling place provisions that the State of Alabama and election officials were using to arbitrarily deny ballots and assistance to Black voters and requiring the adoption of statewide standards for the conduct of election officials).

<sup>25</sup> Lindsay Dunsmuir, *Many Americans Have No Friends of Another Race: Poll*, Reuters, Aug. 8, 2013, available at <http://www.reuters.com/article/2013/08/08/us-usa-poll-race-idUSBRE97704320130808>.

<sup>26</sup> Reuters Polling Explorer, *Close Friends of a Different Race: Filtered to Whites in Alabama*, [http://polling.reuters.com/#!response/D1B\\_2/type/month/filters/RACE\\_:1,DQSTATE:1/dates/20130724-20131217](http://polling.reuters.com/#!response/D1B_2/type/month/filters/RACE_:1,DQSTATE:1/dates/20130724-20131217) (last accessed Feb. 21, 2014).

<sup>27</sup> *See Harris*, 695 F. Supp. at 529 (“[T]he State of Alabama has over the last 100 years adopted and enforced, first, a policy of appointing only white poll officials and, second, a policy of keeping the electoral process closed to black citizens by law and through the use of fraud, force, and intimidation.”).

<sup>28</sup> For example, although the elections supervisor in Jefferson County “seeks to staff precincts with large minority populations with some minority poll workers whenever possible,” the City of Pinson—population 77.8 percent white, 17.2 percent Black people, and 3.7 percent Latino—employed all white election officials in the 2010

official selection process. Thus, as a practical matter, the voucher provision in its current form puts a heavier burden on people of color without photo ID who must rely on the voucher of a class largely composed of white election officials. Indeed, without an objective administrative process, most of these white officials will simply be unable to vouch for the many people of color whom they do not personally know.<sup>29</sup> Likewise, for example, at polling places staffed with Black election officials, the provision may principally benefit Black voters to the detriment of white voters. Such social segregation was the very reason that the courts<sup>30</sup> and Congress<sup>31</sup> found voucher requirements discriminatory.

### ***Proposed Regulations***

The VRA's ban on voucher requirements, however, is not a per se prohibition on voter ID laws that give election officials some level of discretion.<sup>32</sup> The SOS can easily bring Alabama's voucher provision into compliance with the VRA by providing election officials statewide with a fair and nondiscriminatory administrative process for enforcing the provision.<sup>33</sup>

Concretely, we recommend that the SOS promptly adopt a procedure similar to the one that South Carolina implemented as a result of the Section 5 litigation over its voter photo ID law (Act R54). Act R54 "provides that if a voter has 'a reasonable impediment that prevents the elector from obtaining photographic identification,' the voter may complete an affidavit at the polling place attesting to his or her identity."<sup>34</sup> As with our concerns here, the Justice Department's objection letter regarding Act R54 took issue with the reasonable impediment exemption's "am-

---

federal elections. Consent Judgment and Decree, at ¶¶ 14, 21, 24, *City of Pinson v. Holder*, Case No. 1:12-cv-00255 (D.D.C. April 20, 2012), ECF No. 11, *available at* [http://www.justice.gov/crt/about/vot/misc/pinson\\_cd.pdf](http://www.justice.gov/crt/about/vot/misc/pinson_cd.pdf).

<sup>29</sup> The abysmal lack of interracial fraternization in modern Alabama is undoubtedly rooted in the state's longstanding, extensive, and notorious official sponsorship of racial segregation in all areas of life. *See Harris*, 695 F. Supp. at 524 (summarizing the history of government enforced segregation in Alabama in education, parks, private clubs, public transportation, public employment, personal relationships, and prisons through the 1980s).

<sup>30</sup> *See Logue*, 344 F.2d at 292 (holding that voucher requirements are "inherently discriminatory" as-applied because such requirements impose "a heavier burden" on Black people in counties or circumstances in which Black people must "produce a recommendation from a class composed exclusively of white persons"); *Ward*, 222 F. Supp. at 619 ("Since [the registrar] knows most of the white people in the parish and very few of the Negroes, this policy [of not requiring ID from applicants whom she knows] alone inevitably operated to discriminate against Negroes.").

<sup>31</sup> *See Davis v. Gallinhouse*, 246 F. Supp. 208, 217 (E.D. La.1965) ("Congress undoubtedly meant this ban on 'vouching' to hit at the requirement . . . that identity be proven by the voucher of two registered voters, which, where all or a large majority of the registered voters are white, minimizes the possibility of a Negro registering.").

<sup>32</sup> *See id.* at 215-17 (dismissing a VRA challenge to the allegedly discriminatory administration of an ambiguous preregistration voter ID law where the plaintiffs admitted that a more rigid standard requiring specific forms of ID "could work a hardship on some [Black people], who might not have a specific document, such as a driver's license" and where the ID requirement was not "onerous" and was "made easy for [Black applicants] to meet").

<sup>33</sup> *See id.* (holding that the ban on voucher tests does not prohibit a state from requiring voters to present reasonable, nondiscriminatory forms of documentary proof of identity or residency).

<sup>34</sup> *South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D. D.C. 2012) (quoting Act R54).

biguity.”<sup>35</sup> The Justice Department initially concluded that South Carolina’s failure to provide additional guidance on the exemption meant that it could “be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.”<sup>36</sup>

At trial, South Carolina state officials adopted clearer, more specific and *binding* rules for the administration of the reasonable impediment exemption:

To confirm the voter’s identity to the notary (or, in the case of a notary’s unavailability, to the poll manager) who witnesses the affidavit, the voter may show his or her non-photo voter registration card. The affidavit also must list the voter’s reason for not obtaining a photo ID. Together with the affidavit, the voter may cast a provisional ballot, which the county board “*shall find*” valid unless it has “grounds to believe the affidavit is false.” So long as the voter does not lie about his or her identity or lie about the reason he or she has not obtained a photo ID, the reason that the voter gives must be accepted by the county board, and the ballot must be counted. . . . [S]tate and county officials may not review the reasonableness of the voter’s explanation (and, furthermore, may review the explanation for falsity only if someone challenges the ballot). Therefore, all voters in South Carolina who previously voted with (or want to vote with) the non-photo voter registration card may still do so, as long as they state the reason that they have not obtained a photo ID.<sup>37</sup>

Because these South Carolina regulations made clear that people without photo ID could continue to vote using non-photo registration cards, the court granted Act R54 preclearance.<sup>38</sup>

The VRA also compels Alabama, through the SOS, to issue similar statewide guidance and rules establishing objective criteria for the administration of the voucher provision. The failure to issue such rules will result in the voucher provision violating the VRA. Election officials therefore should be required to vouch for any individual without photo ID whose name appears on the voter rolls as an eligible voter and that—if not personally known to officials—*either* can

---

<sup>35</sup> Letter from Thomas E. Perez, Ass’t Attorney General, Civil Rights Division, Dep’t of Justice, to C. Havird Jones, Jr., Ass’t Deputy Attorney General, South Carolina Office of the Attorney General, No. 2011-2495 (Dec. 23, 2011), available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_122311.pdf](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122311.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> *South Carolina*, 898 F. Supp. 2d at 34 (emphasis added).

<sup>38</sup> *Id.* at 50-52. Notably, all voters in South Carolina receive voter registration cards following successful registration. See *id.* at 53 (Kollar-Kotelly, J., concurring) (“New voters will continue to receive non-photo voter registration cards if they register in person . . . or if the voter registers by mail . . .”).

answer simple questions about identifying information in the poll book (e.g., the voter's name and address), signs an identity verifying affidavit, *or* produces a free, widely available form of non-photo ID.<sup>39</sup> *Only if* a prospective voter without photo ID fails to confirm his or her identity in one of those three ways or provides election officials with demonstrably false information should election officials refrain from vouching for that voter or otherwise deny that voter a regular ballot. Such rules are consistent with both voting rights law<sup>40</sup> and the photo ID law itself.<sup>41</sup>

\*\*\*

In light of the above, please address *in writing*: (1) whether the SOS will issue nondiscriminatory regulations clarifying the procedures for the uniform administration of the voucher provision; and (2) a description of those proposed procedures. Please respond by **Monday, March 24, 2014**, so that LDF, the other signatories, and the public generally will have an opportunity to comment on those regulations. It is our sincere desire to assist the SOS in avoiding the costly litigation that may be required to ensure Alabama's compliance with the VRA.

Moreover, to the extent that the SOS may suggest altogether halting the enforcement of the voucher provision, LDF reminds the SOS that “[n]othing in [the VRA] shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.”<sup>42</sup> Thus, the SOS cannot unilaterally interpret the ban on discriminatory tests in any manner that denies voters without photo ID the right to cast regular ballots pursuant to the ameliorative goals of both the voucher provision and the VRA.

We welcome the opportunity to work with you to resolve this important matter amicably and in advance of the June 2014 primary elections. Again, please respond to the questions posed above *in writing* by **March 24, 2014** and feel free to reach out to us directly with any questions.

---

<sup>39</sup> The SOS must at least adopt a process that allows voters to present to officials the forms of non-photo ID that are permissible under the current law, such as voter registration cards, as proof of identity. *See, e.g.,* Ala. Attorney General Op. No. 2005-124 (May 6, 2005), *available at* <http://www.ago.state.al.us/opinions/pdf/2005-124.pdf>.

<sup>40</sup> *See, e.g., Ward*, 349 F.2d at 806-07 (enjoining a voucher requirement and requiring the registrar to instead accept a wide range of photo and non-photo IDs); *South Carolina*, 898 F. Supp. 2d at 32 (requiring poll workers to allow people with non-photo registration cards to vote if they sign an affidavit); *see also Davis*, 246 F. Supp. at 215-17 (holding that the VRA ban on voucher requirements does not prohibit a state from requiring voters to present reasonable, *nondiscriminatory* proof of identity or residency).

<sup>41</sup> Ala. Code § 17-9-30(e) (2011) (“[A]n individual who does not have valid photo [ID] in his or her possession at the polls *shall be* permitted to vote if the individual is positively identified by two election officials as a voter on the poll list who is eligible to vote and the election officials sign a sworn affidavit so stating.” (emphasis added)).

<sup>42</sup> 42 U.S.C. § 1973N (2012).



Sincerely,

Deuel Ross  
Assistant Counsel  
NAACP Legal Defense & Educational Fund, Inc.  
dross@naacpldf.org

Ryan P. Haygood  
Director, Political Participation Group  
NAACP Legal Defense & Educational Fund, Inc.  
rhaygood@naacpldf.org

cc (via email): The Honorable Jim Bennett, Alabama Secretary of State  
Emily Thompson, Alabama Deputy Secretary of State  
Ed Packard, Director, Elections Division, Alabama Secretary of State  
Will Sutton, Elections Attorney, Alabama Secretary of State

Alabama Democratic Conference  
Alabama Elmore County Democratic Committee  
Alabama Lawyers Association  
Alabama State Conference of the NAACP  
Greater Birmingham Ministries  
Magic City Bar Association  
Save OurSelves Movement For Justice and Democracy  
The Ordinary People's Society  
The Urban League of Alabama  
The 21st Century Youth Leadership Movement