

I, Lorraine C. Minnite, of full age, hereby declare as follows:

1. I am an associate professor in the Department of Public Policy and Administration at Rutgers, The State University of New Jersey-Camden. I received a Bachelor of Arts degree in History from Boston University, and two Master's Degrees and a Ph.D. in Political Science from the City University of New York. My area of expertise is American Politics with a specialization in elections and the political process. Specifically, I study the incidence and effect of voter fraud in American elections. I have testified in four (4) other trials or hearings, including as an expert witness in *Jones v. Deininger*;<sup>1</sup> as an expert witness in *Democratic National Committee, et al. v. Republican National Committee, et al.*;<sup>2</sup> as a witness in the U.S. House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties, Oversight Hearing on Voter Suppression, February 26, 2008 (oral and written testimony); and as a fact witness in *ACORN et al. v. Bysiewicz*.<sup>3</sup> In 2003, I co-authored a study of voter fraud with David Callahan for the public policy research and advocacy organization, Demos, titled, "Securing the Vote: An Analysis of Voter Fraud," and I updated this report with new material in 2007.<sup>4</sup> At that time, Demos published a preliminary report I wrote on voter fraud and same-day registration,<sup>5</sup> and in March of 2007, I published a report, "The Politics of Voter Fraud," for Project Vote, a national nonpartisan, nonprofit voting rights organization.<sup>6</sup>

2. In June 2010, Cornell University Press published *The Myth of Voter Fraud*, my full-length scholarly treatment of the subject, upon which this expert report primarily is based. The book analyzes the empirical evidence of voter fraud and concludes that the widespread allegation that in-person voter fraud is a rampant problem of unknown proportions in contemporary U.S. elections is unsupported, and that actual voter fraud is extremely rare. Rational choice models of voting behavior common in political science explain why. My book concludes with case studies that show how baseless allegations of voter fraud are used by politicians and party operatives to justify

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<sup>1</sup> Case No. 2:12-cv-00185-LA (E.D. Wis. 2012).

<sup>2</sup> 671 F. Supp. 2d 575 (D.N.J. 2009).

<sup>3</sup> 413 F. Supp. 2d. 119 (Conn. 2005).

<sup>4</sup> Lorraine C. Minnite, "An Analysis of Voter Fraud," (New York: Demos, 2007), available at: <http://www.demos.org/publication/analysis-voter-fraud-united-states-adapted-2003-report-securing-vote>.

<sup>5</sup> Lorraine C. Minnite, "Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security," (New York: Demos, 2007), available at: <http://www.demos.org/publication/election-day-registration-study-voter-fraud-allegations-and-findings-voter-roll-security>.

<sup>6</sup> Lorraine Minnite, "The Politics of Voter Fraud," (Washington, D.C.: Project Vote, 2007), available at: <http://www.projectvote.org/newsreleases/222-new-report-examines-qthe-politics-of-voter-fraudq.html>.

electoral rules in order to shape the electorate to their advantage. This same context of political opportunism frames the contemporary debate over voter identification laws.<sup>7</sup>

3. I have been asked by attorneys for petitioners in this case to offer an opinion as to whether photo identification requirements such as those mandated by Pennsylvania's Act 18 of 2012 (the Photo ID Law), are justified by evidence of voter impersonation forms of election fraud; and to explain what voter fraud is; discuss the different forms it can take, what distinguishes it from other types of electoral fraud, and the limited types of electoral fraud that the Photo ID Law is capable of addressing; and why voter impersonation fraud is rare; summarizing the findings and conclusions of my scholarship on voter fraud in contemporary U.S. elections. In addition, attorneys have asked me to provide an opinion as to whether the absentee voter exclusion from the photo identification requirements of Act 18 is consistent with the goal of preventing fraudulent voting (given the evidence of fraudulent voting). Attorneys have provided me with the following documents:

- transcript, Commonwealth of Pennsylvania House of Representatives, State Government Committee, Hearing on House Bill 934 and House Bill 647, dated March 21, 2011;
- memorandum from Douglas E. Hill to Pennsylvania House Members of the State Government Committee, dated March 18, 2011;
- *Legislative Journal*, 195<sup>th</sup> Session of the General Assembly, June 20, 2011, June 21, 2011, June 23, 2011, and June 24, 2011, floor debates on HB 934, PN 1805;
- copy of email communication from Shannon Royer to Ian Harlow, subject line: "A Few More Fraud Links," dated August 2, 2011;
- copy of email communication from Scott Sikorski to Patty Dillon (forwarded to Ian Harlow and others, responded to by Harlow), subject line: "Voter Fraud," dated August 10, 2011;

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<sup>7</sup> Recent comments about Pennsylvania's Voter ID Law (Act 18 of 2012) by State House Majority Leader Mike Turzai (R. Allegheny) are consistent with the conclusions regarding political opportunism I draw in *The Myth of Voter Fraud*. According to news reports, Rep. Turzai, speaking before a Republican State Committee meeting in Hershey on June 23, 2012, listed the voter ID law among the accomplishments of Republicans in the state legislature, adding that the new law "is gonna' allow Governor Romney to win the state of Pennsylvania..." See, Kelly Cernetich, "Turzai: Voter ID Law Means Romney Can Win PA," PoliticsPA, June 25, 2012, <http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/>, accessed July 10, 2012.

- transcript, Commonwealth of Pennsylvania House of Representatives, House Appropriations Committee Public Hearing: Department of State, dated March 7, 2012;
- *Legislative Journal*, 196<sup>th</sup> Session of the General Assembly, March 13, 2012, March 14, 2012, floor debates on HB 934, PN 3166;
- Governor's Message, "Governor Corbett Signs Voter ID Bill to Require Photo Identification," March 14, 2012;
- copy of email communication from Owen McEvoy to Ronald Ruman (forwarded to Shannon Royer), subject line: "voter fraud," dated March 28, 2012, with attachment, "Voting Irregularities in Pennsylvania.doc;"
- Petition for Review Addressed to the Court's Original Jurisdiction, dated May 1, 2012;
- copy of email communication from Ian Harlow to Shannon Royer (and others), subject line: "DOH Information Request," dated May 4, 2012, with attachment, "DOH Cancellation with Vote.xlsx;"
- Petitioners' First Request for Production of Documents, dated May 8, 2012;
- Petitioners' First Set of Interrogatories to Respondents, dated May 8, 2012;
- Amended Answers of Respondents to Petitioners' First Set of Interrogatories, dated June 7, 2012;
- deposition of Ian Harlow, with exhibits, dated June 28, 2012;
- deposition of Jonathan Marks, dated June 29, 2012;
- spreadsheet of responses from county D.A.'s, as of July 6, 2012;
- copies of responses by county D.A.'s to Petitioners' subpoenas, as of July 12, 2012;
- Stipulation, dated July 12, 2012.

If data or other evidence of voter fraud in Pennsylvania is produced by the state before this case goes to trial, I expect to analyze and assess its significance for any testimony I may be called to give. I will also continue to review relevant deposition transcripts as they become available. I am being compensated at a rate of \$100 per hour.

4. Summary of Findings and Conclusions from Research on Voter Fraud. Based on findings from my research on voter fraud in contemporary U.S. elections,<sup>8</sup> I conclude that “stringent” photo identification requirements to vote<sup>9</sup> are not justified by claims that such requirements are needed to reduce or prevent voter impersonation forms of election fraud because as the empirical record makes clear, fraud committed by voters either in registering to vote or at the polls on Election Day is already exceedingly rare. For example, national data on illegal registration and voting in the 2002 midterm and 2004 presidential elections in which a total of more than 197 million votes were cast show that the percentage of illegal votes was statistically zero.<sup>10</sup> Of the twenty-six persons convicted by the federal government between 2002 and 2005 of illegal registration or of casting illegal ballots, there was no evidence that any of them impersonated other or fictitious voters.

5. Defining Voter Fraud. In the rich political history of the United States, electoral violence, political corruption, dirty tricks and shenanigans feature prominently.<sup>11</sup> While conflicts over the right to vote have occurred across the society at large, so too have they played out in the legislative arenas where politicians make the rules that govern the process by which they are elected. Before I discuss my definition of “voter fraud,” it is important to point out that the earliest scientific efforts in the 1920s and 1930s to document election fraud found that it was not primarily committed by individual voters acting on their own, but instead by election officials and politicians engaging in conspiracies.<sup>12</sup> For example, in some places, corrupt politicians used the police to “colonize” closely

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<sup>8</sup> Lorraine C. Minnite, *The Myth of Voter Fraud* (Ithaca, New York: Cornell University Press, 2010).

<sup>9</sup> Following recent efforts by political scientists to classify voter identification laws, I adopt the term “stringent” to apply to those laws that impose the highest compliance burden on voters. Typically, stringent voter identification laws are those that limit acceptable forms of identification to current (or only recently expired), government-issued photo identification, treat absentee voters more leniently by exempting them from a photo ID requirement, and allow for few exceptions to the rule. For a discussion of the classification issues, see Robert S. Erikson and Lorraine C. Minnite, “Modeling Problems in the Voter Identification-Voter Turnout Debate,” *Election Law Journal* 8, no. 2 (2009): 85-101.

<sup>10</sup> According to the Clerk of the U.S. House of Representatives, there were 74,706,555 voters cast for Representatives in 2002, and 122,349,480 million votes cast for President in the 2004 election; data on illegal registration and voting come from the Department of Justice’s Ballot Access and Voting Integrity Initiative, discussed in more detail below.

<sup>11</sup> There is a large scholarly literature on the subject of electoral corruption. For one recent treatment, see Tracy Campbell, *Deliver the Vote: A History of Election Fraud, an American Political Tradition – 1792-2004* (New York: Carroll & Graf, 2005).

<sup>12</sup> See Joseph P. Harris, *Election Administration in the United States* (Washington, D.C.: The Brookings Institution, 1934), 375-376 (“...Isolated, individual cases of election frauds are uncommon and unimportant. Election frauds cannot be carried on successfully and upon a wide scale without protection, without the pre-arrangement of election officers who will ‘deliver’ if necessary, and without the backing of a powerful political organization.”). See also,

contested elections with fraudulently registered voters.<sup>13</sup> Reformers enacted voter registration as a means to subdue broader electoral fraud, yet it remains unclear whether the reforms played any part in reducing it.<sup>14</sup>

6. The Civil Rights Era in American history marked a time of activism to promote, amongst other goals, voting rights. With each significant effort to protect and extend the right to vote, franchising opponents argued that reduced barriers would lead to voter fraud. This alleged threat has been taken up by congressional opponents time and time again, for example, in debates over the Voting Rights Act of 1965, the Universal Voter Registration Act of 1977, and the National Voter Registration Act of 1993.<sup>15</sup> However, no conclusive tie between enfranchising reform and voter fraud has ever been proven. Prior to the widespread adoption of the secret ballot, party agents arguably used “inflationary” corruption by buying votes and recycling voters.<sup>16</sup> Afterward, parties pursued “deflationary” corruption by paying opponents to stay home or otherwise defeating their efforts to vote, using devices such as poll taxes, literacy tests, long residency periods and other onerous requirements for voter registration to further their means.

7. Although we treat voter fraud as a crime, no statute exists specifically defining “voter fraud.” Instead, nefarious election-related practices are prevented by state laws making “double voting” or “falsifying records,” etc., illegal.<sup>17</sup> For example, Title 25, Chapter 17 of the Pennsylvania Consolidated Code applies crimes of perjury and

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Dayna Cunningham, “Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States,” *Yale Law and Policy Review* 9, no. 2 (1991): 370-404.

<sup>13</sup> For a 19th century example, see Richard L. McCormick, *From Realignment to Reform: Political Change in New York State, 1893-1910* (Ithaca: Cornell University Press, 1981), 44. For a more recent example, see Frances Fox Piven, Lorraine C. Minnite and Margaret Groarke, *Keeping Down the Black Vote: Race and the Demobilization of American Voters* (New York: The New Press, 2009), 64.

<sup>14</sup> Paul Kleppner, *Who Voted? The Dynamics of Voter Turnout 1870-1980*, American Political Party and Election Series (New York: Greenwood Publishing Group, Inc., 1982), 59-60.

<sup>15</sup> See, for example, U.S. Congress, Senate Committee on the Judiciary, “To Enforce the 15<sup>th</sup> Amendment to the Constitution of the United States: Hearings on S.1564,” 89<sup>th</sup> Cong., 1<sup>st</sup> sess., 1965; U.S. Congress, House Committee on House Administration, “To Establish a Universal Voter Registration Program, and for Other Purposes: Hearings on H.R. 5400,” 95<sup>th</sup> Cong., 1<sup>st</sup> sess., 1977; and U.S. Congress, House Committee on House Administration, Subcommittee on Elections, “Hearing on Voter Registration,” 103<sup>rd</sup> Cong., 1<sup>st</sup> sess., January 26, 1993. For an important account of the movement to reform voter registration laws leading to the passage of the National Voter Registration Act of 1993, see Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote and Why Politicians Want It That Way* (Boston: Beacon Press, 2000); see also, Piven, et al., *Keeping Down the Black Vote*.

<sup>16</sup> Gary W. Cox and J. Morgan Kousser, “Turnout and Rural Corruption: New York as a Test Case,” *American Journal of Political Science* 25, no. 4 (November 1981): 646-63.

<sup>17</sup> For example, in Texas it is a third degree felony to “vote or attempt to vote in an election in which the person

false swearing to violations of the voter registration rules.<sup>18</sup>

8. For my research project, in the absence of a specific, commonly used definition of voter fraud, I crafted a legalistic one that maintains the plain meaning of the words “voter” and “fraud,” and allows for empirical measurement. The process of formulating precise definitions is critical in the social sciences because the social scientific enterprise is grounded in accurate measurement of empirical phenomena.<sup>19</sup> To develop my definition of voter fraud, I examined the stages of the electoral process and looked at the capacity of various actors to impact the outcome and integrity of elections. Actors with that capacity include, but are not limited to, voters, campaign officials, elected officials, and election poll workers.

9. I found a distinction between what parts of the electoral process voters versus other electoral actors can corrupt. Voters are only capable of corrupting the parts of the process to which they have access. For example, voters cannot corrupt the election count because they do not count the ballots; only an official with broad access could corrupt an entire count. But, individual voters can corrupt their registration process and balloting by falsifying their records or identity on a registration application and/or fraudulently misrepresenting themselves to poll workers. Bribery in the form of vote-buying has been used by party operatives, candidates and their moneyed supporters, and election officials to draw voters into conspiracies to rig elections, but voters are not typically treated as culpable in these sorts of crimes precisely because as individuals they lack the means, access and opportunities needed to organize election rigging on the scale needed to ensure success.<sup>20</sup> Photo ID laws would not prevent vote-buying,

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knows the person is not eligible to vote; knowingly votes or attempts to vote more than once in an election; or knowingly impersonates another person and votes as the impersonated person.” TEX. ELEC. CODE ANN. § 64.012 (2003). California prohibits specific election related activity like fraudulent registration, voting in an election which one isn’t entitled to vote in, voting more than once or to try to buy a vote with the promise of a job. CAL. ELEC. CODE § 18520 (1994). In Minnesota, it is a felony to submit more than one absentee ballot or to assist another in submitting more than one absentee ballot, or alter another’s absentee ballot. MINN. STAT. § 203B.03 (1999). In New Jersey, it is a third degree crime to “fraudulently vote...or in any manner so interfere...with the voters lawfully exercising their rights of voting at the election, as to prevent the election or canvass from being fairly had and lawfully conducted.” N.J. STAT. ANN. § 19:34-11 (2011).

<sup>18</sup> Section 1714 (“Crimes Code”) provides that, “The provisions of 18 Pa.C.S. §§ 4902 (relating to perjury), 4903 (relating to false swearing) and 4904 (relating to unsworn falsification to authorities) apply to violations of this part.”

<sup>19</sup> W. Phillips Shively, *The Craft of Political Research*, 5<sup>th</sup> ed. (Upper Saddle River, New Jersey: Prentice Hall, 2002), 30-8.

<sup>20</sup> Vote-buying schemes, absentee ballot frauds, voter intimidation schemes, migratory-voting (or floating-voter)

which corrupts the freedom of choice in support for a candidate and does not necessarily require voter impersonation forms of fraud.

10. Among my scholarly interests are questions about the right to vote, how the rules governing access to the ballot shape the electorate, and how voting behavior translates into public policy. My work on voter fraud bears on these larger questions. As no scholarly study on the incidence of voter fraud in contemporary U.S. election existed, my first task was to document the problem. Before I could do this, however, I had to define voter fraud in ways that allow for measurement. By breaking up the electoral process according to its various stages and the actors that participate, I can tailor my fraud definition to the data that I study: the behavior of individual voters. Accordingly, my definition of voter fraud is deduced from my analysis of the electoral process and the different opportunities for corruption available to different actors in that process. Thus, voter fraud is defined as ‘the intentional corruption of the voting process by voters.’

11. I emphasize the importance of intent in my definition, distinguishing election errors such as misspelled names and recording mistakes. Although these mistakes can produce irregularities that may at first look like fraud, they should not be included in a definition of fraud that limits itself to nefarious acts intentionally committed by voters. The idea of deceit is fundamental to the concept of fraud in criminal law. The word *fraud* derives from the Latin *fraus*, which means “deceit.” *Black’s Law Dictionary* defines fraud as “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”<sup>21</sup> And intent is important to all of the election crime codes at the state and federal levels that I have examined. For example, Title 25, Chapter 17 of Pennsylvania’s Consolidated Code clearly reflects the importance of intent to a definition of what we might call voter registration fraud. Section 1703(a) states (*emphasis added*):

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schemes, and voter “assistance” frauds, in which the wishes of voters are ignored or not sought are classified by the U.S. Department of Justice as election frauds in which voters do participate. However, because voters can be coerced to participate or participate unwittingly in conspiracies, and because successful prosecution of these forms of fraud usually relies on the cooperation of voters whose ballots were corrupted, federal prosecutors treat voters as victims in exchange for their cooperation against the organizers of the fraud. See, Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses*, 7<sup>th</sup> ed., U.S. Department of Justice, Criminal Division, Public Integrity Section (Washington, D.C.: Government Printing Office, 2007), 32-3.

<sup>21</sup> *Black’s Law Dictionary*, 8<sup>th</sup> ed. (St. Paul: Thomson/West, 2004), 685.

An individual may not do any of the following:

- (1) Apply for registration *with knowledge or reason to know* that the individual is not entitled to registration.
- (2) Apply for a change of residence *with knowledge or reason to know* that the individual is not entitled to the change.
- (3) Declare as residence a place or address which *the individual knows* is not the individual's legal residence.
- (4) *Intentionally* impersonate another in an application for registration.

12. My definition of voter fraud is specific to the elements I research. For example, I do not study applications of computer technology to election administration or schemes to manipulate the count, and therefore, a more expansive definition of voter fraud to encompass forms of fraud perpetrated by actors other than voters would produce findings not relevant to the question of whether voters are committing fraud. The next best definition I found is provided by the United States Department of Justice. Their definition of "election fraud," however, is over-broad for my purposes because it includes acts to intimidate voters and covers official malfeasance, such as ballot box stuffing or corruption of the count.<sup>22</sup> Because intimidation may or may not involve fraud, and voters do not count the ballots, these acts should not be included in an accurate definition of voter fraud.

13. My definition of voter fraud is also specific to policy questions concerning voter ID requirements that interest me. There are many forms of corruption that may undermine the integrity of elections and the voting process. Various sections of the Pennsylvania Election Code (25 P.S. §§ 3501 et seq.) outline nearly two dozen different types of election crimes that all carry significant penalties, including prison time and fines. For example, there are crimes related to unlawful possession of ballots, tampering with voting machines, assault and battery at the polls, unlawful voting, bribery at elections, offenses by printers of ballots and so forth. Most of these would not be prevented by requiring voters to present photo IDs at the polling place. The only crimes that voter ID requirements

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<sup>22</sup> Donsanto and Simmons, *Federal Prosecution of Election Offenses*, 24-33. See also, U.S. Department of Justice, "Fact Sheet: Protecting Voting Rights and Preventing Election Fraud," July 2, 2008, available at: <http://www.justice.gov/opa/pr/2008/July/08-crt-585.html>.

address are those involving voter falsification of identity or qualifications, what is commonly referred to as “voter impersonation.” For this reason, in debates over remedies to electoral corruption, such as the debate over photo ID, it is important to make distinctions between the different forms electoral corruption can take and to pay attention to which actors – voters, election officials, parties, candidates, campaigns – are perpetrating the crimes. For remedies to be effective they must be tailored to the problems they intend to correct.

14. Indeed, legislative sponsors of voter identification laws typically claim their purpose is to prevent voters from casting fraudulent votes, or what I define as voter fraud. In other words, in the rhetoric of sponsors of voter identification laws, the problem the laws are designed to solve is fraudulent voting, or the intentional corruption of the voting process by voters. The primary sponsor of Pennsylvania’s Photo ID Law, Representative Metcalfe, has been very clear about the purpose of his bill (House Bill 934), which is to “combat voter fraud.” A press release from May 9, 2011, announced “Metcalfe Legislation to Combat Voter Fraud with Valid Photo ID Green-Lighted for House Consideration.” “Passage of House Bill 934 is essential to preserving the sacred freedom of voting from the ever-present forces of corruption seeking to override the will of the people,” said Metcalfe. “...Guaranteeing the integrity of our state’s election process in which all registered voters can be fully confident that only eligible voters have the privilege of casting a vote, that every vote counts equally and, most importantly, not be canceled out by fraudulent votes deserves no less than equal protection under the law.”<sup>23</sup>

15. However, primary justifications for photo ID laws tend to shift when research reveals voter fraud is very rare. Supporters of photo ID revise their arguments in at least two ways. First, they tend to back away from the claim that actual voter fraud is an actual problem and express a concern that it *might* occur because it has occurred elsewhere or in the past. Usually, a list of news reports about voter fraud allegations or jurisdictions with bloated voter registration rolls is produced to establish the basis for this concern.

16. A second argument is that the record of voter fraud is irrelevant, including whatever reports there may be

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<sup>23</sup> State Representative Daryl Metcalfe, “Metcalfe Legislation to Combat Voter Fraud with Valid Photo ID Green-Lighted for House Consideration,” Press Release, <http://repmetcalfe.com/NewsItem.aspx?NewsID=11314>, accessed July 15, 2012.

from other states. All that matters is the state interest in ensuring the “integrity” of the electoral process. Photo ID is said to be one tool the states can and should use to promote electoral integrity and inspire public confidence.

17. The truth is there is no practical difference between arguments that depend upon the veracity of fraud claims and those that do not. In the first instance, voter fraud allegedly happens at an alarming rate and is the problem photo ID laws are intended to solve. Arguments for photo ID that evade the question of whether voter fraud is actually a problem are still about voter fraud. In the context of requiring voters to produce identity documents in order to exercise their voting rights, what else is meant by “electoral integrity?” A concern about electoral integrity does not change the fact that there can be no other threat from voters but an intentional effort to corrupt their own registration and/or voting process, or what we call voter fraud.

18. A pattern of shifting rationales for photo ID laws is evident in Pennsylvania. In the legislative debates that I have reviewed (see above), House Bill 934 is repeatedly justified as necessary to stopping voter fraud. For example, in a June 20, 2011 House debate on an amendment that would have exempted voters over the age of 62 from the photo ID requirement, Representative Metcalfe, who objected to the amendment, said that the “heart” of House Bill 934 “is to ensure that we stop fraud.”<sup>24</sup> When the bill was signed into law, Governor Corbett’s Message included this quote from the Secretary of the Commonwealth Carol Aichele: “No one entitled to vote will be denied that right by this bill, but by preventing those not legally allowed to vote from casting ballots, we will make sure every vote carries the weight it should in deciding elections.”<sup>25</sup> If photo ID is necessary to stop voter fraud, it is reasonable to assume that proponents are saying there is voter fraud in Pennsylvania.

19. However, just a few months after the Governor signed the photo ID bill into law, Respondents now stipulate that “there have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and the parties do not have direct personal knowledge of any such investigations of prosecutions in other states.”<sup>26</sup>

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<sup>24</sup> Commonwealth of Pennsylvania, *Legislative Journal*, 195th General Assembly, 2011 Regular Session, No. 47, June 20, 2011, 26.

<sup>25</sup> Governor of Pennsylvania, “Governor’s Message,” 196th General Assembly, 2012 Regular Session, March 14, 2012.

<sup>26</sup> *Applewhite v. Commonwealth of Pennsylvania*, Docket No. 33 MD 12, Stipulation, July 12, 2012.

Moreover, Respondents “are not aware of any incidents of in-person voter fraud in Pennsylvania and do not have direct personal knowledge of in person voter fraud elsewhere,” nor do they plan to “offer any evidence in this action that in-person voter fraud has in fact occurred in Pennsylvania or elsewhere.”<sup>27</sup>

20. The Stipulation between Petitioners and Respondents nicely captures the contradiction in shifting rationales for photo ID laws. “The sole rationale for the Photo ID law that will be introduced by Respondents” in this litigation is contained in their Amended Answer to Petitioners’ Interrogatory I, which states that “requiring a photo ID improves the security and integrity of elections in Pennsylvania in a manner that is in keeping with the photo ID requirements of many other secure institutions and processes.” On the other hand, photo ID is “a tool to detect and deter voter fraud.”

21. I interpret what Respondents are saying this way: photo ID will improve the integrity of elections in Pennsylvania because it deters voter fraud, a crime Respondents have no knowledge of in Pennsylvania or elsewhere, and of so little occurrence or consequence there have been no investigations or prosecutions of it.

22. This is an example of how an unfounded concern about voter fraud nevertheless continues to serve as the underlying rationale for an integrity argument in support of photo ID laws (denials that an actual record of voter fraud is relevant, notwithstanding). In debates over photo ID, rationales that dispute the significance of a finding of no in-person voter fraud and stake their claim on a concern for electoral integrity are really nothing more than veiled voter fraud rationales. Calling the problem “electoral integrity” does not change the fact that the only threat to electoral integrity addressed by photo ID laws is in-person voter fraud.

23. Voter Fraud is Rare. There are no officially compiled national or statewide statistics reliably reporting instances of voter fraud. The lack of an accurate centralized tracking system is evidence that voter fraud is not as large a threat to elections as some claim. Using the same standard for judging voter fraud crime rates as we do for other crimes, which is to calculate the incidence of crime from law enforcement statistics on arrests, indictments and

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<sup>27</sup> *Applewhite*, Stipulation.

convictions, we must conclude that the scant evidence of arrests, indictments or convictions for any of the practices defined as voter fraud means that little fraud is being committed relative to the millions of votes cast each year in state, local and federal elections.

24. To study and measure the contemporary incidence of voter fraud reported on *The Myth of Voter Fraud*, I used a “mixed method” research approach, which is common in the social sciences. This method includes qualitative, quantitative and archival research. I interviewed a wide range of people. These interviews included, but were not limited to: prosecutors, defense lawyers, election officials, voters, academics, and people working on voter registration drives. The basis of my quantitative research comes from a data set produced by the Administrative Office of the United States Courts that is available to researchers through the ICPSR (Inter-University Consortium for Political and Social Research).<sup>28</sup> This data set is a complete and total record of all indictments tried annually in federal courts (district and appellate, including the Supreme Court).

25. In addition, I relied on the record of federal indictments generated during the first three years of a special program at the U.S. Department of Justice. In March 2001, United States Attorney General John Ashcroft announced the Ballot Access and Voting Integrity Initiative or “BAVII,” to bring together lawyers from the civil rights and criminal divisions of the Justice Department for an Election Day training and ballot security program.<sup>29</sup> The stated purpose was to help government attorneys recognize election fraud and voter intimidation and to provide their services to voters to receive complaints of the same.<sup>30</sup>

26. After numerous unsuccessful attempts at locating information regarding voter fraud from the BAVII,

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<sup>28</sup> The ICPSR is an international consortium of about 700 academic institutions and research organizations that maintains a data archive of more than half a million files of research in the social sciences. See their website ([www.icpsr.umich.edu](http://www.icpsr.umich.edu)) for more information.

<sup>29</sup> U.S. Department of Justice, press conference, Washington, D.C., March 7, 2001, available at <http://www.justice.gov/archive/ag/speeches/2001/0307civilrightspresconf.htm>. See also, Dan Eggen and David A. Vise, “Ashcroft Takes On Voting Issues; Enforcement, Monitoring of Election Laws to Be Increased,” *Washington Post*, March 8, 2001, A19; and Donsanto and Simmons, *Federal Prosecution of Election Offenses*, 125-32.

<sup>30</sup> In a letter to Attorney General Ashcroft, the Leadership Conference on Civil Rights (“LCCR”) and about two dozen other civil rights and public interest groups voiced concern about this program, noting the “long experience of the civil rights community that overly aggressive ‘voting integrity’ efforts, instead of reducing fraud, tend to intimidate lawful voters and ultimately suppress voter turnout.” Letter from LCCR and sign-on groups to John D. Ashcroft, October 25, 2002 (on file with author).

including several Freedom of Information Act requests, I found a case list of indictments generated by the program in the records of a congressional hearing held in 2006.<sup>31</sup> The list, which was prepared by the U.S. Department of Justice, records ninety-five indictments.<sup>32</sup> I concluded that this was a complete list of BAVII-related indictments by comparing it to Justice Department press releases. I researched every indictment on the BAVII list and concluded that only forty of the ninety-five people indicted were voters; the other fifty-five people were associated with elections in other ways, for example, serving as campaign, party or election officials. Of the forty voters indicted, twenty-six were eventually convicted or pleaded guilty to various charges of illegal registration and voting. The following table, which appears on p. 227 of *The Myth of Voter Fraud*, summarizes the BAVII record of federal election crime defendants and case outcomes by type of election crime and type of defendant, for federal fiscal years 2002 through 2005:

Type of election crime	Convicted or Pleaded Guilty					Acquitted or Case Dismissed	
	Voters	Government Officials	Party or Campaign Workers	Election Workers	Total	Dismissed	Total
Registration Fraud	1	1	1	0	3	0	3
Voting by Ineligibles	20	0	0	0	20	10	30
Multiple Voting	5	0	0	0	5	4	9
Vote-buying	0	8	27	2	37	10	47
Ballot Forgery	0	0	0	1	1	0	1
Civil Rights Violations	0	0	2	0	2	1	3
Voter Intimidation	0	2	0	0	2	0	2
<b>Total</b>	<b>26</b>	<b>11</b>	<b>30</b>	<b>3</b>	<b>70</b>	<b>25</b>	<b>95</b>

There were only two individuals from Pennsylvania among the ninety-five people indicted, as summarized above. Allegheny sheriff's deputies Richard A. Stewart, Jr. and Frank Schiralli were charged in separate indictments with and convicted of making false declarations to the grand jury in violation of 18 U.S.C. § 1623. This is the one case (Stewart and Schiralli worked together) of "voter intimidation" prosecuted by the Bush Justice Department in the

<sup>31</sup> U.S. Congress, House Committee on House Administration, "Hearing on 'You Don't Need Papers to Vote?': Non-Citizen Voting and ID Requirements in U.S. Elections," 109<sup>th</sup> Congress, 2<sup>nd</sup> Sess., June 22, 2006, 245-54.

<sup>32</sup> See the BAVII cast list, U.S. Department of Justice, Criminal Division, Public Integrity Section, "Election Fraud Prosecutions and Convictions: Ballot Access and Voting Integrity Initiative, Oct. 2002 – Sept. 2005, n.d. (on file with author).

first three years of the BAVII.<sup>33</sup>

27. As already noted, Respondents in this litigation have stipulated that there have been no investigations or prosecutions of in-person voter fraud in Pennsylvania, and that they are not personally aware of any incidents of in-person voter fraud in Pennsylvania. In their answer to Petitioners' Interrogatory 2, Respondents point out that the county and district boards of elections, not the Governor's or the Secretary of State's offices are responsible for the administration of elections in the Commonwealth. In other words, local election and law enforcement officials are in the best position to detect and prosecute voter fraud.

28. On this score, the available evidence suggests that local officials have detected very little voter fraud in Pennsylvania. A memorandum from Douglas E. Hill, executive director of the County Commissioners' Association of Pennsylvania to members of the House State Government Committee, dated March 18, 2011, states that "Administration of elections generally, and of polling places, is a responsibility we take seriously. Were the question of fraudulent voting an issue, we would be calling for legislation such as these proposals [House Bills 934 and 647], and perhaps other measures, to deal with the problem. But we find no evidence – substantiated by a search of case records and anecdotal information from the counties – that it is an issue. And so we believe a requirement to present ID at all elections is a solution to a problem that does not exist."

29. In an effort to poll county district attorneys on their experiences regarding allegations, investigations, and prosecutions of voter fraud, Petitioners subpoenaed all sixty-eight district attorneys in the Commonwealth. Prosecutors were asked to produce evidence sufficient to show all cases of voter fraud either prosecuted or closed over the past ten years. "Voter fraud" was broadly defined to include violations of the following sections of 25 P.S. §§ 3501 *et seq.*: § 3515, § 3516, § 3517, § 3518, § 3523, § 3525, § 3527, § 3528, § 3529, § 3533, § 3534, § 3535, §

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<sup>33</sup> The case is unrecognizable as "voter intimidation," but that is how the Justice Department classified it. Stewart and Schiralli were convicted of lying to the grand jury about their role in a coercive fund-raising scheme, whereby they kept track of employees of the Allegheny Sheriff's Office who did not buy tickets to fund-raising events to benefit the re-election campaign of Sheriff Pete DeFazio. Those who did were rewarded with favorable work assignments and those who did not were punished. Schiralli was sentenced to twenty-six months in jail for lying to the grand jury, while Stewart, who pleaded guilty to macing non-contributors was sentenced to one year of probation. See, Paula Ward, "Ex-Sheriff Pleads Guilty to Macing: DeFazio Admits to Coercing Employees Into Contributing to His Campaign Fund," *Pittsburgh Post-Gazette*, November 22, 2006.

3536, § 3538, § 3539, § 3547, § 3548, § 3553, and § 3554. The overwhelming response of those who had responded by July 12, 2012, was that they had no cases to report.<sup>34</sup>

30. The record of in-person voter fraud as stipulated to by Respondents in this litigation, as well as the record attested to by the executive director of the County Commissioners' Association of Pennsylvania, and the responses from county district attorneys to Petitioners' subpoenas are all consistent with my findings regarding efforts to investigate and prosecute voter fraud undertaken by the federal government and the set of states I researched in detail for *The Myth of Voter Fraud*. In my research and as evidenced by the data provided to me by attorneys in this litigation, voters are not intentionally corrupting the voting process in Pennsylvania, there is no voter fraud.

31. Some argue that crime statistics are an invalid measure of the extent of voter fraud. Proponents of this view typically offer two reasons for this: 1) prosecutors are biased and do not pursue voter fraud cases; and 2) voter fraud as fraud escapes detection.<sup>35</sup> Neither of these arguments stand on evidence.

32. First, the federal government designed a program to find and root out voter fraud in federal elections. At the first BAVII annual conference for federal prosecutors in 2002, Attorney General Ashcroft stated that,

We have created this precedent-setting Voting Access and Integrity Initiative for two reasons: first, to enhance our ability to deter discrimination and election fraud, and second, to prosecute violators vigorously whenever and wherever these offenses occur. Our goal is work cooperatively with civil rights leaders and state and local election officials to prevent election offenses and to bring violators to justice. *Our means are a national mobilization of the resources of the Department of Justice* (emphasis added).<sup>36</sup>

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<sup>34</sup> Thirty-seven of the sixty-eight offices subpoenaed responded, with thirty-one reporting no cases.

<sup>35</sup> At least one witness called to testify in early hearings on House Bill 934, Hans von Spakovsky, made both of these assertions, though he had no reliable evidence to support his claims. See, Commonwealth of Pennsylvania, House of Representatives, State Government Committee, Hearing on House Bill 934 (Metcalf) and House Bill 647 (Cruz), March 21, 2011. In fact, von Spakovsky, who has a long history of promoting false and misleading information about voter fraud, may be the originator of these specious arguments.

<sup>36</sup> Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses*, 7<sup>th</sup> ed. (Washington, D.C.: GPO, 2007), 126-7.

As noted above, in its first three years, under vigorous prosecution by the Bush Administration, this program produced just forty indictments of voters, twenty-six of whom pleaded or were found guilty. Some 197 million votes were cast across the two election cycles of that period. The experience of this high priority federal initiative contradicts the claim that prosecutors do not prosecute voter fraud. Moreover, according to Craig Donsanto, the long-time director of the Elections Crimes branch of the Public Integrity Section in the Criminal Division of the U.S. Department of Justice, during the two terms of the George W. Bush Administration, “the investigation and prosecution of election crimes...was outranked [in official prioritizing] only by crimes involving terrorism and espionage.”<sup>37</sup> And there are other examples demonstrating that prosecutors do pursue voter fraud cases, and where almost no voter fraud has been found. County district attorneys in the state of Minnesota are required by law to investigate complaints of voter fraud at risk of losing their jobs. My research into voter fraud in Minnesota between 1999 and 2005, turned up one (rather flagrant) case.<sup>38</sup>

33. Second, is voter fraud less detectable than Social Security fraud, or counterfeiting, or tax evasion, or postal or wire fraud? These forms of fraud share qualities with voter fraud. For example, Social Security fraud can involve impersonation and making false claims about eligibility; counterfeiting can involve forgery and making false claims about identify; tax evasion can involve false claims of residence; and mail fraud statutes have been used to prosecute voter fraud. In federal fiscal year 2005, there were 183,284 criminal indictments brought in the federal courts.<sup>39</sup> Among these we find the following:

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<sup>37</sup> Craig C. Donsanto, “Corruption of the Election Process under U.S. Federal Law,” in *Election Fraud: Detecting and Deterring Electoral Manipulation*, ed. R. Michael Alvarez, Thad E. Hall, and Susan D. Hyde (Washington, D.C.: Brookings Institution, 2008), 34.

<sup>38</sup> For a description of this case, see *The Myth of Voter Fraud*, 61-6.

<sup>39</sup> Federal Judicial Center, Federal Court Cases: Integrated Database, 1997, 2005 [computer file], conducted by the Federal Judicial Center, ICPSR04306, ICPSR04382, Ann Arbor, Mich.: Inter-University Consortium for Political and Social Research [producer and distributor]; author’s calculations.

Criminal charge <sup>40</sup>	FY2005
Election fraud violations <sup>41</sup>	60
Other fraud violations	
Citizenship fraud	776
Social Security fraud	1,980
False claims and statements	6,658
Counterfeiting	3,161
Postal, Internet, and wire fraud	6,929
Tax evasion	781
Total criminal defendants (all crimes)	183,284

34. This data suggest that the claim against a methodology relying on measures of law enforcement to assess the threat of voter fraud to the integrity of U.S. elections is of little merit, especially when we are looking for criminal acts.

35. Nationwide and in jurisdictions where close elections and recounts provide the best documented cases of the operations of election administration, the statistics of voter fraud in polling locations are also statistically zero. For example, Chelan County Superior Court Judge, the Honorable John E. Bridges, concluded that, in a hotly contested gubernatorial election involving a controversial recount, 25 ballots or .0009 percent of the total 2,812,675 ballots cast in the 2004 Washington State gubernatorial election were invalid because they were either cast in the

<sup>40</sup> At least one of the top five filing charges for each defendant falls into crime category.

<sup>41</sup> The Federal Court Cases Integrated Database (FCCID), which purports to be “the official public record of the business of the U.S. courts,” does not code indictments for voter fraud. Instead, it includes a category of “election law violations,” following the coding scheme of the Administrative Office of the U.S. Courts which is responsible for compiling this data. I created a category of “election fraud violations” by excluding indictments for campaign finance violations, however, I was not able to further exclude non-voters. This measure, therefore, is over-inclusive and not directly comparable to other sources of data on federal investigations and prosecutions of voter fraud cases cited in this report. On the FCCID, see Federal Judicial Center, “Description,” Federal Court Cases Integrated Database, 2005, conducted by the Federal Judicial Center ICPSR04382 (Ann Arbor, Mich.: Inter-University Consortium for Political and Social Research).

names of deceased voters or were double votes.<sup>42</sup> Many of these ballots were mailed in for absentee voters, and the judge made no determination that all were fraudulently cast.

36. A review of hundreds of news reports alleging voter fraud over a recent two year period found that, with few exceptions, the allegations fell into one of the three following categories: unsubstantiated or false allegations of voter fraud made by the losers of close elections;<sup>43</sup> mischief; and claims that later turned out to be based upon cases of voter error or administrative mistakes, but not fraud.<sup>44</sup>

37. Allegations of voter fraud should be carefully scrutinized for their accuracy, as there are many examples of misleading and false information being circulated in the media and on the Internet, only to make their way into government hearings, press releases, statements to the media and judicial opinions. This is a very common problem. In *The Myth of Voter Fraud*, I recount in detail several examples of how false or misleading allegations of voter fraud are not, upon closer examination, cases of fraud at all.<sup>45</sup>

38. I will give another example taken from documents supplied to me by attorneys in this litigation. Petitioners' First Set of Interrogatories to Respondents asked, "To the extent you stated in your response to Interrogatory No. 1 that one purpose of the Photo ID Law is to prevent in-person voter fraud, state the date, location, circumstances, and identify all persons with knowledge for each incident of in-person voter fraud on which the Commonwealth bases its justification."<sup>46</sup>

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<sup>42</sup> "Final Judgment Dismissing Election Contest with Prejudice and Confirming Certification of Election of Christine Gregoire," *Timothy Borders, et al. v. King County et al.*, Case No. 05-2-00027-3, Superior Court of the State of Washington for Chelan County, June 24, 2005.

<sup>43</sup> For a discussion of fraud and the sore loser, see generally Michelle L. Robertson, "Election Fraud – Winning at All Costs: Election Fraud in the Third Circuit (*Marks v. Stinson*)," *Villanova Law Review* 40, no. 3 (1995): 869-925.

<sup>44</sup> Minnite, "The Politics of Voter Fraud," 12-13. I also reviewed hundreds of news articles cited in a report by the now defunct American Center for Voting Rights, which purported to be "the most comprehensive and authoritative review of the facts surrounding allegations of vote fraud, intimidation and suppression made during the 2004 presidential election." From this review I concluded that "among the more than one hundred cases cited of alleged voter fraud implicating nearly 300,000 potentially fraudulent votes in the 2004 election cycle, only about 185 votes could be confirmed as *possibly* tainted by fraud [emphasis added]." See also, Minnite, *The Myth of Voter Fraud*, 12.

<sup>45</sup> See, especially, chapter 1 and former *Wall Street Journal* columnist John Fund's allegation that the people who committed terrorist acts against the United States on September 11, 2001, were registered to vote.

<sup>46</sup> *Applewhite v. Commonwealth of Pennsylvania*, Docket No. 33 MD 12, Petitioners' First Set of Interrogatories to Respondents, May 8, 2012.

39. Respondents replied as follows:

Respondents also are aware of the findings by Target 11 investigator Rick Earle that more than 9,000 deceased voters are still on the Allegheny County list of registered voters and more than 16 of them voted in recent elections. Respondents are aware that there are 1,017,958 registered voters in Philadelphia and approximately 1,182,655 adults of voting age. That is an 86% registration rate. According to the report to Congress by the U.S. Election Assistance Commission with regard to 2009-2010, the national percentage of the voting age population that was registered to vote in 2010 was 78.7%. The *National Review* reported in 2004 that, despite a 13% decrease in population in Philadelphia from 1995 to 2004, voter registration increased by 24% during that time period. The Philadelphia City Paper reported in 1995 about complaints that non-residents or former residents of Philadelphia have voted in Philadelphia elections. That report specifically identified a resident of Wildwood, New Jersey, attempting to vote in the 1993 municipal elections in Philadelphia. The New York Times reported on November 1, 2004, that an official from the Republican Party of Pennsylvania sent out 130,000 letters congratulating newly registered voters, but 10,000 of those letters were returned, indicating that the people had died or that the address was non-existent.

On the national level, a study by the Pew Research Center discovered that 1.8 million dead Americans are registered to vote. The same study found that 2.74 million Americans are enrolled in two states while 68,725 are registered in three states. The Pew Research Center found that 24,000,000 active voter registrations in the United States are no longer valid or are significantly inaccurate. A 2000 Scripps Howard study found that numerous counties across the United States have more voters registered than the actual adult population in those counties. According to STATSIndiana, in 2007 there were 644,197 people of voting age residing in Marion County, but there were 677,401 actually registered to vote. In April 2011, election rolls in Detroit showed 560,000 registered voters in the city, but the 2010 U.S. Census had found only 523,430 people of

legal voting age in the city.<sup>47</sup>

40. The accounts here very closely follow a list of “Voting Irregularities in Pennsylvania” prepared by the Governor’s Office in response to media queries concerning statements made by the Governor that there are precincts in Pennsylvania “that have voted over 100 percent.”<sup>48</sup> There are several features of Respondents’ list of data points that stand out as typical of efforts to provide “evidence” of voter fraud when in fact, there is none. The first is the heterogeneous nature of the so-called evidence, none of which actually represents verifiable cases of voter fraud. The second feature is the hasty, careless nature of the compilation, with one irrelevant “fact” piled upon another, none of which are documented by sources that skeptics may review.

41. The third feature is the implication that increased voter registration activity signals fraud, when it does not. Known explanations for increases in voter registration, such as expanding voter interest and the presence of voter registration drives, are ignored.

42. The fourth similar feature is the strong implication that inaccuracies in voter registration lists are somehow evidence of fraud, when they are not. There is no evidence in general and none offered by Respondents in the documents provided to me by attorneys that voters routinely harvest the so-called “dead wood” on registration lists in order to vote more than once, or vote in the name of the dead. There are numerous examples in which lists of allegedly dead voters who cast ballots are completely erroneous. A recent investigation by the South Carolina State Election Commission of a list submitted to the Commission by the South Carolina Attorney General’s office of 207 allegedly dead people who allegedly voted in the 2010 General Election found the following:

- 106 cases were the result of clerical errors by poll managers:
  - Ninety-one cases were name recognition errors such as marking the deceased John Doe, Sr. as voting when John Doe, Jr. actually voted;

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<sup>47</sup> *Applewhite v. Commonwealth of Pennsylvania*, Docket No. 33 MD 12, Amended Answers of Respondents to Petitioners’ First Set of Interrogatories, June 7, 2012.

<sup>48</sup> Email communication, Owen McEvoy, Communications Specialist, Governor’s Office of Press and Communications to Ronald Ruman, Press Secretary, Office of Communications and Press, Department of State, March 28, 2012.

- In six cases, the poll manager apparently began marking incorrect voter, realized mistake, but did not erase the original marks;
  - In five cases, election officials marked the wrong voter as voting absentee;
  - In three cases, election officials issued the absentee application in the wrong name.
- Fifty-six cases were the result of bad data matching. In these cases, it appears the DMV used only the voter's social security number to match against the death file. The voters' names and dates of birth in these cases do not match the names and dates of birth in the death file. In these cases, there is no indication that the voter is deceased.
  - Thirty-two cases were voter participation errors. Voter registration lists marked by poll managers are scanned electronically to record voter participation in each election. Stray marks on the lists and the sensitivity of the automatic scanner can lead to voters erroneously being given credit for voting in an election. In all of these cases, there is no corroborative information on voter registration lists, poll lists, or absentee applications indicating the voter actually voted.
  - Three cases were the result of absentee ballots being issued to a voter, who then died before Election Day.
  - Ten cases had insufficient information in the record to make a determination:
  - In seven cases, the signature on the poll list could not be matched to another voter;
  - In two cases, the poll list is missing making it impossible to match the signature to another person;
  - In one case, the signature on the poll list seems to match a voter in another precinct but could not be.<sup>49</sup>

43. In other words, the Commission, which assigned nearly half its staff of fifteen full-time employees for four weeks to comb through archived paper files, found strong, positive evidence that the allegedly dead voters mostly were not dead. In ninety-five percent of all cases of so-called "cemetery voting" alleged in the 2010 midterm election in South Carolina, human error accounts for nearly all of what the state's highest law enforcement official had misinformed the U.S. Department of Justice was fraud.<sup>50</sup>

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<sup>49</sup> Letter from Marci Andino, Executive Director, South Carolina Election Commission to The Honorable Alan Wilson, Attorney General of South Carolina, dated February 22, 2012 (on file with author).

<sup>50</sup> Associated Press, "South Carolina Attorney General Informs Justice Department of Voter Fraud," *Augusta Chronicle*, January 21, 2012, accessed July 14, 2012.

44. Pennsylvania has had a similar experience with erroneous lists of dead voters who appeared to have cast ballots from the grave. According to a May 4, 2012 email to Shannon Royer, Deputy Secretary of External Affairs and Elections, from Ian Harlow, Deputy Commissioner of the Bureau of Commissions, Elections and Legislation at the Pennsylvania Department of State, there were “40 voters who were cancelled via the DOH Death Notification but who had a vote recorded AFTER the voter record was cancelled in SURE.” The email included as an attachment an Excel file listing the “County,” “Voter Name,” “Date DOH App Rcvd” and “Voter Cancel Date” for each of these voters. Harlow was deposed by Petitioners’ attorneys and asked about the list which he said was produced because Royer asked him to “run a query...to see if there were any votes cast for individuals who could have possibly died before an election.” “Actually,” he said, “it wasn’t even to look at that. It was to look at their vote history to see if the vote history indicated that there was any activity after their death was cataloged...”<sup>51</sup> Harlow reported that Jessica Mathis, Chief of the Division of Elections, “contacted each of the counties to alert them of this situation and asked them to look into it.”<sup>52</sup> The result? Petitioners’ attorney asked Harlow: “So you’re not aware of any of these being instances of voter fraud?” Harlow replied, “Not that I can recall, no. It was my understanding that all of these were looked into and the circumstances surrounding each one were clerical errors.”<sup>53</sup>

45. A fifth similarity between Respondents’ list and other efforts by proponents of photo ID to document phantom voter fraud is the reference to partisan mailings in which some number of letters are returned as undeliverable. The Republican Party has a documented record of failing to identify actual cases of voter fraud by this method.<sup>54</sup> There are many better explanations for why mail might be returned.<sup>55</sup> “Bad addresses” could be explained by recording errors either by voters or by the clerks who keypunch voter registration applications; the high

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<sup>51</sup> *Applewhite v. Commonwealth of Pennsylvania*, Docket No. 33 MD 12, Deposition of Ian Harlow, June 28, 2012, 21-2.

<sup>52</sup> Harlow Deposition, 25.

<sup>53</sup> Harlow Deposition, 26-7.

<sup>54</sup> Litigation over a nearly thirty year period concerning the Republican National Committee’s (RNC) racially discriminatory ballot security programs documented numerous instances in which the Republicans used this practice not to root out fraud but to suppress voting. See, for example, Brief on Behalf of Plaintiff Democratic National Committee in Opposition to Defendant Republic (sic) National Committee’s Motion to Vacate or Modify the Consent Decree, *Democratic National Committee v. Republican National Committee*, Civil Action No: 81-3876 (D.N.J., 2009).

<sup>55</sup> Justin Levitt and Andrew Allison, “A Guide to Voter Caging,” Brennan Center for Justice at New York University School of Law, June 2007, [http://www.brennancenter.org/page/-/d/download\\_file\\_49608.pdf](http://www.brennancenter.org/page/-/d/download_file_49608.pdf), accessed July 15, 2012.

mobility rates of the U.S. population might account for moves after voters are registered but before mailings are sent out. Importantly, there are known problems with address data from the U.S. Postal Service. The U.S. Census Bureau has evaluated mail delivery for purposes of improving survey non-response in the decennial census. One study of mail returned as undeliverable, labeled “Undeliverable As Addressed” or UAA mail by the Postal Service, found Census-trained canvassers were able to successfully re-deliver 16.2 percent of that mail, or 1.4 million census questionnaires where the Postal Service failed.<sup>56</sup> According to the Census evaluators, part of the problem was in the way the Postal Service inaccurately classified buildings as vacant. “Assuming that the final census status is valid, we conclude that the U.S. Postal Service correctly identifies vacant housing units about 50 percent of the time.”<sup>57</sup> A second study assessed the effectiveness of efforts to contact households in urban areas where mail delivery was considered *a priori* unreliable. The report found:

There were 2,114 blocks out of 7,657 blocks with housing units in the census, or 27.6 percent of blocks, where 75 percent or less of the housing units in the block matched the Delivery Sequence File, a list of the addresses serviced by the United States Postal Service. These blocks contained 36,541 housing units out of the 238,216 housing units in the census, or 15.3 percent of the housing units in the census. Such blocks would presumably present mail delivery challenges for the United States Postal Service.<sup>58</sup>

46. Reports about trends in population and voter registration are also often quite misleading. Respondents’ list of examples of voter fraud contains this item: “The *National Review* reported in 2004 that, despite a 13% decrease in population in Philadelphia from 1995 to 2004, voter registration rolls increased by 24% during that time period.” There is no allegation of voter fraud here, but the implication is clear. Someone is padding the registration rolls with fictitious or fraudulent voters in order to facilitate fraudulent voting. The precise source for this information is not provided, however, it is identical to a claim made by John Fund in the first edition of his book, *Stealing Elections*, where he reports, “Philadelphia’s voter rolls, for instance have jumped 24 percent since 1995 at the same time that

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<sup>56</sup> Felipe Kohn, “The United States Postal Service Undeliverable Rates for Census 2000 MailOut Questionnaires,” Census 2000 Evaluation A.6.a, April 10, 2003, 10.

<sup>57</sup> John Chesnut, “Study of the U.S. Postal Service Reasons for Undeliverability of Census 2000 Mailout Questionnaires,” Final Report, Census 2000 Evaluation A.6.b, U.S. Census Bureau, September 30, 2003, iv.

<sup>58</sup> Miriam Rosenthal, “Urban Update/Leave,” Final Report, Census 2000 Evaluation F.11, U.S. Census Bureau, October 3, 2002, v.

the city's population has declined by 13 percent.”<sup>59</sup>

47. Fund's assertions are false and misleading. There is no evidence whatsoever that fraud had anything to do with increases in the number of registered voters in Philadelphia between 1995 and 2004. Voter registration and turnout are responsive to politics. While it is true that the number of registered voters in Philadelphia increased at a time when the city continued to lose population, Fund gets the numbers wrong and by implicating fraud, ignores better explanations for these trends. Annual voter registration tallies for the City of Philadelphia compiled by the Committee of Seventy show a pattern of modest expansion between 1995 and 2000, followed by fluctuations up and down between 2000 and 2004.<sup>60</sup> In years other than a decennial census year, population data for cities is estimated by the Census Bureau from survey data that carry statistical margins of error. According to Census estimates, between 1995 and 2004, Philadelphia's population decreased modestly by about 25,000 or 1.7 percent (from 1,496,000 to 1,471,000), not 13 percent. During that same period, the total number of registered voters increased by 108,173 or about 13 percent (from 849,025 to 957,198), not 24 percent.

48. Given the different drivers and dynamics of population and registered voter gains and losses, in a big city like Philadelphia, there is no inherently suspect reason why a net gain of about 100,000 registrants over a ten year period in which the city's overall population was basically stagnant should raise red flags. The political context best explains increased voter interest and participation<sup>61</sup>, while the marginal decrease in population was consistent with decade's long trends in population loss (only recently reversed). For example, a racially-charged mayoral election in 1999, resulting in the victory of John Street (D) over Sam Katz (R) by just 9,447 votes (of 439,163 cast), and targeted voter registration drives in conjunction with Pennsylvania's swing state status in national elections in both 2000 and 2004, most likely account for the increase in voter registration in the city. Competitive national elections have been producing increases in the total number and percentage of registered voters in communities across the

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<sup>59</sup> John Fund, *Stealing Elections: How Voter Fraud Threatens Our Elections* (San Francisco: Encounter Books, 2004), 4. This likely is the original source for the *National Review* citation since the *National Review* excerpted Fund's book on September 13, 2004.

<sup>60</sup> Committee of Seventy, "Philadelphia Voter Registration Totals 1967-2011," accessed July 10, 2012, [http://www.seventy.org/Downloads/Election\\_Returns\\_&\\_Data/Election\\_Results\\_67-11/Philadelphia\\_Voter\\_Registration\\_Totals\\_1967-2011.pdf](http://www.seventy.org/Downloads/Election_Returns_&_Data/Election_Results_67-11/Philadelphia_Voter_Registration_Totals_1967-2011.pdf).

<sup>61</sup> Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation and Democracy in America*, Longman Classics in Political Science (New York: Longman, [1993] 2002).

country over the last several election cycles. During the 2004 campaign, Robert Tanner reporting on surging voter registration numbers for the Associated Press, quoted Bob Lee, Philadelphia's voter registrar: "We're swamped," said Lee. "It seems like everybody and their little group is out there trying to register people."<sup>62</sup> Similarly, competitive elections and voter mobilization campaigns continued through the 2008 presidential election in Pennsylvania, producing some 1.5 million new registered voters, the highest number of new registrations in memory.<sup>63</sup>

49. In sum, here we have a clear example of an erroneous report from 2004 implicating voter registration fraud that does not even reach to the question of actual voter fraud.<sup>64</sup> It appears on a list of "voting irregularities" prepared in 2012 by the Office of the Governor of Pennsylvania in response to media queries concerning the Governor's statements that there are precincts where more than a hundred percent of the eligible population have cast ballots.<sup>65</sup> And it is repeated in this litigation in Respondents' answers to Petitioners First Set of Interrogatories, giving the idea that increases in voter registration are *prima facie* suspect of criminal behavior more authority than it deserves.

50. Why is Voter Fraud Rare? Rational choice models common to the academic study of voting behavior offer the best explanation for why there is little evidence of voter fraud, and therefore, very likely little actual fraud being committed.<sup>66</sup> Fraudulent registration and voting are criminal acts, and therefore, motivated behavior. Voting fraud is rare because voters are rational actors and given the costs to voting fraudulently, it is not in their interest to knowingly cast illegal ballots. Rational choice models sort the costs and probable benefits of voting (both estimated and perceived) into equations that model the individual decision to vote. Voting fraudulently is more

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<sup>62</sup> Robert Tanner, "Flood of New Voters Signing Up," Associated Press, September 28, 2004 ("New voters are flooding local election offices with paperwork, registering in significantly higher numbers than four years ago, as attention to the presidential election runs high and an array of activist groups recruit would-be voters who could prove critical come Nov. 2.")

<sup>63</sup> Deposition of Jonathan Marks, June 29, 2012, 34-5.

<sup>64</sup> Fund asserted these sorts of inaccuracies as examples of "some of the sloppiness that makes fraud and foul-ups in election counts possible..." See Fund, *Stealing Elections*, 4.

<sup>65</sup> Email from Owen P. McEvoy, Digital Communications Specialist, Governor's Office of Press and Communications to Ronald Ruman, Press Secretary, PA Department of State, Office of Communications and Press, dated March 28, 2012.

<sup>66</sup> See chapter 3 in *The Myth of Voter Fraud* for a fuller discussion of the rational choice literature on voting behavior.

costly than voting legitimately because the additional activity required to cast a fraudulent vote over and above what is required to vote legally, the risks of getting caught, and the penalties that the federal government and all state governments, including Pennsylvania's, provide in state law significantly increase the costs of doing so. While it may be true that the psychic gratification of gaming the system or contributing more than one's fair (and legal) share to the victory of one's preferred candidate could enhance the value or benefit of voting, a "calculus of voting" approach to modeling this behavior suggests it almost always will be irrational to knowingly cast an illegal vote.

51. Excluding Absentee Voters. Pennsylvania's photo ID law, like recently enacted stringent photo ID laws in other states, treats absentee voters differently than voters who cast ballots at the polls on Election Day. Pennsylvania Act 18 of 2012 permits the absentee voter to meet the ID requirement by providing a drivers license number or the last four digits of the voter's Social Security number on the absentee ballot application. Voters may provide this information to election officials over the telephone, which means that unlike those who vote in person on Election Day, absentee voters are able to cast regular (absentee) ballots without providing their identity documents in person to election officials.

52. At a recent hearing before the House Appropriations Committee, Secretary of State Carol Aichele, in response to a question about who prosecutes voter fraud in Pennsylvania, referenced a case of absentee ballot fraud in Philadelphia from the mid-1990s, and implied that the new Photo ID Law would have prevented it.<sup>67</sup> Given the facts of the case, this is incorrect. The fraud was perpetrated *on* the voters, not *by* the voters, through a conspiracy of election officials and a Democratic candidate to violate the state's absentee voting rules. The case involved a 1993 interim high-stakes election in Pennsylvania's second senatorial district between Republican Bruce Marks and Democrat William Stinson. The partisan balance in the State Senate rode on the winner. At the close of the polls, Marks led Stinson on the machine count by a very narrow margin (19,691 votes to 19,127 votes), however, absentee ballots reversed the outcome, and the Philadelphia County Commissioners, sitting as the County Board of Elections, (the "Board") certified Stinson the winner.

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<sup>67</sup> See Commonwealth of Pennsylvania House of Representatives, House Appropriations Committee, Public Hearing: Department of State, March 7, 2012, 21-2. The case is *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994).

53. Marks had evidence of wrongdoing by the Board and the Stinson campaign, and sued to overturn the election, eventually prevailing in federal court. According to findings of fact, about three weeks before the election, Stinson's polling data showed Marks ahead by four percentage points. Stinson ordered his campaign workers to saturate the black and Latino portions of the district with absentee ballot applications, in clear violation of Pennsylvania law.<sup>68</sup> Campaign workers knowingly deceived Latino voters, many of whom were not native English speakers, telling them that the state had created a "new way to vote," and that they could cast their ballots from home.<sup>69</sup> The campaign paid \$1 for each application collected, and sent the applications directly to Commissioner Talmadge. The chair of the City Commissioners, Marge Tartaglione, then issued ballots to the Stinson campaign directly from her home, whereupon Stinson campaign workers delivered the ballots to voters and illegally "assisted" them by coercing them to vote for Democratic candidates. The effort to aid the Stinson campaign on the part of commissioners and Board employees was covert. In some cases, campaign workers illegally marked or forged ballots. Voters were instructed not to date their ballots to conceal the fact that the campaign had solicited them well in advance of the election. Every one of these procedures violated Pennsylvania law on how absentee ballot applications and ballots are to be handled.<sup>70</sup> Because most of the illegal ballots were solicited from registered voters, a photo ID requirement would not necessarily have prevented the official conspiracy or the coercion, nor would Act 18's non-photo ID requirements for absentee voters foiled the scheme.

54. There are numerous examples of third-party conspiracies to corrupt elections that have relied on the misuse, tampering, and purchase or sale of absentee ballots. These practices are facilitated by the opportunity for third party intervention – not present when a voter casts a ballot at a polling place – that absentee voting presents.<sup>71</sup>

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<sup>68</sup> The election code requires that the voter apply for the absentee ballot him or herself (25 PA. CONS. STAT. ANN. § 3146.2(1), (e)(1)-(2) (1994).

<sup>69</sup> Pennsylvania limits absentee eligibility to only those voters who are not physically able to proceed to the polls or unable to be present on Election Day due to work obligations or religious observance. See, Pennsylvania Department of State, VotesPA website, "Voting by Absentee Ballot," <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=1174088&parentname=ObjMgr&parentid=7&mode=2>, accessed July 10, 2012.

<sup>70</sup> Robertson, "Election Fraud – Winning At All Costs."

<sup>71</sup> For examples from various state and federal courts, see, *U.S. v. Odom*, 736 F.2d 104 (4<sup>th</sup> Cir. 1984), a case of nursing home abuse in North Carolina; *U.S. v. Olinger*, 759 F.2d 1293 (7<sup>th</sup> Cir. 1985), finding a scheme in Chicago to exploit the nursing home-bound mentally handicapped by casting ballots in their names; *U.S. v. Smith*, 231 F.3d 800 (11<sup>th</sup> Cir. 2000), another federal appeals court case did not consent to the marking of their ballots; *Womack v.*

55. There is very little in the legislative record that allows us to discern why most states with the most restrictive new rules exempt absentee voters from photo ID requirements. Is it not reasonable to assume that an imposter will assign a lower risk to fraudulently voting by mail? After all, to commit the crime in person, the imposter must expose him or herself to the authorities and execute the foul deed in front of their eyes. If it is less risky to attempt to vote fraudulently through the mails, why have most new voter ID laws such as Pennsylvania's exempted absentee voters from the security requirements applied to voters who cast ballots at the polling place?

56. Conclusion. The public is often misled by allegations of voter fraud which are used as an intimidation tactic to shape the electorate. This is accomplished by manipulating the rules and procedures that govern access to voting. For example, in the wake of false allegations against the community organization ACORN,<sup>72</sup> a Florida law was passed carrying stiff penalties for organizations failing to turn in voter registration applications within ten days of receiving them.<sup>73</sup> This law, later enjoined in a preliminary injunction by a federal judge, caused the League of Women Voters to end 77 years of voter registration activity in Florida for fear that it would be unable to comply.<sup>74</sup>

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*Foster*, No. 99-953 (Ark. S.Ct. 2000), citing improper assistance to elderly voters using absentee ballots in Arkansas; *Straughter v. Collins*, 819 So. 2d 1244 (Miss. 2002), a Mississippi court case overturning an election on evidence of campaign workers filling out ballots and improperly assisting elderly and disabled voters. The 1997 Miami mayoral election, the single most egregious case of election fraud in the last quarter century because of the blatant use of "ballot brokers" to buy and forge absentee ballots (see William T. McCauley, "Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy," *University of Miami Law Review* 54(3): 625-64) ; *U.S. v. McCranie*, 144 F.3d 56 (11<sup>th</sup> Cir. 1998), another egregious case of absentee ballot fraud that involved two conspiracies to buy votes by opposing candidates in a 1996 Dodge City, Georgia county commission primary election, where open bidding for sale of absentee ballots took place inside the county courthouse; and *In Re: The matter of Vanessa Hill v. J.B. (Johnny) Washington*, No. CV-04-122 (Hale County, Ala. Cir. Ct., 2006), in which an Alabama circuit court judge overturned the 2004 run-off election for mayor of tiny, rural Greensboro, Alabama on a finding of 162 fraudulent absentee ballots cast in favor of the incumbent who had prevailed on the strength of his absentee vote.

<sup>72</sup> ACORN was a non-profit grassroots organization of low and moderate income families that engaged in issue and ballot initiative campaigns and voter registration drives. In *Mac Stuart v. ACORN*, plaintiff, an ex-employee of ACORN, accused the organization of failing to submit some 179 registration applications. ACORN denied, and plaintiff failed to produce evidence of this allegation. The matter was dismissed with prejudice by a federal judge, exonerating ACORN of any and all wrongdoing. See Minnite, *The Myth of Voter Fraud*, 96-99; and Joni James, "Voter Fraud Charges Collapse," *St. Petersburg Times*, December 15, 2005.

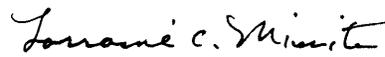
<sup>73</sup> FLA. STAT. §§ 97.021(36), 97.0575 (2005).

<sup>74</sup> *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1325, (S.D. Florida, 2006).

57. Voters can only influence the part of the electoral process to which they have access. There is very little available evidence suggesting that voters are intentionally corrupting the electoral process. Rational actor models of voting behavior predict this result.

58. Accordingly, I conclude that stringent photo identification requirements to vote are not justified by claims that such requirements are needed to reduce or prevent voter impersonation forms of election fraud because as the empirical record makes clear, fraud committed by voters either in registering to vote or at the polls on Election Day is exceedingly rare. That said, exempting absentee voters from photo ID requirements is inconsistent with the stated concern about voter fraud voiced by proponents of photo ID laws (however misplaced, given the evidence, that concern may be).

59. I declare under penalty of perjury that the foregoing is true and correct. Executed on July 16, 2012, in Millerton, New York.



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Lorraine C. Minnite