

October 28, 2004

Roger Begin, Chair
RI State Board of Elections
50 Branch Avenue
Providence, RI 02904

BY FAX AND MAIL

Dear Mr. Begin:

Yesterday we learned some disturbing information about the state's process for handling certain provisional ballots that will be cast in Tuesday's election. Because this process has the potential to unfairly disenfranchise hundreds, if not thousands, of legitimate voters – especially voters in poorer districts – I am writing to ask that this matter be addressed immediately.

As you know, the Help America Vote Act of 2002 created a system for “provisional ballots,” ballots to be given to individuals whose eligibility to vote was subject to question. Under the law, one instance when a provisional ballot is given is when a person (1) since January 1, 2003, registered to vote for the first time by mail, and (2) did not submit a copy of personal identification with their mail application and (3) whose identity cannot be matched with a state database by Social Security Number or driver's license number, and (4) who fails to present a specified identification document when he or she appears at the polls. (Boards of Canvassers are supposed to advise mail registrants about bringing proper identification to the polls, although it is unclear to us whether all the local boards do so.) It is our understanding that the Board of Elections has not begun using a state database to match mail registration applications, so any person who registered by mail since January 1, 2003 and has not yet provided an identification document with their application will be asked to present ID when they vote on Tuesday.

After reviewing your agency's promulgated regulations and Pollworker Training Guide, we found nothing that indicated the procedures that would be followed to determine the fate of these provisional ballots. As a result, Amy Myrick from my staff called the Board and talked yesterday with Robert Rapoza about this. What we learned is cause for alarm. According to Mr. Rapoza, if a person does not present ID, he or she will be given a provisional ballot to fill out. Known to the election officials, but unbeknownst to the naïve voter who takes the time to fill out the ballot, his or her vote is simply not going to be counted.

This scenario is disturbing for at least two reasons. First, we believe that, under HAVA, the Board is required to count these ballots as long as a voter is otherwise eligible to vote under state law. In other words, the mere failure to present ID cannot, in and of itself, serve as grounds to discount a ballot when the voter has otherwise complied with state law and there is no individualized objection to a particular ballot's validity. Section 303(b)(2)(B) of HAVA specifically provides a method of “fail-safe” voting, under which a person who does not present identification at the polling place is entitled to have the ballot counted as a provisional ballot if, as Section 302(a) provides, a determination is made that “the individual is *eligible under state law* to vote.” (emphasis added) Because state law does not contain a polling place identification requirement whether a person has registered in person or by mail, there is no basis for the state to reject these ballots, for the voters have met all of the standards of state law in registering and voting.

We were also troubled by Mr. Rapoza's response because he indicated that voters would not even be advised of the Board's plans to disqualify these ballots. Thus, even if the Board could require photo identification as a condition of counting a ballot (which, we submit, state law does not allow), it has taken the position that it need not advise individuals that if they wanted their vote to count, they should come back to the polling place with ID. Indeed, Mr. Rapoza stated that federal law actually *prohibits* voting officials from advising people to come back with proper identification. However, we have been unable to find any such prohibition, and it is certainly counter-intuitive since the whole idea behind provisional ballots is to allow *more* people to have their vote counted, not fewer.

Mr. Rapoza indicated that he did not believe that discounting ballots from individuals who failed to provide ID would affect many people, on the theory that most people drive to their polling place, so they will have a driver's license with them, which is a valid form of ID. Of course, this also means that it is much more likely to affect the people who do not drive to the polls – particularly low-income people in poorer voting districts, where significant voter registration drives have taken place over the past year.

It is thus possible that hundreds of voters, most of them low-income, will participate on Tuesday in what, for them, can only be considered a sham process in (not) exercising their right to the franchise. This is hardly what the Congressional supporters of HAVA must have had in mind when they enacted this important law two years ago.*

We certainly recognize the state's interest in averting voter fraud, but this can be, and is, addressed in a myriad number of other ways, including the severe criminal penalties attendant upon fraudulent voting, and the presence of individuals at the polls with the right to challenge the eligibility of any purported voter. In fact, the overwhelming majority of voters – those registered to vote before January 1, 2003 and those who have registered since then at any of numerous state or local offices – are under no obligation to present any identification at all, so singling out recently registered voters in this way serves no substantial purpose. It does, however, have the effect of unnecessarily disenfranchising many qualified voters, especially those in poorer and minority communities.

In order to avoid this serious disenfranchisement of qualified voters, we ask for an immediate formal acknowledgement from the Board that the provisional ballots from mail-registered voters who are unable to provide identification at the polls will nonetheless be counted, absent a specific determination that the person is unqualified under state law to vote.

Your immediate attention and response to this matter is appreciated.

Sincerely,

Steven Brown
Executive Director

* We note that state law anticipated the formal promulgation of rules and regulations by the Board to address some of the important issues raised by the introduction of provisional ballots. See R.I.G.L. §17-19-24.1(b). Although the Board did *propose* some rules on the subject in May, it does not appear that any version of them was ever actually *adopted*.