

October 2, 2003

Timothy Lambert Civil Rights Division Department of Justice Washington, D.C. 202-307-3961 via fax

Dear Mr. Lambert:

Thank you for your call inviting comments from the Miami-Dade Election Reform Coalition. The Coalition urges the Civil Rights Division of the Department of Justice to object to two provisions in the 2003 HAVA law that has been submitted for preclearance. We also urge you to consider the inadequacy of public input into shaping the state's HAVA plan while the legislation was pending.

The Florida HAVA law will have a disproportionate negative impact on minority voters in two important ways. First, the legislation fails to require a voter-verified paper record of every individual vote cast on direct recording electronic (DRE) computer voting machines, and it extends the availability of DRE voting to provisional ballots. Evidence from Miami-Dade shows that the failures of DREs had a disproportionate impact on African-American voters. The impact on minority voters is particularly pernicious because, unlike paper ballots, lost votes on DREs *both* disproportionately denied African Americans the right to vote *and* effectively made it impossible to determine the actual number of lost votes and the reasons they were lost. Without a voter-verified paper record, effective recounts are impossible. Our second objection is that the new legislation imposes identification requirements that will have a disproportionate impact on minority voters.

The Permanent Paper Record Required by HAVA

In October 2002, the Help America Vote Act (HAVA) was enacted. Title III, Subtitle A, Section 301(a)(2) of HAVA states that the voting system **shall produce** a permanent paper record with a manual audit capacity and additionally that the paper record produced **shall** be available as an official record for any recount conducted with respect to any election in which the system is used. Read literally, HAVA dictates that a voting system must produce a paper record that can be read by and understood by humans so that a "manual audit" can be performed if necessary. Once HAVA had been enacted, Florida should have amended its existing statutes to take into account the more stringent standard governing paper records than had existed when the state first permitted voting on DREs. Instead, the HAVA plan declared that the paper record requirement was met when a paper tape of summary totals was printed for each precinct. State of Florida HAVA Plan, at 10-11. Section 102.141(6)(d) of the new HAVA bill directed the



Department of State to write regulations that would be used for machine recounts and would be uniform to the extent possible, but the statute did not require paper records that would permit recounts of each *individual* vote. Because the new state law does not require an individual record of every vote, it does not protect minority voters against the racially disproportionate impact of the failure of a DRE voting system.

The right to vote necessarily includes the right to have votes recorded and counted accurately. Recording and counting the votes of minority voters has been a critical issue in Florida. In the 2000 election, according to the U.S. Commission on Civil Rights, "The disenfranchisement of Florida's voters fell most harshly on the shoulders of black voters." Black voters were nearly 10 times more likely than whites to have their votes rejected. Although black voters made up approximately 14 percent of all voters, more than half the 180,000 ballots which were spoiled were cast by black voters. Two years later, in the Democratic primary election of September 2002, Miami-Dade County used a new DRE touch-screen voting system. Widespread problems with the new machines and their use caused chaos in the election. The primary was a disastrous experience for voters throughout the county. The impact of these problems again fell disproportionately on African-American voters

In October 2002, the ACLU of Florida released a study of the problems of the September primary. The study, which covered 31 problem precincts, found that 18,752 voters signed the rolls to vote, but only 17,208 votes were recorded. *This means that a total of 1,544 votes were lost in those precincts, a lost vote rate of 8.2%.* The ACLU reported that approximately half of the lost votes were from African-Americans. These lost votes echoed the failures of the 2000 election. According to the Miami Herald, the rate of under- and over-votes in those 31 precincts had been 6.75% in November 2000. The ACLU also reported a large disparity when the rate of problems at majority black precincts was compared with the rate in majority non-black precincts.

The new machines brought a new problem: lost votes could never be recounted. In fact, it was not possible to prove whether the votes had been cast at all! The computers avoided the problems of punch-card ballots in determining the intent of the voter with under- and over-votes. But the result of the new system was that it was impossible to prove why votes had been lost. Some people may have left the polls without voting, although voters generally sign in *after* they have waited through lines. Some voters may have failed to press the "VOTE" button on the machine. Pollworkers were instructed to press the "VOTE" button if a voter failed to do so, but the pollworkers may also have failed to press it. Or perhaps the machines failed to record the votes at all. Unlike the 2000 election, there was no way to establish the cause of lost votes in black communities. When precinct tabulators print for a second time the total votes tallied on each machine, it is not a true recount—it is only a reprint, and it does not protect voters whose votes were not recorded.



Preventing lost votes is fundamental to preventing disenfranchisement of minority voters. When voting problems occur, it is essential to be able to document whose votes have been lost and what happened to those votes. By collecting data on the race of voters and racial concentration in precincts, the state can identify whose votes have been lost. But without an individual paper record, the number of votes lost can never be measured with certainty, and the intent of uncounted votes can never be ascertained. That is what happened in Miami-Dade in September 2002. Without a voter-verified record of every individual vote, lost votes are gone forever, and the causes of lost votes in minority communities cannot be identified with certainty and addressed effectively.

The Florida statute and HAVA plan incorporate standards that permit voters in the five counties covered under Section 5 to suffer the effects that were experienced by voters in Miami-Dade County in September 2002. Hillsborough County and Collier County use touch-screen DRE voting systems that do not produce individual voter-verified paper records of every vote. Collier County uses an iVotronic Touch Screen system, made by ES&S Software, similar to the system used by Miami-Dade County that experienced failures in the September 2002 primary. Because Florida legislation permits the adoption of these systems, the other counties covered under Section 5 could adopt these touch-screen systems at any time.

Electronic voting machines have brought new problems that demand accurate auditing and recounts. Hardware and mechanical problems, software problems, and problems experienced by voters or pollworkers in the process of casting votes may cause problems with recording votes. If a paper record is produced at the same time the vote is recorded, then it will be clear whether votes were recorded properly in the event of power failures or other problems. If voters forget to push the button to finalize their votes, they will be able to see that the paper record has not yet been completed. Audits can be thorough, checking paper records of the individual votes against the machine totals and checking machine totals against voter rolls. Machine problems will be detected more quickly because voters will be able to identify problems as they develop. A voterverified paper record of every individual vote cast is also necessary for recounts. Unless the totals for each machine can be audited and checked against individual paper records of each vote, votes may still be lost. Finally, the ability to verify a paper record increases voter confidence that the vote will be recorded and counted correctly. Because of disproportionate lost votes among African-American voters in both 2000 and 2002, it is vitally important to restore voter confidence and participation in the voting process. Uncertainty and discouragement of minority voters must be avoided.

As the Florida Supreme Court has said, "The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard." Boardman v. Esteva, 323 So.2d 259 (Fla. 1975). Our experiences in Miami-Dade County have proven that votes can be lost on DREs. A voter-verified paper record of every vote is necessary to protect every voter's right to be heard.



The Florida legislation implementing HAVA did not take necessary measures to prevent disparate impact. Instead, section 101.048(4) permits election supervisors to allow voters casting provisional ballots to vote by electronic means. Florida law requires that voters whose households have moved cast their ballots in the precinct in which they reside, voting on provisional ballots if their names do not appear on the rolls in those precincts. Mobility rates are quite different for whites than for African Americans and Hispanics: white non-Hispanics are least likely to have moved within a calendar year, while Hispanics have the highest mobility rate, closely followed by African Americans. Hispanics and blacks are also most likely to have moved within the same county. U.S. Census Bureau, *Geographical Mobility March 1999 to March 2000*, Current Population Reports, May 2001. If provisional ballots cast on DREs encounter lost votes, the impact will again fall disproportionately on minority voters.

Identification Requirements for New Voters

The Coalition believes it is necessary to further expand the acceptable forms of identification for first-time voters. The identification requirements of the new statute will have a disproportionate impact on minority voters. Minorities are more likely to be impoverished. Florida Legislature, Office of Economic & Demographic Research, 2000 Census Reports, Poverty in Florida (October 2002). They are more likely to have lower educational levels and to be unemployed. Therefore, they are less likely to have drivers licenses and employer or school issued photo identification.

Minorities in Florida have lower literacy levels than do non-Hispanic whites. According to the Adult Literacy Survey in Florida, "African American and Latino adults were more likely than White adults to perform in the lowest two literacy levels and less likely to attain the two highest levels. . . . 12 to 14 percent of White Florida respondents performed in [the lowest level], compared with 48 to 53 percent of African American respondents and 45 to 48 percent of Latino respondents." Executive Summary from Adult Literacy in Florida, Results of the National Adult Literacy Survey, 1994, at 4; http://nces.ed.gov/naal/pdf/state_summaries/Florida.pdf. Literacy levels affect both the type of identification that voters will have available and the process of updating documents to show correct addresses. The combined factors of higher mobility and lower literacy levels will have a disproportionate impact on minority voters.

The Department of Justice has already recognized the disproportionate effects of literacy and economic factors on the population in the five covered counties in Florida. In 1998, objecting to new proposed procedures including changes in absentee ballots, the Department stated: "The literacy rate in the five covered counties is significantly higher for the white population than for the minority population. Significant socio-economic differences also exist between minority and white residents. There are, for example, lower rates of home and vehicle ownership by minority persons in the covered counties." http://www.usdoj.gov/crt/voting/sec_5/ltr/l_081498.htm. The list of acceptable identification in the Florida statute is weighted toward consumption, including buyers



club cards and entertainment passes, and does not sufficiently compensate for the greater problems of minority voters in obtaining acceptable identification. Although voters who do not have such identification can cast a provisional ballot, the Coalition considers the provisional ballot process to be an additional burden on minority voters.

The HAVA Planning Process

Finally, it is important to consider flaws in the process through which Florida created its HAVA plan while legislation was still being drafted. Despite Florida's history of problems with voting in minority communities, the state HAVA Planning Committee did not include advocacy groups that speak for voters in these communities, such as the NAACP. The process of public participation in the HAVA committee meetings was severely limited. In Tallahassee, the Committee permitted only three minutes of comment per person and then adjourned the meeting two hours before the scheduled finish. In Palm Beach, the chair called for a 20-minute lunch break and then adjourned the meeting before the break was over, not allowing for public comment. Not until the two final meetings in Fort Myers and Orlando, after complaints, was there true public comment and discourse between the public and the Committee. The early restrictions that denied effective time for comment limited the ability of the public to have input on crucially important issues including the question of a voter-verified paper record of every individual vote.

Thank you again for soliciting our comments. I have attached as Appendices a description of the groups and individuals participating in the Coalition, and a copy of the documents from the ACLU racial disparity study.

Sincerely,

Martha R. Mahoney Chair, Racial Impact Committee, Miami Dade Election Reform Coalition (Professor of Law, University of Miami School of Law*)

*Organization listed only for identification purposes only