

Testimony before the United States House of Representatives Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

“Protecting the Right to Vote During the COVID-19 Pandemic.”

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Good Morning Mr. Chairman and Members of the Subcommittee,

My name is Tom Fitton. I am President of Judicial Watch, Inc, a Washington DC-based public interest nonprofit dedicated to promoting transparency and restoring trust and accountability in government, politics, and the law. Since 1994, Judicial Watch has become the largest, most successful Freedom of Information Act (FOIA) litigator, exposing corruption in the federal government through FOIA. Consistent with our primary mission, we also have been involved for almost a decade in ensuring the honesty and integrity of our electoral processes. Judicial Watch is now the nation's premier enforcer, public or private, of the election integrity provisions of the National Voter Registration Act of 1993 (NVRA).

For years, Americans have been losing faith in the integrity of our electoral system. Many polls have been taken on this subject and they reach the same conclusion. The Gallup organization conducts a particularly interesting poll, which compares American attitudes with those of other countries. The poll simply asks respondents if they “have confidence” in the “honesty of elections.” Last year, only 40% of Americans answered yes, while an astonishing 59% said no.<sup>1</sup> According to Gallup, the United States has “one of the worst ratings across the world's wealthiest democracies,” with only Chile and Mexico reporting statistically lower ratings.<sup>2</sup> This phenomenon long predates the COVID-19 pandemic. Gallup reports that “[m]ajorities of Americans have consistently lacked confidence in the honesty of elections every year since 2012.”<sup>3</sup>

Among the explanations for this loss of faith, we must include the public's impatience with the politicization of electoral procedure, and, in particular, with dubious objections to what are widely perceived to be commonsense election integrity measures. The most obvious example to date concerns the heated, partisan fight against voter ID laws. A Pew Research Center study after the 2018 elections found strong, bipartisan support for voter ID, which was favored overall by 76% of those polled and even by a considerable majority of those identifying as Democrats (63%).<sup>4</sup>

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<sup>1</sup> R.J. Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, Feb. 13, 2020, available at <https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Kristen Bialik, *How Americans view some of the voting policies approved at the ballot box*, PEW RESEARCH CENTER, Nov. 15, 2018, available at <https://www.pewresearch.org/fact-tank/2018/11/15/how-americans-view-some-of-the-voting-policies-approved-at-the-ballot-box/>.

This support is understandable in a society where one must produce identification for so many different reasons, from getting on a plane to buying prescription drugs to working out in a gym.

That voter ID laws are so often opposed, and with significant success, by political operators is a sad sign of our times. This opposition often relies on unsupported claims that voter ID will depress minority turnout, but this effect is never seen in actual elections. Opponents also try to flip the burden of proof, arguing in effect that, unless those favoring voter ID can prove that voter fraud is a common occurrence that costs elections, there is no justification for requiring an ID. This argument is bogus. As the Supreme Court has noted, regardless of the prevalence of fraud, states have an obvious, legitimate “interest in counting only the votes of eligible voters” and in “carefully identifying all voters participating in the election process.”<sup>5</sup> This interest is justified by the nature of voter fraud, which is hard to detect or punish after the fact. On a more practical note, those expressing doubt about the existence of voter fraud reveal an unrealistic, if touching, view of human nature. People cheat at more or less everything. They cheat at baseball. They cheat at sumo wrestling. They cheat when it doesn’t matter, for example at online gaming or internet chess. Indeed, they cheat at solitaire. I cannot understand why voting, which is so tied up with intense partisan feeling and enthusiasm, would be exempt from cheating.

I could easily multiply examples of commonsense election integrity laws that partisans have made the subject of unnecessary and manufactured opposition. By far the silliest example I have found was a 2017 Virginia state bill that would have required electronic pollbooks to contain the photograph taken by the Department of Motor Vehicles for each registered voter who has a driver’s license.<sup>6</sup> Note that the actual photograph of a voter taken by the DMV cannot possibly discriminate against that voter. Yet Governor McAuliffe vetoed that bill.

My point here is that the American people see what they conclude are disingenuous fights over electoral procedures and lose faith in the honesty of our elections. With this background in mind I turn to measures proposed in response to the COVID-19 pandemic. One of the more common suggestions now is to require greater reliance on mail-in ballots. For example, last month Governor Newsom issued an executive order requiring that county elections officials transmit mail ballots to every registered voter in the State.<sup>7</sup> I view this as a real threat to the integrity of American elections.

In 2005, the bipartisan Carter-Baker Commission noted the particular risks associated with absentee (mail-in) ballots:

Absentee ballots remain the largest source of potential voter fraud...Absentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to

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<sup>5</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008).

<sup>6</sup> S. 1253 (2017).

<sup>7</sup> Executive Order N-64-20 (May 8, 2020).

pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail.<sup>8</sup>

While I share all of these concerns, I would like to focus on the problem of ballots mailed to the wrong address. Voter registration lists throughout the country are routinely out of date, containing registrations for voters who no longer live at the stated address, who have died, or who are ineligible under the law for some other reason. This has been a problem for years. A Pew Research Center report issued during the Obama years noted that “[a]pproximately 2.75 million people have active registrations in more than one state,” that “24 million — one of every eight — active voter registrations in the United States are no longer valid or are significantly inaccurate,” and that “[m]ore than 1.8 million deceased individuals are listed as active voters.”<sup>9</sup> We know about this problem at Judicial Watch because of our work in enforcing the NVRA. Data states provided to the Election Assistance Commission in 2019 showed hundreds of U.S. counties with voter lists containing more registered voters than there were citizens over the age of 18—meaning a registration rate of more than 100%. Considering just the part of counties’ voter rolls in excess of 100% shows that there are 2.5 million “extra” registrants on our nations’ voter rolls.

In particular, counties throughout the country have high numbers of “inactive” registrations that have not yet been cancelled. A registration becomes inactive when a registrant is sent, and fails to respond to, an address confirmation notice. If that registrant does not vote or otherwise contact election officials for the next two general federal elections (from two to four years), that registrations is cancelled pursuant to the NVRA.<sup>10</sup> During that statutory waiting period the voter is called inactive.

It is crucial to note that an inactive registration can still be voted on election day.<sup>11</sup> This does not even require the voter to use a provisional ballot. The voter need only affirm his or her address, and in many states this can be done orally. To be clear, the poll worker asks a voter if he or she lives at the listed address, and the voter says “yes.” At that point, the voter can vote.

Now consider our experience in Los Angeles County, which we sued for noncompliance with the NVRA in 2017. We learned that the State of California had not been removing inactive registrations for *20 years*, pursuant to a misguided accommodation reached with Janet Renos’ Justice Department. As a result, Los Angeles County by 2018 had about 1,565,000 inactive registrations—almost one fourth of all the registrations in the County. Stated differently, the County of Los Angeles alone had more *inactive* voter registrations than the State of Hawaii has people of every age. And this is not just Judicial Watch’s calculation. These inactive registrations were tallied by Los Angeles County, and were openly admitted in the agreement it signed settling

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<sup>8</sup> REPT. OF COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 46 (2005).

<sup>9</sup> *Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade*, PEW RESEARCH CENTER ON THE STATES, Feb. 14, 2012, at 1.

<sup>10</sup> 52 U.S.C. § 20507(d)(2).

<sup>11</sup> 52 U.S.C. § 20507(e).

the lawsuit.<sup>12</sup> Some had been inactive for almost twenty years. Most had moved long ago. Tens of thousands of these inactive registrants had died. But all currently remain “registered voters.”

Until all of these registrations are formally processed under the NVRA, however, which will not be completed until 2022, they still can be voted in Los Angeles County. But Governor Newsom’s executive order requires county officials to “transmit vote-by-mail ballots for the November 3, 2020 General Election to all voters who are . . . registered to vote in that election,” making clear that “every Californian who is eligible to vote in the November 3, 2020 General Election shall receive a vote-by-mail ballot.”<sup>13</sup> Under the plain terms of Governor Newsom’s order, these 1.6 million inactive registrations, the vast majority of whom no longer reside in Los Angeles County, California, should receive ballots. Circulating all of those live ballots, unmonitored by their original owners who have moved or died, is a threat to the integrity of California’s elections.

Many other counties have lists containing old, inactive registrations. Our 2018 consent decree with the Commonwealth of Kentucky addressed the hundreds of thousands of outdated registrations in that State.<sup>14</sup> A few months ago, Allegheny County, Pennsylvania admitted that it had nearly 70,000 inactive registrations that it had failed to remove for longer than the NVRA’s statutory waiting period of two general federal elections. It only removed them after receiving a warning letter from Judicial Watch.<sup>15</sup> North Carolina’s own published shows it has nearly a million inactive registrants. Pennsylvania admits to about 800,000 inactive registrants. Judicial Watch recently commenced lawsuits against both of those states over their failures to clean their voter rolls. If mail-in ballots are sent to the addresses of such inactive voters, there is the danger that they will be improperly voted, at which point they will become “active” again and not subject to removal. Indeed, where states or counties are not cleaning their voter rolls, even their *active* registrations become outdated.

One of the main reasons the Carter-Baker Commission identified absentee ballot fraud as “the largest source of potential voter fraud” is simple: It poses fewer risks for a person filling out and mailing a fraudulent ballot. By contrast, a person attempting “impersonation” fraud at a polling site must at least appear to cast the vote and, in consequence, may be found out and detained. Even so, a number of recent stories attest to the practice of mail-in ballot fraud. Just last week, a West Virginia postal worker was indicted for manipulating eight voters’ absentee ballots.<sup>16</sup>

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<sup>12</sup> Settlement Agreement, *Judicial Watch v. Logan*, 2:17-cv-8948 (C.D. Cal. Jan. 3, 2019) (ECF No. 96-1) at 6, ¶1.

<sup>13</sup> Executive Order N-64-20 (May 8, 2020) at 2, ¶1.

<sup>14</sup> Consent Judgment, *Judicial Watch v. Grimes*, 3:17-cv-94 (E.D. Ky. Jul. 3, 2018) (ECF No. 39).

<sup>15</sup> *Under Threat of Lawsuit, Allegheny Co. Purging 69,000 Inactive Voters From Rolls* (CBS PITTSBURGH, Jan. 14, 2020), available at <https://pittsburgh.cbslocal.com/2020/01/14/allegheny-county-board-of-elections-voter-rolls/>.

<sup>16</sup> John Raby, *West Virginia Mail Carrier Charged With Altering Absentee Ballot Requests*, TIME, May 27, 2020, available at <https://time.com/5843088/west-virginia-mail-carrier-fraud-absentee-ballots/?linkId=89524172>.

In 2019, an Oakland County clerk outside Detroit, Michigan was charged with illegally altering 193 absentee ballots.<sup>17</sup> A Minneapolis, Minnesota man was charged with helping 13 others falsify absentee ballots ahead of the 2018 election.<sup>18</sup> In 2017, a Dallas County, Texas man was convicted after 700 mail-in ballots were witnessed and signed by a fictitious person.<sup>19</sup> And recently in North Carolina’s 9th Congressional District race, a scheme was run to steal 1,200 absentee ballots and fill them out, in a race that was decided by only 900 votes.<sup>20</sup>

As a final point, it is now about five months until election day, and the pandemic’s infection curve has flattened. Insisting now on all-mail ballot elections seems less like a response to a health crisis and more like a partisan application of the immortal words of Rahm Emanuel: “Never allow a good crisis to go to waste.”

Governor Newsom’s executive order in California seems particularly cynical. While he has relied on his emergency powers in the face of the pandemic to order all-mail ballot elections, he notably has failed to restrict ballot harvesting under State law, which allows paid employees of public sector unions, among others, to go door-to-door gathering ballots from strangers, even helping those voters to fill them out. Public health, in other words, is cited as a justification when it is convenient, and is ignored when it is inconvenient. This is just the kind of self-interested, partisan game-playing that causes American voters to react with disgust at how we conduct our elections.

Thomas J. Fitton

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<sup>17</sup> Christine Ferretti, *Southfield city clerk charged with 6 felonies tied to November election*, THE DETROIT NEWS, SEP. 23, 2019, available at <https://www.detroitnews.com/story/news/local/oakland-county/2019/09/23/southfield-city-clerk-charged-six-felonies-november-2018-election/2416101001/>.

<sup>18</sup> Paul Walsh, *Minneapolis man charged with helping 13 people cast fraudulent ballots in 2018*, STAR TRIBUNE, Nov. 5, 2019, available at <https://www.startribune.com/minneapolis-man-acted-as-helper-for-13-people-casting-fraudulent-ballots-charges-say/564507232/>.

<sup>19</sup> Stephen Young, *Dallas Man Pleads Guilty in 2017 West Dallas Voter Fraud Investigation*, DALLAS OBSERVER, Jun. 21, 2018, available at <https://www.dallasobserver.com/news/dallas-man-gets-six-months-for-vote-fraud-10819409>.

<sup>20</sup> David A. Graham, *North Carolina Had No Choice*, THE ATLANTIC, Feb. 22, 2019, available at <https://www.theatlantic.com/politics/archive/2019/02/north-carolina-9th-fraud-board-orders-new-election/583369/>.