



February 20, 2013

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**Re: House Bill 3 – Relating to Voter Photo ID Requirements**  
**ACLU Review of Constitutional Infirmities**

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 3, Relating to Voter Photo ID Requirements.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with information highlighting significant constitutional infirmities with the proposed Legislation.

*Given the fundamental nature of the right to vote*, we hope that the Committee will give thorough consideration to the issues set forth below. In that regard, we would be happy to work with you or the Committee to answer any questions you might have.

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**The State of Alaska Should Not Impair the Right to Vote,  
a Fundamental Right and the Bedrock of Democracy**

The primary authority for government in a democratic society is the election of representatives by the people. Citizens have a fundamental right to vote for the candidates and propositions they choose. Alaska Const., Art. I, Sec. 5; Alaska Const., Art. V, Sec. 1. Laws and regulations relating to the operation of elections and polling places must generally contain “reasonable, nondiscriminatory restrictions” on how, when, and where a voter may cast her ballot. *O’Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996). Unfortunately, **HB 3 does not meet this very basic standard, especially in the unique circumstances here in Alaska.**

HB 3 would repeal the existing voter identification statute, which allows a qualified voter at the polls to appear and present voter identification that **includes an Alaska driver’s license, a passport, a voter identification card, another state identification card, or any document (such as a utility bill) which shows the name and address of the voter.** AS 15.15.225.

HB 3 would replace these provisions with a requirement that an individual produce one piece of photo identification (such as a driver’s license) or two pieces of non-photo identification. HB 3 would also replace the existing exception allowing a person to vote if she is personally recognized by a poll worker, limiting that exception only to cases where *two* poll workers recognize the individual.

**Photo ID bills have been controversial throughout the country. Voters who are poor or members of an ethnic minority are among those most likely to lack an appropriate photo ID. This holds true in Alaska as well as other places. Further, many people living in rural areas are least likely to have or need photo ID and have the least access to state agencies and bureaucracy; they are the ones most likely to find HB 3’s new requirements most burdensome.** Some members of those communities, especially elders, may simply lack certain identity documents; some may have grown up at times and in places where the issuance of birth certificates was uncommon.

**Beyond these traditional arguments, the ACLU of Alaska would highlight the fact that the State of Alaska does not make photo identification available to a large number of rural Alaskans.** The Division of Motor Vehicles refuses to provide photo ID services to people who live in small communities. Instead, those citizens may receive identification cards with no photograph, where the words “valid without photo” appear on the license.<sup>1</sup> The ACLU of Alaska does not argue that the State must open a DMV branch in every village, but **the State’s own failure to provide equal services should bar imposing an unequal burden on those same under-served voters.**

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<sup>1</sup> See Alaska Division of Motor Vehicles, Form 480: Application for Rural Area Driver License, Permit, or ID Card, at <http://doa.alaska.gov/dmv/forms/pdfs/480form.pdf>; Alaska Division of Motor Vehicle, Guide to Rural Driving Information, at <http://www.doa.alaska.gov/dmv/akol/rural.htm#vwop>.

The State cannot allow a voter in Anchorage to appear at the polling place with only her driver's license, while barring a voter in Gambell who shows up with his driver's license, which through state policy will lack a photo. As stated above, **voting laws must be "nondiscriminatory" to meet basic constitutional review**. Since the State refuses to provide photo identification to a large minority of Alaskans, **a selective preference for photo identification is not a neutral or nondiscriminatory basis for election law**.

"[A] citizen has a constitutionally protected right to participate in elections *on an equal basis with other citizens in the jurisdiction*." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis added). If the State will not provide driver's licenses with photographs on an equal basis around the state, a photo ID preference is not a neutral one. A statute like HB 3 which erects procedural hurdles in the way of some voters and not others will be heavily scrutinized by the courts.

### **Courts Will Particularly Scrutinize the Legitimacy of a Statute Which Will Disproportionately Bar Alaska Natives from the Ballot Box**

Anyone familiar with rural, off-the-road-system villages described above will know that **those unable to get photo identification locally will overwhelmingly be Alaska Natives**. That the discriminatory preference for photo identification imposes a heavier burden on a particular racial group **will surely gain the attention of courts, and of the federal Department of Justice, in their review of the constitutionality of HB 3**, should it pass.

Although the State and other jurisdictions are engaged in ongoing litigation about the Voting Rights Act, **Alaska remains under federal supervision as one of a small number of states with a long-standing, demonstrated history of racial discrimination at polling places, in Alaska's case against Alaska Natives**. Along with several states in the Jim Crow south, Alaska maintained a literacy test for voters for years. Even after its literacy test was repealed, Alaska provided little or no language support for Alaska Native voters in many of the same small villages likely to be affected by HB 3. Litigation settled as recently as 2010 resulted in a settlement with the State, substantially reforming its treatment of Alaska Native voters in the Bethel Census Area.

In jurisdictions covered by Section Five of the Voting Rights Act (VRA), including the whole State of Alaska, changes in voting laws require pre-clearance by the United States Department of Justice. In order to obtain pre-clearance, new laws must not cause "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). The U.S. Department of Justice has recently refused to pre-clear a Texas voter ID law. *Texas v. Holder*, 12-CV-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012) (three-judge panel) (upholding refusal to pre-clear Texas law).

The Texas law failed review from the court and the Department of Justice for many reasons which attach with even more strength in the case of HB 3. The original Texas law required voters

to get a “certificate” from the local county registrar and present it at the polling place (essentially like the Alaska voter ID cards issued on registration); voters who did not have their certificate at the polling place could provide alternate ID, including expired driver’s licenses and utility bills. *Id.* at \*1.

The challenged Texas law would have replaced that law with a strict requirement: voters must present a state driver’s license, a concealed carry permit, a passport, a national citizenship certificate, or a U.S. military ID. *Id.* Voters would be allowed to get a non-driver’s ID if they lacked any of those five forms of identification, by appearing at a Texas state office. *Id.* ***In the Texas case, the court found it dispositive that, in 81 Texas counties, obtaining free photo identification would require substantial travel out of the county and burden the voter.*** *Id.* at \*13 (emphasis added); *see also South Carolina v. United States*, CIV.A. 12-203 BMK, 2012 WL 4814094, at \*2 (D.D.C. Oct. 10, 2012) (noting with approval that photo IDs were available at centers in every county in South Carolina); *id.* at \*5 (noting that voters without cars could excuse their lack of photo identification on that basis).

If merely driving out of the county could void the Texas law, the questions presented by the burden imposed on voters in Alaska – predominantly racial minorities – who must *fly* out of their home communities to reach a DMV office would present a comparatively easy question for a court.

### **HB 3 Makes No Provision for a Free Identification Card and Has the Effect of a Prohibited Poll Tax**

The State may not impose a tax on the right to vote, even if the cost is minimal. “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) (striking down as unconstitutional a \$1.50 poll tax). While a photo ID law was upheld in Indiana, the Indiana voter ID law specifically provided for *free* voter identification cards. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008). **HB 3 thus differs in *three* important ways from the Indiana photo identification law: it would be enacted in a state covered by the VRA; it would take effect in a state that denies photo ID to a substantial minority of its population; and it contains no provision for *free* photo IDs.**

All of the documentation described as proper voter identification would cost money to someone who lacks a copy thereof. For instance, a driver’s license costs \$20 in Alaska, and a non-driver ID costs \$15.<sup>2</sup> A first-time adult passport applicant would have to pay \$165.<sup>3</sup> The Division of

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<sup>2</sup> Alaska Division of Motor Vehicles, Driver’s License and Reinstatement Fees, at <http://doa.alaska.gov/dmv/akol/fees.htm>.

<sup>3</sup> U.S. Dep’t of State, Passport Fees, at [http://travel.state.gov/passport/fees/fees\\_837.html](http://travel.state.gov/passport/fees/fees_837.html).

Vital Statistics charges \$30 for a certified copy of a birth certificate.<sup>4</sup> A certified copy of an adoption order, marriage certificate, or name change order – assuming that a voter had ever been married, adopted, or changed her name – would cost \$5 each.<sup>5</sup>

Other identification is similarly available only to certain segments of the population, and whether the documents cost money may vary: tribal ID, student ID, government employee ID, or military ID. Only the state voter ID card is free, but it does not meet the requirements of section (a), since it does not include a photograph. HB 3 would put the Division of Elections in the absurd position where it could not accept its own identification card as adequate to establish a voter's identification.

Moreover, even though comparable proposals have allowed *expired* identification to be used, **HB 3 inexplicably limits the permitted identification to currently valid licenses, passports, and other identification, in a way unrelated to legitimate state interests: after all, even expired identification will tend to show who the person is.** This requirement would be stricter than the acceptance of expired licenses as voter identification in Georgia and Indiana, as well as the overturned Texas scheme. *See Texas v. Holder*, 2012 WL 3743676, at \*15 (criticizing as stricter than other identification schemes, which allowed expired licenses to be used, a Texas law which only allowed licenses that had expired within 60 days of the election to be used). The identification is being used to verify that the voter is who she says she is, not to ensure that she can drive legally.

The State cannot constitutionally charge a tax for the purpose of being a registered voter. And the State cannot bring through the back door what it cannot carry in the front door: a voter ID requirement that effectively requires voters to pay money to the state to cast a vote violates the constitution. The right to vote is and should remain free to everyone.

### **HB 3 Unreasonably Restricts the Most Reliable Means of Identification: Personal Knowledge**

In light of our history as a state of many small and intimate communities, Alaska has long allowed poll workers who recognize a voter by sight to waive the identification requirement. In a village of a few hundred people, everyone knows everyone. Demanding identification from someone you have known for decades is an exercise in silly bureaucracy.

HB 3 would require that *two* different poll workers sign off on confirmations of identity. This requirement is not calculated to deter fraud. In a polling place where one poll worker honestly

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<sup>4</sup> Alaska Division of Vital Statistics, Birth Certificates, at <http://dhss.alaska.gov/dph/VitalStats/Pages/birth/default.aspx>.

<sup>5</sup> Alaska Court System, Records, at <http://courts.alaska.gov/trialcts.htm#recs>.

recognizes a voter and one poll worker does not recognize the voter, the single poll worker's confirmation of the identity of the voter should be more than adequate. The best argument for requiring *two* poll workers to confirm the voter's identity would be to deter collusion between a fraudulent voter and a fraudulent poll worker, by requiring a second poll worker to intervene. However, in this unlikely scenario – **never documented in Alaska** - where a poll worker and a voter collude to commit voter fraud, the pair could simply choose another avenue for fraud; colluding to use a false identity card. Ultimately, the problem in the scenario above is not the law, but the hiring of a poll worker willing to commit fraud.

At the same time that HB 3 makes it *more difficult* to prove one's identity by documentation, HB 3 simultaneously makes it more difficult to prove one's identity by personal recognition; the two provisions, working in tandem, will tend to disenfranchise poor and rural voters under circumstances where the voter's identity is not in serious question. For instance, a person coming to the polling place who is personally recognized by one poll worker and who is carrying his voter ID will be unable to vote, since she meets neither of the criteria outlined by HB 3.

**Since personal recognition will be of special importance in small villages, the expansion of identification requirements and the contraction of the opportunity to waive the identification requirement will both have their most onerous consequences in small villages and in the Alaska Native community in particular.**

### **HB 3 Does Not Represent a Proportionate Response to In-Person Electoral Fraud, Which Is Virtually Non-Existent in Alaska**

The alleged purpose of the Bill is to prevent voter fraud, and to ensure that individuals who appear at the polls are the registered voters they claim to be. **However, the Alaska Division of Elections acknowledges that the problem of voter fraud is essentially non-existent in Alaska.** Ms. Fenumiai, the head of the Division stated that she was aware of only a single instance of voter fraud in which a person voted while falsely claiming to be another person.<sup>6</sup> In that case, the individual was engaged in a much larger identity theft scheme, had obtained a passport and other identification, and was working as an Anchorage police officer. Since he already possessed false identity documents, there is no reason to believe that HB 3 would have barred him from voting, even if it had been the law at the time.

The existing evidence tends to show that Alaska's current voter identification law adequately prevents voter fraud, and that HB 3 would not deter voter fraud at all. **In light of the discriminatory effects of the Bill, courts would likely strongly question whether the Bill responded to a real or imaginary threat.**

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<sup>6</sup> See Letter from Gail Fenumiai to Vicki Otte, January 17, 2013 [attached hereto as an exhibit].

**HB 3 also shows little sign of being narrowly tailored to defeating fraud, instead containing many provisions that restrict access to the ballot box in ways unrelated to fraud prevention.** As stated above, prohibiting the use of expired or otherwise invalid licenses does not meaningfully relate to preventing fraud.

Certainly, existing law arguably leaves potential avenues by which a determined person could *theoretically* accomplish voter fraud. Any teenager can also tell you that fake driver's licenses can be gotten without too much difficulty. Rafael Espinoza, the Anchorage police officer highlighted above, could also tell this Committee that a real driver's license and passport can be gotten fraudulently.

**The State's efforts to ensure the legitimacy of the voting process cannot be gauged to eliminate every possible avenue of fraud.** The State cannot make it harder to vote than to land a job as a law enforcement officer. State policy should instead reflect a careful balance of ensuring that legitimately registered voters can vote and that voter fraud is deterred. Since the State had no evidence that the prior protections were ineffective, the Legislature should decline to erect new, unneeded restrictions that will disenfranchise voters throughout the state, especially Alaska Native voters.

### **Conclusion**

We hope that the State Affairs Committee will note the multiple constitutional infirmities with the proposed language in HB 3, and take note of the negative policy implications therein.

While the ACLU of Alaska **does not contest the State's ability and duty to ensure the security of the polls**, as drafted, **HB 3 goes far outside this permissible sphere, and would systemically bar legitimate voters from the ballot box.** The State cannot change its policy from allowing voters to use free identification to imposing a fee on voter registration in the guise of new identification requirements. It cannot impose with one hand a photo ID preference at the ballot box, while depriving voters of access to that photo ID with the other.

**It cannot hope that a stricter voter ID law will pass Department of Justice review where more forgiving laws have failed.** It cannot base its complete overhaul of photo ID laws based on vague allegations or theoretical fears unsupported by evidence. Voting laws require more respect for individual voting rights.

**The issues raised above present substantial Constitutional problems and would entangle the State in lengthy, costly, and needless litigation, should HB 3 pass as currently written.**

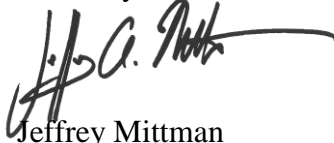
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Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman  
*Executive Director*  
ACLU of Alaska

cc: Representative Lynn Gattis, [Rep.Lynn.Gattis@akleg.gov](mailto:Rep.Lynn.Gattis@akleg.gov)  
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**STATE OF ALASKA**  
**Division of Elections**  
**Office of the Lieutenant Governor**

January 17, 2013

Ms. Vicki Otte  
CEO/Chair  
MTNT  
880 H Street, Suite 100  
Anchorage AK 99501

Dear Ms. Otte:

I have received your public records request for:

"[A]n opportunity to inspect or obtain copies of public records that demonstrate instances of voter fraud including, but not limited to, instances wherein a person not eligible to vote in Alaska attempted to or did cast a ballot and any instances in which a person attempted to or did vote using another person's identity."

My office has no records responsive to your request. The only instance that I am aware of in which a person voted using another person's identity is the case of Rafael Espinoza (Rafael Mora-Lopez), which was a widely-reported case of passport fraud. However, my office is not the holder of records relevant to the criminal investigation and prosecution of this individual.

The requested records do not exist and therefore, we must deny your request under 2 AAC 96.335(a)(1).. That regulation reads:

"A request for a public record that complies with this chapter may be denied only if . . .

(1) the record is not known to exist after the public agency makes a diligent search for it."

Because the division has no responsive records, this is technically a denial of your request. Accordingly, we are required by regulation to advise you that you have the right to administratively appeal this denial by complying with the procedures in 2 AAC 96.340. A copy of the appeal procedure is enclosed. You also have the option of obtaining immediate judicial review of this denial by seeking an injunction from the

[www.elections.alaska.gov](http://www.elections.alaska.gov)

Ms. Vicki Otte  
January 17, 2013  
Page 2 of 2

superior court under AS 40.25.125. Choosing not to pursue an injunction in superior court will have no adverse effect on your rights in the administrative appeal. An administrative appeal from the denial of a request for public records requires no appeal bond.

If you have any further questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Gail Fenumiai", written in a cursive style.

Gail Fenumiai

Enclosure: 2 AAC 96.335-350