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Testimony in Opposition to H.B. 159  
Ohio House of Representatives  
State Government and Elections Committee  
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I. Introduction

Chairman Macklenborg, Ranking Minority Member Gerberry, and other committee members and guests, thank you for allowing me to speak today. I am here to speak in opposition to HB 159, particularly because of its unconstitutional impact on voters with disabilities.

I am a Distinguished University Professor and the Heck-Faust Memorial Chair in Constitutional Law at The Ohio State University’s Moritz College of Law. I am the author of numerous books and articles on the constitutional rights of individuals with disabilities. My work was cited by the majority opinion in Tennessee v. Lane, 541 U.S. 509 (2004) when the United States Supreme Court upheld the constitutionality of Title II of the Americans with Disabilities Act. This testimony is offered solely on my own behalf, not on behalf of any other individuals or entities with which I am associated.

In order to understand the negative impact of HB 159, one must understand the current law. At present, voters are required to show one of the following identifications when they go to the polls:

1. a current and valid photo identification;
2. a copy of a current utility bill, bank statement, government check, paycheck; or
3. a government document that shows the voter’s name and current address.

Voters who do not provide one of those documents are still able to cast a provisional ballot if they provide the last four digits of their social security number. Voters who cannot provide the last four digits of their social security number are also allowed to cast a provisional ballot if they sign an affirmation swearing to their identity.

HB 159 changes these rules dramatically. Unless a voter has a religious objection to being photographed, the voter must present one of the following four kinds of identifications to vote in person:

1. a valid Ohio driver’s license;
2. a valid state identification card;
3. a valid United States military identification card; or
4. a valid United States passport.
HB 159 retains the rule that voters can cast a provisional ballot if they cannot produce one of those forms of identification. The fact that the voter can correctly identify the last four digits of his or her social security number, however, is no longer specified as an explicit factor for validating a ballot. Voters will only be able to avoid the photo ID requirement by affirming their identity if they have a religious objection to being photographed.

This Bill is unsound as a matter of policy, especially in this time of tight fiscal constraints, will have an adverse impact against the voting rights of individuals with disabilities and others, and is likely to be found unconstitutional.

II. Unsound as a Matter of Policy

A. Needless Expense

HB 159 constitutes a remarkably poor way to deter voting fraud, especially in a time of fiscal restraint, because Ohio already has a stringent voter identification requirement. The State incurs significant costs under HB 159 for no discernable positive outcome.

What are some of the expenses associated with HB 159?

First, it will require the State to engage in a massive education campaign to put voters on notice that they need to bring different identification to the polls or acquire a new kind of identification. Public college students will no longer be able to produce university identification, senior citizens will no longer be able to use their Social Security check, and visually impaired voters will no longer be able to show their utility bill as a means of identification. How does the State plan to reach all those people, and others, such as those whose native language is not English, to let them know that the identification rules have radically changed?

Second, HB 159 increases the prevalence and cost of provisional voting. Are we going to hire temporary workers following each election to process identification card requests and assess the additional provisional ballots?

Third, HB 159 establishes a process to allow those who are indigent to receive photo identification at state expense by producing an approved document at a state motor vehicle agency. This seems like a needless expense when we could just let these individuals sign an affidavit as they do in Indiana.

1 It is not clear how HB 159 complies with the HAVA requirement that requires States to verify voter information through an applicant’s driver’s license number or “the last 4 digits of the applicant’s social security number.” 42 U.S.C. § 15483(a)(5)(A)(i).
Fourth, HB 159 will create litigation expenses as Ohio once again engages in protracted litigation about our voter identification laws. After several years of litigation, Ohio recently signed a consent decree in Northeast Ohio Coalition for the Homeless v. Brunner concerning its implementation of its current voter identification law. The current consent decree should have some period of implementation before opening up this topic yet again.

And those costs are just the ones picked up by the State. For those who are not indigent and do not have one of the four forms of identification, the Bill will force them to spend the time and money to acquire a new identification in order to vote.

B. No Positive Policy Impact

This Bill makes a radical change in Ohio voting practices for no sound public policy reason. No one has raised a single example of an incident of voter fraud in Ohio that was not prevented under current law but would have been prevented if HB 159 were in effect.

While HB 159 is unlikely to have any positive effect on deterring election fraud, it will deter voting for individuals who are constitutionally entitled to vote.

The impact on young people is unconscionable. Between one-quarter and one-third of young people between the ages of 18 and 21 do not have driver’s licenses. Likewise, poor people, who are disproportionately racial minorities, are less likely to hold valid driver’s licenses or passports. For example, a Wisconsin study found “that 78% of African-American males ages eighteen to twenty-four lack a valid driver’s license.” Many of these individuals will have to go to the trouble and expense of getting a new state identification in order to vote at a polling place.

The impact will be particularly severe on voters with disabilities. The Brennan Center estimates that at least ten percent of individuals with disabilities who are eligible to vote do not have a government-issued identification, a figure that I suspect is low. This Bill requires them to procure a state-issued identification only if they want to go to the polling place to vote.

The Help America Vote Act (HAVA) took the historic step of requiring all polling places to be accessible to individuals with disabilities and provided states with

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2 Spencer Overton, Voter Identification, 105 Michigan L. Rev. 631, 658 (2007) (noting that “while the rate of unlicensed individuals ages twenty-five to sixty-nine hovered between 5% and 11% in 2003, the percentages of older and younger Americans who lack a driver’s license were much higher;” 32.5% of 18 year olds were found to be unlicensed)

3 Id. at 660.

4 See id. at 659 (2007) (providing various statistics by age about which groups in society are unlikely to have a nonexpired government-issued photo identification).
resources to implement that requirement. Individuals with disabilities argued successfully to Congress that voting at one’s polling place is an important act of citizenship. Hence, states can no longer force voters with disabilities to vote by absentee ballot because polling places are inaccessible.

Further, HAVA required that voters with visual impairments be provided with a confidential and independent means of voting at their polling places. Because absentee voting is notoriously nonconfidential for voters with visual impairments, that was a change of enormous importance to these voters.

HB 159 takes an enormous step backwards for many voters with disabilities because it creates a new barrier to voting at polling places – a documentation barrier rather than a physical barrier. This rule will deter many of these voters from using the polling place to vote.

Some may argue that HB 159 creates an inconsequential burden for voters who do not currently have one of the accepted forms of identification and wish to vote at their polling place – they can simply acquire a state-issued identification. By definition, though, this group of voters does not have a driver’s license so they are dependent on public transportation or friends to drive them to the state office to get the identification. And, often more importantly, many voters with disabilities find such trips to be difficult and exhausting. They may enjoy entering the public sphere to vote (or simply consider it their public duty to vote despite their exhaustion) but find the process of acquiring a government identification to be beyond their energy level.

HB 159 is modeled after the Indiana legislation that was upheld by the United States Supreme Court in Crawford v. Marion County Election Board, 553 U.S. 181 (2008). The Indiana law, however, had an exception for those living and voting in a state-licensed facility such as a nursing home. See Ind. Code Ann. § 3-11-8-25.1(e)(West Supp. 2007). HB 159 contains no such exception. Thus, residents of nursing homes, who often do not have a valid driver’s license, will have to acquire a state-issued identification to vote at a public polling place. That step is unduly burdensome and serves no discernable public interest.

III. HB 159 Violates Federal Law

Although the United States Supreme Court upheld Indiana’s less restrictive voter identification law in Crawford v. Marion County Election Board, 553 U.S. 181 (2008) in a facial challenge, it would likely strike down HB 159 in an “as applied” challenge.

Justice Stevens’ plurality opinion in Crawford, which was joined by Chief Justice Roberts and Justice Kennedy, acknowledged that a voting law that creates even a modest burden on voters “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” Id. at 191. Justices Souter and Ginsburg concluded that a state “must make a particular, factual showing that
threats to its interests outweigh the particular impediments it has imposed.” *Id.* at 209 (Souter and Ginsburg, dissenting). Justice Breyer asked “whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)” *Id.* at 237 (Breyer, dissenting).

The plurality opinion in *Crawford* concluded that Indiana could meet that burden in a facial challenge, because of some unique aspects of its voting system. Indiana acknowledged that it had an “antiquated and inefficient” election in which its election rolls had a large number of names of persons who were either deceased or no longer living in Indiana. *Id.* at 191. In 2004, the Department of Justice determined that 19 of 22 of its counties had registration totals exceeding 100% of the 2004 voting-age population so that the voters had reason to lack confidence in the integrity of the election system. *Id.* at 192. In response, Indiana put in place a voter identification system that allowed the indigent as well as those with religious exemptions to execute an appropriate affidavit rather than secure a photo identification; it also exempted those who lived in and voted in nursing homes from the ID requirement, thereby minimizing the impact against the poor and the elderly.

Ohio is distinguishable from Indiana. Ohio already has a voter identification system and can demonstrate no state interest that is met under HB 159 that is not met under current law. Further, unlike Indiana, Ohio has not taken steps to protect those who live in nursing homes from the disparate impact of this law. Thus, its state interest is weaker and the burden on voters is higher, failing the requisite balancing test in an “as applied” challenge.

IV. Conclusion

HB 159 reflects an enormous waste of state resources to address a non-problem. Ohio already has a stringent voter identification law to deter fraud. It already has a consent decree to ensure that law is fairly administered.

Ohio has also taken important steps in recent years to make public polling places more accessible to individuals with disabilities. HB 159 creates new barriers to access for individuals with disabilities without the achievement of any discernable public good.

Please vote against HB 159 to safeguard the constitutional right to vote for our citizens with disabilities.