



Sent Via Email

October 21, 2020

County Supervisors of Elections
State of Florida

Re: Voter Intimidation and Frivolous Voter Challenges

To all Supervisors of Elections:

On behalf of the NAACP Legal Defense and Educational Fund, Inc., the Brennan Center for Justice at New York University School of Law, Giffords Law Center to Prevent Gun Violence, SPLC Action Fund, League of Women Voters of Florida, and Common Cause Florida, we urge you to ensure that all Election Boards are prepared to respond to voter intimidation and frivolous voter challenges at polling places during early voting and on Election Day. This guidance is especially critical in light of widespread media reports indicating organized efforts to intimidate and harass voters at the polls this fall.¹ We share your goal of conducting an orderly and safe election and appreciate the demands faced by your staff. We are available to provide any assistance you may request.

1. Supervisors of Elections (“SOEs”) and Election Boards Must Be Prepared to Identify and Respond to Voter Intimidation at Polling Places.

Voter intimidation is a serious crime under both federal law and Florida law, and numerous state attorneys general have committed to prosecute anyone who engages in voter intimidation this year.² SOEs and election boards have an obligation to monitor and prevent intimidating conduct. Florida law confers election boards with “full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes.” Fla. Stat. § 102.031(1). All clerks and inspectors should be trained and instructed to:

- identify voter intimidation, with attention to each of the aggravating factors listed below
- immediately order any individuals or organizations engaging in intimidating conduct to desist and leave;

- rely on law enforcement only as a last resort; and
- carefully document and report any instances of potential voter intimidation.

a. Demonstrations Outside Polling Places Could Constitute Voter Intimidation.

Intimidating conduct is based on an objective assessment of the conduct's effect and does not require intent on the part of the individual engaging in the conduct to be unlawful.³ For this reason, conduct that may appear to be routine political activity and that may even comply with Florida's electioneering rules, such as demonstrations outside of the 150-foot no-solicitation zone,⁴ may actually constitute unlawful voter intimidation. In fact, this zone will provide very little protection to voters this year, because lines may extend far beyond 150 feet as voters are instructed to maintain at least six feet of distance while waiting in line.⁵ There are a number of aggravating factors that can make such demonstrations especially concerning and increase the risk of unlawful voter intimidation:

- Failure to wear masks or observe social distancing guidelines. If voters are forced to walk in close proximity to demonstrators, they may be forced to choose between their health and their right to vote.
- Open association with hate groups, including demonstrators waving Confederate flags.⁶
- Physically blocking voters from accessing a polling place, or impeding traffic flow.⁷
- Carrying or brandishing firearms or other weapons.⁸
- Direct confrontation with prospective voters or others,⁹ the use of raised voices or insulting, offensive, or threatening language, or other intimidating conduct including photographing voters, copying license plates, and aggressive exit polling.
- Wearing uniforms or attire that suggests demonstrators are engaging in official functions.¹⁰ This is a significant threat today, because many hate groups have begun wearing standardized attire, law enforcement or security uniforms, and even paramilitary uniforms.¹¹

This year, there have already been reports of demonstrations that might constitute unlawful voter intimidation. For example, in Fairfax County, Virginia, a group of demonstrators disrupted voting (causing election officials to move voters inside), as they waved campaign flags, chanted, yelled, and honked horns as voters entered an early voting site, at one point reportedly forming a line that voters had to walk around in order to access their polling place.¹² Similarly, in Chatham County, North Carolina, demonstrators outside of a polling place displayed flags supporting groups including the Confederacy and the League of the South (designated a violent hate group by the Southern Poverty Law Center), and reportedly yelled slurs at voters as they attempted to access their polling place.¹³ There were reports of intimidation in Florida in the 2016 general election,¹⁴ and SOEs and election boards must be prepared for voter intimidation to occur this year with even greater intensity and severity.

b. Election Boards Should Only Involve Law Enforcement as a Last Resort.

Law enforcement presence at poll sites may intimidate voters. To protect against this risk, Florida law severely limits law enforcement presence at polling places. Law enforcement officials must have permission of the clerk or a majority of the inspectors to enter a polling room. Fla. Stat. § 102.031. Law enforcement officers are also barred from being designated as poll watchers. Fla. Stat. § 101.131.

However, if there is a possibility that demonstrations outside of polling places could become violent, or if individuals or organizations engaging in voter intimidation refuse orders to desist and leave, it may become necessary and appropriate for clerks and inspectors to ask law enforcement to intervene. You should train clerks and inspectors to only call law enforcement in these narrow circumstances. In advance of the election, you should also identify and publish the name and contact information for local law enforcement officials in your county who will be responsible for preventing voter intimidation during the early voting period and on Election Day.

2. Election Boards Must Enforce Rules Concerning Poll Watchers and Voter Challenges.

Given a highly charged politicized environment and the stated intentions of various political groups to mount organized campaigns of poll watching and voter challenges, Florida voters may be subjected to widespread and frivolous voter challenges this year. We urge you to ensure that election boards are trained to (a) enforce rules governing poll watchers; and (b) identify and respond to frivolous voter challenges. We make the following recommendations based on the Brennan Center's extensive research on ballot-security operations in general and voter challenges in particular.¹⁵

a. Election Boards Must Be Trained on the Rules Governing Poll Watchers.

We urge you to provide guidance to election boards addressing, at a minimum, the following rules governing poll watchers:¹⁶

- Each political party, candidate, and applicable political committees may only have one poll watcher at a time in each polling room or early voting area.
- Each election board will receive a list of poll watchers approved for its polling place or early voting area from the SOE and is not permitted to admit any poll watchers that are not on such list.
- Poll watchers must wear their official badges, identifying them by name, while in polling rooms or early voting areas.
- Poll watchers must not obstruct the orderly conduct of the election.
- Poll watchers must not come closer to the officials table or voting booths than is reasonably necessary to perform the poll watcher's functions.

- Poll watchers must not interact with voters.
- Poll watchers may inspect the list of electors who have voted, but access to this list may be regulated to ensure that the inspection does not unreasonably interfere with the operation of the polling place.¹⁷
- Poll watchers must wear PPE and respect social distancing practices.

You should direct election boards to immediately eject poll watchers if they are not in total compliance with each of these requirements. Moreover, even if poll watchers are in compliance with these requirements, if their presence or conduct is causing any delay or otherwise disrupting the voting process, they should be directed to leave.

b. Election Boards Must be Vigilant in Identifying and Responding to Frivolous Voter Challenges.

Frivolous voter challenges are a serious crime under Florida law.¹⁸ Because frivolous challenges can be a form of voter intimidation and discriminatory, they also violate a wide range of additional federal and state laws.¹⁹ For these reasons, election boards must be equipped to identify and respond to frivolous challenges. Accordingly, we urge you to train all election boards on (i) how to identify frivolous challenges and (ii) how to respond to frivolous challenges, as described below:

How to identify frivolous challenges:

- A challenge must be based upon actual evidence that a person is or may be ineligible, not upon mere suspicion or discriminatory stereotypes.
- Evidence of a past conviction, except for murder or felony sexual offense, is a per se insufficient reason to challenge a voter and constitutes a frivolous challenge.²⁰
- Challenges, including those based upon citizenship, may never be based upon race, national origin, appearance, surname, language, or religion. The racial or ethnic composition of a district or polling place may never form any part of a decision to mount challenges in that district or polling place.²¹
- A challenge is frivolous and discriminatory if it is based in whole or in part on evidence gathered from mailings targeted at individuals living in precincts where the majority of voters are members of racial or ethnic minorities,²² voter challenge lists that over-represent members of racial or ethnic minorities,²³ or factors closely related to a voters' race, ethnicity, or national origin.
- Challenges cannot be based solely on: (i) returned mail; or (ii) data discrepancies between the voter registration database and other state, federal, or third-party lists.²⁴ Accordingly, information such as eviction notices or a list of homes subject to foreclosure proceedings are not sufficient bases for a challenge.

How to respond to frivolous challenges:

- Frivolous challenges cannot serve as a basis to require a voter to cast a provisional ballot. Any frivolous challenge must be rejected by the election board.
- Any individual, including any poll watcher, who makes a frivolous challenge must immediately be ejected from the polling place.
- SOEs must maintain and analyze records of challenges to detect—and refer to the appropriate prosecutors—challenges that violate the federal or state civil rights or election laws.
- SOEs and election boards should cooperate with state and federal law enforcement in investigating any individual who engages in frivolous challenges.
- To the extent a challenged voter casts a provisional ballot, that ballot must be counted unless the local canvassing board is satisfied that the challenger has proven the voter's ineligibility on proper grounds and by affirmative, clear, and convincing evidence.

We included a one-page guide for poll workers at the end of this letter, which we ask that you disseminate to election boards along with the guidance in this letter. We ask that you respond in writing by October 26, 2020 to inform us of the steps you will take to address the issues in this letter and whether we can provide any support or assistance to you.

Sincerely,

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NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that prohibit voter discrimination, intimidation, and suppression and increase access to the electoral process.

The Brennan Center for Justice at New York University School of Law

The Brennan Center for Justice at New York University School of Law is an independent, nonpartisan law and policy organization that works to reform, revitalize, and when necessary, defend our country’s systems of democracy and justice.

Giffords Law Center to Prevent Gun Violence

For over 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America by researching, drafting, and defending the laws, policies, and programs proven to save lives from gun violence.

SPLC Action Fund

The SPLC Action Fund is dedicated to fighting hate and bigotry and to seeking justice in our society. Using lobbying, grassroots organizing, and other forms of advocacy, the SPLC Action Fund works toward the day when the ideals of equal justice and equal opportunity will be a reality for everyone.

League of Women Voters of Florida

The League of Women Voters of Florida works to register voters, provide voters with nonpartisan election information through voter guides as well as candidate forums and debates. The League encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

Common Cause

Common Cause is a nonpartisan, grassroots organization dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. Learn more at www.CommonCause.org.

AT A GLANCE: Rules on Voter Intimidation, Poll Watchers, and Voter Challenges

Voter intimidation is unlawful and a *serious crime* under federal and Florida state law. Demonstrations outside of polling places can constitute voter intimidation, especially if they include any of these aggravating factors:

- Unwanted close contact that could risk of exposure to COVID-19.
- Open association with hate groups (including Confederate flags).
- Physically blocking voters' access to the poll site (including by car parade).
- Brandishing firearms or other weapons.
- Raised voices, insulting, offensive, or threatening language, or other intimidating conduct including photographing voters, copying license plates, and aggressive exit polling.
- Uniforms or attire suggesting an official function or association with paramilitary/militia groups.

Demonstrations can constitute unlawful voter intimidation even if they are located outside of Florida's 150-foot "no-solicitation" zone.

As a Poll Worker, it is your obligation to order anyone engaging in voter intimidation to desist and leave.

Only involve law enforcement if demonstrations outside of polling places could become violent or if demonstrators engaging in intimidation refuse your order to leave.

Poll watchers are subject to extensive regulations that must be followed carefully:

- Each political party, candidate, and applicable political committees may only have one poll watcher at a time in each polling room or early voting area.
- Each election board will receive a list of poll watchers approved for its polling place or early voting area from the SOE and is not permitted to admit any poll watchers that are not on such list.
- Poll watchers must wear their official badges, identifying them by name, while in polling rooms or early voting areas.
- Poll watchers must not come closer to the officials table or voting booths than is reasonably necessary to perform the poll watcher's functions.
- Poll watchers must not interact with voters or obstruct the orderly conduct of the election.
- Poll watchers may inspect the list of electors who have voted, but access to this list may be regulated to ensure that the inspection does not unreasonably interfere with the operation of the polling place.
- Poll watchers must wear PPE and respect social distancing practices.

As a Poll Worker, it is your obligation to eject any poll watcher not in total compliance with the law.

Voter challenges must be based upon actual evidence that a person is or may be ineligible, not upon mere suspicion or discriminatory stereotypes. Examples of frivolous challenges include the following:

- Challenges based solely on evidence of a past felony conviction, except for murder or felony sexual offense.
- Challenges based on race, national origin, appearance, surname, language, or religion; racial or ethnic composition of a district or polling place.
- Challenges based on voter challenge lists that over-represent members of racial or ethnic minorities or factors closely related to a voters' race, ethnicity, or national origin.
- Challenges based solely on returned mail or data discrepancies between the voter registration database and other state, federal, or third-party lists (including eviction or foreclosure notices)

As a Poll Worker, it is your obligation to reject any frivolous challenge, allow any voter subject to a frivolous challenge to vote a regular ballot, and immediately eject any individual (including a poll watcher) who makes a frivolous challenge.

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- ¹ See, e.g., Jane C. Timm, *GOP recruits army of poll watchers to fight voter fraud no one can prove exists*, NBC News (June 9, 2020), <https://www.nbcnews.com/politics/donald-trump/gop-recruits-army-poll-watchers%20fight-voter-fraud-no-can-n1217391>; Rosalind S. Helderman et al., *Trump's suggestion of deploying law enforcement officials to monitor polls raises specter of voting intimidation*, Wash. Post (Aug. 21, 2020) https://www.washingtonpost.com/politics/trumps-suggestion-of-deploying-law-enforcement-officials-to-monitor-polls-raises-specter-of-intimidation/2020/08/21/4ff6407a-e3bb-11ea-8dd2-d07812bf00f7_story.html; *Local officials should prepare against Trump-inspired voter intimidation*, Washington Post (Oct. 5, 2020), https://www.washingtonpost.com/opinions/local-officials-should-prepare-against-trump-inspired-voter-intimidation/2020/10/05/867709ea-0454-11eb-b7ed-141dd88560ea_story.html; Brentin Mock, *How Voter Intimidation Could Get Uglier*, Bloomberg (Oct. 7, 2020) <https://www.bloomberg.com/news/articles/2020-10-07/how-voter-intimidation-could-become-violent-in-2020>.
- ² See Michael Wines, *After Trump's call for poll watchers, officials in three states pledge to prosecute any who try to intimidate voters*, N.Y. Times, <https://www.nytimes.com/live/2020/10/06/us/trump-vs-biden#after-trumps-call-for-poll-watchers-officials-in-three-states-pledge-to-prosecute-any-who-try-to-intimidate-voters>. Federal law provides, “Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for [federal office] . . . shall be fined under this title or imprisoned not more than one year, or both.” 18 U.S.C. § 594. Florida law provides, “A person may not directly or indirectly use or threaten to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual to: (a) Vote or refrain from voting; (b) Vote or refrain from voting for any particular individual or ballot measure; (c) Refrain from registering to vote; or (d) Refrain from acting as a legally authorized election official or poll watcher.” § 104.0615, Fla. Stat.
- ³ See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 204 (2015) (explaining that “Section 11(b) [of the Voting Rights Act] does not require a plaintiff to make any showing with regard to the defendant's intent.”).
- ⁴ Under Florida law, “[n]o person, political committee, or other group or organization may solicit voters inside the polling place or within 150 feet of the entrance to any polling place[.]” Fla. Stat. § 102.013(4)(a).
- ⁵ The CDC has urged election officials to “[e]ncourage voters to stay at least 6 feet apart.” See *Considerations for Election Polling Locations and Voters*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. Only 25 voters would be able to stand in line within the 150-foot no-solicitation zone if they are each spaced 6 feet apart.
- ⁶ The Southern Poverty Law Center has identified 67 hate groups that were active in Florida in recent years. See *Groups in Florida*, Southern Poverty Law Center, <https://www.splcenter.org/states/florida>.
- ⁷ This conduct may also violate Fla. Stat. § 316.2045, which makes it a misdemeanor to “obstruct the free, convenient, and normal use of any public street, highway, or road[.]”
- ⁸ Florida law prohibits the open carrying of firearms, and any armed demonstrators are likely in violation of Fla. Stat. § 790.053(1), in addition to engaging in unlawful voter intimidation. Florida law allows for the concealed carry of firearms only by individuals licensed to do so, but even these licenses do not permit the carrying of firearms into polling places. Fla. Stat. § 790.06(12)(a)(6).
- ⁹ This may include election officials, individuals engaging in lawful electioneering, non-partisan election observers, poll watchers, or others.
- ¹⁰ See *DNC v. RNC*, 671 F. Supp. 2d 575, 580 (D. N.J. 2009) (prohibiting polling place election activities by individuals wearing attire that “creates the appearance that the individuals are performing official or government functions, including . . . wearing public or private law enforcement or security uniforms, using arm bands, or carrying or displaying guns or badges”).
- ¹¹ See, e.g., Tasneem Raja, *Decoding the Language of Extremist Clothing*, Topic (Oct. 2017), <https://www.topic.com/decoding-the-language-of-extremist-clothing>.

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- ¹² See, e.g., Nick Corasaniti & Stephanie Saul, *Trump Supporters Disrupt Early Voting in Virginia*, Fairfax Times (Sept. 21, 2020), http://www.fairfaxtimes.com/articles/trump-supporters-disrupt-early-voting-in-virginia/article_be07dda0-fc55-11ea-b8ab-4b39670e4fe8.html; Drew Wilder, *Dems Accuse Trump Supporters of Voter Intimidation in Fairfax County* (Sept. 21, 2020), <https://www.nbcwashington.com/news/local/dems-accuse-trump-supporters-of-voter-intimidation-in-fairfax-county/2424398/>.
- ¹³ See *Letter Calling for Emergency Action Regarding Voter Intimidation* (Feb. 24, 2020), <https://www.naacpldf.org/wp-content/uploads/2-24-20-Coalition-Letter-to-SBOE-re-Voter-Intimidation-in-Chatham-County.pdf>.
- ¹⁴ See William Wan, *Voting issues in Florida: Intimidation reported at polling places*, Wash. Post (Nov. 8, 2016), <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-updates-on-the-2016-election-voting-and-race-results/voting-issues-in-florida-intimidation-reported-at-polling-places/> (“Voters in Florida, a key battleground, have reported multiple accounts of voters saying they have encountered aggressive, intimidating behavior”).
- ¹⁵ See, e.g., Wendy Weiser & Adam Gitlin, *Dangers of “Ballot Security” Operations: Preventing Intimidation, Discrimination, and Disruption*, Aug. 31, 2016, https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Ballot_Security_Voter_Intimidation.pdf; Wendy Weiser & Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is and What the Law Says*, Aug. 29, 2012, http://www.brennancenter.org/sites/default/files/legacy/Democracy/Ballot_Security_Voter_Suppression.pdf; Nicolas Riley, *Voter Challengers*, Aug. 30, 2012, http://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.
- ¹⁶ Fla. Stat. § 101.131.
- ¹⁷ Fla. Stat. § 101.23.
- ¹⁸ Fla. Stat. §§ 101.111(2), 104.0615(3)(a).
- ¹⁹ Voter challenges that constitute voter intimidation also violate a wide range of federal and Florida laws, including 18 U.S.C. § 594, Section 11(b) of Voting Rights Act of 1965, the KKK Act, and Fla. Stat. § 104.0515(3). Discriminatory challenges are illegal for additional reasons. The Fourteenth and Fifteenth Amendments to the U.S. Constitution protect the right to vote from discrimination at the hands of state officials, and when state officials give effect to discriminatory challenges mounted by non-state actors, they may violate a voter’s right to equal protection of the law, regardless of whether they themselves have a discriminatory purpose. Cf. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Civil Rights Act of 1871, 18 U.S.C. § 242, 42 U.S.C. § 1983, and the Voting Rights Act of 1965, 52 U.S.C. §§ 10301, 10303, 10503, prohibit state officials from discriminating against voters based on race, ethnicity or other related characteristics. If two or more individuals agree to challenge voters on the basis of these characteristics—or for any frivolous reason—they violate the civil rights conspiracy laws. 18 U.S.C. § 241; 42 U.S.C. § 1985(3); see *United States v. Lanier*, 520 U.S. 259, 264 (1997).
- ²⁰ The Florida Constitution provides for automatic restoration of voting rights to persons convicted of all other felony offenses once they complete all terms of their sentence. Fla. Const. art. VI, § 4. Thus, Florida has noted that a person with such a conviction is eligible to vote unless there is “credible and reliable” information that the person has not completed all terms of their sentence. Florida Division of Elections, *Constitutional Amendment 4/Felon Voting Rights*, <https://dos.myflorida.com/elections/for-voters/voter-registration/constitutional-amendment-4felon-voting-rights/>.
- ²¹ See *id.* at 580.
- ²² See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 579 (D.N.J. 2009) (“*DNC v. RNC*”); *United States v. Long Cty., Georgia*, No. CV 206-040, 2006 WL 8458526, at *2 (S.D. Ga. Feb. 10, 2006) (consent decree requiring defendants to provide to each person who wishes to challenge the right to vote of any elector and to each person who wishes to challenge the qualifications of any elector on the list of registered voters a notice that states: “A challenger must have a legitimate non-discriminatory basis to challenge a voter. Challenges filed on the basis of race, color, or membership in a language-minority group are not legitimate bases for attacking a voter’s eligibility.”).

²³ See *DNC v. RNC*, 671 F. Supp. 2d at 582.

²⁴ These criteria are unreliable indicators of voter ineligibility and, if used as the sole basis for a challenge, could lead to disenfranchisement of eligible voters. Moreover, upholding a challenge based on unreliable data may run afoul of the Voting Rights Act's prohibition against "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). See generally *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006); *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004); *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995).