



May 18, 2012

T. Christian Herren
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530

Re: Comment: Alabama Section 5 Submission No. 2011-537 (Act No. 2011-535 or House Bill 56)

Dear Mr. Herren:

For the reasons set forth in this letter, the American Civil Liberties Union Voting Rights Project and the American Civil Liberties Union of Alabama urge the U.S. Department of Justice to deny preclearance to Act No. 2011-535 (codified at Alabama Code 31-13-28) under Section 5 of the Voting Rights Act, because it will have a disparate negative impact on minority voters in Alabama. State of Alabama, Office of the Atty. Gen., Submission under Section 5 of the Voting Rights Act of 1965 Act No. 2011-535 (citizenship verification for voter registration) (Apr. 21, 2012) (hereinafter, "Submission"). The bill originated as House Bill 56, so we refer to it as "HB 56," as it is commonly known. Enacted on June 2, 2011 and signed by Gov. Robert Bentley on June 9, 2011, HB 56 requires voters who submit a voter registration application to provide documentary proof of citizenship. Section 29(a) of the law states: "Applications for voter registration shall give voter eligibility requirements and such information as is necessary to . . . enable the relevant election officer to assess the eligibility of the applicant and to administer voter registration" Ala. Code § 31-13-28(a). In turn, Section 29(c) provides that: "[T]he county election officer or Secretary of State's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." *Id.* § 31-13-28(c). Subsection (k) lists the various "satisfactory" forms of documentary proof of U.S. citizenship, including but not limited to: a driver's license or state ID card, a birth

certificate, a U.S. passport, and naturalization documents or the number on the certificate of naturalization. *Id.* § 31-13-28(k).¹

Section 5 of the Voting Rights Act requires certain covered jurisdictions to preclear all voting changes by filing an administrative submission with the U.S. Department of Justice or by suing for declaratory relief in the U.S. District Court for the District of Columbia. The submitting authority, in this case Alabama, bears the burden to demonstrate that the new “qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a covered language minority. 42 U.S.C. § 1973c(a). HB 56 manifestly effects a “change concerning registration.” *See* 28 C.F.R. § 51.13(b). Any voting change “that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) . . .” *Id.* § 1973c(b). Therefore, any voting change must be evaluated to see if it is either discriminatory in purpose or retrogressive in effect. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 446 (2006); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 476-80 (1997). It is the state’s burden to demonstrate that the proposed change does not violate either prong of Section 5. *See U.S. v. Dallas County Comm’n, Dallas County, Ala.*, 850 F.2d 1433, 1437 (11th Cir. 1988).

According to the 2010 Census, African Americans constitute 26.2 percent of Alabama’s total population and 24.9 percent of the state’s voting-age population.² Latinos comprise 3.2 percent of the state’s voting-age population, but the 2010 1-Year Estimates reveal that only 39.7% of Latinos of voting age are U.S. citizens and therefore eligible voters.³ HB 56’s proof-of-citizenship requirement will have an adverse and

¹ If a registrant does not have any of the accepted forms of proof of citizenship, then, according to subsections (l) and (m), she can submit alternative evidence of citizenship to a State Election Board (“SEB”), consisting of the Lieutenant Governor, the Attorney General, and the Secretary of State. Regulation 820-2-2-23 (Submission, Ex. H, at 15-18 of 35) regulates this procedure, which sets forth a preponderance-of-the-evidence standard, but gives little else in the way of guidance on whether the SEB should issue the Certificate of Citizenship for Voting Purposes. (*Id.* at 14-15 of 35, Ala. Admin. Code r. 820-2-2-22; *see also id.*, Ex. P). However, HB 658, which was recently introduced in the Alabama State Legislature, amends Section 29 (Ala. Code § 31-13-28) to eliminate the SEB and vest the appeals process and authority to grant Certificates of Citizenship for Voting Purposes in the local registrars. (Submission, at 12). As Alabama’s submission notes, “[a]n adverse determination by the SEB can only be set aside by winning an action under 8 U.S.C. § 1503.” (*Id.*, Ex. H, at 17-18 of 35).

² U.S. Census Bureau, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010, 2010 Census Redistricting Data (Public Law 94-171) Summary File [QT-PL].

³ *Id.*; U.S. Census Bureau, 2010 ACS 1-Year Estimates, Sex by Age by Citizenship (Hispanic or Latino) [B05003I]. Given the flight of Latinos from the State of Alabama since the implementation of HB 56, this citizenship rate may have increased, as the total number of Latinos decreased. *See, e.g.*, A tough new Alabama law targets illegal immigrants and sends families fleeing, WASH. POST, Oct. 8, 2011, http://www.washingtonpost.com/local/a-tough-new-alabama-law-targets-illegal-immigrants-and-sends-families-fleeing/2011/10/07/gIQA4ZuPWL_story.html?hpid=z2; Alabama immigration law sends Hispanic

disproportionate impact on racial minorities, particularly African-Americans and Latinos, in Alabama.

A. The Proposed Voting Change Violates Section 5's Non-Retrogression Standard

The following documents will satisfy the proof-of-citizenship requirement for registration under HB 56: (1) a driver's license or non-driver's identification card with a notation of U.S. citizenship, issued by the Alabama Department of Public Safety ("DPS") or another state's equivalent agency; (2) a birth certificate; (3) U.S. passport; (4) naturalization documents or the number of the certificate of naturalization; (5) other documents or methods of proof of U.S. citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952, and amendments thereto; (6) a Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number; (7) a consular report of birth abroad of a citizen of the U.S.; (8) a certificate of citizenship issued by U.S. Citizenship and Immigration Services; (9) a certification of report of birth issued by the U.S. Department of State; (10) an American Indian card, with KIC classification, issued by the U.S. Department of Homeland Security; (11) a final adoption decree showing name and U.S. birthplace; (12) an official U.S. military record of service showing U.S. birthplace; and (13) an extract from a U.S. hospital record of birth created at the time of the applicant's birth indicating U.S. birthplace. Ala. Code § 31-13-28(k). For many U.S. citizens born in this country, this is in fact a quite limited list of items, and it will disproportionately force minority voters to acquire certified copies of their birth certificates.

As shown below, this law will have a disparate impact on minority voters, and it is therefore retrogressive under Section 5. However, in its submission, Alabama made absolutely no effort to analyze the impact of the law on minority voters in Alabama, instead giving the following bald and self-serving answer to DOJ's standard question on racial impact: "None. Act No. 2011-535 is racially and language minority neutral on its face." (Submission, at 19). This explanation makes no assertion regarding whether the law has a disproportionate impact on racial and ethnic minorities. Accordingly, the state has failed to meet its burden under Section 5 of the Voting Rights Act.

1. A Certified Copy of A Birth Certificate

For citizens of voting age born in the United States, the birth certificate is the irreducible minimum of documentary proof that must be presented to satisfy HB 56's requirement, if they do not already possess one of the alternatives on the statutory list above. If the native-born applicant has never held a state ID card or driver's license, both of which require proof of U.S. citizenship to secure, that leaves only a certified copy of one's birth certificate, a hospital certificate, or a U.S. Passport, which also bears a proof-of-citizenship requirement and is itself one of the other accepted forms of proof of citizenship under HB 56. As described in more detail in the subsections below, these

families fleeing, WASH. POST, http://www.washingtonpost.com/national/alabama-immigration-law-sends-hispanic-families-fleeing/2011/10/08/gIQAeH3VWL_gallery.html#photo=1.

alternatives are in fact illusory, since original applications for these items all require proof of citizenship—for native-born citizens, a birth certificate, and for those born abroad, a certificate of naturalization, a certificate of citizenship, or similar documents.

Thus, for registration under Alabama Code § 31-13-28, voters born in the U.S. will be effectively required to obtain a certified copy of a birth certificate, if they do not hold a driver's license, state ID card, or U.S. Passport. The Alabama Department of Public Health's ("DPH") Center for Health Statistics charges \$15.00 to search for a birth certificate, which includes one certified copy of the birth certificate or a "Certificate of Failure to Find."⁴ Alabama Code § 31-13-28(n) waives this fee for persons at least 17 years of age who certify that they need a birth certificate for voter registration, but those born in other states will be forced to pay the poll tax. (*See also* Submission, Ex. H, at 5-6 of 35, Ala. Admin. Code r. 820-2-2-.18, Affidavit and Application for Certification of Free Alabama Birth Record for Voter Registration Use). Other states charge fees ranging from \$5.00 to \$30.00, but most are in the range of \$15.00 to \$20.00.⁵ While Alabama's birth certificate application does not have an identification requirement and simply threatens prosecution for false procurement, state and local vital records offices across the country impose identification requirements, sometimes even requiring government-issued photo identification. For instance, in Georgia, an applicant must submit a copy of a driver's license, state ID card, or employee ID card along with the birth certificate application—according to the application, there are no other options.⁶ Photo ID is also required by the Mississippi State Department of Health.⁷ For those voters who are able to acquire certified copies of their birth certificates, they will have incurred substantial costs that would have been unnecessary if not for this law. For voters without photo ID and no means to acquire such without a certified copy of their birth certificate, they will be stuck in a Catch-22 and simply give up on voting.

Minority voters in Alabama will be disproportionately burdened by this requirement to procure and present a birth certificate. Elderly minorities are particularly at risk and disproportionately lack records of their birth vis-à-vis their white counterparts, a vestige of Jim Crow practices that caused a significantly disproportionate share of non-white births to occur at home and not in a hospital. A study published in 1950 concluded that 94.0 percent of white births were registered nationwide, whereas 81.5 percent of non-

⁴ Alabama Dep't of Public Health, Center for Health Statistics, Mail-In Vital Records Application, <http://adph.org/vitalrecords/assets/hs14eng.pdf>.

⁵ Centers for Disease Control and Prevention, National Center for Health Statistics, Where to Write for Vital Records, <http://www.cdc.gov/nchs/w2w.htm>.

⁶ Georgia Dep't of Public Health, Requirements for Vital Records Application, <http://www.health.state.ga.us/programs/vitalrecords/birth.asp>.

⁷ The list includes only the following items: driver's license with a photo, a state-issued photo ID, an employment ID, a school, college, or university ID, a U.S. military ID, a tribal ID, an alien registration or permanent residence card, a temporary resident card, and a U.S. passport. Miss. State Dep't of Health, Application for Certified Copy of Birth Certificate, http://msdh.ms.gov/msdhsite/_static/31,1240,109,62.html.

white births were registered.⁸ While the racial disparity in birth registration was relatively small for in-hospital births (98.6 percent for white births to 96.3 percent for non-white births), even in rural areas, these racial disparities were much more pronounced for out-of-hospital births.⁹ The study concluded: “In the non-white group, close to 23% of the births occurring out of hospitals were unregistered.”¹⁰ That was compared to 11.8 percent of the white births going unregistered.¹¹ As the report noted, the disproportionate lack of registration for out-of-hospital births had a significant disparate impact on non-whites, because they were more likely to be born at home: “This was particularly serious, since about three in four of the non-white infants were born at home.”¹² The racial disparities increased in smaller urban areas and rural areas. While a 7.9 percentage point racial disparity in birth registration completeness held for urban areas as a whole, that figure nearly doubled to 14 percentage points for urban areas with 2500 residents or less and, in rural areas, white birth registration exceeded non-white birth registration by 12.4 percentage points.¹³

In the Jim Crow era, which lasted well into the 20th Century, hospitals, particularly in the South, denied black patients admission. *See, e.g., U.S. v. Med. Soc’y of South Carolina*, 298 F. Supp. 145, 148 (D.S.C. 1969) (finding violation of Title VI and ordering elimination of racial discrimination with respect to admission and treatment of patients) (“[W]ith very few exceptions, there have been no Negro inpatients at Roper Hospital. . . Roper Hospital has been and is regarded in the Charleston community, and particularly among Negroes, as a white-only hospital, at least with respect to the admission of inpatients. Accordingly, Negro doctors in Charleston have made no attempt to secure admission of their patients to Roper Hospital, and few if any Negroes have sought treatment at the Hospital on an in-patient basis.”); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 962 (4th Cir. 1963) (hospitals in North Carolina) (“The Long Hospital . . . completely excludes Negro patients and professionals. The Cone Hospital, on the other hand, excludes all but a select few Negro patients, who are admitted on special conditions not applied to whites . . .”).

Since minorities will disproportionately be forced to obtain certified copies of their birth certificates, they will disproportionately face the financial and administrative hurdles imposed by HB 56 and thereby encounter greater difficulty in proving their

⁸ See Ex. A, S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4:1 Population Studies: A Journal of Demography 86, 98-99 (1950); *see id.* at 98 n.2 (“Registration completeness figures based on matched infant cards and death records were 94.0% for the white race and 82.0% for the non-white.”).

⁹ *Id.* at 99.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

citizenship upon registration. This will in part be attributable to widespread bureaucratic error or deficiencies leading to errors on birth certificates, failures to respond to requests timely and adequately, and misapplication of the law. Plaintiffs in the federal lawsuit challenging Wisconsin's photo ID law have obtained birth certificates with fatal errors such as a transposition of names as well as birth certificates for relatives. *Frank v. Walker*, 2:11-cv-01128 (LA), Docs. 33-8, 35, 40-12, 40-16. For instance, Plaintiff Shirley Brown, who is African-American, applied to the Louisiana vital records office for a certified copy of her birth certificate, but she received a birth certificate for her sister, June Rose Brown, who was born almost four years after her. Docs. 35 & 40-16, Response to Interrog. No. 8. Plaintiff Eddie Lee Holloway Jr., who is also African-American, has a copy of his birth certificate, but while it bears his father's correct name as "Eddie Lee Holloway," his name was erroneously recorded as "Eddie Junior Holloway." Docs. 33-8 & 40-12. These mistakes are common and can often be expensive and time-consuming to fix. Alabama Code § 31-13-28(g) allows the registrant to submit an affidavit explaining any "inconsistencies" and to swear under oath that she is a U.S. citizen. (See also Submission, Ex. H, at 7-8, Ala. Admin. Code r. 820-2-2-.19, Citizenship Document Inconsistency Affidavit Form). However, that affidavit only resolves the issue for minor name discrepancies or for errors in recording sex. A person is not permitted to use this procedure as a way to explain birth date discrepancies or to resolve an issue such as Plaintiff Shirley Brown's predicament.

Again, Alabama has not presented any research on birth certificate possession rates for minority and white voters in Alabama, so it has failed to meet its burden under Section 5 of the Voting Rights Act. The state's voter registration records contain race data. (Submission, Exs. I, L).¹⁴ More aptly, the state could have also sampled the universe of *unregistered* voters and drawn conclusions about what percentage of each racial or ethnic subgroup lack the necessary documentation of citizenship. The submission, however, is devoid of any analysis on the racial impact of this law.

2. Driver's Licenses or State ID Cards

Under HB 56, a driver's license or state ID card issued by any U.S. state will be treated as conclusive—if indirect—documentary evidence of citizenship, but, as noted in Alabama Code § 31-13-28(k)(1), only "if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship." Alabama has not provided information as to how many of the 50 states' driver's licenses or state ID cards include a notation of citizenship status. In communications with the Alabama DPS, the ACLU has been informed that Alabama driver's licenses and state ID cards note that non-citizen licensees and ID card holders are foreign nationals.

¹⁴ The Alabama Secretary of State maintains updated voter registration information by race and ethnicity. Office of the Alabama Secretary of State, Voter Registrations Statistics – Year 2012 (Spreadsheet), <http://www.sos.state.al.us/Elections/VoterReg.aspx>.

The implementing regulations for this law in fact note that only the new REAL ID-compliant driver's licenses and ID cards will be accepted as evidence of citizenship: "Alabama driver's license or nondriver's ID card must be a 'Star' [STAR, or "Secure, Trusted, And Reliable" ID Program] license or ID." (Submission, Ex. H, at 3 of 35, Alabama Administrative Code r. 820-2-2-.17). Many Alabama residents will still hold the old-version, non-STAR licenses and ID cards, not those that will be valid under HB 56, so this alternative is of little use to voters.¹⁵ This is so because Alabama residents can still use those old driver's licenses and ID cards for purposes *other than voter registration*. As the Alabama DPS notes, "[f]ederal agencies will continue to accept your valid, unexpired Alabama license or ID card for official purposes until Dec. 1, 2014, for individuals born after Dec. 1, 1964. Individuals born on or before Dec. 1, 1964, will have until Dec. 1, 2017, to comply."¹⁶ Notably, STAR driver's licenses and ID cards are in fact issued to both citizens and non-citizens, as long as accepted documentation of citizenship *or legal presence* is provided.¹⁷ The gold star in the upper left-hand corner is not an indication that the applicant has provided satisfactory proof of *U.S. citizenship*, as required by Alabama Code § 31-13-28(k)(1), so a local registrar would need to take note of any designation of foreign national status (the ACLU has been informed there is no corresponding notation of U.S. citizenship status). However, the new regulations, including the instructions to local registrars, do not communicate any requirement to check if there is a foreign national designation on the STAR driver's license or ID card. (Submission, Ex. H). Pending bill HB 568 amends Alabama Code § 31-13-28(k)(1) to replace the requirement of an indication of satisfactory proof of United States citizenship with a requirement that the issuance of the driver's license or ID card was conditioned upon "proof of lawful presence in the United States."¹⁸ This bill seemingly acknowledges that REAL ID-compliant/STAR driver's licenses and ID cards are issued to non-citizens upon proof of legal presence, but still fails to create any method by which local registrars must investigate whether the holder of a REAL ID-compliant/STAR product is in fact a citizen and therefore an eligible voter. Without any procedure spelled out for officials to examine whether the applicant is a citizen or not, local registrars may reasonably interpret the regulations to permit any and all STAR driver's licenses and ID cards simply on the presence of the gold star.

The acceptance of STAR driver's licenses or ID cards without checking to see if there is a foreign national designation, of course, would punch a significant hole in this

¹⁵ The STAR driver's license and STAR ID card are identical to the old Alabama driver's licenses and ID cards, except they bear a gold star that indicates compliance with the REAL ID-related laws and regulations. WHNT 19 HD News, *Alabama Driver's Licenses Debut With New Look* (Feb. 13, 2012), <http://whnt.com/2012/02/13/new-look-alabama-drivers-licenses-available-starting-monday/>.

¹⁶ Alabama Dep't of Public Safety, STAR ID – Frequently Asked Questions, <http://dps.alabama.gov/Home/wfContent.aspx?ID=80&PLH1=plhDriverLicense-StarIDFAQ>; *see also* Alabama Dep't of Public Safety, "Get STARted" STAR ID Brochure, http://dps.alabama.gov/Documents/Documents/STAR_ID_Flier_Final.pdf.

¹⁷ *Id.*

¹⁸ Ex. B, Excerpt of House Bill 568.

putative citizenship verification regime. Indeed, this carelessness reveals that the law is not what it purports to be. Rather, it is a thinly disguised measure to discourage and disfranchise voters by bureaucracy, since the very first item on the list of accepted evidence of citizenship in subsection (k) can be obtained by non-citizens, and there is no reference whatsoever in the 186-page submission package to any foreign national designation on STAR driver's licenses or ID cards. One of the factors for DOJ's consideration in this Section 5 analysis is "[t]he extent to which a reasonable and legitimate justification for the change exists." 28 C.F.R. § 51.57(a). The state has a legitimate interest in ensuring that only U.S. citizens vote, but HB 56's inclusion of Alabama STAR driver's licenses and ID cards—without any instruction on the fact that a subset of these will be issued to foreign nationals—is inconsistent with that goal. At any rate, it is far more reasonable to simply require voters to swear under penalty of perjury to the fact of their U.S. citizenship.

According to the U.S. Census Bureau's 2010 American Community Survey 1-Year Estimates (hereinafter, "ACS survey"), African Americans in Alabama rely more heavily on public transportation than do whites. 70.4 percent of Alabama residents using public transportation are black, whereas only 25.8 percent are white.¹⁹ The figures are completely inverted for residents using a car, truck, or van alone as their means of transportation: 74.6 percent of such drivers are white, while 22.2 percent are black.²⁰ The percentage disparity only narrows slightly for carpooling: 62.5 percent white and 28.5 black.²¹ Given these extremely lopsided statistics, it is reasonable to infer that white Alabama residents possess driver's licenses at a significantly higher rate than blacks in Alabama.

The Alabama Department of Public Safety's driver's licensing regulations require that all applicants for driver's licenses who were born in the United States present one of the following limited primary documents: a certified copy of one's birth certificate, a U.S. Passport, or an Alabama driver's license or state ID card.²² For applicants who have never held an Alabama DPS product and never had the resources or inclination to travel abroad, this is a de facto requirement to show a birth certificate. Accordingly, HB 56 will disproportionately force black voters in Alabama to obtain certified copies of their birth certificates or letters of no record from their state of birth.

More importantly for the purposes of Section 5 analysis, the state has failed to meet its burden of proving that the law will not be retrogressive. It has not provided any data on rates of possession of STAR driver's licenses and ID cards in the state of

¹⁹ U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates, Means of Transportation to Work by Selected Characteristics [S0802].

²⁰ *Id.*

²¹ *Id.*

²² Alabama Dep't of Public Safety, Alabama Driver Manual, at 6-9 available at <http://dps.alabama.gov/Documents/Manuals/DriverLicenseManual.pdf>.

Alabama for various racial and ethnic subgroups. Such data is essential to the determination of HB 56's impact on minority voters.

3. *U.S. Passports*

For citizens born in the United States who wish to acquire a passport, the U.S. Passport application process generally requires the presentation of a certified copy of one's birth certificate. Under recently promulgated regulations, the birth certificate must include the following information to be considered acceptable primary evidence of U.S. citizenship: the full name of the applicant, date of birth, place of birth, a raised, embossed, impressed or multicolored seal of the issuing authority, the registrar's signature, and the date the certificate was filed with the registrar's office (must be within one year). 22 C.F.R. § 51.42(a). Suffice it to say that not all birth certificates currently possessed by Alabama voters, particularly the elderly holding birth certificates issued decades ago, will meet these requirements. The U.S. Department of State allows for secondary forms of evidence of citizenship to be used, if primary forms are lacking:

If you were born in the United States and cannot present primary evidence of U.S. citizenship, submit a combination of early public records as evidence of your U.S. citizenship. Early public records must be submitted with a birth record or Letter of No Record. Early public records should show your name, date of birth, place of birth, and preferably be created within the first five years of your life. Examples of early public records are:

- Baptismal certificate
- Hospital birth certificate
- Census record
- Early school record
- Family bible record
- Doctor's record of post-natal care
- Early Public Records are not acceptable when presented alone.²³

Id. § 51.42(b). The State Department regulation on point makes clear that any such secondary evidence of citizenship must be “created shortly after birth but generally not more than 5 years after birth.” *Id.* Thus, a voter who currently lacks a birth certificate, as well as any of these secondary forms of citizenship, would not be able to obtain these documents at this time and then secure a passport in order to register to vote.²⁴ Of course, requiring a voter to pass through this complex process, obtain a document only

²³ U.S. Dep't of State, Secondary Evidence of U.S. Citizenship, http://travel.state.gov/passport/get/secondary_evidence/secondary_evidence_4315.html.

²⁴ Moreover, the elderly could not take advantage of the alternative of providing “affidavits of persons having personal knowledge of the facts of the birth”—those individuals with personal knowledge will likely have been long deceased. 22 C.F.R. § 51.42(b). This is further evidence of what an astoundingly cumbersome process this will be, particularly for citizens with lower levels of education, income, literacy, experience with voting, and access to information.

required for international travel, and pay a minimum of \$55 (for a non-expedited Passport card),²⁵ simply to register to vote in Alabama, is wildly unreasonable, not to mention an unconstitutional poll tax in violation of the Twenty-Fourth and Fourteenth Amendments.

According to the 2010 Census, the overall population of Alabama is 4,779,736.²⁶ From Fiscal Year (“FY”) 2007 to FY 2010, the State Department issued an average of 119,632 passports annually to Alabama residents.²⁷ That figure does not tell us how many Alabama passport-holders are minors who cannot vote. Even still, at this rate, it would take 10 years to issue passports to just 25 percent of the state’s total population. This is not an adequate alternative for those who lack and/or are struggling to obtain certified and accurate copies of their birth certificates.

4. Certificates of Naturalization, Certificates of U.S. Citizenship, and Other Citizenship Documentation

Certificates of naturalization and citizenship cannot be replaced without great expense—the N-565 application fee is \$345.00.²⁸ Consequently, a voter is unlikely to carry her certificate of naturalization with her to the county elections office or place a certificate in the mail with a voter registration form. Alternatively, the applicant can simply provide the naturalization number, if known. Ala. Code § 31-13-28(k)(4). By contrast, Alabama Code § 31-13-28(k)(8) does not state that providing the number on a certificate of citizenship is a way around obtaining a physical version of that certificate, which costs \$600.00 for an original or \$345 for a replacement.²⁹ However, HB 56 states that an applicant who provides her certificate of naturalization number will not be registered until the number “is verified with the United States Bureau of Citizenship and Immigration Services.” *Id.* § 31-13-28(k)(4). The state has provided no information regarding an agreement with U.S. Citizenship and Immigration Services to obtain such verification. Even if such an agreement exists, verification could be incredibly time-consuming, potentially disfranchising many naturalized citizens during the verification process.

²⁵ U.S. Dep’t of State, Passport Fees, http://travel.state.gov/passport/fees/fees_837.html.

²⁶ U.S. Census Bureau, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010, 2010 Census Redistricting Data (Public Law 94-171) Summary File [QT-PL].

²⁷ U.S. Dep’t of State, Passport Statistics, Passport Issuance by State per Fiscal Year (2007 to 2011), http://travel.state.gov/passport/ppi/stats/stats_890.html.

²⁸ U.S. Citizenship and Immigration Services, N-565, Application for Replacement Naturalization/Citizenship Document, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a910cac09aa5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.

²⁹ *Id.*; U.S. Citizenship and Immigration Services, N-600, Application for Certificate of Citizenship, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a936cac09aa5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.

B. Factors That Make the Acquisition of Documentary Evidence of Citizenship More Difficult for Racial and Ethnic Minorities in Alabama

1. Low Income and Poverty

According to the ACS survey, there are significant racial and ethnic disparities across a range of socioeconomic indicators in Alabama. Most noticeably, black and white residents diverge dramatically on income and poverty metrics, as do Latino and white residents. There are also significant variances between relative levels of education, literacy, and access to transportation and the Internet, all of which impact the ability to acquire documentary evidence of citizenship. These disparities illustrate that the burdens of acquiring this proof will fall unevenly on different racial and ethnic groups in Alabama.

Those voters with diminished resources will be hindered in their ability to access the necessary agency offices, obtain the identification required for a birth certificate application, purchase one of the alternatives such as an expensive U.S. passport, and afford transportation costs either to the county DPH office or to a public library, particularly from residences in rural areas. Poverty, low income, unemployment, and homelessness all make the task of acquiring documentary evidence of citizenship more complicated and burdensome.

While only 13.1 percent of non-Hispanic white residents of Alabama fell below the federal poverty level (“FPL”), 32.4 percent of black residents and 30.8 percent of Latino residents are below the FPL, according to the ACS 1-Year Estimates.³⁰ The percentage of all families below the FPL is approximately three times as high for black and Latino residents as it is for white residents: 9.5 percent for non-Hispanic white residents, 28.9 percent for blacks, and 29.5 percent for Latinos.³¹ There are substantial disparities for extreme poverty as well: 5.6 percent of non-Hispanic whites in Alabama living at or below 50 percent of the FPL, whereas 13.9 percent of blacks and 12.4 percent of Latinos are in the same position.³² Moreover, while African Americans only constitute roughly a quarter of Alabama’s voting-age population, half of the households receiving Supplemental Nutrition Assistance Program (“SNAP”) benefits or “food stamps” in the state are African-American.³³ Mean per capita income is also significantly higher for white Alabama residents: \$25,639 for non-Hispanic white residents, in contrast to

³⁰ U.S. Census Bureau, ACS 1-Year Estimates, Poverty Status in the Past 12 Months [S1701].

³¹ U.S. Census Bureau, ACS 1-Year Estimates, Poverty Status in the Past 12 Months of Families [S1702].

³² U.S. Census Bureau, ACS 1-Year Estimates, Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months [S1703].

³³ U.S. Census Bureau, 2010 ACS 1-Year Estimates, Food Stamps/SNAP [S2201].

\$14,504 for black residents and \$12,174 for Latino residents.³⁴ The unemployment rate for non-Hispanic white residents is 9.3 percent, in contrast to 18.9 percent for African-American residents of the state and 11.6 percent for Latino residents.³⁵ Finally, 62 percent of sheltered homeless individuals in Montgomery County and 63 percent in the Birmingham metro area are African-American.³⁶

2. *Education and Literacy*

There are also significant racial and ethnic disparities in educational attainment across Alabama. According to the 2010 ACS 1-Year Estimates, approximately 18.1 percent of Alabama residents 18 years of age or older have less than a high school degree. However, black residents show disproportionately lower levels of education. 15 percent of non-Hispanic white residents of Alabama ages 25 years and up have less than a high school degree, as compared to 22.3 percent of African-American residents aged 25 years and over and 50.5 percent of Latino residents aged 25 years and over.³⁷ Voters with lower levels of education will struggle more with the application procedures and requirements to obtain certified copies of their birth certificates or other documentary proof of citizenship.

Literacy rates are also severely diminished for minority residents of Alabama, and this impacts minority voters' ability to navigate bureaucratic procedures and fill out vital records applications. In 1998, 25 percent of the voting-age population in Alabama was at Level 1 literacy, the lowest level.³⁸ Level 1 literacy is defined as lacking the basic literacy skills "considered necessary for functioning in everyday life."³⁹ In 2003, updated information on literacy in Alabama was compiled, showing 15 percent of residents in the state aged 16 years or older lacked basic prose literacy skills.⁴⁰ The following table shows a comparison between those illiteracy rates compiled by the National Center for

³⁴ U.S. Census Bureau, 2010 ACS 1-Year Estimates, Mean Income in the Past 12 Months (In 2010 Inflation-Adjusted Dollars) [S1902].

³⁵ U.S. Census Bureau, 2010 ACS 1-Year Estimates, Employment Status [S2301].

³⁶ See Ex. C, U.S. Dep't for Housing and Urban Development, Annual Homelessness Assessment Report, Sheltered Homeless Persons in Montgomery County (10/1/2008 – 9/30/2009), at 39; Ex. D, U.S. Dep't for Housing and Urban Development, Annual Homelessness Assessment Report, Sheltered Homeless Persons in Metropolitan Birmingham (10/1/2008 – 9/30/2009), at 39.

³⁷ U.S. Census Bureau, 2010 ACS 1-Year Estimates, Sex by Educational Attainment for the Population 25 Years and Over (Black or African-American Alone) [B15002B], (White Alone, Not Hispanic or Latino) [B15002H], and (Hispanic or Latino) [B15002I].

³⁸ National Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels*, at 4-5 (1998), available at <http://www.eric.ed.gov/PDFS/ED416407.pdf>.

³⁹ *Id.*

⁴⁰ National Center for Education Statistics, National Assessment of Adult Literacy, *State and County Estimates of Low Literacy* (2003), <http://nces.ed.gov/naal/estimates/StateEstimates.aspx>.

Education Statistics for each county in Alabama and the percentage black voting-age population (“BVAP”) in that county.⁴¹ With the sole exception of Montgomery County, the state’s capital, all of the counties with at least a 50 percent BVAP appear in the top 15 counties with the highest illiteracy rates. These include the following counties: Bullock, Greene, Wilcox, Lowndes, Sumter, Perry, Hale, Macon, Dallas, and Marengo. Ten of the top 15 counties for illiteracy are majority BVAP, and of the bottom 15, one is 39.8 percent BVAP, but the rest all have an overwhelmingly non-Hispanic white voting-age population (68 percent and up). There appears to be a very significant association between the proportion of a county that is black and of voting age and the percentage of the same population aged 16 and older that lacks basic prose literacy skills. And for the many voters at low levels of functional literacy, this proof-of-citizenship requirement will operate as a de facto literacy test.

Table 1. Alabama Illiteracy Rates by County⁴²

County in Alabama	Percentage of Population Age 16 and Older Lacking Basic Prose Literacy Skills (National Center for Education Statistics)	Percentage Black Voting-Age Population (“BVAP”) in County (2010 Census – QT-PL Redistricting Dataset)
Bullock	34	68.8
Greene	31	79.2
Wilcox	30	69.6
Lowndes	28	71.7
Sumter	28	72.2
Perry	27	64.4
Hale	26	56.6
Macon	25	82.1
Dallas	24	66.2
Barbour	23	45
Choctaw	23	42.6
Conecuh	23	43.3

⁴¹ All BVAP figures taken from the 2010 Census data set forth in dataset QT-PL, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010, 2010 Census Redistricting Data (Public Law 94-171) Summary File.

⁴² The Census Bureau defines “illiteracy” as those persons having less than a fifth-grade education, but does not seem to track educational attainment at such a fine-grained level. The lowest level of educational attainment is less than a high school degree. See U.S. Census Bureau, Voting Rights Output File Documentation (Sept. 2, 2004).

Marengo	22	50
Butler	21	40.9
Clarke	21	41.8
Coosa	21	29.8
Lawrence	21	11.6
Pickens	21	39.4
Russell	21	39.7
Chambers	20	37
Monroe	20	39.8
Morgan	20	11.1
Washington	20	23.9
Crenshaw	19	22.7
Escambia	19	31
Franklin	19	3.9
Pike	19	34.5
Randolph	19	18.9
Clay	18	14.2
DeKalb	18	1.5
Henry	18	27.7
Lamar	18	10.7
Talladega	18	30.3
Bibb	17	22.4
Cleburne	17	3.3
Covington	17	11.4
Fayette	17	11.2
Cherokee	16	4.5
Geneva	16	9.1
Marion	16	3.9
Mobile	16	32.3
Tallapoosa	16	24.6
Winston	16	0.4
Calhoun	15	19.4
Chilton	15	9.2
Colbert	15	15.6
Jackson	15	3.2
Marshall	15	1.6
Blount	14	1.3

Etowah	14	14.3
Limestone	14	12.8
Montgomery	14	52.2
Tuscaloosa	14	27.2
Walker	14	5.5
Autauga	13	16.9
Coffee	13	16.1
Cullman	13	1.1
Dale	13	17.9
Elmore	13	19.6
Jefferson	13	39.8
Lauderdale	13	9.5
Lee	13	21.3
Houston	12	23.8
St. Clair	12	8.5
Baldwin	11	8.7
Madison	10	23.3
Shelby	7	10.3

3. Access to Transportation

According to the ACS 1-Year Estimates, African Americans in Alabama rely more heavily on public transportation than do whites. 70.4 percent of Alabama residents using public transportation are black, whereas only 25.8 percent are white.⁴³ The figures are completely inverted for residents using a car, truck, or van alone as their means of transportation: 74.6 percent of such drivers are white, while 22.2 percent are black.⁴⁴ The percentage disparity only narrows slightly for carpooling: 62.5 percent white and 28.5 black.⁴⁵ Thirteen of Alabama's 67 counties lack public transportation entirely, including a number of counties with a substantial black voting-age population ("BVAP"), such as Bullock (68.8 percent BVAP), Barbour (45 percent BVAP), Butler (40.9 percent BVAP), Chambers (37 percent BVAP), Pike (34.5 percent BVAP), and Henry (27.7 percent BVAP).⁴⁶

⁴³ U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates, Means of Transportation to Work by Selected Characteristics [S0802].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ American Public Transportation Association, Alabama Transit Links, <http://www.apta.com/resources/links/unitedstates/Pages/AlabamaTransitLinks.aspx>. The BVAP figures are drawn from the 2010 Census Data available at American FactFinder 2.

In its submission to DOJ, Alabama has failed to demonstrate that county DPH offices will be equally accessible to minority and white voters, or that there are reasonable adequate alternatives for voters to learn the information on how to obtain a certified copy of a birth certificate, obtain it, and then register to vote. It should be noted here that an additional trip is required to a location with a photocopy machine, because the voter cannot and will not submit the actual certified copy of the birth certificate if he or she is mailing in the registration form. The patchiness of public transportation, on which black voters in particular rely, suggests that there may be difficulties accessing a county DPH office, photocopy machines, and public libraries in certain parts of the state.

4. *Access to the Internet*

The digital divide in America will also pose disproportionate burdens on African-American voters attempting to acquire proof of citizenship. The Internet allows citizens to learn of HB 56's registration prerequisite in the first place, review information and instructions on the procedures for obtaining a driver's license or a birth certificate, download and print vital records applications, learn office locations and times, and access a variety of other information, e.g. for transportation, that can help them meet this registration requirement.

But many African-American and Latino households in America lack broadband access. The U.S. Department of Commerce released a study in November 2010 entitled "Exploring the Digital Nation: Home Broadband Internet Adoption in the United States."⁴⁷ This study concluded that: "NonHispanic Asian households (77%) had the highest rate of broadband Internet use in 2009, followed by non-Hispanic White households (68%). Hispanic (48%) and non-Hispanic Black (49%) households lagged behind with rates that were about 20 percentage points lower than their non-Hispanic White counterparts."⁴⁸ These already significant racial and ethnic disparities are even more pronounced when the data is disaggregated by rural and urban households. While the rate of non-Hispanic white households with broadband access drops from 71.2 percent to 54.2 percent, black household access to broadband drops from 52.1 percent to a mere 28.7 percent.⁴⁹ Additionally, Hispanic households see their broadband access drop from 48.6 to 36.9 percent.⁵⁰ This makes sense given the relatively lower levels of household income for minority households. Only 35.8 percent of households with less

⁴⁷ U.S. Dep't of Commerce, *Exploring the Digital Nation: Home Broadband Internet Adoption in the United States* (November 2010), available at http://www.ntia.doc.gov/reports/2010/ESA_NTIA_US_Broadband_Adoption_Report_11082010.pdf.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

than \$25,000 income had acquired broadband.⁵¹ Accordingly, the lowest rates of broadband access are observed among very low-income (less than \$25,000), rural black and Hispanic households—17 and 19 percent, respectively.⁵²

C. HB 56 Is Unlawful As Applied to Federal Registration Forms

In addition to the retrogressive impact that it will undoubtedly have on Alabama's racial and ethnic minorities, HB 56 has another fatal flaw. Its proof of citizenship requirement for voter registration for federal elections is superseded by the National Voter Registration Act, 42 U.S.C. §§ 1973gg, *et seq.* ("NVRA").

In 1993, Congress enacted the NVRA in order to "increase the number of eligible citizens who register to vote in elections for Federal office."⁵³ One of the ways in which the NVRA sought to accomplish this goal was by creating a single mail-in voter registration form that can be used by any eligible voter in the country to register to vote in federal elections. The NVRA instructed the Election Assistance Commission ("EAC") to develop the mail-in voter registration form.⁵⁴ Under the NVRA, states are required to "accept and use" the EAC-developed form for voter registration for federal elections.⁵⁵ The NVRA allows states to maintain their own registration forms and procedures, so long as the states also "accept and use" the federal form. As contemplated by the NVRA and developed by the EAC, the federal form requires an applicant to sign a statement swearing, under penalty of perjury, that she is a U.S. citizen.⁵⁶ The form does not require an applicant to submit documentary proof of U.S. citizenship with the NVRA registration form.⁵⁷

HB 56 dictates that an applicant for voter registration for federal elections who properly completes a federal form, and whose eligibility is confirmed based on the information requested on the form, "shall not be registered" to vote until she provides documentary proof of citizenship. As such, HB 56 is in direct conflict with the letter and spirit of the NVRA.

The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, recently reviewed a similar Arizona law and concluded "that the NVRA supersedes [the law's] registration provision as that provision is applied to applicants using the National Mail

⁵¹ *Id.* at 8.

⁵² *Id.* at 9.

⁵³ 42 U.S.C. § 1973gg(b)(1).

⁵⁴ 42 U.S.C. § 1973gg-4(a).

⁵⁵ *Id.*

⁵⁶ 42 U.S.C. §§ 1973gg-7(b)(2) and (3).

⁵⁷ *Id.*

Voter Registration Form (the ‘Federal Form’) to register to vote in federal elections.”⁵⁸ The Court reviewed the test for determining whether a state law is preempted by an act of Congress pursuant to the Elections Clause, and determined that “states have ‘no inherent or reserved power’ over the regulation of federal elections.”⁵⁹ Therefore, the “presumption against preemption” and “plain statement rule” that apply in the Supremacy Clause context do not apply in the Elections Clause context.⁶⁰ If a state statute and an act of Congress “do not operate harmoniously in a single procedural scheme for federal voter registration,” the state statute is superseded by the act of Congress.⁶¹

Arizona’s law at issue in *Gonzalez*, like HB 56, required documentary proof of citizenship in conjunction with an application for voter registration. As to Arizona’s law, the Court found that “[u]nder a natural reading of the NVRA, Arizona’s rejection of every Federal Form submitted without proof of citizenship does not constitute ‘accepting and using’ the Federal Form.”⁶² The Court concluded that “a state that assesses an applicant’s eligibility based on the information requested on the Federal Form is ‘accepting and using’ the form in exactly the way it was meant to be used.” A law that directs registrars to assess an applicant’s eligibility based on information that is not requested on the Federal Form “is contrary to the form’s intended use and purpose.”⁶³

Section 5 of the Voting Rights Act, of course, does not require the Department to fully assess a state statute’s compatibility with other federal voting laws. Nevertheless, in making a Section 5 determination, the Department should pay particular attention to “constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgement on account of race, color, or membership in a language minority group.”⁶⁴ In acknowledging that “discriminatory and unfair registration laws and procedures ... disproportionately harm voter participation by various groups, including minorities,” Congress indisputably passed the NVRA in order to safeguard the right to vote. HB 56’s inconsistency with the NVRA is, therefore, an important consideration in the Section 5 process. Because the proof of citizenship requirement of HB 56 is antithetical to the purpose of NVRA, preclearance should be denied. Moreover, Alabama’s decision to enact the proof of citizenship requirement in HB 56 despite the tension with the NVRA suggests that the state did not follow objective guidelines in adopting the law. In combination with the lack of anything but anecdotal evidence of a problem concerning voting by non-citizens, the state’s decision to press forward with a bill that is certain to have a substantial impact on the ability of eligible, qualified

⁵⁸ *Gonzalez v. Arizona*, No. 08-17115, 2012 WL 1293149 *1 (9th Cir. Apr. 17, 2012) (*en banc*).

⁵⁹ *Id.* at *4.

⁶⁰ *Id.*

⁶¹ *Id.* at *5.

⁶² *Id.* at *8.

⁶³ *Id.*

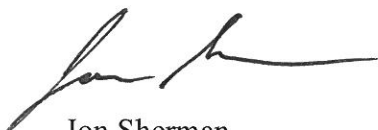
⁶⁴ 28 C.F.R. § 51.55.

residents of Alabama to vote and that likely violates the NVRA strongly suggests the state did not follow objective guidelines in its decision.

D. Summary & Conclusion

Section 29 of HB 56 (Alabama Code § 31-13-28) will disproportionately burden minority voters in Alabama who are less likely to possess one of the required forms of documentary proof of citizenship. In addition, the socioeconomic disparities discussed in this letter will make the acquisition of such proof of citizenship significantly more difficult for racial and ethnic minorities. Accordingly, Alabama Code § 31-13-28 is retrogressive in violation of Section 5 and should be denied preclearance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jon Sherman', with a long horizontal flourish extending to the right.

Jon Sherman
Katie O'Connor
ACLU Foundation, Inc.
Voting Rights Project
230 Peachtree Street
Atlanta, Georgia 30303-1227
Tel: 404-523-2721
jsherman@aclu.org
koconnor@aclu.org

Olivia Turner
Executive Director
ACLU of Alabama
207 Montgomery Street, Suite 910
Montgomery, AL 36104
oturner@aclualabama.org