

**Testimony on behalf of the  
American Civil Liberties Union Of the Nation's Capital**

By

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Before the

Committee on Government Operations and the Environment

of the

Council of the District of Columbia

on

Bill 18-345, the "Omnibus Election Reform Act of 2009"

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The ACLU of the Nation's Capital commends the sponsors of the "Omnibus Election Reform Act of 2009" for introducing this bill. Its enactment will facilitate participation in District elections and enhance confidence in the reported results.

The following is a review of those sections of the bill of particular importance to the ACLU. In some instances, we recommend changes to sections and suggest additional issues for inclusion in the bill.

Section 102: Open Meetings

The requirement for open meetings and limitations on the use of executive sessions will enhance the Board of Elections and Ethics' accountability to the public. Especially important is the requirement of § 102(b) that the Board announce and post its agendas on its website at least 24 hours before a meeting. This is appropriately complemented by the requirement that Board minutes be posted "as soon as practicable" but not later than in advance of the "next regularly scheduled meeting."<sup>1</sup> This will enable the public to prepare for Board meetings and to monitor its actions.

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<sup>1</sup> Bill 18-345, § 102(d).

### Section 104: Nonpartisan Election Monitors

As a member of the Organization for Security and Cooperation in Europe, the United States regularly nominates its citizens to serve as election monitors abroad. In turn, foreign persons monitor elections here. These monitors are trained to evaluate all aspects of the process from access to the media to the integrity of the voting procedures. At the conclusion of an election, the OSCE issues a report evaluating the electoral process. Elections in the District of Columbia could only benefit by the work of such outside monitors.

### Section 201: Registration of 17-Year-Old Persons

This provision does not lower the voting age from 18 to 17. Rather, it facilitates the voting of persons who will be 18 on election day, but whose birthday is so close to election day as to make registration problematic. The need for this change will be reduced if § 301 authorizing same-day registration is approved, but even if that change is approved, we think this provision should be approved as well.

### Section 301: Same-day Registration

The ACLU supports changes to the electoral law that facilitate voting by qualified persons. Same-day registration is one such change. “In the 2008 presidential election, voter participation numbers were highest in the states that allowed SDR [same day registration] – 69 percent compared to 62 percent.”<sup>2</sup> As of June 2, 2009, there are nine states with same-day registration: Iowa, Idaho, Maine, Wisconsin, Minnesota, New Hampshire, Wyoming, Montana, and North Carolina (NC allows same-day registration during early voting, which runs until three days before the election). In addition, North Dakota doesn't require any registration.<sup>3</sup>

Skeptics have questioned whether the District would be able to administer same-day registration without promoting voter fraud. “A bi-partisan team of consultants to the Election Assistance Commission reported widespread agreement that very little evidence existed of voter impersonation at the polls.”<sup>4</sup>

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<sup>2</sup> “Women’s Voices. Women Vote,” p. 4 April 15, 2009, available at <http://www.wvv.org/assets/2009/4/15/WVWV-Access-to-Democracy-Report.pdf>.

<sup>3</sup> *Ibid*, p. 5.

<sup>4</sup> “Voters Win with Election Day Registration,” winter 2009, p. 6, citing U.S. Election Assistance Commission, *Status Report to the Voter Fraud-Voter Intimidation Research Project*, May 17, 2006, available at <http://www.usatoday.com/news/pdf/2006-10-11-election-report.pdf>. See also *Voting Rights, 2008*, edited by Benjamin E. Griffith, published by the American Bar Association Section of State and Local Government Law, Chapter five, “The Promise and Practice of Election Day Registration,” available at <http://www.demos.org/pubs/The%20Promise%20and%20Practice%20of%20Election%20Day%20Registration.pdf>.

There is no reason why the District could not protect against fraud in administering same day registration.

Because fake ID's and utility bills are readily available, we recommend that the provision concerning documents to prove residence (bill, p.9, line 20) be tightened. Proposed subsection "(C)" would authorize the Board to approve "any other document" as "proper identification." If the Committee does not consider itself qualified to limit this authority, it should, at least, require the Board to propose a regulation specifying acceptable documents, which the Council would review.

Additionally, we suggest that the Board be required to publish a list of the names and addresses of all persons who register and vote on Election Day, thereby enabling members of the public and the media to perform a "watchdog" function on this process.

#### Section 501: Voter-verifiable Records

We commend the requirement that District voting systems create a "voter-verifiable record of all votes cast in order that an audit trail is available in the event of a recount."<sup>5</sup> The bill recognizes that the federal Help America Vote Act mandates this.<sup>6</sup>

At the same time, we oppose the inclusion of § 501(b), which reads:

In the event that the voting system presently used by the Board does not meet the standard set forth in subsection (a), the Board shall retrofit any equipment necessary to meet the standard to the extent that such a retrofit is possible.

This provision would appear to make the requirement for a voter-verifiable record illusory for the foreseeable future by allowing the continued use of the current system even if it cannot be made capable of creating a voter-verifiable record of votes cast.

If the current system cannot be retrofitted to meet the requirements of subsection (a), the Council must appropriate funds to make this possible. If it can be retrofitted, then there is no need for subsection (b).

#### Section 601: No-fault Absentee Ballots

Because this provision will increase voter participation, the ACLU of the Nation's Capital supports its adoption. As of October 9, 2008, twenty-eight states

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<sup>5</sup> Bill 18-345, § 501(a).

<sup>6</sup> See [http://en.wikipedia.org/wiki/#cite\\_note-HAVA-sec302a2-7](http://en.wikipedia.org/wiki/#cite_note-HAVA-sec302a2-7).

permit voting by absentee ballot for any reason,<sup>7</sup> and there is no reason that the District of Columbia should not join their ranks.

#### Section 602: Special Ballots for Out-of-Precinct Votes

If a ballot is cast in the wrong precinct, there is no reason that it should not be counted for federal contests, even if it cannot be counted in the local contest. We therefore support this section. But the rationale for this section requires that it be broadened to allow for such ballots to be counted in citywide contests such as Mayor, councilmembers at-large, and the Council Chairman.

#### Section 701: Extending Voting Hours

The Board should have the authority to extend voting hours in the event of an emergency to ensure that no qualified voter seeking to vote is prevented from doing so.

#### Section 801: Ballot Auditing

Because post-election audits will enhance confidence in the process, we support the adoption of this requirement. Lacking expertise in this area, we do not comment on whether this section reflects best audit practices.

#### Section 901: Filing Fees

Presumably, a purpose of this proposal is partially to cover the expenses of conducting an election. A token fee would not make much difference, and a significant fee could deter persons from seeking public office, and would impose vastly different burdens on prospective candidates depending upon their personal wealth. If another purpose of this proposal is to deter “frivolous” candidates, this is a matter for the electorate to decide. The ACLU of the Nation’s Capital therefore opposes this section.

#### Section 903: Electioneering

We endorse this provision to allow voters to wear communicative t-shirts and pins into the polling area.

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<sup>7</sup> National Conference of State Legislatures, available at <http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/AbsenteeandEarlyVoting/tabid/16604/Default.aspx>.

Section 905: Defacing Campaign Posters and Materials<sup>8</sup>

Defacing campaign materials impedes the democratic process; making it a misdemeanor should deter this activity. We urge the adoption of this section.<sup>9</sup>

Section 906: "False" Statements

This section would repeal 3 DCMR § 1003.6(i). We strongly urge its adoption for the following reasons:

D.C. Code § 1-1001.16(h) requires every person who circulates petitions for a ballot measure to submit, with his or her petitions, an affidavit stating: (i) the circulator's name and address, (ii) that the circulator was in the presence of each person signing the petition, (iii) that according to the best information available to the circulator each signature is genuine, (iv) that the circulator is an adult resident of the District, and (v) the dates on which signatures were obtained.

The Board of Elections has added a requirement that the affidavit also state that the circulator "has not made any false statements regarding the initiative or referendum to anyone whose signature is appended to the petition." 3 D.C.M.R. § 1003.6(i). In our view, this addition is beyond the Board's power, because the statute lists the required contents of the circulator's affidavit, and the Board is not authorized to amend that list by subtraction or addition.

To be sure, the Board has the power to "[i]ssue such regulations . . . as are necessary to carry out the purposes" of the election laws. D.C. Code § 1-1001.05(14). But it is not "necessary" for the Board to commission itself as a political speech police in order to "carry out the purposes" of the election law. Nothing in the election law even hints at any purpose of regulating, and potentially punishing, election-related political discussions among citizens. And there is certainly no reason to believe that the Council intended to delegate such an extraordinary power to the Board.<sup>10</sup>

More importantly, the Board's addition to the statutory affidavit requirement is unconstitutional, because the government cannot act as an arbiter of the truthfulness of political speech. As the Supreme Court has noted:

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<sup>8</sup> A similar provision prescribing civil penalties is included in Bill 18-151, § 201. The ACLU of the Nation's Capital prefers § 905 of Bill 18-345 making an offense a misdemeanor, which would have greater deterrent effect than a civil fine.

<sup>9</sup> We note a typographical error on p. 19, line 16: "time" should read "fine."

<sup>10</sup> To understand just how extraordinary the Board's regulation is, one need only imagine the consequences of requiring *candidates* for public office to sign an affidavit stating "I have not made any false statements to voters regarding my candidacy," and empowering the Board of Elections to punish the candidate, or to void the results of an election, upon a finding that a candidate had made a false statement to a voter.

the circulation of an [election] petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”

*Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Accordingly, such communications are at the “zenith” of First Amendment protection, *id.* at 425, and at the nadir of government regulatory power.

Because the First Amendment “was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (emphasis added), it follows that if we are to honor our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *id.* at 270, then a certain amount of “erroneous statement is inevitable . . . [and] must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

The problems inherent in attempting to police election-related speech were addressed long ago in *Edwards v. Hutchinson*, 35 P.2d 90 (Wash. 1934). The plaintiff there sought to prevent acceptance of an initiative petition on the ground that “corrupt and fraudulent practices have been indulged in pursuant to a conspiracy by the proponents of the initiative measure, by means of which they have deceived and deluded many persons into signing the petition without their knowing the nature of the proposed measure.” *Id.* at 90-91.

While the court expressed sympathy, it saw “no possibility of granting the desired relief without . . . usurping political powers which have never yet been granted to or assumed by the courts.” *Id.* at 91. The court explained:

Ever since popular elections were instituted, in every one held, some one, perhaps many voters, have been deceived, and so long as the political field remains free and open, as it should and must if we are to have free popular government, there is no way to prevent prejudices being appealed to, and voters to a greater or less degree will always be deceived.

Manifestly the courts cannot undertake to set aside elections or to interfere with the action of electors upon the theory that some one has been deceived. Attempts to deceive can only be met by publicity and a campaign of education. The courts are powerless, or, if not powerless, an attempt to exercise power would result in confusion worse confounded.

These views, we think, are supported by the great weight of authority.

*Id.* at 92.

This old wisdom remains wisdom. The Board's affidavit requirement opens a Pandora's box of administrative and judicial interference with politics and democracy. Moreover, the Board's affidavit requirement would authorize the prosecution, conviction and imprisonment of citizens who circulate initiative petitions upon a finding that a statement made by a circulator in the course of oral political discussions with other citizens on the sidewalk was false, and the circulator's affidavit was therefore perjurious.

The dangers of this regulation were emphatically demonstrated in 2004, when the D.C. Board of Elections and Ethics attempted to disqualify a proposed initiative legalizing slot machines on the ground that circulators' statements "that the initiative would produce benefits for [District of Columbia] schools and healthcare" in fact "constituted misrepresentations . . . and were therefore in violation of the attestation in the circulators affidavit that prohibits the making of false statements regarding the Initiative." *Citizens Committee for the D.C. Video Lottery Terminal Initiative v. District of Columbia Board of Elections and Ethics*, 860 A.2d 813, 814 (D.C. 2004). The Court of Appeals recognized that there were "significant First Amendment concerns raised by . . . the Board's exclusion of signatures based on 'false advertising,'" *id.*, and resolved the proposed initiative's status on other grounds. But the Board's position was remarkably insensitive to both the realities of political campaigning, and to First Amendment values, since predicting that the tax revenue generated by any given activity will produce benefits for schools and healthcare is an entirely legitimate political argument, of the sort made in every political campaign. The Board's action shows how an administrative agency, armed with the power of subpoena (D.C. Code § 1-1001.05(h)), and the power to impose fines and penalties (D.C. Code §1-1105(b)), can become a source of serious oppression to those who support measures or candidates that the Board disfavors.

The very existence of such administrative power will also impose a serious chill upon the willingness of citizens to participate in the circulation of petitions. Who among us can swear that we never misstate or exaggerate the facts while engaged in oral advocacy? What circulator will want to have to defend herself against an allegation that she made a false statement, made by one or two of the hundreds of people with whom she spoke?

To put the teachings of the courts in the vernacular, in the arena of political speech the "cure" of government regulation for truth or falsity is worse than the "disease" of misinformation. Presumably the Board of Elections felt, in 2004, that it was advancing the cause of good government by protecting D.C. voters from misleading campaigning. But "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are

beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but without understanding.” *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

For these reasons, the Council should repeal 3 D.C.M.R. § 1003.6(i).

In addition, the Council Should Repeal Unconstitutional Limitations on Who May Circulate Election Petitions

Petitions in support of proposed initiatives or referenda may be circulated by any resident of the District of Columbia who is at least 18 years of age. D.C. Code § 1-1001.16(h)(5). But petitions supporting the nomination of candidates may be circulated only by registered, qualified electors. D.C. Code § 1-1001.08(b)(2). And petitions supporting the recall of an elected official may be circulated only by qualified registered electors who also reside in the official's election area (e.g., in a Ward or an ANC Single Member District). D.C. Code § 1-1001.17(i)(6).

We cannot discern any sensible reason for these differences, or any legitimate justification for preventing all adult residents of the District of Columbia from circulating petitions for any electoral purpose. A D.C. resident's interest in good government does not depend upon his or her voter registration status, and does not stop at the boundary of his or her Ward or ANC Single Member District.

Indeed, the courts have struck down as unconstitutional similar requirements in other jurisdictions. See, e.g., *Nader v. Blackwell*, 545 F.3d 459 (8th Cir. 2008) (striking down Ohio law requiring state residency for nominating petition circulators); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (striking down Illinois statute requiring nominating petition circulators to be voters registered in the political subdivision in which the candidate is seeking office); *Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2nd Cir. 2000) (striking down New York statute requiring nominating petition circulators to be residents of the political subdivision related to the office at issue); *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (same); *Frami v. Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003) (striking down Wisconsin law prohibiting out of state residents from circulating nominating petitions for political candidates); *Morrill v. Weaver*, 224 F. Supp. 2d 882 (E.D. Pa. 2002) (striking down Pennsylvania statute requiring nominating petition circulators to be residents of the electoral districts in which they circulate petitions).

Accordingly, D.C. Code §§ 1-1001.08(b)(2) and 1-1001.17(i)(6) should be amended to permit any adult resident of the District of Columbia to circulate petitions.

Thank you for considering our views.