

Supplement to

What's undermining the right to vote?

A C3 Lesson Plan

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Voting Rights *and the* Kansas Secure and Fair Elections Act



A Briefing Report of the
Kansas Advisory Committee to the
U.S. Commission on Civil Rights

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I. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These advisory committees advise the Commission of civil rights issues in their states/district that are within the Commission's jurisdiction.

On January 28, 2015, the Kansas Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to conduct a study of the civil rights impact of voting requirements in the state. Specifically, the Committee sought to examine whether the state's 2011 Secure and Fair Elections (SAFE) Act¹ disparately discourages or denies citizens of their right to vote on the basis of race, color, age, religion, national origin, or other federally protected category in local and/or federal elections.

On January 28, 2016, the Committee convened a public meeting in Topeka, Kansas to hear testimony regarding the implementation and civil rights impact of the Kansas SAFE Act. The following report results from the testimony provided during this meeting, as well as testimony submitted to the Committee in writing during the related period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. The focus of this report is specifically on concerns of disparate impact resulting from voting requirements in Kansas on the basis of race, color, age, religion, national origin, or other federally protected category. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. The Committee adopted this report and the recommendations included within it on February 22, 2017.

¹ K.S.A. 25-208a, 25-2203, 25-2352 & 25-3203 & K.S.A. 2010 Supp. 8-1324, 25-1122, 25-1122d, 25-1123, 25-1124, 25-1128, 25-2309, 25-2320, 25-2908, 25-3002, 25-3104, 25-3107 & 65-2418. Full text available at http://www.kslegislature.org/li_2012/b2011_12/asures/hb2067/ (last accessed June 02, 2016).

II. BACKGROUND

A. The United States Voting Rights Act

Following the end of the American Civil War in 1865, the U.S. Constitution was amended to abolish slavery and to grant citizenship to former slaves.² On February 3, 1870, the Fifteenth Amendment to the Constitution was ratified to guarantee that the right of [male] citizens of the U.S. to vote “shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”³ Despite this proclamation, throughout much of the subsequent American history, state and local jurisdictions resistant to extending voting rights to African American citizens utilized techniques such as gerrymandering; and instituted discretionary, often inconsistently applied requirements such as poll taxes, literacy tests, vouchers of “good character,” and disqualification for “crimes of moral turpitude” in order to suppress the African American vote.⁴ In addition, terrorist organizations such as the Ku Klux Klan and the Knights of the White Camellia used harassment and violence to keep African American voters away from the polls. As a result, by the year 1910 nearly all black citizens in the former Confederate States were effectively excluded from voting.⁵

In response to such continued voter intimidation and suppression, on August 6, 1965—nearly 100 years after the ratification of the Fifteenth Amendment—President Lyndon B. Johnson signed the Voting Rights Act⁶ (VRA) into law. Among its key provisions, the VRA prohibits public officials from “drawing election districts in ways that improperly dilute minorities’ voting power.”⁷ It also requires states and counties with a “history of discriminatory voting practices or poor minority voting registration rates” to secure “preclearance” – that is, the approval of the U.S. Attorney General, or a three-judge panel of the District Court of the District of Columbia –

² U.S. Const. amend. XIII – XIV.

³ The Library of Congress Web Guides: Primary Documents in American History. *15th Amendment to the Constitution*, <https://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html>. (last accessed June 28, 2016).

⁴ The U.S. Dep’t. of Justice, Introduction to Federal Voting Rights Laws. *Before the Voting Rights Act*. Updated August 6, 2015. Available at: <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (last accessed July 12, 2016). Hereafter cited as “DOJ: *Before the Voting Rights Act*.”

⁵ DOJ: *Before the Voting Rights Act*. Updated Aug. 6, 2015, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (last accessed July 12, 2016).

⁶ 42 U.S.C. §§ 1973 - 1973aa-6.

⁷ Cornell Univ. Sch. of Law: Legal Info. Inst., *Voting Rights Act*. Wex., https://www.law.cornell.edu/wex/voting_rights_act (last accessed July 12, 2016).

prior to implementing any changes in their current voting laws.⁸ According to the U.S. Department of Justice Civil Rights Division, soon after the VRA was passed, “black voter registration began a sharp increase,” and as a result, the “Voting Rights Act itself has been called the single most effective piece of civil rights legislation ever passed by Congress.”⁹

With the extension of the VRA in 1975, Congress included protections against voter discrimination toward “language minority citizens.”¹⁰ In 1982, the Act was again extended, and it was amended to provide that a violation of the Act’s nondiscrimination section could be established “without having to prove discriminatory purpose.”¹¹ In other words, regardless of intent, if voting requirements of a particular jurisdiction are found to have a discriminatory impact, they may be found in violation of the VRA.

On June 25, 2013, in a historic decision (*Shelby County v. Holder*), the U.S. Supreme Court ruled the formula used to determine which states should be subjected to “preclearance” requirements under the VRA was outdated and thus unconstitutional.¹² This ruling effectively nullified the preclearance requirement—a core component of the VRA—until Congress agrees upon a new formula. According to the Brennan Center for Justice at the New York University School of Law, as of March 25, 2016, at least 77 bills to restrict access to registration and voting have been introduced or carried over from the prior session in 28 states.¹³ Though across the country state efforts to expand voter access have outpaced restrictive measures overall, in November of 2016, 17 states (including Kansas) had restrictive voting laws in effect for the first time in a

⁸ Cornell Univ. Sch. of Law: Legal Info. Inst., *Voting Rights Act*. Wex., https://www.law.cornell.edu/wex/voting_rights_act (last accessed July 12, 2016).

⁹ The U.S. Dep’t. of Justice, Intro. to Fed. Voting Rights Laws. *The Effect of the Voting Rights Act*. Last Revised June 19, 2009, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> (last accessed July 14, 2016).

¹⁰ The U.S. Dep’t of Justice, History of Fed. Voting Rights Laws. *The Voting Rights Act of 1965*. Updated Aug. 8, 2015, : <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last accessed July 14, 2016). Hereafter cited as “DOJ: *The Voting Rights Act of 1965*.”

¹¹ DOJ: *The Voting Rights Act of 1965*.

¹² *Shelby County, Ala. v. Holder*, Attorney General 679 F. 3d 848. https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf (last accessed July 21, 2016) See also: John Schwartz, *Between the Lines of the Voting Rights Act Opinion*. The N.Y. TIMES. June 25, 2013, http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?_r=2& (last accessed July 21, 2016).

¹³ Brennan Center for Justice at the N.Y. Univ. Sch. of Law. *Voting Laws Roundup 2016*. April 18, 2016 <https://www.brennancenter.org/analysis/voting-laws-roundup-2016>. (last accessed July 21, 2016) Hereafter cited as “*Voting Laws Roundup 2016*.”

presidential election, and the U.S. held its first presidential election in more than 50 years without the full protections of the Voting Rights Act.¹⁴

The right to vote is one of the most fundamental components of democracy—so important, in fact, that the U.S. Constitution includes four amendments protecting it.¹⁵ Established under the Civil Rights Act of 1957, as part of its core mandate, the U.S. Commission on Civil Rights is directed to “[i]nvestigate formal allegations that citizens are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin.”¹⁶

Throughout its history, the Commission and its Advisory Committees have released numerous reports on the state of voting rights in the U.S.¹⁷ The Commission’s hearings on voting rights throughout the American South between 1959 and 1961 have been said to have given critical support to proponents of the VRA, aiding in its 1965 passage.¹⁸ Despite these protections, leading up to and including in the 2016 election cycle, academics and advocates alike have called concern to a number of state-legislated voting restrictions that they say are likely to disproportionately disenfranchise voters of color. In this context, the Kansas Advisory Committee submits this report to the Commission detailing the present state of voting rights in Kansas, and urges the Commission to revisit this topic of national importance.

¹⁴ *Voting Laws Roundup 2016*.

¹⁵ U.S. Constitution, Amend. XV guarantees the right to vote “regardless of race, color, or previous condition of servitude”; Amendment XIX guarantees that the right to vote will not be denied “on account of sex”; Amend. XXIV guarantees that the right to vote will not be denied “by any reason of failure to pay poll tax or other tax”; Amend. XXVI guarantees the right to vote for all citizens aged 18 years or older.

¹⁶ *Voting, 1961 Comm’n on Civil Rights Rep.*, Foreword, p. xv, <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf> (last accessed July 21, 2016).

¹⁷ See Univ. of Md. Francis King Carey School of Law: Thurgood Marshall Law Library: *Historical Publications of the United States Commission on Civil Rights*, http://www.law.umaryland.edu/marshall/usccr/subjlist_index.html (last accessed July 21, 2016).

¹⁸ The Leadership Conf.: U.S. Comm’n on Civil Rights, <http://www.civilrights.org/enforcement/commission/?referrer=https://www.google.com/?referrer=http://www.civilrights.org/enforcement/commission/> (last accessed July 21, 2016).

B. The Kansas Secure and Fair Elections (S.A.F.E) Act

Voter identification requirements are among the most common type of voting restriction employed by states today.¹⁹ In April 2008, the U.S. Supreme Court ruled to uphold an Indiana law requiring voters to provide photographic identification at the polls (*Crawford v. Marion County Election Board*).²⁰ As of the writing of this report, 10 states have instituted voter identification requirements identified by the National Council of State Legislators as “strict,” and an additional 22 states have “non-strict” voter identification requirements.²¹ Proponents of voter identification requirements claim they are necessary to protect against voter fraud.²² Opponents argue that voter identification (ID) laws are unnecessary and disproportionately disenfranchise African American and Latino voters, who may be less likely to own a qualifying ID.²³

On April 18, 2011, Kansas Governor Sam Brownback signed the Kansas SAFE Act into law.²⁴ Introduced by Kansas Secretary of State Kris Kobach, the Act combines three distinct voter identification requirements: (1) newly-registered Kansas voters must prove U.S. citizenship when registering to vote; (2) voters must show photographic identification when casting a vote in person; and (3) voters must have their signature verified and provide a full Kansas driver’s license or non-driver ID number when voting by mail.²⁵

¹⁹ *Voting Laws Roundup 2016*.

²⁰ *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1611 (2008); see also Robert Barnes, *High Court Upholds Indiana Law on Voter ID*, THE WASH. POST., April 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042800968.html>.

²¹ The Nat’l Conf. of State Legislatures: Voter Identification Requirements | Voter ID Laws. Updated July 27, 2016., <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last accessed Aug. 4, 2016) (“*Strict*” ID requirements indicates that voters without acceptable ID must vote on a provisional ballot and take additional steps after election day for their votes to be counted. “*Non-strict*” identification requirements indicates that voters may cast a ballot and have it counted without additional action on the part of a voter. For example, a voter may sign an affidavit of identity, a poll worker may vouch for the voter’s identity, or election officials may verify the voter’s signature after the close of Election Day).

²² Peter Hancock, *Kobach debates voter ID laws with KU law professor*. LAWRENCE JOURNAL WORLD, (Sept. 10, 2015), <http://www2.ljworld.com/news/2015/sep/10/kobach-debates-voter-id-laws-ku-law-professor/>.

²³ Sarah Childress, *Why Voter ID Laws Aren’t Really About Fraud*. FRONTLINE (Oct. 20, 2014), <http://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud/>.

²⁴ Press Release: *Kansas Secure and Fair Elections (SAFE) Act Signed by Governor* (April 18, 2011), https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf.

²⁵ Kobach, Kris. A Guide to Kansas Secure and Fair Elections (SAFE) Act. 2016, https://www.sos.ks.gov/forms/elections/A_Guide_to_SAFE_Act.pdf (last accessed July 27, 2016) Hereafter cited as “*Kobach SAFE Act Guide, 2016*.”

enforcing the decision to approve Kansas, Alabama, and Georgia's requirement for documentary proof of citizenship on the federal voter registration form.³² The Plaintiffs then appealed this order to the D.C. Circuit Court. The D.C. Circuit reversed the District Court and entered an injunction for the course of the litigation, so the decision to implement the revised federal form in Kansas has not taken effect, and is still in litigation.³³

Amid continued legal struggles to implement proof of citizenship requirements for voter registration in Kansas, in January 2013, the State began implementing a "bifurcated voting system, in which individuals who register to vote using the federally approved voter registration form are allowed to vote in federal elections, but not state elections."³⁴ However, on January 15, 2015, Shawnee County District Judge Franklin Theis struck down this bifurcated system, ruling that "a person is either registered to vote or he or she is not. By current Kansas law, registration, hence the right to vote, is not tied to the method of registration."³⁵ Secretary of State Kris Kobach said, "We don't anticipate this decision is going to be the final word on the subject."³⁶ Indeed, despite Judge Theis' 2015 ruling, on July 12, 2016, Secretary Kobach received administrative approval to enact K.A.R. 7-23-16, "a temporary regulation that seeks to formalize his two-tiered voter registration system."³⁷

In May 2016, U.S. District Judge Julie Robinson ruled the Kansas "proof-of-citizenship requirement violates a provision of the National Voter Registration Act that requires 'only the minimum amount of information' to determine a voter's eligibility," and thus cannot be

³² See Brennan Center for Justice at the N.Y.U. Sch. of Law. *League of Women Voters v. Newby*, D.D.C. July 28, 2016, <https://www.brennancenter.org/legal-work/league-women-voters-v-newby> (last accessed Aug. 4, 2016).

³³ *League of Women Voters of the United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).

³⁴ Mark Johnson, *Developments in Kansas Election Law and Voting Rights Law*, U. of Kan. Sch. of Law. May 19, 2016, p. 04., <https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2016/johnson-materials.pdf> (last accessed Aug. 1, 2016) Hereafter cited as: *Developments in Kansas Election Law*. See also: Fernanda Santos, & John Eligon, *2 States Plan 2-Tier System for Balloting*, THE N.Y. TIMES. Oct. 12, 2013, at A1 http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html?pagewanted=1&_r=2 (last accessed Aug. 1, 2016).

³⁵ Edward Eveld, *Judge Rules Kris Kobach Can't Operate Two-Tier Election System in Kansas*, THE KAN. CITY STAR, Jan. 15, 2016, <http://www.kansascity.com/news/politics-government/article54933870.html>. Hereafter cited as: *Judge Rules Kris Kobach Can't Operate Two-Tier Election System in Kansas*.

³⁶ *Judge Rules Kris Kobach Can't Operate Two-Tier Election System in Kansas*.

³⁷ Kan. Admin. Regs. § 7-23-16 (temporary) See also: *What's the Matter with Kansas and the National Voter Registration Form?* (Hicks 2016).

enforced.³⁸ Unless reversed by a higher court, this decision is to affect voters who register using either the Kansas registration form, or the federal voter registration form.

The legal battle regarding Kansas' voter identification and citizenship verifications requirements remains ongoing. The Committee sought through this project to gather direct testimonial evidence, and document the concerns and experiences of Kansas voters in exercising their fundamental right to freely elect their leaders.

³⁸ Lisa Wagner, *Judge Blocks Kansas' Proof-Of-Citizenship Voting Registration Requirement*, NPR AMERICA, (May 18, 2016), <http://www.npr.org/sections/thetwo-way/2016/05/18/478496140/judge-blocks-kansas-proof-of-citizenship-voting-registration-requirement>.

III. SUMMARY OF PANEL TESTIMONY

The panel discussion on January 28, 2016, at the Topeka and Shawnee Public Library in Topeka, Kansas included testimony from diverse academic experts; legal professionals; community advocates; state elected officials; and individual community members directly impacted by voting requirements imposed under the Kansas SAFE Act.³⁹ At the direction of the Committee's bipartisan members, panelists were selected to provide a diverse and balanced overview of the civil rights issues impacting voters in Kansas. Testimony included the perspective of both proponents and opponents of the Kansas SAFE Act, including that of Kansas Secretary of State Kris Kobach, the legislation's author, who testified in person. However, despite an active search and many outreach attempts, the Committee was unable to identify any Kansas-based community organizations or community groups to testify in support of the SAFE Act.⁴⁰ True the Vote, a 'nonpartisan voters' rights and election integrity organization,'⁴¹ was able to send a representative from its Texas office to speak about the importance of preserving election integrity more broadly. No local community organizations in Kansas were identified to speak in support of Kansas' voting requirements, and no individuals in support of these requirements presented themselves to speak during the period of public comment. Regrettably, this lack of participation from community representatives in support of Kansas' voting requirements prevented the Committee from obtaining the full range of intended perspectives.

The Committee notes that where appropriate, all invited parties who were unable to attend personally were offered the opportunity to send a delegate; or, at a minimum, to submit a written statement offering their perspective on the civil rights concerns in question. The Committee did receive a number of written statements from the public offering supplemental information on the topic, which are included in Appendix B. It is in this context that the Committee submits the findings and recommendations following in this report.

A. Voter Identification and Proof of Citizenship

Under the Kansas SAFE Act, voters may obtain a free, non-driver photo ID from the Kansas Division of Vehicles,⁴² and a free, certified copy of an individual's birth certificate from the

³⁹ The complete agenda from this meeting can be found in Appendix A.

⁴⁰ Note: The Committee sought community input, not affiliated with any particular political party

⁴¹ True the Vote, <https://truethevote.org/aboutus> (last accessed July 29, 2016).

⁴² See: *got voter ID? Valid Forms of Photographic Identification*. Kansas Secretary of State, Election Division. 2012., <http://www.gotvoterid.com/valid-photo-ids.html#idlist> (last accessed Aug. 18, 2016). Hereafter cited as "*got voter ID? Photographic Identification*."

Kansas Office of Vital Statistics, to serve as proof of citizenship⁴³ after swearing under penalty of perjury that the documentation is for voting purposes only. Despite these accommodations, throughout the testimony, the Committee heard numerous concerns regarding reasons why legitimate voters may be disenfranchised by these documentation requirements. Such reasons include: (1) inconsistencies in implementation and training; (2) insufficient voter education efforts; (3) the level of burden for citizens to obtain required documentation; and (4) a lack of provision for those born out of state to obtain free documentation.

1. Implementation Training and Consistency

Testimony throughout the Committee's hearing yielded three primary concerns regarding inconsistencies in implementation that may disenfranchise eligible voters under the SAFE Act.

The first is the erroneous assessment of fees for required documentation. Disability rights advocate Mr. Michael Byington testified, "I've worked with a number of people trying to get the [Kansas] birth certificate, and in almost all cases they have attempted to charge them."⁴⁴ He recalled one specific situation, when he accompanied a client who was both visually and hearing impaired to the Kansas Department of Motor Vehicles (DMV) in order to obtain a photo ID for voting purposes. Although his client explained that the ID was for voting purposes, the staff attempted to charge her \$17 for the service. When Mr. Byington reminded the staff person of the SAFE Act provision allowing for free photo identification for voting purposes, the staff reportedly replied, "I think I heard something about that law. And there's probably some form...but I wouldn't have the foggiest idea of where it is. That will be \$17."⁴⁵ Mr. Byington testified that he and his client insisted on waiting until the clerk was able to locate the appropriate form. Mr. Byington reported, "About an hour later my client walked out of that booth and out of that office with her ID and she hadn't had to pay for it. But had I not been there with the knowledge that I had of the laws, she would have definitely been charged the \$17."

In such situations, panelists argued any fees incurred for retrieving required voter identification may effectively stand as a poll tax, which is unconstitutional under both the 14th and the 24th

⁴³ got voter ID? Voter Registration (No Citizenship Documents).

⁴⁴ Byington Testimony, Hearing before the Kansas Advisory Committee to the U.S. Commission on Civil Rights, January 28, 2016. Hearing Transcript, p. 120 line 20 – p. 121 line 23. Available at: [http://www.facadatabase.gov/download.aspx?fn=Meetings/2016-268-135169_transcript_2016-04-21-03-50-24\).pdf](http://www.facadatabase.gov/download.aspx?fn=Meetings/2016-268-135169_transcript_2016-04-21-03-50-24).pdf) (last accessed March 10, 2017). Hereafter cited as: "Transcript"

⁴⁵ Byington Testimony, *Transcript*, p. 261line 02 – p. 264 line 05.

Amendments to the U.S. Constitution.⁴⁶ Mr. Byington concluded, “that is very clearly the way in this country, we have for many years defined a poll tax and a poll tax is not constitutional, it’s not legal, and it’s not patriotic.”⁴⁷ Panelist Richard Levy, Distinguished Professor of Constitutional Law at the University of Kansas School of Law, emphasized even small fees associated with voting may raise related constitutional concerns. Referencing the U.S. Supreme Court decision in *Harper v. Virginia Board of Elections* (1966), he noted the amount of a poll tax is irrelevant to the discussion: “The Court just said paying a tax is not correlated to your qualifications to vote, period.”⁴⁸ In delivering the 1966 majority opinion on *Harper v. Virginia Board of Elections*, Justice William O. Douglas said:

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.⁴⁹

Other concerns regarding improper training and implementation include poll workers erroneously rejecting voter identification that is in fact valid under the SAFE Act. Panelist Carrie O’Toole of the Potawatomi Tribal Council testified she had been denied the right to use her tribal ID as acceptable identification when voting. “It happened by chance that the election officer was sick and missed her training,” Ms. O’Toole explained. So when she presented her tribal identification card to vote, the election officer asked for a driver’s license instead. When Ms. O’Toole informed the election officer that a tribal ID is an approved form of government-issued identification under the Kansas SAFE Act, “she didn’t know anything about it. So it was very frustrating and I was so flustered and in shock that I forgot to ask for a provisional ballot to vote.”⁵⁰ During her testimony, Ms. O’Toole also noted on the same day she was denied the right to use her tribal ID to vote, she observed an election official also deny a military veteran the right

⁴⁶ U.S. Const. amend. XIV, guarantees all people “equal protection of the laws.” Cornell U. Sch. of Law, Legal Info. Inst., <https://www.law.cornell.edu/constitution/amendmentxiv> (last accessed Sept. 14, 2016); U.S. Const. amend. XXIV, prohibits the establishment of poll taxes directly. See <https://www.law.cornell.edu/constitution/amendmentxxiv>. See also: Byington Testimony, *Transcript*, p. 263 line 08 – p. 264 line 17; Davis Testimony, *Transcript*, p. 131 lines 07 – 12.

⁴⁷ Byington Testimony, *Transcript*, p. 261 line 02 – p. 264 line 05.

⁴⁸ Levy Testimony, *Transcript*, p. 50 line 20 – p. 51 line 10.

⁴⁹ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (No. 48.), <http://caselaw.findlaw.com/us-supreme-court/383/663.html> (last accessed Sept. 15, 2016).

⁵⁰ O’Toole Testimony, *Transcript*, p. 79 line 24 – p. 80 line 17.

to use his military ID to vote.⁵¹ Ms. O'Toole now volunteers at the polls to help ensure such errors are not repeated. "We have worked very hard to get people to do the Native vote...I feel it's been very important for my elders and my community members that [they] take the time to be involved in this process."⁵²

Similarly, former State Representative Ann Mah described a number of other situations in which poll workers erroneously rejected voter identification that should have been accepted:⁵³

1. During the 2012 elections, voter ID's were reportedly rejected at multiple polling locations in Wichita, because the address on the ID did not match the voting address.
2. A voter attempted to vote using her temporary (paper) driver's license, along with her old driver's license as ID. The poll worker would not accept her temporary license, so she was forced to vote on a provisional ballot. Because her permanent license did not arrive before the canvas date, her vote was thrown out.
3. A voter was told to vote using a provisional ballot because the poll worker would not accept his suspended driver's license (which he still possessed) as valid identification.
4. Poll workers rejected a veteran's Department of Veteran Affairs service card because it had no address on it.
5. Poll workers rejected a Wichita State University ID as acceptable voter identification.

In her written testimony submitted to the Committee, Ms. Mah asserted that under the SAFE Act, each of these individuals identified should have been permitted to vote with the presented identification, though they were denied due to poll worker error.⁵⁴

Finally, the Committee heard testimony that proof of citizenship documentation is sometimes lost in the voter registration data transfer between the Department of Motor Vehicles (DMV) and county elections officials. Douglas County Clerk Jamie Shew testified that in 2014, his county implemented an outreach program to contact voters who were in suspense due to a lack of documentation.⁵⁵ As the election drew nearer, county staff made personal phone calls to such voters, in an effort to get them to complete their registration. Mr. Shew testified, "The majority

⁵¹ O'Toole Testimony, *Transcript*, p. 80 line 18 – p. 81 line 04.

⁵² O'Toole Testimony, *Transcript*, p. 82 line 16 – p. 83 line 22.

⁵³ Mah Written Testimony, pp. 03 – 06 (Appendix B.1).

⁵⁴ Mah Written Testimony, pp. 03 – 06 (Appendix B.1).

⁵⁵ Shew Testimony, *Transcript*, p. 169 lines 11 – 24.

of the applicants, almost 60 percent, had registered through the DMV. They had presented their documentation, and somewhere it didn't show up to our office, and when we called them they were frustrated because -- they're like, 'I've already done this. Why am I doing this a second time?'"⁵⁶ Mr. Shew lamented that due to such frustration, many voters gave up and are deterred from voting all together—a concern that may disproportionately impact young voters.⁵⁷ He said, "We also know that administrative challenges are the largest impediment to the participation of younger voters. In 2014 we found out the largest group of voters in suspense were 18 to 24 years of age, and they are also the quickest to say 'Forget it. I've got stuff going on.'" ⁵⁸

2. Voter Education

In addition to the importance of properly training election officials and state service employees, the Committee heard testimony about the need to educate the voting public on the SAFE Act's new requirements. Referring to the Supreme Court Case *Crawford v. Marion County Election Board*, former Kansas Representative Ann Mah noted "voter education was a critical issue in [the Court upholding] the voter ID law in Indiana."⁵⁹ She asserted other states instituting new voter ID requirements, such as Indiana, Georgia, and Missouri, spent millions of dollars educating voters on their new requirements. She wrote, "Missouri, for example, spent \$13 million over the first few years of the law."⁶⁰ In contrast, following the passage of the SAFE Act, Kansas reportedly budgeted \$60,000 in 2012 and only \$200,000 in 2013 for voter education.⁶¹ As a member of the Kansas legislature during the passage of the SAFE Act, Representative Mah recalled:

I asked for a copy of the Secretary's voter education plan for voter ID. During the hearings he said that they would rely primarily on free media and legislators to inform individuals of the changes. Other states have had to use broader media and not just low-volume radio stations. This was a real weak spot in the plan. It took Georgia years to meet the court's concerns. Kansas' education plan was minimal. A case in point. Wichita had a ballot initiative in early 2012. The Secretary of State started the public ads just two

⁵⁶ Shew Testimony, *Transcript*, p. 169 lines 11 – 24

⁵⁷ Shew Testimony, *Transcript*, p. 169 lines 11 – 24

⁵⁸ Shew Testimony, *Transcript*, p. 169 line 25 – p. 170 line 06

⁵⁹ Mah Written Testimony p. 02 (Appendix B.1)

⁶⁰ Mah Written Testimony p. 02 (Appendix B.1)

⁶¹ Mah Written Testimony p. 02 (Appendix B.1)

weeks prior to the vote. There is no way someone born out of state or without an ID could comply in time to vote. Later I learned that 45 ballots were rejected for no ID.⁶²

Other panelists also highlighted the need for increased voter education support, noting the efforts of nonprofits and advocacy groups to fill in where the state's efforts to educate voters have fallen short. Dr. Glenda Overstreet of the Kansas NAACP testified that despite her long standing commitment to voting, in the previous election she found out nearly 60 days after the election was over that her advance ballot was not counted.⁶³ She said, "I then stayed resolved to the fact that we constantly have to continue to keep our membership educated on the changing laws," a commitment that the NAACP in Kansas has taken on.⁶⁴ She continued, "It's part of an education process that we have to get out to combat some of these requirements that we're seeing that prove to be cumbersome."⁶⁵

3. *Level of Burden*

In *Crawford v. Marion County Election Board*, the U.S. Supreme Court held that reasonable burdens on voting can be constitutional. In discussing this ruling, Panelist Richard Levy, Distinguished Professor of Constitutional Law at the University of Kansas, School of Law noted the ruling was in response to a facial challenge—meaning it was an overall challenge to Indiana's voter identification law, without regard to how the law had been applied.⁶⁶ Professor Levy explained the burden to establish in order to win a facial challenge in court is especially high, "and the Court emphasized that in *Crawford*."⁶⁷ As such, he testified an "as applied" challenge may result in a different outcome, "particularly for those voters it's especially difficult to meet the photo ID requirement."⁶⁸ Specifically, Levy recalled "the Indiana law contained a lot of alternative ways of identifying yourself and proving who you were that not all of which required that you actually have a photo ID...for example, you can submit...a utility bill with

⁶² Mah Written Testimony p. 02 (Appendix B.1).

⁶³ Overstreet Testimony, *Transcript*, p. 86 lines 04 – 19.

⁶⁴ Overstreet Testimony, *Transcript*, p. 86 line 20 – p. 87 line 06; p. 99 line 15 – p. 100 line 08; p. 104 line 17 – p. 105 line 21.

⁶⁵ Overstreet Testimony, *Transcript*, p. 99 line 15 – p. 100 line 08.

⁶⁶ Levy Testimony, *Transcript*, p. 22 line 21 – p. 23 line 24; A "facial challenge" is distinguished from an "as applied" challenge, which challenges a particular application of a law, without necessarily challenging the law itself.

⁶⁷ Levy Testimony, *Transcript*, p. 22 line 21 – p. 23 line 24.

⁶⁸ Levy Testimony, *Transcript*, p. 22 line 21 – p. 23 line 24.

your name and address on it...part of the Court's reasoning was it was so easy to prove who you were under Indiana law that it couldn't really be a burden."⁶⁹

In contrast, Kansas voter ID requirements under the SAFE Act are significantly more rigorous than the Indiana requirements reviewed under *Crawford*. In Kansas, voter identification must be government-issued, contain a photograph, and must not be expired.⁷⁰ The requirement that individuals provide documentary proof of citizenship upon registration adds an additional burden on would-be voters. As Professor Levy testified, "proving citizenship is more difficult than getting a photo ID, so the burdens are arguably more severe."⁷¹ Therefore, he suggested that in particular "the proof of citizenship requirement for voter registration in the Kansas SAFE Act is more vulnerable to a Constitutional challenge under *Crawford*."⁷²

Indeed, several panelists highlighted the individual burden the SAFE Act requirements may impose on individual voters. Marge Ahrens of the League of Women Voters commented, "it takes little to drive away those who have limited power already."⁷³ Examples of such burdens include:

- Douglass County Clerk Jamie Shew testified in order to meet eligibility requirements for state elections, his office found "it can take up to two months to get your birth certificate."⁷⁴
- Former State Representative Ann Mah explained because Kansas is a rural state, many would-be voters may have to travel great distances to counties where IDs can be acquired.⁷⁵ She noted only 33 counties have full-time DMV locations where citizens could obtain IDs to vote, leaving 72 counties without full-time DMV offices to provide voter IDs.⁷⁶

⁶⁹ Levy Testimony, *Transcript*, p. 51 line 18 – p. 52 line 11.

⁷⁰ Some exceptions apply. For example, persons over age 65 may use an expired identification. For complete list of acceptable photographic identification, see: *got voter ID? Photographic Identification*.

⁷¹ Levy Testimony, *Transcript*, p. 23 lines 20 – 22.

⁷² Levy Testimony, *Transcript*, p. 23 lines 16 – 19.

⁷³ Ahrens Testimony, *Transcript*, p. 142 lines 01 – 08.

⁷⁴ Shew Testimony, *Transcript*, p. 168 line 17 – p. 169 line 10.

⁷⁵ Mah Written Testimony, p. 01 (Appendix B.1).

⁷⁶ Mah Written Testimony, p. 02 (Appendix B.1)

- Mr. Shew recalled that in 2014 he spoke to a 90 year old woman with no proof of birth because she was born at home. Her response to the enhanced requirements was, “I don’t have the energy for all that. I guess I voted most of my lifetime. I’m done.”⁷⁷ Mr. Shew testified the complexity of the forms and requirements is a deterrent for Kansas citizens who have been “confused by the process,”⁷⁸ especially for those citizens with low literacy levels.⁷⁹
- Mr. Kip Elliot of the Disability Rights Center of Kansas explained individuals in hospitals and residential care or nursing facilities may not have family or other support persons who can help them apply for identification documents, such as a birth certificate, they may be missing.⁸⁰ In addition, staff may not be available to take them to the appropriate facilities, particularly in rural communities.⁸¹ Mr. Elliot did note during one election cycle, Secretary Kobach sent staff out to a rural facility with him to help with registration; however, it is not clear the office would have the capacity to provide such assistance on a regular basis.⁸²

In addition to the burden on individuals, testimony indicated voter registration requirements under the SAFE Act have also created a substantial burden on community groups and local elections agencies.⁸³ Civic organizations and local election agencies have reportedly struggled to support citizens working to satisfy voter registration requirements. Marge Ahrens testified despite the many years of experience that the League of Women Voters has in conducting voter registration outreach, the effectiveness of their efforts has declined significantly.⁸⁴ She noted,

Prior to implementation of the SAFE Act the League of Women Voters of Kansas and in nine communities registered voters at events which particularly targeted the underrepresented, schools, community organizations, churches. We frequently were registering people in public venues such as public libraries. And since that time there is a

⁷⁷ Shew Testimony, *Transcript*, p. 170 line 17 – p. 171 line 02.

⁷⁸ Shew Testimony, *Transcript*, p. 170 lines 07 – 16.

⁷⁹ Shew Testimony, *Transcript*, p. 168 lines 17 – 23.

⁸⁰ Elliot Testimony, *Transcript*, p. 73 line 16 – p. 74 line 18.

⁸¹ Elliot Testimony, *Transcript*, p. 73 line 16 – p. 74 line 18.

⁸² Elliot Testimony, *Transcript*, p. 76 lines 06 – 14.

⁸³ King Testimony, *Transcript*, p. 123 – 125; Davis Testimony, *Transcript*, p. 130 – 132; Ahrens Testimony, *Transcript*, p. 142 – 143; Shew Testimony, *Transcript*, p. 166, p. 173.

⁸⁴ Ahrens Testimony, *Transcript*, p. 135 line 09 – p. 138 line 24.

major shift, and I know this from the first-hand reports of the League presidents and voter service chairs across the state of Kansas.⁸⁵

Ms. Ahrens described the difficulty of registering voters at such public events in the wake of the SAFE Act, because the process now requires documentation most people do not have on hand, and some do not have easily accessible.⁸⁶ She predicted that such events “are going to become less and less frequent because they’re not any of any benefit. People really cannot register at these tables.”⁸⁷ She concluded, “We maintain that all government processes need to be accessible and understandable. And now we believe that the complexity and confusion of the laws have created so much uncertainty that the registrant is in fact threatened.”⁸⁸

Gille King of the League of Women Voters also spoke to this phenomenon. Ms. King claimed while working on an initiative to reach out to voters on the suspense list, some people simply “said that they no longer wanted to vote.”⁸⁹ Ms. King documented the “great deal of volunteer time” devoted to help citizens finish their registration, lamenting that “getting citizens registered to vote should not be harder than getting them informed.”⁹⁰

County elections officials have also faced significant burdens in order to ensure all eligible voters are able to register. Mr. Shew specified Douglas County spent more than \$30,000 on outreach and assistance to people working to satisfy voter requirements under the SAFE Act.⁹¹ Ms. Ahrens testified 105 counties have tried to help citizens with incomplete registrations, at a cost of approximately \$5 per attempt.⁹² Many smaller and rural counties may not be able to afford such expenses.

In his testimony, Secretary Kris Kobach dismissed concerns regarding the SAFE Act’s increased documentation burden on voters. He stated, “The photo ID part, I don’t think it’s a burden to reach into one’s wallet or one’s purse and pull out a photo ID. Someone could argue that you’re exerting calories when you’re doing that, and there is some process. I don’t think that’s a

⁸⁵ Ahrens Testimony, *Transcript*, p. 136 lines 08 – 19.

⁸⁶ Ahrens Testimony, *Transcript*, p. 136 line 16 – p. 138 line 18.

⁸⁷ Ahrens Testimony, *Transcript*, p. 141 lines 04 – 07.

⁸⁸ Ahrens Testimony, *Transcript*, p. 138 lines 19 – 24.

⁸⁹ King Written Testimony, p. 01 (Appendix B.2).

⁹⁰ King Written Testimony, p. 01 (Appendix B.2).

⁹¹ Shew Testimony, *Transcript*, p. 173 lines 09 – 13.

⁹² Ahrens Testimony, *Transcript*, p. 142 line 24 – p. 143 line 02.

burden.”⁹³ With respect to the additional requirement of proving citizenship upon registration, Kobach said, “Is this step a burden? I guess it depends on how you define burden. Someone might say that it is to find your birth certificate or your passport and take a picture of it with your phones and email it in or send it in or carry it in. I don’t think it’s significant.”⁹⁴ Kansas Representative Jim Ward challenged this assertion, citing the 40,000 citizens on the suspended voter list due to lack of documentary proof of citizenship. “It is a burden for these voters for the ID part. And 40,000 people in Kansas would definitely disagree with the Secretary and say that this is a burden for them to participate.”⁹⁵ Even if many Kansas citizens are able to produce their documents with relative ease, testimony before the Committee overwhelmingly indicated at least some groups may face a substantial burden in obtaining the documentation required under the SAFE Act. Senator Faust-Goudeau lamented, “these 13 years of being in the legislature, I too have seen that voting...the whole process has diminished and [gone] backwards; we’re going backwards.”⁹⁶

4. *Voters Not Born in Kansas*

Despite provisions in the SAFE Act allowing for free identification documents for voting purposes, the Committee heard testimony that some individuals may actually incur a cost in order to obtain the required documentation. For example, a number of panelists pointed out that the SAFE Act provides only Kansas birth certificates for free.⁹⁷ Voters who were not born in Kansas must pay the applicable fee in the state of their birth in order to secure a certified copy of their birth certificate. Ms. Cheyenne Davis, Field and Political Director for the Kansas Democratic Party, testified, “For some people who have lived out of state or were born out of state and they do not have their birth certificate, the cost of that is [equivalent] to a poll tax.”⁹⁸ Douglass County Clerk Jamie Shew testified his office contacted the appropriate agency in each state in order to inquire as to such costs. Their inquiry revealed fees ranging from \$7 to \$45, with an average cost of \$20.⁹⁹

⁹³ Kobach Testimony, *Transcript*, p. 234 lines 16 – 21.

⁹⁴ Kobach Testimony, *Transcript*, p. 235 lines 01 – 20.

⁹⁵ Ward Testimony, *Transcript*, p. 236 line 21 – p. 237 line 06.

⁹⁶ Faust-Goudeau Testimony, *Transcript*, p. 225 lines 01 – 04.

⁹⁷ Shew Testimony, *Transcript*, p. 167 line 04 – p. 168 line 16; Byington Testimony, *Transcript*, p. 121 lines 08 – 23.

⁹⁸ Davis Testimony, *Transcript*, p. 131 lines 07 – 12.

⁹⁹ Shew Testimony, *Transcript*, p. 167 lines 04 – 18.

In addition to the potential for the SAFE Act's proof of citizenship requirement to stand as a poll tax for Kansas citizens born out of state, Mr. Shew noted broader concern regarding equal protection. He noted under the Act, "one group of citizens...gets something that other groups of citizens do not have."¹⁰⁰ Citing the Help America Vote Act (HAVA), he testified that "each person should have equal, fair access just like any other voter regardless of your circumstances."¹⁰¹ He concluded, "if one group of citizens gets a free birth certificate, all citizens should get a free birth certificate."¹⁰² Accordingly, Mr. Shew noted as of 2014, his county began paying for birth certificates for any resident born out of state who needed the documentation for voting purposes.¹⁰³ Similarly, panelist Marge Ahrens of the League of Women Voters testified her organization had also purchased out of state birth certificates for Kansans who could not afford them, in order to help them complete their registration.¹⁰⁴ Mr. Shew cautioned, however, such initiatives vary by county, and many counties do not have the resources to provide this type of support.¹⁰⁵

B. Voter Participation

Throughout the hearing, the Committee received testimony from a number of panelists citing concern the challenges described above have already resulted in an actual decline in rates of voter participation and voter registration in Kansas since the passage of the SAFE Act. Panelist Doug Bonney of the Kansas Chapter of the American Civil Liberties Union (ACLU) testified that "there is at least preliminary evidence that after Kansas' strict photo ID requirement took effect on January 1, 2012, voter participation in Kansas dropped significantly."¹⁰⁶ The Committee notes in September 2014, the U.S. Government Accountability Office (GAO) released a report entitled "Elections: Issues Related to State Voter Identification Laws."¹⁰⁷ In it, the GAO reported results of an analysis it did of voter turnout in Kansas and Tennessee. The

¹⁰⁰ Shew Testimony, *Transcript*, p. 167 line 19 – p. 168 line 02.

¹⁰¹ Shew Testimony, *Transcript*, p. 168 lines 03 – 16.

¹⁰² Shew Testimony, *Transcript*, p. 168 lines 03 – 16.

¹⁰³ Shew Testimony, *Transcript*, p. 167 lines 19 – 24.

¹⁰⁴ Ahrens Testimony, *Transcript*, p. 142 lines 18 – 23.

¹⁰⁵ Shew Testimony, *Transcript*, p. 185 lines 01 – 10.

¹⁰⁶ Bonney Testimony, *Transcript* p. 67 lines 17 – 20.

¹⁰⁷ U.S. Government Accountability Office. Elections: Issues Related to State Voter Identification Laws [Reissued on Feb. 27, 2015], <http://www.gao.gov/products/GAO-14-634>. (last accessed July 27, 2016). Hereafter cited as: *GAO Elections: Issues Related to State Voter Identification Laws, 2015*.

analysis concluded voter turnout had indeed decreased in Kansas between the 2008 and the 2012 general elections to a greater extent than turnout decreased in selected comparison states, and the decrease was attributable to changes in the state's voter ID requirements.¹⁰⁸ The GAO also found race and age disparities in the demographics of those affected: turnout was reduced by larger numbers among African Americans and young voters between the ages of 18 and 23 than other groups during this time period.¹⁰⁹

On the other hand, Senator Steve Fitzgerald, Vice Chair of the Elections and Ethics Committee in the Kansas Senate, attributed the enthusiasm for the 2008 national election to the historic nature of the election of the first African American president, combined with national get out the vote efforts.¹¹⁰ He testified the diminished enthusiasm in 2012 was more in line with historical norms in Kansas, rather than being attributable to the implementation of any provisions of the SAFE Act.¹¹¹ The Senator did offer that the Elections Committee had been presented with concerns regarding disenfranchisement, though he did not believe the assertions were “substantive” and the questions raised had not been either “proved or disproved.”¹¹²

1. Voter Turnout

In written testimony submitted to the Committee, Nathaniel Birkhead, Assistant Professor of Political Science at Kansas State University, explained the link between strict voter identification requirements and depressed voter participation:

In political science, the most common way to understand voter turnout is to focus on the costs of voting (things that make it harder to vote) and the benefits of voting (things that voters expect to receive if their preferred candidate wins). One of the most consistent findings in political science research is that turnout drops when the costs of voting go up, and that turnout goes up when the costs of voting go down.¹¹³

Professor Birkhead wrote:

¹⁰⁸ GAO Elections: *Issues Related to State Voter Identification Laws*, 2015. Note: the Kansas S.A.F.E. Act was enacted in April of 2011.

¹⁰⁹ GAO Elections: *Issues Related to State Voter Identification Laws*, 2015.

¹¹⁰ Fitzgerald Testimony, *Transcript* p. 191 line 11 – p. 194 line 14.

¹¹¹ Fitzgerald Testimony, *Transcript* p. 191 line 11 – p. 194 line 14.

¹¹² Fitzgerald Testimony, *Transcript* p. 196 line 20 – p. 197 line 08.

¹¹³ Birkhead Written Testimony, p. 01, lines 28-32 (Appendix B.3).

While no research has looked at Kansas' voter ID laws specifically, the consensus in scholarly research is that voter ID laws present a substantial cost to voting, and as such depress turnout. In particular, the costs associated with voter ID laws tend to have disproportionate impact among the poor, uneducated, and young...the ultimate impact...is to make the electorate unrepresentative of the state's citizens.¹¹⁴

Professor Birkhead went on to note that "Kansas' voter registration and voter ID laws are among the most demanding in the country."¹¹⁵ Although as of the time of his writing, no empirical studies had been conducted to specifically assess the impact of Kansas' voter identification requirements on voter turnout in the state, Professor Birkhead referenced an empirical study that had been conducted of Georgia's voter identification requirements, which he noted are "similar to Kansas both in the requirement that voters are able to furnish a photo ID, and similar in what forms of photo IDs are valid."¹¹⁶ This analysis found "the Georgia voter ID statute had a suppressive effect among those lacking IDs: there was an across the board drop in turnout of 6.5% among those without IDs."¹¹⁷ In other words, "about 24,692 registered voters in Georgia were turned away due to the photo ID statute that is similar to Kansas."¹¹⁸

In reviewing this empirical research, the Committee notes that in addition to imposing voter photo identification requirements similar to Georgia, the Kansas SAFE Act also requires that voters show proof of citizenship upon registration. This additional requirement is unique to only two states in the country (Kansas and Arizona) and its impact has not yet been empirically studied. In response to these concerns, Senator Faust-Goudeau spoke about her efforts to introduce legislation to increase voter participation, and the political apathy and opposition she has faced from Secretary Kobach.¹¹⁹

2. *Suspense Voters*

In addition to the potential direct impact on rates of voter participation and voter registration, the Committee heard concern that many citizens in Kansas who have turned out to vote in recent

¹¹⁴ Birkhead Written Testimony, p. 01, lines 10-15 (Appendix B.3).

¹¹⁵ Birkhead Written Testimony, p. 02 line 27 – p. 3 line 02 (Appendix B.3).

¹¹⁶ Birkhead Written Testimony, p. 04, lines 16-24 (Appendix B.3) *See also*: Hood, MV III, and Charles S. Bullock III. 2012. "Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute." *State Politics and Policy Quarterly* 12(4):394-14.

¹¹⁷ Birkhead Written Testimony, p. 04, line 31 – p. 5 line 05 (Appendix B.3).

¹¹⁸ Birkhead Written Testimony, p. 04, line 31 – p. 5 line 05 (Appendix B.3).

¹¹⁹ Faust-Goudeau Testimony, *Transcript* p. 223 line 20- p. 228 line 20.

elections have not had their votes counted. Attorney Mark Johnson explained that under the SAFE Act, voters who register without proof of citizenship are placed on a “suspense voter” list, and must prove their citizenship within 90 days or be purged from the list and required to restart the voter registration process.¹²⁰ Secretary Kobach testified that most people on the suspense list never finished registering simply because they had moved, and that purging the list is a necessary way to decrease cost from sending those people reminders.¹²¹ Similarly, panelist Catherine Engelbrecht of True the Vote, suggested the 90-day rule for purging the suspended voters list is a valuable step in encouraging voters to fix registration in a timely manner and that it “bolsters confidence” in “election integrity.”¹²²

In contrast, Mr. Bonney of the ACLU raised concern regarding the large number of people on Kansas’ suspense voter list. He noted by September 2015, there were 37,000 voters on the suspense list.¹²³ Of those, “almost 32,600 were on the suspense list because they had not provided or because bureaucrats could not find documentary proof of citizenship for the voter registrants.”¹²⁴ Mr. Bonney testified those 32,600 people “equal 2 percent of all the registered voters in Kansas...When a law causes 2 percent of voter...registrants to go into suspense, that law is having a direct and damaging effect on voter participation in the state....”¹²⁵ Mr. Bonney also noted a disparate impact on the basis of both political affiliation and age, with 58 percent of those on the suspense voter list due to a lack of citizenship documentation being politically “unaffiliated” and 40 percent being under the age of 30.¹²⁶

3. *Provisional Voting*

Under the SAFE Act, voters on the suspense voter list due to incomplete documentation or those without approved photo ID at the polls may vote using a provisional ballot, and submit their missing documentation at a later time in order to have their votes counted.¹²⁷ In a written

¹²⁰ Johnson Testimony, *Transcript* p. 150 line 20 – p. 161 line 01.

¹²¹ Kobach Testimony, *Transcript* p. 233 lines 03 – 16.

¹²² Engelbrecht Testimony, *Transcript* p. 152 line 16 – p. 153 line 08.

¹²³ Bonney Testimony, *Transcript* p. 68 lines 06 – 11.

¹²⁴ Bonney Testimony, *Transcript* p. 68 lines 06 – 11.

¹²⁵ Bonney Testimony, *Transcript* p. 69 lines 10 – 18.

¹²⁶ Bonney Testimony, *Transcript* p. 68 lines 20 – 25; *See also*: Smith Testimony, *Transcript*, p. 31 lines 19 – 21 & p. 32 lines 18 – 19.

¹²⁷ State of Kansas County Election Manual. Section D, Provisional Voting, pp. 85 – 86, [https://www.kssos.org/forms/elections/County%20Election%20Manual%20\(Combined\).pdf](https://www.kssos.org/forms/elections/County%20Election%20Manual%20(Combined).pdf) (last accessed February 1, 2017).

statement to the Committee, former State Representative Ann Mah noted before the 2012 election, the Shawnee County Election Commission would provide a list of the names of citizens who voted with provisional ballots because they were lacking photo identification. Representative Mah would then contact these voters to advise them about how to meet eligibility requirements and ensure their votes were counted. After the 2012 general election, Representative Mah requested these same lists. She testified:

When [Secretary] Kobach found out, he made me go to the district court to get the list. When the district court ordered him to give me the list, he went to federal court to try and stop me. When the federal judge ordered him to give me the list, Kobach got a law passed to stop any future requests of the names of those who voted provisional ballots. Now no one can help those who vote [by] provisional ballots understand what has happened and how to make their votes count.¹²⁸

Marge Ahrens of the League of Women Voters raised additional concern regarding the use of provisional ballots. She noted voting with a provisional ballot poses another threat to voter participation because provisional ballots are not confidential and can be read by poll workers.¹²⁹ “It completes the breach of trust between a democratic government and all of its citizens around the most essential signature of a democracy, the right to vote and to the privacy of that vote for all.”¹³⁰ She argued this breach of privacy “means a great deal when you live in a small community.”¹³¹

Ms. Leanne Chase, a poll worker for both Sedgewick and Butler Counties, spoke of concern regarding long lines at the provisional ballot tables, because so many people did not have the required documentation.¹³² She noted she lives in a small county, and poll workers know their neighbors, but could still not allow them to vote because they did not have a photo ID.¹³³ She mentioned provisional voting is particularly difficult on parents, who were trying to get their children ready for school the next day, yet were told after waiting in line to vote they would have to return downtown in the next few days to provide their documentation for their provisional ballot to count.¹³⁴

¹²⁸ Mah Written Testimony, p. 06 (Appendix B.1).

¹²⁹ Ahrens Testimony, *Transcript* p. 141 lines 17 – 24.

¹³⁰ Ahrens Testimony, *Transcript* p. 143 lines 10 – 15.

¹³¹ Ahrens Testimony *Transcript* p. 141 lines 22 – 24.

¹³² Chase Testimony, *Transcript*, p. 253 line 18 – p. 255 line 03.

¹³³ Chase Testimony, *Transcript*, p. 253 line 18 – p. 254 line 04.

¹³⁴ Chase Testimony, *Transcript*, p. 253 line 18 – p. 255 lines 04-14.

Overall, testimony before the Committee indicated that although no empirical research exists to evaluate the impact of the SAFE Act on voter turnout in Kansas, preliminary data in the state as well as comparison empirical research in other states indicate stricter voter identification requirements result in lower voter turnout—and Kansas’ voter ID requirements under the SAFE Act are among the strictest in the nation. Furthermore, a lack of access to suspense voter lists, and the purging of those lists after 90 days, may make it more difficult for county officials to assist voters in completing the requisite documentation. Finally, privacy concerns relating to the required use of a provisional ballot may additionally deter eligible voters from participating. Further study in each of these areas is necessary to ensure the rights of all eligible Kansas citizens to vote, and to have their vote counted.

C. Civil Rights and Disparate Impact

As a Federal Advisory Committee focused specifically on matters of civil rights, the Committee took particular note throughout the hearing of concerns panelists raised regarding evidence of both discriminatory intent and disparate impact. Constitutional Law Professor Richard Levy of the University of Kansas School of Law explained that “Because the S.A.F.E. Act’s requirements are facially neutral as to race or national origin, it will be treated as discriminatory for constitutional purposes only if there is proof of discriminatory intent, which may be proved by a stark pattern of disparate impact or by the circumstances surrounding the adoption of the act.”¹³⁵ Professor Levy also noted, however, that Section 2 of the Voting Rights Act (VRA) goes beyond these constitutional protections in that it “prohibits state laws or requirements that *result* in discrimination without regard to *intent* or *purpose*.”¹³⁶ The Committee heard testimony that raised concern regarding both potential discriminatory intent and disparate impact in relation to the SAFE Act, each discussed below.

1. Improper Intent

In his testimony, Professor Levy emphasized that constitutional challenges based on discriminatory intent are often difficult to demonstrate, because contemporary policymakers are unlikely to openly declare discriminatory intent while writing, introducing, or discussing new laws or regulations.¹³⁷ Professor Levy further explained that under some circumstances,

¹³⁵ Levy Written Testimony, pp. 06 – 07 (Appendix B.4).

¹³⁶ Levy Written Testimony, pp. 07 – 09 (Appendix B.4).

¹³⁷ Levy Testimony, *Transcript* p. 16 line 24 – p. 17 line 14.

been no cases filed involving aliens voting in Kansas”¹⁴⁷ Such a disconnect between the SAFE Act’s purported intent of preventing noncitizens from voting, and actual cases of voter fraud involving U.S. citizens who have illegally voted in more than one jurisdiction, may raise further concern regarding the intent of the legislation.

2. *Disparate Impact*

Testimony from a majority of panelists throughout the Committee’s hearing indicated concern that in addition to a general deterrent effect, the Kansas SAFE Act may pose a disproportionate burden on a number of specific groups of citizens, many of whom fall into federally protected classes. Examples from the testimony illustrate such concern below:

Age

- Dr. Michael Smith compared U.S. census tract data with available data on suspense voters in Kansas and found a significant relationship between the age of citizens in each county and the number of suspense voters.¹⁴⁸ University campuses were particularly likely to have high numbers of suspense voters—The University of Kansas had the highest percentage of suspense voters of any census tract in the state.¹⁴⁹
- Mr. Doug Bonney of the Kansas ACLU testified that in September 2015, voters under the age of 30 made up about 15 percent of registered voters in Kansas, but more than 40 percent of those on the suspense voter list because they were lacking citizenship documentation.¹⁵⁰
- Ms. Marge Ahrens discussed how prior to the SAFE Act, the League of Women Voters of Kansas registered young people in public venues such as libraries and high schools; however, with the proof of citizenship requirement there is little value in those efforts because young voters no longer possess the required documentation and may not know how to acquire it.¹⁵¹ Ms. Ahrens further testified that “high school registration

¹⁴⁷ Johnson Testimony, *Transcript*, p. 157 lines 17 – 18.

¹⁴⁸ Smith Testimony, *Transcript*, p. 40, line 09 – p. 41 line 25.

¹⁴⁹ Smith Testimony, *Transcript*, p. 35 lines 12 – 24.

¹⁵⁰ Bonney Testimony, *Transcript*, p. 68 lines 12 – 25.

¹⁵¹ Ahrens Testimony, *Transcript*, p. 137 lines 03 – 11.

turnout...is very low across the state. Young adults and the poor move more than any group, and they have the weakest hold on their documents of any group.”¹⁵²

- Mr. Jaime Shew testified that “administrative challenges are the largest impediment to the participation of younger voters. In 2014 we found out the largest group of voters in suspense were 18 to 24 years of age, and they are also the quickest to say, ‘Forget it. I’ve got stuff going on.’”¹⁵³
- Mr. Michael Byington testified that the SAFE Act identification requirements disproportionately burden people who struggle with mobility, including the elderly, for whom it is more difficult to access transportation to get an ID and more difficult to manage all of the required documentation.¹⁵⁴

Sex

- Ms. Cheyenne Davis, a Field and Political Director for the Kansas Democratic Party, testified “if [women] have changed their names, then that is reflected in a paper trail that could be scattered across the country.”¹⁵⁵ Ms. Davis described her work with one woman who paid \$75 for her birth certificate from another state. She then had to get her marriage decree, and divorce decree—both from different states—in order to complete her registration.¹⁵⁶ Similarly, Representative Jim Ward testified about a bill he proposed to combat the fact that “women [are] disproportionately affected by the documentation requirement” due to marriage and divorce changes in name.¹⁵⁷
- Elle Boatman wrote that it can be difficult or nearly impossible for transgender/gender non-conforming people to obtain documentation that reflects their legal/preferred name and gender identity, and the process for changing these documents is complex and cost-prohibitive. This leaves transgender/gender non-conforming people at risk of experiencing violence and rejection at their polling place if their identification does not “look” like them.¹⁵⁸

¹⁵² Ahrens Testimony, *Transcript*, p. 137 lines 11 – 16.

¹⁵³ Shew Testimony, *Transcript*, p. 169 line 25 – p. 170 line 06.

¹⁵⁴ Byington Testimony, *Transcript*, p.120 lines 03-19.

¹⁵⁵ Davis Testimony, *Transcript*, p. 131 line 13 – p. 132 line 04.

¹⁵⁶ Davis Testimony, *Transcript*, p. 131 line 13 – p. 132 line 04.

¹⁵⁷ Ward Testimony, *Transcript* p. 217 line 19 – p. 218 line 04.

¹⁵⁸ Boatman Written Testimony, p. 01 (Appendix B.5).

- Mr. Jamie Shew testified that single parents, who are most often women, reported an inability to find the time to maneuver bureaucratic requirements to obtain the required documentation.¹⁵⁹

Disability

- Mr. Michael Byington testified that the SAFE Act identification requirements disproportionately burden people who struggle with mobility, including the elderly, people with mental or physical disabilities, or those with visual or hearing impairments, for whom it is more difficult to access transportation to get an ID and more difficult to manage all of the required documentation.¹⁶⁰ Mr. Byington pointed out that, “if you’re blind or visually impaired significantly, you’re probably going to have to hire someone to help you locate that document if you need it for purposes of voter registration.”¹⁶¹
- Mr. Jamie Shew and Mr. Kip Elliot each cited concern for people with mental illness or physical disabilities who are living in assisted living or skilled nursing facilities.¹⁶² For these individuals, access to transportation and funds is difficult, though they may not meet requirements for permanent advanced voting, which is often reserved for people who medically cannot leave their residence.¹⁶³

Race/Color

- Dr. Michael Smith provided evidence there is a correlation between census tracts with high African American populations and an increase in the number of suspense voters, suggesting that African American voters are likely disproportionately represented on the suspense voters list.¹⁶⁴
- Disability rights advocate Mr. Michael Byington described his work with one African American individual, who was born outside of Kansas in the southern U.S. in the 1930s. This gentleman told Mr. Byington, “they just weren’t very careful about maintaining birth certificate records for people of ... my skin tone back in the 1930s when I was

¹⁵⁹ Shew Testimony, *Transcript*, p. 170 lines 07 – 16.

¹⁶⁰ Byington Testimony, *Transcript*, p. 261 line 02 – p. 264 line 05.

¹⁶¹ Byington Testimony, *Transcript*, p.120 lines 10 – 15.

¹⁶² Shew Testimony, *Transcript*, p. 164 line 14 – p. 165 line 16; Elliot Testimony, *Transcript* p. 73 line 06 – p. 74 line 25.

¹⁶³ Shew Testimony, *Transcript*, p. 164 lines 14-23; Elliot Testimony, *Transcript* p. 73 line 06 – p. 74 line 25.

¹⁶⁴ Smith Testimony, *Transcript*, p. 42 lines 01 – 05.

born.” Mr. Byington reported this man “ended up simply not registering to vote because he could not get the birth certificate.”¹⁶⁵

The following categories are not expressly protected under current federal civil rights law; however, the Committee notes the Commission’s mandate includes the authority to study and report on *all* citizens “being accorded or denied the right to vote in federal elections as a result of patterns or practices of fraud or discrimination.”¹⁶⁶ Testimony indicated the following categories may intersect with other federally protected categories or otherwise threaten election integrity.

Income/Poverty

- Dr. Michael Smith provided evidence indicating there was a relationship between high levels of voters below the poverty line and more suspense voters. This evidence suggests the SAFE Act’s proof of citizenship requirement may disproportionately impact low income voters.¹⁶⁷ Dr. Smith also suggested this relationship may indicate a disproportionate impact on communities of color, but it is difficult to disassociate race from poverty in the data.¹⁶⁸
- Mr. Shew testified that citizens without permanent homes had greater difficulty obtaining and keeping track of documents required to vote.¹⁶⁹
- Ms. Ahrens indicated that “persons of limited means” are most often overburdened by the SAFE Act’s identification requirements.¹⁷⁰ Ms. Ahrens also indicated that “young adults and the poor move more than any group, and they have the weakest hold on their documents of any group.”¹⁷¹
- Dr. Smith’s analysis suggested young voters in high-poverty census tracts may be less likely to provide the follow up documentation necessary to complete their registration once they are placed on the suspense voter list.¹⁷²

¹⁶⁵ Byington Testimony, *Transcript*, p. 121 lines 12 – 23.

¹⁶⁶ 45 C.F.R. § 703.2; see also 42 U.S.C. § 1975(a)(1).

¹⁶⁷ Smith Testimony, *Transcript*, p.42 lines 06 – 13.

¹⁶⁸ Smith Testimony, *Transcript*, p. 42 lines 01 – 13.

¹⁶⁹ Shew Testimony, *Transcript*, p. 165 17 – 22.

¹⁷⁰ Ahrens Testimony, *Transcript*, p. 142 lines 01 – 04.

¹⁷¹ Ahrens Testimony, *Transcript*, p. 137 lines 14 – 22.

¹⁷² Smith Testimony, *Transcript*, p. 59 line 08 – p. 61 line 14.

Political Affiliation

- Dr. Smith found that suspense voters were “far more likely to be unaffiliated and far less likely to register as Republican.”¹⁷³ Furthermore, suspense voters tend to be concentrated in certain census tracks, such as in Johnson County, suburban Kansas City, Sedgwick County/Wichita, Shawnee County, and Douglas County.¹⁷⁴

Mr. Davis Hammet, a community member who spent time volunteering to assist with voter registration drives in the state, explained that for many Kansans citizens, the SAFE Act requirements appear reasonable, and it may be difficult for some to understand why strict identification requirements could be a problem.¹⁷⁵ However, the disparities in impact on marginalized communities are stark. He explained, “it’s very difficult...for white, affluent men to understand why it would be a problem for a photo ID or birth certificate.”¹⁷⁶ However, in many communities, “just stopping and asking someone to fill out a form is incredibly difficult.”¹⁷⁷ After the registration form is completed, he said, “If you could just see people’s faces, a low-income single mom who you’re trying to register to vote and you tell her that she’s going to have to go home and do all this extra work just to vote....I just wish every legislator could see that face looking back at them through this legislation.”¹⁷⁸ He noted apathy and disenchantment with the political system are high in many marginalized communities because of legislation such as the SAFE Act which makes people feel disempowered,¹⁷⁹ and “advances the structural oppression and the advantages of certain people.”¹⁸⁰

D. Addressing Voter Fraud

The integrity of the U.S. electoral system is both a central tenet of democracy and essential to the protection and advancement of civil rights. Such integrity requires equal consideration to ensuring both that (1) no individual is fraudulently afforded the right to vote; and that (2) no eligible citizen is unduly denied the right to vote as a result of discrimination. The Committee

¹⁷³ Smith Testimony, *Transcript*, p. 31line 18 – p. 32 line 22.

¹⁷⁴ Smith Testimony, *Transcript*, p. 55.

¹⁷⁵ Hammet Testimony, *Transcript*, p. 125 line 21 – p. 126 line 24.

¹⁷⁶ Hammet Testimony, *Transcript*, p. 126 lines 01 – 25.

¹⁷⁷ Hammet Testimony, p. 127 lines 08 – 18.

¹⁷⁸ Hammet Testimony, p. 128 lines 02 – 11.

¹⁷⁹ Hammet Testimony, p. 127 lines 08 – 18.

¹⁸⁰ Hammet Testimony, p. 129 lines 04 – 15.

heard testimony indicating that, at times, such concerns can appear to be in conflict with one another, and thus must be carefully balanced. In his testimony, Kansas Secretary of State Kris Kobach noted: “I think we have an ethical duty to ensure that every election is decided fairly...the Secretary of State needs to make sure it’s [both] easy to vote and hard to cheat.”¹⁸¹

In considering evidence of both voter fraud and voter disenfranchisement, supporters and critics of the SAFE Act agreed that even small discrepancies in electoral integrity can have a significant impact on election outcomes, and thus on the foundation of our democracy. Secretary Kobach testified, “we have many close elections in Kansas where...it was decided by just two or three or six votes and those elections if you have even just a handful of votes that are cast by individuals who were not eligible to vote residing in a different state, you have a stolen election.”¹⁸² Similarly, one could reasonably conclude that just a handful of disenfranchised voters could also swing the outcome of an election. Representative Ward noted, “Every vote matters...we are very competitive in the senate elections, and very competitive in the house elections across the state and we will continue to be.”¹⁸³

1. National Significance

The Committee notes small variations in voter access and participation have in fact determined electoral outcomes at all levels of government. The 2016 U.S. presidential election was decided by less than one percent of the vote in a few key swing states—outcomes in Wisconsin and Pennsylvania were determined by 0.7% of the vote; Michigan was determined by just 0.2% of the vote.¹⁸⁴ These three states together carried enough electoral votes to define the outcome of the presidential election. While Kansas is not typically considered to be a swing state in national elections, proponents of the SAFE Act have suggested its use as a model for voting requirements across the country.¹⁸⁵ Accordingly, the Committee finds the discussion of appropriately balancing concern regarding voter fraud with the need to maintain open and unfettered access to the polls to be one of critical national importance.

To this end, testimony provided as part of this Committee’s inquiry, as well as secondary review of available evidence suggests the number of eligible voters turned away from the polls in

¹⁸¹ Kobach Testimony, *Transcript*, p. 249 lines 03 – 21.

¹⁸² Kobach Testimony, *Transcript*, p. 249 lines 03 – 21.

¹⁸³ Ward Testimony, *Transcript*, p. 219 line 17 – p. 220 line 03.

¹⁸⁴ The Cook Political Report, updated Jan. 2, 2017. *2016 Popular Vote Tracker*, <http://cookpolitical.com/story/10174> (last accessed Jan. 31, 2017).

¹⁸⁵ Kobach Testimony, *Transcript*, p. 244 lines 01-09; Engelbrecht Testimony, *Transcript*, p. 144 line 18 – p. 145 line 02; p. 148 lines 06 – 12.

Kansas due to a lack of required identification or a failure to provide documentary proof of citizenship may far exceed the number of documented cases of voter fraud. Secretary Kobach himself testified that in the November 2012 elections, 532 out of the 1.2 million ballots cast in Kansas were cast on provisional ballots that were not counted due to a lack of required photo identification.¹⁸⁶ In comparison, the Secretary alleged 231 cases of voter fraud in the 13 year period between 1997 and 2010.¹⁸⁷ In May 2016, the Associated Press reported that 18,373 individuals have been denied voter registration at Kansas motor vehicle offices due to the state's proof of citizenship requirement.¹⁸⁸ This is compared to evidence that in Kansas just three noncitizens have attempted to vote in federal elections and approximately 14 have attempted to register between 1995 and 2013.¹⁸⁹ In reviewing this evidence, U.S. District Judge Julie Robins concluded "even if instances of noncitizens voting cause indirect voter disenfranchisement by diluting the votes of citizens, such instances pale in comparison to the number of qualified citizens who have been disenfranchised by this law."¹⁹⁰

Those who continue to raise concerns regarding voter fraud have cited errors in voter registration data as evidence that voter fraud may be significantly more widespread than it appears.¹⁹¹ Following the 2016 presidential election, President Donald Trump contended 3-5 million undocumented individuals voted illegally in the election, costing him the nation's popular vote. He promised a federal investigation in response.¹⁹² In January 2017, NBC News reported that a

¹⁸⁶ Kobach Testimony, *Transcript*, p. 202 line 09 – p. 203 line 13. *Note: According to Secretary Kobach, 838 provisional ballots were cast; however, 306 of those voters later presented the required ID so that their ballots would be counted.*

¹⁸⁷ Kobach Testimony, *Transcript*, p. 240 lines 17 – 21; *Note: other panelists testified that earlier claims of the Secretary alleged 21 cases of fraud during this timeframe. See: Bonney Testimony, Transcript*, p. 93 lines 04 – 10. *Note: in an email to the Committee on 2/9/17, Rep. Ann Mah offered the following clarification: "There were 231 reports to the previous Secretary between 1997 and 2010. Most were just anecdotal and did not even get investigated. Only a few turned out to be actual cases that were worthy of investigation."*

¹⁸⁸ Roxana Hedgeman, *Judge says Kansas can't require citizenship proof to vote*, ASSOCIATED PRESS, May 17, 2016, <http://bigstory.ap.org/article/105ca12809694ca98e7ad9e0faad7b81/judge-says-kansas-cant-require-citizenship-proof-vote> (last accessed Jan. 31, 2017).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ John Gibbs, *Voter Fraud Is Real. Here's The Proof*, THE FEDERALIST, Oct. 13, 2016, <http://thefederalist.com/2016/10/13/voter-fraud-real-heres-proof/> (last accessed Jan. 31, 2017).

¹⁹² Daniella Silva, *President Trump Says He Will Ask for 'Major Investigation' into Unsubstantiated Allegations of Voter Fraud*, NBC NEWS, POLITICS, Jan. 25, 2017 (last accessed Jan. 31, 2017).

2012 Pew research study¹⁹³ did find “millions of invalid voter registrations due to people moving or dying, but the report’s author, executive director of the Center for Election Innovation and Research David Becker, said in late November 2016 that the study found no evidence of voter fraud.”¹⁹⁴ The NBC report also cited Heather Gerken, a professor of law at Yale University and expert on election law, who explained that people moving out of state or grieving the loss of a loved one are unlikely to take time to call election officials to update the affected registration.¹⁹⁵ She noted, “to equate that with voter fraud is irresponsible...they’re completely different issues.”¹⁹⁶

2. *Potential Solutions*

To both preserve election integrity and ensure the greatest possible access for eligible citizens to vote, varying provisions across states may offer compromises that could appropriately balance election integrity and voter access concerns. Some examples include:

- automatic voter registration, available in seven states as of December 2016;¹⁹⁷
- same day voter registration, available in 16 states as of January 2017;¹⁹⁸
- online voter registration, available in 34 states and the District of Columbia as of January 2017 (including Kansas);¹⁹⁹

¹⁹³ Inaccurate, Costly, and Inefficient: Evidence that America’s Voter Registration System Needs an Upgrade. *The Pew Center of the States: Election Initiatives, Issue Brief*. Feb. 2012, http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewupgradingvoterregistrationpdf.pdf (last accessed Jan. 31, 2017) [Hereafter cited as: *America’s Voter Registration System Needs an Upgrade*, 2012]

¹⁹⁴ Daniella Silva, *President Trump Says He Will Ask for ‘Major Investigation’ into Unsubstantiated Allegations of Voter Fraud*. NBC NEWS, POLITICS, Jan. 25, 2017 (last accessed Jan. 31, 2017).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ National Conference of State Legislators: Automatic Voter Registration. Dec. 8, 2016, <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (Last accessed Jan. 31, 2017).

¹⁹⁸ National Conference of State Legislators: Same Day Voter Registration. Jan. 11, 2017, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (last accessed Jan. 31, 2017).

¹⁹⁹ National Conference of State Legislators: Online Voter Registration. Jan. 31, 2017, <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx> (Last accessed Feb. 1, 2017).

IV. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.²²⁰ The Kansas Advisory Committee heard testimony that the State's 2011 Secure and Fair Elections Act may disproportionately disenfranchise voters on the basis of race, color, sex, age, disability, and national origin. In addition, the Committee heard concerns regarding the need to find reasonable ways to prevent voter fraud and maintain the integrity of all elections at the local, state, and federal levels.

Below, the Committee offers to the Commission a summary of concerns identified throughout the Committee's inquiry. Following these findings, the Committee proposes for the Commission's consideration several recommendations that apply both to the State of Kansas and to the nation as a whole.

A. Findings

1. Provisions within the SAFE Act allow citizens seeking identification documents for the purposes of voting to receive such documents from the appropriate state agency for free. However, in practice, a number of eligible citizens may be required to pay for their documents. Any such instances may effectively be compared to a poll tax, which is unconstitutional under both the 14th and 24th Amendments:
 - a. Insufficient training for state workers may result in confusion regarding who is eligible for free documentation and how to process the free applications; and
 - b. Voters requiring identity documents from states other than Kansas must pay the applicable fees from the relevant state agency; there are no provisions to allow Kansas voters to obtain required out-of-state documents free of charge.
2. Improper or insufficient training of poll workers has resulted in eligible voters being turned away because the poll workers were unaware that the identification provided is in fact considered "acceptable" under the SAFE Act requirements. Such examples include military ID, tribal ID, current but suspended drivers' licenses, and state university photo IDs, among others.

²²⁰ 45 C.F.R. § 703.2.

3. Inefficient transfer of registration information between state agencies such as the department of motor vehicles and county elections officials, has resulted in data loss. Such data loss has resulted in citizens facing requests to submit the same identification documents multiple times, creating confusion and deterring eventual voter participation.
4. The level of voter education implemented in Kansas to inform citizens about new identification requirements under the SAFE Act was significantly less than similar efforts in other states, and may have resulted in eligible citizen's failure to comply with the new law.
5. Kansas' proof of citizenship and voter ID requirements under the SAFE Act are the strictest in the nation, and may impose a substantially higher burden than that which has been previously challenged in the U.S. Supreme Court. Community groups, local elections officials, and individual citizens all reported struggling to comply with the requirements.
6. The current consensus in political science research is that stricter voting requirements result in lower voting participation. Preliminary analysis of voter turnout data in Kansas indeed suggests that voter participation declined following the implementation of the SAFE Act.
7. Preliminary analysis of suspense voter lists and those required to vote using provisional ballots due to a lack of required documentation suggest as many as two percent of registered voters may not have their votes counted. The purging of suspense voter rolls after 90 days makes it difficult to follow up with suspense voters and to accurately identify the populations affected.
8. A number of panelists suggested the Kansas SAFE Act may have been written and implemented with improper, discriminatory intent. Evidence of such intent included:
 - a. Procedural irregularities – Secretary Kobach is the only Secretary of State in the country with prosecutorial authority over alleged cases of voter fraud;
 - b. The Act's proof of citizenship requirement only applies to voters who registered to vote in Kansas after July 2013, disproportionately affecting young voters (all who turned 18 after this date), and perhaps having a disproportionate impact on the basis of political affiliation; and
 - c. All current documented cases of voter fraud in Kansas involve individuals illegally voting in multiple jurisdictions; yet no provisions of the SAFE Act address this particular type of fraud.
9. Testimony indicated the SAFE Act may disparately impact voters on the basis of age, sex, disability, race, income level, and political affiliation.

10. Balancing the need to ensure voting integrity with all eligible citizens' democratic right to participate free and fair elections is a topic of critical national importance. The U.S. is currently the only major democracy without a standard voter registration system at the national level. Differences in voting requirements between states, as well as an analysis of international standards of best practices, may provide positive solutions for properly addressing both election integrity and voter access concerns moving forward.

B. Recommendations

1. The U.S. Commission on Civil Rights should conduct a national study on voting rights in the U.S. Such a study should include:
 - a. An analysis of changes in state voting laws and related changes in voter participation following the 2013 U.S. Supreme Court *Shelby County v. Holder* decision;
 - b. An analysis of the feasibility and potential impact of establishing a uniform, national voter registration system for all elections; and
 - c. An analysis of current allegations of voter fraud and its related evidence; such a review should include a cost/benefit analysis comparing evidence of voter fraud with evidence of voter suppression, including concerns regarding potential fees associated with required identity documents, poll worker training, and public education efforts.
2. The U.S. Commission on Civil Rights should issue the following formal recommendations to the U.S. Congress:
 - a. The U.S. Congress should establish a working committee to study the impact of the 2013 U.S. Supreme Court decision *Shelby County v. Holder* including a review of any changes in state voting laws and related changes in voter participation since the ruling;
 - b. According to the results of this study, the Congress should develop an updated formula to identify which states require continued review under the Voting Rights Act, and introduce appropriate legislation to implement the new formula; and
 - c. The working committee should then conduct an analysis of the feasibility and potential impact of establishing a uniform, national voter registration system.
3. The U.S. Commission on Civil Rights should issue the following, formal recommendations to the U.S. Department of Justice, Civil Rights Division, Voting Section:

Kansas Advisory Committee to the United States Commission on Civil Rights



U. S. Commission on Civil Rights Contact

USCCR Contact	Melissa Wojnaroski, Civil Rights Analyst Regional Programs Unit U.S. Commission on Civil Rights 55 W. Monroe, Suite 410 Chicago IL, 60603 (312) 353-8311
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This report is the work of the Kansas Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government.



September 2014

ELECTIONS

Issues Related to State Voter Identification Laws

This report was revised on February 27, 2015, to clarify information about one source of data on voter records on pages 83 and 161. This clarification had no impact on the conclusions of our report.

GAO Highlights

Highlights of [GAO-14-634](#), a report to congressional requesters

Why GAO Did This Study

The authority to regulate U.S. elections is shared by federal, state, and local officials. Congress has addressed major functional areas in the voting process, such as voter registration. However, the responsibility for administration of state and federal elections resides at the state level. In 2002 Congress passed the Help America Vote Act (HAVA), which requires states to request ID from first time voters who register by mail, when they register to vote or cast a ballot for the first time, and to permit individuals to vote a provisional ballot if they do not have the requisite ID. Numerous states have enacted additional laws to address how an individual may register to vote or cast a ballot. As of June 2014, 33 states had enacted requirements for all eligible voters to show ID before casting a ballot at the polls on Election Day.

GAO was asked to review issues related to voter ID laws. This report reviews (1) what available literature indicates about voter ownership of and direct costs to obtain select IDs; (2) what available literature and (3) analyses of available data indicate about how, if at all, voter ID laws have affected turnout in select states; (4) to what extent provisional ballots were cast due to ID reasons in select states; and (5) what challenges may exist in using available information to estimate the incidence of in-person voter fraud.

GAO reviewed relevant literature to identify 10 studies that estimated selected ID ownership rates. GAO reviewed the studies' analyses and determined that these studies were sufficiently sound to support their results and conclusions. GAO also reviewed state statutes and websites to identify acceptable forms of voter ID

View [GAO-14-634](#). For more information, contact Rebecca Gambler at (202) 512-8777 or gambler@gao.gov or Nancy R. Kingsbury at (202) 512-2700 or kingsbury@gao.gov

September 2014

ELECTIONS

Issues Related to State Voter Identification Laws

What GAO Found

The studies GAO reviewed on voter ownership of certain forms of identification (ID) documents show that most registered voters in the states that were the focus of these studies possessed the selected forms of state-issued ID, and the direct costs of required ID vary by state. GAO identified 10 studies of driver's license and state ID ownership, which showed that estimated ownership rates among all registered voters ranged from 84 to 95 percent, and that rates varied by racial and ethnic groups. For example, one study estimated that 85 percent of White registered voters and 81 percent of African-American registered voters in one state had a valid ID for voting purposes. The costs and requirements to obtain certain forms of ID, including a driver's license, state ID, or free state ID, vary by state. GAO identified direct costs for these forms of ID in 17 states that require voters to present a photo or government-issued ID at the polls and do not allow voters to affirm their own identities, and found that driver's license direct costs, for example, range from \$14.50 to \$58.50.

Another 10 studies GAO reviewed showed mixed effects of various forms of state voter ID requirements on turnout. All 10 studies examined general elections before 2008, and 1 of the 10 studies also included the 2004 through 2012 general elections. Five of these 10 studies found that ID requirements had no statistically significant effect on turnout; in contrast 4 studies found decreases in turnout and 1 found an increase in turnout that were statistically significant.

GAO conducted a quasi-experimental analysis to compare voter turnout in Kansas and Tennessee to turnout in the four comparison states that did not have changes in their voter ID requirements from the 2008 to 2012 general elections. In selecting these states from among 14 potential states that modified their ID requirements and 35 potential comparison states, GAO applied criteria to ensure that the states did not have other factors present in their election environments that may have significantly affected turnout. GAO selected states that did not experience contemporaneous changes to other election laws that may have significantly affected voter turnout; had presidential general elections where the margin of victory did not substantially change from 2008 to 2012 and all other statewide elections, such as U.S. Senate races, were non-competitive in both the 2008 and 2012 general elections; and ballot questions were not present, noncompetitive, or similarly competitive in both the 2008 and 2012 general elections. GAO analyzed three sources of data on turnout among eligible and registered voters, including data from official voter records and a nationwide survey. GAO's evaluation of voter turnout suggests that turnout decreased in two selected states—Kansas and Tennessee—from the 2008 to the 2012 general elections (the two most recent general elections) to a greater extent than turnout decreased in the selected comparison states—Alabama, Arkansas, Delaware, and Maine. GAO's analysis suggests that the turnout decreases in Kansas and Tennessee beyond decreases in the comparison states were attributable to changes in those two states' voter ID requirements. GAO found that turnout among eligible and registered voters declined more in Kansas and Tennessee than it declined in comparison states—by an estimated 1.9 to 2.2 percentage points more in Kansas and 2.2 to 3.2 percentage points more in Tennessee—and the results were consistent across the different data sources and voter populations used in the analysis.

in selected states and the price for certain forms of ID.

GAO also reviewed relevant literature and identified 10 other studies that estimated the effect of voter ID laws on turnout. GAO reviewed the studies' design, implementation, and analyses, and determined that the studies were sufficiently sound to support their results and conclusions. Further, GAO compared turnout in two states—Kansas and Tennessee—that changed ID requirements from the 2008 to 2012 general elections with turnout in four selected states—Alabama, Arkansas, Delaware, and Maine—that did not. GAO used a quasi-experimental approach, a type of policy evaluation that compares how an outcome changes over time in a treatment group that adopted a new policy, to a comparison group that did not make the same change. GAO selected states for evaluation that did not have other factors in their election environments that also may have affected turnout, such as significant changes to other election laws. GAO analyzed three sources of turnout data for the 2008 and 2012 general elections: (1) data on eligible voters, using official voter records compiled by the United States Elections Project at George Mason University, (2) data on registered voters, using state voter databases that were cleaned by a vendor through data-matching procedures to remove voters who had died or moved, and (3) data on registered voters, as reported to the Current Population Survey conducted by the U.S. Census Bureau.

GAO also analyzed data from Kansas and Tennessee election officials on the number of provisional ballots cast for ID reasons in the 2012 general election, and data from the Election Assistance Commission's Election Administration and Voting Survey on the number of provisional ballots cast in select states in 2008 and 2012.

GAO reviewed relevant literature and identified 5 studies that attempted to identify instances of in-person voter fraud. GAO reviewed the studies' analyses, and determined that these studies were sufficiently sound to support their results and conclusions. GAO also interviewed election officials in 46 states and the District of Columbia and officials from federal agencies that maintain federal crime data to determine how, if at all, instances of in-person voter fraud are tracked in state and federal databases.

To further assess the validity of the results of this analysis, GAO (1) compared Kansas and Tennessee with different combinations of comparison states and with individual comparison states, and (2) controlled for demographic characteristics that can affect turnout, such as age, education, race, and sex. GAO also conducted an analysis using survey data on registrants from Kansas and Tennessee and a nationwide comparison group of all states other than the selected comparison states. These additional analyses produced consistent results. GAO's estimates are limited to turnout in the 2012 general election in Kansas and Tennessee and do not apply to other states or time periods.

GAO also estimated changes in turnout among subpopulations of registrants in Kansas and Tennessee according to their age, length of voter registration, and race or ethnicity. In both Kansas and Tennessee, compared with the four comparison states, GAO found that turnout was reduced by larger amounts:

- among registrants, as of 2008, between the ages of 18 and 23 than among registrants between the ages of 44 and 53;
- among registrants who had been registered less than 1 year than among registrants who had been registered 20 years or more; and
- among African-American registrants than among White, Asian-American, and Hispanic registrants. GAO did not find consistent reductions in turnout among Asian-American or Hispanic registrants compared to White registrants, thus suggesting that the laws did not have larger effects among these subgroups.

A small portion of total provisional ballots in Kansas and Tennessee were cast for ID reasons in 2012, and less than half were counted. In Kansas, 2.2 percent of all provisional ballots in 2012 were cast due to ID reasons, and 37 percent of these provisional ballots were counted. In Tennessee, 9.5 percent of all provisional ballots in 2012 were cast due to ID reasons and 26 percent were counted. Provisional ballots cast for ID reasons may not be counted for a variety of reasons in Kansas and Tennessee, including the voter not providing valid ID during or following an election. GAO's analysis showed that provisional ballot use increased between the 2008 and 2012 general elections by 0.35 percentage points in Kansas and by 0.17 percentage points in Tennessee, relative to all other comparison states combined; these findings are not generalizable.

Challenges exist in using available information to estimate the incidence of in-person voter fraud. For the purposes of this report, "incidence" is defined as the number of separate times a crime is committed during a specific time period. Estimating the incidence of crime involves using information on the number of crimes known to law enforcement authorities—such as crime data submitted to a central repository based on uniform offense definitions—to generate a reliable set of crime statistics. Based on GAO's review of studies by academics and others and information from federal and state agencies, GAO identified various challenges in information available for estimating the incidence of in-person voter fraud that make it difficult to determine a complete picture of such fraud. First, the studies GAO reviewed identified few instances of in-person voter fraud, but contained limitations in, for example, the completeness of information sources used. Second, no single source or database captures the universe of allegations or cases of in-person voter fraud across federal, state, and local levels, in part because responsibility for addressing election fraud is shared among federal, state, and local authorities. Third, federal and state agencies vary in the extent they collect information on election fraud in general and in-person voter fraud in particular, making it difficult to estimate the incidence of in-person voter fraud.

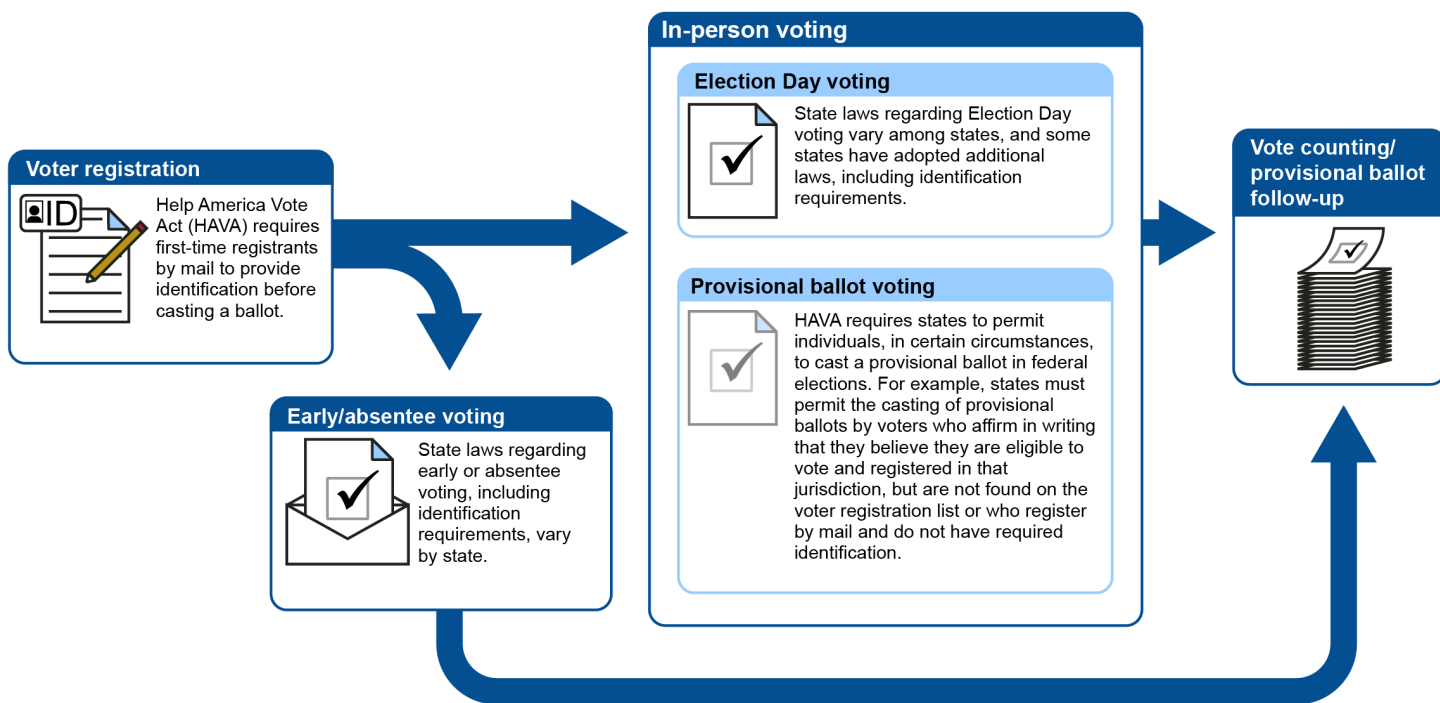
In comments on draft report excerpts the Kansas, Tennessee, and Arkansas Secretary of State Offices disagreed with GAO's criteria for selecting treatment and comparison states and Kansas and Tennessee questioned the reliability of one dataset used to assess turnout. GAO notes that any policy evaluation in a non-experimental setting cannot account for all unobserved factors that could potentially impact the results. However, GAO believes its methodology was robust and valid as, among other things, GAO's selection of treatment and comparison states controlled for factors that could significantly affect voter turnout, and GAO used three data sources it determined to be reliable to assess turnout effects.

Abbreviations:

ACTS II	Automated Case Tracking System II
ANES	American National Election Studies
ATT	average treatment effect for the treated
CCES	Cooperative Congressional Election Study
CPS	Current Population Survey
DMV	Department of Motor Vehicles
DOJ	Department of Justice
EAC	Election Assistance Commission
EAVS	Election Administration and Voting Survey
EOUSA	Executive Office for United States Attorneys
FJC	Federal Judicial Center
HAVA	Help America Vote Act
ID	identification
IDB	Integrated Database
LIONS	Legal Information Office Network System
MOV	margin of victory
NVRA	National Voter Registration Act
PACER	Public Access to Court Electronic Records
UOCAVA	Uniformed and Overseas Citizens Absentee Voting Act
USEP	United States Elections Project
USSC	United States Sentencing Commission

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Figure 1: The Voting Process



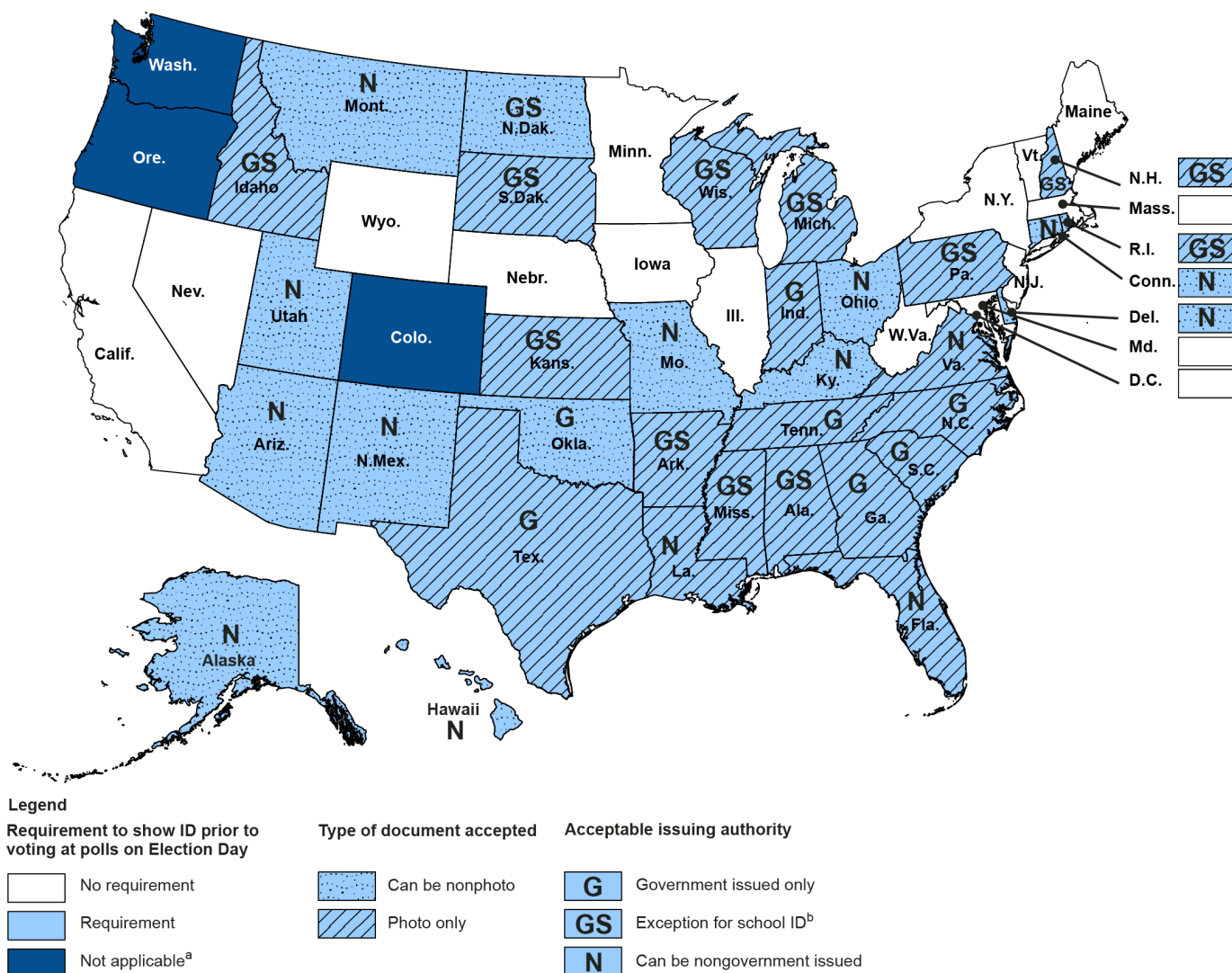
Source: GAO. | GAO-14-634

Registration

States have established a variety of requirements for individuals to present identification when they register to vote. With the exception of North Dakota, all states and the District of Columbia generally require citizens to register before voting. Typically, state eligibility provisions require, at minimum, that a person be a U.S. citizen, at least 18 years of age, and a resident of the state, with some states requiring a minimum residency period. Citizens apply to register to vote in various ways, such as at motor vehicle agencies, by mail, at local voter registrar offices, or through third-parties.²⁰ Election officials process registration applications and compile and maintain the list of registered voters to be used throughout the administration of an election.

²⁰Federal law does not generally address third-party voter registration organizations, but many states have enacted laws regulating how registration drives by third parties may be conducted, by whom, and other aspects of voter registration efforts by nongovernmental organizations.

Figure 3: Map of States that Have Enacted Voter Identification (ID) Requirements, as of June 2014



Notes:

This map includes states with enacted requirements that are currently in effect or scheduled to go into effect by legislation, regardless of the status of litigation. Some state laws may be enjoined pursuant to court order. In particular, as of June 2014, Pennsylvania's ID law was enjoined, *Applewhite v. Commonwealth*, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014), as was Wisconsin's, *Frank v. Walker*, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014). New Hampshire's and North Carolina's new voter ID laws are scheduled to go into effect in 2015 and 2016, respectively.

^aColorado, Oregon and Washington are vote-by-mail states, but laws in these states require that there be places for voters to cast a ballot in person. Colorado law provides that voters who do not have acceptable identification may cast a provisional ballot. If it is verified that a voter who cast a provisional ballot is eligible to vote based on information the voter provided with the provisional ballot

and a check of state databases, the provisional ballot will be counted. Oregon does not have identification requirements for voters who cast a ballot by mail or in person. Washington law has identification requirements applicable to voters who cast a ballot in-person, requiring that voters provide photo identification, or vote by provisional ballot (which will be counted if the signature on the ballot declaration matches the signature in the voter's registration record). For voters who cast a ballot by mail, the ballot will be counted if the signature on the ballot declaration matches the signature in the voter's registration record; there are no additional documentary identification requirements.

^bIn certain states, this exception applies to student IDs only, whereas in other states any identification issued by an education institution may be acceptable (e.g., employee ID). North Dakota additionally provides an exception for a long term care identification certificate (provided by a North Dakota facility) and Pennsylvania provides an exception for identification issued by a Pennsylvania care facility.

Provisional Ballots

Under HAVA, states are required to permit individuals, under certain circumstances, to cast a provisional ballot in federal elections. For example, voters who claim to be eligible to vote and registered in the jurisdiction they desire to vote in but whose names do not appear on the polling place registration list are to be allowed to cast provisional ballots in a federal election. In addition, if a voter does not have the requisite ID at the polls, HAVA requires that the voter be allowed to cast a provisional ballot. Under HAVA, election officials receiving provisional voter information are to determine whether such individuals are eligible to vote under state law. If an individual is determined to be eligible, HAVA specifies that such individual's provisional ballot be counted as a vote in that election in accordance with state law.

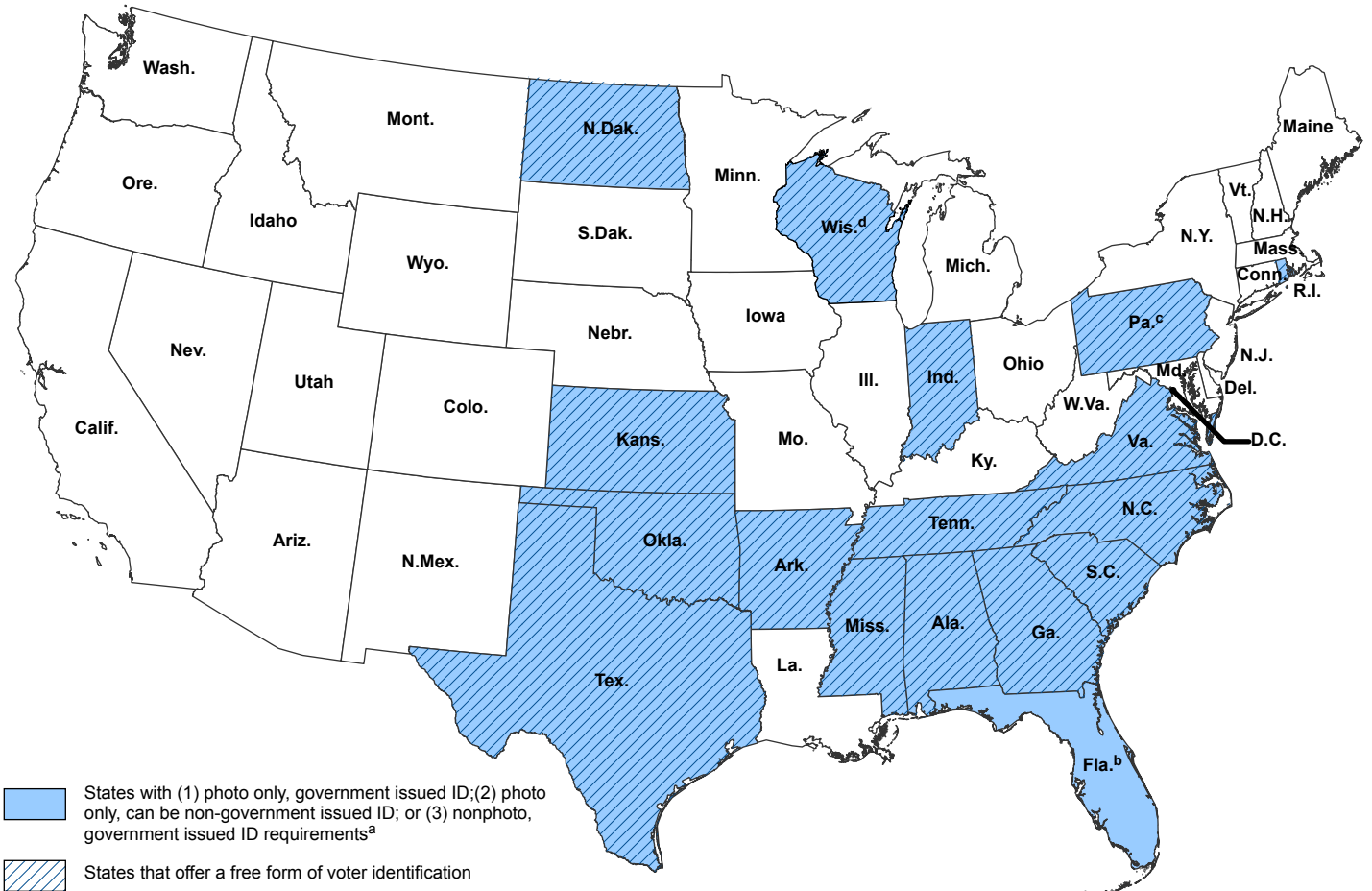
In states with voter ID requirements, there is variety in how states administer the provisional ballot processes when a voter does not have acceptable ID, including the way in which states determine whether the ballot will be counted. Of the 33 states that have an identification requirement for all eligible voters, 18 provide casting a provisional ballot as the only process for voters without acceptable identification.³⁷ Of these 18 states, 15 require some or all voters to provide the election authority

³⁷ Of the remaining 15 states, 1 state does not provide an alternative process if a voter does not have acceptable ID; 10 allow the voter to verify his or her identity and cast a regular ballot; and 4 allow for a voter's identity to be verified by elections officials and vote a regular ballot; and, of those 4, 3 additionally allow for the voter to cast a provisional ballot.

Interactive graphic

Figure 4: License and Nondriver State Identification (ID) Costs in Selected States, as of July 2014

Move mouse over state name to see identification costs. For a printer-friendly version, please see appendix IV.



Source: GAO analysis of state information and data; Map Resources (map). | GAO-14-634

Note: States with voter ID requirements that allow all voters to affirm their own identity at the polls and vote a regular ballot were excluded from our analysis.

The “nondriver identification” category does not include nondriver ID issued for voting purposes.

^aAs of June 2014, in effect or legislated to go into effect, regardless of litigation status. Government-issued ID includes states where there is an exception for a school ID.

^bFlorida allows as acceptable identification photo ID that may be nongovernment issued.

^cPennsylvania’s voter ID law was partially in effect for the 2012 election but has been permanently enjoined by the Pennsylvania Commonwealth Court. Pennsylvania’s Governor issued a statement that the commonwealth will not pursue an appeal to the Pennsylvania Supreme Court to overturn the Commonwealth Court’s decision.

^dWisconsin enacted a new voter ID law that, as of June 2014, was enjoined by federal and Wisconsin state courts.

documentation showing name and address as reflected in the voter registration record.⁵⁰

In general, examples of types of documents individuals can present to obtain a driver's license, nondriver state ID, or free ID could include a birth certificate, Social Security card, or other proof of identification or residency. Individuals may already have these documents, which can be used for other purposes, such as for enrolling in school, obtaining a passport, and obtaining a marriage certificate, among others. For individuals without these documents, the cost to obtain one of these documents to establish identity varies by state. Table 2 provides information on the costs, as of July 2014, of one type of document—the birth certificate—which, among the 17 states, is a common type of document individuals could present, among others, to obtain a driver's license, non-driver state ID, or free ID.⁵¹

Table 2: Cost to Obtain Birth Certificate by State, as of July 2014

State	Cost of birth certificate
Alabama	\$15 ^a
Arkansas	\$12
Florida	\$9
Georgia	\$25
Indiana	\$10
Kansas	\$15 ^b

⁵⁰According to the Alabama Secretary of State's legal counsel, a voter obtaining a free ID from the Alabama Secretary of State's office or a county board of registrar's office does not need to independently provide documentation showing he or she is registered to vote in the state and documentation showing his or her name and address as reflected in the voter registration record because this information can be verified electronically in Alabama's voter registration system.

⁵¹As previously stated, the types of documents and combinations of documents that an individual could present to obtain a driver's license, nondriver state ID, or free ID vary by state. Given this variation, we focused on obtaining and presenting information on costs for a state birth certificate, which is a common type of document individuals could present among the 17 states we reviewed. Other types of documents that could be presented in certain states include a Social Security card or other federal forms of ID; these federal forms of ID may have costs, but those costs are standard across states, and are therefore not discussed in this review. In addition, other types of documents could be presented in certain states, but we excluded them from our review, as the costs and combinations of documents vary across the states.

State	Cost of birth certificate
Mississippi	\$15
North Carolina	\$24
North Dakota	\$7
Oklahoma	\$15
Pennsylvania	\$20
Rhode Island	\$20
South Carolina	\$12
Tennessee	\$8 ^c
Texas	\$22
Virginia	\$12
Wisconsin	\$20

Source: GAO analysis of publicly available state birth certificate cost information. | GAO-14-634

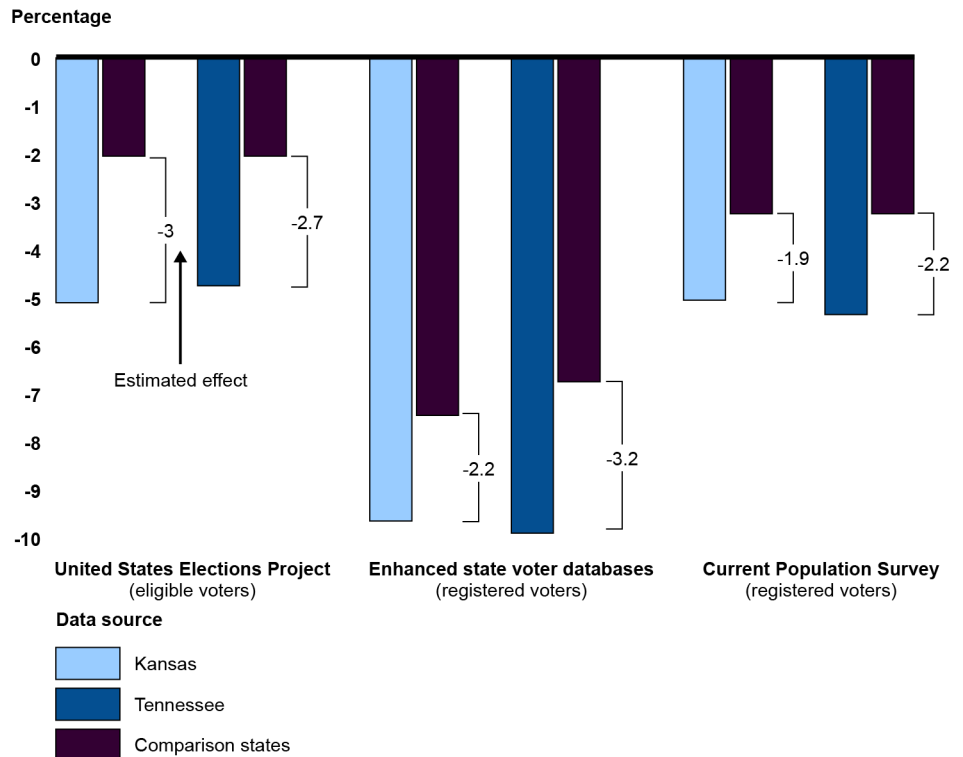
^aA birth certificate may be provided at no cost for the purposes of obtaining required voter ID in Alabama.

^bA birth certificate may be provided at no cost for the purposes of obtaining required voter ID in Kansas.

^cCitizens born in Tennessee before 1949 are required to pay \$15 to obtain a birth certificate.

rather than other factors such as changes in voter demographics, campaign mobilization, or other election administration laws.⁷³

Figure 5: GAO Analysis of the Effects of Voter Identification (ID) Requirement Changes on Turnout in the 2012 General Election in Kansas and Tennessee



Source: GAO analysis of data from the United States Elections Project, state voter registration and history databases (commercially enhanced), and the Current Population Survey. | GAO-14-634

Note: Change in turnout using enhanced state voter databases and the Current Population Survey are derived from multivariate statistical analyses (see app. VI, tables 16 and 21). Estimates of changes in ID requirement effects on voter turnout have a margin of error at the 95 percent confidence level. Depending on the source of the data, we estimated margins of error using statistical models or standard methods for calculating differences in proportions among independent samples (see app. VI). Specifically, the United States Elections Project estimates have a margin of error of +/- 0.12 percent for Kansas and +/- 0.09 percent for Tennessee. The enhanced state voter database estimates have a margin of error of +/- 0.12 percentage points for Kansas and +/- 0.09 percentage points for Tennessee. For the comparison state changes in turnout calculated from the enhanced state voter databases, we used weighting to make the distribution of voters in the comparison states

⁷³In its letter commenting on excerpts from our draft report, Kansas' Secretary of State's Office stated that photo ID laws are intended to reduce or eliminate fraudulent voting and that if lower overall turnout occurs after implementation of a photo ID law, some of the decrease may be attributable to the prevention of fraudulent votes.

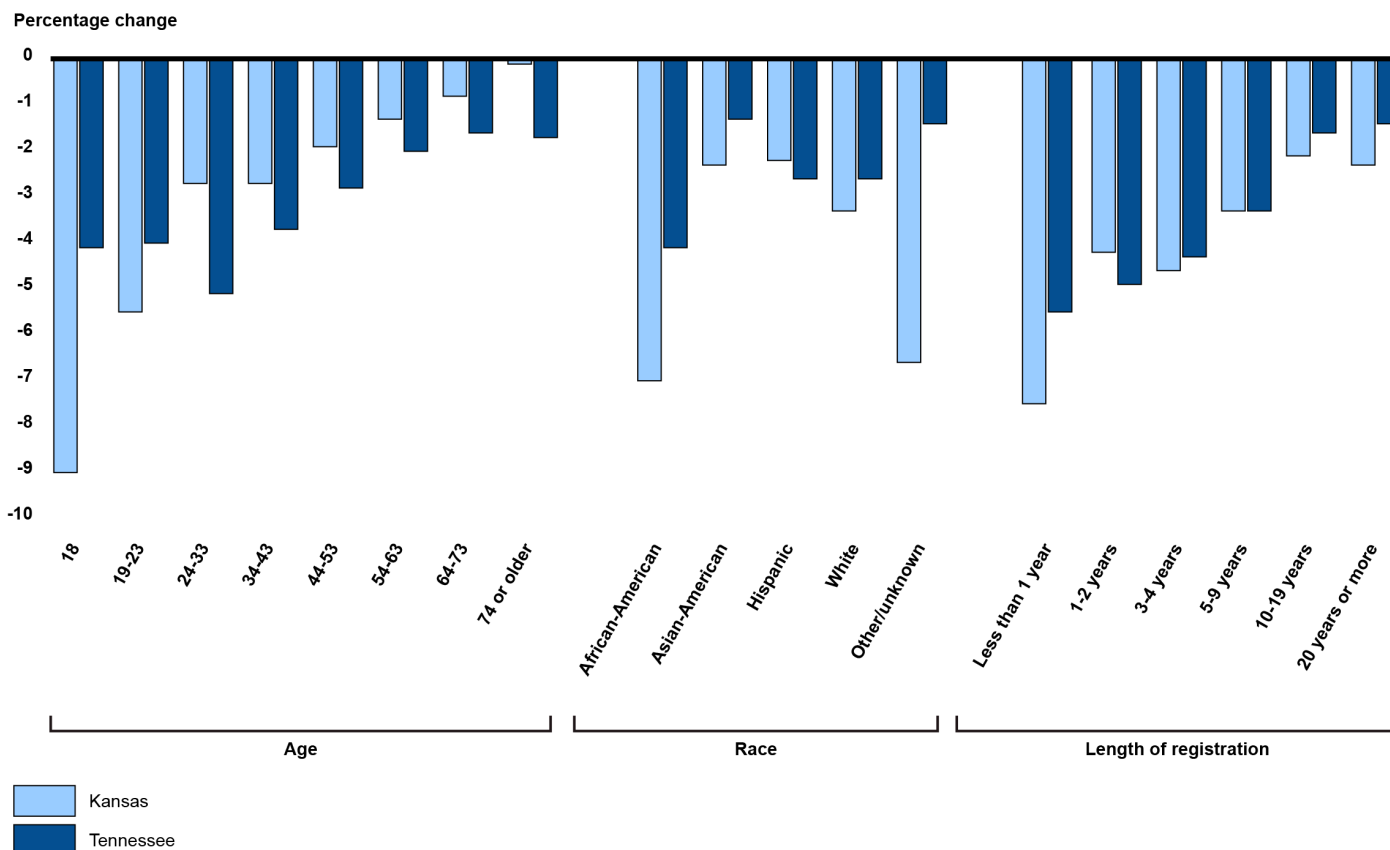
similar to the distribution of voters in Kansas and Tennessee. Specifically, in this analysis, we weighted the distribution of comparison state voters in the categories of age, race, and registration year so that the distribution of registered voters was similar across these characteristics to the distribution in Kansas and Tennessee in 2012. We also limited our analysis to the subset of voters who were registered prior to the 2008 election and potentially eligible to vote in either election. This weighting approach was completed only for the analysis using the enhanced state voter database. The Current Population Survey estimates have a margin of error of +/- 3.5 percentage points for Kansas and +/- 2.8 percentage points for Tennessee.

To validate the results of our analysis, we (1) compared Kansas and Tennessee with both different combinations of comparison states and individual comparison states, and (2) controlled for demographic characteristics that can affect turnout. According to these additional analyses, we found that greater turnout decreases in Kansas and Tennessee compared with individual and different combinations of comparison states, and controlling for demographic characteristics, were most likely attributable to changes in voter ID requirements rather than other factors.

Multiple comparisons. We compared turnout changes in Kansas and Tennessee with turnout changes in various combinations of comparison states using the three datasets, to determine if any particular comparison state or combination of comparison states could bias our results. According to our analysis of the different data sets, we found that the decrease in turnout was greater in both Kansas and Tennessee than the turnout decreases for different combinations of comparators. For example, using USEP data, we found that turnout declined in Kansas 3.1 percentage points more than the pooled decline of Alabama and Arkansas.⁷⁴ Similarly, we found that turnout in Tennessee declined 2.9 percentage points more than the pooled decline in Alabama and Arkansas. We also found similar patterns of declines in turnout when Kansas and Tennessee were compared with individual states. For example, according to CPS data, the turnout decline in Kansas was 2.3 percentage points greater than the decline in Alabama, 3.3 percentage points greater than the decline in Arkansas, 5.6 percentage points greater

⁷⁴When selecting comparison states, Alabama and Arkansas were most comparable to Kansas and Tennessee, because of geographic proximity to Kansas and Tennessee and similarity in historical turnout patterns. See app. V for a more detailed explanation of our analysis of historical turnout patterns.

Figure 6: GAO Analysis of the Effects of Voter Identification (ID) Requirement Changes on Turnout in the 2012 General Election in Kansas and Tennessee by Age (as of 2008), Race, and Length of Registration



Source: GAO analysis of state voter registration and history databases (commercially enhanced). | GAO-14-634

Although the design of our analysis effectively controls for a variety of alternative explanations and sources of bias, several limitations may apply.

Our results cannot be generalized beyond Kansas and Tennessee.

Our impact estimates are limited to changes in turnout among Kansas and Tennessee eligible or registered voters between the 2008 and 2012 general elections and do not necessarily apply to other states or time periods. Our results cannot be generalized to states that adopted substantially different ID requirements, particularly states that allow forms of ID such as utility bills, bank statements, and affidavits. To reliably generalize our findings, replication of our analysis is necessary for other ID laws, states, time periods, and subgroups of voters.

increased slightly between the 2008 and 2012 general elections in Kansas and Tennessee. The rate of provisional ballot usage also increased slightly in Arkansas and Delaware, though the increases were smaller than in Kansas and Tennessee. Table 5 describes the change in provisional ballot usage between the 2008 and 2012 general elections in treatment and comparison states.

Table 5: Change in Provisional Ballot Usage between 2008 and 2012 General Elections, in Treatment and Comparison States

State	Percentage of total ballots that were provisional in 2008	Percentage of total ballots that were provisional in 2012	Change in provisional ballot usage between 2008 and 2012 general elections ^a
Kansas	3.18	3.48	0.30
Tennessee	0.17	0.29	0.12
Alabama	0.47	0.29	-0.18
Arkansas	0.20	0.24	0.04
Delaware	0.09	0.11	0.01
Maine	0.05	0.04	-0.01
Alabama/Arkansas pooled ^b	0.34	0.27	-0.07
Delaware/Maine pooled ^b	0.07	0.07	0.00
All comparison states pooled ^b	0.26	0.21	-0.05

Source: GAO analysis of U.S. Election Assistance Commission's Election Administration and Voting Survey (EAVS) 2008 and 2012 data from jurisdictions in selected states that provided data in response to EAVS in both 2008 and 2012. | GAO-14-634

Notes: This table includes only those jurisdictions that provided data to state officials in response to the EAVS in both 2008 and 2012. The full EAVS data sets for 2008 and 2012 include jurisdictions that did not report data in 1 or both years. Those jurisdictions that did not provide data in both years have been excluded from the analysis.

^aThe change in provisional ballot usage between 2008 and 2012 may not equal the percent of total ballots that were provisional in 2012 minus the percent of total ballots that were provisional in 2008 due to rounding in subtraction.

^b"Pooled" rates of provisional ballot use reflect the grouped states' combined total provisional ballots divided by the grouped states' combined total ballots cast. Because of the quasi-experimental design of our study, we assume that the comparison states are interchangeable and thus can be pooled together to create an additional group for analysis. The larger size of this pooled group reduces the statistical uncertainty of our estimates.

Our analysis of changes in provisional ballot usage rates between the 2008 and 2012 general elections in the treatment and comparison states showed that Kansas and Tennessee increased their usage of provisional ballots by 0.35 percentage points and 0.17 percentage points, respectively, between the two elections, relative to all other comparison states combined, as shown in table 5. These quasi-experimental, "difference-in-difference" estimates control for other factors that could have affected election outcomes such as the presence of competitive

races for statewide or federal offices, voter characteristics that do not change substantially over time (e.g., race), controversial ballot questions, and the voter mobilization activities of campaigns. For these reasons, our analysis suggests that the increased usage of provisional ballots in Kansas and Tennessee from the 2008 to 2012 general elections relative to the comparison states is attributable to changes in those two states' changes in voter ID requirements. Moreover, positive effects on provisional ballots are consistent with our findings that decreases in voter turnout in Kansas and Tennessee in the 2012 general election beyond decreases in the comparison states were attributable to those two states' changes in voter ID requirements, as casting a provisional ballot that is ultimately not counted is one way in which turnout could have decreased.⁸⁸ However, our choice of comparison states was not specifically designed to account for unique factors changing between 2008 and 2012 that could explain the change in provisional ballot usage, such as changes to state systems of registering voters and requirements for when provisional ballots must be cast. As a result, factors other than new voter ID laws may have contributed to the increase in provisional ballot usage.⁸⁹ These findings are not generalizable beyond our specific treatment and comparison states.

Table 6: Comparison of Change in Provisional Ballot Usage between 2008 and 2012 General Elections in Treatment and Comparison State Groups

State	Kansas (%)	Tennessee (%)
Alabama/Arkansas pooled ^a	0.37 (0.047)	0.18 (0.013)
Delaware/Maine pooled ^a	0.30 (0.046)	0.12 (0.011)
All comparison states pooled ^a	0.35 (0.046)	0.17 (0.011)

Source: GAO analysis of U.S. Election Assistance Commission's Election Administration and Voting Survey (EAVS) 2008 and 2012 data from jurisdictions in selected states that provided data in response to the EAVS in both 2008 and 2012. | GAO-14-634

⁸⁸ Alternatively, registrants could have chosen not to attempt to vote at all. A final possibility is that registrants attempted to vote, could not provide adequate ID, and chose not to cast a provisional ballot.

⁸⁹ For example, in its letter commenting on excerpts from the draft report, Tennessee's Secretary of State's Office stated that in June 2011 Tennessee's provisional statute was amended to allow any voter whose eligibility was challenged by an election official to cast a provisional ballot. With this amendment, according to the letter, Tennessee extensively trained its election officials regarding the usage of the provisional ballot throughout 2012 as well as the new photo ID requirements. Tennessee identified these as factors that contributed to increased usage of provisional ballots.

Notes: Entries in parentheses are 95 percent margins of error (e.g., +/- 0.047 percentage points). This table analyzes data from jurisdictions that provided data in response to the EAVS in both 2008 and 2012. The full EAVS data sets for 2008 and 2012 include jurisdictions that did not report data in 1 or both years. Those jurisdictions that did not provide data in both years have been excluded from the analysis.

^a"Pooled" rates of provisional ballot use reflect the grouped states' combined total provisional ballots divided by the grouped states' combined total ballots cast. Because of the quasi-experimental design of our study, we assume that the comparison states are interchangeable and thus can be pooled together to create an additional group for analysis. The larger size of this pooled group reduces the statistical uncertainty of our estimates.

In addition, we analyzed the EAVS data to determine how provisional ballot rates changed over time in our treatment and comparison states using data reported by all jurisdictions in those states (e.g., to include all jurisdictions responding to the EAVS in either 2008 or 2012). We conducted this additional analysis to determine if missing data affected the results of our analysis in which we excluded jurisdictions that did not report data for both the 2008 and 2012 EAVS. In our second analysis, we obtained results similar to those in our first analysis, indicating that our exclusion of jurisdictions with missing data did not affect our conclusion that provisional ballot usage increased in Kansas and Tennessee from the 2008 to the 2012 general election relative to comparison states. Appendix VI provides more detailed information on the results of this additional analysis.

Challenges Exist in Using Available Information to Estimate the Incidence of In-Person Voter Fraud

A variety of factors affect efforts to estimate the incidence of in-person voter fraud, making it difficult to produce complete estimates.⁹⁰ For the purposes of this report, incidence is defined as the number of separate times a crime is committed for a specific time period. Estimating the incidence of crime generally involves using information on the number of crimes known to law enforcement authorities—such as crime data submitted to a central repository within states based on uniform offense definitions—to generate a reliable set of crime statistics. However, even when crime data are centrally collected, the true incidence of crime can be difficult to determine due to the potential for crimes not to be

⁹⁰For the purposes of this report, we have defined "in-person voter fraud" as involving a person who (1) attempts to vote or votes, (2) in person at the polling place; and (3) asserts an identity that is not the person's own, whether it be that of a fictional registered voter, dead registered voter, a false identity, or whether the voter uses a fraudulent identification. In-person voter fraud is also often referred to as "voter impersonation fraud."

How Did Absentee Voting Affect the 2020 U.S. Election?*

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June 25, 2021

Abstract

The 2020 U.S. election saw record turnout, a huge increase in absentee voting, and brought unified national Democratic control—yet these facts alone do not imply that vote-by-mail increased turnout or had major partisan effects. Using new microdata on millions of individual voters as well as aggregated turnout data across all 50 states, this paper offers the first causal analysis of the impact of absentee vote-by-mail during the COVID-19 pandemic. Focusing on natural experiments in Texas and Indiana, we find that 65-year-olds turned out at nearly the same rate as 64-year-olds, despite the fact that only 65-year-olds could vote absentee without an excuse. Being just old enough to vote no-excuse absentee did not substantially increase Democratic turnout relative to Republican turnout. Voter interest appeared to be more important in driving turnout across vote modes, neutralizing the electoral impact of Democrats voting by mail at higher rates during the historic pandemic. Our results do not justify attempts to roll back voting access—the safety, security, and convenience of a method of voting are important values independent of its effects on participation and should be incorporated into any policy analysis.

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1 Introduction

In the United States, the 2020 election, the COVID-19 pandemic, and the violent events of January 6th, 2021 poured gasoline onto an already raging debate about how the nation should administer its elections and, in particular, about voting by mail. While the two parties disagree vehemently over its value, pundits and practitioners on both sides seem to agree that it increases turnout and helps Democrats,¹ pointing out that the 2020 election featured an unprecedented expansion of voting by mail in response to the pandemic, had unusually high turnout, and resulted in unified Democratic control at the federal level. This conventional wisdom, despite being at odds with the beliefs of most election administration experts, structures the partisan debate over vote-by-mail, with many Republican state legislatures considering or implementing reforms to roll back vote-by-mail while most Democrats support its expansion.²

But did voting by mail significantly change participation and massively help Democrats in 2020? Or was turnout high in 2020 due more to high voter interest and engagement during an extraordinary election taking place under unprecedented circumstances? These questions speak directly to the health of democratic elections, as broad participation is thought to be a cornerstone of effective democracy (e.g., Verba, Schlozman, and Brady 1995; Lijphart 1997), and rules governing access to the ballot have often been used to suppress participation (e.g., Keyssar 2000; Keele, Cubbison, and White 2021).

In this paper, we provide the first causal evidence of the effect of no-excuse absentee voting—the most common form of vote-by-mail—during the 2020 presidential election and in historical context using newly assembled data from a natural experiment involving millions

¹For example: “When we see vote by mail increase in any state, we simultaneously see a turnout increase.” (Amber McReynolds, chief executive of the National Vote at Home Institute). In “Republicans Pushed to Restrict Voting. Millions of Americans Pushed Back.” Nick Corasaniti and Jim Rutenberg. *The New York Times*. Dec. 5, 2020; “I’m fairly convinced at this point that the Democratic strategy and the Democratic advantage in vote by mail was just crucially and critically important to Biden’s win.” (Tom Bonier, CEO of TargetSmart). In “Democrats took a risk to push mail-in voting. It paid off.” *The Guardian*. Dec. 3, 2020.

²See for example <https://nymag.com/intelligencer/2021/02/republicans-launch-attacks-on-voting-by-mail.html>.

of individual voters. We start with an observational analysis of aggregate trends in turnout across all 50 states, comparing those that did and did not roll out no-excuse absentee voting for 2020. Then, we use administrative microdata from Texas and from Indiana on nearly 3 million voters, where we can leverage a “natural experiment” based on an age cutoff for no-excuse absentee voting eligibility (first analyzed prior to the pandemic for Texas in Meredith and Endter 2015). Using these datasets, we establish two basic facts that cast doubt on the conventional wisdom about vote-by-mail in 2020: First, states that did not offer no-excuse absentee voting in 2020 saw turnout increases similar in magnitude to states that offered no-excuse absentee voting for the first time in 2020. Second, we find that Texas and Indiana residents eligible to vote absentee without an excuse in 2020 were much more likely to vote absentee, but only slightly more likely to turnout compared to those just shy of the age threshold for voting absentee without an excuse. Finally, we show that while a greater share of Democrats preferred to vote absentee during the pandemic in Texas, the increase in absentee voting was offset by a smaller share of Democrats using early in-person voting. Having the option to vote absentee without an excuse did not, therefore, help Democrats gain a meaningful electoral advantage over Republicans. While our evidence casts doubt on the claim that extending no-excuse absentee voting in 2020 dramatically increased turnout and favored Democrats, our results do not justify attempts to roll back access to voting—even small effects can change election outcomes and many factors like the safety, security, and convenience of a voting method are important to consider when deciding how citizens can vote.

These facts suggest that no-excuse absentee voting did not meaningfully change the composition of the electorate during the 2020 election. They are inconsistent with the idea that vote-by-mail massively increased participation and dramatically boosted the Democratic party’s performance. However, they are largely consistent with the predictions of election administration experts, as well as studies prior to the pandemic that generally suggested

that no-excuse absentee voting has had modest or null effects on turnout before COVID-19,³ that it had been more successful at mobilizing already-engaged voters than marginal ones in previous elections (Berinsky, Burns, and Traugott 2001; Berinsky 2005; Monore and Sylvester 2011; Michelson et al. 2012), and that even universal vote-by-mail, a more dramatic policy, had relatively modest effects on participation before COVID-19 (e.g., Berinsky, Burns, and Traugott 2001; Gerber, Huber, and Hill 2013; Menger, Stein, and Vonnahme 2015; Thompson et al. 2020; Barber and Holbein 2020).⁴ The pandemic was thought to greatly magnify the perceived costs of in-person voting,⁵ and brought much more salience to vote-by-mail than had ever existed before. Studying vote-by-mail in 2020 thus presents a highly unique test case for theories seeking to explain why people vote in elections and how the decision to participate relates to the costs of voting.

Why did no-excuse absentee voting not have a bigger effect on the 2020 election, despite all of the rhetoric around it, and despite its evident popularity as a way to vote? The conventional wisdom that expanding vote-by-mail increased turnout substantially and dramatically helped the Democrats is built, implicitly if not explicitly, on a popular theory of political

³See Table A.2 for a review of the literature. In most studies, the reported relationships between no-excuse absentee policies and overall turnout are null (e.g. Oliver 1996; Gronke, Galanes-Rosenbaum, and Miller 2007; Gronke et al. 2008; Giammo and Brox 2010), or positive but modest (e.g., Karp and Banducci 2001; Francia and Herrnsen 2004; Leighley and Nagler 2009; Larocca and Klemanski 2011; Leighley and Nagler 2011)—though see Burden et al. (2014) for an estimated negative relationship. Studies that employ a clear causal design take one of two approaches. First, a few studies estimate the effects of no-excuse absentee on overall turnout using a difference-in-differences design, where the treatment occurs at the state level. These studies generally show null (Fitzgerald 2005; Springer 2012) or even negative (Burden et al. 2014) effects of no-excuse policies on turnout, though difference-in-differences estimates from state-level treatments are generally imprecise (Erikson and Minnite 2009). Second, Meredith and Endter (2015) estimates the effect of no-excuse absentee policies on turnout using an individual-level regression discontinuity design, leveraging Texas’s 65 year-old age cutoff threshold. Meredith and Endter (2015) finds a null effect of the policy on overall turnout in the 2012 general election, though it did lead to a large increase in the share of voters who used absentee-by-mail voting, similar to previous work (Oliver 1996; Dubin and Kalsow 1996; Karp and Banducci 2001). The paper finds some suggestive evidence for a positive turnout effect when it focuses on counties where take-up of absentee voting was higher among eligible 65-year-olds.

⁴Universal vote-by-mail does not appear to have large effects on partisan turnout or vote shares (Thompson et al. 2020; Barber and Holbein 2020), either, but it does seem to increase turnout among low-propensity voters (Gerber, Huber, and Hill 2013) and affects voters’ choices in primary elections (Meredith and Malhotra 2011).

⁵The degree to which in-person voting was in fact dangerous, and thus more costly than normal during the pandemic, is unclear. There is research suggesting meaningful amounts of SARS-CoV-2 transmission at the polls, but there is also research suggesting little transmission (Leung et al. 2020). In the end, many Americans chose to vote by mail, while many others chose to vote in person.

participation that links the decision to vote in an election to the convenience of how one is able to cast a vote (Downs 1957; Riker and Ordeshook 1968; Wolfinger and Rosenstone 1980; Piven and Cloward 1988), suggesting that there are many marginal voters who will turn out if doing so is convenient and will not turnout otherwise. But others argue that, in high-salience elections like 2020, there are probably few marginal voters who base their decision to participate on the relative costs of one mode of voting over another, so long as the inconvenience and difficulty of in-person voting remains within reasonable bounds.⁶ When an election is highly salient, voters are more engaged, and, having paid the cognitive costs to engage, are less sensitive to costs related directly to the act of voting; when an election is less salient, on the other hand, voters are less engaged and there is more space for the costs related to voting to affect the decision to participate.

Consistent with this view, we find evidence that no-excuse absentee voting *does* increase turnout by one to two percentage points in past midterm elections but not in presidential elections, indicating that convenience voting affects participation more when voter interest is low at baseline. Also consistent with this view, we find that the effect in 2020 is no larger for low-propensity voters.

The results of our paper are important for understanding why people vote and can help to inform future reforms intended to encourage participation in elections. They are not intended to address key normative concerns critical to the vote-by-mail debate. Whether expanding vote-by-mail is a good policy or not depends on evaluating its value to voters and to democracy, which is why election administration experts do not generally focus on its effects on turnout to evaluate it as a policy. Does it facilitate safe ways to vote during the pandemic? Do voters want their states to expand voting by mail? Can it be done in a secure fashion that engenders faith in the electoral process? These are some of the key questions that a principled approach to evaluating vote-by-mail from a policy perspective would need to ask that are beyond the scope of our study. The fact that no-excuse absentee voting does

⁶See “Making Voting Easier Doesn’t Increase Turnout.” Adam Berinsky. *Stanford Social Innovation Review*. Feb. 8, 2016.

not appear to advantage one party over the other in a dramatic fashion is not a reason to implement or not implement the policy—it might be a good policy to implement no matter what, or it might be a bad policy to implement even if it’s neutral from a partisan perspective. Likewise, the fact that it does not increase turnout, with the implication that rolling it back probably would not decrease turnout noticeably, does not imply that the public should not remain vigilant about potential voter suppression efforts related to election administration.

2 Vote-by-Mail and Turnout in 2020:

No Evidence of Large Absentee Turnout Effect in Nationwide Analysis

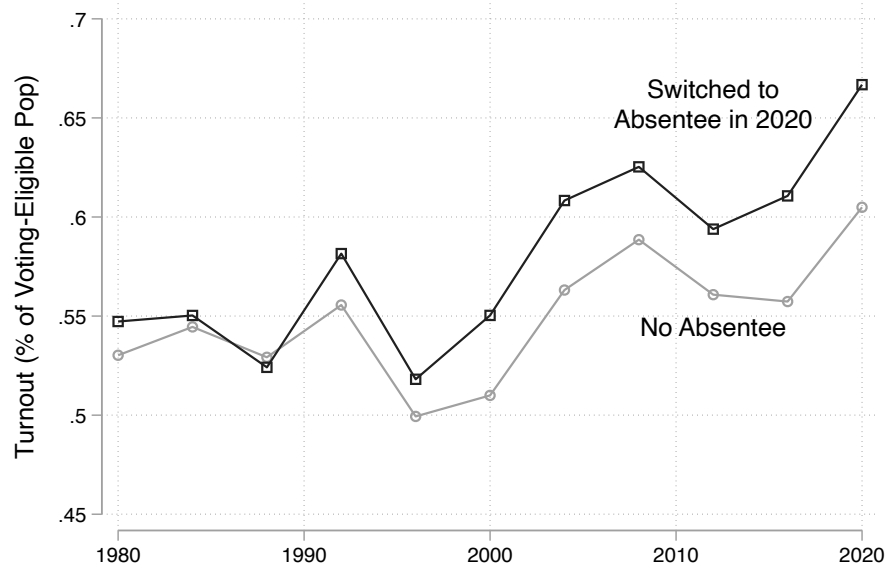
In 2020, a number of states rolled out opportunities to vote by mail, particularly to vote absentee without an excuse, for the first time. In this section, we assemble data to evaluate whether the extension of no-excuse absentee voting had an obvious effect on turnout in 2020.

To evaluate whether there is any evidence that states that implemented vote-by-mail in 2020 saw higher turnout than other states, we assembled data on turnout and on election administration policies for all fifty states. We describe this data collection process in detail in Section A.1 in the online appendix. Election turnout data is from McDonald (2021) and was downloaded from The United States Elections Project website.⁷ All data was merged at the state-year level.

As Figure 1 shows, there is no evidence that turnout rose dramatically more in states that switched on no-excuse absentee voting fully for 2020 than in states that did not. Instead, turnout is up dramatically for both groups of states. Compared to the 2016 presidential election, turnout was up roughly 4.8 percentage points in states that did not implement no-excuse absentee voting for 2020, and up roughly 5.6 percentage points in states that did.

⁷<http://www.electproject.org/>

Figure 1 – Comparing Rates of Turnout for States With Different Vote-by-Mail Policies in 2020. States that implemented no-excuse absentee voting in 2020 for the first time do not exhibit noticeably bigger increases in turnout in 2020 than states that did not implement it.

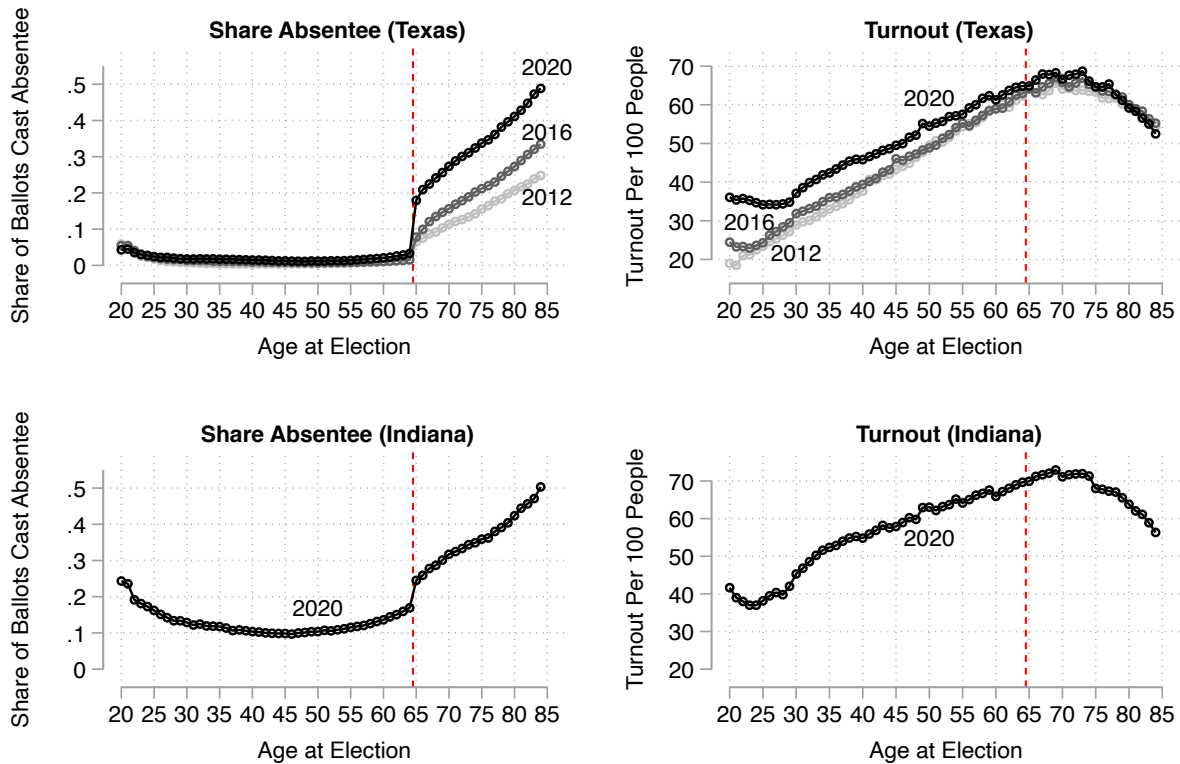


States implementing full no-excuse absentee voting in 2020 are: AL, AR, CT, DE, KY, MA, MI, MO, NH, NY, PA, SC, VA, WV. States without full no-excuse absentee voting are: IN, LA, MS, TX.

This 0.8 percentage point difference in the increase from 2016 for the two groups of states does not necessarily indicate a modest but positive effect of no-excuse absentee voting, either. It could well be statistical noise; in fact, between 2012 and 2016, turnout increased by 1.7 percentage points in states that would go on to implement no-excuse absentee voting in 2020 (but which had not yet implemented it in 2016), and by -0.003 percentage points in states that would go on to not implement it in 2020 (or in 2016). This roughly 1.7 percentage-point gap is more than twice as large as the gap in 2020, yet cannot reflect an effect of absentee voting. Hence, it gives a sense of the amount of random variation that can give rise to different election-to-election changes in turnout.

These estimates are noisy and the empirical design is not strong—the timing of vote-by-mail implementation is not random, and parallel trends is unlikely to be met—but they

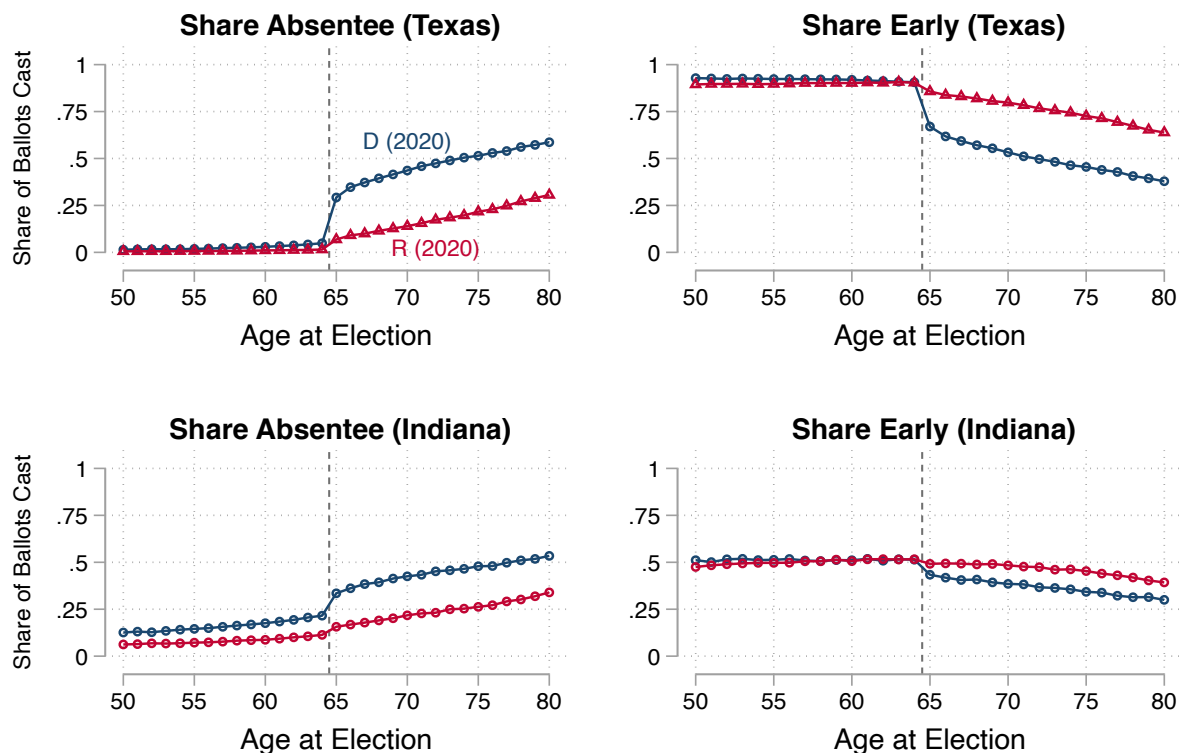
Figure 2 – Absentee Voting and Turnout Across Age and Elections in Texas and Indiana. In Texas and Indiana, only voters aged 65 or older can vote absentee without providing an excuse. This creates a large and discontinuous increase in voting absentee for 65-year-olds, which grew dramatically in 2020 during the pandemic. Yet, turnout does not increase discontinuously between age 64 and 65, implying that the discontinuous increase in absentee voting is offset by a reduction in other modes.



also strongly suggests that many 64-year-olds would like to vote absentee but are not able to.

If the conventional wisdom about the 2020 election is right—that the expansion of vote by mail massively increased turnout and helped the Democrats—then we should see a noticeable increase in turnout for 65-year-olds, because of their ability to vote by mail. The two panels on the right of Figure 2 show that this is not the case. Turnout looks almost identical for 65-year-olds and 64-year-olds in Texas and Indiana in 2020; there is no evidence at all for a jump, in the figure. While 65-year-olds did avail themselves of their ability to vote by mail, there is no noticeable increase in their turnout compared to 64-year-olds.

Figure 3 – Share of Ballots Cast Absentee, By Age and Party, 2020 Texas and Indiana General Elections. The partisan gap in absentee voting is evident in both Texas and Indiana. The greater share of Democrats adopting absentee voting is offset by a smaller share of Democrats using early in-person voting.



that rolling back vote-by-mail policies in places like Georgia does not constitute important voter suppression—we simply lack the statistical power to assess this one way or the other.

4 Conclusion

The 2020 election brought extraordinary challenges to the American electoral system. The dramatic expansion of vote-by-mail in response to the COVID-19 pandemic, the sharp increase in partisan polarization concerning questions of election administration, and the unprecedented refusal of former President Trump to acknowledge the election results have all contributed to a crisis of confidence in American democracy. This crisis has triggered an

ongoing debate about how the U.S. should administer its elections, and about what role absentee voting should play going forward.

A conventional wisdom about vote-by-mail in the 2020 election has already congealed and is setting the terms of this debate. By this account, the expansion of vote-by-mail triggered widespread adoption of absentee voting, which in turn massively increased turnout, which in turn played a big role in helping the Democratic party. Both parties have accepted this narrative and are engaged in rhetorical combat on these terms.

The problem with this conventional wisdom is that it is based on a fallacy. It's true that more people voted by mail than ever before in the 2020 election. It's also true that turnout was extraordinarily high in 2020. And it's also true that the Democratic party won the Presidency and the Senate and maintained control of the House. But these facts do not imply that voting by mail increased turnout or helped the Democrats in dramatic ways.

In fact, as we've shown, the major effect of expanding absentee voting is to change *how* people vote, not *whether* they vote. Simply observing that many people voted by mail in 2020, and that many of the people who voted by mail were Democrats, is insufficient to conclude that vote-by-mail helped the Democrats; many of these voters would probably have voted in person had they not had the opportunity to vote absentee instead.

Using nationwide data, we have shown that states that implemented absentee voting for the 2020 election saw no obvious, dramatic increases in turnout relative to states that did not. Indeed, turnout was up across the board in 2020, and increased markedly in states that did not expand their absentee voting programs at all.

Using data from Texas and Indiana, we offered a more rigorous evaluation of the effects of absentee voting, taking advantage of a natural experiment where 65-year-olds could vote absentee without an excuse while 64-year-olds could not. This rule led many more 65-year-olds to vote absentee than 64-year-olds, but it did not make them turn out at higher rates. In fact, turnout was up most for younger voters who could not vote absentee without an excuse; in Texas, turnout was up most for voters in their 20s, almost none of whom voted

absentee. Moreover, the proportion of voting 65-year-olds in the 2020 election who were Democrats was not noticeably higher than the proportion of voting 64-year-olds who were Democrats, despite the large gap in absentee voting between the two age groups.

The results of our paper do not offer a clear recommendation for the policy debate around vote-by-mail, but they do suggest that both sides of the debate are relying on flawed logic. Vote-by-mail is an important policy that voters seem to like using, and it may be a particularly important tool during the pandemic. Despite all that, and despite the extraordinary circumstances of the 2020 election, vote-by-mail’s effect on turnout and on partisan outcomes is muted, just as research prior to the pandemic would have suggested.

Documenting that the effect of vote-by-mail on turnout is so muted even during a historic pandemic is important for our theories of why people vote. Even during COVID-19, the chance to cast your vote without having to go to the polls in person made little difference for participation. Instead, turnout increased dramatically everywhere because voters on both sides cared more than usual about the outcome. This does not mean that the costs of voting are never important—especially when they are made artificially high in an attempt to suppress participation—but it does suggest that expanding participation requires understanding how to engage voters and make them interested in the election more than it requires focusing on the details of different convenience voting reforms.