



2021

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Kim Vu-Dinh

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### Recommended Citation

Kim Vu-Dinh, *Time to Mail it In? A Survey of 2020 Voting Rights Issues in Arkansas and Recommendations for More Inclusive Elections*, 44 U. ARK. LITTLE ROCK L. REV. 213 (2021).  
Available at: <https://lawrepository.ualr.edu/lawreview/vol44/iss2/2>

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# TIME TO MAIL IT IN? A SURVEY OF 2020 VOTING RIGHTS ISSUES IN ARKANSAS AND RECOMMENDATIONS FOR MORE INCLUSIVE ELECTIONS

*Kim Vu-Dinh\**

## ABSTRACT

*The highly contagious COVID-19 pandemic, combined with over fifty lawsuits brought by former President Donald Trump, made the general election of 2020 one of the most controversial in the history of the United States. Accusations of voter disenfranchisement proliferated across the nation and were initiated by members of both sides of the political spectrum, even before Election Day. Arkansas was no exception to this rule. In 2020, multiple Arkansas lawsuits highlighted the weaknesses of the state's voter infrastructure, particularly with regard to the absentee ballot process. Voting-by-mail was particularly important in the pandemic year when long lines became a public health danger, and Arkansans requested absentee ballots at a rate that was three times more than the prior general election.<sup>1</sup> Perhaps it should be no surprise that voter participation in Arkansas was at an all-time low of 55.5%, placing it at 50th in the nation for election turnout.<sup>2</sup> This Article explores 1) the voter suppression features of the Arkansas election infrastructure, and 2) more inclusive methods of voting—such as universal mail-in ballots and internet-based voting—which could be adopted in Arkansas.*

## I. INTRODUCTION – HISTORY AND NATIONAL CONTEXT OF ELECTION PROTECTION

Since the founding of the United States, the right to vote has been considered sacred. It is broadly understood that the U.S. Constitution requires

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\*Assistant Professor of Clinical Education and Director of the Business Innovations Clinic, University of Arkansas at Little Rock William H. Bowen School of Law. The Author wishes to thank Preston Eldridge, John Tull, Christoph Keller, and Susan Inman for educating and including her on so many of the important issues which informed this Article, and for participating on the symposium panel on voter rights. This Article was drafted with the assistance of a grant from the University of Arkansas at Little Rock William H. Bowen School of Law.

1. Max Brantley, *Lawsuit Challenges State Deadline For Counting Absentee Ballots*, ARK. TIMES (Oct. 23, 2020, 12:08 PM), <https://arktimes.com/arkansas-blog/2020/10/23/lawsuit-challenges-state-deadline-for-counting-absentee-ballots>.

2. *Arkansas Ranks 50th in Voter Turnout For 2020 Election*, THV11 (Nov. 25, 2020, 3:33 PM), <https://www.thv11.com/article/news/politics/elections/arkansas-ranks-50th-in-voter-turnout-for-2020-election/91-115337cc-e9a6-4735-a7f8-a683a4c543b9>.

each vote to have “full and equal significance.”<sup>3</sup> Yet, Americans of all types have had to fight for that right throughout the nation’s history—a right which was finally given to African-Americans and people of color over a century after the founding of the nation through the Fifteenth Amendment<sup>4</sup> and to women almost a century and a half later by the Nineteenth Amendment.<sup>5</sup> Even still, suppression continued in the form of grandfather clauses, White primaries, poll taxes, and literacy tests<sup>6</sup> and was only eradicated during the Civil Rights Era through the Voting Rights Act of 1965.<sup>7</sup>

Yet, the Voting Rights Act did not put a definitive halt to voter suppression. In the 1990s, a federal court found that a local election commission in South Carolina hired poll workers who ““caused confusion, intimidated African American voters, and had a tendency to be condescending to those voters.””<sup>8</sup> In 2003, a Pennsylvania court found that poll workers referred to Latino voters as “[d]umb Spanish-speaking people” and stated they did not “know why they [were] given the right to vote” and singled them out by creating undue hardships on that race alone.<sup>9</sup> In 2006, the Asian American Legal Defense and Education Fund documented poll workers making “improper or excessive demands for identification—often only from Asian American voters.”<sup>10</sup> Indeed, some have characterized the typical American polling place as an “optimal setting” for implicit bias.<sup>11</sup>

In 2020, the run for re-election by former President Trump combined with the unprecedented coronavirus (COVID-19) pandemic created a perfect

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3. Kimberly Breedon & A. Christopher Bryant, *Counting the Votes: Electronic Voting Irregularities, Election Integrity, and Public Corruption*, 49 U. MEM. L. REV. 979, 983 (2019).

4. *Black Americans and the Vote*, THE NAT’L ARCHIVES, <https://www.archives.gov/research/africanamericans/vote#:~:text=The%20original%20U.S.%20Constitution%20did,to%20men%20of%20all%20races> (last visited Aug. 28, 2021).

5. *Did Women Earn the Right to Vote on August 18, 1920?*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/did-women-earn-the-right-to-vote-on-august-18-1920.htm#:~:text=In%20the%20early%20th%20century,right%20on%20August%2018%2C%201920> (last visited Aug. 28, 2021).

6. Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 2 (2009).

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; 52 U.S.C.A. § 10101 (West).

8. Page & Pitts, *supra* note 6, at 2 (quoting *U.S. v. Charleston County Council*, 316 F. Supp. 2d 268, 287 (D.S.C. 2003)).

9. *Id.* at 3 (quoting *U.S. v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 575 (E.D. Pa. 2003)).

10. *Id.* (quoting Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2006 Elections* 1).

11. *See generally id.* (providing extensive evidence of implicit bias against Black, Asian, and Latino voters, using Indiana as a case study).

storm for contentious litigation. Both publicly and in the courts, Trump made sweeping allegations of election fraud to create a tidal wave of discord amongst his supporters—some of whom launched death threats against election officials nationwide and others who rioted at the Capitol, directly and indirectly causing the deaths of five people, including law enforcement.<sup>12</sup> Meanwhile, ample evidence of voter suppression harming minorities resulted in litigation initiated by progressive advocacy groups.<sup>13</sup> In Florida, absentee ballots submitted by Black and Latino voters were twice as likely to be discarded as those of White voters, and the absentee ballots of young voters (ages 18–21) were eight times more likely to be discarded than those of senior citizens (over 65).<sup>14</sup> These patterns were persistent throughout the nation.<sup>15</sup>

## II. ARKANSAS

### A. Pre-election Litigation Efforts

Voter suppression was just as apparent in Arkansas in 2020. Multiple lawsuits brought to light particular features of the state’s election infrastructure that effectively disenfranchised non-English speaking voters, physically disabled voters, overseas voters (including servicemembers), and voters of all types who wanted to avoid contracting the deadly coronavirus. The following is a summary of the election protection lawsuits brought prior to Election Day.

#### 1. *Limitations on the Use of Absentee Ballots*

In all fifty states in the U.S., there exists some form of voting by mail, and three states—Oregon, Washington, and Colorado—conduct their elections almost entirely by mail-in ballots.<sup>16</sup> In Arkansas, voting by mail is limited to *absentee* ballot voting, which requires that the voter either be unavoidably absent from their voting place on the day of the election or unable

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12. See generally Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, REUTERS (June 11, 2021, 11:00 AM), <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>.

13. See Elise Viebeck, *More Than 500,000 Mail Ballots Were Rejected in the Primaries. That Could Make the Difference in Battleground States This Fall*, WASH. POST: POLITICS (Aug. 23, 2020, 9:15 PM), [https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fbc92-d83d-11ea-809e-b8be57ba616e\\_story.html](https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fbc92-d83d-11ea-809e-b8be57ba616e_story.html).

14. *Id.*

15. *Id.*

16. Annie Barouh, *A New Old Solution: Why The United States Should Vote By Mail-In Ballot*, 18 SEATTLE J. FOR SOC. JUST. 243, 244 n. 9 (2020).

to attend the polls on Election Day because of illness or physical disability.<sup>17</sup> The voter must first request an absentee ballot in writing,<sup>18</sup> and such request must contain, amongst other things, a signature and address.<sup>19</sup> The application must be mailed at least seven days before election day, or the day before election day if delivered in person.<sup>20</sup> The voter is then mailed an absentee ballot, the ballot itself, a ballot envelope marked “ballot only,”<sup>21</sup> and a sworn statement template the voter must execute and sign.<sup>22</sup> All contents must be returned in the mailing envelope, which must contain the sworn statement and the sealed “ballot only envelope” with the completed ballot inside.

During the application process, if the election worker feels that the voter’s signature on the application for an absentee ballot does not match the voter’s signature on the Election Commission’s records, the voter will be notified and given the opportunity to cure or explain the discrepancy in order to receive the absentee ballot materials.<sup>23</sup> However, if the signature, name, or address on the absentee ballot itself does not match the application requesting the absentee ballot, no notification before election day must be given, nor is there a cure period, and the vote is thrown out.<sup>24</sup> Voters are not notified in advance that their ballots might be thrown out for mismatch between the application and the sworn statement accompanying the ballot.<sup>25</sup> Arkansas is one of four states that does not provide an opportunity to cure a challenge based on signature matching.<sup>26</sup>

Absentee voters must also return their ballots with a photocopy of the voter’s photo ID, which is complicated by the fact that many public libraries and businesses were closed during the pandemic as a public health measure, thereby requiring voters to have their own computers and printers, if election officials required the submission of additional materials.<sup>27</sup> This re-

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17. ARK. CODE ANN. § 7-5-402 (West 2021); *id.* § 7-5-406 (West 2019).

18. *Id.* § 7-5-404(a)(3) (West 2021).

19. *Id.* § 7-5-405(a)(2)(G) (West 2017); *id.* § 405(a)(3)(A).

20. *Id.* § 7-5-404(a)(3)(A) (West 2021).

21. ARK. CODE ANN. § 7-5-409(b)(1)–(3) (West 2021).

22. *Id.* § 7-5-409(b)(4).

23. ARK. CODE ANN. § 7-5-409(a)(1)(B)–(C).

24. *Id.* § 7-5-416(b)(1)(F)(ii) (West 2021).

25. *Id.* § 7-5-409 (West 2021).

26. Larry Buchanan & Alicia Parlapiano, *Two of These Mail Ballot Signatures Are By the Same Person. Which One?*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/interactive/2020/10/07/upshot/mail-voting-ballots-signature-matching.html>.

27. Mindy Acevedo et al., *Ensuring Equal Access To The Mail-In Ballot Box*, 68 UCLA L. REV. DISCOURSE 4, 15 (2020).

quirement had a disparate impact on low income communities, many of which are comprised of people of color, including Native Americans.<sup>28</sup>

The Arkansas legislature rejected Arkansas Senator Joyce Elliot's attempt to pass a law allowing voters to request an absentee ballot for any reason during the pandemic year.<sup>29</sup> Senator Joyce and Senator Leding requested an opinion letter from Attorney General Leslie Rutledge as to when voting by mail is allowed, receiving no answer after two months. At that point, retired Arkansas Court of Appeals Judge Olly Neal and former Arkansas Board of Elections Commissioner Susan Inman sued the state in an attempt to compel an answer that would allow voters to vote by mail for any reason during the coronavirus epidemic.<sup>30</sup> Both plaintiffs, in their seventies, asserted themselves to be particularly vulnerable to the virus due to their age.<sup>31</sup> Counselors David Couch and Preston Eldridge made a two-pronged argument, the first of which was that "The Arkansas Supreme Court held [in *Forrest v. Baker*] that any and all reasons or excuses are valid, legitimate excuses for an Arkansas citizen to be unavoidably absent to vote absentee."<sup>32</sup> The second argument was that fear of contracting the deadly virus alone should be a sufficient reason to request an absentee ballot. Notably, in the month preceding the lawsuit, the infection rate in Arkansas increased 187% to over 16,000 cases and 227 deaths.<sup>33</sup>

Within days of filing of the lawsuit, the Arkansas State Board of Election Commissioners adopted a resolution allowing fear of COVID-19 to be a sufficient reason for an absentee ballot request in the 2020 General Election.<sup>34</sup> By early August, Governor Asa Hutchinson released an Executive Order stating the same.<sup>35</sup> The case was then dismissed since the relief requested was issued.<sup>36</sup>

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28. *Id.*

29. John Lynch, *Mail-In Voting Focus of Suit Filed in State*, ARK. DEMOCRAT-GAZETTE (June 24, 2020, 7:27 AM), <https://www.arkansasonline.com/news/2020/jun/24/mail-in-voting-focus-of-suit-filed-in-state/>.

30. *Id.*

31. *Id.*

32. Complaint for Injunctive Relief and Declaratory Judgment at 24, *Baker, et al. v. Thurston*, 60CV-20-3565 (Cir. Ct. of Pulaski Cnty.).

33. *Id.* at 2.

34. See State Bd. of Election Comm'rs, 4, 2020 (Ark. 2020), [https://static.ark.org/eeuploads/elections/Resolution\\_No\\_4\\_of\\_2020\\_Regarding\\_Absentee\\_Voting\\_Procedures.pdf](https://static.ark.org/eeuploads/elections/Resolution_No_4_of_2020_Regarding_Absentee_Voting_Procedures.pdf).

35. See Ark. Exec. Order No. 20-44 (Aug. 7, 2020), [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-44.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-44.pdf).

36. *Baker, et al. v. Thurston*, 60CV-20-3565 (Cir. Ct. of Pulaski Cnty.).

## 2. *Signature Matching*

The controversy surrounding the absentee ballot did not end when Governor Asa Hutchinson released the Executive Order. Similar to many other states, to verify the validity of an absentee ballot cast, the State of Arkansas adopted a signature matching procedure in which election workers compare the signature on the sworn affidavit of the absentee ballot of the voter against the signature on the envelope of the application for the absentee ballot. If the signatures do not match or the affidavit signature is missing, the ballot is thrown out and the voter is not offered a period to cure or explain the discrepancy.<sup>37</sup> In *League of Women Voters of Arkansas v. Thurston*, the Arkansas chapter of the national nonprofit League of Women Voters filed a lawsuit requesting the state offer a notice of deficiency and cure period when a ballot is rejected for signature-related reasons.<sup>38</sup>

The case was litigated by the national nonprofit, Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), with Arkansas counsel David Couch and Preston Eldridge.<sup>39</sup> John Powers, counsel at the Lawyers' Committee, stated, "There is a wide range of physical and environmental factors that can cause someone's signature to vary, but this does not mean their vote should be discounted."<sup>40</sup>

In 2016, 27,525 absentee votes were cast in Arkansas, and nearly 6% of those were rejected.<sup>41</sup> Of those rejected, 17% were for either missing signature or signature mismatch.<sup>42</sup> In 2018, 15,208 absentee ballots were cast, and 7.6% were rejected, and 9% of those rejections were based on either a missing or mismatched signature.<sup>43</sup> As of October of 2020, over 100,000 absentee ballots were requested, over three times that of 2016.<sup>44</sup> At the time of this writing, it is unclear how many absentee ballots were rejected, but an

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37. ARK. CODE ANN. § 7-5-416(b)(1)(F)(ii).

38. *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2020 WL 6269598 at \*2 (W.D. Ark. Oct. 26, 2020).

39. *Id.*

40. *LWV of Arkansas Files Lawsuit for Fair Signature Match Process on Absentee Ballots*, LEAGUE OF WOMEN VOTERS (Sept. 22, 2020), <https://www.lwv.org/newsroom/press-releases/lwv-arkansas-files-lawsuit-fair-signature-match-process-absentee-ballots>.

41. Election Administration and Voting Survey Datasets ("EAVS 2016") (Feb. 18, 2020), <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>.

42. *Id.*

43. Election Administration and Voting Survey Datasets Version 1.2 ("EAVS 2018") (Feb. 18, 2020), <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>.

44. Matt DeRienzo, *Arkansas Rejects Absentee Ballots at a High Rate, but Won't Inform Voters*, CTR. FOR PUBLIC INTEGRITY: US POLLING PLACES (Oct. 30, 2020), <https://publicintegrity.org/politics/elections/us-polling-places/arkansas-rejects-absentee-ballots-high-rate-voters/>.

extrapolation of prior election rejection rates would mean over 6,000 ballots were rejected, with over 360 of those being rejected for signature reasons.

In Arkansas, contests can come down to a mere handful of votes. In a 2020 runoff election for a state house seat (District 34), Ryan Davis won by one vote—cast by an absentee voter.<sup>45</sup> In another state house primary that same year (District 31), the outcome was decided by a mere twenty-three votes.<sup>46</sup>

Training of Arkansas poll workers is limited. Two documents offer guidance, and one of which states that signatures are not a mismatch if “the signatures are not exactly the same—but are similar.”<sup>47</sup> The second training document is so cursory it is titled a “quick guide” and instructs poll workers to reject ballots if an “easily recognizable difference” is made between signatures.<sup>48</sup> Neither document provides any further definition or specification of how to measure these standards. Former Director of Elections for Pulaski County Susan Inman has stated that even she herself did not feel qualified to make signature matching determinations after years of serving on the Elections Commission, nor did she feel like anyone else on the Commission had adequate qualifications.<sup>49</sup> To her knowledge, there is not a single Forensic Document Examiner conducting evaluations of absentee ballots anywhere in Arkansas.<sup>50</sup>

As part of the Lawyers’ Committee case challenging signature matching in Ohio, Professor Alexander Street submitted a twenty-six page report of detailed mathematical and evidentiary-based analysis concluding that 97% of the ballots thrown out for signature matching in Ohio were in fact validly submitted by the voter.<sup>51</sup> While the training of signature matching can vary nationally from a couple of hours to an eight hour day depending

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45. Max Brantley, *Joy Springer Wins House Race*, ARK. TIMES, (Feb. 21, 2020, 8:15 PM), <https://arktimes.com/arkansas-blog/2020/02/21/joy-springer-wins-house-race>.

46. See Max Brantley, *Keith Brooks Wins in Recount of Republican Primary Race for House*, ARK. TIMES, (Mar. 14, 2020, 8:07 AM), <https://arktimes.com/arkansas-blog/2020/03/14/keith-brooks-wins-in-recount-of-republican-primary-race-for-house>.

47. ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS, PROCESSING ABSENTEE BALLOTS, [https://static.ark.org/eeuploads/elections/2020\\_Processing\\_Absentee\\_Ballot\\_Exercises.pdf](https://static.ark.org/eeuploads/elections/2020_Processing_Absentee_Ballot_Exercises.pdf).

48. ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS, ABSENTEE CANVASING QUICK GUIDE 1, [https://static.ark.org/eeuploads/elections/Absentee\\_Canvasing\\_QG\\_-\\_Copy.pdf](https://static.ark.org/eeuploads/elections/Absentee_Canvasing_QG_-_Copy.pdf).

49. Complaint at 16–17, *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, (W.D. Ark. Sept. 22, 2020).

50. Election Administration and Voting Survey Datasets Version 1.2 (“EAVS 2018”) (Feb. 18, 2020), <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>.

51. Motion for Preliminary Injunction at 5, *League of Women Voters of Ohio v. Larose, et al.*, 20CV-3843-MHW-KAJ (S.D. Ohio) (No. 24).

on the state, professional forensic document examiners are typically trained for two to three years.<sup>52</sup> The President of the Lawyers' Committee for Civil Rights Under Law stated, "At the end of the day, officials are not trained in how to conduct signature-match verification . . . They use procedures that would not stand up in a court of law."<sup>53</sup> Interestingly, Professor Charles Stewart III of MIT published a study in 2016 finding that states with elections that are conducted mainly by mail-in ballot have a lower rejection rate than those states that limit the use of mail-in ballots to narrow circumstances, such as in Arkansas.<sup>54</sup>

Research has also demonstrated that the voters most marginalized by signature matching are the young, elderly, disabled, and voters of color.<sup>55</sup> Signature changes have been observed in young voters, whose handwriting evolves, as does their life experience, with transactions involving signatures.<sup>56</sup> Signature changes have also been observed in the elderly and disabled voters, many of whom have experienced a change in health and physical circumstances (take, for instance, blindness or shaking hands) causing a change in signature.<sup>57</sup> For voters of color, the data is fairly uncontested that their votes are thrown out at rates that far exceed their white counterparts, but the reason for that is unclear.<sup>58</sup>

In *League of Women Voters of Arkansas v. Thurston*, both plaintiffs suffered from health issues causing a change in signature; one plaintiff had recovered from brain cancer and extensive chemotherapy and the other had a pacemaker and prosthetic heart valve.<sup>59</sup> As a result, both asserted themselves as having handwriting that was inconsistent at times and notably dif-

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52. David A. Graham, *Signed, Sealed, Delivered—Then Discarded*, THE ATLANTIC: IDEAS (Oct. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/signature-matching-is-the-phrenology-of-elections/616790/>.

53. *Id.*

54. *Id.* (citing Charles Stewart III, *Reconsidering Lost Votes by Mail* (last updated Sept. 21, 2020), <https://ssrn.com/abstract=3660625> or <http://dx.doi.org/10.2139/ssrn.3660625>; see also generally Michael P. Caligiuri et al., *Kinematics of Signature Writing in Healthy Aging*, 59 J. FORENSIC SCI. 1020 (2014).

55. Graham, *supra* note 52; see also Acevedo, et al., *supra* note 27, at 9 n.19 (establishing that Arkansas, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Illinois, Indiana, Kansas, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Tennessee conduct signature verification before issuing an absentee ballot); NCSL's Election Team, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

56. Graham, *supra* note 52.

57. *Id.*

58. *Id.*

59. Complaint at 6–7, *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174 (W.D. Ark. Sept. 22, 2020).

ferent from before the onset of their health conditions.<sup>60</sup> The court dismissed the case, and currently, it is on appeal.<sup>61</sup>

### 3. *Statute That Limits the Counting of Absentee Ballots to Eleven Hours, on Election Day Only*

Under Arkansas law, absentee and early votes “shall be counted prior to the closing of the polls on election day” and for no more than eleven hours.<sup>62</sup> The statute was amended to reflect these particular features as recently as 2013.<sup>63</sup> The statute contains other oddities. For example, a plain language interpretation requires that officials cannot begin opening absentee ballots until all of the inner envelopes have been placed in the ballot box, yet absentee ballots may be delivered until 7:30 p.m. on Election Day. In essence, the statute seems to both require and forbid that officials wait until after polls close to count ballots, and the legislative history indicates that this limitation was intentional. In fact, the law was revised again to its current form as recently as 2017.<sup>64</sup>

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60. *Id.*

61. *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2020 WL 6269598 (W.D. Ark. Oct. 26, 2020).

62. ARK. CODE ANN. § 7-5-416(a)(5)(A) (West 2019) (“Absentee and early votes shall be counted prior to the closing of the polls on election day as provided under this section.”). Election officials for absentee ballots cannot meet “earlier than the Tuesday before the election for the purpose of opening the outer envelope, processing, and canvassing of absentee ballot paperwork and no earlier than 8:30 a.m. on election day for the purpose of opening the inner absentee ballot envelope and counting the absentee ballots.” *Id.* § 7-5-416(a)(1). The polls “shall remain open continuously until 7:30 p.m.” *Id.* § 7-5-304(a).

63. *See* ARK. CODE ANN. § 7-5-416(a)(5)(A) (West 2019). Pre-2013 language stated: “It is the intent of this section *to permit* the election officials for absentee ballots to meet and process, canvass, and count absentee ballots according to this section prior to the closing of the polls on election day.” ARK. CODE ANN. § 7-5-416(b)(1)(L)(2)(d) (West) (effective: July 31, 2009 to Aug. 15, 2013) (emphasis added). That language was revised in 2013 to state: “It is the intent of this section *to require* the election officials for absentee ballots to meet and process, canvass, and count absentee ballots according to this section prior to the closing of the polls on election day.” *Id.* § 7-5-416 (West) (emphasis added). Because the legislature chose the word “shall” in its pronouncement, under the standard rules of statutory construction, the statute makes the eleven-hour period mandatory and not discretionary, contrary to the State’s assertion in its pleadings. In fact, the law previously contained the word “may”—making the power to start counting on Election Day only discretionary—but was changed by the legislature to the mandatory word of “shall” as recently as 2013. *Id.* § 7-5-416 (West); H.B. 1727, 89<sup>th</sup> Gen. Assemb., Reg. Sess. (Ark. 2013).

64. H.B. 2035, 91<sup>st</sup> Gen. Assemb., Reg. Sess. (Ark. 2017). In 2017, Representative D. Douglas filed House Bill No. 2035 in the 91<sup>st</sup> General Assembly. *Id.* Bill 2035 added the requirements that absentee ballots be processed no earlier than the Tuesday before election day and that ballots be opened and counted no earlier than 8:30 a.m. on Election day. *Id.*

Though the Board of Elections did not enforce this law in 2020, and did in fact count every absentee ballot, it is free to limit the count to eleven hours in any election (In fact, some might plausibly argue that the Board of Elections has no authority to disregard the will of the legislature by exceeding this eleven-hour limitation.).

In 2020, in anticipation of high absentee voter participation during the upcoming national election, two Arkansas voters sued the Secretary of State to prevent the statute's enforcement.<sup>65</sup> The voters argued that the statute violated their rights under the constitutions of both Arkansas and the United States. They believed the deadline created a risk of their ballots not getting counted. The State of Arkansas responded that the court did not have the authority to make a decision on the case. They also accused the voters of misinterpreting the intention of the legislature.<sup>66</sup>

Immediately following the filing of the lawsuit, the State Board of Election Commissioners issued a "declaratory order" stating that it would count every ballot and that failure to do so would be unlawful.<sup>67</sup> According to the Board, the statutory deadline was not for counting but rather a "statutory mandate . . . to schedule and staff the process of canvassing and counting absentee ballots so that the process can be concluded by the closure of in person voting at 7:30 p.m.," contradicting the plain language of the law.<sup>68</sup> Despite the assertion of the State, the laws in question very clearly limit counting to eleven hours on Election Day.

In 2020, Arkansas voters requested nearly 132,000 absentee ballots, and the counting ran well past Election Day.<sup>69</sup> Even before the pandemic, in multiple prior election years, officials struggled to complete the absentee ballot count by 7:30 p.m. on Election Day.<sup>70</sup> Without repealing the statute, it

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Prior to Bill 2035, ARK. CODE ANN. § 7-5-416(a)(1) only stated that processing, rather than counting, would begin at 8:30 a.m.

65. See Complaint, *Wince, et al v. Thurston*, 60CV-20-5954 (Cir. Ct. of Pulaski Cnty).

66. *Id.*

67. State Bd. of Election Comm'rs, Declaratory Order 2020-002 1 (Oct. 28, 2020), [https://static.ark.org/eeuploads/elections/DO-SBEC\\_2020-002\\_Final\\_Draft.pdf](https://static.ark.org/eeuploads/elections/DO-SBEC_2020-002_Final_Draft.pdf).

68. The Board had the authority to issue its declaratory order because it is "empowered to enforce election and voter registration laws" by ARK. CODE ANN. § 25-15-206. State Bd. of Election Comm'rs, *supra* note 67. It is unclear, however, if the Board's purview of enforcement grants it the power of interpretation, particularly when the interpretation seems to contradict the statute's plain language and the legislature's clearly stated intent.

69. Haylee Brooks, *Arkansas Sees Record Number of Absentee Ballots Requested* (Nov. 2, 2020, 6:20 PM), <https://www.fox16.com/election/arkansas-sees-record-number-of-absentee-ballots-requested/>.

70. Linda Satter, *7:30 Won't End Absentee Ballots Count, Panel Says*, ARK. DEMOCRAT-GAZETTE (Oct. 29, 2020, 7:22 AM), <https://www.arkansasonline.com/news/2020/oct/29/panel-730-wont-end-absentee-ballots-count/?news-arkansas> (under penalty of perjury, Susan Inman, the former director of elections for the Arkansas Secretary of State, testified that even

appears that subsequent administrations will have the authority to disregard the 2020 administrative order.

4. *Statute Preventing One Person from Assisting More than Six Voters*

Arkansas United brought a lawsuit challenging a statutory provision prohibiting individuals from helping more than six people on Election Day.<sup>71</sup> Arkansas United is a tax-exempt nonprofit focused on supporting the Latino community in Arkansas<sup>72</sup> and was represented in court by the Mexican-American and Legal Defense Fund, a nonprofit focused on the legal protection of civil rights of Latinos living in the United States.<sup>73</sup> Arkansas United planned to set up help desks at polling places highly-populated by Latino voters, but the Sebastian County Election Commission prohibited Arkansas United from doing so.<sup>74</sup> The statute makes the forbidden act a misdemeanor punishable by up to one year in prison and up to \$2500 in fines.<sup>75</sup> Thus, in districts where there are large numbers of voters for whom English is a second language, one translator cannot help them all, and in effect, Arkansas United was forced to divert its resources to try to ensure that a Spanish-language interpreter was available for every six Latino voters.<sup>76</sup> In Arkansas, there is no requirement, federal or otherwise, that the election commission provide a translation of ballots into other languages, and accordingly, the ballot is only provided in English.<sup>77</sup> As of 2020, approximately 83,000 eligible voters in Arkansas are of Latino heritage.<sup>78</sup>

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Pulaski County, which is better equipped for tabulating ballots than less populous counties, has “always” experienced difficulty counting ballots before the close of polls).

71. *Ark. United v. Thurston*, 2020 U.S. Dist. LEXIS 207145, \*4 (W.D. Ark. 2020).

72. *See generally History*, ARK. UNITED, <https://arkansasunited.org/en/history> (last visited Aug. 28, 2021).

73. *See generally About*, MEXICAN AM. LEGAL DEF. AND EDUC. FUND, <https://www.maldef.org/about/> (last visited Aug. 28, 2021).

74. *See* ARK. CODE ANN. § 5-4-201(b)(1) (West 2009).

75. *Id.*

76. Max Brantley, *Another Voting Rights Lawsuit Filed, This One to Protect Those Facing Language Barriers*, ARK. TIMES (Nov. 3, 2020, 9:40 AM), <https://arktimes.com/arkansas-blog/2020/11/03/another-voting-rights-lawsuit-filed-this-one-to-protect-those-facing-language-barriers>.

77. Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016), <https://www.justice.gov/crt/file/927231/download>. At the state level, nowhere in the Arkansas code is there any language requirement whatsoever. *See* ARK. CODE ANN. §§ 7-5-101–111 (2020).

78. *Mapping the 2020 Latino Electorate, Voters by State*, PEW RSCH. CTR. (Jan. 31, 2020), <https://www.pewresearch.org/hispanic/interactives/mapping-the-latino-electorate/>.

English-proficient voters with a physical disability are also disenfranchised by voter assistance restrictions. In Arkansas, 479,188 individuals are estimated to have a disability.<sup>79</sup> Additionally, an estimated 66,770 veterans with a disability live in Arkansas.<sup>80</sup> A conservative estimate accounts for almost 30,000 of those veterans turning out to vote.<sup>81</sup> Similar to those who cannot read English proficiently enough to vote, voters with disabilities must rely on family, friends, or organizations specializing in voter assistance, who have the time and resources to ensure that no individual assists more than six voters. In short, the statutes discriminate against the fundamental right to vote based on national origin, the inability to read English, and health disabilities.

Federal courts have struck down similar statutes in other states,<sup>82</sup> and will likely strike down the Arkansas version as well. Under the federal Voting Rights Act, eligible voters with disabilities or an inability to read or write are entitled to assistance by any “person of the voter’s choice.”<sup>83</sup> Although Federal District Court Judge Timothy Brooks in Arkansas did not grant the injunction in the 2020 case (ostensibly due to the last-minute timing of the request), he clearly articulated his agreement with the merits of the plaintiff’s argument, citing a “substantial likelihood of success” for the

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79. *Housing Assistance Council Tabulations of the Census Bureau’s 2009–2013 American Community Survey, Arkansas Veterans*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=arkansas%20veterans&t=ACSST1Y2019.S2101&hidePreview=true>.

80. *Id.*

81. See Ruth Igielnik, *A Political Profile of Disabled Americans*, PEW RSCH. CTR. (Sept. 22, 2016), <https://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans/> (reporting that approximately eighty percent of individuals with disabilities are registered voters—this estimate is conservative in that it applies general voter registration and turnout data to veterans, who are more likely to be civically engaged); Andrew Epperson, *Arkansas Has Second-Lowest Voter Turnout Percentage Nationally*, KNWA (Nov. 11, 2020, 10:17 PM), <https://www.nwahomepage.com/knwa/arkansas-has-second-lowest-voter-turnout-percentage-nationally/> (“[C]alculations show 55.5% of Arkansas’ [sic] eligible voters turned out” in the 2020 election.).

82. See *DSCC, et al., v. Simon*, 950 N.W.2d 280, 290–91 (Minn. 2020) (holding that Minnesota’s three-person limit on ballot-marking assistance was preempted by Section 208 of the Voting Rights Act); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (holding that a Texas state-law requirement that a voter’s chosen interpreter be registered to vote in the voter’s county of residence “impermissibly narrow[ed] the right guaranteed by Section 208 of the VRA”); *Democracy N.C. v. N.C. State Bd. of Elections*, 2020 WL 4484063 at \*60 (M.D.N.C. Aug. 4, 2020) (holding a state law limiting assistance for voters residing at health care facilities contravened the Voting Rights Act guarantee for assistance from any person).

83. 52 U.S.C. §10508 (excluding “the voter’s employer or agent of that employer or officer or agent of the voter’s union”).

plaintiffs.<sup>84</sup> Arkansas United will likely prevail on the merits, and at the time of this writing, the case is still pending.

#### B. Subsequent, Post-Election Legislation and Ensuing Litigation Efforts

The 2021 legislative session resulted in the enactment of twenty laws impacting election protection.<sup>85</sup> Kymara Seals, Policy Director at the Arkansas Public Policy Panel, stated, “We clearly see this as voter suppression, chipping away at access to the ballot, and the modern-day poll tax.”<sup>86</sup> Of these, the following are of note to the subject matter of this Article:

- Act 249 removed voters’ ability to provide a signed affidavit in lieu of a state-issued photo ID.<sup>87</sup> (Note that a similar provision in Florida was struck down as unconstitutional, and indeed, Arkansas’s previous allowance of the affidavit distinguished it from the unconstitutional provision.)<sup>88</sup>
- Act 610 reduced the ability of the legislature to hold special elections from once a month to once a quarter.<sup>89</sup>
- Act 951 required that canvassers collecting signatures for ballot initiatives be both Arkansas residents and United States citizens, thereby preventing them from being paid on a per signature basis.<sup>90</sup>
- Act 273 increased the number of required signatures for a candidate to appear on the ballot from 1,000 to 5,000.<sup>91</sup>
- Act 728 prohibited people being within 100 feet of the entrance to a voting site while voting is taking place, except when a person is entering

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84. Ark. United v. Thurston, 2020 U.S. Dist. LEXIS 207145, \*11–12 (W. D. Ark. 2020).

85. See *infra* notes accompanying text at 89–100.

86. Rachel Herzog, *Arkansas Session Rolls Out Array of Vote Laws, Changes Hailed by Some as Protective, Reviled by Others as Added Restrictions*, ARK. DEMOCRAT-GAZETTE (May 9, 2021, 11:14 AM), <https://www.arkansasonline.com/news/2021/may/09/session-rolls-out-array-of-vote-laws/>.

87. *Id.*

88. *Democratic Exec. Comm. v. Detzner*, 347 F. Supp. 3d 1017 1023 (N.D. Fla. 2018). (detailing the evolution of Fla. Stat. § 101.68(4)(a) (2017) and the revisions made regarding making available the affidavit in order to comply with the Constitution as required by the federal courts).

89. Herzog, *supra* note 86.

90. *Id.*

91. *Id.*

or exiting the building. It is unclear whether this Act prohibits someone from giving water to a voter waiting in line.<sup>92</sup>

- Act 736 requires absentee voter statements to be uniform and approved by the Election Commissioners and requires voters to provide a residential address and a mailing address; no such specificity for either of these provisions was required prior to this Act.<sup>93</sup> It also requires that election workers compare signatures on ballot affidavits against the absentee ballot application only, as opposed to other prior documents on public record, as was done in some Arkansas counties prior to the enactment of this law.<sup>94</sup>
- Act 973 shortened the deadline for the in-person return of absentee ballots from the day before Election Day to the Friday before Election Day.<sup>95</sup> Though refusing to veto it, Governor Hutchinson did not sign this Act into law, stating: “[It] unnecessarily limits the opportunities for voters to cast their ballot prior to the election.”<sup>96</sup>
- HJR 1005 now requires a sixty percent popular majority vote, up from a simple majority.<sup>97</sup>

Subsequently, Arkansas United and the League of Women Voters of Arkansas brought a lawsuit against the state challenging Act 249 (doing away with the voter affidavit option in lieu of photo ID), Act 728 (creating a 100 foot exclusion zone prohibiting friends and family from accompanying the voter), Act 736 (limiting signature comparison to the absentee ballot application only), and Act 973 (moving up the deadline to deliver an absentee ballot in person).<sup>98</sup> This lawsuit was filed less than a month prior to the drafting of this Article and the outcome is unknown at this time.

### III. PRE-PANDEMIC ELECTION WEAKNESSES GENERALLY

Regardless of this new crop of legislation, it is important to note that the voting process in Arkansas has been fraught with frailties for decades. Poll workers have been entrusted to make important decisions as to where a

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92. *Id.*

93. *Id.*

94. *Id.*

95. Herzog, *supra* note 86.

96. *Id.*

97. *Id.*

98. Nyssa Kruse, *Lawsuit Challenging New Arkansas Election-Administration Laws, Explained*, ARK. DEMOCRAT-GAZETTE (May 25, 2021, 11:51 AM), <https://www.arkansasonline.com/news/2021/may/25/lawsuit-challenging-new-arkansas-election-administ/>.

voter can actually vote,<sup>99</sup> which ballot type a voter should be given,<sup>100</sup> whether the vote should be kept or thrown out,<sup>101</sup> and more.<sup>102</sup> This pressure starts with the commencement of the election season and continues well after Election Day as votes are counted, absentee ballots continue to come in, and results around the state and country are announced. Election officials operate on limited budgets for more than sixteen hours a day, making minimal pay and managing a paid staff who are, on average, over seventy years in age.<sup>103</sup>

These conditions facilitate implicit bias.<sup>104</sup> In a detailed survey and analysis of the work of election officials and poll workers, Professors Antony Page and Michael Pitts characterize the typical American polling place as an “optimal setting” for implicit bias.<sup>105</sup> Their work provides extensive evidence of implicit bias against Black, Asian, and Latino voters, using Indiana as a case study.<sup>106</sup>

The authors found instances of voters being rejected based on an address change and based on name changes due to marriage or divorce.<sup>107</sup> In other instances, poll workers bounce voters from one poll to the next under a premise that the voter cannot be identified on anyone’s rolls.<sup>108</sup> In one instance, an Asian-American voter was instructed to go to multiple polling places, only to return two hours later to the first poll where the workers “suddenly” found his name.<sup>109</sup>

The confusion caused by incompetent and overworked poll workers started even before Election Day, during the pre-election management phase (selecting polling places, determining how the vote will be administered, determining who is eligible to vote, and which voting machines will be

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99. STATE BD. OF ELECTION COMM’RS, TRAINING GUIDE AND CHECKLIST FOR POLL WORKERS 23 (2020), [https://static.ark.org/euploads/elections/2020\\_Poll\\_Worker\\_Guide\\_final.pdf](https://static.ark.org/euploads/elections/2020_Poll_Worker_Guide_final.pdf).

100. *Id.* at 24–25.

101. *Id.* at 55–59.

102. *See generally id.*

103. Jeremy Epstein, *Internet Voting, Security, and Privacy*, 19 WM. & MARY BILL RTS. J. 885, 894 (2011) (citing Jim Drinkard, *Panel Cites Poll Workers’ Age as Problem*, USA TODAY (Aug. 9, 2004, 12:13 AM), [https://usatoday30.usatoday.com/news/politics/elections/nation/2004-08-08-voting-workers\\_x.htm](https://usatoday30.usatoday.com/news/politics/elections/nation/2004-08-08-voting-workers_x.htm)).

104. *See generally* Page & Pitts, *supra* note 6.

105. *Id.* at 4.

106. *See id.*

107. *Id.* at 18, n. 96.

108. *Id.* at 52 (citing Brief of Asian American Legal Defense and Education Fund as Amici Curiae in Support of Petitioners at 22, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25)).

109. *Id.*

used).<sup>110</sup> In the high profile contest of African-American Stacy Abrams' run for Governor in Georgia against Brian Kemp, who was the standing Secretary of State in charge of administering the election at the time, Election Day included missing power cords, malfunctioning voting machines, and voters waiting in line for hours at polling places, some of which were near historical black colleges in Atlanta.<sup>111</sup> Georgia is one of five states that conducts its voting entirely by electronic voting machines that do not create a paper trail.<sup>112</sup>

This chaos is partially explained by a U.S. Supreme Court decision that, in effect, removed federal oversight of elections.<sup>113</sup> Before 2013, the Voting Rights Act required states with "indicators of a history of discrimination" to obtain a pre-clearance from the federal government before the state adopted any change in voter procedure.<sup>114</sup> In effect, the pre-clearance requirement regulated where and how many polls were available, amongst other things.<sup>115</sup> A formula in the statute determined whether this provision of the VRA applied to any given state.<sup>116</sup> This all changed in 2013 when the Supreme Court of the United States invalidated the formula used to determine which states required pre-clearance, in effect, removing the requirement altogether.<sup>117</sup> Immediately following the decision, 868 polling places nationwide closed by 2016.<sup>118</sup> Sixty-one percent of Louisiana's parishes closed polling places, twelve of eighteen counties in Alabama closed polling places, and Texas closed at least 400 polling places.<sup>119</sup>

Under this regime, poll workers are given a large amount of decision-making authority with virtually no oversight. Critics have observed that even when poll workers possess no ill intent, the amount of discretion given

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110. Barouh, *supra* note 16, at 249.

111. Jeff Martin & Kate Brumback, *Broken Voting Machines, Long Lines Under Scrutiny in Georgia*, ASSOCIATED PRESS NEWS (Nov. 7, 2018), <https://apnews.com/article/donald-trump-ap-top-news-elections-voting-voting-machines-a2b641d6f03f41f28b2645a20200951f>.

112. *Id.*

113. See *Shelby County Decision*, U.S. DEPT. OF JUSTICE VOTING SECTION, <https://www.justice.gov/crt/voting-section> (last visited Aug. 28, 2021).

114. *Id.*; see generally Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, Section 5.

115. *Shelby County Decision*, *supra* note 113.

116. Barouh, *supra* note 16, at 250 (citing *Shelby County Decision*, U.S. DEPT. OF JUSTICE VOTING SECTION, <https://www.justice.gov/crt/voting-section> (last visited Aug. 28, 2021)).

117. *Id.*

118. Barouh, *supra* note 16, at 251 (citing Zoltan L. Hajnal, et al., *Do Voter Identification Laws Suppress Minority Voting? Yes, We Did The Research*, WASH. POST (Feb. 15, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/>).

119. *Id.*

to them facilitates discrimination through unconscious bias.<sup>120</sup> For instance, Professors Page and Pitts concisely explain:

Unconscious bias appears most likely to make a difference for decisions that might be described as judgment calls rather than decisions where the outcome is clear, as several experiments have shown. . . . Judgment calls tend to create an opportunity for unconscious bias. However, it is less likely that a person will use (and act upon) unconscious stereotypes the more cognitive resources (i.e., brain power) a person has available. A person trying to make a decision in a hurry may be unable to use his or her cognitive resources. If people are allowed time to control their responses, high prejudice people will show more prejudice than low prejudice people.<sup>121</sup>

In short, the more the election system requires people with little training to make time sensitive decisions in high pressure election day scenarios, the more likely implicit bias will occur, even by well-meaning election workers.

#### IV. SOLUTIONS

The reality of human error has made the possibility of automation attractive to some.<sup>122</sup> At the same time, the increased incidence of election interference by foreign nations has made others skeptical about the reliability of technology in the polls, especially with software requiring internet connectivity. The next section of this Article will discuss the increased use of 1) internet voting and 2) universal vote by mail systems. These comprise the two primary directions widely discussed as solutions to voter disenfranchisement through in-person voting.

##### A. Universal Vote by Mail

Universal Vote by Mail (universal VBM) differs from the absentee ballot process in that universal VBM does not require the voter to provide a reason for voting by mail, whereas as “absentee” voting does.<sup>123</sup> VBM was

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120. See generally Page & Pitts, *supra* note 6.

121. Page & Pitts, *supra* note 6, at 33–34. The authors point to issues of timing, the amount of information available to the poll worker other than race, the lack of training covering the technology of the equipment, and the potential of implicit bias and how to guard against it. *Id.* at 12, 14–15.

122. See *id.* at 40.

123. John C. Fortier & Normal J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483, 484 n.2 (2003).

made available for the first time in U.S. during the Civil War.<sup>124</sup> Today, election officials must send ballots to military personnel and other citizens overseas, and voting by mail is available in all fifty states in some form or fashion.<sup>125</sup> Sixteen states require a reason to vote absentee, for issues such as illness, disability, incarceration, work schedule, religious beliefs/practices, etc.<sup>126</sup> Twenty states do not require a reason, and five automatically send ballots to every registered voter through a universal VBM election.<sup>127</sup> Three states, Washington, Oregon and Colorado, operate their election systems almost entirely by mail.<sup>128</sup>

In 2018, Susan Inman ran for Arkansas Secretary of State on a platform promoting universal VBM.<sup>129</sup> She argued that universal VBM would save taxpayers millions of dollars, eliminate hacking potential, and significantly increase voter participation.<sup>130</sup> She stated,

Amazon is changing how we shop by using the mail, and now it's time to use the mail to change how we vote.] . . . Under my plan, every registered voter is automatically mailed a ballot. For it to be counted it must be returned with a copy of a government-issued ID to comply with the new voter ID law. By moving to a complete Vote By Mail system taxpayers will save millions and we'll no longer have the debacles we saw in Lonoke County on primary election day. Voting by mail is the future of our election process. Let's put Arkansas on the forefront of this issue.<sup>131</sup>

In addition to the states of Colorado, Washington, and Oregon, Utah's election system operates almost entirely as a VBM state (over ninety percent), as does most of Montana (about seventy-five percent), both solidly Republican states.<sup>132</sup> Hawaii is also a "vote at home" state for the most

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124. *Id.* at 492–93 (2003).

125. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat 924 (1986) (codified as amended at 52 U.S.C.A. §§ 20301-20310 (West 2015)).

126. *VOPP: Table 2: Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 20, 2020) <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx>.

127. *VOPP: Table 1: States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>.

128. *Id.*

129. Max Brantley, *Susan Inman Backs Vote By Mail*, ARK. TIMES (June 13, 2018, 6:08 PM), <https://arktimes.com/arkansas-blog/2018/06/13/susan-inman-backs-vote-by-mail>.

130. *Id.*

131. *Id.*

132. Kate Rabinowitz & Brittany Renee Mayes, *At Least 84% of American Voters Can Cast Ballots by Mail in the Fall*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/>.

part.<sup>133</sup> In Colorado, each voter is mailed a ballot approximately three weeks before the election and can either return it by mail or deliver it personally to a drop box in a secure location.<sup>134</sup> Both Colorado and Washington still have in-person polls available where voters can exchange their mail-in ballot for an in-person ballot.<sup>135</sup> Oregon conducts its election entirely by mail.<sup>136</sup> Washington also maintains centers where voters can get help with ballots.<sup>137</sup>

In addition to the advantages articulated by Inman, Professors Page and Pits argue that increased VBM can effectively eliminate opportunities for unconscious bias by taking away the authority of poll workers to make time-crunched decisions with little information available to them.<sup>138</sup>

### 1. *Cost*

Though members of Congress acknowledged that the estimated cost to fund no-excuse VBM in all states was two billion dollars, they allocated only four-hundred million dollars to states through the Coronavirus Aid, Relief, and Economic Security Grants.<sup>139</sup> The consensus, however, is that a VBM system is cheaper in the long run.<sup>140</sup> The National Conference of State Legislatures, a nonpartisan organization of public officials, concluded that because VBM requires fewer poll workers than in-person voting, and because poll workers comprise a significant portion of the election budget, universal VBM is more cost-effective.<sup>141</sup> In Montana, one state representative calculated a savings of \$500,000 for a Secretary of State position that was converted to a mail-in election.<sup>142</sup> Oregon's transformation to universal VBM reflected an election cost decrease of approximately 30%, from \$3.07

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133. Jason A. Abel, *Voting in an Era of Crisis*, 45 HUM. RTS. 2, 4 (2020).

134. *Id.*

135. *Id.*

136. *Id.*

137. Barouh, *supra* note 16, at 257 (citing *Absentee and Early Voting*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 17, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>).

138. Page & Pitts, *supra* note 6, at 16.

139. Abel, *supra* note 133, at 4.

140. *See* Barouh, *supra* note 16, at 265.

141. *Id.* (citing *All-Mail Elections*, NAT'L CONF. OF STATE LEGISLATORS (Jan. 12, 2017), <http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx>); *see also* Wendy Underhill & Michael D. Hernandez, *All-Mail Elections Quietly Flourish*, 50 THE CANVASS 1, 2 (2014).

142. Matt Volz, *Montana Senate Passes Bill to Allow Mail-in Ballot*, U.S. NEWS & WORLD REPORT (Feb. 24, 2017, 9:14 PM), <https://www.usnews.com/news/montana/articles/2017-02-24/montana-senate-endorses-bill-to-allow-mail-in-ballot>.

per voter to \$2.21 per voter.<sup>143</sup> Colorado's election costs decreased by about 40% after converting to universal VBM.<sup>144</sup>

## 2. *Voter Participation Increases – Overall and for Marginalized Groups*

While the popular lore is that universal VBM increases voter participation overall, the research is less clear cut. A study looking at the staggered transition of Washington state for the years 2007, 2008, and 2013 reflected only modest increases in voter turnout.<sup>145</sup> This is consistent with a more recent study published by the Stanford Institute for Economic Policy Research looking at the turnout for the 2020 election, which observed no major increases nationwide when most states made mail voting easier because of the pandemic.<sup>146</sup>

However, the few studies that analyzed the effect of VBM on historically marginalized groups have shown more significant results. Specifically, a study from 2019 reflects that VBM results in a greater turnout among not only youth and racial minorities<sup>147</sup> but also rural voters.<sup>148</sup>

About one in five individuals, or sixty million people, live in rural America,<sup>149</sup> an area that comprises 97% of the nation's land.<sup>150</sup> The population of rural America is growing and becoming increasingly more diverse.<sup>151</sup>

143. Barouh, *supra* note 16, at 266.

144. *Id.*

145. Gerber et al., *Identifying the Effect of All-Mail Elections on Turnout: Staggered Reform in the Evergreen State*, 1 POL. SCI. RSCH. & METHODS 91, 92–103 (2013); *see also* Thad Kousser & Megan Mullin, *Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment*, 15 POL. ANALYSIS 428, 441–44 (2007).

146. Jesse Yoder et al., *How Did Absentee Voting Affect the 2020 U.S. Election?*, STANFORD INST. FOR ECON. POLICY RSCH. at 26–28 (Mar. 5, 2021), <https://siepr.stanford.edu/sites/default/files/publications/21-011.pdf>.

147. Atsushika et al., *Compositional Effects of Vote by Mail Elections on Voter Turnout*, at 14–16 (Mar. 28, 2019) (unpublished manuscript prepared for the 77th Annual Midwest Political Science Association Conference in Chicago, Illinois).

148. Elizabeth Bergman & Philip A. Yates, *Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?*, 10 ELECTION L. J. 115, 119 (June 17, 2011), <http://doi.org/10.1089/elj.2010.0079>.

149. America Counts Staff, *One in Five Americans Live in Rural Areas*, U.S. CENSUS BUREAU (Aug. 9, 2017), <https://www.census.gov/library/stories/2017/08/rural-america.html> (noting the Census Bureau defines “rural” by low-density housing, which factors population thresholds, density, distance, and land use).

150. *Id.*

151. *See A Few Things to Know About Rural America*, THE ASPEN INST. 1–2 (May 6, 2020), <https://www.aspeninstitute.org/wp-content/uploads/2020/05/A-Few-Things-To-Know-CSG-Brief-Update.pdf>.

Between 1970 and 2010, the population of rural areas grew by 11%.<sup>152</sup> From 2000-2010, about of rural America's population growth was comprised of people of color, who now make up about 20% of the region.<sup>153</sup> In 2010-2016, immigrants comprised 37% of the population growth.<sup>154</sup>

Rural America is also becoming more attractive. In the same Pew study, 30% of urban residents who were interested in relocating said they would move to a rural area if they could, (contrasted with 20% of rural residents who desired to relocate who would be willing to move to urban areas).<sup>155</sup> Another study reflected a rural "brain gain" of individuals aged thirty to sixty-four, looking for a simpler way of life and lower cost of living.<sup>156</sup>

The most recent census data from 2020 is consistent with the results of the Pew study. According to the 2020 census, the state with the fastest growing population was North Dakota, a largely rural state, which enjoyed a 15.8% population increase mostly due to in-migration.<sup>157</sup> Also amongst the fastest growing states were Utah, Idaho, Nevada, and Arizona.<sup>158</sup> On the other hand, Illinois had some of the largest population losses.<sup>159</sup> Most noteworthy, however, was the marked decrease in growth rate in California, which grew only 6% in the last decade, the lowest growth rate in its history, largely attributable to out-migration.<sup>160</sup> From an electoral perspective, the states that lost seats in Congressional seat allocation were California, New York, Illinois, Pennsylvania, Michigan, Ohio, and West Virginia.<sup>161</sup> The states that have added seats are Colorado, Montana, Oregon, North Carolina, Texas, and Florida.<sup>162</sup>

Arkansas fits squarely within all of these Sun Belt<sup>163</sup> trends. Arkansas's overall population has increased ninety-five thousand people since the pre-

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152. *Id.*

153. *Id.* at 2 (citing Kenneth Johnson, *Where is 'Rural America' and What Does it Look Like?*, THE CONVERSATION (Feb. 20, 2017, 8:19 PM), <https://theconversation.com/where-is-rural-america-and-what-does-it-look-like-72045>).

154. *Id.*

155. *Id.*

156. *Id.* (citing Benjamin Winchester, *Rewriting the Rural Narrative: Speak Softly and Carry Statistics*, REGENTS OF THE UNIV. OF MINNESOTA (2014), <https://danehansen=foundation.org/wp-content/uploads/2017/04/Rewriting-the-Rural-narrativ-e-ben-winchester.pdf>).

157. William H. Frey, *Census 2020: First Results Show Near Historically Low Population Growth and a First-Ever Congressional Seat Loss for California*, BROOKINGS (Apr. 26, 2021), <https://www.brookings.edu/research/census-2020-data-release/>.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. See Frey, *supra* note 157 (noting Sun Belt commonly refers to states in the Southern

vious census (2010), topping three million for the first time in its history.<sup>164</sup> Looking solely at the population of Latino Arkansans, as of 2020, there are eighty-three thousand eligible voters, about 8% of the total population of all Arkansan voters.<sup>165</sup> From 2010 to 2018, there were eleven thousand more eligible African American voters, for a total of about 15% of all Arkansan voters.<sup>166</sup>

Thus, while universal VBM may show only modest increases in participation overall, it likely will have a stronger impact amongst two growing demographics in Arkansas—rural voters and minority voters.

### 3. *Problems—Real and Perceived—with VBM, and Viable Solutions*

#### a. Non-partisan effects and few incidents of voter fraud

In California, the Republican Party fought hard to restrict the use of VBM, consistent with critiques and commentary by conservative host Tucker Carlson of Fox News.<sup>167</sup> Former President Donald Trump himself posted a tweet urging Republicans to “fight very hard” against statewide mail-in voting,<sup>168</sup> and referred to it as “the greatest scam in the history of politics,”<sup>169</sup> despite the fact that red states such as Colorado and Utah implement VBM with strong bipartisan support.<sup>170</sup> Trump’s tweets created the antici-

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and Western regions of the country).

164. Kristin Higgins & Wayne Miller, *Arkansas Experiences One of its Slowest Growth Rates Since 1900 Census*, MAGNOLIA REPORTER (May 7, 2021), [http://www.magnoliareporter.com/news\\_and\\_business/regional\\_news/article\\_537df16e-ae9c-11eb-b285-2bcfec9a37ba.html](http://www.magnoliareporter.com/news_and_business/regional_news/article_537df16e-ae9c-11eb-b285-2bcfec9a37ba.html).

165. *Mapping the 2020 Latino Electorate, Voters by State*, *supra* note 78.

166. Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), <https://www.pewresearch.org/20-20/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>.

167. Acevedo, et al., *supra* note 27, at 12–13.

168. *Id.*

169. Maayan Silver, *Some in GOP Fear Trump’s Push Against Mail-In Voting Could Harm The Party’s Chances*, NAT’L PARK RADIO (Aug. 31, 2020, 5:15 AM), <https://www.npr.org/2020/08/31/907091223/some-in-gop-fear-trumps-push-against-mail-in-voting-could-harm-the-party-s-chance>.

170. See Eric Cortellessa, *How to Save Elections From a Pandemic*, YES! SOLUTIONS JOURNALISM (Mar. 26, 2020), <https://www.yesmagazine.org/democracy/2020/03/26/coronavirus-elections>; see also UTAH CODE ANN. § 20A-3-301 (West 2019) (repealed 2020). A handful of other Republicans share this against-the-grain sentiment. Republican Secretary of State Kim Wyman from the Washington state issued a public statement of support of Washington’s status as a universal VBM state and stated that it is “‘disappointing when anyone in leadership’ makes fraud claims . . . When it happens, the public loses confidence in the foundational pillar of our system.” Associated Press, *As Trump Rails Against Mail Voting, Some*

pated effect: A Republican county chairman in Fond du Lac Wisconsin shared, “I do sense the skepticism among a lot of Republican voters about the mail-in balloting thing, . . . [t]hey don’t trust it, and one of the reasons they don’t trust it is the president’s previous tweets and comments about it.”<sup>171</sup> A 2005 Bipartisan report from Commission on Federal Election Reform stated that “[a]bsentee ballots remain the largest source of potential voter fraud,”<sup>172</sup> and a subsequent 2012 report agreed.<sup>173</sup>

One of the biggest concerns regarding voter fraud is *ballot harvesting*, or the return of votes to mailboxes or drop boxes by people other than the voters themselves. In an opinion piece published by Fox News, Republican Representative Rodney Davis from the state of Illinois stated:

What Democrats are also not telling you is that California allows for ballot harvesting—meaning that any individual can pick up any number of ballots for any reason, completely unchecked. These harvesters picking up ballots don’t have to show an ID, they don’t have to be a citizen, and they don’t have to be eligible to vote. You expect Americans to believe that having someone who can’t vote picking up ballots won’t invite fraud in our elections? No one is keeping track of who is picking up thousands of ballots, so how do we know they’re being delivered? How do we know the harvesters aren’t altering votes or pressuring people on how to vote? Also, why are Democrats pushing to allow for ballot harvesting when all these mail ballots will supposedly have prepaid postage? If voters can mail ballots in for free, then they don’t need “ballot brokers” coming to collect their ballots, unchecked. This raises questions in my home state of Illinois, where the state Legislature just passed a bill to allow ballot drop boxes in Champaign County. These ballot boxes have no checks on who would be dropping off ballots or how many are turned in to these boxes, not to mention no supervision of the ballots once they’re dropped off. Practices like these raise many red flags and leave our election systems ripe for fraud.<sup>174</sup>

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*Allies Embrace It*, Q13 FOX SEATTLE (Apr. 10, 2020), <https://www.q13fox.com/news/as-trump-rails-against-mail-voting-some-allies-embrace-it>.

171. Silver, *supra* note 169.

172. CTR. FOR DEMOCRACY AND ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 46 (Sept. 2005), [www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf](http://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf).

173. R. MICHEAL ALVAREZ, ET AL., VOTING: WHAT HAS CHANGED, WHAT HASN’T, AND WHAT NEEDS IMPROVEMENT 41 (Oct. 18, 2012), [https://journalistsresource.org/wp-content/uploads/2012/10/Voting-Technology-Report\\_final.pdf](https://journalistsresource.org/wp-content/uploads/2012/10/Voting-Technology-Report_final.pdf).

174. Rodney Davis, *Rep. Rodney Davis: Twitter Tries to Censor Trump with ‘Fact Check’ but Gets its Facts Wrong on Voter Fraud*, FOX NEWS (May 28, 2020), <https://www.foxnews.com/opinion/rep-rodney-davis-twitter-tries-to-censor-trump-with-fact-check-but-gets-its-facts-wrong-on-voter-fraud>.

The data, however, tell a different story. Experts have deemed voter fraud to be “exceedingly rare,” with some estimates calculated at less than 1% of the total votes cast by mail.<sup>175</sup> In Arkansas, since 2002, only three incidents of fraud have been documented, according to a report issued by the Heritage Group, a conservative-leaning think tank.<sup>176</sup>

Stanford University’s Democracy & Polarization Lab published an in-depth study titled *The Neutral Partisan Effects of Vote-by-Mail Partisan Result: Evidence from County-Level Rollouts*. The study concluded that VBM does not appear to either “affect either party’s share of turnout” or “increase either party’s voter share.”<sup>177</sup> This conclusion is consistent with the data presented in reports issued by the U.S. Election Assistance Commission, which analyzed the most comprehensive set of federal election data, reflecting no marked benefit to any one party from the adoption of VBM.<sup>178</sup>

On the contrary, supporters assert that VBM is actually less vulnerable to fraud given that there is no website tabulating votes or storing data, as opposed to online ballot marking using a Direct Recording Electronic (DRE) machine, commonly used with in-person voting.<sup>179</sup> The Brennan Center for Justice, a legal think tank and litigation nonprofit based out of New York University’s law school, has argued that there is no evidence showing that VBM increases voting fraud, in large part because of built-in protections safeguarding against ballot theft and impersonation.<sup>180</sup> Such safeguards include allowing only registered voters to request ballots, mailing ballots only to addresses on the voter registration rolls, requiring signatures on the external return envelope, and ensuring the ballot was received from the address of a genuine voter.<sup>181</sup> Signature matching techniques and

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175. Abel, *supra* note 133, at 5.

176. Herzog, *supra* note 86.

177. Abel, *supra* note 133, at 5; *see also* Daniel M. Thompson, et al., *The Neutral Partisan Effects of Vote-By-Mail: Evidence From County-Level Roll-Outs*, STANFORD INST. FOR ECON. POLICY RSCH. (Apr. 15, 2020), <https://siepr.stanford.edu/research/publications/neutral-partisan-effects-vote-mail-evidence-county-level-roll-outs> (Recent research comparing data collected from 1996 to 2018 from three states confirmed previous findings that no political party gained an advantage from the implementation of VBM.).

178. Acevedo et al., *supra* note 27, at 7.

179. Barouh, *supra* note 16, at 257.

180. Matthew Harwood, *Why a Vote-By-Mail Option is Necessary*, BRENNAN CTR. FOR JUSTICE (last updated Apr. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/why-vote-mail-option-necessary>.

181. Darrell M. West, *How Does Vote-By-Mail Work and Does It Increase Election Fraud?*, POLICY 2020 BROOKINGS (June 22, 2020), <https://www.brookings.edu/policy20-20/votervital/how-does-vote-by-mail-work-and-does-it-increase-election-fraud/>.

poll worker training also serve as ballot fraud safeguards.<sup>182</sup> In essence, this prevents a person from requesting a ballot for someone else and having it mailed to an address, not on record with the voting authorities. It also reduces the likelihood of a ballot being stolen, since the voter can request the ballot weeks before an election, and election authorities receive them on a rolling basis.<sup>183</sup>

Only 143 criminal convictions for voter fraud via absentee ballots have occurred in the past twenty years—about .00006% of all votes cast.<sup>184</sup> Modern provisions such as signature comparison and ballot tracking seem to reduce fraud even more.<sup>185</sup> Thus, concerns over voter fraud seem to be over-inflated, and at the end of the day, the practice does not appear to benefit one party over another.<sup>186</sup>

b. Voter suppression of marginalized communities

As highlighted earlier, in many states the majority of the absentee ballots thrown out have belonged to African-American voters.<sup>187</sup> For example, in Georgia's 2018 midterm elections, hundreds of absentee ballots were rejected, more than one-third of those from the ethnically diverse Gwinnett County, where over 50% of the rejections were of African American or Asian American voters.<sup>188</sup> Critics on both sides of the political spectrum have expressed shared concerns over the inclusion of people of color and other marginalized voters. In the aforementioned Fox News op-ed, Representative Rodney Davis expressed concern over the disenfranchisement of Native American voters, citing a statement by the Native American Rights Fund, which outlined issues of access to traditional mail services, lack of

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182. *Id.*

183. *Id.*

184. Amber McReynolds & Charles Stewart III, *Let's Put the Vote-By-Mail 'Fraud' Myth to Rest*, THE HILL (Apr. 28, 2020, 7:00 AM), <https://thehill.com/opinion/campaign/494189-lets-put-the-vote-by-mail-fraud-myth-to-rest>.

185. Lisa Danetz, *Mail Ballot Security Features: A Primer*, BRENNAN CTR. FOR JUSTICE (Oct. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer>.

186. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-By-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS (June 2, 2020), <https://www.brookings.edu/blog/fix-gov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/>.

187. Viebeck, *supra* note 13.

188. Danielle Root & Aadam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:03 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections>.

broadband, and cultural communication barriers.<sup>189</sup> Representative Davis is not alone in this critique. In 2018, the Native American Voting Rights Coalition released a 127-page Survey Research Report titled *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota*, which documented a number of issues such as lack of access to internet and digital literacy, both which occur disproportionately in the Native American population.<sup>190</sup> The report also stated that a significant number of Native Americans lack government-recognized addresses.<sup>191</sup>

The signature matching requirement has also disproportionately posed challenges for many voters of color.<sup>192</sup> As discussed earlier in this Article, training of poll workers is minimal at best, far beneath that required of signature experts providing admissible expert testimony.<sup>193</sup>

Another election suppression tactic with a disparate impact on voters of color is the photo ID requirement. This discrimination is especially ripe in states which fail to provide voters with the ability to submit an affidavit in lieu of a photocopy of a photo ID, a requirement that disproportionately affects voters of color.<sup>194</sup> Arkansas is one such state where the types of allowable ID are now restricted,<sup>195</sup> and the voter may not submit an affidavit in place of the ID,<sup>196</sup> nor is there an alternative procedure for this.<sup>197</sup>

The competence of the U.S. Postal Service has also come under a microscope during the elections, creating doubt amongst would-be mail-in voters.<sup>198</sup> Critics have pointed out the degree to which VBM relies on the U.S. Postal Service, a service which was greatly compromised by former President Trump and Postmaster General DeJoy, both who overhauled U.S.

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189. Davis, *supra* note 174.

190. *Voting Barriers Encountered By Native Americans in Arizona, New Mexico, Nevada and South Dakota*, THE NATIVE AMERICAN VOTING RIGHTS COALITION (Jan. 2018), [https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf?fbclid=IwAR2-f63a7LunWsWDJsDPWos\\_zRA\\_Qmm8HSiuciJleGAWLm2N-PX99Z-KGKIRY](https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf?fbclid=IwAR2-f63a7LunWsWDJsDPWos_zRA_Qmm8HSiuciJleGAWLm2N-PX99Z-KGKIRY).

191. Acevedo, *supra* note 27, at 8–9.

192. See generally Graham, *supra* note 52.

193. *Id.*

194. Daniel A. Smith, *Analysis of Absentee (“Vote-By-Mail”) Ballots Cast in Florida* (2016), <https://electionsmith.files.wordpress.com/2016/10/smith-coie-jenner-report-dnc-fdp.pdf> [<https://perma.cc/347H-9AWN>]; Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019).

195. ARK. CONST. amend. 51, § 13(b)(1)(A)(i) (2021).

196. See generally *id.*; see also John Lynch, *Four Election Laws in State Inspire Suit*, ARK. DEMOCRAT-GAZETTE (May 21, 2021, 6:50 AM), <https://www.arkansasonline.com/news/2021/may/21/four-election-laws-inspire-suit/>.

197. See generally ARK. CONST. amend. 51, § 13(b)(1)(A)(i) (2021).

198. See John J. Martin, *Mail-In Ballots and Constraints on Federal Power Under the Electors Clause*, 107 VA. L. REV. ONLINE 84, 87 (Apr. 2021).

Postal Service operations months before the election by removing hundreds of mailboxes and high-speed sorting machines, reducing overtime, and prohibiting extra or late trips to the post office, despite the overwhelming popularity of VBM during the 2020 election.<sup>199</sup> DeJoy also introduced a pilot program that caused chaos in mail processing in over four hundred voting jurisdictions and refused to treat election-related mail as First Class.<sup>200</sup> He then ordered general counsel to send letters to state governments warning them that mail-in ballots might not be delivered in time for the November general election.<sup>201</sup> Eventually, in August of 2020, the House voted to pass a twenty-five billion dollar relief package earmarked for the U.S. Postal Service, to which former President Trump explicitly expressed an intention to block.<sup>202</sup> Trump and DeJoy were both sued by twenty states, with three courts issuing preliminary injunctions preventing DeJoy from imposing its policy changes that would thwart the election process, arguing that such interference would be a Constitutional violation of the Elector's Clause.<sup>203</sup> Regardless, the chaos to VBM caused by the President and the partisan-appointed Postmaster General created doubt in the viability of universal VBM.

c. Solutions to VBM risks

However, all of the aforementioned problems are not without viable solutions. One observer proposed that jurisdictions—Native government entities in particular—create a designated location where voters can pick up and drop off ballots.<sup>204</sup> The signature matching requirement can still serve its security purpose without disenfranchising voters, if a cure period is provided for any ballots rejected for any reason. Not only is a cure period a best practice ensuring voter inclusion, but a lack of one, as is now the case in Arkansas, has been deemed unconstitutional.<sup>205</sup> Some recommend a cure period of at least twenty-one days to ensure sufficient time for correction and it should allow voters to submit required information either by phone, email, online,

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 87–88.

204. Acevedo et al., *supra* note 27, at 16.

205. *Id.* at 7 (citing *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1022 (N.D. Fla. 2018)) (“The precise issue in this case is whether Florida’s law that allows county election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection—passes constitutional muster. The answer is simple. It does not.”).

or in person.<sup>206</sup> In-person curing should be considered a last resort, where other methods provide an opportunity to cure from the security of a location of the voter's selection.<sup>207</sup> In terms of photo ID requirements, voters should be allowed alternatives such as providing the last four digits of their Social Security Number, a bank statement, a utility bill, a driver's license or passport number, or a digital photograph of the voter, fingerprint of the voter, and the voter should also be allowed to submit a sworn statement.<sup>208</sup> Any lack of transparency in the counting process can be curbed by ensuring that all ballots are processed on centralized count scanning equipment, with 24/7 video camera surveillance that can be streamed online for the entire duration of the vote collection and counting period.<sup>209</sup>

Other best practices recommended by experts would be for applications to be proactively provided by the state, with online applications available for download.<sup>210</sup> The state should also provide postage for the application and the ballot return<sup>211</sup> and make it clear that postage is not required, thereby avoiding the poll tax question raised by the American Civil Liberties Union when a state failed to indicate that absentee ballot envelopes do not require postage.<sup>212</sup>

The state should also adopt a robust tracking system to ensure that such votes are counted.<sup>213</sup> And, in the post-pandemic world, states should eliminate notary or witness requirements which are overly burdensome during times when social distancing and self-quarantining are the norms.<sup>214</sup> States should commit to counting any ballot postmarked by Election Day, regardless of when the local jurisdiction received it<sup>215</sup> (note that the Supreme Court has stated in *RNC v. DNC* that it would endorse the position that any ballot postmarked by Election Day must be counted).<sup>216</sup>

A best practices working template which issues strict guidelines and thorough poll worker training for signature verification can be pulled from Colorado, for example.<sup>217</sup> Most counties in Colorado use signature verification software and broadly publish the signature verification standards no less

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206. *Id.* at 12.

207. *Id.*

208. *Id.*

209. Acevedo et al., *supra* note 27, at 19–20.

210. Abel, *supra* note 133, at 4.

211. *Id.*

212. Joseph Brickman & Logan D. Kirkes, *Elections*, 37 GA. ST. U. L. REV. 241, 250–51 (2020).

213. Abel, *supra* note 133, at 4.

214. *Id.*

215. *Id.*

216. *Id.*

217. Acevedo et al., *supra* note 27, at 12.

than two weeks prior to Election Day.<sup>218</sup> Colorado is one of the earliest examples of a universal VBM state. “We’ve been social distancing before it was cool, with our mail-in ballots,” says Denver Clerk and Recorder Paul Lopez,<sup>219</sup> making it “pandemic-proof.”<sup>220</sup> In Colorado, the state mails a blank ballot to every registered voter at least one week before Election Day (if not more).<sup>221</sup> Ballots can be returned via U.S. postal service or at designated drop boxes, which are emptied by ballot security workers on a daily basis. Processing ballots can begin upon receipt and starts with signature verification and the opening of envelopes.<sup>222</sup> Election workers are trained to compare the ballot signature with not only the one on file, but also versions obtained from the Department of Motor Vehicles and public records.<sup>223</sup> State law requires an opportunity to cure for any ballot rejected, and recently, Colorado has adopted an app which enables voters to cure any deficiencies (such as missing information) through their smartphones.<sup>224</sup> Simultaneously, there is a live stream feed of ballot-processing rooms available to the general public.<sup>225</sup> The City of Denver also sets up thirty-six physical polling sites for in-person voting for those who prefer to vote in person.<sup>226</sup>

The system adopted in Colorado addresses all of the major concerns. The potential for corruption of the U.S. Postal Service and disenfranchisement of those without government-recognized mailing addresses is mitigated by the creation of drop-off boxes specifically for the election. The potential disenfranchisement of those with changing signatures is mitigated by the establishment of a cure period and through a variety of mediums. The potential disenfranchisement of those without a photo ID is mitigated by the ability to submit alternative information during the cure period. The need for assistance, either physically or for language reasons, is mitigated by the fact that anyone can assist the voter in the privacy of her own home. There is no longer the need to wait in long lines or miss work, nor is there the possibility of being sent to the wrong polling place by incompetent workers. Signature matching activities are supported by software, reducing the amount of dis-

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218. *Id.*

219. Alexa Corse, *In Colorado, Voting by Mail Was Practiced Well Before Coronavirus*, WALL STREET J. (Oct. 28, 2020, 12:00 PM), <https://www.wsj.com/articles/in-colorado-voting-by-mail-was-practiced-well-before-coronavirus-11603900816>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Corse, *supra* note 219.

226. *Id.*

cretion given to inadequately trained and underpaid poll workers who might possibly allow their implicit biases to disenfranchise voters.

## B. Internet Voting

One of the most common thoughts amongst contemporary Americans, more so in the post-pandemic world, is, “I shop and bank online, why not vote?”<sup>227</sup> Another method of voting revisited during the pandemic was internet-based voting.<sup>228</sup> For the purposes of this Article, I define *internet voting* as “the return of voted ballots over the Internet, using a computer, a tablet, or a smart phone. The voted ballot may be transmitted via a web portal, as a PDF or other attachment, or as a fax.”<sup>229</sup> Also related is voting by mobile apps, which have gained much interest. In a national survey of 1200 voters, 49% of the respondents wanted mobile app voting capability.<sup>230</sup>

Supporters of internet voting tout the following potential benefits: the potential to increase transparency, reduce voter error, create uniformity in the process, and increase access.<sup>231</sup> Supporters also argue that internet voting (on a computer) would increase turnout amongst the already-tech savvy young,<sup>232</sup> and also civilian and military voters living overseas.<sup>233</sup> In 2010, thirty-three states allowed for return of ballots via the Internet. Others want to take it to the next level and believe mobile app voting, using a smartphone, will increase voter turnout amongst the young.<sup>234</sup> West Virginia, Utah, Oregon, and Colorado are all at various stages in implementing a mobile app, with a heavy focus on accommodating overseas servicemem-

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227. Barbara Simons, *Why Internet Voting is Dangerous*, 4 GEO. L. TECH. REV. 543, 543 (2020).

228. Miles Parks, *States Expand Internet Voting Experiments Amid Pandemic, Raising Security Fears*, NAT'L PARK RADIO (Apr. 28, 2020, 5:00 A.M.), <https://www.npr.org/2020/04/28/844581667/states-expand-internet-voting-experiments-amid-pandemic-raising-security-fears>.

229. Simons, *supra* note 227.

230. Eric Geller, *Coronavirus Boosts Push for Online Voting Despite Security Risks*, POLITICO (May 1, 2020 7:30 PM), <https://www.politico.com/news/2020/05/01/coronavirus-online-voting-229690> (citing *COVID-19 and Elections—Findings from a National Poll of American Voters*, TARGETSMART (Apr. 14, 2020) <https://insights.targetsmart.com/covid-19-and-elections-findings-from-a-national-poll-of-american-voters.html>).

231. R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK, AND VOTE: THE FUTURE OF INTERNET VOTING 41 (2004).

232. Epstein, *supra* note 103, at 886.

233. *Id.*

234. Miles Parks, *In 2020, Some Americans Will Vote On Their Phones. Is That The Future?*, NAT'L PARK RADIO (Nov. 7, 2019), <https://www.npr.org/2019/11/07/776403310/in-2020-some-americans-will-vote-on-their-phones-is-that-the-future>.

bers.<sup>235</sup> The detailed nature of these apps has not been widely known as many of the security formulas are protected trade secrets.<sup>236</sup>

Critics of internet-based voting are rampant. As one critic has articulated, “Pajama voting may be convenient. It just can’t ensure your vote will count.”<sup>237</sup> Indeed, skepticism towards online voting is rife amongst experts with scientific and data technology backgrounds. In a letter signed by seventy tech experts, the American Association for the Advancement of Sciences strongly discouraged internet use for voting.<sup>238</sup> Similarly, Barbara Simons, a retired IBM Researcher and a member and Board Chair of the Board of Advisors of the U.S. Election Assistance Commission, is a vocal critic of internet-based voting.<sup>239</sup> The root of the concern is based in the prevalence of hacking and election interference.<sup>240</sup> To the argument that contemporary life enables numerous types of commercial transactions, Simons points out that large corporations, who have spent millions of dollars to explore the most secure methods of online commerce, have not cracked the nut and instead opt to absorb millions of dollars of loss in order to provide this amenity to consumers as a cost of doing business.<sup>241</sup> Simons also makes an important distinction between banking and voting, in that online purchase and banking transactions are linked to the user’s identity, while voting is a secretive and confidential process in which the identity of the voter is to remain confidential to all other parties, including the vote recipient.<sup>242</sup> This secrecy makes it impossible to double-check and roll back any errors, and unlike paper ballots, recounting is difficult with current technologies.<sup>243</sup>

Hacking, Simons points out, is rampant and is a serious problem, so much so that Cap One, Google, Facebook, the Federal Bureau of Investigation, Symantec, and Marriott, spend millions of dollars to prevent hacking, and yet have all been successfully hacked.<sup>244</sup> She adds that foreign interference with U.S. elections through hacking is a substantial problem. Even without online voting, the FBI and NSA determined that election interfer-

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235. *Id.*

236. *Id.*

237. Epstein, *supra* note 103, at 885.

238. Geller, *supra* note 230.

239. *See generally* Simons, *supra* note 227.

240. *Id.* at 547.

241. *Id.* at 543–44 (citing Peter Haynes, *Online Voting: Rewards and Risks*, ATLANTIC COUNCIL (Oct. 8, 2014), <https://www.atlanticcouncil.org/in-depth-research-reports/report/online-voting-rewards-and-risks-2/>).

242. Simons, *supra* note 227, at 544.

243. *Id.*

244. *Id.* at 544–45.

ence occurred in 2016 through emails to the Clinton campaign, DNC, and RNC.<sup>245</sup>

Set against this backdrop of highly sophisticated hackers breaking into portals protected by the best that corporate and government money can buy are the small, local, governments administering elections, who have nowhere near the resources to guard against being hacked. As noted by Special Counsel Robert Mueller III in 2019, Secretary of Defense James Mattis in 2018, FBI Director Christopher Wray in 2018, and a report of bipartisan Senate Intelligence Committee in 2019,<sup>246</sup> the U.S. elections have been hacked multiple times by Russian-backed hackers. The Senate Intelligence Committee on October 8, 2019, stated:

. . . DHS [Department of Homeland Security] assessed that the [Russian] searches, done alphabetically, probably included all 50 states, and consisted of research on general election-related web pages, voter ID information, election system software, and election service companies.<sup>247</sup>

Simons is not alone in her consternation. The Congressional House Subcommittee on research and technology asked the National Institute of Standards and Technology (NIST) to develop voting standards for internet-based voting, but the NIST refused to do so.<sup>248</sup> Instead, it issued a report warning Congress about the threats inherent in internet voting.<sup>249</sup> One of the most salient of issues is the fact that everyday users—and would-be voters—do not have the capacity to adequately guard against attacks, making them vulnerable to malware, phishing, and denial of service attacks.<sup>250</sup>

Cyberattacks occur through four major pathways: 1) Denial of Service (DoS) attacks, which “interrupt or slow down access to a computer system for legitimate users by flooding the system with illegitimate traffic” by disrupting e-pollbooks, electronic voting machines, voter registration data-

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245. Matthew Rosenberg, *Trump Misleads on Russian Meddling: Why 17 Intelligence Agencies Don't Need to Agree*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/us/politics/trump-russia-intelligence-agencies-cia-fbi-nsa.html>; Raphael Satter, *Inside Story: How Russians Hacked the Democrats' Emails*, AP NEWS (Nov. 4, 2017), <https://apnews.com/article/technology-europe-russia-hacking-only-on-ap-dea73efc01594839957c3c9a6c962b8a>; Nicole Gaouette, *FBI's Comey: Republicans Also Hacked by Russia*, CNN (Jan. 10, 2017, 4:16 PM), <http://www.cnn.com/2017/01/10/politics/comey-republicans-hacked-russia/index.html> [<https://perma.cc/S875-P9QJ>].

246. Simons, *supra* note 227, at 545.

247. *Id.* (quoting SELECT COMM. ON INTEL., REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, D. REP. NO. 166-XX, at 8 (2019), [https://www.intelligence.senate.gov/sites/default/files/documents/report\\_volume.pdf](https://www.intelligence.senate.gov/sites/default/files/documents/report_volume.pdf)).

248. *Id.* at 547.

249. *Id.*

250. *Id.*

bases, and electronic auditing systems, rendering them unusable;<sup>251</sup> 2) Malware attacks which introduce worms, spyware, viruses, Trojan horses, and ransomware that also can disrupt e-pollbooks, electronic voting machines, voter registration databases, and electronic auditing systems<sup>252</sup> (but unlike DoS, can manipulate vote counts on a voting machine or changing a person's voting registration status on an e-pollbook);<sup>253</sup> 3) Structured Query Language—or SQL Attack (SQL injection)—which essentially is “a code injection technique that hackers can use to insert malicious SQL statements into [user-facing] input fields for execution by the underlying SQL database,”<sup>254</sup> which then could destroy data in voter registration bases; and 4) phishing attacks, in which “an attacker, ‘masquerading as a trusted entity,’ sends an email or text to a victim that prompts the victim into providing the attacker with sensitive information for that ‘trusted entity,’ like a username and password,” to gain access to otherwise secure databases.<sup>255</sup>

Cyberattacks are not unique to internet voting, and the hacking risks in online voting are not significantly different from the risks inherent with in-person voting where an electronic machine is involved.<sup>256</sup> Voter machines gained popularity after the controversy of the 2000 General Election in Florida, in which punch card-styled votes were thrown out when hanging chads remained partially attached to returned ballots.<sup>257</sup> In that election, George Bush won the electoral college vote even though Al Gore won the popular vote. Bush's electoral college victory hinged on the election in Florida, where he had an advantage of 537 votes after ballots were rejected for hanging chads and more.<sup>258</sup>

Hacking is possible after any connection to the Internet, no matter how minute, and can occur at in-person polls via two primary mediums: 1) voting machines or 2) voter registration databases. Thus, polling places that use automated voting machines are vulnerable to cyberattacks as well. This is because a voting machine, even if not connected to the Internet during the election, is vulnerable when it connects to election management computers

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251. Daniel Barabander, *Cyberattacks and Election Integrity*, 4 GEO. L. TECH. REV. 665, 666 (2020).

252. *Id.*

253. *Id.*

254. *Id.* (quoting *How to Protect Against SQL Injection Attacks*, UC BERKELEY, <https://security.berkeley.edu/education-awareness/how-protect-against-sql-injection-attacks> (last visited Oct. 2, 2021)).

255. *Id.* (citing *Phishing Attacks*, IMPERVA, <https://www.imperva.com/learn/application-security/phishing-attack-scam> (last visited Oct. 2, 2021)).

256. ALVAREZ & HALL, *supra* note 231, at 87.

257. Barouh, *supra* note 16, at 245–46.

258. *See* Bush v. Gore, 531 U.S. 98, 101 (2000).

needed software downloads.<sup>259</sup> For instance, many machines require ballot definition files to be downloaded from election management computers using a cartridge or memory card.<sup>260</sup> An infected election management computer can distribute viruses to a cartridge or memory card that the poll worker then uses to set up a voting machine.<sup>261</sup> Thus, if that election management computer is connected to the Internet at any time, hacking can occur.<sup>262</sup>

A voting machine can also be hacked through the exchange of voter data information.<sup>263</sup> Voter registration databases are defined as a “single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State”<sup>264</sup> and are almost always connected to the Internet at some point.<sup>265</sup> Manipulation of the voter information can affect both in-person voting and VBM; for example, a hacker could change the status of a voter to a felon without an opportunity to cure.<sup>266</sup> A hacker could also manipulate addresses of record, affecting where ballots are mailed and verification of both mail-in and same day address matching.<sup>267</sup>

This phenomenon is well-illustrated in an example from Virginia.<sup>268</sup> There, a wireless network was used to program ballots and to exchange data between voting machines.<sup>269</sup> Virginia’s Board of Elections investigated and found that wireless cards on the voting machines permitted “an external party to access the [machine] and modify the data [on the machine] without notice from a nearby location, . . . [so] an attacker could join the wireless ad-hoc network, record voting data or inject malicious [data.]”<sup>270</sup> In another instance, a joint report from 2000 found that two percent of the ballots were

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259. Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. SCI. & TECH. L. 168, 175 (2018); see also Marian K. Schneider, *Election Security: Increasing Election Integrity by Improving Cybersecurity*, THE FUTURE OF ELECTION ADMIN., 243, 252 (Mitchell Brown et al. eds., 2019) (noting that “[a]lthough jurisdictions ‘should’ not connect those computers to a network or the Internet, no systematic efforts exist to ensure compliance with recommended security configurations”).

260. Manpearl, *supra* note 259.

261. *Id.*

262. *Id.*

263. See Barabander, *supra* note 251, at 669.

264. 52 U.S.C. § 21083(a)(1)(A) (2002).

265. Barabander, *supra* note 251, at 669 (citing Mike Orcutt, *How Hackers Could Send Your Polling Station into Chaos*, MIT TECH. REV. (Oct. 5, 2016)).

266. Barabander, *supra* note 251, at 669.

267. *Id.*

268. Manpearl, *supra* note 259, at 175–76.

269. *Id.*

270. *Id.* at 176 (quoting LAWRENCE NORDEN & CRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUSTICE, AMERICA’S VOTING MACHINES AT RISK 8 (2015)).

not counted (estimated at four to six million votes), and 5% did not show a Senate or gubernatorial vote (estimated at three to five million), depending on which voting equipment was used.<sup>271</sup>

This internet-related frailty is only exacerbated if a voting machine does not have a paper audit trail.<sup>272</sup> For example, DRE machines without a Voter Verified Paper Audit Trail (VVPAT) do not produce a hardcopy of a vote, and the only record is in the machine itself.<sup>273</sup> Thus, there can be no audit, verification, or recount of the votes cast on that machine if it is hacked.<sup>274</sup> In 2020, at least eight states used voting machines with no paper trail backup.<sup>275</sup>

There are few examples of jurisdictions with widespread online voting, none of which bode well in terms of cybersecurity. The oft-cited example of Estonia has administered its elections completely online since 2005 and was digitally compromised so severely in 2007 by Russian hackers that all online activity within its borders was brought to a halt.<sup>276</sup> Representatives of its national government in 2014 invited international experts to review the nation's electoral technology and make recommendations—the experts recommended the nation stop using it.<sup>277</sup>

It is also worth noting that internet voting does not appear to increase voter participation. For example, from 2009 to 2017, voter participation in Estonia decreased by 7%.<sup>278</sup> Data collected from two cantons in Switzerland that administered internet elections from 2004 to 2014 reflected no notable effect on turnout.<sup>279</sup>

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271. ALVAREZ & HALL, *supra* note 231, at 31–32 (citing CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS WHAT COULD BE (2001), [https://vote-prod.s3.amazonaws.com/documents/voting\\_what\\_is\\_what\\_could\\_be.pdf?awsaccessKeyId=AKIAI4764GFDOFW6EPAQ&Signature=s17ZJSuoq%2FaWOYNYHKMwu%2FoXb0%3D&Expires=1627878133](https://vote-prod.s3.amazonaws.com/documents/voting_what_is_what_could_be.pdf?awsaccessKeyId=AKIAI4764GFDOFW6EPAQ&Signature=s17ZJSuoq%2FaWOYNYHKMwu%2FoXb0%3D&Expires=1627878133)).

272. Barabander, *supra* note 251, at 668 (citing Marian K. Schneider, *Election Security: Increasing Election Integrity by Improving Cybersecurity*, THE FUTURE OF ELECTION ADMINISTRATION 243, 254 (Mitchell Brown et al. eds., 2019); Kimberly Breendon & Christopher A. Bryant, *Counting the Votes: Electronic Voting Irregularities, Election Integrity, and Public Corruption*, 49 U. MEM. L. REV. 979, 990 (2019)).

273. Barabander, *supra* note 251, at 668.

274. *Id.*

275. Sue Halpern, *Can Our Ballots be Both Secret and Secure?*, THE NEW YORKER (July 7, 2020), <https://www.newyorker.com/news/the-future-of-democracy/can-our-ballots-be-both-secret-and-secure>.

276. Simons, *supra* note 227, at 544.

277. *Id.* at 550 (citing J. Alex Halderman et al., *Security Analysis of the Estonian Internet Voting System* at 1 (May 2014), [https://verifiedvoting.org/wp-content/uploads/2020/07/estonia\\_2014\\_ivotingreport.pdf](https://verifiedvoting.org/wp-content/uploads/2020/07/estonia_2014_ivotingreport.pdf) [<https://perma.cc/ML6T-KRXA>]).

278. *Id.* at 555.

279. *Id.*

In Washington D.C., Open Source Digital Voting Foundation (The Foundation) established a system in 2010 specifically for overseas service-members.<sup>280</sup> As part of this process, The Foundation created a “public review period” in which it invited hackers to break into the system during a mock election for a period of 2 months.<sup>281</sup> Within thirty-six hours of the start of the mock election, a team headed up by a professor at the University of Michigan successfully broke in, modifying previously cast ballots, rigging subsequently cast ballots, and revealing voter selections.<sup>282</sup> The team left its calling card in the form of the University of Michigan Fight Song being played each time a voter cast his ballot.<sup>283</sup>

The City of Toronto issued a Request For Proposals in 2014 to invite a contract for an internet voting program.<sup>284</sup> The city hired independent experts to review the proposals and recommend which one to hire.<sup>285</sup> The experts wrote a report recommending none and provided detailed reasoning as to why.<sup>286</sup>

Even putting aside the potential for election interference from hackers, the persistent digital divide in the U.S. makes internet voting far from ideal.<sup>287</sup> *Broadband* has come to be defined as an internet service with a minimum download speed of twenty-five megabytes per second (mbps), and a minimum upload speed of three mbps.<sup>288</sup> It can be delivered via power lines, cable, fiber optics, wireless, dedicated service lines, or satellite.<sup>289</sup> Seventeen million rural residents (26.4% of all rural residents) do not have access to broadband,<sup>290</sup> and lower-income counties (including in urban regions) lag

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280. *Id.* at 548.

281. *Id.*

282. Simons, *supra* note 228, at 548.

283. *Id.*

284. *Id.* at 548–49 (citing JEREMY CLARK & ALEKSANDER ESSEX, INTERNET VOTING FOR PERSONS WITH DISABILITIES—SECURITY ASSESSMENT OF VENDOR PROPOSALS: FINAL REPORT 178 (2014), <https://www.verifiedvoting.org/wp-content/uploads/2014/09/Canada-2014-01543-security-report.pdf>).

285. *Id.*

286. *Id.* at 549.

287. See generally ALVAREZ & HALL, *supra* note 231.

288. Jameson Zimmer, *What is Broadband?*, BROADBANDNOW (last updated July 21, 2021), <https://broadbandnow.com/report/fcc-broadband-definition/>.

289. GETTING BROADBAND Q&A, FED. COMM’N COMM’N (last updated Feb. 5, 2020), <https://www.fcc.gov/consumers/guides/getting-broadband-qa#:~:text=What%20is%20broadband%3F,%22dial%22Dup%22%20services>.

290. Yulong Chen, et al., *Does Rural Broadband Expansion Encourage Firm Entry?*, AGRIC. POLICY REV. (2020).

higher income counties in broadband subscription by 13%.<sup>291</sup> Lack of broadband can make internet voting difficult.

In 2021, a bipartisan coalition of Senators introduced the BRIDGE Act, a bill proposing \$40 billion to bring broadband to rural and tribal areas and urban regions with low-income counties.<sup>292</sup> While this is a step in a more inclusive direction, there is much to improve, with approximately 162 million Americans living without broadband.<sup>293</sup>

Some have cautiously recommended the use of the Internet for limited activities such as downloading a ballot within a certain amount of time before an election to accommodate overseas military and civilian citizens (which is already allowed by the 2009 Military and Overseas Voter Empowerment Act) and disabled voters (who could use technology to download an enlarged ballot), but that both such cases a physical copy of the completed ballot should then be mailed in.<sup>294</sup> Colorado provides another example of a best practice use, which would be to allow voters to cure defective mail-in ballots by using the Internet and mobile apps to submit missing information.

## V. CONCLUSION

In-person voting in Arkansas, under the current legislation, is in top form to disenfranchise voters and disrupt close elections. Limiting access to assistants at the voting booth while refusing to provide translations of voting documents, making mail-in voting arduous by requiring written requests, prohibiting cure periods to those whose vote was discarded for signature matching flaws as determined by untrained poll workers, and limiting the time allowed to count mail-in votes are all highly effective ways to reduce the number of votes in any given election. This need not be so, however. Alternative solutions are created by universal vote by mail, following the best practices recommended by the experts cited in this Article and those set out by the state of Colorado. Until technology has evolved to the point when well-funded, powerful corporations and government agencies are impenetrable to hackers, Arkansas—with its comparatively modest budget for elec-

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291. Michael Martin, *Rural and Lower-Income Counties Lag Nation in Internet Subscription*, U.S. CENSUS BUREAU (Dec. 6, 2018), <https://www.census.gov/library/stories/2018/1-2/rural-and-lower-income-counties-lag-nation-internet-subscription.html>.

292. Cat Zakrzewski, *Bipartisan Group of Senators Introduces \$40 Billion Bill to Close the Digital Divide*, WASH. POST (June 15, 2021, 5:00 AM), <https://www.washingtonpost.com/technology/2021/06/15/digital-divide-bridge-act-senate/>.

293. *Nextlink Internet and Microsoft Closing Broadband Gap in Central US*, MICROSOFT NEWS CTR. (Sept. 18, 2019), <https://news.microsoft.com/2019/09/18/nextlink-internet-and-microsoft-closing-broadband-gap-in-central-us/>.

294. Simons, *supra* note 227, at 551–54.

tion administration—should stick to the cost-effective universal vote-by-mail system, which even the American Association for the Advancement of Sciences recommends as a much safer option to internet-based voting.<sup>295</sup> Arkansas should consider the limited use of the Internet to ballot downloading and ballot-curing purposes only and move away from using tech-based voting machines that require the use of software downloaded from any internet-connected computer, no matter how remote that connection may be. Election interference and voter suppression are at an all-time high, and it is time for Arkansas to mail it in.

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295. Geller, *supra* note 230.