

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



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

March 2017

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. These committees are composed of state/district citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their states/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state or district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states/district.

Acknowledgements

The Kansas Advisory Committee would like to thank each of the panelists who presented to the Committee during the January 28, 2016 meeting of the Kansas Advisory Committee, and the members of the public who either submitted written testimony or who spoke during the period of public comment. The Committee would also like to thank the Topeka and Shawnee County Public Library for hosting the public event.

The Committee is also grateful to Elizabeth Kronk-Warner, former Chair of the Kansas Advisory Committee, who presided over the 2016 hearing; and former Committee members Marsha Frey, Michael Abrams, Janell Avila, Laurie Johnson, Robert Mandel, and Charles Scott who assisted in the project planning and hearing preparations.

**Kansas Advisory Committee to the
U.S. Commission on Civil Rights**

The Kansas Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the voting requirements outlined in the Kansas Secure and Fair Elections (S.A.F.E.) Act, and the potential disparate impact such requirements have on the basis of race, color, age, religion, or disability. The committee submits this report as part of its responsibility to study and report on civil rights issues in the state of Kansas. The contents of this report are primarily based on testimony the Committee heard during a public hearing on January 28, 2016 in Topeka, KS.

This report details civil rights concerns relating to the SAFE Act's key requirements that: (1) voters provide documentary proof of citizenship upon registering to vote; and (2) that voters present photographic identification at the polls. Primary concerns included inconsistent training and implementation, resulting in individuals with valid identification being turned away at the polls; insufficient voter education to ensure that voters are aware of the new documentation requirements and how to fulfill them; circumstances under which individuals may be charged a fee to obtain the required documentation to vote; the potential for disparate impact on the basis of a number of federally protected classes; and the importance of weighing measures intended to prevent voter fraud against the potential for voter disenfranchisement. From these findings, the Committee offers to the Commission recommendations for addressing this problem of national importance.

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I. INTRODUCTION

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

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

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

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

II. BACKGROUND

A. The United States Voting Rights Act

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

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

² U.S. Const. amend. XIII – XIV.

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

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

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

⁶ 42 U.S.C. §§ 1973 - 1973aa-6.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴ *Voting Laws Roundup 2016*.

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

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

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

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

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

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

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

¹⁹ *Voting Laws Roundup 2016*.

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

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

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

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

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

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

Kansas' requirement that voters demonstrate U.S. citizenship in addition to producing photo ID makes Kansas law among the strictest voter identification requirements in the nation. Kansas and Arizona then requested that the Election Assistance Commission add state-specific instructions to the federal form for voter registration that would require those registering with the federal form in those States to provide documentary proof of their United States citizenship. Pursuant to the National Voter Registration Act²⁶ and Help America Vote Act,²⁷ the federal form is maintained by the Election Assistance Commission.²⁸ The Commission denied the request. Kansas and Arizona then brought suit against the Election Assistance Commission, which has resulted in the following court challenges and decisions:

- In November 2014, the 10th Circuit Court of Appeals ruled that the states (Kansas and Arizona) cannot require the Election Assistance Commission to approve the request to add citizenship documentation of voters who use the federal form to register. In June 2015, the U.S. Supreme Court declined to review the case, upholding the 10th Circuit's ruling.²⁹
- In January 2016, Brian Newby, the newly appointed Executive Director of the Election Assistance Commission and a former county elections official in Kansas, approved the renewed requests by Kansas, Alabama, and Georgia to update their voter registration instructions on the federal registration form to include the states' requirement for documentary proof of citizenship.³⁰ This decision was widely criticized as outside Newby's authority as Executive Director.³¹
- The League of Women's Voters has also challenged Mr. Newby's decision in the District Court. In June 2016, the U.S. District Court for the District of Columbia denied an injunction to prevent Mr. Newby and the Election Assistance Commission from

²⁷ Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

²⁹ *Kobach v. U.S. Election Assistance Comm'n*, 6 F. Supp. 3d 1252 (10th Cir. 2014); see also Ken Klukowski, *SCOTUS: States Can't Require Proof of Citizenship to Vote Using Federal Form*, BREITBART. June 17, 2013, <http://www.breitbart.com/big-government/2013/06/17/states-can-t-require-proof-of-citizenship-to-vote-supreme-court-says/>. Jesse Byrnes, *Supreme Court Denies States' Request for Proof of Voter Citizenship*. THE HILL (June 29, 2015, 8:11 PM), <http://thehill.com/blogs/ballot-box/246497-supreme-court-denies-states-request-for-proof-of-voter-citizenship>.

³⁰ Declaration of Brian Dale Newby. Case No. 1:16-cv-00236-RJL. Exhibit 2. February 21, 2016, <http://www.politico.com/f/?id=00000153-09c8-de04-af73-cfcb7e040001> (last accessed Aug. 3, 2016).

³¹ Statement by Vice-Chair Thomas Hicks, February 2, 2016, http://www.eac.gov/assets/1/workflow_staging/Documents/7829.PDF (last accessed Aug. 3, 2016).

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

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

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

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

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

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

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

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

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

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

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

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

III. SUMMARY OF PANEL TESTIMONY

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

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

A. Voter Identification and Proof of Citizenship

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

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

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

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

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

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

1. Implementation Training and Consistency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Voter Education

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

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

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

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

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

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

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

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

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

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

3. *Level of Burden*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Voters Not Born in Kansas

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

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

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

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

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

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

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

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

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

B. Voter Participation

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

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

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

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

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

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

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

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

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

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

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

1. Voter Turnout

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

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

Professor Birkhead wrote:

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

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

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

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

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

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

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

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

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

2. *Suspense Voters*

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

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

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

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

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

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

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

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

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

3. *Provisional Voting*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Civil Rights and Disparate Impact

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

1. Improper Intent

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

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

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

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

procedural irregularities can be considered evidence of discriminatory intent.¹³⁸ In this light, the Committee notes Secretary Kobach is the only Secretary of State in the nation with the authority to prosecute voter fraud—a fact which Dr. Glenda Overstreet of the Kansas NAACP testified may indicate exactly such a procedural irregularity raising questions of improper intent.¹³⁹

In addition, Professor Levy raised question about the structure of the SAFE Act itself, in that its requirement for proof of citizenship at the time of voter registration only applies after July 1, 2013.¹⁴⁰ As such, while this requirement may affect some older voters who moved from out of state after this date, “it applies to everyone who wasn't 18 as of July 1st, 2013.”¹⁴¹ He concluded, “that might create a problem under the 26th Amendment if that's viewed as discrimination or if you could prove that there was an intent to exclude younger voters, perhaps because of their political affiliations or leanings.”¹⁴²

Finally, concern regarding the intent of the SAFE Act stemmed from testimony regarding recent cases of voter fraud in the state. Secretary Kobach himself testified every allegation of voter fraud his office has prosecuted since receiving prosecutorial authority in 2015 has involved individuals who have voted twice, often in two or more different jurisdictions.¹⁴³ Instead of focusing on preventing problems with such “double-voting” however, attorney Mark Johnson testified much of the debate around the adoption of the SAFE Act was focused on preventing undocumented immigrants from registering to vote: “In the spring of 2011 the advocates of the SAFE Act told the legislature that voter impersonation was rampant and untold numbers of aliens were voting.”¹⁴⁴ However, Mr. Johnson asserted that the cases of voting fraud that have been identified have not substantiated this concern.¹⁴⁵ He concluded, “We have to determine whether the [stated] rationale for the legislation has been borne out by the facts.”¹⁴⁶ “There have

¹³⁸ Levy Testimony, *Transcript* p. 16 lines 06 – 23; Levy Written Testimony, pp. 06 – 07 (Appendix B.4).

¹³⁹ Overstreet Testimony, *Transcript* p. 115 line 14 – p. 115 line 09; p. 87 lines 07 – 15; *See also*: Bonney Testimony, *Transcript* p. 67 lines 02 – 13.

¹⁴⁰ Levy Testimony, *Transcript*, p. 24 line 13 – p. 25 line 04.

¹⁴¹ Levy Testimony, *Transcript*, p. 24 line 13 – p. 25 line 04.

¹⁴² Levy Testimony, *Transcript*, p. 24 line 13 – p. 25 line 04.

¹⁴³ Kobach Testimony, *Transcript*, p. 249 lines 03 – 10; *See also*: Leiker, Amy Renee. “Wichita man pleads guilty in Kansas voter fraud case.” *The Wichita Eagle*, May 4, 2016. Available at: <http://www.kansas.com/news/local/crime/article75545277.html> (last accessed December 30, 2016).

¹⁴⁴ Johnson Testimony, *Transcript*, p. 155 lines 14 – 21.

¹⁴⁵ Johnson Testimony, *Transcript*, p. 156 – 157; p. 158 lines 06 – 18.

¹⁴⁶ Johnson Testimony, *Transcript*, p. 155 line 22 – p. 156 line 06.

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

2. *Disparate Impact*

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

Age

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

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

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

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

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

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

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

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

Sex

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

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

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

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

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

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

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

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

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

Disability

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

Race/Color

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

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

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

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

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

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

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

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

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

Income/Poverty

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

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

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

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

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

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

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

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

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

Political Affiliation

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

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

D. Addressing Voter Fraud

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

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

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

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

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

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

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

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

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

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

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

1. National Significance

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

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

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

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

2. *Potential Solutions*

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

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

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

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

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

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

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

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

- “non-strict” voter identification laws that allow at least some voters without acceptable identification to vote using alternative verification methods, such as signing an affidavit declaring their identity; available in 22 states as of September 2016.²⁰⁰

Senator Faust-Goudeau testified she introduced legislation, Senate Bill 333, which would “allow individuals to register to vote and check a box saying that they are a Kansas citizen and then the Secretary of State’s office would cross reference with the vital statistics office to ensure that that individual had actually been born in the State of Kansas.”²⁰¹ In addition, the Senator also introduced legislation which would allow same day voter registration, though reportedly at the direction of Secretary Kobach, the Chairman of the Ethics and Elections Committee would not allow her a hearing on the proposed legislation.²⁰² Finally, she also introduced legislation to allow college students attending school out of state to get their advanced ballots early, “similar to what we allowed those in the military to do.”²⁰³

Representative Jim Ward suggested that Kansas voters should sign an affidavit stating under penalty of perjury that they are a citizen and a resident of the State of Kansas; such a statement should serve as sufficient proof of citizenship to register and vote.²⁰⁴ Currently, the federal voter registration form requires exactly such an oath.²⁰⁵ Proponents of the SAFE Act have cautioned, however, that signing an affidavit may not be sufficient in an increasingly mobile society, and that confusion may lead non-citizens to fill out a form even if they are not eligible.²⁰⁶ Catherine Engelbrecht of True the Vote suggested international norms support a more rigorous demonstration of proof of identity in order to register and vote. She noted both Mexico and Canada require voters to document their citizenship prior to voter registration.²⁰⁷

Despite this difference, and perhaps in part due to the fragmented system whereby each state maintains its own voting requirements in consultation with the Elections Assistance

²⁰⁰ National Conference of State Legislators: Voter Identification Requirements | Voter ID Laws. Sept. 26, 2016, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last accessed Jan. 31, 2017).

²⁰¹ Faust-Goudeau Testimony, *Transcript*, p. 223 line 24 – p. 224 line 07.

²⁰² Faust-Goudeau Testimony, *Transcript*, p. 227 lines 01 – 18.

²⁰³ Faust-Goudeau Testimony, *Transcript*, p. 227 line 19 – p. 228 line 09.

²⁰⁴ Ward Testimony, *Transcript*, p. 217, lines 11 – 18; *See also*; Bonney Testimony, *Transcript*, p. 93.

²⁰⁵ Merrit Kennedy, *Court Blocks Proof of Citizenship Requirement in 3 States*. NPR NEWS: THE TWO-WAY. Sept. 10, 2016. Available at: <http://www.npr.org/sections/thetwo-way/2016/09/10/493405211/court-blocks-proof-of-citizenship-requirement-for-voters-in-3-states> (last accessed Jan. 31, 2017).

²⁰⁶ Engelbrecht Testimony, *Transcript*, p. 148 – 149, p. 187.

²⁰⁷ Engelbrecht Testimony, *Transcript*, p. 149 line 21 – p. 150 line 10.

Committee,²⁰⁸ current U.S. data presented by the Pew Center on the States suggests that more than 24 percent of the voting eligible population of the U.S. is unregistered, compared with just seven percent of the voting eligible population in Canada.²⁰⁹ As noted in the previous section of this report, inaccuracies in voter registration records are most commonly cited as evidence that the U.S. electoral system is widely vulnerable to fraud. Thus, the maintenance of complete and accurate voter registration rolls is perhaps the single most important strategy for addressing election integrity concerns. Yet, as Secretary Kobach pointed out in his testimony, every state has different voter registration requirements, and one state, North Dakota, has no voter registration at all.²¹⁰ The Pew study suggested the U.S. voter registration system could be improved through three key strategies: (1) comparing voter registration lists with other data sources; (2) using data matching techniques to improve accuracy; and (3) establishing new ways for voters to submit their data directly online, minimizing manual data entry and the resulting costs and errors.²¹¹

An international review of the voter registration structures and requirements of other democracies around the world, published by the “nonpartisan electoral reform organization” FairVote, suggested most national governments take a much more active role than the U.S. in ensuring all citizens are accurately registered: “the international norm is a process of government-mandated automatic voter registration of every citizen who reaches voting age.”²¹² FairVote’s review explores how “other major, well-established democracies concretely manage to build comprehensive, inclusive, accurate voting rolls that leave no voters behind while ensuring a high level of privacy.”²¹³ Canada, for example, uses data sharing agreements between federal agencies to allow individuals to check a box when they file their taxes, apply for citizenship, or file a change of address notice with the post office, which will automatically register them to vote or update their voter registration information with Elections Canada.²¹⁴ The

²⁰⁸ 52 U.S.C. § 205.05, §205.08

²⁰⁹ *America’s Voter Registration System Needs an Upgrade*, 2012, p. 08.

²¹⁰ Kobach Testimony, *Transcript*, p. 235 lines 01 – 14.

²¹¹ *America’s Voter Registration System Needs an Upgrade*, 2012, p. 09.

²¹² Eve Robert, *Voter Registration: An International Perspective* Right to Vote Initiative. FairVote Research Report. p. 01, <http://archive.fairvote.org/rtv/Universal%20Voter%20Registration-4-21-09.pdf> (last accessed Jan. 31, 2017) [*Hereafter cited as: FairVote: An International Perspective*].

²¹³ *FairVote: An International Perspective*, p. 01.

²¹⁴ *FairVote: An International Perspective*, pp. 09 – 10.

country has also utilized door-to door- enumerations,²¹⁵ school based registration drives,²¹⁶ and birthday cards mailed directly to electors turning 18,²¹⁷ to ensure maximum registration among the voting-eligible population. In much of Europe and Latin America, a civil registry system combined with the issuance of national citizen IDs allows for the efficient maintenance of highly accurate voter rolls.²¹⁸ At the conclusion of its review of international voting standards, FairVote determined. “the U.S. System could be improved by allowing room for federal level supervision (or certification) of the voter lists (in a European fashion), or interoperability of voters between states...of all the democracies studied, only the U.S. has no national lists or standards for voter registration.”²¹⁹

The Committee takes very seriously its commitment to ensuring that *neither* fraud *nor* voter disenfranchisement presents a threat to the integrity of U.S. elections in Kansas or on the national stage. Where appropriate, the Committee remains open to reviewing rigorous and verifiable evidence suggesting either has been compromised. As the President’s concerns regarding voter fraud launch the topic to the forefront of national discussion, the Committee urges caution that both fraud protection measures and potential voter disenfranchisement must be considered in tandem, and their impacts weighed against one another.

²¹⁵ *FairVote: An International Perspective*, pp. 03 – 05.

²¹⁶ *FairVote: An International Perspective*, pp. 15 – 16.

²¹⁷ *FairVote: An International Perspective*, pp. 16 – 17.

²¹⁸ *FairVote: An International Perspective*, pp. 09 – 10.

²¹⁹ *FairVote: An International Perspective*, 19; see also 52 U.S.C. § 20505 (*The national mail-in voter registration form developed by the Federal Election Assistance Commission (updated 2006) allows individuals to register by mail in most states for federal elections using a single form. However, instructions for completing the registration and required accompanying documentation vary by state. Wyoming does not accept mail registration, and New Hampshire uses the federal form only as a request for their own mail-in registration form*), <https://www.usa.gov/register-to-vote#item-212998>. (last accessed Feb. 1, 2017).

IV. FINDINGS AND RECOMMENDATIONS

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

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

A. Findings

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

²²⁰ 45 C.F.R. § 703.2.

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

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

B. Recommendations

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

-
- a. The Division should conduct a thorough review of the requirements imposed under the Kansas SAFE Act to assess their compliance with applicable federal law including but not limited to: the Voting Rights Act, the Help America Vote Act, and the National Voter Registration Act; and
 - b. If such a review reveals areas of noncompliance or conflict with federal law, then the Division should take appropriate enforcement action to correct them.
 4. The U.S. Commission on Civil Rights should issue a letter to the U.S. Election Assistance Commission, to the Kansas Governor, and the Kansas Legislature urging them to:
 - a. Review the findings and recommendations contained within this report; and
 - b. Further investigate identified areas of concern within their jurisdiction and take appropriate action to address them.

V. APPENDIX

A. Hearing Agenda: January 28, 2016

B. Written Testimony:

1. Ann Mah, Former Representative, Kansas State Legislature
2. Cille King, League of Women Voters
3. Nathaniel Birkhead, Kansas State University Department of Political Science
4. Richard Levy, University of Kansas School of Law
5. Elle Boatman, FaceoOfTrans.com, WiTCoN

U.S. COMMISSION ON CIVIL RIGHTS



The Impact of the Secure and Fair Elections (S.A.F.E.) Act on Individual Civil Rights in Kansas

Hosted By:

The Kansas Advisory Committee to the U.S. Commission on Civil Rights

Date:

Thursday January 28, 2016

Time:

9:00 a.m.—5:15 p.m.

Location:

Topeka and Shawnee County Public Library

1515 SW 10th Avenue,
Topeka, Kansas 66604

U.S. COMMISSION ON CIVIL RIGHTS

Midwestern Regional Office
55 West Monroe
Suite 410
Chicago IL, 60603

Phone: 312-353-8311
Fax: 312-353-8324
Online: www.usccr.gov

The Kansas Advisory Committee to the United States Commission on Civil Rights is hosting a public meeting to hear testimony regarding civil rights concerns related to voting requirements in the State. This meeting is free and open to the public.

- *Opening Remarks and Introductions (9:00am-9:15am)*
 - *Panel 1: Academic (9:15am-10:30am)*
 - *Panel 2: Community (10:45am-12:00pm)*
 - *Open Forum I (12:10pm-12:30pm) ****Recently added***
- *Break (12:30pm-1:30pm)*
 - *Panel 3: Voting Rights (1:30pm-2:45pm)*
 - *Panel 4: Elected Officials (3:00pm-4:15pm)*
 - *Open Forum II (4:20pm-5:00pm)*
- *Closing Remarks (5:00pm-5:15pm)*

The Committee will hear public testimony during the open forum session, as time allows. Please arrive early if you wish to speak. For more information please contact the Midwestern Regional Office of the U.S. Commission on Civil Rights.

State Advisory Committees to the U.S. Commission on Civil Rights are composed of state citizens who serve without compensation. The Committees advise the Commission of civil rights issues in their states, providing recommendations and advice regarding such matters to the Commission.

Agenda

Opening Remarks and Introductions (9:00am-9:15am)

Panel 1: Academic (9:15am-10:30am)

Dr. Nathaniel Birkhead, Kansas State University
Professor Richard Levy, University of Kansas
Dr. Michael Smith, Emporia State University

Panel 2: Community (10:45am-12:00pm)

Doug Bonney, Kansas ACLU
Kip Elliot, Disability Rights Center of Kansas
Lieutenant Colonel (Ret.) Robert Morse
Carrie O'Toole, Prairie Band Potawatomi Tribal Council
Dr. Glenda Overstreet, Kansas NAACP

Open Forum I (12:10pm-12:30pm) (**Recently Added**)

Break (12:30pm-1:30pm)

Panel 3: Voting Rights (1:30pm-2:45pm)

Marge Ahrens, League of Women Voters
Catherine Engelbrecht, True the Vote
Mark Johnson, Partner, Dentons US LLP
Jamie Shew, County Clerk for Douglas County

Panel 4: Elected Officials (3:00pm-4:15pm)

Senator Oletha Faust-Goudeau
Senator Steve Fitzgerald
Secretary of State Kris Kobach
Representative Jim Ward

Open Forum II (4:20pm-5:00pm)

Closing Remarks (5:00pm-5:15pm)

Comments on Kansas Voting Laws for the Kansas Committee
of the
U.S. Commission on Civil Rights

These comments on Kansas voting laws are being provided to the Kansas Committee of the USCCR in preparation for the hearing on the Kansas voter ID law. I understand that data shows that voting in Kansas took a larger than expected dip following implementation of the law in 2012. I was in the Kansas House of Representatives during the passage and implementation of that law and served as the ranking Democrat on the House Elections Committee. I am writing to provide information you may find helpful in your deliberations and better understand the impact of the Voter ID law on Kansas voters and elections.

This document is a compilation of issues raised in HB 2067 (the S.A.F.E. Act), passed in 2011, that might be violations of federal law, the Constitution, or simply raise barriers to voting. They are divided into the categories of voter identification, advance voting, and the impact of the law on voters and procedures.

I have already submitted to the Committee comments presented September 2, 2015, to the Kansas Secretary of State's office regarding proposed regulation changes to the Kansas proof of citizenship law. In Kansas we have more than 32,000 voter registrations being held in suspense because registrants did not provide proof of citizenship. I would suggest the committee consider investigating that law as well.

VOTER IDENTIFICATION:

All voters have to provide a government-issued photo ID at the polls. The poll workers verify that the person is the one on the ID. If there is no photo ID or the poll workers believe it is not a valid ID, a provisional ballot may be cast and a valid ID provided prior to canvass. Some voters are exempted from the ID requirement, such as those on permanent disability, military out of the area on duty, or those with religious objections.

1. At first, I thought there might not be much of a case to appeal our voter ID law, since several states already have a photo ID requirement. But in reviewing what the Supreme Court said were the key requirements for an acceptable photo ID law in the Indiana case and what the courts required in Georgia, it appears we do not meet requirements.
2. In Georgia, there were concerns about how far a person had to travel or how much time it took or how much planning was needed to get the free ID they might to vote. Georgia had to set up a location in every county to provide free IDs. Distance to travel to obtain that ID was also considered, but not in Kansas. Being a rural state, people can live quite a distance from the one city in the county where an ID may be obtained. Not every county has an office providing IDs that is open full time.
3. People trying to get a free photo ID to vote after 1/1/2012 were told they had to have a birth certificate to get the ID. This can be an extra burden, especially for the elderly, poor, or those born out of state.

4. Voter education was also a big issue in states implementing voter ID requirements. Indiana, Georgia, and Missouri spent millions educating voters on the voter ID law. Missouri, for example, spent \$13 million over the first few years of the law. The Supreme Court noted that voter education was a critical issue in approving the voter ID law in Indiana. Kobach budgeted \$60,000 in 2012 and only \$200,000 in 2013. I asked for a copy of the Secretary's voter education plan for voter ID. During the hearings he said that they would rely primarily on free media and legislators to inform individuals of the changes. Other states have had to use broader media and not just low-volume radio stations. This was a real weak spot in the plan. It took Georgia years to meet the court's concerns. Kansas' education plan was minimal.
5. A case in point. Wichita had a ballot initiative in early 2012. The Secretary of State started the public ads just two weeks prior to the vote. There is no way someone born out of state or without an ID could comply in time to vote. Later I learned that 45 ballots were rejected for no ID.
6. I asked the Division of Motor Vehicles (DMV) how many counties had locations where you could get an ID to vote. At that time there were only 33. That means that over 70 counties have no full-time DMV and those wanting a voter ID could have to travel to another county to get one.
7. To document some of the problems people are having with voter ID compliance I talked with a nursing home supervisor in Peabody who worked hard to get her residents the IDs they need to vote. She has 51 residents. About 75% of them voted. But only 9 had IDs and only 2 had the birth certificates needed to get a voter ID. The residents came from Kansas, six other states and Korea. Many had no family contact and she didn't know where to start to find the birth certificates. They only get \$62 a month stipend, so paying for an out-of-state birth certificate would be a burden at best and poll tax at worst. Then even if they can get the documents, they have to travel 15 miles to the next town to the DMV. She hated to see them lose their right to vote, but she couldn't spend all the hours necessary to get them their photo IDs. I mentioned this situation in an elections committee hearing. In response, Secretary Kobach sent Eric Rucker to Peabody to fix the situation. Even after that attempt, not every resident was able to get a photo ID. Several just gave up trying – and their right to vote. I visited with another nursing home in Paola with similar concerns. That's just the tip of the iceberg.
8. Here is the Peabody nursing home director's story about how it went when Eric Rucker came from Secretary Kobach's office to fix the situation in 2012:

“Okay, after 2 of the 3 days of ID processing with Marion County, here is an update. It took 2 ½ hours yesterday with 3 of our staff to process 6 clients ID's plus 1 hour of driving time with a driver. We were not told they needed SS#'s on any of the forms and they were necessary. Every time there was a typo upon entering the info the system said they had performed an illegal operation and shut down. They had to call Topeka each time to reset.

Today, Marion County came out to process the out-of-state births. They took pics and took the information with them to send to the SOS's office. There they will process (investigate for authentication). The County office was not sure how long this would

take or if the client's would have an ID in time to vote at the August 7 election. In the 6 months that we have been working on the persons without ID, a dozen and a half with ID's have expired. Secretary Kobach was on KFDI Monday as saying Kansas had avoided the glitches other States have had by being proactive. Ha! I am exhausted with this entire process as I am sure you are. Each year, with new admissions and expired ID's, this is going to be a mess.”

When the director asked Mr. Rucker what would happen with all the other nursing homes in the state that he would not be going to, he said that it was their legislators’ job to get them the information they needed.

9. It is clear that what information voters get at the polling place if they have to vote a provisional ballot for no photo ID is inconsistent place to place. Some report they received a note saying they had to bring in a photo ID prior to the canvass. Others did not.
10. In a situation in the 2014 primary, a local senior residence (Brewster Place in Topeka) reported that seniors without IDs were not allowed to vote a provisional ballot. Two years after implementation, this kind of lapse in training of poll workers is not acceptable.
11. In the Supreme Court’s decision on the Indiana voter ID law, it noted that there may be a case brought forward by seniors born out of state, who would have particular difficulty obtaining IDs. That is still the case in Kansas.

VOTER ID AND ADVANCE VOTING:

To advance vote in person, it is the same as voting on election day at the polls in terms of showing ID. If you have no ID, you may cast a provisional ballot and provide an ID prior to the canvass date. To request an advance ballot by mail, you have to provide a driver’s license number, non-drivers ID number, or a photocopy of any of the IDs identified in KSA 25-2908. If you send the request in without proper ID, you have to provide it prior to the canvass date. If you need to make a photocopy, you can get one made for free at any state office.

1. Other court cases have noted that requiring voters to get an ID to the election office by the canvass date can be an issue. We extended the canvass date three days (from the Friday following the Tuesday election to the Monday following a Tuesday election), but it still may be short in a court’s mind, especially when the voter is located in another city than the county election office. I think Indiana is the state where the court said 10 days should be allowed to get IDs to the election office.
2. Requiring photo ID to get an advance ballot adds a new burden for those who cannot get out to vote. You are only excused from the photo ID requirement if you have a permanent disability ballot (or meet one of the exclusions in KSA 25-2908).
3. The law will not allow you to put a social security number (SSN) on the advance ballot request as proof of identity. County clerks tell me that they can get everything they need to know about you from your name, address, and the last four digits of your SSN.

SSN is the easiest thing for voters to come up with and most have one. If we just kept the last four digits of the SSN as an identifying feature, it would eliminate the cost and burden of folks who don't have an ID getting one to get an advance ballot.

4. Indiana does not require a photo ID and that was the state Kobach cited as his model. During testimony, Kobach said many times our voter ID law would be like Indiana's and easily meet a court challenge. That was not true and the difference in advance ballot handling is just one example.
5. There are now extra burdens to returning a mail ballot to the election office. If you have someone return it for you, you both have to sign an affidavit designating who is to return it. That was not required prior to the S.A.F.E. Act. There are penalties if everything is not done correctly, trying to use intimidation to keep people from returning ballots for someone else.

IMPACT OF THE VOTER ID LAW:

Once the voter ID law started in 2012, it did not take long to feel the impact.

1. I made a point in the House Elections Committee about the burden of getting a birth certificate for a photo ID for those born out-of-state. To cover up this issue, Kobach said that those born out-of-state, or those for whom the state of Kansas had no birth certificate, could get a free photo ID at the county election office. The election office is supposed to have a camera there, take your picture, and Kobach's office will make an ID. The interesting thing is that all you have to do to get this ID is sign an affidavit. The same accommodation is not made to the rest of those born in Kansas. Further, there was no education/information made public about this opportunity, so no one really knows about it. And the counties are all across the board about how they implement it. In Douglas county they will actually go to your house to take your photo and make the ID themselves. My point is help from county to county in any aspect of the law varies widely.
2. As you can imagine, the first year of the voter ID law saw its issues due to lack of education and lack of training of poll workers. Here are just a few of the reports sent to me regarding what was happening at the polls in the 2012 and 2014 elections.
 - A voter said she had her temporary (paper) driver's license along with her old driver's license when she went to vote. The poll workers would not accept the paper ID and made her vote a provisional ballot. Since her permanent license did not arrive before the canvass date, her vote was thrown out. There are tens of thousands of Kansans in this situation at any given time. The truth is, they are supposed to accept this document at the polls. So, again, there is no consistent enforcement of the law across the state.
 - In 2012, IDs were rejected at multiple polling locations in Wichita because the address on the ID did not match the voting address. That is not a requirement of the law. You can, in fact, even use an out-of-state driver's license. The only thing the photo is to be used for is to match name and face.
 - An elderly woman's only ID was a photo of herself in her military uniform taped to her walker. She had no other ID so her provisional vote was eventually thrown out.

- Two elderly residents at an Osage county nursing home had no valid ID. At the polls on election day they were made to vote provisional ballots and their ballots were thrown out at the county canvass. The county clerk contacted relatives to help, but the gentlemen had no photo IDs and no way to get one on time.
- A voter refused to show his ID as a protest, and was told that when he filled out his provisional ballot that was all he had to do and that his vote would count. He didn't know he had to provide an ID prior to the canvass in order for his vote to count. What voters are told when they vote a provisional ballot varies widely across the state.
- In Marion County they told voters of provisional ballots that they had to have their IDs in by the Friday after the election. They should have given them until Monday, the canvass date. So not all county election officials knew what the law said.
- Three residents of the same facility took expired drivers licenses to vote. All were under the age of 65, so an expired license would not have been a valid ID for any of them. The white resident was allowed to vote a regular ballot, but the Hawaiian and the Mexican-American voters were made to vote provisional ballots. The two provisional ballots would have ultimately been thrown out since they had no other IDs.
- A voter told me he had to vote a provisional ballot because his license was suspended and he had no other valid photo ID. There are thousands of Kansans with suspended licenses at any time. The truth is, if you were allowed to keep your suspended license, they are to accept it. But many times it is confiscated. You can get a free photo ID from the DMV in this situation, but, again, you need a birth certificate, and no one tells these suspended drivers what is available to them.
- A veteran presented his Department of Veterans Affairs service card but it was rejected by poll workers because it had no address on it. He was told they wouldn't take anything but a driver's license. In another instance they rejected a Wichita State University ID, which was also a legal photo ID. There has been a dispute about taking high school IDs. It is hard to tell how many poll officials across the state have a different understanding of what constitutes a valid photo ID.
- A nursing home in Wichita reported that they took a resident to the DMV three times to get an ID, but could not provide enough proof she was a citizen.
- A voter in Carbondale did not have his driver's license current at the time he voted. He voted a provisional ballot, but figured his ballot would be thrown out because he worked in Topeka and could not get the documents needed in time to get a valid ID. I asked him to go through his wallet and we found a Topeka city bus pass with a photo. I faxed it to the Osage county election office and they took the ID. Had I not intervened on his behalf, his vote would have been thrown out. Neither he nor the poll workers were aware the bus pass would be valid for voting. Even the county election official had to check with the Secretary's office to verify that it would.
- The Topeka Rescue Mission reported that 50% of the women staying there have no ID and 15% of men. They would have a difficult time getting the underlying documents to get a birth certificate and then a photo ID. And they have no

transportation to get to the DMV. The Lawrence shelter said that 20% of their residents have no IDs. The Kansas City Rescue Mission said that 40% of their residents have no ID. The Saline Rescue Mission reported that they help get the birth certificates, but they have to get to the DMV by bus and they don't give them bus tokens.

- In Shawnee county, a student who did not provide a driver's license number on his absentee ballot request was told he had to have the information back by 7 pm on election day. He actually had until the canvass date. I heard this same story from two other students who had mistakenly put their school address on the outside of the envelope instead of their home voting address.
 - For non-drivers, a trip to the DMV to get a state ID can be a burden. One disabled Kansan told me a harrowing story of waiting hours (not unusual) to get his ID. With his health issues, he almost gave up. He had resources to help him get through it, but not everyone does.
3. Prior to the 2012 general election, I contacted the Shawnee County election commissioner about getting the names of those who were made to vote a provisional ballot for lack of photo ID. I wanted to be able to contact them and advise them they needed to take action to make their votes count. The county election commissioner said it would be no problem. They routinely gave out those lists. After the 2012 general election I requested the list. When Kobach found out, he made me go to the district court to get the list. When the district court ordered him to give me the list, he went to federal court to try and stop me. When the federal judge ordered him to give me the list, Kobach got a law passed to stop any future requests of the names of those who voted provisional ballots. Now no one can help those who vote provisional ballots understand what has happened and how to make their votes count.
 4. In the 2012 primary and general elections, there were 787 ballots thrown out for no voter ID. In the 2014 primary and general elections there were 427 ballots thrown out. I did some calculations of the votes thrown out in Kansas for no photo ID compared to Georgia in 2012. Kansas had several times more votes thrown out than Georgia, based on numbers voting and votes thrown out. I credit lack of education and disparate implementation of the law across the state for so many votes being thrown out.

WHAT COULD BE DONE?

There are a number of measures that could be taken to alleviate the problems created by the Kansas S.A.F.E. Act voter ID requirements. Here are just a couple:

1. Do not require those voting a provisional ballot for lack of photo ID at the polls to provide an ID prior to the canvass date. In order to vote a provisional ballot the voter must fill out a voter registration form. That means they have to provide a driver's license number or a social security number, their address, their birth date, and a signature swearing they are who they say they are. If the election office finds all that information valid and the signature matching the one on file, they should have their vote counted without additional effort.

2. Expand the types of valid IDs accepted. In other states, like our neighboring state, Missouri, there are a number of IDs that are accepted that are not government-issued photo IDs.

On a final note, Secretary Kobach has been given prosecutorial powers over election crimes. He has stated that in October he will announce some cases he is filing. He says they are cases where people voted in two places. Interestingly, these are cases that would not be prevented under the S.A.F.E. Act.

I hope this has been helpful in understanding the situation with voter ID in Kansas. If you have questions, please contact me.

Ann Mah
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785-231-0823

Statement to the Kansas Commission on Civil Rights, January 28, 2016 addressing the burden of the SAFE Act on an organization that helps Kansans register to vote.

I am Cille King, with the League of Women Voters of Lawrence-Douglas County. Our local League has, over the years, been very active in registering Kansas citizens to vote. In the fall of 2013, we learned that the statewide voters in suspense list was growing into the thousands due to the requirement to provide proof of citizenship to register to vote.

We discussed our desire to contact those in suspense with the Douglas County clerk's office. We requested and received from them an electronic list of those in suspense. This suspense list of October 30, 2013, had 827 people, of which 55 % were under 25 years of age. Douglas County is the home of the University of Kansas and Haskell Indian Nations University which explains why our young voters in suspense are so greatly represented on the suspense list.

Our League committee developed a narrative for telephone calls and email contacts. Only some of the names on the suspense list had accompanying phone numbers. We checked the phone book for matching last names and addresses to find 30 – 40 additional numbers.

University of Kansas email addresses were found by entering the names (one by one) into the KU's email search.

We had **little identifiable success** with calling or email efforts. The majority of phone calls went to message machine (we left a message of the problem and a call back number), some didn't have a message machine, and some were no longer working numbers. There were a few people who answered the phone or called back. They responded that they would take care of it, and a few said that they no longer wanted to vote. Of those who said they would take care of it, some remained on the suspense list a month later. No one responded to our emails. So, we didn't know if it was our message or a letter from the County Clerk, or some other reason when some eventually provided their proof of citizenship.

Later we expanded to using facebook and text messaging, with the same lack of response.

The most effective means, we found, was to talk with the voter, personally.

The weekend before the November 2014 election, we paired up and went **to people's homes** to help them finish their registration. We concentrated our efforts on the student housing around the KU campus, and an area of low-income housing on the north central side of the city. We went to 115 homes and helped 30 of those people finish their voter registration. Some documents we carried to the county clerk, some we watched as the voter took an image of his document and emailed it to the county clerk, and some we learned had finished by checking the voter rolls after the files had been updated, following the statewide canvass.

All this takes a great deal of volunteer time. Over an hour was spent to achieve each successful home visit. Countless hours are spent with the telephone calls, emails, facebook and text messages. League and member resources are consumed by this effort which reached so few of those Douglas County residents with incomplete voter registrations.

Our Leagues want all citizens to be informed and voting. Getting citizens registered to vote should not be harder than getting them informed.

Respectfully, Cille King, League of Women Voters Lawrence-Douglas County; cilleking@gmail.com

1 Thank you for the invitation to participate in the Kansas Advisory Committee to the US
2 Commission on Civil Rights' hearing to discuss the important matter of Kansas' Voter ID laws.
3 I regret being unable to offer my oral testimony at the hearing, though appreciate the opportunity
4 to submit my written testimony.

5 My name is Nathaniel Birkhead, and I have a PhD in Political Science (Indiana University
6 2012). I am an Assistant Professor of Political Science at Kansas State University, where I have
7 been since 2012. Some of my published research focuses state legislative elections, voter
8 behavior, and citizen participation. Thus, I am qualified to offer this testimony, which is an
9 attempt to summarize the extensive body of research that addresses turnout and voter ID laws.

10 While no research has looked at Kansas' voter ID laws specifically, the consensus in the
11 scholarly research is that **voter ID laws present a substantial cost to voting, and as such**
12 **depress turnout.** In particular, the costs associated with **voter ID laws tend to have**
13 **disproportionate impact among the poor, uneducated, and young.** This makes the electorate
14 older, better educated, and more affluent than the state's population. Thus, the ultimate impact
15 of voter ID laws is to make the electorate unrepresentative of the state's citizens.

16 Political scientists have long viewed citizen participation in elections as the most critical form of
17 political activity. Not only does voter participation convey legitimacy to elections results, but
18 also ensures responsiveness of politicians to voters. As V.O. Key once wrote, "The blunt truth is
19 that politicians and officials are under no compulsion to pay much heed to classes and groups of
20 people that do not vote."¹ As such, there is a large and thorough body of political science
21 research dedicated to understand the factors that may increase or decrease political participation
22 by its citizens.

23 In what follows, I begin with a brief discussion of what political scientists know about things that
24 influence citizens' decisions to vote in an election, in a general sense. I will then proceed to a
25 more specific discussion of the political science research on voter ID laws.

26

27 *Citizens Vote Less when the Costs of Voting Are High*

28 In political science, the most common way to understand voter turnout is to focus on the costs of
29 voting (things that make it harder to vote) and the benefits of voting (things that voters expect to
30 receive if their preferred candidate wins).² One of the most consistent findings in political
31 science research is that turnout drops when the costs of voting go up, and that turnout goes up
32 when the costs of voting go down.

33 The most substantial costs associated with voting have been poll taxes and literacy tests, which
34 many former states Confederate states enacted following the Civil War and the end of

¹ Key, VO. 1949. *Southern Politics in State and Nation*. New York: Vintage. Pg., 527

² Hershey, Marjorie. 2009. "What We Know about Voter ID Laws, Registration, and Turnout,"
PS: Political Science and Politics. 42(1), 87-91.

1 Reconstruction. Poll taxes often required some payment to register to vote, while literacy tests
2 required potential voters to demonstrate their reading and math skills before being allowed to
3 vote. These standards were not meted out equally, however, as many states including a number
4 of “grandfather clauses” that prevented blacks access to the ballot, while still allowing some poor
5 or illiterate whites to vote.³ These costs on voting had very real implications for voter
6 participation: poll taxes in the South depressed turnout by nearly 15 percentage points, while
7 literacy tests depressed turnout by about 9 percentage points.⁴ The implications of this research
8 clearly show that citizens respond to the costs associated with voting, and tend to stay home
9 when the costs are too high. Moreover, the effects of poll-taxes and literacy tests were not held
10 equally across a state’s citizenry – blacks and poor whites were disproportionately affected by
11 them.

12 Potential voters are also sensitive to costs as they attempt to register. Reforms that have
13 attempted to make the voter registration process easier have had significant effects. For
14 example, in states where driver’s license agency employees asked clients if they’d like to register
15 to vote, turnout was about 5 percentage points higher in states where driver’s license agencies
16 simply made registration materials available.⁵ Thus, actively encouraging people to register to
17 vote had a real and significant impact on individuals’ decisions to vote.

18 Moreover, this active voter registration program particularly boosts the turnout rates among
19 groups who are typically less likely to vote. These active voter registration programs benefitted
20 the “young, the residentially mobile, and those with lower levels of education.”⁶ By contrast,
21 states with less active voter registration programs – that is those with a higher cost to registration
22 – had less participation by the less educated and the young. Thus, not only do all citizens
23 respond to the costs of voting, but some groups of citizens are *particularly* sensitive to the costs
24 of voting. As such, these costs prevent the electorate from being wholly representative of the
25 state’s citizenry.

26

27 *Voter ID Laws Present a Significant Costs to Voting*

28 Kansas’ voter registration and voter ID laws are among the most demanding in the country.
29 Since 2013, to register to vote, Kansas requires that citizens furnish proof of US citizenship –
30 necessitating a passport, birth certificate, or naturalization papers – before being added to the

³ Highton, Benjamin. 2004. “Voter Registration and Turnout in the United States.” *Perspectives on Politics* 2(September):507-15. Rosenstone, Steven J and John Mark Hansen. 2003.

Mobilization, Participation, and Democracy in America New York: Longman.

⁴ Springer, Melanie J. 2012. “State Electoral Institutions and Voter Turnout in Presidential Elections, 1920-2000” *State Politics and Policy Quarterly* 12(3): 252-83.

⁵ Knack, Stephen. 1995. “Does ‘Motor Voter’ Work?” *Journal of Politics* 57(August): 796-811.

⁶ Highton, Benjamin and Raymond Wolfinger. 1998. “Estimating the Effects of the National Voter Registration Act of 1993” *Political Behavior* 20(June):79-104.

1 record. **Kansas and Arizona are currently the only two states in the country that require**
2 **such documentation.**

3 Once a voter has been registered, they must show photographic identification to vote in person,
4 and unless the person is 65 or older, the photo ID must be current and have an expiration date on
5 it. As Hershey writes, this restriction “poses no additional costs to registrants with a current
6 driver’s license, state ID, passport, or other appropriate ID.” However, for those who do not
7 have a current suitable ID, the process of acquiring one – by furnishing social security card, birth
8 certificate, proof of residency, and so on – imposes financial costs as well as requiring time,
9 information, and transportation. Moreover, the burden of acquiring these non-drivers’ license ID
10 cards is often large, as people who need them do not have driver’s licenses and likely do not
11 have access to public transportation in their county.

12 To put these requirements in context, **Kansas is one of only 9 states to have what the National**
13 **Conference of State Legislatures calls a “Strict Photo ID” requirement.** That is, the ballot
14 will not be counted unless the voter furnishes a photo ID at the polling place, or else casts a
15 provisional ballot and provides a valid form of ID to the county election officer. By contrast, 14
16 states have what the NCSL terms “Non-strict, non-photo ID requirements,” where the most
17 common practice is to ask voters without an ID to sign an affidavit affirming that they are the
18 person listed on the record (as in Connecticut, Delaware, Kentucky, Michigan, and several other
19 states).⁷ Moreover, *16 states do not require a document to vote.* Thus, we clearly see that the
20 costs associated with voting in Kanas are quite high, and indeed far higher than in most other
21 states.

22

23 *Voter ID Laws Decrease Turnout*

24 To my knowledge, no political science research project has focused on Kansas’ voter ID laws,
25 specifically. However, as states began passing voter ID laws in the early 2000s, several studies
26 have analyzed their impact on turnout. There are a number of different approaches to studying
27 these effects – from aggregate elections analysis to a number of different survey instruments.⁸

⁷ “Voter Identification Requirements” 1/4/2016. National Conference of State Legislatures.
<http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> Accessed 2/12/2016.

⁸ Alvarez, R. Michael, Delia Bailey, and Jonathan N. Katz 2008 “The Effect of Voter Identification Laws on Turnout.” Social Science Working Papers 1267R, California Institute of Technology; Barretto, Matt A, Stephen A Nuño, and Gabriel R. Sanchez 2009 “The Disproportionate Impact of Voter-ID Requirements on the Electorate” *PS: Political Science and Politics* 41(1):111-16. Vercellotti, Timothy and David Andersen. 2006. “Protecting the Franchise, or Restricting it?” Paper presented at the annual meeting of the American Political Science Association, Philadelphia, PA.; Mycoff, Jason D., Michael W. Wagner, and David C. Wilson. 2009. “The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout.” *PS: Political Science and Politics* 41(1):121-26.

1 Rather than analyzing the strengths and weaknesses of each study, I will focus on the most
2 methodologically sophisticated, as they offer the most reliable conclusions.

3 Individual level survey results show that, in general, voter ID laws reduce turnout. Alvarez,
4 Bailey, and Katz show that voter ID laws make registered voters less likely to turn out on
5 election day. Moreover, the stricter voter ID laws are, the less likely citizens are to vote. As
6 Alvarez et al note “stricter requirements – more than merely presenting a non-photo
7 identification card – are significant negative burdens on voters, relative to a weaker requirement,
8 such as merely signing a poll-book.” Erikson and Minnite find similar results in their analysis:
9 going from “lax to severe voter ID requirements is associated with a couple of percentage points
10 less in the voting rate.”⁹

11 While these results are reliable, survey results do come with their own limitations. Simply,
12 citizens often fill out surveys inaccurately. For example, they may report that they voted, despite
13 not having done so. Alternatively, they may report having a government ID, but not actually be
14 able to furnish one. Ultimately, the best way to determine if voter ID laws restrict turnout is to
15 move beyond survey results to focus on actual shifts in official recorded votes.

16 The best analysis of the impact of voter ID laws comes from Hood and Bullock¹⁰, who relied on
17 data from the state of Georgia as ID laws were implemented between the 2004 and 2008
18 elections. The Georgia voter ID law is similar to Kansas’, both in the requirement that voters are
19 able to furnish a photo ID, and similar in what forms of photo IDs are valid. Hood and Bullock
20 analyzed the voter registration and history database, which the state of Georgia cross-referenced
21 with DMV records, indicating which registrants had either a valid driver’s license or state ID
22 card. This database is incredibly unique, and offers the ideal research design to determine how
23 voter ID laws influence voter behavior. We do not need to worry about citizens misreporting
24 voting, nor do we need to worry about citizens’ accuracy in being able to furnish a state ID card.

25 Hood and Bullock are able to determine which citizens voted in 2004 before the ID laws went
26 into effect, they are able to determine which citizens voted without a state ID. They are able to
27 make a similar evaluation in 2008, after the voter ID laws went into effect. Thus, they are able to
28 clearly identify which citizens were still able to vote, and which citizens were disenfranchised by
29 the voter ID laws. Simply put, the Georgia database that Hood and Bullock gained access to is
30 the gold standard for examining the voter ID laws’ impact.

31 Their analysis found that the Georgia voter ID statute had a suppressive effect among those
32 lacking IDs: there was an across the board *drop in turnout of 6.5%* among those without IDs.
33 They ultimately conclude that “turnout in Georgia in 2008 would have been four-tenths of a
34 percentage point higher” if the photo ID statute had been blocked by the courts. Put another

⁹ Erikson, Robert S. and Lorraine C. Minnite 2009. “Modeling Problems in the Voter Identification-Voter Turnout Debate” *Election Law Journal* 8(2): 85-101.

¹⁰ Hood, MV III, and Charles S. Bullock III. 2012. “Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute.” *State Politics and Policy Quarterly* 12(4):394-14.

1 way, Hood and Bullock estimate that about **24,692 registered voters in Georgia were turned**
2 **away due to the photo ID statute that is similar to Kansas’.**

3 Again, the preponderance of evidence – whether from government issued surveys like the
4 Current Population Survey (CPS) or from official government records like Georgia’s files –
5 show that voter ID laws have a clear suppressive effect on the voting eligible population.

6

7 *Voter ID Laws on Disproportionately Decrease Turnout by the Poor and Uneducated*

8 Several empirical studies listed above have shown that the costs of registering to vote, and
9 voting, do not equally effect all citizens’ voting behavior. Rather, the costs are
10 disproportionately felt by some groups – the less educated, poor, and young – than by other
11 groups.¹¹

12 Though racial and ethnic minorities are affected by voter ID laws, the empirical estimates are
13 mixed. Some studies show that blacks are disproportionately affected. Barreto et al found that
14 black registered voters were less likely than whites to have a valid state-issued ID. Similarly, the
15 laws may not always be enforced consistently: Alvarez et al found that a much higher proportion
16 of black voters were asked for identification in 2007 and in the 2008 Super Tuesday events than
17 white voters were. By contrast, Hood and Bullock’s analysis of Georgia found that whites were
18 slightly more demobilized than blacks by the new law, though we should note that this may have
19 been due to higher than average get-out-the-vote drives by the Obama campaign in 2008 that
20 disproportionately mobilized black voters.

21 **A consistent finding across these studies is that the poor and uneducated of all races and**
22 **ethnicities tend to be adversely effected.** Alvarez et al show that registered voters with lower
23 levels of income or education are less likely to turn out to vote when the voter ID laws are more
24 restrictive. These findings are corroborated by Erikson and Minnite, and by Vercellotti and
25 Anderson. Moreover, it is always important to emphasize that blacks and Latinos tend to have
26 lower socio-economic status than whites. As such, while racial and ethnic minorities are not
27 disproportionately targeted by voter ID laws, they nonetheless are still heavily influenced.

28 To conclude, the evidence shows clearly that voter ID laws demobilize citizens. The higher the
29 cost of registering to vote, and the higher the cost of being able to cast a vote, the less likely
30 citizens are to turn out. Again, estimates based off the government’s official records in Georgia
31 show that over 24,000 voters were turned away by the restrictive voter ID law. While it is
32 unclear the extent to which these laws demobilize racial and ethnic minorities, a robust finding is
33 that the increased costs of voting disproportionately demobilize the poor and uneducated. **The**
34 **result is that strict voter ID laws, such as Kansas’, create an electorate that is more affluent**

¹¹ Jackson, Robert A., Robert D. Brown, and Gerald C. Wright. 1998 “Registration, Turnout, and the Electoral Representativeness of the U.S. State Electorates.” *American Politics Quarterly* 26(July):259-87; Avery, James M. and Mark Peffley. 2005. “Voter Registration Requirements, Voter Turnout, and Welfare Eligibility Policy.” *State Politics and Policy Quarterly* 5(1):47-67.

- 1 **and educated than its state's citizens are.** This unrepresentative electorate creates a system
- 2 where policy written by elected officials represents the concerns of the electorate, rather than the
- 3 concerns of all the state's citizens.

KANSAS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS

The Impact of the Secure and Fair Elections (S.A.F.E.) Act on Individual Civil Rights in Kansas

January 28, 2016

Constitutional (and Statutory) Issues Surrounding the S.A.F.E. Act

by
Richard E. Levy*

Introduction

I want to thank the Advisory Committee for giving me the opportunity to discuss the important issues raised by the Kansas Secure and Fair Elections Act (the S.A.F.E. Act). Although I have personal views about these issues, I will endeavor to put those views to one side, so as to offer a neutral account of the issues raised by the act and the applicable legal principles. My goal in so doing is to provide the committee with a framework it can use to analyze the complex legal issues raised by the act.

The S.A.F.E. Act imposes three sets of requirements that affect the exercise of voting rights: (1) new voters must submit proof of citizenship at the time of registration; (2) voters must provide a photo ID at the polling place; and (3) additional verification steps must be taken to submit ballots by mail. In practice, the first two requirements present more serious legal questions. To the extent that the proof of citizenship and photo ID requirements make it more difficult for some people to participate in elections, they may violate constitutional and statutory provisions that protect the right to vote. In general terms, the validity of such requirements depends on the nature and extent of the burden they impose on the right to vote and whether those burdens are justified by sufficiently important state interests.

In the context of specific constitutional and statutory provisions, however, determining the validity of the S.A.F.E. Act raises a variety of complex questions, not all of which are within the purview of the Advisory Committee. To assist the Advisory Committee in navigating these complex issues, I will summarize and explain the applicable legal principles. The key principles are set forth as a series of “bullet points” in the executive summary, which is followed by a more detailed discussion of each principle. Please note that I have not attempted to conduct or provide comprehensive research into lower court decisions addressing similar issues.

* J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. Name, title, and affiliation are provided for purposes of identification only. I do not speak for the University or the Law School and all views, statements, or positions articulated in this document are solely my own.

Executive Summary

- **The S.A.F.E. Act’s proof of citizenship and photo ID requirements may be invalid if they (1) discriminate by restricting the right to vote based on impermissible classifications or (2) impose excessive burdens on the right to vote without sufficient justification.**
- **In constitutional challenges based on improper discrimination, voting requirements that use a “suspect” (race) or “quasi-suspect” (gender) classification are nearly per se invalid, but other classifications are valid so long as they are reasonably related to a legitimate state purpose.**
- **Because the S.A.F.E. Act’s requirements are facially neutral as to race or national origin, it will be treated as discriminatory for constitutional purposes only if there is proof of discriminatory intent, which may be proved by a stark pattern of disparate impact or by the circumstances surrounding the adoption of the act.**
- **Section 2 of the Voting Rights Act (VRA) does not require proof of discriminatory intent, but rather prohibits voting requirements that have the effect of restricting the right to vote because of race, which is determined in light of the totality of circumstances, including multiple factors.**
- **Laws that impose undue burdens on the right to vote may violate the Constitution irrespective of discrimination, with the applicable level of scrutiny dependent upon the severity of the burden.**
- **Although the Court upheld photo ID requirements in *Crawford v. Marion County Election Board* and the same framework would apply to the requirements of the S.A.F.E. Act, the result in *Crawford* is not controlling if, as applied to some voters, the S.A.F.E. Act’s requirements impose more severe burdens on the right to vote.**
- **Even requirements that neither discriminate on the basis of race nor impose severe burdens may be invalid if they serve illegitimate purposes or are unrelated to the state’s legitimate interests in conducting free and fair elections.**

Discussion

- **The S.A.F.E. Act’s proof of citizenship and photo ID requirements may be invalid if they (1) discriminate by restricting the right to vote based on impermissible classifications or (2) impose excessive burdens on the right to vote without sufficient justification.**

The conduct of free and fair elections for positions of public trust is essential to our system of democracy. Accordingly, the right to vote is considered fundamental and is subject to a variety of protections reflected in constitutional amendments, Supreme Court precedents, and statutory provisions. The state can and indeed must regulate the voting process in various ways, but state laws or regulations that improperly impair or impede the right to vote are invalid. Broadly speaking, the requirements of the S.A.F.E. Act implicate two types of voting rights claims: discrimination claims and impermissible burden claims.

Discrimination claims focus on the *nature of the classification* used in determining the ability to vote. In other words, they assert that voting requirements have the purpose or effect of restricting the right to vote based on improper classifications, such as race. Some constitutional amendments, notably the Fifteenth, Nineteenth, and Twenty-Sixth Amendments explicitly prohibit the denial or abridgment of the right to vote on account of race, gender, and age (for citizens over 18 years of age). Thus, statutes, regulations, or other requirements that violate these amendments are per se invalid. More broadly, the Equal Protection Clause of the Fourteenth Amendment also prohibits improper classifications that limit the right to vote. *See generally Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the Equal Protection Clause incorporates a one person-one vote principle). In addition, § 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301 (formerly codified at 42 U.S.C. § 1973), prohibits voting practices that have the effect of denying or abridging the right to vote on account of race.

Impermissible burden claims focus on the *extent of the impairment* imposed by a voting requirement. In other words, they assert that voting requirements impose excessive burdens that improperly prevent people from voting (without regard to whether the requirement uses improper classifications). Thus, for example, the Twenty-Fourth Amendment prohibits the imposition of a poll tax as a condition of voting in federal elections and the Supreme Court has held that the Equal Protection Clause prohibits poll taxes for state or local elections. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). More generally, reasonable regulations that impose only incidental burdens on the right to vote are generally valid, but requirements that impose severe burdens are invalid unless they are justified by especially compelling reasons. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). In addition, some federal statutes, such as the National Voter Registration Act (NVRA), are intended to make it easier to vote. *See* 52 U.S.C. §§ 20501-20511 (formerly codified at 42 U.S.C. §§ 1973gg-1 to 1973gg-10) (requiring states to allow eligible persons to register to vote in federal elections when applying for or renewing a driver’s license).

As pending litigation suggests, the proof of citizenship and photo ID requirements of the S.A.F.E. Act are subject to both kinds of legal challenge and both kinds of challenge implicate both constitutional and statutory provisions. *See* Complaint for Declaratory and Injunctive

Relief, *Cromwell v. Kobach*, No. 2:15-cv-09300-JAR-GLR (D. Kan. Sept. 30, 2015), available at 2015 WL 5731924; *Belenky v. Kobach*, No 2013-CV-001331, (Shawnee County District Court), at <https://public.shawneecourt.org/PublicAccess/publicAccess/publicAccess/?goto=caseLookup>. I will discuss the principles that apply to a discrimination claim first, followed by the principles that apply to an impermissible burden claim. It is important to note that the validity of both types of claims depends on an assessment of the facts—specifically (1) how the law’s requirements affect voting rights in practice; (2) the purposes and motives behind the law; and (3) the extent to which the law is justified by valid concerns about voter fraud.

- **In constitutional challenges based on improper discrimination, voting requirements that use a “suspect” (race) or “quasi-suspect” (gender) classification are nearly per se invalid, but other classifications are valid so long as they are reasonably related to a legitimate state purpose.**

In general terms, discrimination claims based on equal protection and related constitutional provisions are determined using “ends-means scrutiny.” Under this form of analysis, courts consider (1) whether the ends or purposes of state action are valid; and (2) the means chosen (i.e., the classification) are sufficiently related to those ends. Conventionally, this type of scrutiny may be more or less deferential to the state, depending on the nature of the classification and whether the classification burdens fundamental rights. The focus here is on the nature of the classification—the burden on fundamental rights will be discussed below in connection with analysis of impermissible burden claims.

The law does not treat all people equally and all laws must classify in some way—even murder laws treat murderers differently from non-murderers. Courts are usually very deferential to the state’s policy judgments, and ordinary classifications are subject to a form of scrutiny known as the “rational basis test.” Under this form of scrutiny a law is valid so long as the state’s purpose is “legitimate” and the classification is “reasonably” or “rationally” related to it. The rational basis test is usually extraordinarily deferential—courts accept any plausible purpose for a law (without regard to whether it was advanced at the time of the state action) and any means that policy makers might plausibly believe would further that purpose. *See F.C.C. v. Beach Communications*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”). In some cases, however, the Court has applied what appears to be a less deferential form of the rational basis test when state action appears to be motivated by animus against a politically unpopular group, which is not a legitimate purpose. *See Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *U.S.D.A. v. Moreno*, 413 U.S. 528 (1973).

Because the rational basis test is usually easy to satisfy, parties challenging a law typically try to convince the courts to apply heightened forms of scrutiny, which include both “strict scrutiny” and “intermediate scrutiny.” Strict scrutiny applies to classifications that are inherently suspect, such as race and national origin.¹ To survive strict scrutiny, the state must provide clear

¹ In this context, national origin refers to ethnicity or ancestry, not citizenship. Voting rights can clearly be limited to U.S. citizens.

and convincing proof that the purpose is “compelling” and that the use of the classification is “necessary” and/or “narrowly tailored” to the attainment of that purpose. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). To satisfy this test, there must be strong evidence to show that the interest is compelling and that it was the true purpose of the law. Likewise, the classification must also be necessary in the sense that there are no non-discriminatory alternatives and narrowly tailored in the sense that it cannot be over inclusive (reaching more cases than necessary to fulfill its purpose) or under inclusive (omitting cases that would fulfill its purpose). Although there are some exceptions, strict scrutiny is very difficult to survive and usually results in the invalidation of a law.

As its name suggests, intermediate scrutiny falls somewhere between the rational basis test and strict scrutiny. It requires an important governmental purpose and the classification must be substantially related to that purpose. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). In practice, the application of intermediate scrutiny may be more or less strict, depending on the context. *Compare United States v. Virginia*, 518 U.S. 515 (1996) (applying stricter form of intermediate scrutiny to invalidate Virginia Military Institute’s males-only admissions policy), *with Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (applying deferential form of intermediate scrutiny to uphold more rigorous citizenship requirements for foreign born children of unmarried U.S. fathers than of unmarried U.S. mothers).

In the context of voting requirements, however, there are specific constitutional amendments prohibiting discrimination based on race (the Fifteenth Amendment) and gender (the Nineteenth Amendment). Accordingly, if the S.A.F.E. Act denies or abridges the right to vote because of race or gender, then it is likely per se invalid, without regard to whether it survives strict or intermediate scrutiny. In any event, its requirements have been defended as nondiscriminatory, and there is no suggestion that they would be valid if they do in fact discriminate on the basis of race or gender. Thus, the critical issue for purposes of this type of claim is whether the act’s requirements discriminate on the basis of race or national origin.

It is important to note that the Supreme Court has explicitly rejected the application of heightened constitutional scrutiny to several classifications potentially implicated by the S.A.F.E. Act, including the poor, the elderly, and the disabled. Thus, although there were some indications in some cases during the 1950s and 1960s that the Supreme Court was prepared to apply heightened scrutiny to laws discriminating against the poor, it refused to recognize wealth as a suspect classification in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Not long thereafter, the Court held that age is not a suspect classification, upholding a state’s mandatory retirement age for law enforcement officers. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Likewise, the Court declined to recognize disability as a suspect classification in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), although it nonetheless held that the denial of a zoning variance to a group home for adults with developmental disabilities violated even the rational basis test because it was based on animus.

Accordingly, the principal discrimination claim at issue in the S.A.F.E. Act relates to race or national origin. There is no suggestion that the act discriminates on the basis of gender, and any disproportionate burden on the poor, the elderly, or the disabled would not be invalid unless it is motivated by animus against those groups (see below).

- **Because the S.A.F.E. Act’s requirements are facially neutral as to race or national origin, it will be treated as discriminatory for constitutional purposes only if there is proof of discriminatory intent, which may be proved by a stark pattern of disparate impact or by the circumstances surrounding the adoption of the act.**

The S.A.F.E. Act is “facially neutral” in the sense that it does not explicitly incorporate classifications based on race, national origin, gender, or other “suspect” characteristics. Accordingly, any discrimination claims are based on “disparate impact”; i.e., the claim that the proof of citizenship or photo ID requirement disproportionately burdens racial and ethnic minorities.

The Supreme Court has held, however, that the Constitution prohibits only intentional discrimination. Thus, facially neutral laws that disproportionately burden racial and ethnic minorities are unconstitutional only if it is shown that they were adopted for the purpose of excluding minorities. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (upholding use of high school diploma and test scores to determine promotions notwithstanding racially disproportionate impact); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding English literacy requirement for voting in the absence of proof of discriminatory intent or application). In practice, it may be very difficult to prove that facially neutral laws were adopted with discriminatory intent.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court discussed how to prove discriminatory intent in the context of a disparate impact claim. First, the disparate impact itself may create an inference of discriminatory intent, especially if the pattern cannot be explained by other, race-neutral reasons. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (concluding that drawing city boundaries into an irregular twenty-eight-sided figure that excluded all but a few of its 400 black voters without excluding a single white voter reflected intentional discrimination); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (licensing program for laundries applied to deny all applications by Chinese Americans while granting licenses to all but one white applicant violated equal protection). This sort of proof requires a particularly clear pattern that cannot be explained on other grounds; it is not sufficient to show a statistical probability that race is a factor. *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting equal protection challenge to capital punishment notwithstanding statistical analysis demonstrating that race was a significant factor in the imposition of the death penalty); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (concluding that although veteran’s preference beneficiaries were over 98% male, the statistical pattern did not establish discrimination based on sex because the desire to benefit veterans was a legitimate alternative explanation for the disparity).

Second, the courts may consider the procedural and substantive context of the challenged action, including:

- “The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes”;
- “[t]he specific sequence of events leading up to the challenged decision”;
- “[d]epartures from normal procedural sequence”;
- “substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached”; and
- “[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports.”

Arlington Heights, 429 U.S. at 267-68. Because it seems unlikely that the S.A.F.E. Act’s disparate impact, standing alone, would be sufficient to establish discriminatory intent, the Advisory Committee will need to consider these factors to determine whether the S.A.F.E. Act violates equal protection or the Fifteenth Amendment.

In addition, if there is an especially bad fit between the requirements of a law and its alleged purposes, that may suggest that those purposes are a mere pretext, masking an improper purpose. The Supreme Court has applied this sort of reasoning in cases like *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), concluding that laws adversely affecting homosexuals or same sex couples were based on “animus” and therefore invalid because the sweep and scope of the laws were so far removed from the supposedly legitimate justifications advanced on their behalf. *See also Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (applying similar reasoning to conclude that denial of zoning variance was based on animus against adults with developmental disabilities). Although the Supreme Court has not used this sort of analysis to determine whether a facially neutral law discriminates on the basis of race, it has done so in regard to religious discrimination, in which facially neutral laws are also subject to the rational basis test unless there is proof of discriminatory intent. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (concluding that a city’s ban on animal sacrifice was motivated by religious discrimination because the scope of the ban did not match the city’s asserted health and safety or animal cruelty justifications).

Whether the S.A.F.E. Act reflects a discriminatory intent for purposes of constitutional claims based on equal protection or the Fifteenth Amendment may not be a critical question, however, because § 2 of the Voting Rights Act (VRA) provides greater protection against voting requirements with a racially disproportionate impact.

- **Section 2 of the Voting Rights Act (VRA) does not require proof of discriminatory intent, but rather prohibits voting requirements that have the effect of restricting the right to vote because of race, which is determined in light of the totality of circumstances, including multiple factors.**

The Voting Rights Act (VRA), originally adopted in 1964, provides additional protections against voting requirements, practices, and procedures that limit voting rights on the basis of race. Although the VRA was adopted pursuant to Congress’s authority to enforce the Fourteenth and Fifteenth Amendments, the Supreme Court has made clear that this power includes the

power to provide some protections that go beyond the protections of the Amendments themselves. Thus, for example, although the Supreme Court held in *Lassiter* that an English literacy requirement did not violate the Fifteenth Amendment, it also upheld the authority of Congress to prohibit the imposition of literacy requirements for students who have completed the sixth grade in American schools where the language of instruction was English. *See* 52 U.S.C. § 10303(e); *see also Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding original version of this provision as within the scope of congressional power to enforce the Fourteenth and Fifteenth Amendments).

Of particular relevance here is § 2(a) of the VRA, as amended, 52 U.S.C. § 10301(a), which prohibits the adoption or application of any requirement that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”² This provision prohibits state laws or requirements that **result** in discrimination without regard to **intent** or **purpose**. To underscore this point, § 2(b) further specifies that:

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Subsection (b) also provides that “[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered,” but adds a proviso that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”

In practice, courts analyze § 2 claims using a two part framework in which plaintiffs must show:

- (1) That a challenged requirement imposes a discriminatory burden because “members of a protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”; and
- (2) The burden is linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class.

See, e.g., Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015) (upholding district court’s determination that Texas photo ID law violated § 2); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015) (granting preliminary injunction against some parts of North Carolina elections reforms and affirming the denial of a preliminary injunction against other parts of the law because the plaintiffs had not shown irreparable harm).

In making these determinations, courts often consider several factors identified in the Senate Report accompanying the VRA, which the Supreme Court endorsed in *Thornburg v. Gingles*, 478 U.S. 30 (1986). These factors include:

² The validity of this provision was unaffected by *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which invalidated the formula for determining the scope of the VRA’s “preclearance” requirements and thus rendered those requirements unenforceable. The preclearance requirements would not have applied to Kansas in any event.

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). Two other factors identified in the report (but not on the numbered list) are “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group” and “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” *Id.*

Because it is easier to establish a violation of § 2 than to establish a violation of the Fourteenth or Fifteenth Amendment, and because courts generally prefer to avoid resolving unnecessary constitutional questions, the success of any discrimination claims will likely depend primarily on the application of § 2. If there is a violation of § 2, then the analysis of constitutional claims of discrimination is unnecessary. *See Veasey v. Abbott*, 796 F.3d at 513-14 (finding it unnecessary to address claims that Texas photo ID law requiring proof of citizenship imposed unconstitutional burdens on the right to vote). On the other hand, if the evidence is insufficient to show a violation § 2, then it is highly unlikely that the evidence would prove intentional discrimination.

- **Laws that impose undue burdens on the right to vote may violate the Constitution irrespective of discrimination, with the applicable level of scrutiny dependent upon the severity of the burden.**

The second type of voting rights claim focuses on the burdens imposed by voting requirements. Some burdens, such as a poll tax, are per se invalid. Other burdens may violate the Equal Protection Clause of the Fourteenth Amendment.³ Although there might be an argument that photo ID or registration requirements are a form of poll tax if it costs money to comply, the United States Court of Appeals rejected that claim in *Veasey*, 796 F.3d at 514-17, and it will not be further discussed here. The discussion that follows considers the analysis of equal protection claims based on the burdens imposed by the S.A.F.E. Act’s voter registration and photo ID requirements.

³ When regulation of political parties and primaries is involved, burdens on the right to vote may also implicate freedom of political association, which is guaranteed by the First Amendment. In addition, courts sometimes treat the right to vote as protected by due process. The analysis of freedom of association or due process claims does not differ materially from the equal protection analysis.

Although most challenges to the burdens imposed by voting requirements arise under the Equal Protection Clause, the focus of such claims is not the nature of the classification incorporated in the requirement, but rather the burden it imposes. As the Court explained in *Reynolds v. Sims*, 377 U.S. 533, 566 (1966), “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.” Thus, [d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race” *Id.* Although *Reynolds* involved vote dilution as a result of legislative districts of unequal population size, a similar principle applies to other regulations that may burden the right to vote, including restrictions on voter registration or casting ballots.

Nonetheless, the Court has also recognized that federal, state, and local governments must regulate the electoral process and that such regulations will inevitably impose some burdens on some voters. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (reasoning that “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections” and that “[e]lection laws will invariably impose some burden upon individual voters”). As a result, the “rigorousness” of scrutiny “depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Id.* at 234. Under this approach, requirements that impose “severe restrictions must be narrowly drawn to advance a state interest of compelling importance,” but “the State’s important regulatory interests are generally sufficient to justify” “reasonable, nondiscriminatory restrictions.” *Id.* (internal quotation marks and citations omitted).

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Court applied this framework to a photo ID requirement, although the precise meaning of the framework was the subject of disagreement between the plurality opinion and concurring Justices. The plurality treated the test as creating a sliding scale of scrutiny under which the more severe the burden the greater the degree of rigorousness applies. The concurring justices, however, viewed *Burdick* as establishing that the rational basis test would apply unless a restriction was “severe” in which case strict scrutiny applied. Regardless of their disagreements about the meaning of the *Burdick* framework, the plurality and concurring opinion agreed that the plaintiffs in that case failed to establish that the photo ID requirement in question imposed sufficient burdens to justify elevated forms of scrutiny, and upheld it as a reasonable measure to prevent voter fraud.

- **Although the Court upheld photo ID requirements in *Crawford v. Marion County Election Board* and the same framework would apply to the requirements of the S.A.F.E. Act, the result in *Crawford* is not controlling if, as applied to some voters, the S.A.F.E. Act’s requirements impose more severe burdens on the right to vote.**

Both plurality and concurring opinions in *Crawford* emphasized that the case involved a “facial” challenge to the Indiana photo ID requirement and that the plaintiffs in that case had made no showing that the requirement would prevent a large number of people from voting or severely burden their right to do so. In view of these limiting factors, the result in *Crawford* is not necessarily controlling as to the S.A.F.E. Act’s requirements.

First, the plurality in *Crawford* emphasized that the law was being challenged “on its face,” i.e., without regard to its application in a particular case. Ordinarily, parties challenge the validity of a law or regulation “as applied” to them or their conduct. Such a challenge focuses on the specific application and the remedy would be to prevent prohibit the unconstitutional application of the law, without necessarily invalidating the law itself. In such a challenge, the argument is that the law’s unconstitutional sweep is so broad that it must be invalidated as a whole. As the Court emphasized in *Crawford*, the standards for a successful facial challenge are especially difficult to meet. For example, it cited *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), which described the standard as follows:

[A] plaintiff can only succeed in a facial challenge by “establish[ing] that no set of circumstances exists under which the Act would be valid,” i.e., that the law is unconstitutional in all of its applications.” . . . While some Members of the Court have criticized [this] formulation, all agree that a facial challenge must fail where the statute has a “ ‘plainly legitimate sweep.’ ” (citations omitted).

Although the facial challenge failed in *Crawford*, a parties whose voting rights are burdened might be able to challenge the law as applied to them, which requires a lesser showing. *See Lee v. Virginia State Board of Elections*, (E.D. Va. December 18, 2015), available at 2015 WL 9274922 (concluding that a facial challenge to state’s photo ID law was foreclosed by *Crawford*, but allowing an as-applied challenge to go forward).

Second, if the burdens imposed by the S.A.F.E. Act are more severe, or if there is better evidence that its provisions prevent or impede the right to vote, a higher level of scrutiny may apply and the state’s justifications may be insufficient. This point is most clear with respect to the proof of citizenship requirement for voter registration, insofar as the Indiana law did not impose such a requirement. In practice, proof of citizenship may be more difficult than obtaining a photo ID, especially insofar as under the S.A.F.E. Act, obtaining a driver’s license (which is a valid photo ID) does not of itself establish citizenship. Media accounts suggest that tens of thousands of voter registrations have been held in suspense because of the proof of citizenship requirements and that the Secretary of State’s office has sought to remove individuals from the list of voters whose registration is held in suspense (which would require them to register again). If accurate, these accounts might suggest that, as applied to some voters, the degree of burden imposed by the proof of citizenship requirement is more severe than the burden imposed by the photo ID requirement in *Crawford*. Nonetheless, it is unclear whether this burden would be severe enough to trigger higher levels of scrutiny.

The same point also applies to the S.A.F.E. Act’s photo ID requirement, if it is more difficult to satisfy than the requirement in *Crawford* or there is more evidence that it prevents some people from voting or otherwise imposes severe burdens on the right to vote. Ultimately, however, the success of any such challenge, even an as-applied challenge, would likely depend on proof that the photo ID requirement imposes a severe burden on some voters.

It should be noted that any effort by the state to require proof of citizenship to register and vote in federal elections would be preempted by the National Voter Registration Act, which requires states to accept registrations using a federal form that does require proof of citizenship, *see Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), but that federal law does not apply to state

elections. The resulting dual system of registration and voting in national and state elections raises some distinctive state law issues, *see Belenky v. Kobach, supra*, which are beyond the scope of the Advisory Committee’s inquiry.

- **Even requirements that neither discriminate on the basis of race nor impose severe burdens may be invalid if they serve illegitimate purposes or are unrelated to the state’s legitimate interests in conducting free and fair elections.**

The Supreme Court’s cases also indicate that even nondiscriminatory laws that do not impose severe burdens may violate equal protection if they serve improper purposes or are unrelated to the state’s legitimate interests in the integrity of elections. Thus, for example, in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966), the Court invalidated a poll tax in a state election, concluding that—even if the burden imposed was minimal—“a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard” because “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” In the context of the S.A.F.E. Act, limiting the franchise to citizens and preventing voter fraud are certainly legitimate purposes and the act’s requirements would appear to be related to them.

Nonetheless, there may be a constitutional problem if those purposes are a pretext for some other, improper goal. First, animus towards a politically unpopular group, if established, would be an illegitimate purpose. Second, and perhaps more pertinent, voter requirements intended to secure partisan political advantage would presumably be invalid. In *Crawford*, for example, the plurality observed that “[i]t is fair to infer that partisan considerations may have played a significant role in the decision” to adopt a photo ID requirement and that “[i]f such considerations had provided the only justification for a photo identification requirement, we may also assume that [it] would suffer the same fate as the poll tax at issue in *Harper*.” 553 U.S. at 203. Nonetheless, the plurality went on to state that “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.” *Id.* at 204. Thus, the plurality concluded that the state interests identified as justifications for the photo ID requirement were “both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute.” *Id.*

As with the other aspects of the *Crawford* decision, this analysis may not be controlling in this case, particularly if there is an as-applied challenge and the evidence of a partisan purpose is stronger.

**Written Testimony of Elle Boatman, Founder and Creative Director of FaceOfTrans.com,
co-Founder of WiTCoN**

I think that the culmination for transgender people regarding the SAFE Act is the rejection they are likely to experience at their polling center, which is ultimately the end result of a number of barriers that trans people face in obtaining accurate, legal identification documents. It can be difficult or even impossible for transgender people to obtain photo ID that accurately reflects their legal/preferred name, gender identity, or even their appearance.

Firstly, the legal process for a trans person changing their name is often intimidating and cost-prohibitive. Even if one does manage to legally change their name, obtaining updated documents can be a nightmare of bureaucratic red tape. In Kansas, updating your name on your license is a two-step process (two trips to court and one to the DMV) and the process for updating your gender is a completely separate process which requires a physician's note. Many trans people in Kansas are unable to access a health care professional willing to provide the required medical documentation. Accurate birth certificates can often be impossible for trans people to obtain as many states severely restrict or do not allow you to update birth certificate information.

An incident in West Virginia was made famous due to DMV clerks denying service to trans women based on their appearance, telling them that they would have to remove any and all makeup and wigs before they would be allowed to be photographed. I personally know a trans woman, my fiancée, who was turned away from her polling place in Wichita because her license photo did not look enough like her.

In short, the SAFE Act has immense potential to put a transgender person in a very uncomfortable and possibly dangerous situation. The trans person is unduly required to "out" themselves to not only the polling official but to everyone within hearing range of the conversation, and they will still most likely be wrongly turned away and unable to vote for all of their trouble

**Kansas Advisory Committee to the
United States Commission on Civil Rights**



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