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Tracey Carter

Belmont University - College of Law

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Post-Crawford: Were Recent Changes to State Voter ID Laws Really Necessary to Prevent Voter Fraud and Protect the Electoral Process?

DR. TRACEY B. CARTER[†]

INTRODUCTION

The right to vote is an important one. All citizens should be able to engage in this constitutional right without barriers. Voter identification (ID) laws require presentation of identification in order to cast a ballot at the polls. Recent changes in state voter ID laws across the country¹ place restrictions on the ability to vote and have been the topic of much debate over the past several years. In fact, “[v]oter ID was the hottest topic of legislation in the field of elections in 2011.”² However, the debate did not end in 2011 as “[v]oter ID continued to be a high-profile issue in many state legislatures” throughout 2012.³

In 2011, Tennessee passed legislation requiring all voters to show a government-issued photo ID in order to cast a ballot at the polls beginning on January 1, 2012.⁴ That same year, states across the country considered and passed what some have termed “voter suppression measures” that make it harder for certain groups of Americans, including the poor, minorities, the elderly, students, and people with disabilities to exercise their fundamental right to vote.⁵

This article discusses the right to vote, recent voter photo ID

[†] Associate Dean for Academic Affairs, Director of Academic Success, and Assistant Professor of Law, Belmont University College of Law; B.A., Virginia Intermont College; J.D., University of Tennessee College of Law; M.P.A. and Ed.D., Tennessee State University. The author wishes to thank Melanie Spaulding, Jay Klein, and the rest of the staff of the *Connecticut Public Interest Law Journal* for their assistance. She also expresses gratitude to her mother, family, and friends for their support.

¹ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188–89 (2008).

² *Voter ID: 2011 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 26, 2012), <http://www.ncsl.org/legislatures-elections/elections/voter-id-2011-legislation.aspx> [Hereinafter *NCSL 2011 Legislation*]. The information is accurate as of the author’s completion of this article.

³ *Voter ID: 2012 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jul. 13, 2012), <http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx> [Hereinafter *NCSL 2012 Legislation*].

⁴ Tenn. Code Ann. § 2-7-112 (West 2012); See also *Photo ID Handout*, TENNESSEE SECRETARY OF STATE: DIVISION OF ELECTIONS, <http://www.tn.gov/sos/election/111031%20Photo%20ID%20Handout.pdf> (last visited Jan. 30, 2013); *Voter Identification Requirements*, TENNESSEE DEPARTMENT OF STATE: ELECTIONS, <http://www.tn.gov/sos/election/photoID.htm> (last visited Jan. 30, 2013); *Voter Photo ID*, TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, <http://www.tn.gov/safety/photoids.shtml> (last visited Jan. 30, 2013).

⁵ *The Battle to Protect the Ballot: Voter Suppression Measures Passed Since 2011*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/maps/battle-protect-ballot-voter-suppression-measures-passed-2011> (last visited Apr. 11, 2013).

requirements implemented by various states, including Tennessee after the *Crawford* decision, and alternatives to strict photo ID laws. Part I presents a historical overview of election laws, the right to vote, and the history of voter ID laws, including a discussion of the U.S. Supreme Court's 2008 *Crawford* decision. Part II provides a general overview of the types of voter ID laws and a summary of the arguments made for and against various voter ID laws, especially strict photo ID laws, included in several studies related to voter ID laws. Part III summarizes state voter ID legislation from 2001 to 2010, reviews proposed and enacted voter ID legislation in 2011, including states that enacted new voter ID laws (i.e., states that did not already require voter ID at the polls) and states that modified their existing voter ID laws by requiring photo ID at the polls. Part III also analyzes various state voter ID laws in effect in 2012 and discusses recent cases decided post-*Crawford* related to photo ID laws. Part IV examines Tennessee's new strict photo ID law, including arguments made for and against passage of the new law. Part IV also compares Tennessee's new strict photo ID law with other state voter ID laws passed post-*Crawford*. In addition, Part IV discusses alternative methods to prevent voter fraud, besides strict photo ID laws, that have been implemented in various states that do not have voter ID laws or that do not require a photo ID to vote.

This article concludes that recent changes to state voter ID laws are permissible, but strict photo ID laws are not necessary to prevent voter fraud and to protect the electoral process. It also concludes that Tennessee did not have to pass a strict photo ID law in order to prevent voter fraud when less restrictive alternative methods could have been utilized.

I. HISTORICAL OVERVIEW OF ELECTION LAWS, THE RIGHT TO VOTE, AND VOTER ID LAWS

The right to vote is “established within the United States Constitution and Supreme Court jurisprudence.”⁶ The history of the right to vote begins with the U.S. Constitution,⁷ but this constitutional right has expanded over the years due to various U.S. Supreme Court decisions including the 2008 *Crawford* decision. In addition, Congress has passed legislation to protect the right to vote and to make the process of voting as easy as possible for voters to select their candidate of choice.

A. Voting Rights and the U.S. Constitution

A review of the articles of the U.S. Constitution show that there are

⁶ Kelly Brilleaux, *The Right, the Test, and the Vote: Evaluating the Reasoning Employed in Crawford v. Marion County Election Board*, 70 LA. L. REV. 1023, 1024 (2010).

⁷ *Id.*

very few explicitly stated voting rights. Article I, Section 1 of the Constitution states that Congress shall “consist of a Senate and House of Representatives.”⁸ Article I, Section 2 states “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁹ Article I, Section 3 of the U.S. Constitution states that “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”¹⁰ In addition, Article I, Section 4 states “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”¹¹ Besides the election of Senators and Representatives for Congress, Article II, Section 1 of the U.S. Constitution “delegates to the states the power to establish the method of selecting electors during a presidential election.”¹² Specifically, Article II, Section 1 states:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.¹³

Besides the aforementioned original articles of the U.S. Constitution, various amendments specifically relate to voting rights, including the Fifteenth Amendment,¹⁴ Nineteenth Amendment,¹⁵ Twenty-Fourth Amendment,¹⁶ and Twenty-Sixth Amendment.¹⁷ The Fifteenth Amendment states “[t]he right of citizens of the United States 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.”¹⁸ The Nineteenth Amendment states “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account

⁸ U.S. CONST. art. I, § 1.

⁹ *Id.* § 2.

¹⁰ *Id.* § 3.

¹¹ *Id.* § 4.

¹² U.S. CONST. art. II, § 1; Brilleaux, *supra* note 6, at 1024.

¹³ U.S. CONST. art. II, § 1, cl. 2.

¹⁴ U.S. CONST. amend. XV.

¹⁵ U.S. CONST. amend. XIX.

¹⁶ U.S. CONST. amend. XXIV.

¹⁷ U.S. CONST. amend. XXVI.

¹⁸ U.S. CONST. amend. XV, § 1.

of sex.”¹⁹ In addition to prohibiting the denial of the right of citizens to vote on the basis of race, color, previous condition of servitude, and sex, there are other constitutional amendments that prohibit denial of the right of citizens to vote on other bases. The Twenty-Fourth Amendment states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.²⁰

Also, the Twenty-Sixth Amendment states “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”²¹ Other amendments to the U.S. Constitution that concern the right to vote include the Seventeenth Amendment²² and Twenty-Third Amendment.²³ Thus, the above mentioned amendments to the U.S. Constitution establish that a citizen’s right to vote cannot be denied on various bases.

Another important constitutional amendment that has been “interpreted to protect United States citizens’ right to vote” is the Equal Protection Clause of the Fourteenth Amendment.²⁴ Section One of the Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.²⁵

Therefore, the Equal Protection Clause of the Fourteenth Amendment provides that all citizens have an equal right to participate in the electoral process.

¹⁹ U.S. CONST. amend. XIX, § 1.

²⁰ U.S. CONST. amend. XXIV, § 1.

²¹ U.S. CONST. amend. XXVI, § 1.

²² U.S. CONST. amend. XVII (discusses the popular election of senators).

²³ U.S. CONST. amend. XXIII (provides that District of Columbia residents have the right to vote in presidential elections).

²⁴ U.S. CONST. amend. XIV; Brilleaux, *supra* note 6, at 1025.

²⁵ U.S. CONST. amend. XIV, § 1.

B. Voting Rights and U.S. Supreme Court Decisions Pre-Crawford

In addition to the constitutional provisions that protect and define voting rights, the U.S. Supreme Court has repeatedly held that the right to vote is a fundamental right protected under the Equal Protection Clause of the Fourteenth Amendment.²⁶ Both historically and in recent years, two key issues regarding the right to vote include laws that deny some citizens the right to vote and laws that dilute the voting power of certain citizens.²⁷ Six restrictions on the ability to vote include poll taxes, property ownership requirements, durational residency requirements, literacy tests, laws preventing convicted felons from voting, and requirements for photo identification for voting.²⁸

1. Poll Taxes

In general, poll taxes require that citizens pay a fee in order to vote. In 1964, the Twenty-Fourth Amendment unequivocally prohibited poll taxes in federal elections.²⁹ Two years later, in *Harper v. Virginia Board of Elections*, the Supreme Court found poll taxes to be an unconstitutional denial of equal protection in state and local elections.³⁰

2. Property Ownership Requirements

In 1969, the Supreme Court held in *Kramer v. Union Free School District* that property ownership requirements for voting were generally unconstitutional.³¹ However, twelve years later, in *Ball v. James*, the Court found an exception to this rule. The Supreme Court upheld property ownership requirements in a local election pertaining to water reclamation district directors where the government required property ownership as a prerequisite for voting.³²

3. Durational Residency Requirements

The Supreme Court has upheld durational residency requirements for voting when the length of the residency requirement has been deemed reasonable. In *Dunn v. Blumstein* (1972), the Supreme Court invalidated a one-year durational residency requirement in Tennessee, finding the requirement to be unconstitutional.³³ However, one year later, the Court “qualified *Dunn v. Blumstein*” and permitted a durational residency

²⁶ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1080 (3d ed. 2009); See Brilleaux, *supra* note 6, at 1025.

²⁷ CHERMERINSKY, *supra* note 26, at 1081.

²⁸ *Id.*

²⁹ See U.S. CONST. amend. XXIV.

³⁰ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 663 (1966).

³¹ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 621 (1969).

³² *Ball v. James*, 451 U.S. 355, 355 (1981).

³³ *Dunn v. Blumstein*, 405 U.S. 330, 330 (1972); CHERMERINSKY, *supra* note 26, at 1078.

requirement of up to fifty days for voting to provide the government with a reasonable amount of time “to check election rolls, prevent fraud, and administer the electoral system.”³⁴

4. Literacy Tests

The U.S. Supreme Court has held that literacy tests do not violate the U.S. Constitution and are therefore “constitutionally permissible as a qualification for voting.”³⁵ In 1915, in *Guinn v. United States*,³⁶ the Supreme Court “upheld the ability of states to require passing a literacy test as a condition for voting,”³⁷ explicitly stating that “[n]o time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted.”³⁸

In 1959, the Supreme Court in *Lassiter v. Northampton County Board of Elections*³⁹ “upheld a North Carolina statute that conditioned voting eligibility on a person’s ability to read and write any section of the Constitution in the English language.”⁴⁰ The Supreme Court stated “[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course discrimination which the Constitution condemns . . . a State might conclude that only those who are literate should exercise the franchise.”⁴¹ Despite literacy tests being declared constitutionally permissible by the U.S. Supreme Court in *Guinn* and *Lassiter*, such tests were later abolished by a federal statute, the Voting Rights Act of 1965 (VRA).⁴²

5. Laws Preventing Convicted Felons from Voting

In *Richardson v. Ramirez* (1974),⁴³ the Supreme Court held that it was constitutional for a state to permanently disenfranchise a convicted felon, including those who have completed their sentences and parole.⁴⁴ In Tennessee, “Article 4, §2 of the Tennessee Constitution provides that the Tennessee legislature may deny the right to vote to persons convicted of ‘infamous’ crimes. Pursuant to this provision in the Tennessee Constitution, the Tennessee legislature has excluded individuals convicted

³⁴ CHEMERINSKY, *supra* note 26, at 1078 (citing *Marston v. Lewis*, 410 U.S. 679, 679 (1973)).

³⁵ *Id.* at 1089.

³⁶ *Guinn v. United States*, 238 U.S. 347, 366 (1915).

³⁷ CHEMERINSKY, *supra* note 26, at 1089.

³⁸ *Id.* (quoting *Guinn*, 238 U.S. at 366).

³⁹ *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 45 (1959).

⁴⁰ CHEMERINSKY, *supra* note 26, at 1089 (citing *Lassiter*, 360 U.S. at 53–54 (1959)).

⁴¹ CHEMERINSKY, *supra* note 26, at 1089; *Lassiter*, 360 U.S. at 50, 52.

⁴² See CHEMERINSKY, *supra* note 26, at 1089.

⁴³ See generally *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁴⁴ *Id.* at 25; CHEMERINSKY, *supra* note 26, at 1090 (citing *Richardson*, 418 U.S. at 24).

of various felonies from the right of suffrage.”⁴⁵ However, some states, including Tennessee, have provisions allowing persons convicted of certain felonies to have their voting rights restored.⁴⁶ Tennessee’s legislature “has also established conditions and procedures through which individuals who have lost their voting rights may regain them. The manner in which a person may restore a lost voting right depends upon the crime committed and the year in which the conviction occurred.”⁴⁷ Tennessee law prohibits the following convicted felons from having their voter rights restored: any felon convicted between July 1, 1986 and June 30, 1996 of first degree murder, aggravated rape, treason, or voter fraud; any felon convicted between July 1, 1996 and June 30, 2006 of murder, rape, treason, or voter fraud; and any felon convicted on or after July 1, 2006 of any of the above named offenses, any degree of murder or rape, violent sexual offenses designated as a felony against a minor, as well as certain other designated serious crimes.⁴⁸ Additionally, in Tennessee, “[a] person is not eligible to apply for a voter registration card and have their voting rights restored unless the person is current in all child support obligations.”⁴⁹ In fact, “[b]efore restoring the voting rights of an applicant, the Coordinator of Elections will verify with the Department of Human Services that the applicant does not have any outstanding child support payments or arrearages.”⁵⁰

However, Tennessee felons convicted of lesser felonies that are not specifically listed may have a Certificate of Restoration of Voting Rights Form submitted on their behalf, requesting restoration of their voting rights.⁵¹ The certification form must be completed by “an agent of the pardoning authority, an agent or officer of the incarcerating authority, or a probation/parole officer or agent of the supervising authority.”⁵² For any felon seeking to have his or her voting rights restored, after completion of the Certificate of Restoration, the original certification form must be filed with the local office in the county where the convicted felon desires to

⁴⁵ *Restore Voting Rights*, TENN. DEPT. OF STATE: ELECTIONS, <http://www.tn.gov/sos/election/restoration.htm> (last visited Jan. 31, 2013).

⁴⁶ *Id.*; See *Certificate of Restoration of Voting Rights Form*, TENNESSEE DEPARTMENT OF STATE: ELECTIONS, <http://www.tn.gov/sos/election/forms/ss-3041.pdf> (last visited Apr. 15, 2013) [hereinafter *Restoration Form*].

⁴⁷ *Restore Voting Rights*, TENN. DEPT. OF STATE: ELECTIONS, <http://www.tn.gov/sos/election/restoration.htm> (last visited Jan. 31, 2013).

⁴⁸ *Restoration Form*, *supra* note 46 (stating that “[p]ersons convicted of any of the following, cannot have his or her voting rights restored . . . On or after July 1, 2006 – Any of the above, or any degree of murder or rape or any felony offense under TCA Title 39, Chapter 16, parts 1, 4, or 5; or any sexual offense under TCA §40-39-202(17) or any violent sexual offense under TCA § 40-39-202(25) designated as a felony and where the victim of such offense was a minor.”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

vote.⁵³

6. Requirements for Photo Identification for Voting

Various voter ID laws across the United States require voters to show some form of ID in order to vote in person at the polls. The Supreme Court has upheld voter identification requirements for voting as constitutional.⁵⁴

7. Standard of Review in Voting Rights Cases

Over the years, the U.S. Supreme Court has applied different standards of review in the voting rights context. For example, the Supreme Court “used strict scrutiny in evaluating poll taxes, property ownership requirements for voting, and durational residency requirements.”⁵⁵ However, the Supreme Court did not use strict scrutiny and upheld restrictions on voting in the areas of literacy tests, prevention of convicted felons from voting, and a requirement for photo identification for voting.⁵⁶

a. Harper v. Virginia Board of Elections

In 1966, the U.S. Supreme Court in *Harper v. Virginia Board of Elections* applied strict scrutiny when considering the constitutionality of a Virginia election law restricting the right to vote.⁵⁷ The Court held that poll taxes were unconstitutional as a denial of equal protection in state and local elections in violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁸

b. Anderson v. Celebrezze

In 1983, the U.S. Supreme Court shifted its analysis away from strict scrutiny when considering the constitutionality of election laws. In *Anderson v. Celebrezze*,⁵⁹ the Supreme Court articulated a balancing standard, as opposed to strict scrutiny, when assessing the constitutionality of election laws being challenged before the Court.⁶⁰ Under *Anderson’s* balancing test, the U.S. Supreme Court must do the following:

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.

⁵³ *Id.*

⁵⁴ See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188–89 (2008).

⁵⁵ CHEMERINSKY, *supra* note 26, at 1081.

⁵⁶ *Id.*

⁵⁷ See Harper v. Va. Bd. of Elections, 383 U.S. 663, 663 (1966); Matthew McGuane, Crawford v. Marion County Election Board: *The Disenfranchised Must Wait*, 64 U. MIAMI L. REV. 713, 714 (2010).

⁵⁸ *Harper*, 383 U.S. at 663.

⁵⁹ Anderson v. Celebrezze, 460 U.S. 780, 780 (1983).

⁶⁰ *Id.* at 780; See McGuane, *supra* note 57, at 715.

It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.⁶¹

c. *Burdick v. Takushi*

In 1992, the Court further clarified its standard when evaluating the constitutionality of challenged election laws.⁶² In *Burdick v. Takushi*,⁶³ the Supreme Court “adopted and clarified Anderson’s balancing test and pronounced that ‘[e]lection laws will invariably impose some burden upon individual voters’ and ‘to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.’”⁶⁴ In *Burdick*, the Supreme Court “moved away from *Harper*’s notion that strict scrutiny must be applied whenever a state election law burdens the right to vote and adopted a balancing test weighing the burden imposed by the election law against the State’s interest in enacting it.”⁶⁵

C. *U.S. Congressional Acts and Voting*

At various times, Congress has passed landmark national legislation in order to correct problems identified with voting practices and procedures throughout the United States. Such legislation includes the Voting Rights Act of 1965, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, Help America Vote Act of 2002, and the Military and Overseas Voter Empowerment Act of 2009.

1. *The Voting Rights Act of 1965*

The Voting Rights Act of 1965 (VRA)⁶⁶ is the federal statute that abolished literacy tests as a restriction on the right to vote.⁶⁷ The Act forbids states from imposing any “voting qualification or prerequisite to voting, or standard, practice, or procedure . . . [to deny or abridge] . . . the right of any citizen of the United States to vote on account of race or color.”⁶⁸ The VRA’s language parallels the wording of the Fifteenth Amendment, which states that “[t]he right of citizens of the United States

⁶¹ McGuane, *supra* note 57, at 715 n.14 (quoting *Anderson*, 460 U.S. at 789).

⁶² *Id.* at 715.

⁶³ See generally *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁶⁴ McGuane, *supra* note 57, at 715 (quoting *Burdick*, 504 U.S. at 433).

⁶⁵ McGuane, *supra* note 57, at 715.

⁶⁶ Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6(2006).

⁶⁷ CHEMERINSKY, *supra* note 26, at 1089.

⁶⁸ Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2006).

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.”⁶⁹

Under Section 5 of the Voting Rights Act, the Department of Justice (DOJ) has substantial authority to review and approve or deny state voter ID laws before they are actually implemented if a state is a “covered jurisdiction.”⁷⁰ Covered jurisdictions must prove that changes to voter laws “will not have a discriminatory impact on minority voters.”⁷¹ Moreover, “[i]n states not covered by Section 5, DOJ can exercise vigilance in overseeing whether these laws are implemented in a way that discriminates against protected classes in violation of Section 2 of the Voting Rights Act.”⁷²

2. *Uniformed and Overseas Citizens Absentee Voting Act of 1986*

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), first enacted by Congress in 1986, is a federal statute that entitles certain U.S. citizens to register and vote by absentee ballot in federal elections.⁷³ The Director of the Federal Voting Assistance Program (FVAP) is responsible for administering the UOCAVA on behalf of the Secretary of Defense.⁷⁴ UOCAVA requires that states and territories allow absentee voting for uniformed service voters as well as overseas voters in

⁶⁹ U.S. CONST. amend. XV, § 1.

⁷⁰ *Bennet Urges DOJ to Review Voter ID Laws*, UNITED STATES SENATE DEMOCRATS, (June 29, 2011), <http://democrats.senate.gov/2011/06/29/bennet-urges-doj-to-review-voter-id-laws/>; *See Section 4 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Feb. 22, 2013) (noting that “[w]hen Congress enacted the Voting Rights Act of 1965, it determined that racial discrimination in voting had been more prevalent in certain areas of the country.” Therefore, certain states have to receive approval prior to voting changes taking place.); *See About Section 5 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Feb. 22, 2013) (stating that “Section 5 freezes election practices or procedures in certain states until the new procedures have been subjected to review, either after an administrative review by the United States Attorney General, or after a lawsuit before the United States District Court for the District of Columbia. This means that voting changes in covered jurisdictions may not be used until that review has been obtained.”); *See About Section 5 Covered Jurisdictions*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Feb. 22, 2013) (In terms of “covered jurisdictions,” the DOJ’s website lists “States Covered as a Whole” as Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. “Covered Counties in States Not Covered as a Whole” include certain counties in California, Florida, New York, North Carolina, and South Dakota. “Covered Townships in States Not Covered as a Whole” include certain townships in Michigan and New Hampshire).

⁷¹ UNITED STATES SENATE DEMOCRATS, *supra* note 70.

⁷² *Id.*

⁷³ The Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff *et seq.* (2006), available at <http://www.fvap.gov/resources/media/uocavalaw.pdf> (last visited Feb 13, 2013); *About FVAP*, FED. VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/global/index.html> (last visited July 19, 2012); *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/activ_uoc.php (last visited July 19, 2012).

⁷⁴ FED. VOTING ASSISTANCE PROGRAM, *supra* note 73.

elections for federal office.⁷⁵ The specific voters that the UOCAVA applies to includes “[m]embers of the Uniformed Services (including Army, Navy, Air Force, Marine Corps, Coast Guard, Merchant Marine), Commissioned Corps of the Public Health Service, and Commissioned Corps of the National Oceanic and Atmospheric Administration, Eligible family members of the above,” and “U.S. citizens employed by the Federal Government residing outside the U.S., and all other private U.S. citizens residing outside the U.S.”⁷⁶ In general, the UOCAVA “provides the legal basis for absentee voting requirements for these citizens.”⁷⁷

3. National Voter Registration Act of 1993

The National Voter Registration Act of 1993 (NVRA)⁷⁸ made it “necessary for States to reexamine” and modernize their election procedures.⁷⁹ In NVRA, “Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process.”⁸⁰ Specifically, NVRA requires state motor vehicle driver’s license applications to additionally “serve as voter registration applications.”⁸¹ In addition to UOCAVA, the Director of the Federal Voting Assistance Program (FVAP) is also responsible for administering the “[f]ederal responsibilities of the National Voter Registration Act (NVRA), which designates armed forces recruiting offices nationwide as voter registration agencies allowing eligible U.S. citizens to apply for voter registration, or apply to change voter registration data.”⁸²

4. Help America Vote Act of 2002

Almost a decade after the NVRA, Congress enacted another federal statute requiring states to modernize their election procedures. Congress’ 2002 federal Help America Vote Act (HAVA) requires “every State to create and maintain a computerized statewide list of all registered voters.”⁸³ HAVA also mandates “the States to verify voter information

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *The Uniformed and Overseas Citizens Absentee Voting Act Overview*, FED. VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/reference/laws/uocava.html> (last visited Feb. 2, 2013).

⁷⁸ National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq* (2006).

⁷⁹ *Id.*; *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 192 (2008).

⁸⁰ *See Crawford*, 553 U.S. at 192 (citing the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg (2006)); U.S. ELECTION ASSISTANCE COMM’N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009–2010: A REPORT TO THE 112TH CONGRESS (2011), *available at* www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf.

⁸¹ *See Crawford*, 553 U.S. at 192 (citing the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg–3(a)(1)(1981)).

⁸² FED. VOTING ASSISTANCE PROGRAM, *supra* note 73.

⁸³ *Crawford*, 553 U.S. at 192 (citing 42 U.S.C. § 15483(a) (2000 ed., Supp. V)); *See Help America Vote Act of 2002*, 42 U.S.C. § 15483(a)(2006).

contained in a voter registration application and specifies either an ‘applicant’s driver’s license number’ or ‘the last 4 digits of the applicant’s social security number’ as acceptable verifications.”⁸⁴ If an applicant “has neither number, the State is required to assign the applicant a voter identification number.”⁸⁵

HAVA also imposes photo or non-photo ID requirements for first time voters in federal elections who register and submit their applications by mail.⁸⁶ Pursuant to HAVA, to vote in person at the polls, a voter must “present local election officials with written identification, which may be either ‘a current and valid photo identification’ or another form of documentation such as a bank statement or paycheck.”⁸⁷ HAVA requires absentee voters to “include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver’s license number or Social Security number for verification.”⁸⁸ Finally, recognizing that some voters may be challenged when attempting to vote, HAVA has a “Fail-Safe Voting” provision, allowing challenged voters to cast provisional ballots.⁸⁹

5. *Military and Overseas Voter Empowerment Act of 2009*

The Military and Overseas Voter Empowerment Act (MOVE) is a federal law signed by President Obama on October 28, 2009, which amends UOCAVA and modifies other statutes.⁹⁰ In 2009, MOVE, as a subtitle of the National Defense Authorization Act for Fiscal Year 2010, “amended UOCAVA to establish new voter registration and absentee ballot procedures which states must follow in all federal elections.”⁹¹ In fact, “UOCAVA was expanded significantly in 2009, when Congress passed the Military and Overseas Voter Empowerment (MOVE) Act to provide greater protections for service members, their families and other overseas citizens.”⁹² The MOVE Act “requires states to transmit validly-requested absentee ballots to UOCAVA voters no later than 45 days before a federal election, when the request has been received by that date, except where the state has been granted an undue hardship waiver approved by the

⁸⁴ *Crawford*, 553 U.S. at 192; *See* Help America Vote Act, 42 U.S.C. § 15483(a)(5)(A)(i) (2006).

⁸⁵ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.128, 181 (2008); *See* Help America Vote Act, 42 U.S.C. § 15483(a)(5)(A)(ii)(2006).

⁸⁶ *Crawford*, 553 U.S. at 193; *See* Help America Vote Act, 42 U.S.C. § 15483(b) (2006).

⁸⁷ *Crawford*, 553 U.S. at 193; *See* Help America Vote Act, 42 U.S.C. §15483(b)(2)(A) (2006).

⁸⁸ *Crawford*, 553 U.S. at 193; *See* Help America Vote Act, 42 U.S.C. § 15483(b)(3) (2006).

⁸⁹ *Crawford*, 553 U.S. 193; *See* Help America Vote Act, 42 U.S.C. § 15483(b)(2)(B) (2006).

⁹⁰ FED. VOTING ASSISTANCE PROGRAM, *supra* note 77. *See The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/42usc/subch_ig2.php (last visited July 19, 2012);

⁹¹ *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/active_uoc.php (last visited Apr. 15, 2012).

⁹² *Fact Sheet: Move Act*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/opa/pr/2010/October/10-crt-1212.html> (last visited Feb. 22, 2013).

Department of Defense for that election.”⁹³ The DOJ enforces the MOVE Act and ensured that all military and overseas voters were able to exercise their right to vote in the 2010 federal election.⁹⁴

D. Voting Rights and the U.S. Supreme Court Decision in Crawford

Despite the precedent noted in Part I(B) above, there are certain areas related to voting rights wherein the U.S. Supreme Court has found that strict scrutiny is an inappropriate test, upholding restrictions on voting, including photo identification requirements. Such photo ID requirements were upheld by the Supreme Court in *Crawford v. Marion County Election Board*.⁹⁵

In *Crawford*, the Court considered the constitutionality of Indiana’s photo ID requirements.⁹⁶ The Supreme Court measured the severity of the burden that Indiana’s photo ID law imposed on voters and whether it was justified by “relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”⁹⁷ The Court then analyzed the constitutionality of Indiana’s photo ID statute by focusing on the state’s interests to justify the burdens that its photo ID law imposed both on actual and potential voters.⁹⁸ The three major arguments articulated by Indiana in support of the photo ID requirements were to modernize election procedures, to prevent and detect in-person voter fraud, and to safeguard voter confidence in the integrity of the electoral process.⁹⁹ In a 6-3 decision, the Court upheld the facial validity of the Indiana law.¹⁰⁰ There was a plurality decision, but no majority opinion, in the *Crawford* case.¹⁰¹ The Court ruled that “‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in *Harper*.”¹⁰² Six of the Supreme Court Justices voted to allow the photo identification requirement based upon the interests articulated by Indiana, but these six Justices used different tests in upholding the photo ID law.¹⁰³ Three Justices used a balancing test.¹⁰⁴

Justice Stevens, who wrote the opinion, was joined by Chief Justice

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 188–89 (2008).

⁹⁶ *Id.* at 181.

⁹⁷ *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

⁹⁸ *Id.* at 191.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 183, 188–89.

¹⁰¹ *Crawford*, 553 U.S. at 183.

¹⁰² *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)) (internal citations omitted).

¹⁰³ *Id.* at 181–83.

¹⁰⁴ *Id.* at 209, 237 (Souter, J. and Ginsberg, J., dissenting; Breyer, J., dissenting).

Roberts and Justice Kennedy.¹⁰⁵ These three justices used a balancing test that weighed the state's interests against the burden imposed by the restriction and found that the state's interests were neutral and strong enough to uphold the constitutionality of the Indiana statute.¹⁰⁶

Justice Scalia, joined by Justices Thomas and Alito, concurred in the *Crawford* judgment but instead looked at whether there was a severe restriction on the right to vote.¹⁰⁷ In finding the law constitutional, they argued that a law such as Indiana's should be upheld unless it severely restricts the right to vote.¹⁰⁸ Justices Souter, Ginsburg, and Breyer dissented, arguing that the plurality struck the wrong balance because there would be a great burden on some voters. There was no evidence of in-person voter impersonation fraud at the polls ever being a problem in Indiana's history, and there was no evidence that Indiana's law would fix the perceived problem of voter fraud.¹⁰⁹ Thus, the dissenters held that the burden on certain voters was great and that Indiana's law was unconstitutional under the balancing standard articulated in Supreme Court precedent.¹¹⁰

II. GENERAL OVERVIEW OF STATE VOTER ID LAWS

The controversial *Bush v. Gore* case¹¹¹ became pivotal in election law jurisprudence in 2000.¹¹² In December 2000, the Supreme Court held that the ongoing ballot recount in certain Florida counties was unconstitutional.¹¹³ The opinion decided the outcome of the presidential election in favor of former Texas Governor George W. Bush against Vice President Al Gore, Jr.¹¹⁴ The Supreme Court also held that individual citizens have "no federal constitutional right to vote for electors for the President of the United States."¹¹⁵ Following the presidential election in which George W. Bush won Florida by a slim margin, there was a public outcry for overhauling the electoral process and passage of new voting measures. Such measures included the enactment of HAVA in 2002 at the

¹⁰⁵ *Id.* at 185.

¹⁰⁶ *Id.* at 190, 204.

¹⁰⁷ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 204 (2008).

¹⁰⁸ *Id.* at 209.

¹⁰⁹ *See id.* at 209–41 (Souter, J. and Ginsberg, J., dissenting; Breyer, J., dissenting).

¹¹⁰ *Id.* at 237 (Souter, J. and Ginsberg, J., dissenting; Breyer, J., dissenting).

¹¹¹ *See generally* *Bush v. Gore*, 531 U.S. 98 (2000).

¹¹² Sara N. D'Agostini, *Voter Identification Laws: The Past, the Present, and the Unpredictable Future*, 86 U. DET. MERCY L. REV. 579, 580 (2009) (stating that "The 2000 presidential election shook America's confidence in the legitimacy of its electoral system unlike any other ordeal 'in living memory' . . . The effect of the 2000 presidential election crisis is measurable.").

¹¹³ *Bush*, 531 U.S. at 98.

¹¹⁴ *Id.* at 144 (Ginsberg, J., dissenting).

¹¹⁵ *Id.* at 104.

federal level.¹¹⁶

A. Overview of the Types of Voter ID Laws

State legislatures throughout the United States have passed numerous voter ID laws over the last decade. Voter ID laws are generally categorized as strict photo ID, photo ID, or non-photo ID.¹¹⁷

1. Strict Photo ID Laws

In states that have “strict photo ID” laws, voters are required to present a photo ID to cast a ballot at the polls.¹¹⁸ A voter who cannot meet this ID requirement at the polls is allowed to cast a provisional ballot, which is only counted if the voter returns to election officials shortly after the election to show a photo ID.¹¹⁹

2. Photo ID Laws

State voter “photo ID” laws ask voters to present a photo ID to cast a ballot at the polls.¹²⁰ A voter who is unable to show the requested photo ID is given other options and is still permitted to cast a ballot if the voter meets certain other criteria, varying by state.¹²¹ In certain states, a poll worker can vouch for a voter without an ID if they personally know the voter.¹²² In other states, a voter without an ID may be asked to sign an affidavit of his or her identity.¹²³ In photo ID states, voters without an ID at the polls are not obligated to return to election officials within a few days after the election and show a photo ID for their ballots to be counted.¹²⁴

3. Non-Photo ID Laws

In states that have “non-photo ID” laws, voters are simply required to

¹¹⁶ See Help America Vote Act of 2002, 42 U.S.C. § 15483(2006); See also D’Agostini, *supra* note 112, at 581 (containing a section titled “Congressional Response to the 2000 Presidential Election Crisis: The Help America Vote Act of 2002.”).

¹¹⁷ *Voter ID: State Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (May 22, 2012), <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> [Hereinafter *NCSL State Requirements: May 22, 2012*]; See also *Voter ID: State Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Oct. 24, 2012), <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> [Hereinafter *NCSL State Requirements Oct. 24, 2012*].

¹¹⁸ *NCSL State Requirement: May 22, 2012*, *supra* note 117.

¹¹⁹ *Id.* The voter would need to return to election officials within a few days to confirm their identity.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *NCSL State Requirements: May 22, 2012*, *supra* note 117.

¹²⁴ *Id.*

present an ID to cast a ballot at the polls.¹²⁵ Acceptable IDs vary by state and include options that do not require a photo of the voter, such as a current utility bill, bank statement, or paycheck that contains the voter's name and address.¹²⁶

B. Arguments For and Against Photo ID Laws

1. Proponents of Photo ID Laws

Proponents of state voter photo ID laws have articulated various arguments to support their position. For the most part, these arguments fall in line with the three major arguments cited by Indiana and upheld by the *Crawford* Court. As previously noted, Indiana cited the goals of election modernization, prevention of voter fraud, and safeguarding voter confidence as the primary state interests in enacting the state's strict photo ID law, which the Supreme Court upheld as constitutional in *Crawford*.¹²⁷ States passing voter ID laws consistently cite these same arguments in support of their state's photo ID law. Supporters contend that voter ID laws are essential in preventing voter fraud and protecting public confidence in the integrity of the electoral process.¹²⁸

Proponents of voter ID laws often reference the 2005 Commission on Federal Election Reform, also known as the "Carter-Baker Commission,"¹²⁹ which was cited by the *Crawford* Court.¹³⁰ The Commission was co-chaired by former Democratic President Jimmy Carter and former Republican Secretary of State James Baker.¹³¹ In September 2005, the Commission issued a report containing eighty-seven recommendations, including a proposal that voters be required to produce a photo ID card as a prerequisite to voting.¹³² Although the Commission was bipartisan, research has shown that voter ID laws are often supported along

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 188–89 (2008).

¹²⁸ Associated Press, *Supreme Court upholds voter ID law*, NBC NEWS (Apr. 28, 2008), <http://www.msnbc.msn.com/id/24351798/ns/politics/t/supreme-court-upholds-voter-id-law> (stating that Indiana's law "is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process,' Justice John Paul Stevens said in an opinion that was joined by Chief Justice John Roberts and Anthony Kennedy."); See Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 185–86 (2009) (stating that "Proponents argue that ID laws are necessary to prevent voter fraud and restore public confidence in elections."); *Fox News Poll: Most Voters Think Voter ID Laws Are Necessary*, FOX NEWS (Apr. 18, 2012), <http://www.foxnews.com/politics/interactive/2012/04/18/fox-news-poll-most-think-voter-id-laws-are-necessary> (Fox News Survey stated that "Supporters of these laws [i.e., federally-issued photo identification] say they are necessary to stop ineligible people from voting illegally.").

¹²⁹ Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

¹³⁰ *Crawford*, 553 U.S. at 193–94.

¹³¹ Overton, *supra* note 129, at 633.

¹³² *Id.*

party lines, with most Republicans supporting voter ID laws.¹³³

2. Opponents of Photo ID Laws

In the *Crawford* decision, Justices Souter and Ginsburg found that “Indiana’s ‘Voter ID Law’ threatens to impose nontrivial burdens on the voting right of tens of thousands of the State’s citizens,” “a significant percentage of those individuals are likely to be deterred from voting,” and “[t]he statute is unconstitutional under the balancing standard of *Burdick v. Takushi*.”¹³⁴ In addition, the dissenters in *Crawford* found that Indiana’s voter ID law threatened to impose serious burdens on the right to vote for a significant number of voters.¹³⁵

Democrats and civil rights groups often oppose voter ID laws, stating that such laws “deter poor, older and minority voters from casting ballots.”¹³⁶ Researchers have found that voter ID laws actually disenfranchise certain groups of citizens, including the poor, the elderly, the disabled, college students, and minorities; such laws are unnecessary because in-person voter fraud is rare.¹³⁷ In fact, various studies have shown that “actual voter fraud is extraordinarily rare” and that “Americans are more likely to be struck by lightning than to commit voter fraud.”¹³⁸

In addition, similar to the dissenters in *Crawford*, other researchers have concluded that the state’s interest in preventing voter fraud is outweighed by the burden on millions of disenfranchised voters and that voter ID laws should be declared unconstitutional.¹³⁹ Another researcher

¹³³ Associated Press, *supra* note 128 (stating that based on the *Crawford* ruling that “states can require voters to produce photo identification without violating their constitutional rights, validating Republican-inspired voter ID laws.”).

¹³⁴ *Crawford*, 553 U.S. at 209 (Souter, J., and Ginsburg, J., dissenting) (internal citations omitted).

¹³⁵ *Id.* at 209, 237.

¹³⁶ Associated Press, *supra* note 128.

¹³⁷ See de Alth, *supra* note 128, at 186 (stating that “[o]pponents answer that these laws disenfranchise the poor, minorities, and the elderly and are unnecessary because voter impersonation fraud is rare.”); See McGuane, *supra* note 57, at 730; See also Overton, *supra* note 129, at 681 (finding that “[e]xisting data suggests that a photo-identification requirement would disenfranchise twenty million Americans while deterring minimal voter fraud.”); See also Jonathan Brater, *The Past is not Past: Why We Still Need Section 5 of the Voting Rights Act*, BOSTON REVIEW (Feb. 7, 2012), http://www.bostonreview.net/BR37.1/jonathan_brater_voting_rights_laws_south_carolina. (stating that “[l]aws restricting voting rights threaten to disenfranchise up to 5 million American citizens in 2012.”).

¹³⁸ Wendy Weiser & Vishal Agraharkar, *Ballot Security and Voter Suppression: Information Citizens Should Know*, BRENNAN CENTER FOR JUSTICE 1 n.1 (2010), http://brennan.3cdn.net/e2d20eec819018aa49_xpm6iixd.pdf (last accessed Apr. 15, 2013) (citing Justin Levitt, *The Truth About “Voter Fraud,”* BRENNAN CENTER FOR JUSTICE 3, 23 (2007), http://www.brennancenter.org/page/-/download_file_38347.pdf (wherein “various studies of voter fraud in Missouri, New Jersey, and Wisconsin revealed voter fraud rates of 0.0003%, 0.0004%, and 0.0002%, respectively.”)).

¹³⁹ See de Alth, *supra* note 128, at 186 (finding that “[g]iven the scant existing evidence of voter impersonation fraud, this research suggests that the state’s interest in preventing fraud is outweighed by the burden on millions of voters, and that voter ID laws are therefore unconstitutional.”); David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 487 (2008) (concluding that “photo ID laws are unconstitutional.”).

concluded that *Crawford's* photo ID requirement creates the potential for states to pass restrictive and burdensome elections laws intentionally designed to skew election results.¹⁴⁰ Also, opponents have argued that photo ID “laws are unnecessary and mostly discourage legal voters from voting.”¹⁴¹ Spencer Overton, who served on the Carter-Baker Commission, dissented to the commission’s photo ID proposal.¹⁴² Overton concluded that empirical data is imperative for a true cost-benefit analysis of various types of election regulations.¹⁴³ Researchers have also found that implementing photo ID requirements is costly, and states should consider the fiscal implications of enacting strict voting requirements during such tough economic times.¹⁴⁴

Moreover, others argue that various states across the United States, including Tennessee, passed “voter suppression measures” that make it especially difficult for African-Americans, the elderly, students, and people with disabilities, to participate in the democratic process by freely exercising their constitutional right to vote.¹⁴⁵ In fact, although “[t]here is

¹⁴⁰ McGuane, *supra* note 57, at 714, 733; *See also* Associated Press, *supra* note 128 (stating in regards to the photo ID law considered in the *Crawford* case that “[d]emocrats and civil rights groups opposed the law as unconstitutional and called it a thinly veiled effort to discourage elderly, poor and minority voters — those most likely to lack proper ID and who tend to vote for Democrats.”); *See also* Overton, *supra* note 129, at 680 (arguing that other “antifraud measures pose little risk of discouraging legitimate voter participation and are less likely than photo-identification requirements to improperly skew election outcomes.”).

¹⁴¹ *Fox News Poll*, *supra* note 128.

¹⁴² Overton, *supra* note 129, at 633.

¹⁴³ *Id.* at 634; *See also* de Alth, *supra* note 128, at 186 (finding that quantifying a voter ID law’s effect on deterring voting “requires reliable empirical analysis, yet “[w]hat has been missing from this debate . . . is any data that could give a sense of the scope of either the problem of fraud or the potential for disenfranchisement.”” (citing Stephen Ansolabehere, *Ballot Bonanza: The First Big Survey of Voter ID Requirements—And Its Surprising Findings*, SLATE (Mar. 16, 2007), <http://www.slate.com/id/2161928>)).

¹⁴⁴ Vishal Agraharkar, Wendy Weiser, & Adam Skaggs, *The Cost of Voter ID Laws: What the Courts Say*, BRENNAN CENTER FOR JUSTICE 1–2 (Feb. 17, 2011), http://brennan.3cdn.net/2f0860fb73fd559359_zzm6bhnd.pdf (stating that “[a] fiscal note prepared in conjunction with a proposed photo ID law in Missouri estimated a cost of \$6 million for the first year in which the law was to be in effect, followed by recurring costs of approximately \$4 million per year.” Also, Indiana estimated the costs of its photo ID law and “found that, to provide more than 168,000 IDs to voters, the total production costs, including man-power, transaction time and manufacturing was in excess of \$1.3 million, with an additional revenue loss of nearly \$2.2 million. That estimate apparently did not include a variety of necessary costs, including the costs of training and voter education and outreach.” In addition, “[a] fiscal note assessing an ID bill in Minnesota estimated at least \$250,000 for the manufacturing costs of providing free ID at only 90 locations across the state, the costs of one training conference for county auditors, and some administrative costs. The estimate included neither the costs of outreach and education, nor any of the significant costs that would be borne by local governments. The note estimated an additional cost of \$536,000 per election if each precinct hired just one additional election judge.”) (internal quotation marks omitted).

¹⁴⁵ Brater, *supra* note 137 (stating that “[i]f the United States awarded medals for voter suppression, South Carolina would compete for the gold. In the last two years, South Carolina has debated and approved numerous laws that would cripple the ability of minority voters to participate.”); *The Battle to Protect the Ballot*, *supra* note 5; *See* Weiser & Agraharkar, *supra* note 138, at 1 (stating that “[f]ar too often, however, ballot security initiatives have the effect of suppressing eligible votes, either inadvertently or through outright interference with voting rights.”).

nothing intrinsically wrong with investigating and preventing voter fraud,” “democracy suffers when anti-fraud initiatives block or create unnecessary hurdles for eligible voters; when they target voters based on race, ethnicity, or other impermissible characteristics; when they cause voter intimidation and confusion; and when they disrupt the voting process.”¹⁴⁶

Additional arguments against strict photo ID requirements include the fact that many Americans lack proper identification or documentation, such as a birth certificate, to get a government-issued photo ID, so such voters would not be able to cast a ballot on Election Day.¹⁴⁷ The Brennan Center for Justice at NYU School of Law sponsored a national survey in November 2006, which revealed that: (1) seven percent of U.S. citizens (roughly thirteen million Americans) do not have readily accessible citizenship documents such as U.S. passports, naturalization papers, or birth certificates; (2) American citizens whose income is less than \$25,000 per year are greater than twice as likely to lack readily accessible documentation to prove their citizenship as compared to persons with annual incomes higher than \$25,000, which accounts for twelve percent of voting-age American citizens whose income is less than \$25,000 per year; (3) as many as thirty-two million women do not have proof of citizenship documents that reflect their current name; (4) as many as eleven percent of United States citizens or more than twenty-one million American citizens do not possess a current, unexpired government-issued photo ID such as a driver’s license or military ID; (5) certain groups, especially American citizens earning less than \$35,000 per year, elderly citizens, and minority citizens disproportionately lack photo identification and are less likely to possess government-issued photo identification as compared to the general population; and (6) roughly 4.5 million younger citizens between the ages of 18 and 24 with current, valid government-issued photo IDs do not have a photo ID with both their current address and their current legal name.¹⁴⁸ Therefore, the percentage of voters without a government issued ID “is higher among seniors, racial minorities, low-income voters and students.”¹⁴⁹

¹⁴⁶ Weiser & Agraharkar, *supra* note 138, at 1.

¹⁴⁷ *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/page/-/download_file_39242.pdf (last accessed Apr. 15, 2013).

¹⁴⁸ *Id.*; See also UNITED STATES SENATE DEMOCRATS, *supra* note 70 (stating that studies have also found that “as high as 11 percent of eligible voters nationwide do not have a government-issued ID.”).

¹⁴⁹ UNITED STATES SENATE DEMOCRATS, *supra* note 70 (stating that the percentage of voters without a government issued ID “is higher among seniors, racial minorities, low-income voters and students.”); See also BRENNAN CENTER FOR JUSTICE, *supra* note 147.

III. SUMMARY OF STATE VOTER ID LEGISLATION FROM 2001–2012

A. State Voter ID Legislation from 2001–2010

The National Conference of State Legislatures tracks and maintains current information as it relates to state voter ID requirements.¹⁵⁰ During the past eleven years, state legislatures throughout the United States have been debating voter ID legislation.¹⁵¹ In fact, “[v]oter ID has been a hot topic in state legislatures over the past decade.”¹⁵² Specifically, “[s]ince 2001, nearly 1,000 [voter ID] bills have been introduced in a total of 46 states.”¹⁵³ This figure clearly demonstrates that there has been an increasing discussion about voter ID laws in state legislators over the last decade.

Research shows that between 2003 and 2011, twenty-one states passed major voter ID laws.¹⁵⁴ In 2003, new voter ID laws were passed in Alabama, Colorado, Montana, North Dakota, and South Dakota.¹⁵⁵ In 2005, new voter ID laws were passed in Indiana, New Mexico, and Washington.¹⁵⁶ That same year, Georgia modified its existing voter ID law by imposing a photo ID requirement on voters.¹⁵⁷ A year later, a new voter ID law was passed in Ohio.¹⁵⁸ Also in 2006, Georgia “passed a law providing for the issuance of voter ID cards at no cost to registered voters who do not have a driver’s license or state-issued ID card,” whereas “Missouri tightened an existing voter ID law to require photo ID.”¹⁵⁹ As of 2008, “New Mexico relaxed an existing voter ID law, and now allows a voter to satisfy the ID requirement by stating his/her name, address as registered, and year of birth.”¹⁶⁰ In 2009 and 2010, Utah and Idaho, respectively, passed new voter ID laws.¹⁶¹ In 2010, “Oklahoma voters approved a voter ID proposal placed on the ballot by the Legislature.”¹⁶²

¹⁵⁰ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *NCSL State Requirements: May 22, 2012*, *supra* note 117.

¹⁵⁵ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

¹⁶² *Id.*

B. State Voter ID Legislation in 2011

In 2011, the Brennan Center published a comprehensive report of state legislative actions during that year related to voting rights, “focusing on new laws as well as state legislation that has not yet passed or that failed.”¹⁶³ Moreover, the National Conference of State Legislatures also reported similar voter ID information for 2011.¹⁶⁴ Voter ID legislation was a hot button issue in the field of election law throughout 2011:¹⁶⁵ voter ID legislation was introduced in thirty four states in 2011.¹⁶⁶ Only Oregon, Vermont, and Wyoming “didn’t have a voter ID law and didn’t consider voter ID legislation that year [in 2011].”¹⁶⁷ In general, voter ID legislation considered in 2011 fell into the following two categories: (1) state proposals for new voter ID laws and (2) state proposals to strengthen or tighten existing voter ID laws to require a photo ID at the polls.¹⁶⁸

1. State Proposals for New Voter ID Laws

Regarding state proposals for new voter ID laws, this category included “proposals for new voter ID laws in states that didn’t already require voter ID at the polls” prior to 2011, which proposed legislation was considered by twenty states.¹⁶⁹ Of these twenty states with new voter ID proposals, only three state legislatures enacted the proposed new voter ID requirements in their respective states.¹⁷⁰ In terms of the other seventeen states with new voter ID proposals, their voter ID bills fell into the following four categories: (1) failed, (2) failed but voters approved a citizen initiative proposing a voter ID law on the November 2011 ballot, (3) vetoed by governors, and (4) adjourned and/or carried over to the 2012 legislative session.¹⁷¹

a. New Voter ID Proposals that Failed

Of the twenty states with new voter ID proposals, such proposals failed

¹⁶³ Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CENTER FOR JUSTICE 1 (Oct. 3, 2011), http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf.

¹⁶⁴ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

¹⁶⁵ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

¹⁶⁶ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *See also* Weiser & Norden, *supra* note 163.

¹⁶⁷ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

¹⁶⁸ *NCSL State Requirements*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

¹⁶⁹ *NCSL State Requirements*, *supra* note 117; *See NCSL 2011 Legislation*, *supra* note 2. These states included California, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, West Virginia, and Wisconsin.

¹⁷⁰ *NCSL 2011 Legislation*, *supra* note 2.

¹⁷¹ *Id.*

in six states.¹⁷²

b. New Voter ID Proposal that Failed but Citizen Initiative Proposed a Voter ID Law

In Mississippi, there were various new voter ID proposals considered by the legislature, but all of the proposed bills failed.¹⁷³ However, in November 2011, Mississippi voters “approved a citizen initiative proposing voter ID in November 2011.”¹⁷⁴ Mississippi was the only state that fell within this category in 2011.¹⁷⁵

c. New Voter ID Proposals Vetoed by Governors

Out of the twenty states, new voter ID proposals were vetoed by governors in Minnesota, New Hampshire, and North Carolina.¹⁷⁶

d. New Voter ID Proposals Adjourned and/or Carried Over to the 2012 Legislative Session

New voter ID proposals were adjourned and/or carried over to the 2012 legislative session in seven of the twenty states considering new voter ID proposals in 2011.¹⁷⁷

e. New Voter ID Proposals Enacted

Of the twenty states that considered new voter ID proposals in 2011, only Kansas, Rhode Island, and Wisconsin actually enacted the proposed new voter ID requirements in the same year.¹⁷⁸

2. State Proposals for New Photo ID Laws

Regarding states modifying their existing voter ID laws in 2011 to require a photo ID at the polls, this category included “proposals to strengthen existing voter ID requirements in order to require *photo* ID at the polls.”¹⁷⁹ As of January 2011, twenty-seven states had non-photo ID laws in place in order to vote at the polls.¹⁸⁰ In fact, Georgia and Indiana were the only two states with strict photo ID laws in effect at the beginning

¹⁷² *Id.* These proposals failed in California, Maryland, Nevada, New Jersey, New Mexico, and West Virginia.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (The National Conference of State Legislatures stated that “voters approved a citizen initiative on the Nov. 8 ballot.”).

¹⁷⁵ *NCSL 2011 Legislation, supra* note 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* These states were Illinois, Iowa, Maine, Massachusetts, Nebraska, New York, and Pennsylvania.

¹⁷⁸ *Id.*

¹⁷⁹ *NCSL State Requirements: May 22, 2012, supra* note 117; *NCSL State Requirements: Oct. 24, 2012, supra* note 117; *NCSL 2011 Legislation, supra* note 2 (emphasis in original).

¹⁸⁰ *NCSL 2011 Legislation, supra* note 2.

of 2011.¹⁸¹

Fourteen of the twenty seven states with non-photo ID laws considered new photo voter ID proposals in 2011.¹⁸² Of the fourteen states with new photo ID proposed bills, four state legislatures enacted the proposed new voter ID requirements to show a photo ID at the polls in their respective states in 2011.¹⁸³ In terms of the other ten states with new photo voter ID proposals, their voter ID bills fell into the following three categories: (1) failed, (2) vetoed by the governor, and (3) adjourned and carried over to the 2012 legislative session.¹⁸⁴

a. New Photo ID Proposals that Failed

Of the fourteen states with new photo ID proposals, such proposals failed in four states.¹⁸⁵

b. New Photo ID Proposals Vetoed by Governors

Out of the fourteen states, new photo ID proposals were vetoed by the governors in Missouri and Montana.¹⁸⁶

c. New Photo ID Proposals Adjourned and Carried Over to the 2012 Legislative Session

New photo ID proposals were adjourned and carried over to the 2012 legislative session in four of the fourteen states that considered new photo ID proposals in 2011.¹⁸⁷

d. New Photo ID Proposals Enacted

Of the fourteen states that considered new photo ID proposals in 2011, only four states enacted the proposed new photo ID requirements in their respective states the same year.¹⁸⁸ However, new photo ID laws enacted in Alabama, South Carolina, and Texas required preclearance by the DOJ before becoming effective.¹⁸⁹

¹⁸¹ *NCSL State Requirements: May 22, 2012*, *supra* note 117.

¹⁸² *NCSL 2011 Legislation*, *supra* note 2. These states were Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Missouri, Montana, Ohio, South Carolina, Tennessee, Texas, and Virginia.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* These states were Arkansas, Colorado, Connecticut, and Virginia.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* These states were Alaska, Delaware, Hawaii, and Ohio.

¹⁸⁸ *NCSL 2011 Legislation*, *supra* note 2. These states were Alabama, South Carolina, Tennessee, and Texas.

¹⁸⁹ *Id.*

e. Summary Regarding New Voter ID Laws and New Photo ID Laws in 2011

Whereas new voter ID laws were passed in Kansas, Mississippi, Rhode Island, and Wisconsin in 2011, Alabama, South Carolina, Tennessee, and Texas modified their existing voter ID laws in 2011 to make them stricter by requiring a photo ID to cast a ballot at the polls;¹⁹⁰ however three of these states were required to receive preclearance from the DOJ before their respective new state photo ID laws could take effect.¹⁹¹ Rhode Island's 2011 voter ID legislation takes effect in two different stages.¹⁹² In 2012, Rhode Island voters must show an ID to vote at the polls but are not required to show a photo ID in order to vote.¹⁹³ However, in 2014, a photo ID requirement becomes effective.¹⁹⁴ Conversely, “[g]overnors in Minnesota, Missouri, Montana, New Hampshire and North Carolina vetoed strict new photo ID laws in 2011.”¹⁹⁵

C. State Voter ID Legislation in 2012

Voter ID legislation was a hot button issue in 2012, with legislation introduced in thirty-two states.¹⁹⁶ In general, voter ID legislation being considered by many state legislators in 2012 fell into the following three categories: (1) state proposals for new voter ID laws, (2) state proposals to strengthen or tighten existing voter ID laws, and (3) amendments to existing voter ID laws, especially new voter ID laws that were passed during 2011.¹⁹⁷ Voter ID legislation in 2012 “include[d] new voter ID proposals in 14 states, proposals to strengthen existing voter ID laws in ten states, and bills in nine states to amend the new voter ID laws passed in 2011.”¹⁹⁸ Below is a summary of voter ID legislation that was under consideration by states during the 2012 legislative session related to the first two categories noted above.

¹⁹⁰ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

¹⁹¹ *NCSL 2011 Legislation*, *supra* note 2. These states were Alabama, South Carolina, and Texas.

¹⁹² *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

¹⁹³ *NCSL State Requirements: May 22, 2012*, *supra* note 117.

¹⁹⁴ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

¹⁹⁵ *Id.*

¹⁹⁶ *NCSL State Requirements*, *supra* note 117; *NCSL 2012 Legislation*, *supra* note 3. This information is accurate as of the completion of this article.

¹⁹⁷ *NCSL State Requirements*, *supra* note 117; *NCSL 2012 Legislation*, *supra* note 3.

¹⁹⁸ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *See also NCSL 2012 Legislation*, *supra* note 3 (stating that there were “bills in ten states to amend existing laws, many of them new voter ID laws passed in 2011.”).

1. State Proposals for New Voter ID Laws

Regarding state proposals for new voter ID laws in states that did not previously require voter ID at the polls, proposed legislation was considered by fourteen states in 2012.¹⁹⁹ Of these fourteen states with new voter ID proposals, only two state legislatures enacted new voter ID requirements in their respective state.²⁰⁰ In terms of the other twelve states with new voter ID bills in 2012, their voter ID proposals fell into the following six categories: (1) pending in committee, (2) pending in committee as a carry-over from the 2011 legislative session, (3) amended to the extent that the proposed law ceases to be a voter ID law, (4) failed, (5) passed but required voter approval on the November 2012 ballot, and (6) enacted.²⁰¹

a. New Voter ID Proposal Pending in Committee

Out of the fourteen states with new voter ID proposals in 2012, a new proposal is pending in committee in only one state that was not carried over from the 2011 legislative session.²⁰² The sole state with such a new voter ID proposal pending in committee as of July 2012 was New Jersey.²⁰³

b. Voter ID Proposals Pending in Committee as Carry-Overs from the 2011 Legislative Session

Several of the fourteen voter ID proposals pending in committee are carry-overs from each state's 2011 legislative session.²⁰⁴ Such carry-over proposals are pending in committee in Illinois, Massachusetts, New York, and North Carolina.²⁰⁵

c. New Voter ID Proposal Amended and Ceases to be a Voter ID Law

In 2011, Maine's legislature considered a new voter ID proposal.²⁰⁶ However, the legislature adjourned, and the new proposal was carried over into the 2012 legislative session.²⁰⁷ In 2012, Maine's legislature considered the new voter ID proposed bill, but it was "amended

¹⁹⁹ *Id.* These states are Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, and West Virginia.

²⁰⁰ *NCSL 2012 Legislation, supra* note 3.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *NCSL 2012 Legislation, supra* note 3.

²⁰⁶ *NCSL 2011 Legislation, supra* note 2; *NCSL 2012 Legislation, supra* note 3.

²⁰⁷ *NCSL 2011 Legislation, supra* note 2.

significantly and no longer relates to voter ID (carried over from 2011).”²⁰⁸ Thus, Maine’s legislature amended the 2011 new voter ID proposal to the extent that it ceased to be considered a voter ID law and thus failed.²⁰⁹ Research shows that Maine was the only state out of the fourteen that fell within this specific category.²¹⁰

d. New Voter ID Proposals that Failed

Of the fourteen states previously mentioned with new voter ID proposals in 2012, proposals failed in five states: Iowa, Maryland, Nebraska, New Mexico, and West Virginia.²¹¹

e. New Voter ID Proposal that Passed but Required Voter Approval in November 2012

In Minnesota, a new voter ID bill was passed by the Minnesota legislature in 2012.²¹² However, this new proposed voter ID bill was ultimately rejected by Minnesota’s voters in 2012.²¹³ The Minnesota legislature also considered other new voter ID proposals as well in 2012,²¹⁴ but many of these proposed voter ID bills failed.²¹⁵

f. New Voter ID Proposal Enacted

Of the fourteen states considering new voter ID proposals in 2012, only two actually enacted new voter ID requirements,²¹⁶ these two states were Pennsylvania and New Hampshire.²¹⁷ Tom Corbett, Pennsylvania’s governor signed the state’s new voter ID bill on March 14, 2012.²¹⁸ New Hampshire’s voter ID law required preclearance from the U.S. DOJ, which was granted on September 4, 2012.²¹⁹

2. State Proposals to Strengthen Existing Voter ID Laws

In 2012, ten state legislatures considered proposals to modify and strengthen their existing voter ID laws.²²⁰ Only one state legislature

²⁰⁸ NCSL 2012 Legislation, *supra* note 3.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ NCSL State Requirements: Oct. 24, 2012, *supra* note 117. As of the printing of this article, Minnesota voters rejected the proposed bill.

²¹⁴ NCSL 2012 Legislation, *supra* note 3.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*; See also NCSL State Requirements, *supra* note 117.

²¹⁸ Sarah Smith, Pa. Governor Signs Voter ID Bill Into Law, THE DAILY PENNSYLVANIAN, Mar. 14, 2012, http://www.thedp.com/article/2012/03/pa._governor_signs_voter_id_bill_into_law.

²¹⁹ NCSL State Requirements: Oct. 24, 2012, *supra* note 117.

²²⁰ NCSL 2012 Legislation, *supra* note 3. These ten states were Alaska, Colorado, Delaware, Florida, Hawaii, Kentucky, Missouri, Ohio, Oklahoma, and Virginia.

enacted proposed changes to its voter ID law.²²¹ In terms of the other nine states with proposals to strengthen their existing voter ID laws in 2012, the status of the nine voter ID bills fell within the following two categories: (1) failed or (2) pending in committee as a carry-over from the 2011 legislative session.²²²

a. Proposals that Failed

Of the ten states considering proposals to strengthen their existing voter ID laws, such proposals failed in seven states in 2012.²²³

b. Proposals Pending in Committee as Carry-Overs from the 2011 Legislative Session

Out of the ten states considering proposals to strengthen their existing voter ID laws in 2012, only Delaware and Ohio have proposals pending in committees in their respective state legislatures as carry-overs from the 2011 legislative session.²²⁴

c. Proposals that Have Been Enacted

In 2012, only one state has enacted legislation to strengthen the state's existing voter ID law.²²⁵ The Virginia legislature enacted bills in 2012 to strengthen the state's voter ID law.²²⁶ In April 2012, Governor Bob McDonnell recommended changes to Virginia's voter ID legislation and sent the proposed legislation back to Virginia's General Assembly with his suggested changes.²²⁷ Governor McDonnell's recommendations included allowing community college students to present a college ID to vote and extending the time period for voters to return and show election officials an ID if a voter fails to present an ID at the polls on Election Day.²²⁸ Virginia's General Assembly considered the governor's recommendations and, in the voter ID legislation sent back to McDonnell in April 2012, included provisions in the legislation expanding the acceptable forms of identification to vote, including adding some non-photo ID options.²²⁹ In May 2012, Governor McDonnell signed the voter ID legislation.²³⁰

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* Proposals failed in Alaska, Colorado, Florida, Hawaii, Kentucky, Missouri, and Oklahoma.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *NCSL State Requirements: Oct. 24, 2012, supra* note 117.

²²⁷ David Sherfinski, *McDonnell calls for tweaking of Virginia's voter-ID bill*, WASHINGTON TIMES, Apr. 10, 2012, <http://www.washingtontimes.com/news/2012/apr/10/mcdonnell-calls-for-tweaking-of-virginias-voter-id/?page=all>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ David Sherfinski, *McDonnell signs voter ID law, orders Election Board to issue new registration cards*, WASHINGTON TIMES, May 18, 2012, <http://www.washingtontimes.com/news/2012/may/18/mcdonnell-signs-voter-id-law-orders-election-board/>

However, Virginia's law required preclearance from the DOJ, which was granted in August 2012, allowing Virginia's amended voter ID law to be used during the November 2012 election.²³¹

D. Status of State Voter ID Laws in 2012

By October 2012, thirty-three states had enacted voter ID laws.²³² However, only thirty states had voter ID laws in place mandating voters to show some form of ID in order to vote at the polls in November 2012.²³³ There is a possibility that more than thirty states will have voter ID requirements in the near future.²³⁴ Seventeen states have passed legislation to either require or request a photo ID to vote, categorized as strict photo ID and photo ID states respectively.²³⁵ In contrast, sixteen other states only require some form of ID to vote and non-photo IDs are accepted.²³⁶ Such states are categorized as non-photo ID states.²³⁷ In non-photo ID states, a photo ID is not required in order to vote at the polls.²³⁸ Below is a summary of the thirty-three states that have passed strict photo ID, photo ID, and non-photo ID laws.²³⁹ However, it is important to note that some of the new voter ID laws that have been passed and that are discussed below are not currently in effect.²⁴⁰

Based on the *Crawford* decision, the DOJ recognizes that states have a legitimate interest in preventing voter fraud and safeguarding voter confidence; however, jurisdiction over certain states' election procedures fall within the purview of the DOJ, which must pre-clear (i.e., approve) proposed changes to state election laws.²⁴¹ When required for preclearance, states can submit proposed changes to the attorney general pursuant to Section 5 of the Voting Rights Act of 1965.²⁴² Certain states, as required, have recently requested preclearance from the U.S. DOJ prior to imposing new or stricter photo ID requirements on voters in their respective states.

1. States that Require a Photo ID: Strict Photo ID

As previously noted, a state voter ID law is categorized as "strict photo

²³¹ NCSL State Requirements: Oct. 24, 2012, *supra* note 117.

²³² NCSL State Requirements: Oct. 24, 2012, *supra* note 117.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ NCSL State Requirements: Oct. 24, 2012, *supra* note 117.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dept. of Justice to Keith Ingram, Director of Elections, Office of Texas Secretary of State (Mar. 12, 2012).

²⁴² *Id.*; Voting Rights Act of 1965, 42 U.S.C. §1973c (1970).

ID” if a voter is required to present a photo ID to cast a ballot at the polls.²⁴³ Nine states are currently categorized as strict photo ID states.²⁴⁴ In 2011, Mississippi and Wisconsin both passed strict photo ID requirements to vote, but neither state currently has the strict photo ID requirement in place to vote.²⁴⁵

a. Mississippi

In Mississippi, “the strict photo ID amendment passed by citizen initiative in November 2011 requires both implementing legislation and pre-clearance under Section 5 of the Voting Rights Act before it can be implemented.”²⁴⁶ In early May 2012, the Mississippi Legislature sent a voter ID bill to Governor Phil Bryant.²⁴⁷ The strict photo ID bill “lays out the specific details necessary to implement the citizen initiative approved by voters in November 2011.”²⁴⁸ Governor Bryant signed the strict photo ID legislation in May 2012.²⁴⁹ However, Mississippi’s strict photo ID law still must be pre-cleared by the DOJ under Section 5 of the Voting Rights Act prior to its implementation.²⁵⁰

b. Wisconsin

Wisconsin’s new strict photo ID law, passed the legislature in 2011, was briefly in effect in early 2012 but was declared unconstitutional by a state judge on March 12, 2012. The state is barred from enforcing the law unless an appeal overturns the March 12 ruling.²⁵¹ In *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*, the only issue the court considered was the constitutionality of Wisconsin’s photo ID requirements.²⁵² The circuit court judge entered a judgment “declaring 2011 Wisconsin Act 23’s photo ID requirements unconstitutional to the

²⁴³ *NCSL State Requirements: May 22, 2012, supra* note 117; *NCSL State Requirements: Oct. 24, 2012, supra* note 117.

²⁴⁴ *NCSL State Requirements: May 22, 2012, supra* note 117. These nine states are Georgia, Indiana, Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin.

²⁴⁵ *Id.* (As of October 2012, strict photo ID requirements were in effect in only four out of the nine states that have enacted strict photo ID laws: Georgia, Indiana, Kansas, and Tennessee. Strict photo ID requirements were not in effect in the states of Mississippi, Pennsylvania, South Carolina, Texas, and Wisconsin.).

²⁴⁶ *Id.* (The National Conference of State Legislatures further stated “Mississippi’s new voter ID law was passed via the citizen initiative process. However, the language in [a] constitutional amendment passed by MS voters on Nov. 8 is very general, and implementing legislation will be required before the amendment can take effect. The MS provision will also require pre-clearance under Section 5 of the Voting Rights Act before it can take effect.”).

²⁴⁷ *NCSL State Requirements: May 22, 2012, supra* note 117.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *NCSL State Requirements: Oct. 24, 2012, supra* note 117.

²⁵¹ *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669 at 8 (Wis. Cir. Ct., Mar. 12, 2012) (granting summary declaratory judgment and permanent injunction).

²⁵² *Id.*

extent they serve as a condition for voting at the polls. Moreover, defendants are permanently enjoined forthwith from any further implementation or enforcement of those provisions²⁵³ The circuit court judge further held that “the disqualification of qualified electors from casting votes in any election where they do not timely produce photo ID’s satisfying Act 23’s requirements violates Article III, Sections 1 and 2 [of] the Wisconsin Constitution.”²⁵⁴ The judge entered a summary declaratory judgment as well as a permanent injunction barring enforcement of Wisconsin photo ID statute.²⁵⁵ In both Mississippi and Wisconsin, each state presently has no strict voter ID law in effect.²⁵⁶ However, Wisconsin plans to appeal the judge’s ruling.²⁵⁷

c. South Carolina

South Carolina’s legislature enacted photo ID requirements in 2011.²⁵⁸ The state subsequently requested preclearance in June 2011 from the U.S. DOJ.²⁵⁹ However, in December 2011, the U.S. DOJ denied South Carolina’s request for preclearance for its new photo ID law.²⁶⁰ The DOJ concluded that South Carolina’s new photo voter ID requirements were discriminatory based on the fact that minority voters in the state were twenty percent more likely than white voters not to possess a photo ID that would be required in order to vote in the state.²⁶¹ However since the DOJ denied South Carolina preclearance for its newly enacted strict photo ID law, the state filed in February 2012 for reconsideration of the DOJ’s decision by filing a challenge with a federal district court in the case of *South Carolina v. Holder*.²⁶² On October 11, 2012, a “federal district court in Washington, D.C. . . . granted pre-clearance for South Carolina’s [strict new photo] voter ID law, but delayed implementation until 2013.”²⁶³

d. Texas

Similar to South Carolina, Texas passed a new photo voter ID law in

²⁵³ *Id.* at 8.

²⁵⁴ *Id.*

²⁵⁵ *NCSL State Requirements: Oct. 24, 2012, supra* note 117.

²⁵⁶ *Id.*

²⁵⁷ *Id.* (National Conference of State Legislatures stated that “the state [Wisconsin] has said it will appeal.”).

²⁵⁸ *NCSL 2011 Legislation, supra* note 2.

²⁵⁹ *See NCSL State Requirements: May 22, 2012, supra* note 117; *South Carolina v. Holder*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, (Mar. 27, 2012), <http://www.brennancenter.org/legal-work/south-carolina-v-holder>.

²⁶⁰ *Id.*

²⁶¹ *NCSL State Requirements: May 22, 2012, supra* note 117.

²⁶² *See BRENNAN CENTER FOR JUSTICE, supra* note 259.

²⁶³ *NCSL State Requirements, Oct. 24, 2012, supra* note 117.

2011 and requested preclearance from the DOJ.²⁶⁴ The law amended Texas Transportation Code “relating to the issuance of election identification certificates” and amended Texas’ Election Code “relating to the procedures for implementing the photographic identification requirements, including registration procedures, provisional-ballot procedures, notice requirements, and education and training requirements, for the State of Texas.”²⁶⁵ However, under Section 5 of the Voting Rights Act, “the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group.”²⁶⁶ In March 2012, the Attorney General rejected Texas’ Chapter 123 (S.B. 14) and denied Texas preclearance for its new strict photo ID law.²⁶⁷ Therefore, Texas filed a lawsuit requesting preclearance with a three-judge panel in the Washington, D.C. federal district court in the case styled *Texas v. Holder*.²⁶⁸ In August 2012, the federal district court denied Texas preclearance for its new strict photo ID law; any appeals of the federal court’s decision have to be filed with the U.S. Supreme Court.²⁶⁹

2. States that Request a Photo ID: Photo ID

A state voter ID law is categorized as “photo ID” if a voter is requested to present a photo ID to cast a ballot at the polls.²⁷⁰ Eight states have enacted legislation to be categorized as photo ID states.²⁷¹ Although Alabama’s legislature considered and passed new photo voter ID requirements in 2011, the law is scheduled to take effect in 2014.²⁷² However, Alabama must apply for and receive preclearance from the DOJ before the state’s new state photo ID law can become effective in 2014.²⁷³ Therefore, Alabama’s non-photo voter ID law is currently in effect.²⁷⁴

²⁶⁴ *Id.*; Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dept. of Justice, to Keith Ingram, Director of Elections, Office of Texas Secretary of State (Mar. 12, 2012).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*; Julian Aguilar, *Feds Reject Texas Voter ID Law*, THE TEXAS TRIBUNE, (Mar. 12, 2012), <http://www.texastribune.org/texas-politics/voter-id/feds-reject-texas-voter-id-law/>.

²⁶⁸ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *Texas v. Holder*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, (Mar. 12, 2012), <http://www.brennancenter.org/legal-work/texas-v-holder>.

²⁶⁹ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

²⁷⁰ *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL State Requirements: May 22, 2012*, *supra* note 117.

²⁷¹ *Id.* These states are Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, New Hampshire, and South Dakota.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

3. States that Require an ID: Non-Photo ID

A state voter ID law is categorized as “non-photo ID” if a voter is only required to present an ID to cast a ballot at the polls.²⁷⁵ Sixteen states have passed laws that only require some form of ID to vote, and a non-photo ID is acceptable in each of these states.²⁷⁶ Despite Oklahoma’s categorization by some researchers as a “non-photo ID” state,²⁷⁷ it has also been termed by others as a “photo ID” state since most voters in the state present a photo ID prior to voting.²⁷⁸ However, since Oklahoma’s voter ID law permits a properly issued voter registration card to be presented as proof of identity in place of a photo ID, Oklahoma is considered a “non-photo ID” state.²⁷⁹

E. Recent Litigation Post-Crawford Related to Voter ID Laws

The *Crawford* Court held that states have a legitimate interest in preventing voter fraud and safeguarding voter confidence and upheld Indiana’s strict photo ID law requiring photo identification for in-person voting.²⁸⁰ Despite *Crawford*’s 6-3 plurality decision upholding the facial validity of Indiana’s strict photo ID law,²⁸¹ the Supreme Court left open the possibility of success in future lawsuits challenging the constitutionality of state voter ID statutes when applied to specific classes of voters.²⁸² As noted above in Part II(D)(1)(c-d), South Carolina and Texas both filed lawsuits seeking preclearance from federal district courts to obtain approval of their new strict photo ID laws.²⁸³ In addition, various state voter ID laws have been challenged post-*Crawford* as violations of state constitutions.

1. Common Cause/Georgia v. Billups

In *Common Cause/Georgia v. Billups*,²⁸⁴ various organizations, including the National Association for the Advancement of Colored People (NAACP) of Georgia, and registered voters filed a lawsuit against

²⁷⁵ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL State Requirements: May 22, 2012*, *supra* note 117.

²⁷⁶ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117. These states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, Oklahoma, Rhode Island, Utah, Virginia, and Washington.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 188–89 (2008).

²⁸¹ *Id.*

²⁸² *Id.* at 191, 202; *See de Alth*, *supra* note 128, at 185 (finding that “[s]ince the [Supreme] Court left open the possibility of as-applied challenges to voter ID laws, future litigants who can produce research such as this will have a much stronger case to have these laws declared unconstitutional.”).

²⁸³ *NCSL State Requirements, May 22, 2012*, *supra* note 117; BRENNAN CENTER FOR JUSTICE, *supra* note 259; BRENNAN CENTER FOR JUSTICE, *supra* note 268.

²⁸⁴ *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

Georgia's Secretary of State as well as the superintendents of elections for several Georgia counties, challenging the constitutionality of Georgia's 2005 photo ID statute.²⁸⁵ Georgia's law required in-person voters to show a government-issued photo ID in order to vote.²⁸⁶ The organizations and voters alleged that Georgia's photo ID statute was unconstitutional and amounted to a "poll tax in violation of the Twenty-Fourth Amendment and Equal Protection Clause, violated the Fourteenth Amendment, violated the Civil Rights Act of 1964 and [S]ection 2 of the Voting Rights Act of 1965, and violated the Georgia Constitution."²⁸⁷ The district court granted a preliminary injunction barring enforcement of Georgia's 2005 photo ID statute during the 2005 elections, finding that "the organizations and voters had proved a substantial likelihood of success on the merits of their claims that the statute unduly burdened the right to vote and constituted a poll tax."²⁸⁸

In 2006, Georgia's General Assembly repealed the 2005 photo ID statute and enacted a new statute, which required voters to show one of six kinds of photo ID prior to in-person voting.²⁸⁹ Another motion was filed requesting a preliminary injunction barring enforcement of the new photo ID requirement during the 2006 elections.²⁹⁰ The district court granted a preliminary injunction barring enforcement of the 2006 photo ID statute.²⁹¹ On September 6, 2007, the U.S. District Court for the Northern District of Georgia dismissed the complaint due to a lack of standing and denied the plaintiff's request for a permanent injunction regarding the 2006 Photo ID Act.²⁹² However, on December 27, 2007, the district court awarded the NAACP and voters attorney fees for their successful challenge of Georgia's earlier statute.²⁹³

On January 14, 2009, the U.S. Court of Appeals for the Eleventh Circuit vacated the order of dismissal and entered judgment in favor of the defendant election officials but affirmed the order awarding prevailing party attorney fees to the plaintiffs.²⁹⁴ Specifically, the Court of Appeals held that the NAACP and voters had standing to challenge Georgia's photo ID requirement, but that the district court was within its power to decline to permanently enjoin the 2006 photo ID requirement; that it was within the district court's discretion to award prevailing party attorney fees to the

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1346.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Common Cause/Georgia*, 554 F.3d at 1347–48.

²⁹¹ *Id.*

²⁹² *Id.* at 1348.

²⁹³ *Id.* at 1349.

²⁹⁴ *Id.* at 1357.

NAACP and voters for obtaining a preliminary injunction of the earlier 2005 photo ID statute; and that the plaintiffs were not entitled to an award of attorney fees for any appellate work related to challenging Georgia's earlier statute.²⁹⁵ Therefore, the Court of Appeals in *Common Cause/Georgia v. Billups* sustained Georgia's 2006 Photo ID Act requiring in-person voters to present a government-issued photo ID prior to being allowed to vote.²⁹⁶ On June 8, 2009, the U.S. Supreme Court refused to hear the case.²⁹⁷

2. *League of Women Voters of Indiana, Inc. v. Rokita*

After *Crawford*, the League of Women Voters of Indiana, Inc., a voter's organization, filed a lawsuit against Todd Rokita, Indiana's Secretary of State, seeking a declaratory judgment that Indiana's voter ID law violated two articles of the Indiana Constitution.²⁹⁸ The trial court dismissed the lawsuit, finding that the state's voter ID law did not violate either constitutional provision.²⁹⁹ The League of Women Voters of Indiana appealed the dismissal.³⁰⁰ The Court of Appeals reversed and remanded the case.³⁰¹ The Supreme Court of Indiana considered the League of Women Voter's facial challenges to the constitutionality of Indiana's photo voter ID law and in 2010, the state Supreme Court affirmed the trial court's dismissal of the complaint.³⁰²

On June 30, 2010, the Supreme Court of Indiana held that the requirement that in-person voters present a government-issued photo ID in order to vote at the polls did not impose "additional substantive voter qualifications" in violation of Indiana's Constitution.³⁰³ Indiana's Supreme Court further held that requiring in-person voters to show a government-issued photo ID was not in violation of the Equal Privileges and Immunities Clause of Indiana's Constitution.³⁰⁴ Indiana's Supreme Court dismissed the League of Women Voter's complaint "without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote."³⁰⁵ Therefore, an individual voter who alleges that Indiana's photo ID law actually stopped him or her from voting or "inhibited his or her ability to vote in any way" is not prohibited from

²⁹⁵ *Id.* at 1349–57.

²⁹⁶ *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009).

²⁹⁷ *N.A.A.C.P. v. Billups*, 129 S. Ct. 2770 (2009), *cert. denied*.

²⁹⁸ *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758, 760 (Ind. 2010).

²⁹⁹ *Id.* at 760, 762.

³⁰⁰ *Id.*

³⁰¹ *Id.* (citing *League of Women Voters of Indiana, Inc. v. Rokita*, 915 N.E.2d 151 (Ind.App. 2009)).

³⁰² See *League of Women Voters of Indiana*, 929 N.E.2d at 760, 772–73.

³⁰³ *Id.* at 767.

³⁰⁴ *Id.* at 758.

³⁰⁵ *Id.* at 760.

challenging Indiana's photo ID law in the future.³⁰⁶

3. *Applewhite v. Pennsylvania*

On May 1, 2012, the American Civil Liberties Union (ACLU) representing voters, the League of Women Voters of Pennsylvania, the NAACP, and the Homeless Advocacy Project filed a lawsuit against the Commonwealth of Pennsylvania, the Governor of Pennsylvania, and the Secretary of the Commonwealth of Pennsylvania's Bureau of Commissions, Elections, and Legislation alleging that the state's new strict photo voter ID law violated the Pennsylvania Constitution.³⁰⁷ Pennsylvania's new Photo ID Law was signed into law by Governor Corbett on March 14, 2012.³⁰⁸

On May 1, 2012, the ACLU filed in the Commonwealth Court of Pennsylvania an Application for Special Relief in the Nature of a Preliminary Injunction requesting that the court enjoin the Commonwealth, the Governor, and the Secretary of the Commonwealth from imposing Act 18, the "Photo ID Law," on Pennsylvania voters until the pending lawsuit is resolved.³⁰⁹ On October 2, 2012, a state judge "temporarily enjoined enforcement" of Pennsylvania's new strict photo voter ID law, which meant that the new law would not be in effect for the November 2012 elections.³¹⁰

IV. TENNESSEE'S NEW STRICT PHOTO ID LAW

Prior to 2012, Tennessee allowed either a photo ID or non-photo ID in order to vote at the polls on Election Day.³¹¹ However, similar to several other states, Tennessee's legislature in 2011 changed its voter identification requirements to require a photo ID at the polls in 2012.³¹² However, only nine states, including Tennessee, are considered strict photo ID states.³¹³

A. *Requirements under Tennessee's New Strict Photo ID Law*

Effective January 1, 2012, all voters in Tennessee are required to present a government-issued ID showing the voter's name and photo.³¹⁴

³⁰⁶ *Id.* at 761.

³⁰⁷ *NCSL State Requirements: May 22, 2012*, *supra* note 117. See *Applewhite v. Commonwealth*, No. 330 M/D/2012, 2012 WL 4497211 (Pa. Commw. Ct., Oct. 2, 2012).

³⁰⁸ *Applewhite*, 2012 WL 4497211, at *1.

³⁰⁹ *Id.* at *3.

³¹⁰ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117.

³¹¹ *Overton*, *supra* note 129, at 678.

³¹² *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; *NCSL State Requirements: May 22, 2012*, *supra* note 117; *NCSL 2011 Legislation*, *supra* note 2.

³¹³ *NCSL State Requirements: Oct. 24, 2012*, *supra* note 117; See *supra* notes 243–45.

³¹⁴ TENN. CODE ANN. § 2-7-112(a), (c) (West 2012).

The photo ID requirement is applicable whether a qualified Tennessee voter is voting early or on Election Day.³¹⁵ Acceptable forms of ID in Tennessee include: (1) a current or expired driver's license issued in Tennessee or by another state that contains the voter's photo, (2) a U.S. passport, (3) a Tennessee Department of Safety and Homeland Security photo ID, (4) a photo ID issued by the federal or state government such as an employee ID from the U.S. Department of Energy with the voter's photo, (5) a United States military photo ID including a Veteran Identification Card, and (6) a state-issued handgun carry permit card with a voter's photo.³¹⁶

Tennessee law specifically excludes college student photo IDs as well as photo IDs not issued by the federal or state government (such as those issued by a discount club card or a bank card) as acceptable forms of ID, despite the card displaying the voter's photo, in order to cast a ballot.³¹⁷ Only five groups of voters are exempt from Tennessee's strict photo ID law, and these groups are: (1) absentee voters who vote by mail, (2) voters residing at licensed nursing homes or assisted living centers who vote at the facility, (3) voters who are in the hospital, (4) voters who object for religious reasons to being photographed, and (5) indigent voters who are unable to obtain a photo ID without paying a fee.³¹⁸

Should a voter arrive at the polls without a photo ID in Tennessee, the voter may cast a provisional ballot and then must return within two business days after Election Day to the Tennessee Election Commission Office to show proof of a valid photo ID for their vote to be counted.³¹⁹ Any voter who does not have a photo ID can obtain a free photo ID in order to vote from the Department of Safety and Homeland Security at a driver service center.³²⁰ However, to obtain a free voter photo ID, Tennessee voters must meet the following conditions: (1) the voter must provide one proof of citizenship (such as an original or certified birth certificate or valid, unexpired U.S. passport), (2) one primary proof of ID with the voter's full name and date of birth (such as a birth certificate or passport), (3) one secondary proof of identity (such as a check stub, work ID, bank statements, and social security documents), (4) two proofs of Tennessee residency (such as a voter registration card, utility bill, vehicle registration/title, or bank statement), (5) if a voter's name differs from their

See also TENNESSEE SECRETARY OF STATE, *supra* note 4; TENNESSEE DEPARTMENT OF STATE, *supra* note 4; TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, *supra* note 4.

³¹⁵ TENNESSEE SECRETARY OF STATE, *supra* note 4.

³¹⁶ See TENNESSEE SECRETARY OF STATE, *supra* note 4; See TENNESSEE DEPARTMENT OF STATE, *supra* note 4; See TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, *supra* note 4; See TENN. CODE ANN. § 2-7-112 (West, 2012).

³¹⁷ See *supra* note 4.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

primary ID, proof of the changed name (such as certified marriage certificate, divorce decree, or certified court order), and (6) a social security number or a sworn affidavit if no social security number has been issued.³²¹

Moreover, to obtain a photo ID, each voter applicant is required to sign an affidavit under penalty of perjury certifying that he or she does not have any other form of a valid, government-issued photo ID for voting purposes.³²² Voters who do not have photos on their driver's license and who also do not have any other form of valid photo ID may go to a driver service center and have their photo added to their current license "free" of charge "upon request."³²³ However, any Tennessee voter who already possesses a valid, government-issued photo ID will not receive a free photo ID from the Tennessee Department of Safety.³²⁴

B. Arguments For and Against Passage of Tennessee's New Strict Photo ID Law

Similar to other states, Tennessee enacted its strict photo ID law following the *Crawford* decision upholding Indiana's voter ID law.³²⁵ Passage of Tennessee's new photo ID law created a split among voters, including senior citizens.³²⁶ In general, proponents of Tennessee's photo ID law argued that "the law will combat voter fraud."³²⁷ However, opponents of Tennessee's photo ID law responded that "fraud is rare and [is] usually perpetrated by election workers, not voters posing as other people."³²⁸ Opponents also argued that Tennessee's photo ID law would "discourage turnout among the poor, disabled and senior citizens - people who are less likely to own cars and have driver's licenses, the most common form of picture identification."³²⁹ Some elderly voters in Tennessee believed that the strict photo ID law would fight against voter fraud, whereas other senior citizens stated that the law's "main purpose is to suppress turnout among older voters by requiring them to revisit driver's

³²¹ See TENN. CODE ANN. § 2-7-112 (West, 2012); See also Tennessee Citizen Action, Photo ID to Vote Law in Tennessee Information Packet (Nov. 3, 2011) (on file with author). The author of this article received the information packet from the Executive Director of Tennessee Citizen Action Mary Mancini at a Voter Photo ID Forum in Nashville, Tenn. on Nov. 3, 2011. The packet included a list of approved documents for a free photo ID in Tennessee and cited the list's source as <http://www.tn.gov/safety/driverlicense/dlidentify.shtml>.

³²² TENN. CODE ANN. § 2-7-112 (West 2012).

³²³ TENNESSEE SECRETARY OF STATE, *supra* note 4.

³²⁴ *Id.*

³²⁵ Chas Sisk, *Tennessee voter ID law awaits effect on seniors*, THE TENNESSEAN (Sept. 28, 2011), <http://www.wbir.com/news/article/185824/2/Tennessee-voter-ID-law-awaits-effect-on-seniors>.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

license stations.”³³⁰ Tennessee Citizen Action is a consumer rights organization that campaigned against passage of Tennessee’s strict photo ID law and subsequently sought to repeal the law by having concerned voters sign a petition seeking repeal of the government-issued photo ID law.³³¹

The primary reasons Tennessee Citizen Action articulated for repeal of Tennessee’s strict photo ID requirements include the fact that the “requirements necessary for Tennesseans to comply with the law are excessive and restrictive. The law itself is confusing.”³³² Tennessee Citizen Action further argued that “Tennessee lawmakers are taking away a person’s right to vote, telling them that they have to have a very specific government-issued photo ID to get it back, and confusing them in the process.”³³³ The group further opposed Tennessee’s photo ID restrictions based on the fact that “[g]overnment-issued photo ID restrictions on voting disproportionately affect people of color, young voters, seniors and people with disabilities.”³³⁴ The law also adversely affects “people who work two and three jobs” who are not able to take “time off to go to a Driver Services Center and wait in line for hours” and only about half of Tennessee’s 95 counties have driver services facilities equipped to print the required government-issued IDs resulting in “Tennesseans in rural communities hav[ing] to travel two or three counties away.”³³⁵ In addition, although the photo ID is free, the documents required to receive a free photo ID in Tennessee “are very specific and excessively restrictive and for some very difficult to obtain.”³³⁶ Regarding senior citizens being disenfranchised, Mary Mancini, Executive Director of Tennessee Citizen Action, argued that “I think we’re going to find that there are a lot of those people [i.e., senior citizens] that don’t have the means or the opportunity to make that trip back to the DMV.”³³⁷

C. Tennessee’s Strict Photo ID Law Versus Contiguous State Voter ID Laws

Subsequent to the 2008 *Crawford* decision, Tennessee is one of only a few states that has passed and implemented a strict photo ID law. When looking at the eight states contiguous to Tennessee, it is easy to see that other state legislatures took less restrictive measures when considering and

³³⁰ *Id.*

³³¹ Tennessee Citizen Action, *supra* note 321. As of the writing of this article, the organization’s efforts to repeal Tennessee’s photo ID law have failed.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*; *See generally* notes *supra* 136–49.

³³⁵ Tennessee Citizen Action, *supra* note 321.

³³⁶ *Id.*

³³⁷ Sisk, *supra* note 325.

passing voter ID laws. The eight states that border Tennessee are Alabama, Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, and Virginia.³³⁸ As previously noted, Georgia is one of only two states that had a strict photo ID law in effect at the beginning of 2011.³³⁹ However, the remaining contiguous states to Tennessee that have passed some form of voter ID laws, besides Georgia, are Alabama, Arkansas, Kentucky, Mississippi, Missouri, and Virginia.³⁴⁰ Contiguous states such as Arkansas, Kentucky, Missouri, and Virginia all require some form of ID but are non-photo ID states because their state requirements include non-photo ID options as acceptable forms of identification to vote at the polls.³⁴¹ Therefore, some voters living in Tennessee would have fewer restrictions imposed on their right to vote on Election Day if they lived or moved to another state very close to Tennessee.

D. Alternative Methods to Strict Photo ID Laws to Prevent Voter Fraud

Alternatives to strict photo ID requirements have been implemented in various states that do not have voter ID laws or that do not require a photo ID to vote. Under federal law, in-person voter fraud can subject a violator to up to five years in prison and \$10,000 in fines,³⁴² so increased criminal prosecution when actual violations of voter fraud are found is an alternative to strict photo ID requirements.

Some other alternatives that have been recommended in response to strict photo ID laws that would allow voters who lack a photo ID to vote at the polls include, but are not limited to, the following: (1) allowing non-photo identification as acceptable forms of documentation such as bank statements or utility bills, (2) having signature comparisons wherein each voter's signature at the polls in the poll book is compared with a photocopy of the signature the voter provided when she or he registered, (3) allowing voters to sign affidavits attesting to his or her identity under penalty of perjury, (4) having the government obtain a photograph, biometric, or thumbprint from citizens when they register to vote and make this information accessible for poll workers on Election Day to confirm any voter's identity who arrives at the polls without a photo ID on Election Day, and (5) implementing better election administration practices and anti-fraud measures including "regular and unannounced independent

³³⁸ NCSL *State Requirements: Oct. 24, 2012*, *supra* note 117; NCSL *State Requirements: May 22, 2012*, *supra* note 117 (containing a map of the United States that shows voter ID requirements throughout the United States).

³³⁹ NCSL *State Requirements: May 22, 2012*, *supra* note 117.

³⁴⁰ See NCSL *State Requirements: Oct. 24, 2012*, *supra* note 117 (The website contains a table that shows the thirty-three states that have enacted voter ID laws as well as each states' statutory requirements for voter identification).

³⁴¹ *Id.*

³⁴² UNITED STATES SENATE DEMOCRATS, *supra* note 70.

audits of polling places, county election boards, [and] Secretary of State offices,” and “private vendors should examine voter registration and polling place procedures, voting machines, vote-tabulation systems, software, purge processes, and other procedures.”³⁴³ Some of these practices have been utilized in various states.³⁴⁴ In the past, Tennessee allowed either a photo ID or non-photo ID in order to vote on Election Day.³⁴⁵ Therefore, Tennessee could and should have allowed such alternatives to remain in effect if the state was really concerned about allowing all eligible voters the right to vote at the polls on Election Day.

V. CONCLUSION

Over the years, voter ID laws have created partisan concerns and controversies, with Republicans often supporting voter ID laws and many Democrats opposing them. Supporters often contend that voter ID laws are essential to prevent voter impersonation fraud and to protect public confidence in the integrity of the electoral process. In contrast, opponents respond that voter ID laws actually disenfranchise certain groups of voters, such as the poor, minorities, students, and senior citizens, and that such laws are unnecessary because in-person voter fraud is rare. Various states across the United States have no voter ID laws, whereas many states have recently passed voter ID laws ranging from non-photo ID requirements to strict photo ID requirements. As it relates to strict photo ID requirements, opponents argue that such photo ID laws create needless obstacles to voting and exclude certain citizens from voting, including the elderly, the disabled, college students, and minorities.

Recent changes to state voter ID laws, especially strict photo ID statutes, appear to be permissible based upon the most recent leading U.S. Supreme Court decision in *Crawford*, unless a core group of citizens can directly show their right to vote has been denied due to their state’s voter ID law. However, strict voter photo ID requirements are not necessary to protect the electoral process. Research has found very “few cases of the kind of voter fraud photo ID laws would prevent, and voter impersonation already is punishable by up to five years in prison and \$10,000 in fines under federal law.”³⁴⁶ As noted by Tennessee Citizen Action, “[t]he Devil is in the [d]etails” when “[c]onsidering we already have a system in place that severely punishes people who commit fraud. The system has worked in the past so why are we placing additional barriers in front of the ballot box?”³⁴⁷

³⁴³ Overton, *supra* note 129, at 678–80.

³⁴⁴ *Id.* at 679.

³⁴⁵ *Id.* at 678.

³⁴⁶ UNITED STATES SENATE DEMOCRATS, *supra* note 70.

³⁴⁷ Tennessee Citizen Action, *supra* note 321.

The elderly, the disabled, the poor, college students, as well as minorities have the constitutional right to equal access to voting. Although there may be a few instances of actual voter ID fraud, other less restrictive alternative measures can be implemented to combat any such fraud so that strict photo ID requirements are not necessary in order to protect the electoral process. Certain classes of voters should not be disenfranchised based upon rare instances of voter fraud. Laws such as Tennessee's photo ID law are over-inclusive and do not deal with the real issue since instances of in-person voter fraud are rare. Better detection of voter fraud, whether in person or by absentee ballot, should rest with election officials and should not create burdensome restrictions on honest citizens simply exercising their fundamental constitutional right to vote.