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Unequal Protection: Rethinking the Standards and Safeguards for Absentee Ballot Schemes

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UNEQUAL PROTECTION: RETHINKING THE STANDARDS AND SAFEGUARDS FOR ABSENTEE BALLOT SCHEMES

Kira M. Simon*

INTRODUCTION	561
I. HOW STATES HANDLE MAIL-IN ABSENTEE BALLOTS	564
A. <i>State Error: Misdelivery and Misprinting</i>	565
B. <i>Disenfranchisement by Deadline</i>	566
II. CONGRESS'S ELECTION ADMINISTRATION POWERS	573
III. DISENFRANCHISEMENT BY STATE ERROR AND UNWORKABLE DEADLINES VIOLATES THE EQUAL PROTECTION CLAUSE	576
A. <i>The Fundamental Right to Vote: Changing Standards for Evaluating State Election Laws</i>	576
B. <i>Applying the Standards to Virginia's Absentee Ballot Scheme</i>	582
IV. HOW TO PREVENT AND TREAT STATE ERROR IN ABSENTEE BALLOTS	586
CONCLUSION	589

INTRODUCTION

In 2017, election officials decided the race for the Ninety-Fourth District of the Virginia House of Delegates by pulling a name in a film canister out of a ceramic bowl.¹ Officials resorted to this decidedly old school method of calling a race—which had the potential to give Democrats control of the House of Delegates for the first time in nearly twenty years—because the race was tied, and at that time, it was what the law provided as the solution.² At the tiebreaking, the history of the ceramic

* JD Candidate, William & Mary Law School, 2021; BA, University of Pennsylvania, 2015. I would like to thank the *William & Mary Bill of Rights Journal* staff for their hard work and thoughtful edits during a pandemic; Professor Rebecca Green for teaching me the details of election law; my parents, Sheldon and Ruth, for their support; and Will, for keeping me sane. This Note was inspired by my experience receiving an absentee ballot for the wrong party in 2019.

¹ Laura Vozzella, *A Rare, Random Drawing Helped Republicans Win a Tied Virginia Election but It May Not End There*, WASH. POST (Jan. 4, 2018, 6:16 PM), https://www.washingtonpost.com/local/virginia-politics/republican-yancey-picked-in-random-lottery-declared-winner-of-pivotal-va-house-race/2018/01/04/9c9caa5a-f0a1-11e7-b390-a36dc3fa2842_story.html [https://perma.cc/6T78-YNLF].

² *Id.* Although the House of Delegates would have been tied 50–50 if the Democrat had won, with a Democrat in the lieutenant governor's seat, Democrats would have been able to break ties in their favor. *Id.* This tie-breaker was mandated by a law from 1705. *Election Tie-breaker for Virginia House Seat*, C-SPAN, at 00:28 (Jan. 4, 2018), <https://www.c-span.org>

bowl received a longer explanation than why the winner was being chosen from the bowl³—so how did a race in which 23,896 people voted⁴ get decided this way?

On Election Day, it appeared that the incumbent, Republican David Yancey, won by ten votes.⁵ As officials counted all the ballots in the race, Yancey's challenger, Democrat Shelley Simonds, and the Democratic Party of Virginia filed an emergency motion to see the rejected absentee ballot envelopes and obtain the names of those voters.⁶ After getting the names, but not the envelopes, a circuit court judge granted an order to release an amended request for one particular envelope.⁷ The voter who cast that disputed absentee ballot (for Simonds) was an eighty-six-year-old with macular degeneration (an eye condition) that may have caused her to sign the wrong part of the envelope—an error that invalidated her vote.⁸ However, at that point it appeared that Simonds won the race by one vote.⁹

The race went forward to a recount, and officials counted in-person votes, provisional ballots, and absentee ballots, and confirmed the previous outcome: that Simonds won by one vote.¹⁰ However, “[t]he next day, a three-judge recount court decided that a ballot declared ineligible during the recount should” have counted for Yancey, tying the race.¹¹ Those judges rejected Simonds's request to reconsider, so with that tie the election went to the process provided by law—the aforementioned random drawing that resulted in Yancey's win.¹²

A total of 23,896 people voted in that race¹³—but one absentee ballot had the potential to decide its outcome, as well as the party makeup of the Virginia House

/video/?439246-1/republican-david-yancey-drawn-winner-virginia-house-delegates-race [https://perma.cc/MM3B-96RY]. Effective July 1, 2020, tied elections (except for governor, lieutenant governor, or attorney general) must go to a special election. VA. CODE ANN. § 24.2-802.2(H) (West 2020).

³ See *Election Tiebreaker for Virginia House Seat*, *supra* note 2, at 05:59.

⁴ *2017 House of Delegates General Election: District 94*, VA. DEP'T ELECTIONS, <https://historical.elections.virginia.gov/elections/view/88247/> [https://perma.cc/XDP2-8JY2] (last visited Dec. 8, 2020).

⁵ Gregory S. Schneider, *A Single Vote Leads to a Rare Tie for Control of the Virginia Legislature*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/local/virginia-politics/democrat-wins-va-house-seat-in-recount-by-single-vote-creating-50-50-tie-in-legislature/2017/12/19/3ff227ae-e43e-11e7-ab50-621fe0588340_story.html [https://perma.cc/U3QF-P6AQ].

⁶ Reema Amin, *Lone Absentee Ballot Remains Rejected for 94th District Race*, DAILY PRESS (Nov. 14, 2017, 3:15 PM), <https://www.dailypress.com/news/newport-news/dp-nws-politics-94th-district-absentee-ballot-20171114-story.html> [https://perma.cc/UQ9A-VALM].

⁷ *Id.*

⁸ *See id.*

⁹ Schneider, *supra* note 5.

¹⁰ *Id.*

¹¹ Vozzella, *supra* note 1.

¹² *Id.*

¹³ *2017 House of Delegates General Election: District 94*, *supra* note 4.

of Delegates.¹⁴ Overall, 192,397 people voted absentee in Virginia's November 2017 off-year general election.¹⁵ Rates of absentee voting are steadily trending upward in Virginia,¹⁶ as well as nationally,¹⁷ and as these trends continue, states will have to address how to deal not just with voter error but with preventing and fixing the state's own error when it comes to properly counting absentee ballots.

State error regarding absentee ballots has the potential to play an outsized role in determining elections. In another Virginia House of Delegates race in 2017, fifty-five absentee ballots were not counted when they arrived at the Stafford County registrar's office the day after the election due to postal service error.¹⁸ Without counting the withheld absentee ballots, the Republican candidate was ahead by eighty-two votes.¹⁹ The Democratic campaign sued to have the ballots counted and presented evidence of an email by a county election official to show that the ballots would have arrived on time "but for the mistake of a government official" at the United States Postal Service (USPS).²⁰ After county election officials voted not to count the ballots, a federal judge declined to order a count of the ballots.²¹ Two years later, that Democratic candidate, Joshua Cole, won his race for the same district in the House of Delegates.²² Although the absentee votes ultimately did not have the ability to decide the 2017 race,²³ it is chilling to consider that anyone's absentee ballot, properly filled

¹⁴ See Amin, *supra* note 6.

¹⁵ *Registration/Turnout Reports*, VA. DEP'T ELECTIONS, <https://www.elections.virginia.gov/resultsreports/registrationturnout-statistics/> [<https://perma.cc/7TQ3-GG93>] (last visited Dec. 8, 2020).

¹⁶ See *id.* In the 2018 general election, 337,315 people voted absentee, nearly 10% of all votes. *Id.* That is by far the highest number of absentee voters in Virginia ever recorded in a non-presidential election. See *id.* (reporting from 1976 through 2019). In the 2016 general election, 566,948 people voted absentee in Virginia—14% of the total votes cast and the highest number of absentee votes since Virginia started tracking that data consistently in 1992. *Id.* In 1992, 141,123 absentee votes were cast—0.5% of the total votes cast in that year's election. *Id.*

¹⁷ *Voting by Mail and Absentee Voting*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/K8KJ-JGVN>] (last visited Dec. 8, 2020). Nationally, votes submitted by mail have risen from approximately 10% of votes in 1992 to over 20% of votes in 2016. *Id.*

¹⁸ Rachel Weiner & Laura Vozzella, *Virginia Judge Won't Force Count of 55 Absentee Ballots in Close Delegate Race*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/local/virginia-politics/virginia-judge-wont-force-count-of-55-absentee-ballots-in-close-delegate-race/2017/11/17/492d27c6-cbb4-11e7-b0cf-7689a9f2d84e_story.html [<https://perma.cc/F75R-QWWK>].

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Democrat Cole Defeats Milde in Key 28th House District Race*, FREE-LANCE STAR (Nov. 5, 2019), https://www.fredericksburg.com/news/local/democrat-cole-defeats-milde-in-key-th-house-district-race/article_3e340aac-737e-5e53-ac3d-9e8485c6626d.html [<https://perma.cc/8UGF-6GNC>].

²³ See Weiner & Vozzella, *supra* note 18.

out and mailed with enough time, may not count because it was sitting in the post office by mistake.

Every vote should be counted because of the importance of maintaining democratic norms and confidence in elections. Aside from normative arguments, absentee ballot schemes that lack safeguards to address state error regarding absentee ballots or that have prohibitively restrictive absentee ballot deadlines violate the Fourteenth Amendment's Equal Protection Clause.²⁴ Part I of this Note will provide further background on the landscape of absentee voting laws across the country. This will show that the ability to amend state error involving absentee ballots depends on states' wildly different timelines to request and return ballots and that some of those timelines are unconstitutionally restrictive. Part II will discuss how Congress may direct states to administer elections with more safeguards for mailed absentee ballots. Part III will illustrate how not counting mailed absentee ballots due to state error or unworkable deadlines is a violation of the Fourteenth Amendment's Equal Protection Clause. Part IV will provide solutions to address these constitutional violations—namely, reforms at the state and federal levels that would expand the window to request and return an absentee ballot and implement safeguards to count certain mailed absentee ballots as provisional ballots.

I. HOW STATES HANDLE MAIL-IN ABSENTEE BALLOTS

While absentee voting is increasing in popularity,²⁵ it has long been a staple of the American election system.²⁶ Farmers and frontiersmen during the seventeenth century voted absentee while the colonies were still under English rule.²⁷ Twenty states implemented excused absentee voting by the end of World War I.²⁸ By 1972, two states allowed no-excuse absentee voting.²⁹ Now, all fifty states have some form of absentee voting, thirty-four of which allow no-excuse absentee voting.³⁰ As more people vote absentee, states need to find a way to ensure that every vote is indeed

²⁴ See generally *infra* Part III.

²⁵ *Voting by Mail and Absentee Voting*, *supra* note 17.

²⁶ See Dotty LeMieux, *Absentee Voting in the Twenty-First Century*, in 1 VOTING IN AMERICA 83, 83 (Morgan E. Felchner ed., 2008).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jan E. Leighley & Jonathan Nagler, *Absentee Ballot Regimes: Easing Costs or Adding a Step?*, in ELECTION ADMINISTRATION IN THE UNITED STATES 144, 144 (R. Michael Alvarez & Bernard Grofman eds., 2014).

³⁰ See *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/7XGZ-5QS9>] (Sept. 24, 2020). Sixteen states require excuses to vote absentee; thirty-four states and the District of Columbia do not require an excuse to vote absentee. *Id.* Five states mail ballots to all eligible voters in each election. *Id.*

counted—because, as illustrated by the tied race in Virginia in 2017, as well as numerous other close races up and down the ballot over the years,³¹ every vote truly matters.

A. State Error: Misdelivery and Misprinting

State error that causes otherwise valid absentee ballots to not be counted is not limited to a one-time mistake on the part of the postal service, such as in Stafford County.³² Errors that can be broadly categorized as misdistribution can have massive impacts on high-stakes elections. A particularly striking example of absentee ballot delivery issues is what happened in Florida's 2018 general election. Voters in multiple counties never received their absentee ballots, even though they requested the ballots before the deadline.³³ Other voters received the ballots too late to return them in time to count.³⁴ Additional voters mailed their ballots within the specified time frame, but their votes still were not counted, for unexplained reasons.³⁵ After the election, 266 absentee ballots were found in a USPS facility; people speculated that it was not a lone incident.³⁶ It is concerning when mail errors impact absentee ballots in one race for a state legislative seat, such as in Stafford County.³⁷ It is much more concerning when similar errors affect ballots across a state in elections as impactful and hotly contested as Florida's 2018 statewide races (not to mention the various other local races on those ballots).³⁸

In addition to delivery problems, states have struggled with misprinting basic information on absentee ballots. When absentee ballots for New Hampshire's 2018 general election were mailed to voters, the ballots mistakenly listed a Democrat who

³¹ See Domenico Montanaro, *Why Every Vote Matters—the Election Decided by a Single Vote (or a Little More)*, NPR, <https://www.npr.org/2018/11/03/663709392/why-every-vote-matters-the-elections-decided-by-a-single-vote-or-a-little-more> [https://perma.cc/H3EX-WJWM] (Nov. 10, 2018, 4:15 PM). Over a dozen races in the past twenty years alone have been decided by a single vote or ended in a tie. *Id.*

³² See Weiner & Vozzella, *supra* note 18.

³³ Sarah Blaskey, *South Florida's Absentee-Ballot Blues: 'I Am Infuriated that I Was Not Able to Vote,'* MIAMI HERALD (Nov. 13, 2018, 6:00 AM), <https://www.miamiherald.com/news/politics-government/election/article221518235.html> [https://perma.cc/X4RW-G958].

³⁴ *Id.*

³⁵ *See id.*

³⁶ *Id.*

³⁷ See Weiner & Vozzella, *supra* note 18.

³⁸ The senate, gubernatorial, and agricultural commissioner races were so close that they caused Florida's first full, statewide recount. Frances Robles & Patricia Mazzei, *Florida Begins Vote Recounts in Senate and Governor's Races*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/us/florida-senate-governor-votes-recount.html> [https://perma.cc/U2FZ-CHW5]. A few days later, with the senate race's margin of 0.15%, the state ordered a manual recount for that race. Frances Robles, Glenn Thrush & Audra D.S. Burch, *Recount Ordered in Florida Senate Race as Governor's Contest Nears End*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/florida-recount.html> [https://perma.cc/22AB-Y4JM].

had lost the primary as the Democratic candidate for the general election.³⁹ Additionally, a different Democratic candidate was listed in the wrong party column, and another Democratic candidate was listed with the wrong party label.⁴⁰ Although the ballots were replaced in a few days, at that point the federal deadline for overseas absentee ballots had passed, restricting an entire class of people from voting.⁴¹ In California's 2016 general election, some absentee voters were sent the right ballots, but they contained the wrong voter's name.⁴² Between misprints and misdeliveries, there are a lot of ways a state can err in delivering and returning absentee ballots, with minimal safeguards.

B. Disenfranchisement by Deadline

Aside from what may be categorized as state error (misdelivery, misprinting, and other mistakes), there are state laws that lead to too-late delivery of otherwise valid absentee ballots.⁴³ This is like a more sinister form of misdelivery by the state, because the voter is less likely to be aware of, and thus be able to correct, the problem. In Pennsylvania, thousands of voters every year had their absentee ballots rejected because of the state's extremely tight deadlines to request (by 5 p.m. the Tuesday before the election) and return (by 5 p.m. the Friday before the election) absentee ballots.⁴⁴

The ACLU of Pennsylvania and the Lawyers' Committee for Civil Rights Under Law, together with nine voters whose absentee ballots did not arrive in time for the November 2018 election, sued the state in 2019 to prevent that type of disenfranchisement from occurring in future elections.⁴⁵ The plaintiffs argued that the restrictive absentee ballot deadlines violated the state's constitution, the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.⁴⁶ The plaintiffs

³⁹ *Voting Advocates Say Absentee Ballot Errors Demonstrate Flaws in System*, CONCORD MONITOR (Oct. 13, 2018, 8:16 PM), <https://www.concordmonitor.com/New-Hampshire-voting-advocates-say-absentee-ballot-errors-expose-flaws-in-Secretary-of-State-system-20760704> [<https://perma.cc/WT8U-QNLD>].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Matt Bloom, *Missing Your Mail-In Ballot? You're Not Alone*, KPCC (Nov. 8, 2016), <https://www.scpr.org/news/2016/11/08/66006/missing-your-mail-in-ballot-you-re-not-alone/> [<https://perma.cc/5256-8KKP>]. In one family, a mother and her daughters requested absentee ballots, but they were each sent an absentee ballot for the mother. *Id.*

⁴³ See, e.g., Jonathan Lai, *Are Pa.'s Absentee-Ballot Deadlines Unconstitutional? Judges Consider Whether a Lawsuit Should Continue*, PITTSBURGH POST-GAZETTE (June 5, 2019, 4:25 PM), <https://www.post-gazette.com/news/politics-local/2019/06/05/Are-Pa-s-absentee-ballot-deadlines-unconstitutional-Judges-consider-whether-a-lawsuit-should-move-forward/stories/201906050148> [<https://perma.cc/BE37-7694>].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Lai, *supra* note 43.

further contended that the deadlines were an unconstitutional burden on the fundamental right to vote because they resulted in complete disenfranchisement.⁴⁷ Judges heard oral arguments in that case in June 2019,⁴⁸ but before they ruled on it, the state passed a bipartisan election reform law that overhauled Pennsylvania's absentee ballot scheme, effective as of April 2020.⁴⁹

The new law allows voters to cast no-excuse absentee ballots up to fifty days before an election.⁵⁰ The law also extends the deadline to return absentee ballots from 5 p.m. the Friday before the election to 8 p.m. on Election Day.⁵¹ This moved Pennsylvania from having one of the shortest absentee ballot windows in the country⁵² to having the longest absentee ballot window in the country.⁵³

Providing more flexible timing for accepting absentee ballots should allow the state to stop disenfranchising absentee voters who cannot meet the prohibitively restrictive deadlines. Pennsylvania's new law shows that bipartisan reform expanding absentee mail-in voting is a possibility for states, even those with mixed-party executive and legislative branches.⁵⁴ Such reform could look like Pennsylvania's new law, opening the window to request an absentee ballot far enough out from the election so the state has sufficient time to correct any errors.⁵⁵ New laws should also extend the time in which the state will accept valid absentee ballots.

Absentee ballot reform is trending—after Virginia secured an all-Democratic government in 2019, legislators passed a slew of changes to the absentee voting scheme. Both chambers of the legislature passed measures replacing the law mandating pre-approved, excused absentee voting with no-excuse absentee voting.⁵⁶ The

⁴⁷ See Petition for Review at ¶¶ 103–06, *Jones v. Torres*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

⁴⁸ *Lai*, *supra* note 43.

⁴⁹ Evan Simko-Bednarski, *Overhaul of Election Laws Find Bipartisan Support in the Battleground State of Pennsylvania*, CNN, https://www.cnn.com/2019/11/01/_politics-zone-injection/pennsylvania-election-overhaul/index.html [<https://perma.cc/X9UP-GA48>] (Nov. 1, 2019, 4:05 PM).

⁵⁰ *Id.*

⁵¹ See *Lai*, *supra* note 43; Simko-Bednarski, *supra* note 49.

⁵² David Murrell, *New Online Absentee Ballot Request Makes Voting in Pa. . . . Marginally Easier*, PHILA. MAG. (Sept. 17, 2019, 3:38 PM), <https://www.phillymag.com/news/2019/09/17/pennsylvania-absentee-ballot-online/> [<https://perma.cc/NX25-GJWQ>].

⁵³ Simko-Bednarski, *supra* note 49.

⁵⁴ *Id.* (noting Pennsylvania's Democratic governor and the Republican state senate majority leader).

⁵⁵ See *id.*

⁵⁶ Dean Mirshahi, *Bill Allowing No-Excuse Absentee Voting Passes Virginia Senate*, WRIC, <https://www.wric.com/news/politics/capitol-connection/bill-allowing-no-excuse-absentee-voting-passes-virginia-senate/> [<https://perma.cc/5FVB-3R9B>] (Jan. 20, 2020, 4:28 PM); Max Smith, *House Approves Significant Absentee Voting Expansion*, WTOP (Jan. 31, 2020, 4:12 AM), <https://wtop.com/virginia/2020/01/va-house-approves-significant-absentee-voting-expansion/> [<https://perma.cc/TNY2-R95X>].

state will accept absentee ballots that were postmarked before close of polls until noon the Friday after the election (instead of only accepting absentee ballots until close of polls).⁵⁷ One other significant change is that instead of allowing voters to apply online or by mail to vote absentee up to a week before an election, voters will have to apply at least eleven days before an election.⁵⁸ These laws are now in effect.⁵⁹

The through line in both Pennsylvania's and Virginia's absentee ballot reforms is creating a more flexible deadline for the voter to request and mail the ballot and for the state to receive the ballot.⁶⁰ Overly restrictive deadlines end up disenfranchising voters even when voters have timely requested and mailed back the ballot, because the state may not receive it by the deadline for the registrar. These timelines become compounded when there is state error like misdelivery or misprinting.

One complicating factor in ensuring timely delivery of an absentee ballot is that before a voter may return an absentee ballot, they must first apply for and be approved to receive one.⁶¹ Methods of applying differ by state, varyingly allowing voters to apply in-person, by mail, or online.⁶²

For voters who want to apply by mail to vote absentee, Rhode Island's deadline to return an application is the earliest among the states—twenty-one days before the election.⁶³ Texas, Nebraska, Idaho, and Arizona—and now Virginia⁶⁴—hover around the middle of all the states, with deadlines to mail in the absentee ballot application eleven days before Election Day.⁶⁵ Keeping in mind the size of those western states, and other states with farther-out deadlines, a buffer time makes sense so that officials can process and send out ballots in time for voters to receive the ballots before the election. Connecticut, Delaware, Massachusetts, Minnesota, Montana, South Dakota,

⁵⁷ H.B. 238, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); Smith, *supra* note 56.

⁵⁸ H.B. 239, 2020 Gen. Assemb., Reg. Sess. (Va. 2020). Another bill created an exception for emergencies that prevent residents from voting after the application deadline. H.B. 242, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁵⁹ See VA. CODE ANN. §§ 24.2-701, 703, 705-07, 710 (West 2020); see also H.B. 207, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (“Any registered voter may vote by absentee ballot *in accordance with the provisions of this chapter . . .*” (emphasis added)).

⁶⁰ See Simko-Bednarski, *supra* note 49; Smith, *supra* note 56.

⁶¹ See generally *Absentee Ballot Deadlines*, VOTE.ORG, <https://www.vote.org/absentee-ballot-deadlines/> [<https://perma.cc/V85R-APNT>] (last visited Dec. 8, 2020) (listing state deadlines for absentee ballot application).

⁶² *Id.*

⁶³ *Absentee Ballot Deadlines*, *supra* note 61; *Apply for a Mail Ballot*, R.I. BD. ELECTIONS, <https://www.elections.ri.gov/voting/applymail.php> [<https://perma.cc/8T8T-KXQ3>] (last visited Dec. 8, 2020). There is an exception for emergencies, but voters must apply in-person and may not mail the absentee ballot to the board of elections. *Emergency Mail Ballot*, R.I. BD. ELECTIONS, <https://www.elections.ri.gov/voting/emergency.php> [<https://perma.cc/A795-KC86>] (last visited Dec. 8, 2020) (“A voter may apply for an emergency mail ballot by obtaining an application from their local Board of Canvassers.”).

⁶⁴ H.B. 239, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁶⁵ *Absentee Ballot Deadlines*, *supra* note 61.

Vermont, and Wyoming all require that voters' mailed-in applications to vote absentee be received by the day before Election Day—but also require that absentee ballots be received by the state *on* Election Day.⁶⁶ That is a completely unworkable timeline for voters who submit mail applications on the last possible day.

The online application deadlines can be just as confounding as the mailed application deadlines. In Arkansas, voters can apply to vote absentee up until the day before the election if they do so in person, but they have to apply seven days before the election if they apply online.⁶⁷ By the time voters apply online a week out, there still might not be enough time for their application to be processed, for the voter to receive the ballot, and for the state to receive the completed ballot back by the final deadline.⁶⁸

After a voter has been approved to receive an absentee ballot, and the state has mailed it to them, the final deadline to return the absentee ballot varies greatly from state to state. In some states, absentee ballots must arrive at the clerk's office by the day before the election, while in other states, ballots may arrive up to ten days after the election.⁶⁹ To reiterate, depending on how late voters are allowed to apply to vote absentee, and when the state sends out the absentee ballot, many voters may end up being completely disenfranchised, through no fault of their own, if they receive their ballot so late that it cannot be delivered by the state's final deadline to count it.⁷⁰ The burden should not be on voters who have timely applied for absentee ballots to then ensure that their ballots are received by the state by an essentially unworkable deadline. States should accommodate voters who comply with their deadlines to apply for an absentee ballot and then mail in their ballots by allowing for a few more days to count ballots.

Despite the hurdles to vote absentee, nearly 18% of voters nationwide voted absentee in the November 2016 election.⁷¹ So why do so many people vote absentee? It may be difficult (or impossible) for a voter to get to their voting precinct on Election Day, especially since elections are generally held on a workday.⁷² Even if a voter

⁶⁶ *Id.*

⁶⁷ *Elections*, ARK. SEC'Y STATE, <https://www.sos.arkansas.gov/elections/voter-information/absentee-voting> [<https://perma.cc/S7GP-9FED>] (last visited Dec. 8, 2020).

⁶⁸ If a voter ballot is mailed by the USPS via First-Class Mail, it could take up to three days for the voter to receive the ballot; returning the ballot could take the same amount of time. *Mail & Ship*, U.S. POSTAL SERV., <https://www.usps.com/ship/> [<https://perma.cc/SD5S-F9QK>] (last visited Dec. 8, 2020).

⁶⁹ *Absentee Ballot Deadlines*, *supra* note 61.

⁷⁰ *See id.* (South Dakota, for example, accepts applications received one day before Election Day but returned ballots must be received on Election Day.).

⁷¹ *EAVS Deep Dive: Early, Absentee and Mail Voting*, U.S. ELECTION ASSISTANCE COMM'N 2 (Oct. 17, 2017), <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview/> [<https://perma.cc/L7SG-X6AJ>].

⁷² *See* CONG. RSCH. SERV., R46413, ELECTION DAY: FREQUENTLY ASKED QUESTIONS 1 (2020), <https://fas.org/sgp/crs/misc/R46413.pdf> [<https://perma.cc/PSH9-B3BW>].

can get to their precinct, prohibitively long wait times might make it impossible for them to stay and vote.⁷³ As a global pandemic has gripped the United States, absentee voting has only become a more urgent need.⁷⁴

Virginia's excuses to vote absentee, although now defunct,⁷⁵ illustrate in more detail why voters need the ability to vote absentee—and have those votes counted. These are some of the excuses that allowed a Virginia resident, at one point, to vote absentee: the voter was a student outside the locality, the voter had business outside the locality on Election Day, or the voter was working and commuting for eleven or more hours while the polls were open.⁷⁶ These were a few among the twenty permissible excuses.⁷⁷ Some of these reasons were known far enough ahead of Election Day to send in an absentee ballot application, and return a timely ballot, but others were not—an example being if a voter received a last-minute shift and was going to work throughout the time polls were open.⁷⁸

If a voter lives in one of the sixteen states that still requires an excuse to vote absentee,⁷⁹ once a voter knows they are allowed to vote absentee, they must still meet other requirements that vary by state to receive their ballot. In Virginia, for example, you must be registered to vote prior to applying for an absentee ballot.⁸⁰ Residents of Virginia must wait five days between registering to vote and applying in-person for an absentee ballot.⁸¹ Additionally, in state elections, some first-time voters are not allowed to vote absentee by mail.⁸² The changes to Virginia's absentee ballot scheme did not change these requirements.⁸³ These requirements, plus the deadlines

⁷³ See Leighley & Nagler, *supra* note 29, at 145.

⁷⁴ See Pam Fessler, *The Legal Fight over Voting Rights During the Pandemic Is Getting Hotter*, NPR (May 2, 2020, 7:00 AM), <https://www.npr.org/2020/05/02/849090889/the-legal-fight-over-voting-rights-during-the-pandemic-is-getting-hotter> [<https://perma.cc/X2QN-9XGB>].

⁷⁵ See *supra* notes 56–59 and accompanying text.

⁷⁶ H.B. 207, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁷⁷ *Id.* Though the statute had twelve numbered excuses, these were often broken out into twenty to account for variants such as being an out-of-state student or her spouse. See, e.g., *Virginia Absentee Ballot Application Form*, VA. DEP'T ELECTIONS (July 2017), <https://www.alexandriava.gov/uploadedFiles/elections/AB%20Application%20701%20Fillable.pdf> [<https://perma.cc/V46M-FKX8>].

⁷⁸ *Absentee and Early Voting*, VA. DEP'T ELECTIONS, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> [<https://perma.cc/FNX4-S9SP>] (last visited Dec. 8, 2020).

⁷⁹ *VOPP: Table 2: Excuses to Vote Absentee*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx> [<https://perma.cc/P42H-VB4N>] (Apr. 20, 2020).

⁸⁰ See *Frequently Asked Questions About Absentee Voting*, VA. DEP'T ELECTIONS, https://www.elections.virginia.gov/media/absentee-landing-page/FAQ_absentee_voting.pdf [<https://perma.cc/VNY5-PULK>] (last visited Dec. 8, 2020).

⁸¹ VA. CODE ANN. § 24.2-701 (West 2020). The statute refers only to in-person voting, but it is likely that online registration requires the same waiting period to request an absentee ballot.

⁸² *Absentee and Early Voting*, *supra* note 78.

⁸³ See *supra* notes 56–59 and accompanying text.

to request and return absentee ballots, add barriers to absentee voting and exacerbate the time crunch to count absentee ballots.⁸⁴

Before the recent changes to the absentee voting scheme in Virginia, once a voter timely sent in their absentee ballot application, met all the requirements, and was approved to vote absentee, like in the majority of states,⁸⁵ their ballot had to be returned to the registrar's office by close of polls on Election Day.⁸⁶ Virginia law now provides an exception to count late absentee ballots that meet certain requirements.⁸⁷ Before the 2020 legislative updates, the exception applied only to any absentee ballot (1) received after the polls closed, (2) received before 5 p.m. on the second business day before the state board certifies election results, (3) requested on or before but not sent by the deadline for making absentee ballots available, and (4) cast by an eligible absentee voter.⁸⁸

For the third requirement, the deadline for making absentee ballots available was no later than forty-five days before an election, or within three business days of the receipt of a properly completed absentee ballot application (whichever came later).⁸⁹ Reading the plain language of the statute that created the exception together with the statute that created the deadline for making absentee ballots available, an absentee ballot (1) received between the time polls closed and nine days after the election, (2) that was requested on or before but not sent by forty-five days before the election or within three business days of the receipt of a properly completed absentee ballot application, and (3) cast by an eligible voter, would have been counted.⁹⁰ That excluded any absentee ballots that were requested within the actual time frame that was provided to request absentee ballots, unless the ballot was not sent within three business days from the date the voter's absentee ballot application was received by the state⁹¹—and most voters likely, still, do not know when their applications are received.⁹²

This could have discounted many absentee ballots that were received after the final deadline, even if a ballot was mailed by the state without enough time for the voter to return it. In contrast, a properly completed absentee ballot returned by the

⁸⁴ See *Absentee Ballot Deadlines*, *supra* note 61.

⁸⁵ *Id.*

⁸⁶ See Smith, *supra* note 56.

⁸⁷ VA. CODE ANN. § 24.2-709(B)–(C) (West 2020).

⁸⁸ *Id.* § 24.2-709 (West 2019). The Virginia Board of Elections certifies results the third Monday of the month of the election, *id.* § 24.2-679(A) (West 2020), putting the final deadline to receive a completed ballot nine days after Election Day.

⁸⁹ *Id.* § 24.2-612 (West 2019). This language is the same in the 2020 update. See *id.* (West 2020).

⁹⁰ See *id.* §§ 24.2-612, 709 (West 2019).

⁹¹ See *id.*

⁹² But see *Absentee and Early Voting*, *supra* note 78 (If applying by mail, Virginia's "Citizen Portal" shows whether an application has been received. It is unknown how many absentee voters utilize this functionality.).

deadline from a voter who died before that day would be counted.⁹³ It makes no sense to count the absentee votes of dead citizens but not ensure better safeguards to count the votes of living citizens who are actually impacted by the results of the election in which they are voting.

Virginia legislators noticed that the absentee ballot deadline was prohibitively restrictive for many voters and updated it in 2020.⁹⁴ Now, any valid absentee ballot (1) returned to the registrar after the close of polls, but before noon on the third day after an election, and (2) postmarked on or before the election date will be counted.⁹⁵ This language was merely added in, arguably creating further confusion about what late absentee ballots should be counted.

In the 2018 general election, “374,308 Virginians requested an absentee ballot . . . a record for nonpresidential election years.”⁹⁶ Only 337,315 of those voters returned their ballots in time to be counted—less than the total amount of absentee ballots requested, but nearly 10% of the total votes counted.⁹⁷ Of those absentee ballots, about 42% were submitted by mail (as opposed to being submitted in person by the voter or a designated representative).⁹⁸ The state received 6,771 absentee ballots in the four weeks following Election Day, nearly all of which were received by mail.⁹⁹ Those late absentee ballots represent a lot of uncounted votes with the power to decide elections.¹⁰⁰

It is important to remember that those numbers were for a midterm election—absentee voting is much higher in presidential years.¹⁰¹ Counting every vote, including mailed absentee ballots, will be an especially pressing need in 2020 and beyond. At the time of writing, the 2020 election was “poised to have the highest turnout in a century.”¹⁰² In Virginia, voter complaints about incidents involving absentee ballots increased greatly going into the 2016 presidential election—from three complaints in the 2015 off-year election to sixty-one in 2016.¹⁰³

⁹³ § 24.2-709(D) (West 2019). This is still true under the amended statute. *Id.* § 24.2-709(C) (West 2020).

⁹⁴ *See id.* § 24.2-709.

⁹⁵ *Id.* § 24.2-709(B).

⁹⁶ *Post-Election Report*, VA. DEP'T ELECTIONS 7 (Nov. 6, 2018), <https://www.elections.virginia.gov/media/formwarehouse/maintenance-reports/Post-ElectionReportNovember2018rev.pdf> [<https://perma.cc/D2F4-HAAR>].

⁹⁷ *Id.*; *Registration/Turnout Reports*, *supra* note 15.

⁹⁸ VA. DEP'T ELECTIONS, *supra* note 96, at 4.

⁹⁹ *Id.*

¹⁰⁰ *See* Montanaro, *supra* note 31.

¹⁰¹ *Registration/Turnout Reports*, *supra* note 15.

¹⁰² Nate Cohn, *Huge Turnout Is Expected in 2020. So Which Party Would Benefit?*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/upshot/2020-election-turnout-analysis.html> [<https://perma.cc/XL4T-L6WK>].

¹⁰³ VA. DEP'T ELECTIONS, *supra* note 96, at 13. Complaints decreased to eighteen in 2017 and twenty-six in 2018. *Id.*

Although Virginia's absentee ballot laws recently changed,¹⁰⁴ the pre-2020 scheme illustrated the problems with unworkable absentee ballot deadlines in states across the country. The newly passed laws, like Pennsylvania's recent reforms, pave a path forward that other states should follow.¹⁰⁵ States need to address problems that essentially purge mailed absentee ballots, given how often states' own mistakes and conflicting deadlines cause absentee voter disenfranchisement through no fault of the voter.¹⁰⁶

II. CONGRESS'S ELECTION ADMINISTRATION POWERS

Congress has the power to regulate federal elections through the Elections Clause of the Constitution.¹⁰⁷ The Elections Clause 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 ch[oo]sing Senators."¹⁰⁸ Congress has utilized this power a few times to standardize election administration practices across the country, including to pass the Help America Vote Act (HAVA).¹⁰⁹ The Clause suggests that states could have different election systems for federal offices and state or local offices, but because of the significant administrative burden, Congress has generally expected states to adopt the federal election regulations for all elections.¹¹⁰

Congress passed HAVA in 2002 in response to the contentious 2000 presidential election.¹¹¹ The law authorized \$3.86 billion in aid to help states modernize their election administration, with the key goal of ensuring uniform and nondiscriminatory federal election administration.¹¹² The federal funding was tied to requirements that states "update voting equipment, mandate that first-time voters who register by mail show photo identification, offer provisional ballots to voters whose eligibility is in question, post voting information at polling locations, maintain statewide voter registration lists, and establish complaint procedures for those who experience problems in

¹⁰⁴ See *supra* notes 56–59 and accompanying text.

¹⁰⁵ See Simko-Bednarski, *supra* note 49.

¹⁰⁶ See *Absentee Ballot Deadlines*, *supra* note 61.

¹⁰⁷ KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, *ADMINISTERING ELECTIONS* 55 (2015).

¹⁰⁸ U.S. CONST. art. I, § 4.

¹⁰⁹ See HALE ET AL., *supra* note 107, at 77. Congress has only passed a few laws that explicitly address election administration: the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act (later amended by the Military and Overseas Voting Empowerment Act), the National Voter Registration Act, and HAVA. *Id.*

¹¹⁰ HALE ET AL., *supra* note 107, at 55.

¹¹¹ GLENN H. UTTER & RUTH ANN STRICKLAND, *CAMPAIGN AND ELECTION REFORM* 30–31 (2d ed. 2008).

¹¹² *Id.* at 31.

voting,” among other requirements.¹¹³ The law also created the United States Election Assistance Commission (EAC).¹¹⁴

HAVA did not do much regarding absentee voting—it mandated some reporting on absentee voting and amended portions of The Uniformed and Overseas Citizens Absentee Voting Act.¹¹⁵ However, both Democrats and Republicans agreed that part of the main goal of the law was to enact “provisions for voters to correct errors in their voting.”¹¹⁶ This goal made sense in the aftermath of the presidential recount in Florida, which was caused mainly by voter error that stemmed from confusion over how to properly fill out the ballot.¹¹⁷

Part of this error correction included a requirement that states provide provisional ballots to voters who believe they are registered but do not appear on the voter list at the polls.¹¹⁸ There are a variety of reasons why voter names may not show up on the voter list—for example, voters might be mistakenly removed from the registry due to state error with data entry or general administration.¹¹⁹ The provisional ballots mandated by HAVA are “a counterweight to the possibility of [such] clerical errors.”¹²⁰ Additionally, if courts order polls to stay open late, people who vote later than the original closing time must vote provisionally.¹²¹

Provisional ballots are kept separate from other ballots until the eligibility of the voter is determined by checking registration records.¹²² Once the voter’s eligibility is determined, the state must notify the voter in writing whether their vote did or did

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Help America Vote Act of 2002, Pub. L. No. 107-252, § 703, 116 Stat. 1666, 1723–24.

¹¹⁶ Warren Christopher, Opinion, *The Stalling of Election Reform*, N.Y. TIMES (Sept. 15, 2002), <https://www.nytimes.com/2002/09/15/opinion/the-stalling-of-election-reform.html> [<https://perma.cc/GDU3-GXA5>].

¹¹⁷ In the 2000 presidential election, there were numerous instances of voter error with Florida’s voting machines, leading to the presidential recount in the state. Many ballots were not perforated all the way (“hanging” or “dimpled” chads), but there was no way for voters to report their intent after the state realized the error and tried to interpret voter intent. See *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (per curiam); Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NPR, <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/G6CV-HARM>] (Nov. 12, 2008, 5:00 AM). Although the mistakes were characterized as voter error, that is not a fair characterization—the punch card voting machines were quite confusing and onerous to use. The machines had been invented for accounting before World War II and were incredibly flawed for voting purposes. See RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 12 (2012).

¹¹⁸ MARTHA KROPF & DAVID C. KIMBALL, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM* 26 (2011).

¹¹⁹ *Id.*

¹²⁰ HALE ET AL., *supra* note 107, at 88.

¹²¹ KROPF & KIMBALL, *supra* note 118, at 26.

¹²² *Id.*

not count.¹²³ States may create their own timeline for when election officials must verify whether a provisional ballot will count before certifying election results.¹²⁴ HAVA is enforced through § 1983 litigation, so a citizen may bring a claim when their constitutional right to vote is deprived by an official administering the election.¹²⁵

Taken together, these requirements may seem like a lot of safeguards to impose on states, especially considering how little federal legislation addresses election administration.¹²⁶ However, the provisional ballot safeguards enacted in HAVA were deemed necessary to balance two vital goals: preventing eligible voters from being denied the right to vote and preventing voter fraud.¹²⁷ Requiring all states to provide “provisional ballots ostensibly created a more uniform ability to vote, given the variation in state rules about voter eligibility.”¹²⁸ Unfortunately, a lack of guidance from the EAC on when “provisional ballots should be issued or counted” has resulted in states creating a variety of situations that allow (or do not allow) provisional voting.¹²⁹

HAVA’s provisional voting framework should serve as the foundation for federal legislation increasing uniformity in how states handle mailed absentee ballots.¹³⁰ While HAVA passed somewhat expeditiously for federal legislation,¹³¹ it seems unlikely that bipartisan election reform will become law any time soon given the current gridlock in the federal government.¹³² Therefore, states should take the lead

¹²³ *Id.*

¹²⁴ *Id.* at 27.

¹²⁵ See John Stone, *Civil Rights: Help America Vote Act Creates Individual Right Enforceable Through § 1983*, NAT’L LEGAL RSCH. GRP., INC. (Mar. 15, 2016, 1:03 PM), <http://www.nlr.org/public-law-legal-research/civil-rights-help-america-vote-act-creates-individual-right-enforceable-through-1983> [<https://perma.cc/GH9X-KSUQ>].

¹²⁶ See HALE ET AL., *supra* note 107, at 77.

¹²⁷ See KROPF & KIMBALL, *supra* note 118, at 24.

¹²⁸ HALE ET AL., *supra* note 107, at 88.

¹²⁹ See *id.*

¹³⁰ See generally Charles Stewart III, *What Hath HAVA Wrought? Consequences, Intended and Not, of the Post-Bush v. Gore Reforms*, in ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER *BUSH V. GORE* 79, 79–81, 83–85 (R. Michael Alvarez & Bernard Grofman eds., 2014) (discussing HAVA’s legislative history).

¹³¹ Prompted by the 2000 presidential election, the 107th Congress passed HAVA in January 2002—only a year after that session of Congress commenced following the 2000 election. See *id.* at 83–85.

¹³² See Shawn Zeller, *Divided Government Will Pose an Obstacle to Lawmaking in 2019*, ROLL CALL (Jan. 3, 2019, 7:03 AM), <https://www.rollcall.com/news/politics/divided-government-will-pose-obstacle-lawmaking-2019> [<https://perma.cc/L2PK-SSDV>]. While the House did pass an election reform package in March 2019 that would change how congressional elections are funded, impose new state voter-access rules, and mandate disclosure of presidential candidates’ tax returns, it was passed along party lines and has not received any movement in the Senate. Mike DeBonis & John Wagner, *House Democrats Pass H.R. 1, Their Answer to Draining the Swamp*, WASH. POST (Mar. 8, 2019, 8:23 PM), https://www.washingtonpost.com/powerpost/house-democrats-prepare-to-pass-hr-1-their-answer-to-draining-the-swamp/2019/03/08/740f6b48-415b-11e9-9361-301ffb5bd5e6_story.html [<https://perma.cc/XCZ7-2ZZP>].

on updating their election laws to address the increased use of mail-in absentee ballots to prevent eligible voters from being disenfranchised. However, if states do not reform their absentee ballot laws, then Congress should amend HAVA or pass a similar law that would standardize mail-in absentee ballot procedures.

III. DISENFRANCHISEMENT BY STATE ERROR AND UNWORKABLE DEADLINES VIOLATES THE EQUAL PROTECTION CLAUSE

A. The Fundamental Right to Vote: Changing Standards for Evaluating State Election Laws

A long line of cases establishes that voting is a fundamental right protected by the Equal Protection Clause of the Constitution.¹³³ In *Reynolds v. Sims*, the Supreme Court emphasized the right to vote's unique importance as a fundamental right that is preservative of all other rights.¹³⁴ Two years later in *Harper v. Virginia State Board of Elections*, the Court declared, "[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."¹³⁵ Election law scholars agree that *Reynolds* and *Harper* established that voting is a fundamental right, burdens on which are subject to heightened scrutiny.¹³⁶

In the modern era, the fundamental right to vote was reinforced at the Supreme Court in *Bush v. Gore*.¹³⁷ The opinion in *Bush* emphasized, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."¹³⁸ *Bush*'s holding was narrow: it invalidated Florida's recount procedures on equal protection grounds just to be applied to the facts of the 2000 presidential recount in Florida.¹³⁹ The holding, however, expressed the potentially expansive nature of the right to vote:

¹³³ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). This was reinforced again in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

¹³⁴ 377 U.S. at 561–62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. . . . Almost a century ago . . . the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.'" (quoting *Yick Wo*, 118 U.S. at 370)).

¹³⁵ 383 U.S. at 670.

¹³⁶ *E.g.*, DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS STEPANOPOULOS, *ELECTION LAW: CASES AND MATERIALS* 394 (6th ed. 2017).

¹³⁷ 531 U.S. 98, 104 (2000) (per curiam) (The opinion specifically discussed the fundamental right to vote for president.).

¹³⁸ *Id.* at 104.

¹³⁹ *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); *see* HASEN, *supra* note 117, at 136 (noting that the "Court tried to limit the reach of its holding").

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.¹⁴⁰

The differences in how ballots were being recounted across Florida did not meet the “minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” under the Equal Protection Clause.¹⁴¹ The recount process failed to satisfy the Equal Protection Clause because (1) the state lacked uniform rules to determine the intent of voters when determining whether to count a ballot, (2) the second recount counted votes differently from the first recount, (3) the final recount was not guaranteed to count all votes, and (4) the people conducting the recount were not necessarily equipped to satisfactorily complete it.¹⁴² All those issues taken together were unconstitutional because they allowed one person's vote to be valued more than another person's vote.¹⁴³

The *Bush* decision illustrated important applications for the right to vote in terms of election administration, mainly that equal protection applies to the manner of the exercise of the vote—a state may not value one person's vote over another by “arbitrary and disparate treatment.”¹⁴⁴ Additionally, the desire for speed is not an excuse for ignoring equal protection guarantees.¹⁴⁵ The opinion emphasized the necessity of at least minimum procedural safeguards to protect the fundamental right of each voter.¹⁴⁶ Election law scholar Richard Hasen called this “a new equal protection right to some kind of rudimentary fairness in the nuts and bolts of elections.”¹⁴⁷ Although *Bush*'s precedential value has, unfortunately, been minimal,¹⁴⁸ its unique

¹⁴⁰ *Bush*, 531 U.S. at 104–05 (citing *Harper*, 383 U.S. at 665). The opinion also stated that the right to vote “can be denied by a debasement . . . of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* at 105 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

¹⁴¹ *Id.*

¹⁴² See Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 384–85 (2002).

¹⁴³ HASEN, *supra* note 117, at 136.

¹⁴⁴ *Bush*, 531 U.S. at 104.

¹⁴⁵ *Id.* at 108.

¹⁴⁶ *Id.* at 109.

¹⁴⁷ HASEN, *supra* note 117, at 136.

¹⁴⁸ *Bush v. Gore* as legal precedent, ironically, does not appear to be the cause of much of the rise in litigation. . . . [F]ew of the lawsuits since 2000 actually have led to successful *Bush v. Gore* claims, and most lower courts have read the case narrowly when it has come up.

Id. Hasen previously predicted (correctly) that the decision would have little precedential value. See generally Hasen, *supra* note 142, at 386–92 (discussing reasons why commentators’ “optimism [was] entirely understandable,” but ultimately unwarranted).

equal protection analysis should serve as a framework for ensuring that a state does not value one person's vote over another by "arbitrary and disparate treatment"¹⁴⁹—regardless of the type of election or method of casting a ballot. Specifically, it should ensure that states do not value in-person voters' ballots over absentee voters' ballots by arbitrary and disparate treatment.

Bush's equal protection analysis did not directly use the more traditional balancing test for equal protection challenges to election administration,¹⁵⁰ but that test—the *Anderson-Burdick* test—seems to still be the applicable standard.¹⁵¹ The *Anderson-Burdick* test comes out of two cases¹⁵²: *Anderson v. Celebrezze*¹⁵³ and *Burdick v. Takushi*.¹⁵⁴ In *Anderson*, Ohio supporters of independent presidential candidate John Anderson met the substantive requirements to put his name on the ballot, but the statutory deadline to qualify as an independent candidate passed before he met those requirements.¹⁵⁵ Anderson challenged the early filing deadline as an unconstitutional burden on the voting and associational rights of his supporters.¹⁵⁶ The Court applied a balancing test to determine the deadline's constitutionality:

[A 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. 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. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.¹⁵⁷

¹⁴⁹ *Bush*, 531 U.S. at 104.

¹⁵⁰ *See id.* at 104–05 (applying an "arbitrary and disparate treatment" standard); *see also* Rachel Provencher & John Hardin Young, *The Administrative Challenges for Recounts, in AMERICA VOTES!: CHALLENGES TO MODERN ELECTION LAW AND VOTING RIGHTS* 58, 63–65 (Benjamin E. Griffith ed., 3d ed. 2016).

¹⁵¹ *See* Provencher & Young, *supra* note 150, at 65 (arguing that in 2008, the Court agreed unanimously on *Anderson-Burdick*'s applicability, despite division over the test's application). *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

¹⁵² *See* Provencher & Young, *supra* note 150, at 63–64.

¹⁵³ 460 U.S. 780 (1983).

¹⁵⁴ 504 U.S. 428 (1992).

¹⁵⁵ *Anderson*, 460 U.S. at 782.

¹⁵⁶ *Id.* at 782–83.

¹⁵⁷ *Id.* at 789 (citations omitted).

In this case, the injury to Anderson and his supporters outweighed the interests put forward by the state: voter education, equal treatment for partisan and independent candidates, and political stability.¹⁵⁸ Thus, the Court found the deadline unconstitutional.¹⁵⁹

Later, in *Burdick*, the Court applied and refined *Anderson*'s standard.¹⁶⁰ The slightly modified balancing test clarified that the standard in *Anderson* should be used to determine the level of scrutiny applied to the challenged state election law.¹⁶¹ When the challenged state election law severely burdens the right to vote, the law will receive a stricter form of scrutiny.¹⁶² When the challenged law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” it is subject to a less strict review.¹⁶³ Using the test, the Court found that Hawaii’s practice of banning write-in votes was not sufficiently burdensome, and the state’s reason for banning such votes—including preventing unrestrained factionalism—was compelling enough to justify it.¹⁶⁴

To summarize the *Anderson-Burdick* test: First, a court must evaluate how severe the burden or injury is on the right to vote.¹⁶⁵ If there is a high burden, the Court “require[s] that the regulation be narrowly tailored to advance a compelling state interest.”¹⁶⁶ If the law does not burden many voters or is easy to address, the state merely needs a relevant interest.¹⁶⁷ Second, the court must identify and evaluate the precise interests put forward by the state as justifications for the burden, and then decide if the law is unconstitutional.¹⁶⁸ This is a fact-intensive inquiry.¹⁶⁹

Eight years after *Bush*, the Supreme Court once again applied the *Anderson-Burdick* test when it considered a challenge to an Indiana election administration law in *Crawford v. Marion County Election Board*.¹⁷⁰ In *Crawford*, the plaintiffs alleged that a state law in Indiana that required citizens voting in person on Election Day or casting an early ballot in person to present photo identification unduly burdened the right to vote under the Fourteenth Amendment.¹⁷¹ The plaintiffs argued that the carve-out the state gave to voters who did not have photo IDs was too difficult to execute.¹⁷² The exception required a lot of travel, especially for voters who may not

¹⁵⁸ See *id.* at 796, 805–06.

¹⁵⁹ See *id.* at 805–06.

¹⁶⁰ See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

¹⁶¹ See *id.*

¹⁶² See *id.* at 434.

¹⁶³ See *id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

¹⁶⁴ See *id.* at 438–42.

¹⁶⁵ See *Anderson*, 460 U.S. at 789.

¹⁶⁶ *Burdick*, 504 U.S. at 433–34.

¹⁶⁷ See *id.* at 434.

¹⁶⁸ See *Anderson*, 460 U.S. at 789.

¹⁶⁹ See *id.*

¹⁷⁰ 553 U.S. 181 (2008).

¹⁷¹ See *id.* at 187 (plurality opinion).

¹⁷² See *id.* at 198.

have had cars in a location where public transportation was essentially non-existent, to get to the Bureau of Motor Vehicles, which was open during the same hours that most people work.¹⁷³ Voters would have to do that for every single election.¹⁷⁴ It was also difficult for residents born out of state to get documents, like their birth certificates, that they needed to get state IDs, precluding a prospective 43,000 people from voting.¹⁷⁵ The result was that the law “arbitrarily disenfranchise[d] qualified voters.”¹⁷⁶

As a solution, Indiana provided free photo IDs to voters that needed IDs.¹⁷⁷ In addition to that remedy, the interests put forward by the state included preventing voter fraud based on bloated voter rolls caused by the state’s own incompetence,¹⁷⁸ modernizing elections, and safeguarding voter confidence.¹⁷⁹ The plaintiffs had strong counterarguments. There was no evidence of in-person voter fraud ever occurring in the state.¹⁸⁰ The state mandated criminal sanctions for people who tried to commit voter fraud, which should have been enough of a deterrent.¹⁸¹ Furthermore, the bloated voter rolls were the result of the state’s own negligence, and the state should not burden voters to fix their own error.¹⁸²

The Court was divided over applying the *Anderson-Burdick* test in *Crawford*.¹⁸³ The plurality opinion considered that the statute could be “unconstitutional for imposing an ‘excessively burdensome requirement[.]’ on any specific class of voters.”¹⁸⁴ However, the concurrence and two dissents each came to separate conclusions on how to apply the test,¹⁸⁵ leaving its future in question. Upon applying the test, the plurality ultimately upheld the statute based on its application to the majority of voters.¹⁸⁶

Using the *Anderson-Burdick* test, the Court found that the asserted injury was not severe.¹⁸⁷ One reason was that voters’ ability to “cast a provisional ballot provides an adequate remedy.”¹⁸⁸ The Court was also persuaded by the state’s arguments that the burden was not severe because voters could get free IDs and that a trip to the Bureau of Motor Vehicles was a mere inconvenience.¹⁸⁹ Although the Court noted

¹⁷³ See *id.* at 198, 200.

¹⁷⁴ See *id.* at 199 n.19.

¹⁷⁵ *Id.* at 187–88.

¹⁷⁶ *Id.* at 187.

¹⁷⁷ *Id.* at 186.

¹⁷⁸ See *id.* at 234 (Souter, J., dissenting).

¹⁷⁹ *Id.* at 191 (plurality opinion).

¹⁸⁰ *Id.* at 194.

¹⁸¹ See *id.* at 194–95.

¹⁸² See *id.* at 196–97.

¹⁸³ See Provencher & Young, *supra* note 150, at 65.

¹⁸⁴ *Id.* (quoting *Crawford*, 533 U.S. at 202).

¹⁸⁵ *Id.*

¹⁸⁶ *Crawford*, 533 U.S. at 204.

¹⁸⁷ See *id.* at 197–200.

¹⁸⁸ *Id.* at 197–98.

¹⁸⁹ See *id.* at 198.

that a heavier burden would fall on some voters, especially elderly voters, the Court emphasized the importance of provisional ballots as a lifeline to save the law.¹⁹⁰ Thus, Indiana needed only a relevant interest to uphold the law.¹⁹¹ The Court analyzed the state's purported interests¹⁹² and evaluated them as sufficient justification for the allegedly minor burden.¹⁹³ The Court decided the state's interests were sufficiently strong to reject the challenge and uphold the voter ID law.¹⁹⁴

A case out of the Sixth Circuit about the counting of provisional ballots, *Hunter v. Hamilton County Board of Elections*,¹⁹⁵ shows how courts should apply *Bush*'s arbitrary and disparate treatment standard to a wider range of election administration procedures, either replacing or adding to the *Anderson-Burdick* analysis.¹⁹⁶ In a contested judicial election, the Hamilton County Board of Elections counted certain provisional ballots cast in the wrong precinct because of "clear pollworker error," but refused to investigate others that may have been subjected to the same type of error.¹⁹⁷ The Sixth Circuit's opinion used the *Bush* analysis to emphasize the need for standard procedure in the counting of votes.¹⁹⁸ The opinion noted the importance of "'specific standards to ensure . . . equal application' particularly 'necessary to protect the fundamental right of each voter' to have his or her vote count on equal terms."¹⁹⁹ Otherwise, the "lack of specific standards for reviewing provisional ballots can . . . result in 'unequal evaluation of ballots.'"²⁰⁰

The judge emphasized that "the cause for constitutional concern is much greater when" deciding issues of "'casting and counting . . . ballots,' like evaluating evidence of poll-worker error."²⁰¹ The solution was not to discount all ballots cast in error, but rather to count more potentially erroneously cast ballots.²⁰² As in *Bush*, the election process could not involve "'arbitrary and disparate treatment' of votes."²⁰³ *Hunter* also cited the *Anderson-Burdick* test, but did not clearly apply it.²⁰⁴

¹⁹⁰ See *id.* at 199.

¹⁹¹ See *id.* at 191.

¹⁹² See *id.* at 191–97.

¹⁹³ See *id.* at 203–04.

¹⁹⁴ *Id.* at 204.

¹⁹⁵ 635 F.3d 219 (6th Cir. 2011).

¹⁹⁶ See HASEN, *supra* note 117, at 147–48.

¹⁹⁷ See *id.* at 147–48; see also *Hunter*, 635 F.3d at 224 (directly quoting language from the transcript of an election board meeting).

¹⁹⁸ *Hunter*, 635 F.3d at 234–35, 241.

¹⁹⁹ *Id.* at 235 (quoting *Bush v. Gore*, 531 U.S. 98, 106, 109 (2000) (per curiam)).

²⁰⁰ *Id.* (quoting *Bush*, 531 U.S. at 106).

²⁰¹ *Id.* (quoting Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035, 1037 (2007)).

²⁰² See *id.* at 240–41.

²⁰³ *Id.* at 231, 234 (quoting *Bush*, 531 U.S. at 105); see also Provencher & Young, *supra* note 150, at 68.

²⁰⁴ Provencher & Young, *supra* note 150, at 68; see *Hunter*, 635 F.3d at 238.

The *Anderson-Burdick* test is rightfully under fire.²⁰⁵ Assessing Virginia's absentee ballot scheme under that standard illustrates that the *Anderson-Burdick* test is not strong enough to protect the fundamental right to vote.²⁰⁶ Courts, like the Sixth Circuit in *Hunter*,²⁰⁷ should move toward applying the framework of *Bush* to state election administration challenges. Only then will citizens be able to exercise their fundamental right to vote irrespective of the manner in which they cast it, without "arbitrary and disparate treatment" by the state.²⁰⁸

B. Applying the Standards to Virginia's Absentee Ballot Scheme

When applying the *Anderson-Burdick* standard to Virginia's mail-in absentee ballot scheme, the first step is determining the burden.²⁰⁹ For voters before the 2020 updates, the first burden was meeting the excuses necessary to be approved for a mail-in absentee ballot.²¹⁰ At that time, voters needed to qualify under one of twenty approved reasons to vote absentee by mail.²¹¹ The list of excuses was rather comprehensive, but some potential first-time mail-in absentee voters, like full-time caregivers for an elderly family member, were not allowed to vote absentee by mail, even if they fell into a pre-approved category.²¹² It was burdensome for voters to figure out if they fell into one of these excused categories and fell outside of the excepted categories for first-time voters. However, because the categories were pretty expansive, it was not a significant burden.²¹³

Next, and a current requirement, voters must request a mail-in absentee ballot.²¹⁴ Voters may do that by submitting an application to their local registrar in person or by mail, fax, or email.²¹⁵ This is an added burden that in-person voters do not have to go through, but it is not a high burden, as many voters should be able to submit

²⁰⁵ See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 276 (2020); cf. Provencher & Young, *supra* note 150, at 65 (noting that there have been inconsistent rulings in the lower courts over the confusion involving application of the proper test).

²⁰⁶ See *infra* Section III.B.

²⁰⁷ See *Hunter*, 635 F.3d at 234, 247.

²⁰⁸ See *id.* at 234; *Bush*, 531 U.S. at 105.

²⁰⁹ See *supra* notes 165–69 and accompanying text.

²¹⁰ See VA. CODE ANN. § 24.2-700 (West 2019); H.B. 207, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (noting repeal of the excuses).

²¹¹ § 24.2-700 (West 2019).

²¹² Compare *id.* (listing, for example, caregivers), with *id.* § 24.2-416.1 (West 2020) (failing to include certain absentee voters, like caregivers).

²¹³ But see Nick Gilmore, *New Study: Virginia Is One of the Hardest States to Vote in*, WVTF (Oct. 13, 2018), <https://www.wvtf.org/post/new-study-virginia-one-hardest-states-vote> [<https://perma.cc/TGN5-JB2H>] (A 2018 study ranked Virginia the 49th most difficult state in which to vote.).

²¹⁴ *Absentee and Early Voting*, *supra* note 78.

²¹⁵ *Id.*

the application through one of those four methods. The significant burden comes in the form of the deadlines to request a mail-in absentee ballot. Before the recent changes, the registrar must have received the voter's application a week before the election.²¹⁶ Now, it must be received eleven days before the election.²¹⁷ Voters may apply as far in advance as forty-five days before the election,²¹⁸ but a voter may not know that they will be unable to get to the polls on Election Day far enough out to make sure that the registrar receives the application in time. The ability to submit the application by email lessens the burden because it allows voters to submit their application the last day it is due, but by the time the registrar processes the application, mails the ballot, and the voter mails the ballot back, it very well could be too late to count.²¹⁹ Before the recent changes, individuals with pre-approved excuses to vote absentee still may not have known a week in advance that they would need to vote absentee by mail—for example, having last-minute business outside the locality.²²⁰

Once voters have submitted their application, the largest burden comes from the turnaround time for voters to receive their ballots with enough time to mail them back to the registrar by the final deadline.²²¹ The registrar has to process the application and mail out the ballot, and then the voter has to mail the ballot back to the registrar in time—before the changes, that was by close of polls on Election Day; now it is by noon the Friday following the election.²²² Before the changes, the timeline likely looked something like the following: The application arrived the Tuesday before the election, the office took at least a day to process the application, and then at the earliest the registrar put ballots in the mail on Wednesday. Probably the earliest the ballot would have gotten to the voter would have been Friday, if the voter was in Virginia, which they may not have been as they were requesting an absentee ballot. If the voter got home on Friday, found the ballot, and immediately dropped it in a mailbox, it could get to the registrar's office by close of polls Tuesday—but

²¹⁶ H.B. 239, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (noting the former deadline).

²¹⁷ VA. CODE ANN. § 24.2-701(B)(2) (West 2020).

²¹⁸ *Absentee and Early Voting*, *supra* note 78.

²¹⁹ *See supra* notes 79–84 and accompanying text.

²²⁰ *See* § 24.2-700 (West 2019). The state did allow for emergency absentee voting, but that exception still had early deadlines. The first excuse for emergency absentee voting was incapacity: the voter either became or stayed ill after the seventh day before Election Day, or the voter is grieving the death of a close family member in that same time period. *Id.* § 24.2-705. To vote emergency absentee due to incapacity, a designated representative of the voter must request an application to vote absentee before 2 p.m. on Election Day and return the application by 5 p.m. on Election Day, with the actual absentee ballot returned by the time polls close on Election Day. *Id.*; *see also id.* § 24.2-705 (West 2020). The second excuse for emergency absentee voting is that the voter's plans changed after noon the Saturday before the election, but only for required emergency travel for business or hospitalization or death of an immediate family member. *Id.* § 24.2-705.1 (West 2019). In that case, the voter must apply for an absentee ballot and vote in-person by 2 p.m. the day before the election. *Id.*

²²¹ *See supra* notes 69–70 and accompanying text.

²²² *See* H.B. 238, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

that would have been an extremely tight turnaround time. Given that timeline, moving the deadline to request an absentee ballot up to eleven days before the election gave the state more time, but it also gave voters less time to request an absentee ballot if they need one.²²³

Importantly, if something is wrong with the ballot, like it is for the incorrect election, has the wrong name on it, or was sent to the wrong address, there is no real safeguard to address those state errors.²²⁴ The registrar could send a new ballot, but it likely would not arrive in time. The new ballot would not fall into the narrow exceptions to accept late ballots because it was not requested within three business days of the original application's receipt.²²⁵ This tight turnaround, which allows no realistic safeguard to deal with state errors, is a significant burden on voters.

Under the *Crawford* plurality's *Anderson-Burdick* analysis, a court may agree that this scheme is a significant burden but nevertheless disregard that burden because only about 7,000 absentee ballots arrived late in the last election for which information is available²²⁶—a far fewer number than the 43,000 affected voters that the Court did not find to be a large enough group in *Crawford*.²²⁷ If a court instead focuses on the 337,315 people who voted absentee in 2018 (nearly 10% of all votes),²²⁸ it may be persuaded that this heavy burden affects a significant enough number of voters.

After evaluating the burdens of the law, the next step is to evaluate the state interest.²²⁹ If there is a high burden, like with Virginia's absentee voter scheme, the state interest must be compelling and the law narrowly tailored to that interest.²³⁰ The state's interests might include, inter alia, preventing fraud, securing timely election results, and keeping administrative costs low.²³¹ The state might also be interested in assuring voter confidence in election integrity.²³² While the Court in *Crawford* found preventing voter fraud to be a compelling-enough interest to justify Indiana's voter ID requirements,²³³ the mail-in absentee ballot law is very different and not narrowly tailored to further the state's compelling interests.

The mail-in absentee ballot law is extremely underinclusive because it results in thousands of absentee ballots being discarded.²³⁴ It excludes voters who meet the

²²³ See H.B. 239, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

²²⁴ See § 24.2-612 (West 2020).

²²⁵ See *id.* §§ 24.2-612, 709.

²²⁶ VA. DEP'T ELECTIONS, *supra* note 96, at 7.

²²⁷ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186, 189, 200 (2008) (plurality opinion).

²²⁸ *Registration/Turnout Reports*, *supra* note 15.

²²⁹ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

²³⁰ *Crawford*, 553 U.S. at 190.

²³¹ See, e.g., *id.* at 225 (Souter, J., dissenting) (“There is no denying the abstract importance, the compelling nature, of combating voter fraud.” (citation omitted)).

²³² See *id.* at 235 (noting states’ “legitimate interest in safeguarding public confidence”).

²³³ *Id.* at 191 (plurality opinion).

²³⁴ See VA. DEP'T ELECTIONS, *supra* note 96, at 7.

first deadline to apply for an absentee ballot but are not allowed enough time to return, and even sometimes receive, that ballot.²³⁵ In its previous form with the excuse requirements, it also unnecessarily prevented voters from even being able to apply for mail-in absentee votes. The law is overinclusive because it allows dead residents to vote absentee by mail²³⁶ but does not actually address concerns that the state may have about voter fraud—which happens extremely rarely in-person, but absentee ballots are susceptible to it.²³⁷

The state might counter that while voter fraud is rare,²³⁸ a political operative was recently indicted on charges of tampering with absentee ballots in North Carolina, which caused the state to redo the election.²³⁹ Additionally, the state might argue that continued, but debunked claims of voter fraud from the president,²⁴⁰ combined with careless claims of absentee voter fraud from the candidate who lost the 2019 Kentucky gubernatorial race,²⁴¹ necessitate strict rules to dissuade concerns of absentee voter fraud. However, measures to counter voter fraud are already in place—the state just needs to verify the voter’s information when the absentee ballot arrives.²⁴² If courts

²³⁵ See VA. CODE ANN. §§ 24.2-612, 24.2-709 (West 2020).

²³⁶ See *id.* § 24.2-709.

²³⁷ Most reports of voter fraud at the polls are actually the result of clerical error or bad data matching—rates of voter fraud are between 0.0003% and 0.0025%. *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth> [<https://perma.cc/4N4T-GWDJ>]. It is more likely “that an American ‘will be struck by lightning than that he will impersonate another voter at the polls.’” *Id.* (quoting Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. 4 (Nov. 2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf [<https://perma.cc/9F7L-69U8>]). However, in the 2019 race for North Carolina’s Ninth Congressional District, a Republican operative was indicted on felony charges for tampering with absentee ballots. Richard Gonzales, *North Carolina GOP Operative Faces Felony Charges that Allege Ballot Fraud*, NPR (July 30, 2019, 10:29 PM), <https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud> [<https://perma.cc/WBU8-FZVJ>].

²³⁸ *Debunking the Voter Fraud Myth*, *supra* note 237.

²³⁹ Gonzales, *supra* note 237.

²⁴⁰ Amy Gardner, *Trump’s Revival of Claim of Voting Fraud in New Hampshire Alarms Some State Republicans*, WASH. POST (Aug. 29, 2019, 8:00 AM), https://www.washingtonpost.com/politics/trumps-revival-of-claim-of-voting-fraud-in-new-hampshire-alarms-some-state-republicans/2019/08/28/0c22107e-c38f-11e9-9986-1fb3e4397be4_story.html [<https://perma.cc/37LA-K42P>]; *In Their Own Words: Officials Refuting False Claims of Voter Fraud*, BRENNAN CTR. FOR JUST. (Apr. 13, 2017), <https://www.brennancenter.org/our-work/research-reports/their-own-words-officials-refuting-false-claims-voter-fraud> [<https://perma.cc/D7SB-7B93>].

²⁴¹ Miles Parks, *Skeptics Urge Bevin to Show Proof of Fraud Claims, Warning of Corrosive Effects*, NPR (Nov. 10, 2019, 7:10 AM), <https://www.npr.org/2019/11/10/777300611/skeptics-urge-bevin-to-show-proof-of-fraud-claims-warning-of-corrosive-effects> [<https://perma.cc/N3RB-QMUP>].

²⁴² See VA. CODE ANN. § 24.2-710 (West 2020).

continue to follow the *Anderson-Burdick* analysis, this would, unfortunately, likely satisfy the compelling interest and narrow tailoring requirements.²⁴³ At that point, a court may not even continue to analyze other state interests, and the absentee ballot scheme would likely be upheld. What good is a fundamental right if a state can take it away with restrictive deadlines or a misprinted name?

Alternatively, a court could come to a more just conclusion under *Bush*'s arbitrary and disparate impact test.²⁴⁴ In this absentee ballot scheme, the state, having granted the right to vote on equal terms, arbitrarily and disparately values in-person votes (on Election Day or absentee) over mail-in absentee votes. Given that treatment, a court would likely find the laws in violation of the Fourteenth Amendment's Equal Protection Clause.²⁴⁵

Fortunately, Virginia has already started to change the absentee voting laws.²⁴⁶ However, there is still room for improvement. The state should allow for more time to count valid, late absentee ballots provisionally if they arrive within ten days.²⁴⁷ This would allow for more flexibility in dealing with state error. The state already counts some ballots provisionally²⁴⁸ but does not certify results until the third Monday of the month.²⁴⁹ Arbitrarily and disparately discarding votes due to unworkable deadlines or state error is not the way to ensure voter confidence and election integrity.

IV. HOW TO PREVENT AND TREAT STATE ERROR IN ABSENTEE BALLOTS

There are a few solutions to prevent future violations of the fundamental right to vote. States should expand the window to request and return absentee ballots, as well as implement safeguards to count certain absentee ballots provisionally.²⁵⁰ Additionally, Congress should intervene and mandate certain safeguards for all states, similar to HAVA.²⁵¹ The best solution is proactive: rather than find a way to deal with tens, hundreds, or thousands of absentee ballots that would have been counted but for state error or unworkable deadlines, states should try to anticipate and prevent such issues with a two-pronged approach.

²⁴³ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (plurality opinion).

²⁴⁴ See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

²⁴⁵ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 231, 234 (6th Cir. 2011).

²⁴⁶ See *supra* notes 56–59 and accompanying text.

²⁴⁷ Three states—Alaska, Maryland, and Ohio—currently accept late absentee ballots that arrive within ten days following Election Day. See *Absentee Ballot Deadlines*, *supra* note 61.

²⁴⁸ See VA. CODE ANN. §§ 24.2-653, 653.01 (West 2020).

²⁴⁹ *Id.* § 24.2-679(A).

²⁵⁰ For example, a new Pennsylvania law allows voters to cast absentee ballots up to fifty days before an election. *Simko-Bednarski*, *supra* note 49. The deadline to return absentee ballots in Pennsylvania is 8 p.m. on Election Day, making Pennsylvania's absentee ballot window the longest in the country. *Id.*

²⁵¹ See Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 302–03, 116 Stat. 1666, 1706–14; *cf.* KROPF & KIMBALL, *supra* note 118, at 26.

First, states should implement a preventive approach. One change should be expanding the deadlines to apply for and return absentee ballots, which would likely address a large amount of the otherwise valid late absentee ballots.²⁵² Like Pennsylvania, states should move toward allowing voters to request absentee ballots 50 days before an election to ensure ample time to process applications.²⁵³ Of course, that alone will not solve the problem of people needing last-minute absentee ballots.

To alleviate the burden on voters requesting last-minute absentee ballots, and all other absentee ballots, states should count all absentee ballots postmarked by Election Day that arrive within a reasonable time frame.²⁵⁴ This would allow states to count absentee ballots that would have otherwise been invalid because of a missed deadline. It also allows the voter and the state to work together to fix situations where absentee ballots are mailed to the wrong person, or the wrong ballot is mailed, or countless other issues, with enough time for the voter to submit a timely absentee ballot.

States should count those ballots postmarked by Election Day that arrive within ten days after Election Day.²⁵⁵ In Virginia, the state does not certify results until thirteen days after the election,²⁵⁶ leaving time to account for slow delivery of valid ballots. This is a reasonable timeline for states to count absentee ballots while still ensuring timely election results.

States should also implement a uniform system so all voters can track their absentee ballots and know if they have been counted—otherwise, voters will not know that there is a problem with their ballot to fix the error. Some states have these tracking systems already, but others do not.²⁵⁷ A clear, uniform tracking system has

²⁵² In Virginia alone, almost 7,000 otherwise valid absentee ballots arrived late in the last election. See VA. DEP'T ELECTIONS, *supra* note 96, at 7.

²⁵³ See Simko-Bednarski, *supra* note 49.

²⁵⁴ Many states already employ this practice. *Absentee Ballot Deadlines*, *supra* note 61. One example of how this deadline can still be prohibitively restrictive is California's absentee ballot scheme, which was temporarily altered in 2020 to accommodate anticipated pandemic-related mail sorting issues. See John Myers, *What You Should Know About How and When California Counts Ballots*, L.A. TIMES (Nov. 2, 2020, 2:26 PM), <https://www.latimes.com/california/story/2020-11-02/2020-election-california-ballot-count> [<https://perma.cc/BA4C-VQQ6>]. Normally, absentee ballots must be postmarked by Election Day and received within three days of the election. *Id.* If someone is mailing a ballot from Sacramento to San Diego, it seems unlikely that, even within the state, a piece of mail would be processed and delivered from cities eight hours away from each other in three days.

²⁵⁵ Alaska, Maryland, and Ohio already follow this recommendation. See *id.*

²⁵⁶ See VA. CODE ANN. § 24.2-679 (West 2019).

²⁵⁷ See *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 30 (noting that at least forty-four states and the District of Columbia either mandate or voluntarily maintain some form of ballot tracking for absentee/mailed ballots). California's ballot tracking systems differ by county, and some counties do not have online ballot tracking, where voters must call the county election office. Ballot Status, CAL. SEC'Y STATE, <https://www.sos.ca.gov/elections/ballot-status/> [<https://perma.cc/AGD8-D6FZ>] (last visited Dec. 8, 2020).

the potential to further political participation and keep citizens informed of what is happening with their ballots. Part of this uniform tracking should include a way to alert a voter if their absentee ballot will not be counted due to error.

Second, states should treat absentee ballots that would not be counted because of state error like misprinting or misdelivery as provisional ballots. This would treat absentee voters the same as in-person voters in regards to how long they have to make their decision (until Election Day), while accounting for how long it may take the mail to arrive, especially in large states or when a voter is mailing their ballot from a different state. Hopefully the preventive approach proposed above will fix most state error with absentee ballots, but the reality is that mix-ups will inevitably happen. In those situations, it is not sufficient for states to refuse to count valid absentee ballots because of state error. Treating those ballots like provisional ballots will ensure more safeguards for the fundamental right to vote.²⁵⁸

What does it mean for a ballot to be counted provisionally? In Virginia, provisional ballots are kept apart from the in-person Election Day ballots, and they are not counted on Election Day.²⁵⁹ They are used when voters believe they are registered at that precinct but for some reason are not on the registered voters list, when voters do not have the correct form of identification on them, and when voters who were sent an absentee ballot have not received or have lost the ballot.²⁶⁰ The election board looks at the provisional ballots the next day, and determines whether the voters are qualified and thus whether the votes will be counted.²⁶¹

While Pennsylvania is a good example of a mixed-party government working together to pass election reform,²⁶² states may not want to follow its lead. If states are unwilling to enact election reforms, Congress should use its Elections Clause power to enact preventive measures to prevent disenfranchisement of absentee voters, and to require states to count absentee ballots provisionally that would have been counted but for state error.²⁶³ Congress could do this by amending HAVA or passing a separate bill. This uniformity would eliminate concerns about arbitrary and disparate treatment.²⁶⁴ Although it could only be binding on federal elections, the administrative burden of following different procedures for different elections should lead to enactment of those changes in all elections.

²⁵⁸ For more on this perspective, see *Provisional Ballots in Virginia: What Are They, and When Are They Used?*, WUSA9, <https://www.wusa9.com/article/news/politics/elections/provisional-ballots-in-virginia-what-are-they-and-when-are-they-used/65-611852666> [https://perma.cc/RJE2-WWTK] (Nov. 6, 2018, 6:52 PM).

²⁵⁹ *Id.*; VA. CODE ANN. §§ 24.2-651.1, 653, 653.1 (West 2020).

²⁶⁰ *Provisional Ballots in Virginia: What Are They, and When Are They Used?*, *supra* note 258.

²⁶¹ *Id.*

²⁶² See Simko-Bednarski, *supra* note 49.

²⁶³ U.S. CONST. art. I, § 4 (“[T]he Congress may at any time by Law make or alter [time, place and manner election] Regulations . . .”).

²⁶⁴ See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

Aside from the legislative action suggested above, voters whose timely absentee ballots were not counted because the state could not receive their ballots in time could bring a lawsuit and seek a judicial declaration that the state's absentee ballot deadlines are facially unconstitutional and unconstitutional as applied.²⁶⁵ However, even if the theoretical plaintiffs were successful in proving a constitutional violation, the law would merely be invalidated.²⁶⁶ Legislative reform at the state level would still be necessary. States should amend and clarify their absentee ballot schemes to provide measures to prevent the state from treating voters who submit mail-in absentee ballots arbitrarily and disparately compared to in-person voters.²⁶⁷ If the federal government shifts to being in a position to pass such reform, Congress should also overhaul absentee ballot schemes at the federal level.²⁶⁸

CONCLUSION

As more people vote absentee, more voters will be disenfranchised by state error or unconstitutionally restrictive mailing deadlines.²⁶⁹ These methods of disenfranchisement, while passive, are still a serious constitutional violation of citizens' fundamental right to vote. States must act promptly to fix these holes in their absentee ballot schemes.

As states address these constitutional violations, courts should continue moving toward applying *Bush*'s arbitrary and disparate treatment test in evaluating the constitutionality of state election administration laws.²⁷⁰ States should enact preventive measures to make sure that absentee voters are not treated in an arbitrary and disparate manner compared to in-person voters.²⁷¹ Additionally, states should provide a safeguard to count absentee ballots that would have been counted but for state error as provisional ballots. If states do not take action, Congress should mandate preventive measures to ensure consistency of absentee voting and enact provisional ballot safeguards. States cannot bestow the right to vote absentee on citizens and then draw lines that are inconsistent with the Equal Protection Clause.

²⁶⁵ See, e.g., Petition for Review, *supra* note 47, ¶¶ 103–06.

²⁶⁶ See *id.*

²⁶⁷ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 231, 234 (6th Cir. 2011).

²⁶⁸ The Help America Vote Act's provisional voting framework should serve as the foundation for federal legislation to regulate absentee ballot schemes at the federal level. See Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 302–03, 116 Stat. 1666, 1706–14; see also KROPF & KIMBALL, *supra* note 118, at 26.

²⁶⁹ See *supra* Part III.

²⁷⁰ See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

²⁷¹ See *Hunter*, 635 F.3d at 231, 234.