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Abstract

Mail-in voting has feverishly gained popularity in the United States over the last few primary and general elections. In light of this new balloting reality, a trend has emerged. Statistics from minority and vulnerable populations reveal that mail-in ballots composed and sent by these groups have been consistently rejected at a higher rate compared to majority populations. This Note begins by surveying the constitutional background for bringing a challenge to voting rights legislation, while confronting the divisive history of legal precedent surrounding these claims. This Note then analyzes the Supreme Court's decision in Crawford v. Marion County Election Board *and the balancing test from that decision applied to election regulation challenges. This Note will then proceed to identify the legislature's continued attempt to safeguard the election process with the Voting Rights Act of 1965 and discuss the origin and evolution of absentee voting in the United States, pointing out issues faced specifically by minority and vulnerable groups. After a thorough discussion of these issues, this Note will advocate for a cognizable claim of action for disenfranchised minority and vulnerable voters under the Equal Protection Clause of the Fourteenth Amendment, focusing on the application of the balancing test developed in* Crawford *to claims of discriminatory*

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voting practices, manipulating the test to give less deference to how individual state's justify strict mail-in voting regulations. This Note will emphasize the broader utilization of mail-in voting system moving forward and the importance of correcting systemic errors to provide unrestricted access to the ballot.

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I. Introduction

Minority and vulnerable populations—those that have suffered from a historical lack of universal suffrage—are continuing to be disproportionately affected by voting rights legislation.[1] Specifically, in the wake of the growing popularity of mail-in voting, rejection rates of ballots from these groups are consistently higher compared to other populations.[2] Imagine that a middle-aged Black woman named Catherine was planning to vote by mail in the general election on November 3rd, 2020. She and her two voting-age sons were also planning to vote by mail, and all three of them were registered to vote in North Carolina, a state that requires a witness to verify the ballot was completed accurately.[3] They served as each other's witnesses and mailed their ballots in accordance with North Carolina absentee voting procedures by October 30th, 2020.

A few days later, on November 3rd, Catherine arrived home from work at 7 p.m. and received an email from the county board of elections that a deficiency had been assessed in her ballot. It was Catherine and her sons' first time voting by mail, and they forgot

1. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1594 (2019) (advising that electoral practices that result racial discrepancies should be banned).

2. *See* Michael McDonald, *North Carolina Early Voting Statistics*, U.S. ELECTIONS PROJECT (Nov. 4, 2020), (reporting that the rejection rate of absentee ballots from Black, Hispanic, and Native Americans were 1.8%, 2%, and 2.7% respectively, compared to 0.5% of White ballots rejected) [https://perma.cc/WJ2V-V4YD].

3. *See Detailed Instructions for Voting by Mail*, NORTH CAROLINA STATE BOARD OF ELECTIONS (2020) (providing instructions for mail-in voters to comply with in returning their absentee ballots) [https://perma.cc/67BH-FF74].

to sign the back of each other's envelopes. As a result, their votes were not counted. Catherine and her two sons realized they were unable to correct the error by mail, as it was Election Day, and all ballots must be postmarked by that day to be counted.[4] Catherine and her sons then rushed to their closest polling location, only to find a line that was wrapped around the outside of the building. The polls closed at 7:30 p.m., it was 7:35 p.m., and because they were not in line before the polls closed, they were unable to cast their ballots in the 2020 general election.

Now imagine Alan, an eighty-three-year-old man with macular degeneration, an eye disorder common in people over fifty that causes impaired vision.[5] Alan was planning to vote absentee in the 2020 general election. He resided and was registered to vote in Tennessee, a state that required a valid excuse to vote by absentee ballot.[6] Alan was over the age of sixty, therefore he was able to vote by mail in the election.[7] To properly submit his ballot, he had to complete the ballot in compliance with state mandates, and sign it to verify completeness and accuracy.[8] Upon submission, Alan's signature was matched to the signature on his voting registration application, and if the county administrator of elections determined it was "not the same," the ballot would be rejected.[9]

That is exactly what happened to Alan, as his ballot was rejected due to a mismatched signature. His macular degeneration has affected his ability to read and write printed words the way he did when he completed his voter registration, and his signature now looks much different. Although Alan did have the choice to

4. *See id*. (specifying that for a mail-in ballot to be counted, it must be postmarked by Election Day).

5. *See Dry Macular Degeneration*, MAYO CLINIC (Dec. 11, 2020) (explaining that macular degeneration causes reduced vision in one or both eyes, increased blurriness of printed words, and other visual impairments) [https://perma.cc/UR2A-BTNT].

6. *See Absentee By-Mail Ballot Information*, TENNESSEE SECRETARY OF STATE (2020), (clarifying what is considered a valid excuse to vote by absentee ballot) [https://perma.cc/K9ZU-CWZ3].

7. *See id*. (elaborating on absentee voting regulations in Tennessee).

8. *See id*. (emphasizing the importance of a voter's signature on an absentee ballot).

9. *See* TENN. CODE. ANN. § 2-202(b) (West 2021) (stating that if a signature is not the found to be the same, then the ballot will be rejected).

have assistance in casting his ballot[10], Alan's signature does not resemble his signature prior to his disorder and did not get verified. His absentee ballot was rejected, and Alan had no opportunity to correct his ballot after the fact. This issue was litigated in the Sixth Circuit, which concluded that the signature matching requirement did not pose a concrete or imminent threat of harm, despite the lack of opportunity to correct the deficiency.[11] Alan did not feel well enough to make it to the polls on Election Day, so he was unable to cast a vote in the 2020 general election.

The above scenarios are just two examples; however, they are exemplary of the disenfranchisement that can occur upon mailing ballots.[12] Treatment of absentee ballots is a very important issue, and this Note will focus on how historically discriminated minority and vulnerable groups deserve constitutional protection on the right to cast a mail-in ballot.[13]

This Note proceeds as follows. Part II[14] will elaborate on the divisive history of voting rights legislation and precedent in our country.[15] It will begin with an explanation of the constitutional background and then proceed to identify and analyze the Supreme Court case *Crawford v. Marion County Election Board*,[16] that has been fundamental in assessing the constitutionality of voting regulations.[17] The *Crawford* decision is the cornerstone for an analysis of whether there are conceivable protections afforded to minority and vulnerable groups attempting to cast an absentee

10. *See* 52 U.S.C. § 10508 (2018) (specifying that "any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

11. *See* Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 390 (2020) (finding that no irreparable harm was demonstrated).

12. *See* Stephanopoulos, *supra* note 1, at 1582 (recognizing the treatment of absentee ballot issues in the judicial system to be integral to providing a fair election administration).

13. *See* discussion *infra* Part V.

14. *See* discussion *infra* Part II.

15. *See* discussion *infra* Part II.

16. *See* Crawford v. Marion Cnty. Election Bd. 553 U.S. 181, 203 (2008) (holding that an Indiana election law requiring photo identification did not violate the Equal Protection Clause).

17. *See id.* at 189 (establishing a framework for evaluating the burden a state law imposes on a voter).

ballot.[18] There, the Supreme Court proffers a balancing test that has the potential be manipulated and applied to evaluate absentee voting regulations that disproportionately affect minority and vulnerable groups.[19]

Part III[20] will explore how the legislature has attempted to regulate anti-discriminatory practices and promote fairness in election procedures through the Voting Rights Act of 1965 and subsequent corresponding legislation.

Part IV[21] will discuss the origins of absentee voting and expound on the growing popularity of submitting a vote by mail. The section proceeds by pointing out issues minority and vulnerable groups face in casting a mail-in ballot and identifies common absentee voting regulations and state justifications for implementation.

Part V[22] will advocate for a cognizable claim of action for disenfranchised minority and vulnerable voters under the Equal Protection Clause of the Fourteenth Amendment. There has been a small amount of scholarship about this issue.[23] However, this argument will focus on the application of the balancing test developed in *Crawford* to claims of discriminatory voting practices, while providing a recommendation for courts to give less deference to the state justifications for mail-in ballot regulations that are shown to disproportionately affect minority and vulnerable groups.[24] The argument will conclude by emphasizing the broader utilization of the mail-in voting system moving forward and

18. *See id*. at 191–204 (employing the balance test on claims of disenfranchisement by the absentee ballot regime).

19. *See id*. at 189 (weighing state justifications against the burdens imposed on voters); *see also* discussion *infra* Part V.

20. *See* discussion *infra* Part III.

21. *See* discussion *infra* Part IV.

22. *See* discussion *infra* Part V.

23. *See* Sal H. Lee, *Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward*, 105 IOWA L. REV. 799, 821–23 (2020) (arguing that the *Crawford* balancing test should be applied to absentee voting claims, yet proposing that the burden should be shifted to the state to provide sufficient justifications for any voting requirement that imposes a burden on a voter).

24. *See* discussion *infra* Part V.

importance of rectifying systemic errors to provide more unrestricted access to the ballot.[25]

II. Background

Racially motivated challenges to election law have surfaced in American jurisprudence over the last century.[26] As these challenges are brought forward, judicial interpretations of cases pertaining to voting rights issues have simultaneously evolved.[27] This section summarizes the evolution of election law in the form of claims brought in the interest of disenfranchised minority voters. It sets the stage for an analysis of modern society's shift to an overall increase in absentee voting among all voter populations, and the subsequent impact on minority and vulnerable voters.[28] As society hosts more elections that permit voters choose to mail-in votes, there is a persistent disparity of rejected ballots between majority and minority voter populations.[29] This section will identify the legal background for challenging this disparity and facilitate the discussion of whether these disparaged groups have the potential to be afforded protections under the constitution or the Voting Rights Act.[30]

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25. *See* discussion *infra* Part V.

26. *See* Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L. J. 1, 1–3 (2006) (analyzing the "racial gap" in lost votes between Black and White voters in recent elections through litigation that had been brought forward based on allegations of voter disenfranchisement).

27. *See* Terry v. Adams, 345 U.S. 461, 467–68 (1953) (extending the reach of Fifteenth Amendment protections against racial discrimination to state action).

28. *See* EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING, U.S. ELECTION ASSISTANCE COMM'N, Oct. 17, 2017, at 2 (distinguishing voting trends in the 21st century from earlier voting procedures and elaborating on the current trends that include increased rates of early, absentee, and mail voting) [https://perma.cc/NS3W-FPNL].

29. *See* Curt Devine & Drew Griffin, *Georgia County Tosses Out Hundreds of Minority Absentee Ballots*, CNN (Oct. 21, 2018, 9:05 AM) (publicizing that more than 300 of 595 rejected absentee ballots from an election in a Georgia county belonged to Asian Americans and African Americans, emphasizing the disparate treatment of minority voters) [https://perma.cc/BK8R-M5HD].

30. *See* discussion *infra* Part II.

A. Constitutional Protections Against Voter Discrimination

The individual states have the power to control the "times, places and manner of holding Elections" pursuant to Article I of the United States Constitution.[31] Various constitutional amendments and federal laws have been enacted to elaborate on the protections of United States citizens' voting rights.[32] The amendments have focused on expanding protections against discrimination based on age, gender, race, and pecuniary interests.[33] This section will elaborate on the constitutional amendments that have been enacted to prohibit discrimination against minority populations and subsequent Supreme Court decisions ruling on challenges to these provisions.[34]

1. The Fourteenth Amendment

The Fourteenth Amendment[35] was adopted into the United States Constitution in the immediate aftermath of the American Civil War to prevent states from making or enforcing laws that would abridge the privileges or immunities of citizens of the United States.[36] This amendment grants the states leeway in prescribing election restrictions that impose reasonable burdens on ballot

31. U.S. CONST. art. I, § 4.

32. *See Voting and Election Laws*, USA GOV, https://www.usa.gov/voting-laws (last updated June 18, 2021) (summarizing the advancements in United States voting laws) [https://perma.cc/9YKU-GWWB].

33. *See id*. (enumerating the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments and their effects on voting rights in the United States).

34. *See* discussion *infra* Part II.

35. U.S. CONST. amend. XIV, § 1.

36. *See* William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, WM. & MARY FACULTY PUBL'N 779, 42–43 (1965) (explaining that the "Reconstruction Committee" of the thirty-ninth congress enacted the Fourteenth Amendment to further objectives of prohibiting states from disenfranchising their citizens).

access.[37] The obligation of determining the extent of "reasonable" burdens has traditionally been in the hands of the state judiciary.[38]

Despite this margin of unique privilege, the states are prohibited from placing burdens on their citizens' right to vote that are not reasonably justified by the states important regulatory interest.[39] The asserted injury to the right to vote is weighed against the specific interests alleged by the state as justifications for the implementation of the election procedure or rule and a determination is made about whether the restriction is reasonable.[40]

The Fourteenth Amendment includes an Equal Protection Clause.[41] The Equal Protection Clause has often been asserted as a basis for voting discrimination claims and analyzed by the Supreme Court to evaluate challenges to voting laws that disproportionately effect minority and vulnerable groups.[42] The Supreme Court has held that when challenges to voting rights are asserted under the Equal Protection Clause, the judiciary must review the challenge to ensure it is closely scrutinized and carefully confined.[43] This is because a the right to vote is

37. *See* Burdick v. Takushi, 504 U.S. 428, 441 (1992) (upholding Hawaii's prohibition on write-in voting as a reasonable burden on voters that was constitutionally valid).

38. *See id*. at 428 (filing a claim in the district court for the District of Hawaii to determine whether Hawaii's election laws reasonably permitted mail-in voting).

39. *See* Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983) (explaining that comprehensive state election codes are for the purpose of upholding the integrity of the election proves and that the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions).

40. *See id*. at 789 (employing a balancing test to evaluate if a ballot restriction is considered a reasonable burden).

41. *See* U.S. CONST. amend. XIV, § 1 ("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 equal protection of the laws.").

42. *See* Nixon v. Condon, 286 U.S. 73, 88–89 (1932) (holding that a state law denying Blacks the right to vote violates the Fourteenth Amendment and is inconsistent with the Equal Protection Clause).

43. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (examining a challenge to a Virginia poll tax and declaring it unconstitutional in violation of the Fourteenth Amendment Equal Protection Clause).

considered a fundamental right and liberty that deserves protection from the unsubstantiated governmental interference.[44]

a. Crawford v. Marion County Election Board

In 2008, the Supreme Court heard a challenge under the Fourteenth Amendment to an Indiana State law[45] that required a government issued photo identification as a requirement to vote.[46] The question presented was whether, under the Fourteenth Amendment, the State's justifications were sufficient to rationalize a voting restriction imposed on voters.[47] The Court held in favor of the State, finding that the State interests were neutral and sufficiently strong, and that State election law did not create any "excessively burdensome requirements" on any class of voters and therefore, did not violate the Fourteenth Amendment.[48]

The State election law at issue in *Crawford*[49] required citizens voting in person either early or on election day to present government-issued photo identification in both primary and general elections.[50] No photo identification was required to be eligible to register to vote, and if a voter was able to verify their residence and identity, the State provided free photo identification.[51] The photo identification requirement did not apply

44. *See id.* (applying the judicial scrutiny of a fundamental right and liberty to the right to vote and emphasizing that it is especially necessary when the challenge involves wealth or race).

45. IND. CODE. ANN. § 3–11–8–25.1(e) (West 2019).

46. *See* Crawford v. Marion Cnty. Election Bd. 553 U.S. 181, 185 (2008) (framing the question before the Court).

47. *See id.* at 191 (focusing on the relevant and legitimate state interests to decide whether the statute violates the Fourteenth Amendment).

48. *See id.* at 202–04 (weighing the interests of the State against the burden on the voters to determine the constitutionality of the statute).

49. *See id.* at 185 (challenging a State election law in the Supreme Court that imposes a requirement on citizens to present photo identification issued by the government prior to voting).

50. *See id.* at 186 (requiring citizens to obtain and show valid photo identification issued by the government to vote in person).

51. *See Crawford*, 553 U.S. at 186. (defining the procedure a voter undergoes to obtain photo identification to be in compliance with the statute).

to absentee ballots submitted by mail.[52] The statute also contained exceptions for citizens who lived and voted in a state-licensed facility.[53]

Under the statute, if a voter was indigent or had a religious objection to being photographed, an affidavit had to be executed within ten days at the circuit court clerk's officer for the ballot to be counted.[54] If a voter was unable to present photo identification at the polls, there was an opportunity to file a provisional ballot and proof of photo identification had to be produced within ten days at the circuit court clerk's office for the ballot to be counted.[55]

Plaintiffs, the Indiana Democratic Party and the Marion County Democratic Central Committee ("the State"), filed suit in the district court, seeking judgment to declare the statute invalid and to enjoin its enforcement.[56] Plaintiffs alleged that the photo identification requirement "substantially burdened the right to vote in violation of the Fourteenth Amendment."[57] Further, Plaintiffs attacked the State's justification for the requirement, and argued that it is an "unjustified burden" on voters who are not able to readily obtain government-issued identification.[58] The district court granted summary judgment in favor of the State[59], and the court of appeals in the Seventh Circuit affirmed.[60]

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52. *See id.* (distinguishing between when the photo identification requirement applies, and when it does not apply).

53. *See id.* (providing a nursing home as an example of a state-licensed facility where a resident would be exempt from the requirement).

54. *See id.* (demonstrating the voting process for a person who has inability to obtain government photo identifications or has moral objections to being photographed).

55. *See id.* (explaining the course of action for a voter who does not present identification when casting a ballot to ensure the ballot is cast in conformity with the statute).

56. *See Crawford*, 553 U.S. at 186–87 (summarizing the basis for Plaintiffs' claim).

57. *See id.* at 187 (encapsulating the allegations that Plaintiffs' purported in the district court).

58. *See id.* (arguing that the photo identification requirement is neither necessary nor appropriate as a method of avoiding election fraud, a justification offered by the State for imposing the statute).

59. *See id.* at 187–88 (finding that there was no evidence of any voters who would have their right to vote unduly burdened by the state requirement).

60. *See id.* at 188 (concluding that the burden on voters was offset by the state's legitimate objective of reducing the risk of election fraud).

b. The Crawford *Opinion*

In a plurality opinion authored by Justice John Paul Stevens, the Court delivered judgment in favor of the State.[61] The Court found the statute requiring government-issued photo identification to vote was supported by legitimate state interests that offset any burdens placed on voters.[62]

Justice Stevens began by evaluating the state interests put forth in justifying the statute.[63] Election modernization, the prevention of voter fraud, and the safeguarding of voter confidence were all analyzed against the burden of obtaining and producing a valid government-issued photo identification.[64] The State's interest in election modernization was supported by then-recent federal legislation indicating Congress's belief that photo identification is a reliable method of establishing voter qualifications.[65]

The interest of preventing voter fraud by requiring photo identification was narrowly construed by the Court as an interest in averting in-person voter impersonation.[66] The Court acknowledged that there was no record of any fraud occurring in the State at any time in its history.[67] However, the Court reasoned that because this type of fraud had occurred in other parts of the country, and preventing it served to maintain an "orderly administration" and "accurate recordkeeping," a sufficient

61. *See* Crawford v. Marion Cnty. Election Bd. 553 U.S. 181, 184–204 (2008) (weighing the two competing claims and delivering judgment in favor of the State).

62. *See id.* at 204 (concluding that the burden on voters did not outweigh the state interests put forward to support the statute).

63. *See id.* at 191 (analyzing the interests that the State has identified to justify the potential burdens that the statute imposes on voters).

64. *See id.* at 192–200 (listing the State interests applied as justifications for the photo identification requirement).

65. *See id.* at 192–94 (verifying the State's interests in issuing a photo identification by comparing federal legislation that encompasses similar requirements as a means to improve the integrity of the election process).

66. *See Crawford*, 553 U.S. at 194 (narrowing the inquiry to voter fraud that could reasonably occur if the state statute was not upheld).

67. *See id.* at 194–95 (pointing out that there is no evidence that the State has experienced voter fraud of this kind in its history).

justification existed to uphold the statute.[68] The Court rationalized that the interest of safeguarding voter confidence to determine that it was not only closely related to the State's interest, but also possessed an independent significance of promoting the democratic process.[69]

The Court addressed the burdens inherent in the preservation of the photo identification requirement.[70] Ultimately, Justice Stevens concluded that the burdens were "neither so serious nor so frequent" to deem that the state statute was unconstitutional under the Fourteenth Amendment.[71] Further, the Court acknowledged burdens imposed on eligible voters that do not have photo identification that were compliant with the statute.[72] The Court pointed to the alternative method of compliance unambiguously provided in the statute—casting a provisional ballot—as adequate means of rectifying any potential burdens.[73]

2. The Fifteenth Amendment

The Fifteenth Amendment[74] to the United States Constitution was enacted into law as a consequence of the pervasive racial

68. *See id.* at 195–96 (reasoning that the interest of preventing voter fraud in this manner is supported by examples throughout other parts of the country and would simultaneously benefit the State's administrative goals).

69. *See id.* at 197 (finding that public confidence in the electoral process will encourage participation in the democratic process).

70. *See id.* at 197 (providing examples of burdens that a voter may "lose his photo identification," "have his wallet stolen on the way to the polls," or "not resemble the photo identification" because of cosmetic changes).

71. *See Crawford*, 553 U.S. at 198 (characterizing the burdens as "life's vagaries" and determining that they do not pose constitutional issues).

72. *See id.* at 198–99 (clarifying that the burdens imposed on people who do not possess the required identification are the most relevant burdens to the issue).

73. *See id.* at 198–99 (rationalizing that the severity of the burdens are mitigated by the ability to cast a provisional ballot, and provide proper identification, or execute a required affidavit at the circuit court clerk's office within ten days).

74. U.S. CONST. amend. XV, § 1 ("[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"); U.S. CONST. amend. XV, § 2. ("[T]he congress shall have power to enforce this article by appropriate legislation").

disparity following the American Civil War.[75] To comprehensively analyze the racial disparity in mail-in voting, it is vital to discuss the Fifteenth Amendment's broad voting protections on account of "race, color, or previous condition of servitude."[76] To effectuate this provision, Congress is granted the power to enforce by enacting appropriate legislation.[77]

Despite the passage of this amendment, some states fashioned ancillary barriers to voting that disproportionately affected minority populations, such as literacy tests.[78] Immediately after the passage of the Fifteenth Amendment, Congress ratified the Enforcement Act of 1870[79] to apply the contours of the Fifteenth Amendment directly against the denial of the right to vote on account of race or color and attempt to eliminate any accompanying discrimination.[80] An amendment to the Enforcement Act furthered these objectives by establishing a system of federal supervision of state elections.[81] Despite these legislative commitments, Congress repealed a majority of the provisions of the enforcement act by 1894.[82]

The United States was still experiencing persistent and unrelenting racism in the federal and state electoral process during the nineteenth century through a variety of state-enacted election restrictions intended to disenfranchise Black voter

75. *See* John Marby Mathews, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 11–13 (1909) (synthesizing the general purpose of the enactment of the Fifteenth Amendment to a method of requiring the individual States to ensure Black suffrage in their respective election processes).

76. U.S. CONST. amend. XV, § 1.

77. U.S. CONST. amend. XV, § 2.

78. *See Voting and Election Laws*, USA GOV (last updated Sept. 1, 2020) (explaining that states continued to restrict access to voting after the enactment of the Fifteenth Amendment) [https://perma.cc/BGJ9-9U2B].

79. Enforcement Act, ch. 114, 16 Stat. 140 (1870).

80. *See* Act of May 31, 1870, ch. 114, § 22, 16 Stat. 145–46 (establishing that it is a federal crime to violate state laws governing election processes); Act of May 31, 1870, ch. 114, §§ 4–6, 19, 16 Stat. 141, 144 (stating that a private or official interference with a citizen's right to vote is a criminal offense); Act of May 31, 1870, ch. 114, §§ 20, 22, 16 Stat. 145 (mandating that a fraudulent act relating to the registration of voters or count of ballots is a violation of federal law).

81. *See* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (requiring the federal supervision of state elections).

82. *See* Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (repealing the provision that concerned federal supervision of state elections).

populations.[83] The Fifteenth Amendment served as a basis for affording constitutional protections and enacting federal voting rights laws in the interest of voters who are discriminated against based on race, color, or otherwise.[84]

III. Federal Protections Against Discriminatory Election Practices

In an effort to compound the protections afforded to voters inherent in the constitution, Congress has enacted federal legislation to combat rampant discrimination in election law.[85] The expansive legislation has provided a framework for an abundance of claims filed on behalf of disenfranchised voters.[86] This section will explore the history, extent, and availability of those claims, and will end with a case discussion of a state absentee ballot provision that disproportionately affected minority voters.[87]

A. History of the Voting Rights Act of 1965

The Voting Rights Act of 1965[88] was passed by the Eighty-Ninth Congress as a federal law with the intention to supplement the protections of the Fourteenth and Fifteenth Amendments to the United States Constitution and to explicitly prohibit racial discrimination in voting.[89] The Voting Rights Act prohibits nationwide voter discrimination based on race, color, or

83. *See* Robert J. Deichert, *The Fifteenth Amendment at a Crossroads*, 32 U. CONN. L. REV. 1075, 1080–1081 (2000) (elaborating on the state's defiance of the Fifteenth Amendment through subterfuge in the form of restrictions that proved to disproportionately affected Black voters).

84. *See id.* (reiterating the confines of the Fifteenth Amendment protections).

85. *See* Moke & Saphire, *supra* note 26, at 15 (asking how the copious amount of American voting laws applies to the racial gap in voting).

86. *See id.* (pointing out that the Supreme Court has interpreted the Voting Rights Act broadly in an effort to curb voter discrimination).

87. *See* discussion *infra* Part I.

88. 42 U.S.C. § 1973 (2018).

89. *See* Brian K. Landsberg, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT 11–12 (UNIV. PRESS OF KAN. 2007) (examining the origins of the 1965 Voting Rights Act and proclaiming that it arose from a systematic violation of the Fifteenth Amendment by state and local officials).

membership in a language minority group.[90] A discussion of the Voting Rights Act is relevant in assessing the protections afforded to minority and vulnerable voters when returning an absentee ballot.[91]

Two main purposes for enacting the Voting Right Act emerge from the copious legislative history of the Act.[92] First, Congress felt "confronted" by the duplicitous evil of voter discrimination that was preserved in the United States despite the equal protection commands of the constitution.[93] Second, Congress was interested in replacing the previous remedies that proved to be unsuccessful with more elaborate measures that would generate compliance with the Fifteenth Amendment.[94]

Passage of the Act was also largely in response to indirect efforts by the states to disenfranchise minority voters in the electoral process.[95] The Voting Rights Act is not a permanent piece of legislation, yet Congress regularly extends the sections of the act for numerous years at a time.[96] The last extension of the law was in 2006, for a period of twenty-five years.[97]

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90. *See Voting and Election Laws*, USA GOV, (last updated Sept. 1, 2020) (paraphrasing the widespread protections of the Voting Rights Act) [https://perma.cc/BGJ9-9U2B].

91. *See* Landsberg, *supra* note 89, at 13 (providing that the Voting Rights Act allows for robust protections of minority and vulnerable voting groups).

92. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (summarizing the relevant considerations from the abundance of committee hearings and floor debates that surrounded the passage of the Voting Rights Act).

93. *See id.* (opining that Congress considered voter discrimination an insidious evil that required legislative action).

94. *See id.* (interpreting the need for new legislation in the realm of voter discrimination as an indication that remedies prescribed in the past were unsuccessful at curing racial bias in the electoral framework).

95. *See* Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1936–37 (2013) (analyzing the passage of the Voting Rights Act of 1965 as a response to states impending poll taxes, literacy tests, and a multitude of other barriers to restrict minority populations).

96. *See History of Federal Voting Rights Laws*, U.S. DEP'T OF JUST., (last updated July 28, 2017) (describing that Congress has the power to extend sections of the Voting Rights Act for specific periods of time) [https://perma.cc/5PUY-RCZG].

97. *See id.* (pointing out that Congress most recently renewed the provisions of the Voting Rights Act in 2006).

To best understand the judicial protection against voting discrimination, this Section will proceed with a discussion of prominent sections of the Voting Rights Act and noteworthy decisions that incorporated those sections.[98]

1. The Coverage Formula in Section 4 and its Effect on States through Section 5

Prior to 2013, the Voting Rights Act prohibited states from enacting election practices that either have a discriminatory purpose or effect through the operation of two sections working in tandem.[99] Section 4(b) contained a coverage formula that was used to determine whether a specific state was carrying out election procedures that were discriminating against racial populations.[100] The first element analyzed was whether the state was utilizing any tests that voter applicants had to pass to be given the opportunity to vote.[101] Examples of these tests include literacy tests, or assessments that a person had good moral character.[102] The second element of the formula was a determination by the Director of the Census of whether less than fifty percent of voting aged citizens were registered to vote, or that less than fifty percent of voting aged citizens voted in the 1964 presidential election.[103] The coverage formula was renewed and extended regularly until 2006,

98. *See* discussion *infra* Part I.

99. *See Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUST., (last updated Sept. 11, 2020) (explaining that Section 4 sets out a formula used to determine which states are subject to the restrictions laid out within Section 5) [https://perma.cc/6Q6N-3VWD].

100. *See Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUST., (last updated May 5, 2020) (commentating on the purpose of enacting Section 4(b) in the scope of voting rights legislation) [https://perma.cc/3H82-VRR7].

101. *See id.* (paraphrasing the first subset of criteria that state election procedures had to meet to comply with Section 4(b)).

102. *See id.* (laying out examples of tests that states were not permitted to use in their election practices because of the discriminatory effect on populations).

103. *See id.* (expanding on the second element of the coverage formula established in Section 4(b)).

and was also modified to address voting discrimination against language minority groups.[104]

Another section of the Act functioned to enforce these ambitious requirements.[105] Section 5 applied to states that fell within the coverage framework set forth in Section 4(b).[106] These states' and their political subdivisions were considered "covered" and were not permitted to amend their election practices or procedures unless they were proven to not have a discriminatory purpose or effect.[107] To determine the effect of the proposed election law, covered states were required to have either an administrative review by the Attorney General or a lawsuit in the United States district court for the District of Columbia before enacting a new voting procedure.[108] The provisions within Section 5 persisted by legislative extension until the coverage formula in Section 4(b) was ruled unconstitutional by the Supreme Court in 2013, leaving Section 5 virtually irrelevant to the election regulatory scheme.[109]

2. Shelby County, Ala. v. Holder

In 2013, the Supreme Court held that Section 4(b), a historically controversial provision of the Voting Rights Act, as unconstitutional.[110] Shelby County is located in Alabama, a state that previously met the coverage formula under Section 4(b) and

104. *See id.* (detailing the reoccurrence expansion of the coverage formula throughout the history of voting legislation).

105. *See About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-section-5-voting-rights-act (last updated Sept. 11, 2020) (explaining that section 5 targets states with election practices that have a discriminatory purpose or effect) [https://perma.cc/8C26-D7QS].

106. *See id.* (naming jurisdictions as "covered" if they met the criteria in Section 4(b)).

107. *See id.* (elaborating on the process for covered states to enact new voting legislation).

108. *See id.* (defining the two processes that a covered state can go through to prove that a proposed voting restriction does not abridge the right to vote for any populations).

109. *See id.* (Ginsberg, J., dissenting) (stating that Section 5 was effectively overruled when the Supreme Court ruled Section 4(b) as unconstitutional).

110. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (holding that Section 4(b) of the Voting Rights Act, permitting a coverage formula used to prevent states from flagrant voter discrimination, was unconstitutional).

required federal preclearance before enacting a voting restriction.[111] Shelby County sued the U.S. Attorney General in the District of Columbia, claiming that Section 4(b) and Section 5 were facially unconstitutional.[112] The district court ruled against the County, finding that the statutory framework was constitutionally sound, and the court of appeals affirmed.[113] In a 5–4 opinion authored by Justice Roberts, the Supreme Court reversed the district court and the court of appeals, holding that section 4(b) was unconstitutional.[114] The Court did not issue a holding on Section 5, leaving room for Congress to potentially draft another coverage formula based on warranting conditions.[115] This holding was primarily based on principles of state autonomy and equal sovereignty among the states.[116]

The Court found that Section 4(b) did not satisfy these foundational tenets of the Constitution, as the preclearance requirement permitted federal intrusion on state policymaking.[117] Further, the Court acknowledged that the coverage formula in Section 4(b) was based on expired data and could no longer pass constitutional muster as the disparate voter turnout no longer existed.[118]

Throughout the dicta of the opinion, the Court noted that the abysmal discriminatory voting processes that originally justified the provisions contained within Sections 4 and 5 no longer existed

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111. *See id.* at 540–41 (establishing Shelby County's standing).

112. *See id.* at 541–42 (examining the background of the constitutional challenge heard by the Supreme Court).

113. *See id.* (reviewing the procedural history to explain that the court drastically departed from the preceding decisions).

114. *See id.* at 557 (determining that the coverage formula under Section 2 did not comply with the requirements of the constitution).

115. *See Shelby Cnty.*, 570 U.S. at 557 (acknowledging that in the future the climate of election restrictions may require a coverage formula to address voter discrimination).

116. *See id.* at 543–44 (analyzing the constitutional guarantee of state sovereignty in conjunction with the "fundamental principle of equal sovereignty").

117. *See id.* at 544–45 (reckoning that allowing federal approval of a state law conflicts with the state sovereignty inherent in our constitution and could result in an interference with state legislative decisions).

118. *See id.* at 547–51 (pointing out that our modern society does not face the same discriminatory issues as the culture at the time the original coverage formula was developed as the voter turnout gap has dramatically narrowed).

in those jurisdictions, and therefore no preclearance was required.[119] Simultaneously, the Court gave apparent recognition that voting discrimination still existed in the United States.[120] Despite the radical decision, the Court emphasized that judicial remedy for voting discrimination still, and would permanently, exist under Section 2.[121] Justice Roberts hesitated to overrule an act of Congress, yet the record compelled "no choice but to declare § 4(b) unconstitutional."[122] Ultimately, the Court agreed with Shelby County and found that the preclearance requirement exceeded the authority of the Constitution.[123]

3. Justice Ginsberg's Dissent

Justice Ginsberg, with the support of three more Justices, authored a dissent that took a position of continued enforcement of the provisions in dispute.[124] Justice Ginsberg argued that Congress had the ability to enact and renew the Voting Rights Act, and more specifically, Sections 4(b) and 5, through the power to enforce the Fourteenth and Fifteenth Amendments.[125] Support for this notion was cited through legislative history and previous

119. *See id.* at 535 (finding that voting conditions have considerably departed from the excessive discrimination that supported the passage of Section 4(b)).

120. *See Shelby Cnty.*, 570 U.S. at 536 (retreating from the original perspective laid out by the court that voting discrimination was not a substantial issue).

121. *See id.* at 537, 557 (highlighting that Section 2 does not apply in the present case yet exists as a ban on racial discrimination).

122. *See id.* at 556–557 ("[S]triking down an act of Congress is the gravest and most delicate duty that this Court is called on to perform.") (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).

123. *See id.* at 557 (finding that our current needs do not require the burdens imposed on the states by permitting the coverage formula).

124. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 559–94 (2013) (Ginsberg, J., dissenting) (arguing that Congress operated by legitimate authority when enacting and renewing Sections 4(b) and 5).

125. *See id.* at 566 (contending that congressional power to enforce the Fourteenth and Fifteenth Amendments commands "substantial deference").

precedent that permitted congressional authority to prevent state abuse and disregard of these amendments.[126]

The dissent was premised on the notion that Congress did not have unlimited authority, and that the means taken within their enforcement powers must have rationally advanced a legitimate objective.[127] Justice Ginsberg found that here, the congressional reauthorization of the preclearance requirements satisfied the rational-basis test for three reasons.[128]

First, the extensive legislative record that supported the initial legislation warranted significant deference.[129] Second, the inherent limitation Congress built into the act when it required reauthorization exemplified the intention to review the current needs of the federal voting scheme and modify accordingly.[130] Third, the recognized improvement in voting discrimination should have served as a signal that the preclearance requirements were operating as intended, and indicated no reason to invalidate the applicable provisions.[131] Additionally, Justice Ginsberg recognized the limitations of requiring plaintiffs to only rely on Section 2 litigation when submitting a voting discrimination case.[132]

Ultimately, Justice Ginsberg concluded that Section 4(b) should not be invalidated, and that the preclearance requirements,

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126. *See id.* at 567–68 (explaining that the Fifteenth Amendment provides Congress with enforcement powers to enact appropriate legislation to combat state discriminatory practices).

127. *See id*. at 569–70 (purporting that the proper standard for judicial review is the rational-basis test, and that the court should review the congressional record accordingly).

128. *See id*. at 569 (listing justifications for congressional reauthorization of the provisions that create and enforce the federal preclearance requirements).

129. *See Shelby Cnty.*, 570 U.S at 569 (recognizing that Congress is entitled to consider the legislative record when the legislation was initially enacted and when it was renewed to determine if the rational-basis test is met).

130. *See id*. (giving Congress deference in their decision to renew the preclearance provisions).

131. *See id*. (providing an explanation for the decreased disparity in voter turnout and attributing the improvements to the implementation and enforcement of the preclearance requirements).

132. *See id*. at 572 (finding that a voting discrimination claim under Section 2 is an "inadequate substitute" for preclearance requirements as it attacks discriminatory practices retroactively, as opposed to the preclearance requirements, which defy discrimination proactively).

as they were enacted, have made strides toward fulfilling the commands of the Fifteenth Amendment to reduce voting discrimination.[133]

B. The Realities of Vote Denial and Vote Dilution Under Section 2

Section 2 of the Voting Rights Act was enacted to prohibit both first-generation and second-generation barriers to voting by banning any state "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[134] It was originally successful in eliminating only first-generation barriers to voting, which are regulations fashioned to exclude populations from voting based solely on a discriminatory purpose.[135] Excluding an entire race from voting in a state election, based solely on race, is an example of a first-generation barrier to voting.[136]

Despite the progress made towards phasing out voter inequality in the wake of the Voting Rights Act, state and local elections were not entirely impervious to discriminatory practices.[137] Second-generation barriers imposed by state election laws limit the influence that minority voters have on the election process through incidental constraints on the election process targeted directly at minority and vulnerable populations.[138]

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133. *See id*. at 593 (identifying the positive impact the preclearance requirements had on reducing voter discrimination in our country).

134. 42 U.S.C. § 1973 (2018).

135. *See* Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-generation Discrimination*, 30 ST. LOUIS UNIV. PUB. L. REV. 77, 81 (2010) (defining a first-generation barrier to voting, and the regulatory impact the Voting Rights Act had on eradicating them from the electoral system in the United States).

136. *See id*. (providing that first-generation barriers serve to exclude entire classes of people from the right to vote).

137. *See* Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 95 (2018) (purporting that second-generation barriers evolved to indirectly insulate political institutions from integration as a response to the elimination of first-generation barriers).

138. *See id*. at 95–96 (analyzing the effects of second-generation barriers as an impairment on the strength of the minority vote).

Implementing these barriers involves manipulation of an electoral structure to disproportionately exclude minority populations from the electoral process.[139] Examples of second-generation barriers to voting are redistricting a county to diminish the impact of the minority vote, or disenfranchising a felon from the opportunity to vote.[140]

Under Section 2, voters are permitted to seek judicial review if they believe that a state or local government has limited voting rights on the basis of race, color, or membership in a language minority group.[141] Claims brought under this title are typically characterized as "vote denial" or "vote dilution."[142] Vote denial happens when a person is directly denied the opportunity to cast a ballot or have their vote accurately counted.[143] Vote dilution occurs when the strength of a person's vote is diminished by state electoral practices.[144] Section 2 arguably has the largest impact on federal voting requirements as it effectively acts as an enforcement mechanism to guarantee the commands of the Fifteenth Amendment.[145]

In 1982, Congress amended Section 2 to include language that reads "results in a denial or abridgement,"[146] replacing the original

139. *See id*. at 96 (evaluating the negative implications of second-generation barriers on the influence minority populations have on an election's outcome).

140. *See id*. at 96–97 (proffering a second-generation barrier utilized to exclude the minority vote); *see also* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) (providing "felon disenfranchisement" as an example of a second-generation barrier used to denial a class of persons the right to vote).

141. 42 U.S.C. § 1973 (2018).

142. *See* Morgan, *supra* note 137, at 97 (distinguishing between vote denial and vote dilution by the ultimate impact on voter populations).

143. *See id*. (expounding on the direct impact of vote denial).

144. *See id*. (paraphrasing the consequences of vote dilution on minority populations).

145. *See id*. (elaborating on the legislative foundation of vote denial and vote dilution).

146. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 443 (describing the impact the congressional amendment on the original Section 2 had on shifting the burden of proof from the state's "purpose" to discriminate by the electoral law in question to the "effect" the state's electoral law in question had on discrimination).

dialect mimicking the Fifteenth Amendment.[147] Scholars have determine that by making this amendment, Congress intended for Section 2 to provide protection against voting laws that either intentionally, or unintentionally, racially discriminated.[148] The Supreme Court in *Thornburg v. Gingles*[149] defined the appropriate question to ask in a vote dilution case as "whether as a result of the challenged practice or structure plaintiffs' do not have an equal opportunity to participate in the political process and elect candidates of their choice."[150]

The protections afforded by Section 2 are permanently enforceable and apply across all jurisdictions in the United States.[151] Section 2 is violated if, "based on the totality of the circumstances," protected citizens "have less opportunity than other members of the electorate to participate in the political process."[152] The Supreme Court has identified several factors that courts may consider in evaluating the totality of the circumstances.[153]

1. Democratic National Committee v. Hobbs

In 2020, the Ninth Circuit heard a challenge to two Arizona state election laws on the premise that they were in violation of the Voting Rights Act, the First, Fourteenth, and Fifteenth

147. *See* Voting Rights Act of 1965, Pub. L. 89–110, § 2, 79 Stat. 437, 437 (1965) ("No voting qualification or prerequisite to voting, or standard, or practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

148. *See* Tokaji, *supra* note 146, at 443–44 (purporting that Congress's amendment to Section 2 intended to overrule a Supreme Court decision that extended the reach of Section 2 only to protections against intentional discrimination).

149. *See* Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (stating the questions to ask to establish Section 2 violations).

150. *See id*. (quoting the Senate Report to the 1982 Amendments).

151. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 537 (distinguishing Section 2 of the Voting Rights Act from Section 5, stating that Section 2 is permanent and widespread).

152. 42 U.S.C. § 1973(b) (2018).

153. *See Gingles*, 478 U.S. at 36–37 (listing the factors that should be examined to determine if Section 2 of the Voting Rights Act is violated).

Amendments to the United States Constitution.[154] The first law challenged was Arizona's out-of-precinct policy[155] of completely discarding, rather than partially counting, ballots cast by voters in the wrong precinct.[156] The second law challenged a statute ("H.B. 2023")[157] that criminalized the third party collection and delivery of another person's absentee ballot.[158]

Plaintiff, the Democratic National Committee ("DNC"), sued Arizona's Secretary of State and Attorney General in federal district court.[159] The DNC argued that the out-of-precinct policy and H.B. 2023 violated Section 2 of the Voting Rights Act because they disparately affected minority groups voting privileges.[160] The DNC further claimed that H.B. 2023 violated Section 2 of the Voting Rights Act and the Fifteenth Amendment because it was enacted with discriminatory intent.[161] Lastly, the DNC contended that both laws violated the First and Fourteenth Amendments because they unduly burdened the minority vote.[162] The district court found in favor of the State on all of the claims.[163] The DNC

154. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 999 (2020) (rehearing a case *en banc* that challenged Arizona election laws).

155. *See* ARIZ. REV. STAT. § 16–122 (Lexis 1994) (providing that for a vote to be counted, voter must vote in their specifically assigned precinct).

156. *See Hobbs*, 948 F.3d at 999 (asserting that the procedure of wholly discarding votes cast in a precinct other than that in which a voter is registered is a violation of the Constitution and the Voting Rights Act).

157. *See* ARIZ. REV. STAT. §§ 16–1005(H), (I) (Lexis 2016) (criminalizing the collection and return of another voter's absentee ballot).

158. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 999 (9th Cir. 2020) (denouncing the policy that effectuated the statute that prohibited third party collection and return of ballots).

159. *See id*. (summarizing the initial action that led to the litigation).

160. *See id*. (arguing that Section 2 protections against discriminatory voting practices prevents the application of the Arizona voting laws).

161. *See id*. (claiming that H.B. 2023 was ratified with racial prejudice in violation of Section 2 and the Fifteenth Amendment).

162. *See id*. (contending that the First and Fourteenth Amendment provide protections for minority groups that are disproportionately affected by the enactment of the voting regulations at issue).

163. *See Hobbs*, 948 F.3d at 998 (ruling in favor of Arizona in the district court).

appealed the case to the Ninth Circuit and the judgement was affirmed.[164]

Following that decision, a majority of non-recused, active judges voted to rehear the case *en banc*.[165] Judge William A. Fletcher opened his opinion for the Ninth Circuit by declaring that the right to vote is the foundation of our democracy.[166] The court evaluated both Arizona state election laws under the "results test" found within section 2 of the Voting Rights Act.[167] The first step of the test was to ask whether, the law at issue resulted in a disparate burden on a protected class.[168] The second step of the test was more complex.[169] It asked whether, under the totality of the circumstances, the disparate burden on minority voters was linked to social and historical conditions in Arizona so as "to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred representatives."[170]

The court began its analysis of out-of-precinct policy under the first prong of the results test by identifying uncontradicted evidence, presented in the district court that established minority voters comprised discarded out-of-precinct votes at a rate of two to one.[171] Throughout the inquiry, multiple errors in the district court's analysis were debunked.[172] For example, the district court concluded that because the amount of out-of-precinct votes was

164. *See id*. (affirming the decision by a three-judge panel of the Ninth Circuit).

165. *See id*. (ordering the case to be reheard *en banc*).

166. *See id*. at 998–99 (emphasizing the basic right to vote is essential to maintain a democratic society) (quoting Earl Warren, *The Memoirs of Earl Warren* 306 (1977)).

167. *See id*. at 1011–33 (analyzing the effects of the election laws under the framework developed in the Supreme Court for Section 2 claims).

168. *See id*. at 1012 (asking if voters have an equal opportunity to participate in the political process despite the existence of the voting regulation at issue).

169. *See Hobbs*, 948 F.3d at 1011 (describing that step two involves an investigation into the election law at issue and the specific historical and social context in the state in which it was enacted).

170. *See id*. (enumerating the second prong of the results test) (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (alteration in original)).

171. *See id*. at 1014 (pointing out that minority voter groups were primarily disadvantaged by the out-of-precinct policy).

172. *See id*. at 1014–16 (finding that the district court had correct data but failed to apply it in a manner that recognized the apparent injustice).

declining on average, there could not be a disparate impact on minority voters.[173] The Ninth Circuit reasoned that the district court failed to recognize that there was a cognizable decline in all in-person votes, with a consistent trend of predominantly minority voter ballots being wholly discarded in violation of the out-of-precinct policy.[174] The court found that the DNC survived step one, as it only needed to show "a causal connection between the challenged voting practice and a prohibited discriminatory result."[175] The DNC successfully showed that the policy of completely discarding the ballots resulted in a higher percentage of discarded minority votes in comparison to white votes.[176]

Beginning the analysis of step two, the court acknowledged the district court's discussion of seven Senate factors[177] that are considered in vote denial and dilution claims.[178] It was concluded that the district court minimized the strength of the DNC's claim under several factors, and that all of the factors weighed in the DNC's favor.[179] Following this conclusion, the court held that the

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173. *See id*. at 1014–15 (explaining the rationale the district court employed in concluding that plaintiffs failed at step one of the results test).

174. *See Hobbs*, 948 F.3d at 1015 (clarifying that the number of out-of-precinct votes increased in comparison to the total number of in-person votes cast).

175. *See id*. at 1016 (stating that the burden of proof plaintiffs needed to meet to succeed on their claim) (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997)).

176. *See id.* at 1016 (concluding that the DNC showed a sufficient causal connection to survive step one of the results test).

177. *See id*. at 1017.

> The district court considered seven of the nine Senate factors: factor one, the history of official discrimination connected to voting; factor two, racially polarized voting patterns; factor five, the effects of discrimination in other areas on minority groups' access to voting; factor six, racial appeals in political campaigns; factor seven, the number of minorities in public office; factor eight, officials' responsiveness to the needs of minority groups; and factor nine, the tenuousness of the justification for the challenged voting practice.

178. *See id*. (indicating that of all the Senate factors, some are more relevant than others, depending on the case at hand).

179. *See Hobbs*, 948 F.3d at 1032 (reasoning that the DNC provided sufficient evidence to show that all the Senate factors, specifically five and nine, weigh in their favor).

out-of-precinct policy imposed a significant disparate burden on minority groups in violation of the results test of Section 2.[180]

H.B. 2023 was also evaluated under the results test provided by Section 2.[181] At the threshold of the analysis, the court identified that uncontested evidence presented in the district court showed that a disproportionate number of minority voters utilized third party services to collect and deliver their absentee ballots prior to the enactment of H.B. 2023.[182] The district court classified this evidence as "circumstantial and anecdotal."[183] The Ninth Circuit determined that the district court erred in this conclusion, finding that it was direct testimonial evidence that established large numbers of absentee ballots collected by third parties were from minority voters.[184] The court held that H.B. 2023 succeeded in step one of the results test, as the statute resulted in a disparate burden on minority voters.[185]

In consideration of step two, the district court did not differentiate its discussion of the test in regards to the out-of-precinct policy or H.B. 2023.[186] The Ninth Circuit found that the same Senate factors that weighed in favor of the Plaintiffs for the out-of-precinct policy, also applied to H.B. 2023.[187] Following this

180. *See id*. (concluding that Plaintiffs have carried the burden to meet both steps of the results test and have shown a violation of Section 2).

181. *See id*. (following the same standard used to evaluate the out-of-precinct policy under Section 2 of the Voting Rights Act).

182. *See id*. (finding that evidence of minority reliance on third party vote collection is undisputed, and that there is no evidence of white voters' significant reliance on this method of vote collection).

183. *See id*. at 1033 (citing the district court's conclusion that the evidence was insufficient to establish a claim under Section 2).

184. *See Hobbs*, 948 F.3d at 1033 (refuting the conclusion drawn in the district court based on the facts presented in support of the Plaintiffs' claim).

185. *See id*. (concluding that the district court clearly erred when determining that H.B. 2023 did not succeed on the first step of the results test).

186. *See id*. (pointing out that the district court did not make a distinction in their evaluation of the Senate factors in application to either of the two election laws at issue).

187. *See id*. (regarding Senate factors five, the effects of discrimination in other areas on minorities access to voting, and nine, the tenuousness of the justification for the challenged voting practices, as especially important in the analysis).

determination, the Court held that H.B. 2023 also violated the results test under section 2.[188]

H.B. 2023 was further analyzed using the "intent test" embedded in section 2.[189] To prevail under the intent test, the DNC needed to show that discriminatory purpose was a motivating factor for the enactment of the legislation at issue.[190] In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[191] the Supreme Court delineated the following list of factors for courts to consider when assessing claims of intentional discrimination:[192] (1) the historical background; (2) the sequence of events leading to enactment, including any substantive or procedural departures from the normal legislative process; (3) the relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group.[193] Once it had been established that racial discrimination was a motivating factor behind legislative enactment, the burden shifted to Arizona to demonstrate that the law would have been enacted without the discriminatory motivation.[194] Here, the Ninth Circuit held that all four of the factors weighed in favor of the DNC.[195] Additionally, the court made a factual finding that H.B. 2023 would not have been

188. *See id*. at 1037 (recognizing that a large portion of the Senate factor analysis for the out-of-precinct policy similarly applied to H.B. 2023).

189. *See Hobbs*, 948 F.3d at 1037 (applying the intent test provided by Section 2 to assess the discriminatory nature of the enactment of House Bill 2023).

190. *See id*. at 1038 (differentiating between the discriminatory purpose being a "primary" motive for legislation); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (establishing the test for analyzing claims of intentional discrimination).

191. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (describing factors that must be examined with claims of intentional discrimination).

192. *See id.* at 266 (providing a non-exhaustive list of factors for courts to apply to the voting legislation at issue).

193. *See id.* at 266–68 (listing factors used to determine if legislation was enacted with discriminatory intent).

194. *See* Hunter v. Underwood, 471 U.S. 222, 228 (explaining the burden-shifting mechanism that provides defendants with an opportunity to defend the enactment of the law).

195. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1041 (9th Cir. 2020) (holding that the district court clearly erred in determining that the DNC did not meet the initial burden under the intent test).

enacted without racial discrimination.[196] In finding that H.B. 2023 failed the intent test, the court reasoned that it was also in violation of the Fifteenth Amendment.[197]

In holding that the out-of-precinct policy violated the results test of Section 2 and H.B. 2023 violated both the results test, the intent test, and the Fifteenth Amendment, the court departed from the district court and initial case in the Ninth Circuit to hold in favor of the DNC on all of the claims.[198] In doing so, the Ninth Circuit created a window of opportunity for voters to bring claims against mail-in voting regulations that can be shown to disadvantage minority voters.[199]

2. Brnovich v. Democratic National Committee

Recently in 2021, the Supreme Court granted certiorari to decide whether the Arizona voting legislation disproportionately affected participation in the electoral process.[200] In an opinion authored by Justice Samuel Alito, the Court ruled that neither Arizona's out-of-precinct rule, nor its ballot-collection law violates section 2.[201] The Court's rationale relied heavily on the precedent set in *Crawford*[202] to determine that the burdens imposed by these

196. *See id.* (citing race-based allegations made by Arizona state Senators as justification for this conclusion).

197. *See id.* (correlating meeting the burden of the intent test with a violation of the Fifteenth Amendment).

198. *See id.* at 1046 (reciting the holding that departed from the procedural posture of the case).

199. *See id.* at 1008–15 (imposing a lower burden for Plaintiffs who bring claims under Section 2).

200. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (granting certiorari to review the out-of-precinct policy and H.B. 2023 that dictates the Arizona voting regime).

201. *See id.* at 2343–44 (reciting the Court's holding in favor of the Petitioners).

202. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 192–99 (2008) (concluding that "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting").

restrictions were not unconstitutional.[203] Justice Alito emphasized that despite the evidence of statistical showing of a higher rejection rate for minority votes cast, no racial disparity existed.[204] The Court also reasoned that the State justifications proffered for the Arizona voting laws supported any burdens.[205] The decision noted that Section 2 does not require a state to show that its chosen policy is absolutely necessary, or that a less restrictive means would not comply with the state's objectives.[206] Ultimately, the Court concluded that the "modest" racially disparate burdens imposed by the Arizona election laws, juxtaposed with the state justifications, do not violate Section 2.[207] By doing this, the Court foreclosed any opportunities for discriminatory election legislation to be challenged under Section 2.[208] Further, the Court found that H.B. 2023 was not enacted with a discriminatory purpose.[209]

The dissenting opinion, authored by Justice Elena Kagan, presented that the Congressional intent of enacting section 2 was to prevent these explicitly discriminatory policies.[210] Justice Kagan emphasized that Section 2 provides sweeping language that prohibits any "voting qualification" any "prerequisite to voting," or "any standard, practice, or procedure" that "results in a denial or abridgement of the right to vote on account of race."[211] The dissent heavily criticized the majority's approach for failing to consider

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203. *See Brnovich*, 141 S. Ct. at 2344 (comparing the burdens set forth as unconstitutional in this case to the burdens determined to be constitutional in *Crawford*).

204. *See id.* at 2344–45 (noting that the racial disparity was small and that the system was not inequitable for certain populations).

205. *See id.* at 2345 (finding that the Court of Appeals' decision "failed" to give appropriate weight to the state interests advanced).

206. *See id.* at 2345–46 (interpreting Section 2 jurisprudence and applying it to the Arizona voting policy).

207. *See id.* at 2346–2348 (concluding that Section 2 does not provide a remedy for disadvantaged minority voters).

208. *See id.* at 2372–2373 (Kagan, J., dissenting) (emphasizing that the majority opinion cuts the breadth and strength of the protections afforded by Section 2).

209. *See id.* at 2349–50 (majority opinion) (finding that there is no evidence that the legislature as a whole was racially motivated in enacting H.B. 2023).

210. *See id.* at 2365 (pointing out that states have historically intertwined discriminatory voting laws cloaked in facially neutral procedure).

211. *See id.* at 2356 (reiterating the purpose of Section 2 as it applies to the case at hand).

Section 2 precedent and a voter's "equal opportunity" to cast a ballot.[212] Justice Kagan ended her dissent with skepticism for the future of voting rights claims, contemplating that the every American, of every race, is given an equal chance to participate in democracy, and that Section 2 was a crucial tool to achieve that goal before it was manipulated by this Court.[213]

IV. The Evolution of Absentee Voting

With no remedy left under Section 2, the following question remains: when a minority voter is disadvantaged by a discriminatory absentee voting practice, how do they create a cognizable claim?[214] For the purposes of this Note, absentee and mail-in voting will be used interchangeably, and the terms refer to when registered voters to submit their ballots remotely by mail, rather than in person at polling stations.[215] The foundation of the current voting by mail-in ballot system in the United States can be traced back as early as 1874.[216] During the American Civil War, the United States experimented with the idea of allowing someone to cast a vote in an election remotely.[217] As industrialization surged in the United States, the presence of absentee voting respectively intensified.[218] Each year since then, more voters have made the

212. *See id.* at 2361 (explaining how the Court did not carefully consider the language and widespread application of Section 2 in the majority opinion).

213. *See id.* at 2373 (refuting the majority's interpretation of Section 2 and explaining that Congress enacted Section 2 to prevent the discriminatory effects that these laws have created).

214. *See* discussion *infra* Part V.

215. *See Absentee and Early Voting*, USA GOV (last updated Oct. 8, 2020) (defining examples of people who are permitted to vote absentee as voters who reside in the United States, United States military members and families stationed outside of the United States, and overseas United States citizens) [https://perma.cc/7GZJ-ZLRM].

216. *See generally* RUSS W. CARTER, WAR BALLOTS: MILITARY VOTING FROM THE CIVIL WAR TO WWII (Military Postal History Society ed., 2005) (clarifying that precedents to absentee voting existed in Pennsylvania, New Jersey, and about half of the Confederate states).

217. *See id.* (explaining that the Ohio legislature enacted a provision that allowed many eligible male voters were stationed outside of their home districts fighting in the American Civil War to vote absentee in the 1864 presidential election).

218. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 122–23 (Basic Books ed., 2009) (interpreting

choice to mail in their ballots and the states have responded by regulating procedures to safeguard the integrity of the election process.[219]

In general, citizens in every state have access to absentee voting, yet rules vary on who can partake.[220] Absentee voting regulations also differ from state to state,[221] and the ability to vote in this manner has been construed as a privilege to voters, as opposed to an absolute right.[222] This is because the Constitution expressly grants the states authority to establish specific voting qualifications, including the time, place, and manner by which one can participate.[223] The freedom states have in crafting election law also encompasses the construction of absentee voting procedures.[224] Consequently, the rules governing a citizen's ability to vote in this manner depends on the state where the citizen is registered to vote.[225]

Despite the patchwork of statutory regimes, the Voting Rights Act has imposed a number of national standards relevant to the

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the industrial revolution in the United States as a potential reason for why more than twenty states adopted formal registration absentee voting procedures for individuals who could demonstrate a work-related reason for being absent on election day).

219. *See* EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING, U.S. ELECTION ASSISTANCE COMM'N, Oct. 17, 2017, at 2 (graphing the large rise in the percentage of absentee and mail-in ballots over a span of 12 years ranging from 2004 to 2016) [https://perma.cc/NS3W-FPNL].

220. *See* KEYSSAR, *supra* note 218, at 123 (disclosing that some states may require voters to have a valid excuse to send an absentee ballot in the mail in lieu of their in-person vote).

221. This note will not discuss the validity of any particular state's absentee voter laws as that would require a particular evaluation of state constitutional provisions.

222. *See* McDonald v. Bd. of Election Com'rs of Chi., 394 U.S. 802, 811 (1969) (upholding an Illinois absentee voting provision that denied pretrial detainees the ability to vote by absentee ballot despite a challenge under the Equal Protection Clause); Sheils v. Flynn, 299 N.Y.S. 64, 78–80 (N.Y. Sup. Ct. 1937) (stating that the state legislature is authorized to provide the manner, time, and place of voters who are absent on election day).

223. U.S. CONST. art. I, § 2, cl. 1.

224. *See McDonald*, 394 U.S. at 808–09 (describing the deference that the court gives to the state's election law procedures as a presumption of statutory validity upon review).

225. *See id.* at 810–11 (affirming that states have the autonomy to determine absentee voting procedures).

absentee voting scheme.[226] For example, in 1970, the legislation was amended to include uniform nation rules for absentee registration and voting in presidential and vice-presidential elections.[227] These amendments have been challenged and upheld in the Supreme Court as a reasonable means for eliminating an unnecessary burden on the right of interstate travel.[228] Further, to address the needs of vulnerable or disabled voters, a provision was enacted to allow for a voter that requires assistance to vote due to a disability or impairment to be given help in casting a ballot by a person of the voter's choice.[229] This wake of reform in the twentieth century has been in attempt to adapt to the growing needs of our more diverse, transient, and flexible society.[230]

A. Who Can Vote Absentee?

Absentee voting is a distinctly different process than in-person voting and requires vastly different procedures to be performed in accordance with the corresponding state statute where the election is taking place.[231] At the time this is written, only sixteen states require registered voters to provide an "excuse"[232] to vote by mail

226. 42 U.S.C. § 1973 (2018).

227. 42 U.S.C. § 1973 (2018).

228. *See* Dunn v. Blumstein, 405 U.S. 330, 340–41 (1972) (maintaining the holding that the amendments made to the federal Voting Rights Act, mandating absentee voting for presidential elections, as constitutional under the travel and enforcement clauses of the Fourteenth Amendment).

229. *See* 52 U.S.C. § 10508 (specifying that if a voter requires assistance because of blindness, disability, or illiteracy, they are permitted to have assistance from anyone other than the voter's employer or agent of that employer, or officer or agent of the voter's union).

230. *See* KEYSSAR, *supra* note 218, at 123 (laying a basis for the legislative amendments that have been implemented to provide voter protections).

231. *See Absentee and Mail Voting Policies in Effect for the 2020 Election*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 3, 2020) (providing a survey of the different absentee and mail voting policies across the nation) [https://perma.cc/7ATY-8G74].

232. *See Table 2: Excuses to Vote Absentee*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 20, 2020) (providing specific examples of excuses that states require for their citizens to vote by mail, including illness, disability, work, religious beliefs, etc.) [https://perma.cc/E5RW-73UK].

in an election, the other thirty-four and Washington D.C. either do not require an excuse or conduct all mail elections.[233]

Although many voters are eligible to vote using an absentee ballot, characteristics of voters who request an absentee ballot systemically differ in comparison with registered voters in the remainder of the population.[234] It has been maintained that minority groups are less inclined to cast an absentee ballot because they are less likely to have a permanent address, more likely to live in areas inconsistent with mail delivery, and are more prone to not return mail they receive.[235] As a consequence of these pervasive issues, mail-in voting has led to a disparate impact on the rejection of mail-in votes from minority and vulnerable groups.[236]

1. Current Absentee Voting Regime

To best accommodate the increasing numbers of voters deciding to mail their ballot before election day, individual states have promulgated more restrictive measures on casting an absentee ballot in an effort to continue to closely regulate state-wide voting regulations.[237] States have chosen to implement these requirements to protect a multitude of state interests in the electoral process.[238] If a ballot fails to meet strict state

233. *See generally Table 1: States with No-Excuse Absentee Voting*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 1, 2020) [https://perma.cc/BT9S-VUSK].

234. *See* THAD KOUSSER & MEGAN MULLIN, DOES VOTING BY MAIL INCREASE PARTICIPATION? USING MATCHING TO ANALYZE A NATURAL EXPERIMENT 430 (Cambridge Univ. Press et al. eds., 2007) (finding that those who choose to vote by absentee ballot are more likely to be male, well-educated, older Republicans).

235. *See* Stephanopoulos, *supra*, note 1, at 1644–45 (elaborating on factors that are prevalent among minority groups that explain why they are disproportionately affected by mail-in voting).

236. *See id.* (weighing the impact that mail-in voting has on minority voters and concluding that those groups are at a disadvantage if they wanted to vote absentee in an election).

237. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483, 508–09 (2003) (exploring state concerns in regulating mail-in voting procedures).

238. *See* Bell v. Gannaway, 227 N.W.2d 797, 802 (Minn. 1975) (citing the preservation of the enfranchisement of voters, the secrecy of the voter's ballot, the

requirements, it has the possibility to be rejected by the vote tabulator, causing that individual's vote to be not counted.[239]

States have autonomy in implementing absentee voting regulations that further state interests and simultaneously safeguard the election process.[240] A frequently implemented form of absentee ballot requirement amongst state statutes is that an absentee ballot shall be opened, marked, closed, and sealed in the presence of a witness, and it shall be accompanied by a prescribed affidavit of the voter and the certificate of the witness.[241] Across the nation, ballots are regulated by, and can be rejected upon arrival for, reasons including mismatched signatures[242], technical errors[243], and postage issues.[244] During the 2016 Presidential Election, almost twenty-four percent of approximately one hundred and forty million votes were mailed in, and over three hundred thousand of those votes were discarded and not

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prevention of fraud, and the compilation of election results in a reasonable timeframe to determine the election outcome as state interests advanced through absentee voter legislation).

239. *See* Colten v. City of Haverhill, 564 N.E.2d 987, 989 (Mass. 1991) (illustrating the principle by evaluating the validity of ballots that were not counted in a Massachusetts election).

240. *See* Stephanopoulos, *supra* note 1, at 508 (clarifying the authority and interest states have in administering elections according to state prescribed standards).

241. *See Colten*, 564 N.E.2d at 990–91 (verifying the validity of a Massachusetts absentee voting provision that requires the form to be completed in front of a witness and enclosed with a corresponding properly executed affidavit).

242. *See* Connolly v. Secretary of the Commonwealth, 536 N.E.2d 1058, 1063–64 (Mass. 1989) (holding that elderly voters' absentee ballots containing signatures followed by initials was technically a violation of the Massachusetts statute); Saucedo v. Gardner, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (ruling that New Hampshire's signature-match requirement for mail-in votes was facially unconstitutional under the Fourteenth Amendment because of the natural variation in voters' signatures, the absence of training on handwriting analysis for reviewers, and the lack of compliance measures).

243. *See* Gooch v. Hendrix, 851 P.2d 1321, 1329–31 (Cal. 1993) (finding that ballots that were collected and returned to the county clerk by a political association could not be counted, and absentee ballots that had political associations listed as the address for ballots to be sent could also not be counted).

244. *See* Washington v. Hill, 960 So.2d 643, 650 (Ala. 2006) (confirming the validity of an Alabama absentee voting statute which provided that votes may be rejected if they are retrieved from the United States Post Office without a postmark or postmarked with a date later than a day before the election).

counted.[245] In 2017, sixteen states had more than fifty percent of voters choose to vote at the polling place before Election Day or prior to the election by absentee ballot.[246] Most recently, in the 2020 general election, some states had more than two percent of all absentee ballots cast be discarded for an error.[247] While that percentage may seem insignificant, it is important to remember that the fundamental right to vote is at stake, and as more people make the choice to vote absentee, it will continue to rise unless state restrictions are given less deference in judicial decisions.[248]

a. State Justifications for Absentee Voting Restrictions

In general, states are focused on safeguarding the integrity of the electoral process through implementation of strict absentee ballot regulations.[249] States posit numerous justifications for strict compliance with superfluous election regulations.[250] The option to partake in the mail-in voting process presents a large range of public interest issues for states to regulate through legislation.[251] Prevention of voter fraud is often specified as a state interest when

245. *See generally* U.S. ELECTION ASSISTANCE COMMISSION, THE ELECTION ADMINISTRATION AND VOTING SURVEY, 2016 COMPREHENSIVE REPORT (2016) (reporting on statistics from the 2016 general election and the number of mailed ballots that were not counted).

246. *See* EAVS DEEP DIVE: EARLY, ABSENTEE AND MAIL VOTING, U.S. ELECTION ASSISTANCE COMM'N, Oct. 17, 2017, at 3 (reporting statistics on states that had more than half of their ballots cast early, absentee, or by mail during the 2016 presidential election).

247. *See Election Downloads: 11/03/2020*, NORTH CAROLINA STATE BOARD OF ELECTIONS (2020), (reporting that North Carolina rejected almost 2.5 percent of absentee ballots in the 2020 general election) [https://perma.cc/BHW2-ZT8Z].

248. *See* discussion *infra* Part V.B.

249. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 192–99 (2008) (viewing the interest of safeguarding voter confidence as closely related to other interests promulgated by the state).

250. *See id.* at 192 (listing all of the state interests in enacting the photo identification provision).

251. *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 24, 2020) (presenting advantages and disadvantages to the mail-in voting process) [https://perma.cc/HMH5-ZDZ4].

fashioning mail-in voter laws.[252] Identification requirements, like signature matching and witness oversight, are explained by the desire to deter fraudulent votes.[253] Maintaining the secrecy of the voter's preferences are of equal importance to the states, who are concerned with preserving the sanctity of the electoral process.[254] These interests are compelling and significant in administering a proper election, yet they must be weighed against the potential for voter deprivation to pass constitutional muster.[255]

b. Issues Faced by Minority and Vulnerable Populations in Returning an Absentee Ballot

For most Americans, it seems relatively simple to receive an absentee ballot in the mail and return it according to state standards.[256] There are a multitude of concerns that might present themselves for specific subsets of the population trying to participate in an election by mail.[257] For example, not every U.S. citizen has access to mail delivery.[258] The issue is made even more complex as literacy issues often cause further ballot discrepancies among certain populations.[259]

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252. *See id.* (proffering that the deterrence of voter fraud is a motivator to establish election restrictions for absentee votes).

253. *See id.* (identifying restrictions that are commonly used to achieve that goal).

254. *See* Scott v. Kenyon, 105 P.2d 291, 295 (Cal. 1940) (upholding California's election law requirements for absentee voting as a means to protect the secrecy of the voter).

255. *See id.* at 190 (performing an analysis that weighed the interests put forward by the state against the asserted injury to determine the constitutionality of an election regulation).

256. *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 24, 2020) (stating that convenience is an advantage voters have when they choose to vote by absentee ballot) [https://perma.cc/HMH5-ZDZ4].

257. *See Hobbs,* 948 F.3d at 1025–26 (presenting examples of barriers citizens face in the attempt to access a ballot).

258. *See id.* at 1027–28 (detailing the disparate effect that mail-in voting has on Native Americans on reservations that do not have street addresses or other barriers to receiving mail).

259. *See id.* (explaining that literacy has a disparaging affect for uneducated voters because election materials are often written at a college level).

Studies have been conducted in numerous states that conclude that mailed ballots cast by minority populations are more likely to be rejected than mail ballots cast by white voters, and relatedly, these groups are less likely to correct a ballot that has been returned due to error.[260] The burdens of these laws do not fall equally on all voting populations, as there is evidence of how these seemingly neutral rules serve to disadvantage young voters and voters of color.[261] Research derived from the 2018 election in Florida revealed that the rejection rate for mail-in ballots for ages eighteen to twenty-one was almost two percent higher than the voters age sixty-five and older.[262] The same study identified Black and Hispanic minority groups have a higher percentage of mail-in votes rejected as compared to White voters.[263] There are similar controversaries from vulnerable groups, such as disabled populations, that are comparably disadvantaged from the strict absentee voting standards.[264]

It is vital to directly address the broader regulatory state interests in implementing these strict mail-in voting standards.[265] It has been argued that with appropriate modern safeguards, voting by mail produces a scant number of fraudulent votes.[266] Over the past twenty years, more than 250 million ballots have been cast by mail, yet there have been less than one hundred and

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260. *See generally* Steve Bousquet, *Study: Mail Ballots Have Higher Rejection Rates and They Vary Widely by County*, TAMPA BAY TIMES (Sept. 20, 2018) [https://perma.cc/7QW5-JJXR]; Chris Joyner & Jennifer Peebles, *AJC Analysis: Absentee Voting Pitfalls Tripped Thousands of Ga. Voters*, THE ATLANTA J. CONST. (Dec. 20, 2018) [https://perma.cc/5CB8-D49Z].

261. *See id.* (identifying the age and race disparity in rejection of mail-in ballots).

262. *See* Anna Baringer et al., *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of Coronavirus*, 19 ELECTION L.J. 289, 309 (2020) (reporting on the total rejected ballots among different age groups).

263. *See id.* at 299 (finding that White mail-in votes are rejected at a rate of 0.9 percent and Black and Hispanic voters are rejected at rates of 1.96 percent and 2.05 percent, respectively).

264. *See* Drenth v. Boockvar, No. 1:20-CV-00829, 2020 WL 4805621, at *1 (M. D. Pa. Aug. 18, 2020) (noting the preliminary injunction that required the state to provide an "Accessible Write-n Ballot").

265. *See* discussion *infra* Part V.

266. *See* Marc Elias, *Four Pillars to Safeguard Vote by Mail*, DEMOCRACY DOCKET (Mar. 18, 2020) (arguing that minority and vulnerable groups are disproportionately affected as mail-in voters) [https://perma.cc/L8GY-EZAG].

fifty criminal convictions for election fraud related to mail-in ballots.[267]

V. Minority and Vulnerable Populations Deserve Protection Surrounding the Right to Cast an Absentee Ballot Under the Constitution

The excessive history of voting rights jurisprudence in an attempt to safeguard minority and vulnerable voters is illustrious of the need for a specific judicial remedy in the case of absentee ballot discrimination. Mail-in voting disproportionately harms voters in a racial minority group and voters with disabilities or impairments.[268] Higher rejection rates and lower return rates of absentee ballots from these groups compared to other subsets of the population are clear evidence of this declaration.

Notwithstanding the abundance of legal precedent, this precise question still remains: which legislative provision provides a cognizable and promising judicial remedy for disenfranchised minority and vulnerable absentee voters?[269]

The Fourteenth Amendment permits states to enact laws that create a reasonable burden on the right to vote.[270] The Equal Protection Clause has been the basis for a plethora of litigation to determine the definition of a "reasonable burden" in voting rights cases.[271] In *Crawford*, the Supreme Court applied a balancing framework on a voter identification law to refine the

267. *See Election Fraud Cases*, THE HERITAGE FOUNDATION (reporting on all incidents of election fraud nationwide and indicating the type of fraud that was found in each case) [https://perma.cc/U2JR-AYKZ].

268. *See* Danielle Root et al., *In Expanding Vote by Mail, States Must Maintain In-Person Voting Options During the Coronavirus*, CENTER FOR AMERICAN PROGRESS (pointing out that there is a clear imbalance of minority and vulnerable populations voting by mail compared to majority populations and arguing that an in-person voting option is necessary for these groups when no other option remains) [https://perma.cc/H7LE-3HL3].

269. *See* Stephanopoulos, *supra* note 1, at 1588 (questioning how the judicial system can create a remedy for deprived voters).

270. *See Burdick,* 504 U.S. at 441–42 (upholding Hawaii's prohibition on write-in voting as a reasonable burden on voters that is valid under the Fourteenth Amendment).

271. *See* U.S. CONST. amend. XIV, § 1 ("[N]or deny to any person within its jurisdiction equal protection of the laws.").

understanding of a reasonable burden of an election regulation.[272] The framework involved weighing the state justifications in enacting the regulation against the burden faced by voters as a result of the regulation at issue.[273] This framework has been the cornerstone for evaluating state voting regulations as recent as the year 2021.[274] In ruling that the voter identification law did not impose "excessively burdensome requirements" and that the state interests were "sufficiently strong" in enacting the provision, the Court implied a significant amount of deference to the state's proffered justifications without much further inquiry.[275]

In the years following the *Crawford* decision, many district and circuit courts have continued to apply the balancing test with an interpretation that declined to give states as much deference in their justifications for strict voting regulations.[276] Specifically, the District Court for the Southern District of Texas found that an election law violated the Fourteenth Amendment from applying the *Crawford* balancing test, but instead of analyzing whether the election law was "sufficient" to achieve state objectives, it asked whether the regulations were "necessary" to accomplish state interests and burden a plaintiff's rights.[277] Furthermore, some courts did not give as much weight to the state's justifications for the election law at issue, purposely because the law limited a minority voter's effective exercise of the electoral franchise and the burdens on an entire racial population facing a disadvantage were

272. *See Crawford,* 553 U.S. at 190 (acknowledging that balancing tests have been utilized in claims challenging election regulations).

273. *See id.* at 191 (identifying the claims of both parties before weighing and determining whether the burden asserted by the state is reasonable in light of the justifications).

274. *See Brnovich,* 141 S. Ct. at 2338 (applying the *Crawford* analysis to claims brought against an alleged discriminatory voting practice).

275. *See Crawford,* 553 U.S. at 203–04 (concluding that the election law regulation was reasonable on a facial challenge).

276. *See, e.g.*, Veasey v. Perry, 71 F. Supp. 3d 627, 686–88 (2014) (applying a balancing test that identifies the natures of the states' interests and the voter's burden to ask whether the states interests make it necessary to burden the voter's rights), *aff'd in part, vacated in part, rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016).

277. *See id.* at 685 ("[T]aking into consideration 'the extent to which those interests make it necessary to burden a plaintiff's rights.'" (quoting from Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

characterized as particularly strong.[278] The courts have postulated that the burden of discrimination imposed on voters were distinguished from the burdens in *Crawford* as more severe, resulting in an unreasonable burden despite the state's purpose in enacting the regulation.[279] The court found that although the state justifications were similar, the discriminatory result was too severe to justify.[280] The *Crawford* balancing test was originally formulated in deciding the constitutionality of an in-person voting regulation.[281] However, the test has also been employed by district courts in deciding the constitutionality of mail-in ballot regulations that unduly burdened the minority vote.[282] Therefore, it would be appropriate to apply the *Crawford* balancing tests to Fourteenth Amendment claims to mail-in voting requirements in the future.[283] Moreover, in federal district court the Equal Protection Clause has been construed to provide protection to disabled and elderly voters from mail-in voting signature match requirements, permitting the *Crawford* test in application of these claims as well.[284]

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278. *See* Texas v. Holder, 888 F. Supp. 2d 113, 143–44 (D.D.C. 2012) (holding that Texas failed to prove that a photo-identification law did not have a retrogressive effect on the racial minority vote), *vacated,* 570 U.S. 928 (2013); *see also* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016) (classifying the state justifications as "meager" in comparison to the apparent racial discrimination).

279. *See* One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 949 (W.D. Wis. 2016) (finding that the burden on voters who were facing racial discrimination in an effort to cast an absentee ballot were much greater than those who faced obstacles complying with a photo-identification requirement), *aff'd in part, vacated in part, rev'd in part sub nom.* Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

280. *See id.* (concluding that otherwise qualified voters were experiencing limited access to the vote as a result of the regulations).

281. *See Crawford,* 553 U.S. at 191 (reasoning that the state's interest must be "relevant in protecting the integrity and reliability of the electoral process").

282. *See Thomsen,* 198 F. Supp. 3d at 935 (finding that the state's interests did not justify the racial discrimination caused by the mail-in voting regime).

283. *See id.* at 929–30 (applying *Crawford's* balancing test throughout after the plaintiff claimed the voting law impermissibly burdens voters in violation of the Fourteenth Amendment).

284. *See* Frederick v. Lawson, 481 F. Supp 3d 774, 798–99 (S.D. Ind. 2020) (emphasizing that the state's interests were not sufficient to justify the burdens placed upon disabled and elderly voters).

Landmark Supreme Court cases have also signaled a cause of action under the Fourteenth Amendment.[285] Justice Ginsberg's dissenting opinion in *Shelby County* provides support for this proposition.[286] There, she argued that there was a means to eliminate the invidious voting discrimination by explicitly pointing to the Fourteenth Amendment as support for providing relief to disenfranchised minority voter populations.[287]

Circuit courts have also seen explicit challenges to mail-in vote requirements under the Fourteenth Amendment.[288] The court in *Hobbs* did not make a finding on the Fourteenth Amendment claim against the absentee voting provisions that allegedly discriminated against minority populations.[289] *Hobbs* was consolidated and granted writ of certiorari to consider a claim of facially neutral voter restrictions that disproportionately affect minority populations under Section 2 of the Voting Rights Act.[290] The Supreme Court granting certiorari and deciding the case, *Brnovich v. Democratic National Committee*[291] was indicative of the fact that there is a disadvantage that minority and vulnerable populations face when attempting to cast a mail-in ballot; unfortunately because the Court found that no remedy was available under Section 2, there *must* be another alternative available to successfully adjudicate these claims, as the absentee voting regime is only getting more prevalent.[292] Justice Kagan's

285. *See Shelby Cnty.,* 570 U.S. at 567–68 (providing the Fourteenth Amendment as a foundation for challenging voter discrimination issues).

286. *See id.* at 568 (arguing that the Equal Protection Clause of the Fourteenth Amendment gave Congress the power to enforce the coverage formula at issue).

287. *See id.* at 579 (identifying that a violation of the Fourteenth Amendment has occurred when a subset of the population is indirectly excluded from the electoral process).

288. *See, e.g.*, Hobbs, 948 F.3d at 999 (challenging Arizona's ballot harvesting statute under the Fourteenth Amendment).

289. *See id.* at 1046 (extending the judgment to only the section 2 and Fifteenth Amendment claims).

290. *See* Ariz. Republican Party v. Democratic Nat'l Comm., 141 S. Ct. 221 (2020) (granting the petition for certiorari to the Ninth Circuit), *rev'd sub nom.* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

291. *See Brnovich,* 141 S. Ct. 2321 (granting certiorari to review the out-of-precinct policy and H.B. 2023 that dictates the Arizona voting regime).

292. *See* discussion *infra* Part V.

dissenting opinion in *Brnovich* unwaveringly supports this notion, as it emphasizes the "right" every American, of every race, has to equal access to the electoral scheme, and that the majority opinion undermines this fundamental right.[293]

Going back to *Crawford*, if the Court manufactured a revised balancing test for a claim under the Equal Protection clause of the Fourteenth Amendment against the showing of an apparent disproportionate amount of rejected mail-in ballots from minority and vulnerable populations, relief should be recognizably available.[294]

A. The Equal Protection Clause of the Fourteenth Amendment Should Provide Protection to Disenfranchised Minority and Vulnerable Populations

A disproportionate effect of tossed absentee ballots from minority and vulnerable voters can be attributed to strict state mail-in voting requirements.[295] The validity of absentee voting legislation in light of this data continues to be challenged on Equal Protection grounds.[296] In situations that produce a disproportionate number of rejected ballots from minority and vulnerable voters, state justifications for strict absentee ballot regimes are insufficient to rationalize the excessive burdens.[297] These situations produce circumstances unlike the setting in *Crawford*, as the burdens there did not involve an issue as

293. *See Brnovich,* 141 S. Ct. at 2366 (criticizing fervently the effect of the majority opinion on voting rights equality).

294. *See Crawford,* 553 U.S. at 190 (examining previous tests the Court applied with claims challenging voting regulations under the Fourteenth Amendment).

295. *See* Stephanopoulos, *supra* note 1, at 1582–83 (pointing out that courts consider a challenged state election practice against an asserted injury).

296. *See* ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1322–23 (10th Cir. 2008) (finding that absentee voting procedures that required a voter to complete an absentee voter application with a personal identification number was sufficient to confirm the identification of the voter and did not violate equal protection).

297. *See Thomsen,* 198 F. Supp. 3d at 934–35 (concluding that the racial discrimination and subsequent burdens caused by the mail-in voting regime was unreasonable despite the state justifications).

fundamental as discrimination in access to the electoral scheme.[298] It has been argued that the justifications set forth in *Crawford* were not sufficient in light of the excessive burdens the Indiana photo identification laws placed on voters.[299] Upon consideration of the Court's excessive deference to state justifications in that case, to provide the most protection for minority and vulnerable voters, a modified version of the balancing test should be applied to these claims.[300] The *Crawford* balancing test should be applied to mail-in voting claims under the Equal Protection Clause of the Fourteenth Amendment more regularly, specifically to those claims that present a showing of discrimination through disproportionate rejection rates of absentee ballots from minority and vulnerable voters.[301]

In adjudicating these claims, courts should also give considerably less deference to state interests and decide whether the state interest makes it *necessary* to burden the voters' rights when deciding a claim of discrimination.[302] Implementing this framework will create more protection for minority and vulnerable voters as it will ensure the state restrictions are not designed to exclude any portions of the population from enfranchisement.[303]

B. Mail-In Voting is Here to Stay

In 2020, the COVID-19 pandemic created a surge in absentee voters and subsequent absentee voting legislation.[304] Disputes of

298. *See Crawford,* 553 U.S. at 192 (presenting the burdens of Indiana voters as "limited" in the context of availability of increased access to the ballot).

299. *See* Abigail A. Howell, *An Examination of Crawford v. Marion County Election Board: Photo Identification Requirements Make the Fundamental Right to Vote Far from "Picture Perfect*," S. DAKOTA L. REV. 325, 351–355 (2010) (analyzing the state justifications from *Crawford* and finding that they are not justifiable compared to the burdens).

300. *See id.* at 353 (arguing that the state justifications received too much deference in the *Crawford* case).

301. *See id.* (supporting the notion that state justifications should not be given as much weight in the *Crawford* analysis).

302. *See Veasey,* 71 F. Supp. 3d at 686–88 (determining that Texas failed to mitigate burdens for eligible voters).

303. *See id.*

304. *See* Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 51–52 (S.D.N.Y. 2020) (concluding that plaintiffs had established their entitlement to

this nature have illuminated concerns and constitutional challenges regarding the right to vote by mail.[305] States have seen increased participation from voters as a result of a widely utilized absentee voting regime, furthering public policy objectives of promoting the electoral process.[306] Therefore, it is essential that our judicial system provides a cognizable remedy for those individuals who choose to participate in a process designed to streamline and protect a voter's unencumbered access to the ballot.[307]

VI. Conclusion

Judicial remedies for discriminatory election legislation have evolved with our rapidly growing society. As mail-in voting becomes a more commonly chosen route to exercise the constitutional right to vote, careful observation of state regulation is necessary to provide the rights and liberties afforded to our population. Under the Fourteenth Amendment, and through applying a modified version of the balancing test laid out in *Crawford*, protection is available for minority and vulnerable populations who have a higher absentee ballot rejection rate. In trying these discriminatory issues, state justifications must be found necessary, not sufficient, to prevent the stated risks to comply with the Equal Protection Clause.

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an injunction to rectify the violation of the First and Fourteenth Amendments to the United States Constitution resulting from the state's decision to not count non-postmarked absentee ballots cast in the June 23, 2020 primary when those ballots have other guarantees of being timely mailed).

305. *See id.* at 42–49 (making a constitutional argument during the COVID-19 pandemic).

306. *See id.* at 30–31 (providing context for the increased participation by mail-in ballot).

307. *See id.* at 49–50 ("Requiring Defendants to count valid ballots already cast will provide clarity in the face of unexpected and constitutionally significant chaos and strengthen voters' faith in the franchise.").