

A Proposal for a Voter-Identification Law Limiting Voter Disenfranchisement*

I. INTRODUCTION

Often, lawmakers consider all but a law's real-life impact on constituents. Voter-identification laws are no exception. Recently, in the midst of a polarizing presidential campaign, an equally divisive political debate arose over voter-identification laws in Arkansas.¹ In 2013, the Arkansas General Assembly passed its own voter-identification law—Act 595.² Considering valid policy considerations from both sides of the voter-ID argument, this note proposes an alternative solution to Act 595 for addressing voter-identification issues.

Valid points exist both for and against implementing a voter-identification law in Arkansas. The underlying policy behind both arguments is preserving the integrity of our elections. While the State has a strong interest in preventing voter fraud, election integrity calls for ensuring that qualified voters can access the polls. A law that fails to consider both arguments, and its implications, fails to address election integrity adequately.

This legislative note proposes an approach to voter identification that balances the State's interest in preventing voter fraud with the need to prevent unnecessary voter disenfranchisement. Part II analyzes Act 595 and how the new law altered prior Arkansas election law. Part III

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1. See Roby Brock, *Representatives King and Williams Debate Voter ID and Medicaid Expansion*, TALK BUS. (Sept. 17, 2012), <http://talkbusiness.net/2012/09/representatives-king-and-williams-debate-voter-id-and-medicaid>.

2. Act 595, 2013 Ark. Acts 2240 (codified at §§ 7-5-201(d)–(e), -305(a)(8)(A)–(B), -5-321 to -322, -5-418(c)–(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)–(d)).

discusses recent United States Supreme Court caselaw addressing the constitutionality of voter-identification laws. Part IV discusses the arguments for and against enacting laws similar to Act 595. Finally, Part V proposes a new approach to solving voter-identification problems, aiming to provide legislators with provisions that will ensure a fair, balanced, and effective approach to prevent voter fraud and protect election integrity.

II. VOTER-IDENTIFICATION LAW AND ACT 595

A. Prior Arkansas Law: Identification Requirements for Voting

To understand the potential implications of Arkansas's new voter-identification law, one must first understand the law prior to Act 595. Before the passage of Act 595, the Arkansas Code did not require a voter to present photo identification for voting in person.³ However, Arkansas law required mail-registrant voters to present identification when voting in person.⁴ The previous law required such mail-registrant voters to present "current and valid photo identification" or a "copy of a current utility bill, bank statement, government check, paycheck, or other government document" that included the "name and address of the voter."⁵ If the potential voter was voting by mail, the individual had to provide the ballot along with the identification described above.⁶ Notably, these prior provisions contained no identification requirement for mail-registrant voters who had previously voted in a federal election in Arkansas, regardless of whether the individual

3. See ARK. CODE ANN. §§ 7-5-101 to -810 (Repl. 2011), amended by Act 595, 2013 Ark. Acts 2240 (codified at §§ 7-5-201(d)-(e), -305(a)(8)(A)-(B), -5-321 to -322, -5-418(c)-(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)-(d)).

4. ARK. CODE ANN. § 7-5-201(d)(1) (Repl. 2011), amended by ARK. CODE ANN. § 7-5-201(e)(1)(A) (Supp. 2013).

5. ARK. CODE ANN. § 7-5-201(d)(1)(A), amended by ARK. CODE ANN. § 7-5-201(e)(1)(A) (Supp. 2013).

6. ARK. CODE ANN. § 7-5-201(d)(1)(B), amended by ARK. CODE ANN. § 7-5-201(e)(1)(B) (Supp. 2013).

was voting in person or by mail.⁷ The prior statute also did not define “photo identification.”⁸

Under previous law, before a person could submit a ballot on Election Day, a poll worker had to complete a number of steps to verify that the voter was registered.⁹ Act 595 did not alter most of the procedures for voter registration; however, prior to Act 595, section 7-5-305 of the Arkansas Code was the primary mechanism for verifying voter registration.¹⁰ First, the poll worker had to “[r]equest the voter to identify himself or herself in order to verify the existence of his or her name on the precinct voter registration list.”¹¹ Second, the poll worker had to “[r]equest the voter, in the presence of the poll worker, to state his or her address and state his or her date of birth,” and determine whether the “voter’s date of birth and address are the same as those on the precinct voter registration list.”¹² If the given date of birth differed from that on the precinct voter-registration list, the law required the poll worker to “request the voter to provide identification as the poll worker deem[ed] appropriate.”¹³ At that point, the poll worker had to check the address on the given identification with the address listed on the voter-registration list.¹⁴ If the addresses differed, the poll worker then had to check whether the voter’s address was within the polling location’s precinct.¹⁵ If so, the poll worker then requested the voter to complete a voter-registration application, which updated the county voter-registration records.¹⁶ If the address was not within the precinct, the poll worker instructed the voter to go to the

7. See ARK. CODE ANN. § 7-5-201(d)(1), *amended by* ARK. CODE ANN. § 7-5-201(e)(1) (Supp. 2013).

8. See ARK. CODE ANN. § 7-1-101 (Repl. 2011), *amended by* Act 595, 2013 Ark. Acts 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)(A)) (defining “proof of identity”).

9. See ARK. CODE ANN. § 7-5-305 (Repl. 2011), *amended by* ARK. CODE ANN. § 7-5-305(a)(8)(A)–(B) (Supp. 2013).

10. See Act 595, 2013 Ark. Acts 2240, 2244-45 (codified at ARK. CODE ANN. § 7-5-305(a)(8) (Supp. 2013)) (providing Act 595’s only modification to section 7-5-305).

11. ARK. CODE ANN. § 7-5-305(a)(1).

12. ARK. CODE ANN. § 7-5-305(a)(2)(3).

13. ARK. CODE ANN. § 7-5-305(a)(4).

14. ARK. CODE ANN. § 7-5-305(a)(5).

15. ARK. CODE ANN. § 7-5-305(a)(5)(A).

16. ARK. CODE ANN. § 7-5-305(a)(5)(B).

proper precinct's corresponding polling location.¹⁷ If the voter's name was different than that listed on the voter-registration list, the poll worker had to request the voter to complete a voter-registration form.¹⁸ Further, under subsection 7-5-305(a)(7), the poll worker "[r]equest[ed] the voter, in the presence of the poll worker, to sign his or her name . . . in the space provided on the precinct voter registration list."¹⁹

In the event that photo identification was not available, the prior statute required the poll worker to "indicate on the precinct voter registration list that the voter did not provide identification."²⁰ The statute provided that "[a] first-time voter who registers by mail without providing identification when registering and desires to vote in person but who does not meet the identification requirements . . . may cast a provisional ballot."²¹ After the election, the law permitted the election board to provide information to the prosecuting attorney about voters who did not provide identification, allowing the prosecuting attorney to investigate possible voter fraud.²²

The requirements for early voting were very similar to the process for regular voting.²³ Before an individual could submit an early vote, the prior Arkansas statute required the "county clerk or election official" to:

- (1) Request the voter to identify himself or herself by stating his or her name, date of birth, and address in order to verify his or her registration;
- (2) If the voter's name or address is not the same as that in the county voter registration record files, request

17. ARK. CODE ANN. § 7-5-305(a)(5)(C).

18. ARK. CODE ANN. § 7-5-305(a)(6).

19. ARK. CODE ANN. § 7-5-305(a)(7).

20. ARK. CODE ANN. § 7-5-305(a)(8)(B)(i) (Repl. 2011), *amended by* ARK. CODE ANN. § 7-5-305(a)(8)(B)(i)(a) (Supp. 2013).

21. ARK. CODE ANN. § 7-5-305(a)(8)(B)(ii), *amended by* ARK. CODE ANN. § 7-5-305(a)(8)(B)(iii) (Supp. 2013).

22. ARK. CODE ANN. § 7-5-305(a)(8)(B)(iii)–(iv), *amended by* ARK. CODE ANN. § 7-5-305(a)(8)(B)(iv)–(v) (Supp. 2013).

23. *Compare* ARK. CODE ANN. § 7-5-418(c) (Repl. 2011) (detailing the requirements for early voting), *amended by* Act 595, 2013 Ark. Acts 2240, 2247 (to be codified at ARK. CODE ANN. § 7-5-418(c)), *with* ARK. CODE ANN. § 7-5-305 (explaining the requirements to cast a ballot in an election), *amended by* ARK. CODE ANN. § 7-5-305(a)(8)(A)–(B)(iii) (Supp. 2013).

the voter to complete an updated voter registration application form;

(3) Request the voter to sign an early voting roster or early voting request form that identifies his or her name, address, date of birth, and the date on the roster or form.²⁴

Further, if a poll worker could not verify the voter's registration or the voter was not listed in voter-registration records, the statute provided that the "voter may [cast] a provisional ballot that shall be counted only upon verification of the voter's registration status."²⁵

For absentee voting, the prior law provided that "[a]pplications for absentee ballots must be signed by the applicant and verified by the county clerk by checking the voter's name, address, date of birth, and signature from the registration records or, if sent by electronic means, the application must bear a verifiable facsimile of the applicant's signature."²⁶ Upon returning the absentee ballot, "first-time voters who registered by mail" had to attach a copy of a "current and valid photographic identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the first-time voter."²⁷ This provision did not apply if the voter provided the information at the time he or she registered by mail, or if the voter submitted his or her "driver's license number or at least the last four (4) digits of his or her social security number at the time" the voter registered.²⁸ If the voter provided his or her driver's license or social security number at the time of registration, it had to match "the information in an existing state identification record bearing the same number, name, and date of birth as provided in the registration."²⁹

24. ARK. CODE ANN. § 7-5-418(c), *amended by* Act 595, 2013 Ark. Acts 2240, 2247 (to be codified at ARK. CODE ANN. § 7-5-418(c)).

25. ARK. CODE ANN. § 7-5-418(d), *amended by* Act 595, 2013 Ark. Acts 2240, 2248 (to be codified at ARK. CODE ANN. § 7-5-418(d)(1)).

26. ARK. CODE ANN. § 7-5-404(a)(1) (Repl. 2011).

27. ARK. CODE ANN. § 7-5-412(a)(2) (Repl. 2011).

28. ARK. CODE ANN. § 7-5-412(a)(2)(A)-(B).

29. ARK. CODE ANN. § 7-5-412(a)(2)(B).

B. Changes to Arkansas Law by Act 595

Arkansas State Senator Bryan King introduced what would become Act 595 during the 2013 regular session of the Arkansas General Assembly.³⁰ Although Act 595 did not modify many of the existing voter-verification procedures, the law substantially heightened the identification standards.³¹ As discussed later, opponents of Act 595 are concerned about its impact on Arkansas elections.³²

Act 595 requires a potential voter to present “proof of identity” when voting in person.³³ This requirement applies to both early voting and voting on Election Day.³⁴ Act 595 defines “Proof of Identity” as:

A document or identification card that:

(a) Shows the name of the person to whom the document was issued;

(b) Shows a photograph for the person to whom the document was issued;

(c) Is issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in the State of Arkansas; and

(d) . . . (1) Is not expired; or (2) Expired no more than four (4) years before the date of the election in which the person seeks to vote[.]³⁵

These identification standards are much higher than those in the prior law. Act 595 requires voters to present a government-issued document or card showing a

30. See Act 595, 2013 Ark. Acts 2240, 2240 (codified at §§ 7-5-201(d)–(e), -305(a)(8)(A)–(B), -5-321 to -322, -5-418(c)–(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)–(d)).

31. See Act 595, 2013 Ark. Acts 2240 (codified at §§ 7-5-201(d)–(e), -305(a)(8)(A)–(B), -5-321 to -322, -5-418(c)–(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)–(d)).

32. See *infra* Part IV.B.

33. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(A) (Supp. 2013)).

34. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(A) (Supp. 2013)).

35. Act 595, 2013 Ark. Acts. 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)(A)). Act 595 also allows voters to present “[a] voter identification card under § 7-5-322” as proof of identity. Act 595, 2013 Ark. Acts 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)(A)(i)).

photograph.³⁶ In contrast, prior Arkansas law did not define what qualified as current and valid photo identification.³⁷ Presumably, a non-government document or card was sufficient to satisfy this requirement under prior law.³⁸ The prior law also allowed voters to present a utility bill, bank statement, or other similar document showing the voter's address.³⁹ Act 595 essentially requires voters to produce a government-issued photo-ID upon voting, whereas voters had more options to verify their identity under prior law.

However, Act 595 allows voters casting absentee ballots to choose which type of identification they want to provide.⁴⁰ The voter may either include a copy of a "current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."⁴¹ This requirement does not extend to active-duty members of the armed forces or marine merchants, including their spouses.⁴² The requirements that Act 595 sets forth for absentee ballots provide for a potential hole in the legislation. For instance, although a recently expired drivers' license would satisfy the requirements for in-person voting,⁴³ whether it would satisfy the requirements for absentee voting is unclear.⁴⁴ However, a utility bill showing the voter's address and name *would* satisfy the requirements for

36. See Act 595, 2013 Ark. Acts 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)(A)) (accepting IDs issued by the U.S. Government, the State of Arkansas, and accredited post-secondary education institutions).

37. See ARK. CODE ANN. § 7-1-101 (Repl. 2011), amended by Act 595, 2013 Ark. Acts 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)).

38. See ARK. CODE ANN. § 7-5-305(a)(8)(A) (Repl. 2011), amended by ARK. CODE ANN. § 7-5-305(a)(8)(A) (Supp. 2013).

39. ARK. CODE ANN. § 7-5-305(a)(8)(A), amended by ARK. CODE ANN. § 7-5-305(a)(8)(A)(i) (Supp. 2013).

40. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B) (Supp. 2013)).

41. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B) (Supp. 2013)).

42. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B)(i)-(iii) (Supp. 2013)).

43. Act 595, 2013 Ark. Acts 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)(A)-(B)) (allowing for the use of certain expired IDs).

44. See Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B) (Supp. 2013)) (requiring either "current and valid photo identification" or a copy of another type of identification that verifies the voter's name and address).

absentee voting, but it would *not* satisfy the requirements for in-person voting.⁴⁵

Act 595's "proof of identity" requirement does not apply to individuals who are residents of a licensed "long-term care or residential care facility."⁴⁶ In other words, a voter who lives in a licensed nursing home does not have to provide proof of identity with his or her ballot. However, the voter must provide "documentation from the administrator of the facility attesting that the person is a resident of the facility."⁴⁷

In the event that a voter cannot provide proof of identity when voting in person, Act 595 permits the voter to cast a "provisional ballot."⁴⁸ Election officials will count the provisional only if:

- (1) The voter returns to the county board of election commissioners by 12:00 p.m. on the Monday following the election and . . . [p]rovides proof of identity; or . . . [p]rovides an affidavit stating that the voter cannot provide proof of identity because the voter . . . [i]s indigent; or . . . [h]as a religious objection to being photographed; and (2) The voter has not been challenged or required to vote a provisional ballot for any other reason.⁴⁹

Additionally, Act 595 requires the Arkansas Secretary of State to provide for the issuance of a "voter identification card that may be requested by an individual to be used as

45. Compare Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B) (Supp. 2013)) (allowing absentee-ballot voter to submit "a copy of a current utility bill, bank statement, government check, paycheck or other government document" showing the voter's name and address), with Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(A) (Supp. 2013)) (requiring in-person voters to "[p]resent proof of identity"), and Act 595, 2013 Ark. Acts 2240, 2240-41 (to be codified at ARK. CODE ANN. § 7-1-101(25)) (defining "proof of identity," which does not include documents such as utility bills, etc.).

46. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(2)(A) (Supp. 2013)).

47. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(2)(B) (Supp. 2013)).

48. Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321(a)(2) (Supp. 2013)).

49. Act 595, 2013 Ark. Acts 2240, 2245-46 (codified at ARK. CODE ANN. § 7-5-321(c) (Supp. 2013)).

proof of identity when appearing to vote in person.”⁵⁰ These voter-ID cards will be issued absent “a fee or charge to an individual who . . . does not have another valid form of proof of identity; and . . . [i]s registered to vote; or . . . [w]ill be at least eighteen (18) years of age at the next election.”⁵¹ According to the governing rules established by the Arkansas Secretary of State, county clerks will issue these voter-ID cards.⁵² To obtain such an ID, a voter must present documents to the county clerk that verify the voter’s identity.⁵³ This documentation must include the voter’s date of birth, full legal name, residential address, and evidence that the voter is registered to vote in that county.⁵⁴ The Rules also provide a laundry list of documents that will satisfy these requirements to obtain a “free” voter-ID card.⁵⁵

III. *CRAWFORD V. MARION COUNTY ELECTION BOARD*

In the 2008 decision *Crawford v. Marion County Election Board*, the United States Supreme Court considered the constitutionality of a voter-identification law in Indiana.⁵⁶ The Indiana law, “SEA 483,” required in-person voters to present photo identification as a prerequisite to voting in primary and general elections.⁵⁷ The law did not require photo identification for absentee ballots submitted by mail.⁵⁸ Further, the law provided “an exception for persons living and voting in a state-licensed

50. Act 595, 2013 Ark. Acts 2240, 2246 (codified at ARK. CODE ANN. § 7-5-322(a)(1)(A) (Supp. 2013)).

51. Act 595, 2013 Ark. Acts 2240, 2246-47 (codified at ARK. CODE ANN. § 7-5-322(b) (Supp. 2013)).

52. ARK. SEC’Y OF STATE, RULES ON VOTER IDENTIFICATION § 5.01, at 2 (2013), *available at* http://www.sos.arkansas.gov/elections/Documents/SOS%20Rules_Voter%20ID%20Final.pdf.

53. *Id.* § 7.02, at 4.

54. *Id.*

55. *Id.* § 7.03, at 4-5 (birth certificate, marriage-license application, notarized copy of a state or federal tax return, paycheck stub, Medicare or Medicaid statement, social-security statement, school record or transcript from the current or preceding calendar year, naturalization document, or discharge papers from the military).

56. 553 U.S. 181, 185 (2008).

57. *Id.* (internal quotation marks omitted).

58. *Id.* at 185-86.

facility such as a nursing home.”⁵⁹ SEA 483 did not impose a requirement for registering to vote, and the “State offer[ed] free photo identification to qualified voters able to establish their residence and identity.”⁶⁰ Soon after the law’s enactment, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit seeking “a judgment declaring [the voter-ID law] invalid and enjoining its enforcement.”⁶¹

The *Crawford* Court addressed the argument put forth by the Democratic Party that SEA 483 was analogous to a poll tax.⁶² Historically, the Supreme Court has applied a strict standard of scrutiny when determining whether conduct “invidiously discriminate[s]” against a class of individuals and, thus, “violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”⁶³ Under this standard, “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”⁶⁴

However, the Court rejected the Democratic Party’s poll-tax argument and applied a more lenient test for Indiana’s voter-identification law.⁶⁵ The Court used a “balancing approach” that “called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation” on the right to vote.⁶⁶ In other words, the *Crawford* Court balanced the State’s interest of protecting election integrity with the burden placed on all Indiana voters. Applying this balancing approach, the Supreme Court determined that the interests put forth by the State of Indiana for imposing a voter-identification requirement outweighed voters’ burdens.⁶⁷

59. *Id.* at 186.

60. *Id.*

61. *Crawford*, 553 U.S. at 186-87.

62. *Id.* at 189.

63. *Id.* (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966)).

64. *Id.*

65. *See id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

66. *Crawford*, 553 U.S. at 190 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)) (internal quotation marks omitted).

67. *Id.* at 203 (quoting *Burdick*, 504 U.S. at 434, 439).

In defense of SEA 483, the State first argued that the modernization of elections requires states to “reexamine their election procedures.”⁶⁸ Specifically, the National Voter Registration Act⁶⁹ “increased the number of registered voters” and caused Indiana’s voter rolls to “inflate[] by as much as 41.4%.”⁷⁰ Additionally, Indiana contended that the Help Americans Vote Act of 2002⁷¹ showed “Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote.”⁷² Pointing to inflated voter rolls and the effectiveness of photo identification, the State argued that it had an interest in counting only ballots from qualified voters.⁷³ Second, Indiana argued that it has a strong interest in safeguarding voter confidence.⁷⁴ The State contended that the “integrity and legitimacy of representative government” called for its voter-identification law.⁷⁵

On the other hand, Indiana Democrats argued the law imposed burdens on voters that outweighed the State’s interests.⁷⁶ Specifically, by forcing voters to have an ID, the law may overburden and, therefore, disenfranchise “persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.”⁷⁷ The Court, referencing its decision in *Harper v. Virginia Board of Elections*, reiterated that an “invidiously discriminate” standard should apply whenever a state “makes the affluence of the voter or payment of any fee an electoral standard” because such conduct violates the Equal Protection Clause.⁷⁸ But the Court applied a less strict balancing test, stating that the Indiana voters’ burdens did “not qualify as a substantial burden on the right to vote, or

68. *Id.* at 192.

69. Pub. L. No. 103-31, § 2, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg-1973gg-10 (2006)).

70. *Crawford*, 553 U.S. at 192.

71. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-15545 (2006)).

72. *Crawford*, 553 U.S. at 193.

73. *Id.* at 196-97.

74. *Id.* at 197.

75. *Id.* (internal quotation mark omitted).

76. *Id.* at 187.

77. *Crawford*, 553 U.S. at 198.

78. *Id.* at 189 (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966)).

even represent a significant increase over the usual burdens of voting.”⁷⁹ Although the burden was “somewhat heavier . . . on a limited number of persons”—including “elderly persons born out of state, who may have difficulty obtaining a birth certificate, [and] persons [with] economic or other personal limitations”—these voters’ burdens were “mitigated by the fact that . . . voters without photo identification may cast provisional ballots that will ultimately be counted.”⁸⁰

IV. CONFLICTING POLICIES

A. Argument in Favor of Voter-Identification Law in Arkansas

Elections are the cornerstone of the American system of government. Thus, proponents of voter-identification laws point to a state’s strong interest in protecting the integrity of the electoral process.⁸¹ In other words, states have “an interest in protecting public confidence in the integrity and legitimacy of representative government.”⁸² For example, in *Crawford*, Indiana argued that “the electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of the voters.”⁸³

In Arkansas, the most notorious instance of voter fraud is that of former State Representative Hudson Hallum (D – Marion).⁸⁴ Hallum took advantage of the lack of oversight over absentee voting to win his contested primary election.⁸⁵ He eventually pled guilty to federal charges for destroying

79. *Id.* at 198.

80. *Id.* at 199.

81. *See id.* at 197 (discussing the State’s argument that safeguarding voter confidence is a strong state interest).

82. *Crawford*, 553 U.S. at 197 (internal quotation marks omitted).

83. *Id.* (internal quotation marks omitted).

84. *See* David Ramsey, *Former State Rep. Hudson Hallum Sentenced*, ARK. TIMES (June 20, 2013, 1:37 PM), <http://www.arktimes.com/ArkansasBlog/archives/2013/06/20/former-state-rep-hudson-hallum-sentenced>.

85. Eric Shawn, *Vodka for Votes: Arkansas Rep, Operatives Await Sentencing in Fraud Scheme*, FOXNEWS.COM (Oct. 22, 2012), <http://www.foxnews.com/politics/2012/10/22/arkansas-operatives-plead-guilty-in-vodka-for-votes-scam>.

absentee ballots and exchanging money and food in return for absentee votes.⁸⁶ In fact, Arkansas State Senator Bryan King, the lead sponsor of Act 595, used Mr. Hallum's actions as justification for Act 595.⁸⁷

Other instances of high-profile voter fraud have recently occurred. In September 2012, the Republican National Committee (RNC) cut ties with Strategic Allied Consulting, a "firm running a major get-out-the-vote effort" in multiple swing states for the 2012 General Election.⁸⁸ The RNC hired the firm to register voters in Colorado, Florida, Nevada, North Carolina, and Virginia, and the firm was planning further registration drives in Ohio and Wisconsin.⁸⁹ However, the RNC discharged the firm after Florida election officials discovered the GOP turned in over 106 forged voter-registration forms.⁹⁰ Someone appeared to have completed the forms in the same handwriting, and many of the forms contained incorrect addresses and birthdays.⁹¹ In summary, Senator King and proponents of voter-identification laws argue that requiring photo identification for voting is necessary to prevent occurrences like those of Mr. Hallum's or Strategic Alliance's from taking place.

Proponents of voter-identification laws argue that requiring photo identification for voting is a matter of "common sense."⁹² In other words, voting should be no different than any other license; just as one needs a driver's license to drive, a hunting license to hunt, and a license to start a business, one should need a license to vote.⁹³ Further, voter-identification laws prevent and deter "impersonation fraud at the polls; voting under fictitious voter registrations;

86. *Id.*

87. Brock, *supra* note 1.

88. Joseph Tanfani et al., *GOP Acts as Voter Fraud Is Alleged*, L.A. TIMES, Sept. 28, 2012, at AA1, available at <http://www.latimes.com/news/nationworld/nation/la-na-voter-fraud-allegations-20120928,0,4284007.story>.

89. *Id.*

90. *Id.*

91. *Id.*

92. See, e.g., George Weir, *Common Sense on Voter ID*, WASH. TIMES (Oct. 28, 2012), <http://communities.washingtontimes.com/neighborhood/political-potpourri/2012/oct/28/common-sense-solves-lot-problems>.

93. *Id.*

double voting by individuals registered in more than one state or locality; and voting by illegal aliens.”⁹⁴

B. Argument Against Voter-Identification Law in Arkansas

Those who oppose voter-identification laws argue that such laws disenfranchise otherwise qualified voters and are discriminatory in nature.⁹⁵ Allowing voter-identification laws to exist reveals a “vision of American democracy that tolerate[s] the exclusion of voters as both inevitable and acceptable.”⁹⁶ In his dissenting opinion in *Crawford*, Justice Souter argued that the Court’s majority opinion and proponents of voter-identification laws undervalue the burdens placed on the fundamental right to vote.⁹⁷ Although the burdens of such a law would affect a small percentage of the voting population, Justice Souter argued that these burdens would substantially inhibit the economically disadvantaged from voting.⁹⁸

First, Justice Souter argued that travel costs and fees associated with obtaining the “free” voter-identification card place an unreasonable burden on underprivileged voters.⁹⁹ According to an individual voter’s set of circumstances, “[p]oor, old, and disabled voters who do not drive a car . . . may find the trip [to the DMV] prohibitive.”¹⁰⁰ A trip to the DMV may be a mere inconvenience for the average voter, but it presents a more serious problem for underprivileged voters.¹⁰¹ For example, a trip to the DMV to obtain a voter-

94. Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*, 11 ELECTION L.J. 90, 91 (2012).

95. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008). The Indiana Democratic Party argued that the voter-identification law placed a burden on potential voters by making the acquisition of a voter-identification card difficult and inferred that the law would disenfranchise qualified voters. See *id.*

96. *Photo Identification Requirement for In-Person Voting: Crawford v. Marion County Election Board*, 122 HARV. L. REV. 355, 356 (2008).

97. See *Crawford*, 553 U.S. at 210-11 (2008) (Souter, J., dissenting). The *Crawford* majority explained that “[h]owever slight [the] burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Id.* at 191 (majority opinion). But Justice Souter argued that the majority opinion “does not insist enough on the hard facts that our standard of review demands.” *Id.* at 211 (Souter, J., dissenting).

98. *Id.* at 211-15.

99. *Id.* at 211-13.

100. *Crawford*, 553 U.S. at 212.

101. *Id.*

identification card could result in lost wages and the cost of transportation.¹⁰² For first-time voters attempting to obtain a voter-identification card, they would have the added burden and costs associated with presenting “a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.”¹⁰³ As discussed previously, the Arkansas Secretary of State Rules on Voter Identification require that a voter produce similar types of identification or documentation to obtain the free voter-ID card.¹⁰⁴ Thus, allowing an indigent voter to obtain a voter-identification card “free of charge” does not serve such a statute’s purpose. The voter must still bear the cost of travel, lost wages, and the cost of collecting the required documents.¹⁰⁵ Although these financial burdens do not rise to the level of “severe,” Justice Souter argued that the Court should not ignore them.¹⁰⁶

Further, opponents of voter-identification laws argue that such laws are solutions to a problem that does not exist. In vetoing Act 595, Governor Beebe argued that in-person voter fraud is a non-existent problem and that the cost of implementing the law far outweighs any supposed benefit.¹⁰⁷ Essentially, this argument emphasizes the lack of data showing that in-person voter fraud is widespread.¹⁰⁸ As mentioned, Senator King offered Mr. Hallum’s actions as justification for Act 595,¹⁰⁹ but the law does not address the buying of absentee votes.¹¹⁰ Although the law requires

102. *See id.* at 213-14.

103. *Id.* at 215 (internal quotation marks omitted).

104. ARKANSAS SEC’Y OF STATE, *supra* note 52, § 7.02-.03, at 4-5.

105. *See Crawford*, 553 U.S. at 215.

106. *Id.* (internal quotation marks omitted).

107. *Governor Beebe Vetoes Senate Bill 2*, ARK. GOVERNOR MIKE BEEBE (Mar. 25, 2013), http://governor.arkansas.gov/newsroom/index.php?do:newsDetail=1&news_id=3812.

108. *See, e.g., David Schultz, A Costly, Unnecessary Abuse of the Constitution*, 69 BENCH AND BAR MINN., Aug. 2012, at 17-18.

109. Brock, *supra* note 1.

110. *See* Brock, *supra* note 1. *See also* Act 595, 2013 Ark. Acts 2240 (codified at §§ 7-5-201(d)-(e), -305(a)(8)(A)-(B), -5-321 to -322, -5-418(c)-(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)-(d)); ARK. CODE ANN. §§ 7-5-401 to -417 (Repl. 2011) (concerning absentee voting and remaining unchanged by Act 595).

absentee voters to include a copy of some type of identification with their ballot, it does not prevent the type of issues that occurred with Mr. Hallum.¹¹¹ To date, Senator King has neither offered a specific instance of in-person voter fraud in Arkansas nor any empirical data on in-person voter fraud to support Act 595.¹¹² Thus, pointing to the lack of examples or data showing voter-ID fraud, opponents of voter-identification laws argue that the laws are solutions to a non-existent problem.¹¹³

V. PROPOSALS TO THE ARKANSAS GENERAL ASSEMBLY

A. Alternatives to Act 595's Government-Issued-Identification Approach

A number of alternatives to government-issued IDs could verify voters' identities and reduce voters' burdens.¹¹⁴ Before Act 595, Arkansas already required that individuals registering to vote present either approved photo identification or an approved non-photo document.¹¹⁵ For in-person voters, election officials verified voters' identities by checking their names, addresses, and dates of birth.¹¹⁶ Thus, one must assume the proponents of Act 595 believe that this verification process could not prevent in-person voter fraud, but no empirical data is available on in-person voter fraud in Arkansas.¹¹⁷

111. See Brock, *supra* note 1. See also Act 595, 2013 Ark. Acts 2240 (codified at §§ 7-5-201(d)–(e), -305(a)(8)(A)–(B), -5-321 to -322, -5-418(c)–(d) (Supp. 2013)) (to be codified at ARK. CODE ANN. §§ 7-1-101(25), -5-418(c)–(d)); ARK. CODE ANN. §§ 7-5-401 to -417 (Repl. 2011) (concerning absentee voting and remaining unchanged by Act 595).

112. See Brock, *supra* note 1.

113. See *supra* notes 107-08 and accompanying text.

114. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 674-81 (2007).

115. See ARK. CODE ANN. § 7-5-201(d)(1)(A) (Repl. 2011), amended by ARK. CODE ANN. § 7-5-201(e)(1)(A) (Supp. 2013).

116. See ARK. CODE ANN. § 7-5-305(a) (Repl. 2011), amended by ARK. CODE ANN. § 7-5-305(a)(8)(A) (Supp. 2013).

117. See Overton, *supra* note 114, at 678 (stating that advocates of voter-identification laws would argue that a law similar to Arkansas's invites voter fraud, but that "statistical study is needed . . . to establish the extent to which improper impersonation using nonphoto documentation occurs").

Nevertheless, in the interest of reaching a fair compromise, Arkansas should maintain Act 595's requirements while adding non-ID requirements for provisional ballots of voters who lack IDs. Although the extent of in-person-voter fraud in Arkansas is unclear, the State has a strong interest in maintaining voter confidence in elections. With this interest in mind, however, the Arkansas General Assembly should also minimize the burdens that any requirements place on voters.

A system that compares a voter's signatures would balance the competing public-policy interests of election integrity and voter-disenfranchisement prevention. Many states compare the signature a voter provides on a ballot to that provided on the voter's registration form to verify in-person voters' identities.¹¹⁸

B. Proposed Signature-Comparison Process

Adding a signature-comparison step and altering the requirements of Act 595 would protect indigent voters from unnecessary and arbitrary disenfranchisement. Arkansas currently compares signatures of absentee voters.¹¹⁹ Expanding this signature-comparison process to the provisional ballots discussed in Act 595 would not overly burden election officials because such comparisons are already routine duties in each election.¹²⁰ For each absentee ballot in Arkansas, election officials compare "the name, address, date of birth, and signature of the voter's absentee application with the voter's [ballot]."¹²¹ Election commissioners do not count an absentee ballot if the "application and the voter's statement do not compare as to name, address, date of birth, and signature."¹²²

Arkansas's method for counting in-person provisional ballots under Act 595¹²³ should add the signature-verification

118. *Id.* at 679.

119. ARK. CODE ANN. § 7-5-416(b)(1)(F) (Repl. 2011).

120. *See* ARK. CODE ANN. § 7-5-416(b)(1)(F).

121. ARK. CODE ANN. § 7-5-416(b)(1)(F)(i).

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

123. Act 595, 2013 Ark. Acts 2240, 2245-46 (codified at ARK. CODE ANN. § 7-5-321 (Supp. 2013)).

process used for absentee ballots.¹²⁴ Senator King's Act 595 requires voters who fail to present proof of identity to appear before the election board by the following Monday with either valid proof of identity or an affidavit stating that they are indigent or have a religious objection to having their picture taken.¹²⁵ Act 595's current procedure requiring provisional ballots of voters who lack proper proof of identity will likely lead to voter disenfranchisement. This proposed signature-comparison amendment to Act 595 takes a reasonable, commonsense approach to implementing a voter-identification law and reduces the amount of voters whom the law may unreasonably burden. While this proposed change would accommodate the arguments against voter-ID laws, it would also uphold the alleged policy behind such laws—ensuring the integrity of our elections.

Therefore, the Arkansas General Assembly should amend section 5 of Act 595, adding the following to subsection 7-5-321(a) of the Arkansas Code:

(3) For individuals who do not meet the requirements of § 7-5-321(b)¹²⁶ and who do not provide proof of identity, the election official shall obtain the voter's signature on the provisional ballot. Thereafter, the election official should compare the signature on the provisional ballot to the signature on the individual's voter-registration form. If the signatures do not match according to § 7-5-416(b)(1)(F), the election official shall require the voter to comply with the requirements of § 7-5-321(c).¹²⁷ If the signatures match, the provisional ballot should be counted and the voter need not appear with proof of identity.

124. See ARK. CODE ANN. § 7-5-416(b)(1)(F).

125. Act 595, 2013 Ark. Acts 2240, 2245-46 (codified at ARK. CODE ANN. § 7-5-321(c) (Supp. 2013)).

126. The exception for residents of licensed nursing homes and other similar assisted-living facilities should remain in the law. See Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321(b) (Supp. 2013)).

127. Act 595, 2013 Ark. Acts 2240, 2245-46 (codified at ARK. CODE ANN. § 7-5-321(c) (Supp. 2013)) (requiring voters who fail to present proof of identity to appear before the election board by the following Monday with proof of identity or to sign an affidavit attesting to the voter's indigence or religious objection).

C. Addressing Possible Arguments Against Signature Verification

Opponents to this signature-verification process may argue that election officials could not match signatures accurately because they are not handwriting experts. Such an argument is without merit. Signature verification is already relied upon for absentee voting in Arkansas.¹²⁸ Since election officials compare signatures on absentee ballots in every election, arguing that they would not be able to compare signatures adequately for in-person ballots is hypocritical.

Nonetheless, the Arkansas Code provides no standards for verifying signatures.¹²⁹ Therefore, to prevent election officials from imposing subjective guidelines, the General Assembly should adopt guidelines and safeguards that other states employ. For example, Oregon has used a vote-by-mail process for all elections since 1998.¹³⁰ Under this system, registered voters in Oregon receive and return their ballots through the mail.¹³¹ According to the Oregon Secretary of State, election officials compare voters' signatures on each ballot to the voters' registration records.¹³²

The Oregon Secretary of State released a manual addressing the procedures for verifying signatures and the characteristics of valid and invalid signatures.¹³³ To protect against election officials' subjective criteria, the Arkansas Secretary of State should adopt guidelines similar to Oregon's. Oregon's procedures require the following:

1. Agreement in style and general appearance, including basic construction, skill, alignment, fluency,

128. See ARK. CODE ANN. § 7-5-416(b)(1)(F)(i) (Repl. 2011).

129. See ARK. CODE ANN. § 7-5-416(b).

130. Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 426 (2008).

131. *Id.*

132. OR. SEC'Y OF STATE & OR. ASS'N OF CNTY. CLERKS, VOTE BY MAIL PROCEDURES MANUAL 27 (2012) [hereinafter VOTE BY MAIL], available at http://www.oregonvotes.org/doc/voterresources/vbm/vbm_manual.pdf; see also PAUL GRONKE, THE EARLY VOTING INFO. CTR., REED COLL., BALLOT INTEGRITY AND VOTING BY MAIL: THE OREGON EXPERIENCE 4 (2005) (describing Oregon's signature-verification process), available at <http://people.reed.edu/~gronkep/docs/Carter%20Baker%20Report-publicrelease.pdf>.

133. VOTE BY MAIL, *supra* note 132, at 27-28.

and a general uniformity and consistency between signatures.

2. Agreement in the proportions of individual letters, height to width, and heights of the upper to lower case letters.

3. Irregular spacing, slants, or sizes of letters are duplicated in both signatures.

4. General traits and agreement of the most distinctive, unusual traits of the signatures.

5. Only a signature possessing obvious and predominately matching characteristics with the signature on the voter registration record may be reviewed and determined to be a match by a single county elections official. A signature possessing one or more distinctive dissimilarities from the signature on the voter registration card shall be reviewed by at least two different county elections officials before it is accepted as a matching signature or rejected as non-matching signature.

6. A single distinctive trait is insufficient to conclude that the signatures are by the same writer. There must be a combination or cluster of shared characteristics. Likewise, there must be a combination or cluster of dissimilarities to conclude that the signatures may be by different writers.

7. When evaluating signatures, election officials may review broad characteristics used to evaluate an entire signature as a unit or they may narrow the scope of their examination to that of specific letters within a signature. A list of characteristics for consideration when evaluating an entire signature as a unit and a list of characteristics for consideration when narrowing the scope of the examination to specific letters or combinations of letters.¹³⁴

D. Definitions for Ambiguous Terms and Solutions for Gaps in the Law

Pursuant to Act 595, a voter who does not provide proof of identity when voting in person will have her provisional ballot counted only if she:

134. *Id.* at 28.

returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election and . . . (A) Provides proof of identity; or (B) Provides an affidavit stating that the voter cannot provide proof of identity because the voter . . . [i]s indigent; or . . . [h]as a religious objection to being photographed.¹³⁵

In other words, if voters cannot provide valid proof of identity by the Monday following the election, their only other option is to sign an affidavit attesting to their indigence or their religious objection to taking a photograph.¹³⁶ Act 595 does not provide a definition for either “indigent” or “religious objection.”¹³⁷

Therefore, one may assume that potential voters who do not possess proof of identity and wish to claim indigence or a religious objection will rely upon a subjective understanding of those terms. Such reliance will create an obvious problem if the potential voter’s understanding of these terms differs from the meaning applied by the election official or the investigator.¹³⁸ To remedy this issue, the General Assembly should clearly define “indigent” and “religious objection.” This note is concerned with Act 595’s implications on poor voters; therefore, it will address the term “indigent.”

Elsewhere in the Arkansas Code, the General Assembly has defined “indigent” as “a person with an income that is below two hundred percent (200%) of the federal poverty level.”¹³⁹ By including a similar definition in Act 595, the General Assembly would eliminate the potential for litigation on the meaning of this term. Such a

135. Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321(c)(1) (Supp. 2013)).

136. See Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321(c)(1) (Supp. 2013)).

137. See Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321(c)(1) (Supp. 2013)).

138. Senator King said that he plans to establish a “voter integrity unit”—comprised of “independent prosecutors and judges”—to investigate allegations of voter fraud in Arkansas. Rob Mortiz, *Lawmaker Seeks Voter Fraud Unit with Voter ID Law*, ARK. NEWS (Dec. 13, 2012, 6:10 PM), <http://arkansasnews.com/sections/news/arkansas/lawmaker-seeks-voter-fraud-unit-voter-id-law.html>.

139. ARK. CODE ANN. § 17-92-1102(4) (Repl. 2010).

definition would clearly indicate to voters and investigators whom this exception covers.

Finally, Act 595 is poorly written and has significant gaps. As mentioned above, the law requires absentee voters to produce either a “current and valid” photo-ID or another document verifying the voters’ address and name.¹⁴⁰ However, Act 595 provides no guidance if an absentee voter neglects to include such identification.¹⁴¹ Indeed, section 5 of Act 595 only provides the process by which *in-person* voters can have their provisional ballots counted if they fail to provide proof of identity at the polls.¹⁴² Act 595 does not state whether election commissioners can later count absentee ballots submitted without identification through the section 5 process.¹⁴³ This gap could cause substantial issues during the next general election. Given the ambiguity of the law, different counties could decide how to fill the gap differently. Some counties may not count absentee ballots without identification, but other counties may count such ballots if the voter complies with the section 5 process.

VI. CONCLUSION

This note’s proposal finds a commonsense and bipartisan approach to the politically charged issue of voter identification. The signature-verification process described above accommodates the competing policies in protecting election integrity: (1) establishing safeguards to prevent in-person-voter fraud; and (2) protecting eligible voters from unreasonable burdens to submitting a ballot.

Although Act 595 aims to protect election integrity, the right to vote is such an integral process in the American system of government that the Arkansas General Assembly should take due care not to disenfranchise eligible voters. Senator King’s proposal would require voters to take

140. Act 595, 2013 Ark. Acts 2240, 2242 (codified at ARK. CODE ANN. § 7-5-201(d)(1)(B) (Supp. 2013)).

141. See Act 595, 2013 Ark. Acts 2240, 2242-43 (codified at ARK. CODE ANN. § 7-5-201 (Supp. 2013)).

142. See Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321 (Supp. 2013)).

143. See Act 595, 2013 Ark. Acts 2240, 2245 (codified at ARK. CODE ANN. § 7-5-321 (Supp. 2013)).

affirmative and, arguably, unreasonable steps to vote; but a signature-verification process would only require a voter to sign a piece of paper. This note's proposal would not require voters to take time off from work or spend money for travel and obtaining documents. Thus, a signature-verification process protects against voter disenfranchisement while ensuring the integrity of our elections.

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