AFTER FURTHER REVIEW: TOWARDS A REBUTTABLE PRESUMPTION IN FAVOR OF BALLOT VALIDITY

DEVIN HUMPHREYS*

INTRODUCTION

Both historically and at the present day, the state of Michigan has been at the forefront of developments in election law. By challenging the constitutionality of the federal National Voter Registration Act of 1993,[1] the State of Michigan caused the contours of how federalism works in election law to be refined. The federal courts confirmed that while the federal government and the states have concurrent power to make legislation regulating elections, federal election law controls in the event of any conflict, unlike in other areas of concurrent federal and state legislative power. However, in the almost thirty years after that, the state of Michigan's shifting priorities for election policy have seen the state going above and beyond the federal minimum in securing the electoral franchise, presenting an opportunity for other states to follow suit. In 2018, voters in the state of Michigan passed a constitutional reform that re-calibrated standards for whether and when ballots should be counted in the event of ambiguities surrounding a voter's qualifications.[2] Although this reform package continued to recognize the federally-drawn distinction between regular ballots and so-called "provisional ballots," the voters of the State of Michigan opted to develop a third, intermediate tier of ballot classification, dubbed a "challenged ballot."[3] While regular ballots are counted and tabulated normally, and provisional ballots are not tabulated unless and until their regularity can be established, challenged ballots are counted despite their irregularities, with procedural safeguards in place to enable further review after a closely contested election. For these challenged ballots, there is a presumption that they are valid unless a preponderance of the evidence after the fact shows otherwise. This Note argues in favor of applying this presumption in the vast majority of ambiguous cases, a reform implementable at a state-by-state level.

Part I provides both an overview of the contours of the federal government's power to regulate elections and a more specific example of the exercise of those

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1. *See* 52 U.S.C. § 20501 *et seq.*
2. *See* MICH. CONST. art. II, § 4.
3. MICH. COMP. LAWS § 168.497 (2021).

powers in the Help America Vote Act. For almost twenty years, that piece of federal legislation has constituted a framework for guaranteeing that every voter at least has the opportunity to exercise the franchise in cases where a voter's qualifications are called into dispute. Part II proceeds to critique that federal framework for its set of presumptions about the validity of this class of ballots by analyzing the various ways in which states have put the Help America Vote Act's requirements on provisional ballots into practice. Part III discusses the state of Michigan's 2018 constitutional amendments dealing with electoral reform, developing an intermediate classification of a "challenged ballot." Part IV argues that this intermediate framework establishes a rebuttable presumption (analogous to the tort doctrine of *res ipsa loquitur*, among other things) in favor of both tabulating ballots on Election Day and considering those ballots validly cast unless the reasons to the contrary are exceptionally compelling. Finally, Part V argues that other states should adopt this rebuttable presumption in favor of ballot validity as a general rule within the confines of federal law.

I. FEDERAL REGULATIONS SURROUNDING PROVISIONAL BALLOTS

Although Article I, Section 4, Clause 1 of the U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,"[4] it also reserves in Congress the power to "at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[5] As one court has noted:

> Article I section 4 explicitly grants Congress the authority either to "make" laws regarding federal elections (similar to the authority granted in the Commerce Clause), or to "alter" the laws initially promulgated by the states. Thus, unlike the Commerce Clause . . . , Article I section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.[6]

This authority enables Congress to enact legislation regulating elections in the several states and compel state action to bring such legislation's precepts into effect. The contours of this doctrine were spelled out when the National Voter Registration Act of 1993[7] was challenged by the State of Michigan in the landmark case of *ACORN v. Miller*.[8] In that case, the United States District Court for the Western District of Michigan denied summary judgment to the State of Michigan, instead granting partial summary judgment to those suing the state seeking its

4. U.S. CONST. art. I, § 4, cl. 1.

5. *Id.*

6. Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997); *see* Foster v. Love, 522 U.S. 67, 69 (1997) (describing the Elections Clause as "a default provision" able to be preempted by legislative action from Congress); *see also* Gonzalez v. Ariz., 677 F.3d 383, 390 (9th Cir. 2012) ("In a nutshell, state governments are given the initial responsibility for regulating the mechanics of federal elections, but Congress is given the authority to 'make or alter' the states' regulations.").

7. *See* 52 U.S.C. § 20501 *et seq.*

8. 129 F.3d at 836–37.

compliance with the precepts of the NVRA.[9] The State of Michigan, building on a line of Commerce Clause jurisprudence culminating in the landmark case of *New York v. United States*,[10] appealed on constitutional grounds, asserting that because the NVRA "conscripts state agencies, personnel, and funds to further a federal purpose," it "thereby imping[ed] upon basic principles of federalism and violat[ed] the Tenth Amendment."[11] Since *New York* held that Congress is prohibited from commandeering state officers when implementing a federal regulatory program,[12] the State of Michigan asserted that a similar prohibition should apply to Congress's regulation of the electoral process.[13] However, the "make or alter" part of the Elections Clause distinguishes its grant of power to Congress from the Commerce Clause or the other enumerated powers of Article I, Section 8 of the Constitution.[14] Thus, the Sixth Circuit held that "unlike the Commerce Clause at issue in *New York*, Article I section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections."[15] The end result of this litigation was the holding that the NVRA passed constitutional muster, confirming Congress's power to broadly regulate the electoral process at the federal level.[16]

After the NVRA and Michigan's challenge to that law, perhaps the most impactful instance of Congress exercising its powers to compel state action on election regulation came in 2002. In that year, Congress passed the Help America Vote Act ("HAVA"),[17] signed into law by President George W. Bush on October 29 of that year. Creating the U.S. Election Assistance Commission ("EAC"), HAVA was adopted to implement electoral reforms proposed after the 2000 election.[18] In particular, HAVA established "new mandatory minimum standards for states to follow in several key areas of election administration."[19] Among other reforms implemented at the federal level (including the development of a national voter registration form[20] and requirements surrounding voter identification,[21] the establishment of statewide voter lists,[22] the replacement of certain types of voting

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9. *See* Ass'n of Cmty. Orgs. for Reform Now v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997).

10. 505 U.S. 144 (1992).

11. *Miller*, 129 F.3d at 836.

12. *New York*, 505 U.S. at 161.

13. *Miller*, 129 F.3d at 836.

14. *See* U.S. CONST. art. I, § 8.

15. *Id.*

16. *Id.* at 834.

17. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901–21145).

18. *Help America Vote Act,* U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx (last visited Oct. 27, 2021).

19. *Id.*

20. 52 U.S.C. § 20508.

21. *Id.* § 21083.

22. *Id.*

machines,[23] and requiring a paper trail for election audit purposes),[24] HAVA required election officials to issue a "provisional ballot" under a specific set of circumstances:

> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot[.][25]

Critically, however, HAVA's rules surrounding provisional ballots require that action be taken to authenticate their validity *after* having been cast. More specifically, once a provisional ballot has been cast, it is an election inspector's responsibility to "transmit the ballot cast by the individual . . . to an appropriate State or local election official for prompt verification[,]"[26] and then, "[i]f the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law."[27]

This system ensures that where a voter's qualifications are called into dispute, that mere fact alone does not disqualify a voter from exercising his or her franchise.[28] Such a voter may be required to jump over several additional procedural hurdles to have his or her ballot be counted. However, HAVA nonetheless constituted a significant advance towards the stated goal of Presidents Gerald Ford and Jimmy Carter, co-chairs of the National Commission on Election Reform, that "[n]o American qualified to vote anywhere in her or his state should be turned away from a polling place in that state."[29] In the 2004 election (the first

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23. *Id.* § 20902.

24. *Id.* § 21081(a)(2).

25. *Id.* § 21082(a).

26. *Id.* § 21082(a)(3).

27. *Id.* § 21082(a)(4).

28. Notably, there exists a line of precedent asserting that Congress is unable to pass legislation setting mandatory minimum standards for the qualifications of electors themselves. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013). In that case, when the State of Arizona rejected federally standardized voter registration submissions that were not accompanied with "documentary evidence of citizenship," the Court held that while Arizona's specific actions were unconstitutional, "Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The Constitution prescribes a straightforward rule for the composition of the federal electorate." *Id.* at 1, 16 (*see* U.S. CONST. art. I, § 2, cl. 1). *See also* Arcia v. Sec'y of Fla., 772 F.3d 1335, 1346 ("Certainly an interpretation of the General Removal Provision [of the NVRA] that prevents Florida from removing non-citizens would raise constitutional concerns regarding Congress's power to determine the qualifications of eligible voters in federal elections.").

29. NAT'L COMM'N ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 35 (2001), *quoted in* WENDY R. WEISER, ARE HAVA'S PROVISIONAL BALLOTS WORKING? 1 (2006).

presidential election after the passage of HAVA), about 1.9 million voters cast provisional ballots, of which approximately 1.2 million ended up counting.[30] In the absence of a provisional balloting scheme, these are voters who could have been turned away.

But these were also 1.2 million votes that were not immediately tabulated with the rest of the ballots cast in the 2004 election.[31] Each of these provisional ballots required an election official to take a second look at the voter's qualifications, determine that the voter was indeed eligible, and then tabulate the ballot post-mortem.[32] The consequences of such a framework cannot be ignored—with approximately 122 million voters deciding between George W. Bush and John Kerry in 2004,[33] 1.2 million provisional ballots amounted to 1% of the entire set of voters in that election. With provisional ballots being employed at this level of ubiquity, elections with less than a 1% margin between the winning candidate and the losing one are then "decided" by these provisional ballots, and the inclusion or exclusion of each of these ballots then becomes the core determiner of who wins or loses an election. Because of the framework under which HAVA requires provisional ballots to be reviewed, they end up being tabulated *after* an election has concluded if they are to be counted at all, with eleven states even requiring a voter who is issued a provisional ballot "to return to an election office following the election to verify his or her identity and/or eligibility to vote."[34] In the current political context of elections in the United States, in which delays in vote-counting during the 2020 election due to the rise of vote-by-mail during COVID-19 became the subject of widespread social commentary,[35] the notion that provisional ballots, both despite and because of their ubiquity, could give rise to similar delays in future election cycles is almost undoubtedly undesirable on its own terms. Given that voters are issued a provisional ballot in cases where their qualifications are in dispute, the notion that their votes, added to an electoral count after an initial canvass has concluded, could lead to one candidate having an electoral lead instead of another is somewhat problematic.

Indeed, an empirical analysis on this very question concluded that "overtime votes," defined as votes counted after Election Day, have tended to "systematically (albeit unintentionally) [favor] Democrats . . . at least in the vote for president,"

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30. WEISER, *supra* note 30, at 2.

31. *See id.*

32. *See id.*

33. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2004, at 5 (2005), https://www.fec.gov/resources/cms-content/documents/federalelections2004.pdf.

34. *Provisional Ballots*, NAT'L CONF. OF STATE LEGS., https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx (last updated Jan. 10, 2022).

35. *See, e.g.,* Laura Bliss & Sarah Holder, *Nevada, What Took So Long?*, BLOOMBERG CITYLAB (Nov. 11, 2020), https://www.bloomberg.com/news/articles/2020-11-11/why-counting-the-2020-ballots-is-taking-so-long; Lawrence Douglas, *Don't Be Fooled: The Delays in the U.S. Election Result Mean Our System Is Working*, GUARDIAN (Nov. 4, 2020), https://www.theguardian.com/commentisfree/2020/nov/04/presidential-election-early-ballots-counted.

essentially since the enactment of HAVA, resulting in a phenomenon that the authors dubbed the "blue shift."[36] As the authors of that study noted:

> Normatively, a growing gap between initial and final vote counts—and a gap that is skewed in one direction—raises the possibility that losing candidates and their supporters may increasingly, and even mistakenly, regard the vote count as "rigged." The public is more likely to perceive, rightly or wrongly, that ballots counted for the first time after Election Day are more susceptible to partisan manipulation than ballots counted on Election Day, with this perception stronger if these overtime ballots tilt more favorably toward one party and diverge from the Election-Day count.[37]

Foley and Stewart note the existence of a variety of stories of historical post-election shenanigans involving "post-Election-Day ballot harvesting,"[38] some of which pre-date this "blue shift" phenomenon which itself arose as an indirect result of HAVA.[39] Those authors proceed to contend that contemporary accounts of similar incidents, when taken in conjunction with this blue shift phenomenon, will lead to an even stronger public perception that "when an election goes into extra innings, one of the two teams is given extra at-bats."[40]

However, it does not take an accompanying history of ballot-harvesting anecdotes to render the "blue shift" phenomenon problematic on its face. The empirical conclusion that provisional ballots counted after Election Day tend to lean in favor of one political party over the other gives rise to two scenarios. Each one jeopardizes the public legitimacy of an election if the number of provisional ballots remaining to be counted after Election Day exceeds the margin between a leading candidate and a trailing candidate as the election count stands on Election Day itself. In the first, where enough provisional ballots are ruled valid, the flipped result of the election could be perceived as illegitimate on the ground that provisional ballots were over-counted, or standards for affirming their legitimacy were applied too loosely. Whether elected officials are on the winning or losing side of an election, the risk that they may either make public statements affirming these public perceptions or even manipulate such perceptions for their own

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36. Edward B. Foley & Charles Stewart III, *Explaining the Blue Shift in Election Canvassing*, 1 J. POL. INST. & POL. ECON. 239, 241 (2020). The authors note that a sufficient national trend can be observed to reject the null hypothesis that ballots counted after Election Day do not cause a net partisan gain in the 2004, 2008, 2012, and 2016 elections, all of which occurred after HAVA's passage in 2000. *See id.* at 247. Further, due to survey evidence from 2008, 2012, and 2016 corroborating the hypothesis that those who vote a provisional ballot are more likely to vote for the Democratic Party by a 60-40 margin, *see id.* at 251 (citing the Cooperative Congressional Election Study), the authors state that this "blue shift" is at least in part correlated with the prevalence of provisional ballots in a state, and perhaps even more closely correlated with provisional ballot prevalence than the extent to which a state utilizes voting by mail. *See id.* at 251–52.

37. *Id.* at 240–41 (citations omitted).

38. *Id.* at 241 n.5 (citations omitted).

39. *See id.* at 240.

40. *Id.* at 241.

political ends is certainly demonstrable.[41] In the second, where not enough provisional ballots are ruled valid, and the result remains the same as it had appeared on the night of the election, that result could likewise be seen as illegitimate on the ground that provisional ballots were under-counted, with ballot-counting standards being applied too strictly. In either case, scrutiny of provisional ballots has the effect of jeopardizing the public integrity of an election on these facts.

One way of neutralizing this effect, the way for which the rest of this Note will seek to advocate, is by ensuring that only the most dubious of ballots undergo the verification process employed for provisional ballots. Even if certain procedural safeguards are applied to a more extensive selection of ballots cast on Election Day, those ballots should still be counted in the first instance on Election Day itself, wherever feasible.[42] However, instead, the trend post-HAVA has been to put more ballots through this sort of scrutiny rather than less, if only for the fact that provisional ballots were made a part of the election process in almost every state in 2004,[43] compared to seventeen states that had a similar process for the 2000 election.[44] In the vast majority of states that do use provisional ballots for a more expansive set of reasons than required by HAVA, "after being cast, the provisional ballot is kept separate from other ballots until after the election."[45]

II. SURVEY OF STATE PRACTICES ON PROVISIONAL BALLOTS

However, one factor that must not be ignored in evaluating the scope of the problem of too many provisional ballots is the fact that HAVA is not entirely to blame for the rise of either provisional ballots or the administrative problems that accompany them. Although HAVA certainly catalyzed the issues surrounding provisional ballots by rendering that framework a necessary component of most states' election systems, HAVA itself only mandates the availability of provisional ballots in two particular circumstances: first, when a voter asserts his or her eligibility to vote despite not being on the list,[46] and second, when a federal or state

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41. For an example played out in practice of elected officials engaging in this sort of conduct, see *id.* at 240–41 n.3.

42. For an example of this regulatory framework in practice, see *infra* Part III and accompanying discussion.

43. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35 (noting that while forty-four states saw HAVA mandate the inclusion of provisional ballots in their election processes, the states of Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming were exempted from the requirement to offer provisional ballots to their voters because those states "offered same-day voter registration at the time the National Voter Registration Act was enacted").

44. *See* WEISER, *supra* note 30, at 1 n.6 ("As electionline.org has documented, before HAVA, seventeen (17) states allowed voters to cast provisional ballots similar to HAVA's[.]").

45. NAT'L CONF. OF STATE LEGS., *supra* note 35.

46. 52 U.S.C. § 21082(a). The National Conference of State Legislatures notes that forty-six states and the District of Columbia provide provisional ballots under these circumstances, while Idaho, Minnesota, and New Hampshire, with their long-standing practices of allowing voters to register on the same day, as well as North Dakota, which do not keep a voter registration list, are exempted from this requirement of HAVA. NAT'L CONF. OF STATE LEGS., *supra* note 35. Additionally, while the availability of a provisional ballot option to voters who fail to meet federal voter identification

court has ordered the extension of voting hours beyond the "time established for closing the polls."[47] One can acknowledge the prudence of legislative regulation like HAVA requiring that a voter, questioning the accuracy of the local record meant to authenticate who can vote in an election, cast his or her ballot with the presumption that it does not count unless a preponderance of the evidence can show otherwise. But there are all sorts of other reasons for which states now mandate the issuance of provisional ballots in the aftermath of HAVA that, while using HAVA's terminology, are outside of HAVA's scope. These other reasons include a voter being challenged by a poll watcher, a voter lacking the right kind of identification under state or federal law, an absentee ballot having been issued but not cast by a voter, and changes of address.[48] These other issues, in turn, obfuscate the number of issued provisional ballots as a statistic, preventing one from diagnosing precisely what caused the number of provisional ballots to be as high as 1.8% of all ballots cast in, for instance, the 2016 election.[49] It is clearly not the case that every voter issued a provisional ballot in a given cycle was, for instance, asserting their presence on an electoral roll that did not feature their name.[50] This Part seeks to argue that the provisional ballot framework that HAVA helped establish did not achieve HAVA's intended purpose on the provisional ballot front (to wit, preventing voters from being outright disenfranchised for issues with qualifications).[51] Instead, in some circumstances, the provisional ballot framework

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requirements is laid out in another provision of HAVA, *see* 52 U.S.C. § 21083(B)(2)(b)(i), the relevant language is not presented as a mandate to states in the way that the requirement that a voter not on an electoral roll receive a provisional ballot is presented. *Compare id.* ("An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), *may* cast a provisional ballot . . . ." (emphasis added)) *with id.* § 21082(a) ("If an individual declares that such individual is a registered voter . . ., such individual *shall be permitted* to cast a provisional ballot . . . ." (emphasis added)).

47. *Id.* § 21082(c). The circumstance of voters being required to cast provisional ballots when voting outside of normal hours as the result of a court order is rare but significantly distinguishable from other reasons, either due to HAVA or due to state requirements, that voters are required to vote provisional ballots. The language of the relevant subsection requires provisional ballots cast by voters who voted after the standard close of polls to be sequestered from other ballots. *Id.* When a voter disputes his or her non-inclusion on an electoral roll, or when a voter is unable to provide additional identification, the relevant electoral administrator has no evidentiary basis beyond the voter's written affirmation on which to uphold that voter's eligibility, preventing "prompt verification" as required under HAVA for a provisional ballot to be counted. *See id.* § 21082(a)(3). In contrast, when a voter has voted outside of normal polling hours as the result of a court order, that set of facts is obviously more readily verifiable, and so the fact that the onus falls on the election official to engage in the process of prompt verification cuts in favor of those ballots being counted when all is said and done. Thus, while the ballots may end up being counted later than ballots cast during normal hours, they do not end up being effectively presumed invalid, unlike other provisional ballots.

48. NAT'L CONF. OF STATE LEGS., *supra* note 35.

49. *See* Foley & Stewart, *supra* note 37, at 249–50. The authors also note that eight states saw provisional ballots constitute more than 2% of total ballot casts, with California's provisional ballot rate as high as 8.9%. *Id.* at 250.

50. *Cf. id.* at 250 ("[P]rovisional ballot laws vary across states . . . ."); *see also generally* Orin Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

51. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35 (framing HAVA and the rest of the provisional ballot framework as seeking to "provide a fail-safe mechanism for voters who arrive at the

has resulted in the effective disenfranchisement of otherwise qualified voters by imposing upon their ballots a presumption of invalidity that remains unrebutted if and when that voter fails to provide additional verification.

The National Conference of State Legislatures ("NCSL") has noted that in twenty-seven states and the District of Columbia, provisional ballots are also issued when a voter's eligibility to vote is called into question by a poll watcher or challenger.[52] While poll watchers (or any other individuals for that matter) are prohibited as a matter of federal law under pain of imprisonment from engaging in conduct that "intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce" voters in federal elections,[53] the Brennan Center for Justice has noted the recent uptick in legislation liberalizing poll watchers' abilities to intervene at a variety of different points in the voting process, from the casting of votes to their being counted.[54] Some of these actual or pending reforms carry the potential to enable conduct which, though within the bounds of the letter of federal law prohibiting voter intimidation, nonetheless may function to intimidate would-be voters.[55] In those twenty-seven states where poll watchers have ballot challenging authority,[56] however, the more subjective concern for voter intimidation becomes secondary because a voter whose credentials have been challenged by a poll watcher is thereafter presumptively ineligible to cast a ballot until that voter makes a showing that their credentials are legitimate. This presumptive ineligibility is a direct result of the fact that in these twenty-seven states, when a voter's eligibility is challenged, a provisional ballot is issued, and when a provisional ballot is issued, the onus is on the voter to show that he or she is indeed qualified to vote in the given election—in the absence of any such showing, that voter's ballot will not be counted by default.

The NCSL has also noted that thirty-six states and the District of Columbia require that a provisional ballot be issued to any voter who does not present state-required identification.[57] While HAVA does have a federal identification requirement for first-time voters who register by mail,[58] and voters who fail to

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polls on Election Day and whose eligibility to vote is uncertain," and claiming that "[p]rovisional ballots ensure that voters are not excluded from the voting process due to an administrative error").

52. *Id.*

53. 18 U.S.C. § 594.

54. Eliza Sweren-Becker, *Who Watches the Poll Watchers*, BRENNAN CTR. FOR JUST. (Apr. 29, 2021), https://www.brennancenter.org/our-work/research-reports/who-watches-poll-watchers.

55. *See id.* (citing S.B. 210, 2021-22 Leg. (Wis. 2021) (reducing the distance between poll watchers and election administrators to three feet); S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021) (establishing criminal penalties for distancing the view of poll watchers and allowing poll watchers to seek injunctive relief).

56. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35; *see also Poll Watchers and Challengers*, NAT'L CONF. OF STATE LEGS. (Oct. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/poll-watcher-qualifications.aspx (noting the distinction, in some states, between a "poll watcher," who is unable to challenge a voter's eligibility, and a "poll challenger," who is able to lodge such challenges but is sometimes subject to heightened requirements).

57. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35.

58. *See* 52 U.S.C. § 21083(b)(2)(A) (outlining the identification requirements for voters who register to vote by mail when they vote for the first time in a federal or state election). HAVA's identification requirement does not require that photo ID be presented to comply with the requirement,

comply with this requirement are required to cast a provisional ballot instead and then provide the requisite identification in order for their vote to be counted,[59] these thirty-seven jurisdictions have additional identification requirements that go beyond the federal minimum laid out in HAVA. Just as occurs when a ballot is challenged by a poll challenger, the terminology and procedures for a provisional ballot are generally employed in these situations where a state has stricter ID requirements than the federal minimum. The result, in turn, is similar: a presumption against counting the ballot of a voter who fails to show voter ID that is compliant with a given state's additional requirements. Although this presumption is most certainly rebuttable, the result of a voter being asked to provide additional verification leads to one of two scenarios. In the worst case, such a voter is disenfranchised if a problem with his or her identification renders his or her ballot un-countable in a given precinct, for instance, when a voter has registered in one location but attempts to vote in another.[60] In the best case, even if a ballot sequestered under these procedures is verified to be valid and thereafter counted, the time taken to engage in such verification procedures raises similar public perception issues to those which underpin the aforementioned "blue shift" phenomenon. Whether due to the "blue shift" phenomenon or the mere passage of time between when a ballot is cast and when it is counted, issues surrounding the counting of provisional ballots give rise to either actual problems or the appearance thereof.

III. THE RISE OF THE CHALLENGED BALLOT: AMENDMENTS TO MICHIGAN'S ADOPTED PROPOSAL 3 OF 2018

In 2018, the voters of the State of Michigan enacted a state constitutional amendment by referendum by a two-to-one margin.[61] The initiative, officially Proposal 18-3, amended the Michigan Constitution by adding an entire subsection on rights "[e]very citizen of the United States who is an elector qualified to vote in

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allowing for "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" to substitute. *Id.* § 21083(b)(2)(A)(i)(II); *id.* § 21083(b)(2)(A)(ii)(II).

59. *See id.* § 21083(b)(2)(B).

60. These ballots do not count in twenty-five states. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35. *But see id.* (noting that nineteen states plus the District of Columbia will allow ballots cast in the wrong precinct to count in some part).

61. Kat Stafford, *Voters Approve Proposal 3, Bringing Sweeping Changes to Michigan's Election Law*, DETROIT FREE PRESS (Nov. 7, 2018, 6:52 PM), https://www.freep.com/story/news/politics/elections/2018/11/06/michigan-voting-proposal-3-results/1885266002/.

Michigan" has.[62] Among those rights was the right to register to vote as late as the day of the election itself:

> Sec. 4. (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
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> . . . .
>
> (f) The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies. Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.[63]

In short, this permitted voters to register as late as fifteen days before an election without proof of residency, and voters could even register on the same day as the election so long as they provided this proof of residency. When these new constitutional rights were codified into statutory law, however, the Michigan Legislature opted to regulate the preparation of ballots issued to voters who had registered within this fifteen-day window:

> (5) Immediately after approving a voter registration application, the city or township clerk shall provide to the individual registering to vote a voter registration receipt that is in a form as approved by the secretary of state. If an individual registers to vote in person 14 days or less before an election or registers to vote on election day, and that applicant registers to vote under subsection (3) or (4), the ballot of that elector must be prepared as a challenged ballot . . . and must be counted as any other ballot is counted unless determined otherwise by a court of law . . . .[64]

The distinction between a "regular ballot," as the Michigan Constitution requires to be provided, and a "challenged ballot," which relevant Michigan statute now requires to be provided, resulted in litigation on the scope of this new constitutional right.[65] In a lawsuit filed by "Promote the Vote," the organization that had supported the adoption of 2018 Proposal 3 in the first instance,[66] Promote the Vote argued, among other things, that a "challenged ballot" could not comply with the constitutional requirement that voters receive a "regular ballot" even if

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62. *See* MICH. CONST. art. II, § 4.

63. *Id.* § 4(1)(f).

64. MICH. COMP. LAWS § 168.497 (2021).

65. *See* Promote the Vote v. Sec'y of State, 958 N.W.2d 861 (Mich. Ct. App. 2020).

66. *See generally* PROMOTE THE VOTE MICHIGAN, https://promotethevotemi.com/ (last visited Oct. 29, 2020).

they registered to vote within fifteen days of an election.[67] The Michigan Court of Appeals affirmed the trial court's decision, noting that "[w]hile the Legislature may not impose additional obligations on a self-executing constitutional provision, . . . it may enact laws that supplement a self-executing constitutional provision."[68] The Michigan Court of Appeals insisted that "[a] challenged ballot is not a third type of ballot."[69] While it is true that "a challenged ballot is entered and tabulated with all the other ballots that are cast,"[70] this framework does develop a third, intermediate level of scrutiny for a ballot's validity—between the stricter scrutiny applied in Michigan (as in the rest of the states that have them) to provisional ballots and the minimal scrutiny attached to ballots cast under the standard procedures, whether in-person or absentee. To be clear, it would be a mistake to conclude that the procedure for rendering a ballot challenged was a new innovation in light of 2018 Proposal 3, and it was already the case in Michigan that when a poll challenger challenged a voter's qualifications, that voter would still be able to cast his or her ballot normally:

> To prevent the identification of [a challenged] ballot, except as hereinafter provided for in case of a contested election, the inspectors of election shall cause to be securely attached to said ballot, with mucilage or other adhesive substance, a slip or piece of blank paper of the same color and appearance, as nearly as may be, as the paper of the ballot, in such manner as to cover and wholly conceal said endorsement but not to injure or deface the same; and if any inspector or other officer of an election shall afterward expose said endorsement or remove the said slip of paper covering the same, or attempt to identify the ballot of any voter, or suffer the same to be done by any other person, he shall, on conviction thereof, be deemed guilty of a misdemeanor.[71]

Provisional ballots in Michigan continue to be prepared by a similar procedure but then "tabulated only after verification of the individual's eligibility to vote."[72] At first glance, this challenging procedure would appear to be exceptionally problematic, given its potential to render an individual vote subject to post-casting scrutiny. The measures taken to preserve challenged ballots for review would appear to jeopardize the secrecy of those ballots, contrary to the Michigan state constitution's guarantee of the right to "a secret ballot."[73] However, long-standing case law in Michigan clarifies why this apparent result does not materialize. In the landmark case of *Belcher v. Mayor of Ann Arbor*, where an Ann

67. *Promote the Vote,* 958 N.W.2d at 879.

68. *Id.* at 877.

69. *Id.* at 879. The Court of Appeals, however, makes this declaration when comparing a challenged ballot to a "regular ballot" or an "absent voter ballot," rather than drawing a comparison to the dichotomy between a regular ballot and a provisional ballot, as I do here.

70. *Id.*

71. MICH. COMP. LAWS § 168.746 (2021).

72. *See id.* § 168.523a(8).

73. MICH. CONST. art. II, § 4(1)(a).

Arbor mayoral election with a margin of one vote saw seventeen voters cast ballots despite not technically living in the boundaries of the city, the Michigan Supreme Court held that "a citizen's right to a secret ballot in all elections as guaranteed by Const.1963, art. 2, § 4, cannot be so abrogated in the absence of a showing that the voter acted fraudulently."[74] When the First District of the Michigan Court of Appeals considered the Promote the Vote challenge of the Michigan Legislature's statutory codification of 2018 Proposal 3, that court, relying on *Belcher*, held that since the procedures for "marking" a challenged ballot are undertaken before the ballot is filled out by a voter, those procedures complied with that standard.[75] By relying on *Belcher*, the court simultaneously affirmed the challenged ballot procedures established by the Michigan Legislature while still setting a high bar for challenged ballots' validity to be called into question.[76] That said, unlike in *Belcher*, where the case turned on the inability of election officials to independently review ballots cast under a regular procedure,[77] challenged ballots preserve the opportunity to prevent a would-be voter who fraudulently casts a ballot from succeeding in having that ballot be counted. Since nothing short of fraud will enable the abrogation of a Michigan voter's right to a secret ballot,[78] a voter whose ballot is challenged but still allowed to be cast is afforded a relatively strong presumption that his or her qualifications are legitimate and his or her ballot will count. By establishing that voters registered within fifteen days of an election would be required to vote a ballot prepared as a challenged ballot, but then further establishing that such a ballot must be counted regularly in the absence of a court order to the contrary, the Michigan Legislature solidified a third type of ballot, which is presumed to count unless and until a court order is secured to subject that ballot (and others like it) to further review.

IV. LEGAL THEORY BEHIND REBUTTABLE PRESUMPTIONS

The landmark tort law case of *Byrne v. Boadle* rejected the notion that "in no case can a presumption of negligence arise from the fact of an accident."[79] The result was the first articulation of the legal doctrine of *res ipsa loquitur*,[80] the notion that tort liability should rest by default on a defendant in certain circumstances where a negligent act, causing injury, "speaks for itself."[81] The federal framework for handling provisional ballots and the state of Michigan's framework for handling challenged ballots each establish their own independent sets of rebuttable

74. Belcher v. Mayor of Ann Arbor, 262 N.W.2d 1, 2 (Mich. 1978).

75. Promote the Vote v. Sec'y of State, 958 N.W.2d 861, 880 (Mich. Ct. App. 2020) ("[A challenged ballot] may only be inspected if the person consents, the person has been convicted of falsely swearing in such ballot, or if it has been determined that such person was an unqualified elector at the time of casting the ballot.").

76. *See id.* at 873.

77. *See Belcher*, 262 N.W.2d at 1–2 (noting that the seventeen voters who had mistakenly cast ballots refused to testify as to for whom they had voted).

78. *Id.* at 879–80 (citing *Belcher*, 262 N.W.2d at 2).

79. Byrne v. Boadle, 159 Eng. Rep. 299, 301 (1863).

80. *Id.* at 300.

81. *Res Ipsa Loquitur*, BLACK'S LAW DICTIONARY (11th ed. 2019).

presumptions, along the same lines, about whether or not a ballot is valid. For provisional ballots, the rebuttable presumption is that the ballot is invalid and will not be counted. In other words, the challenge to validity "speaks for itself." In the Michigan framework, challenged ballots carry the opposite rebuttable presumption that the ballot is valid and will be counted. In other words, the ballot "speaks for itself." This means that where no evidence exists to counter a fact established *prima facie*, a fact-finder can arrive at a conclusion on the strength of these presumptions alone.[82]

One of the theoretical underpinnings of the tort doctrine of *res ipsa loquitur* is that it only applies in circumstances where "the defendant possessed superior knowledge or means of information about the cause of the occurrence" resulting in an injury.[83] When applied against a party, the doctrine invites that party to provide some sort of an explanation.[84] As applied (by analogy) to these rebuttable presumptions of election law surrounding ballot validity, then, the provisional ballot procedure asks the voter to explain why he or she *is* qualified to vote, while Michigan's challenged ballot procedure asks both the challenger (where a challenge is initiated) and the court (where post-election litigation seeks to review a ballot) to explain why a voter is *not* qualified. From a normative perspective, in most cases, it is more just for voters whose credentials have been subjected to a challenge to be afforded the presumption that they have presented themselves to vote in good faith. While the establishment of precautions to ensure that fraudulently cast votes can be detected and removed from an electoral tally is a valuable social good, the pursuit of those precautions should not rise to the level of presuming fraudulent intent on the part of a more general electorate.

V. ARGUMENT

A. Voters whose credentials are challenged by poll challengers should be sworn under oath, and if their answers to questions suggest that they are eligible to vote, their ballots should be presumed to be valid.

As previously noted, poll watchers in a slim majority of states are capable of requiring a voter to cast a provisional ballot as the result of a successfully lodged challenge, placing the burden on the voter to demonstrate his or her electoral qualifications by taking some sort of action after the election has concluded.[85] This capability of poll watchers places an additional hurdle upon voters whose qualifications may be entirely satisfactory as a matter of law, simply because a poll watcher has decided to (at times even peremptorily) challenge the ballot at issue. By setting the presumption, in such cases, against a ballot's validity, by requiring such ballots to be counted only after a voter's credentials have been established through a second look, these states give too much power to poll watchers to require the extra scrutiny of individual ballots. In instances where poll watchers

82. *See* 31A C.J.S. *Evidence* § 201.

83. *Res Ipsa Loquitur*, BLACK'S LAW DICTIONARY (11th ed. 2019).

84. *Id.*

85. *See supra* Part II and accompanying discussion.

wish to challenge a voter's eligibility to vote, a challenger should be able to inquire into a voter's age, citizenship, residency, and other qualifications that states supply for those seeking to vote in that state.[86] This ability of challengers to raise such questions is justified as establishing a check in the electoral system to prevent Type II errors, defined as "fail[ing] to reject a null hypothesis that is actually false in the population."[87] In the electoral context, the null hypothesis, which asserts no association between two variables,[88] is that a voter whose name is included on an electoral roll is eligible to vote in a given election, with all of the prerequisites (including age, citizenship, and residency) such a conclusion entails. By that definition, a Type II error would occur whenever a voter is allowed to vote but actually ineligible to vote, and in situations where an electoral roll inaccurately lists a voter as eligibly registered who is not of age, not a citizen of the United States, or not a resident of the precinct in which an election is held, an individual unable to be challenged by a poll challenger would result in such a Type II error occurring. Conversely, if a poll challenger's singling out of a voter were dispositive, then the likelihood of a Type I error, defined as "reject[ing] a null hypothesis that is actually true in the population,"[89] increases significantly. Presuming the validity of an elector's qualifications (a presumption perhaps somewhat tempered by special procedures on the handling of challenged ballots)[90] when that elector is willing to swear under penalty of perjury to those qualifications minimizes the risk of disenfranchising a duly registered elector without opening the floodgates to widespread voter fraud.

B. Voters whose age, citizenship, or residency are questioned in an official record should be sworn under oath, and if their answers to questions suggest that they are eligible, their ballots should be presumed to be valid.

Similar policy considerations apply, then, when an official electoral roll indicates a discrepancy in a would-be voter's eligibility. There, a challenge is initiated not by a poll challenger but *sua sponte* by a poll worker, an election inspector, or another similar administrator.[91] Here, the risks flip, with a Type I error being the default outcome when a voter's credentials are challenged by the electoral roll itself. However, the outright disenfranchisement of a voter flagged by a given electoral roll can be avoided when the various safeguards that apply to

86. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1 (allowing states to set additional qualifications to vote in U.S. House elections); *id.* amend. XVII (same, but for U.S. Senate elections).

87. Amitav Banerjee et al., *Hypothesis Testing, Type I and Type II Errors*, 18 INDUS. PSYCH. J. 127, 129 (2009).

88. *See id.* at 128.

89. *Id.* at 129.

90. *See supra* Part III and accompanying discussion.

91. For a state-by-state overview of the difference between a poll worker, election inspector, or other similar administrator and a poll watcher or poll challenger, see generally U.S. ELECTION ASSISTANCE COMM'N, COMPENDIUM OF STATE POLL WORKER REQUIREMENTS (4th ed. 2020), https://www.eac.gov/sites/default/files/electionofficials/pollworkers/Compendium_2020.pdf.

voters challenged by a poll watcher or challenger are equally applied when voters' credentials are challenged by the record itself. The questioning of such voters under oath, issuance of specially marked ballots, and provision for court-ordered post-election review function in tandem as a three-pronged system of checks and balances, both when voters are challenged by a poll watcher and when an elector's credentials are challenged by the electoral roll itself.

C. Voters who cannot provide the necessary identification under federal law should receive a provisional ballot.

All of the recommendations provided here can be implemented at the state level,[92] and since many of them deal with the contours of defining who is qualified to vote, major constitutional concerns would be raised if these issues were regulated at the federal level.[93] Bearing these facts in mind, the Help America Vote Act requires that any voter who declares that he or she is eligible to vote in a given jurisdiction must be given a provisional ballot.[94] The act also establishes that its requirements "are minimum requirements,"[95] meaning that while states can establish stricter standards on election technology or administration, they cannot enact legislation "inconsistent with the Federal requirements under this title . . . ."[96] Thus, for instance, a state cannot declare that voters who merely declare themselves, under written (but not sworn) affirmation, to be registered in a precinct must receive no ballot, since HAVA states that such an individual "shall be permitted to cast a provisional ballot."[97]

While, then, in theory, there would be no barrier in many cases to states being able to allow voters who would otherwise be *required* to be issued a provisional ballot in the interest of ensuring enfranchisements to receive a challenged ballot instead, HAVA's requirement that a voter who registers by mail present proper photo identification,[98] in turn, mandates that states require such identification "in a uniform and nondiscriminatory manner,"[99] applying the federal government's Article I Section 4 power to commandeer states with regard to electoral administration. Since this photo identification requirement does not directly

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92. Calls for reform of the Help America Vote Act at the federal level are accordingly beyond the scope of this Note.

93. *See* U.S. CONST. art. I, § 2, cl. 1; Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013) (affirming state supremacy on issues of electoral qualification but federal supremacy on issues of electoral regulation); *see also generally supra* Part I and accompanying discussion.

94. *See* 52 U.S.C. § 21082.

95. 52 U.S.C. § 21084.

96. *Id.*

97. 52 U.S.C. § 21082. In instances where such a voter *knowingly* provided misinformation as to his or her qualifications while submitting such an affidavit, HAVA provides for criminal sanctions. *See generally* 52 U.S.C. § 21144. However, this framework does not cover the plausibly more common circumstance of a voter insistent that he or she is in the right precinct, mistaken as to that fact, and adamant about voting anyway.

98. *See* 52 U.S.C. § 21083(b)(2).

99. *Id.* at § 21083(b)(1).

dictate who may vote in a given election, state-level legislation that attempts to abrogate this requirement would run afoul of the federal government's constitutional authority under Article I, Section 4.

Further, from a policy perspective, the notion that certain subcategories of voters should receive stricter scrutiny makes facial sense. In instances where a voter's qualifications are dubious, either because a challenger has brought attention to a discrepancy or such discrepancy is noted on the electoral roll, at least some of the fault for such dubiousness lays at the feet of those administering that particular election rather than on the voter in question. Such is not true when the facts of the matter are not disputed, like when a voter did not produce identification while registering by mail and does not have identification when voting, so in those circumstances subjecting the voter's ballot to additional scrutiny (by rendering it provisional and requiring post-election verification rather than rendering it challenged and able to be cast on Election Day) is justifiable.

D. State laws need to make at least some distinction between "challenged ballots" and "provisional ballots" to be compliant with both HAVA and the Constitution's election regulation provisions more generally.

One could envision a framework by which *all* provisional ballots receive this presumption of validity, but the underlying policy presumptions notwithstanding, it is not likely within the constitutional purview of the states to implement such a framework. That said, the state of Maine's election laws, which stand in particular contrast to the state of Michigan's, merit particular mention here. Maine's statutory framework governing "challenged ballots" makes no distinction between a "challenged ballot" under state law and ballots that must be voted provisionally under HAVA.[100] In either case, Maine's laws purport that "[a] challenged ballot must be counted the same as a regular ballot."[101] When the total number of challenged ballots is large enough to "affect[] the results of an election[,]" the challenged ballots are automatically reviewed, [102] unlike the Michigan framework in which such review must occur within the context of a trial.[103]

Relying on the relevant legislative history leading up to HAVA's passage in the first instance, the Maine Attorney General issued an opinion in 2011 essentially conflating Maine's state law provisions on challenged ballots with the federal requirement that provisional ballots be issued "when an election official asserts that the voter is not eligible to vote," claiming that the aforementioned legislative history supports the assertion that Maine's pre-existing legislative framework was compliant with HAVA, despite HAVA's requirement that provisional ballots be resolved after an election rather than presumed valid at the outset.[104] Although Maine's framework, therefore, pre-dated Michigan's in establishing a rebuttable presumption in favor of ballot validity by at least a decade,[105] the Maine

100. *See generally* ME. REV. STAT. ANN. tit. 21-A, §§ 673, 696 (2021).

101. *Id.* § 696.

102. *Id.*

103. MICH. COMP. LAWS § 168.747 (2021).

104. 2011 Me. AG LEXIS 1.

105. *See* ME. REV. STAT. tit. 21-A § 696(1) (noting its most recent revision in 2003).

framework's compatibility with HAVA is dubious at best due to HAVA's set of requirements surrounding how provisional ballots are treated. Because this Note discusses election reforms that can be implemented at the state level, a proposal to adopt Maine's lack of distinction between a provisional ballot and a challenged ballot, which potentially would run afoul of HAVA's regulation of provisional ballots where first-time voters fail to show identification at registration or at the polling place, is beyond this Note's scope. This Note instead advocates for a model that distinguishes between a "challenged ballot" entitled to a presumption of validity and a provisional ballot that does not carry this presumption.

E. Provisional ballots should generally not be accepted by voters who knowingly seek to vote in the wrong location, and more generally, election inspectors should prioritize ensuring that a voter's vote will count if cast.

Both the text of HAVA and the legislative history surrounding its passage support the assertion that Congress did not intend for voters to vote a provisional ballot whenever they show up at a polling place at which they are not actually entitled to vote.[106] However, HAVA's provisional ballot language leads to this result anyway for two reasons. First, as the National Conference of State Legislatures has noted, when polling places are about to close, get-out-the-vote campaigns will often encourage voters to accept a provisional ballot at the wrong precinct rather than attempt to travel to the correct location and risk not being able to vote at all because polls have closed.[107] Second, because HAVA's rules on provisional ballots are reliant on the declaration of an individual voter,[108] if an individual voter claims to be entitled to vote in a particular jurisdiction, the statutory framework of HAVA states that an election official "shall" provide that voter with a provisional ballot.[109]

This is not to say, however, that HAVA makes any sort of guarantee that a provisional ballot voted in this manner and on these facts will count. Indeed, a 2004 case from the Sixth Circuit arrived at the opposite conclusion, holding that while HAVA does require that a voter be able to receive a provisional ballot upon request, it does not require that the whole of that ballot, or any portion thereof, be counted if the ballot was cast in the wrong precinct.[110] In these circumstances, where a voter asserts his or her right to vote in a jurisdiction, but that assertion is

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106. *See* 148 CONG. REC. S10491-02 (daily ed. Oct. 16, 2002) ("It is not the intent of the authors of this bill to extend the right to vote by provisional ballot to everyone who shows up at the polls and is not registered . . . . The intent is to provide protection to those who in fact registered but do not appear on the register because of an administrative mistake or oversight.").

107. *See* NAT'L CONF. OF STATE LEGS., *supra* note 35.

108. *See* 52 U.S.C. § 21082(a) (requiring that an election official provide a provisional ballot to an individual who "declares that [he or she] is a registered voter in the jurisdiction in which the individual desires to vote").

109. *Id.*

110. Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 578 (6th Cir. 2004) ("There is no reason to think that HAVA . . . should be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be counted . . . . Nor does the legislative history of the statute provide any reason to believe that HAVA requires that ballots cast in the wrong precinct be counted.").

contrary to agreed-upon facts, the proper remedy, as noted by Senator Christopher Bond, is not for such a voter to be automatically issued a provisional ballot in the first instance, but rather for the election inspector or poll worker to "direct the voter to the correct polling place."[111] Although an election official in this situation would eventually be required to issue a provisional ballot to an adamant would-be voter, that election official's first priority in such circumstances should be to make efforts to inform that voter about how he or she could vote his or her ballot in a manner such that it will count, rather than ensuring that a voter receives the opportunity to fill out a ballot that likely will not count.

Where the confidence of these would-be voters is taken into account, the argument against knowingly voting a provisional ballot only grows stronger. Even outside of the confines of this provisional ballot scenario, voter confidence surveys have shown that about a quarter of those who voted in any given federal election lack confidence that their own cast votes were actually counted.[112] While that statistic likely betrays a broader distrust of the electoral system among those whose preferred candidates at a given time are not elected to office,[113] it is one thing for a voter to lack confidence in his or her vote having counted (whether for reasons related to outcome or due to something else), and it is entirely another thing for a voter to *know*, beyond a shadow of a doubt, that his or her vote *did* not count. HAVA requires that a voter who has been given a provisional ballot be given the opportunity to ascertain whether or not his or her vote ended up counting.[114] In this electoral landscape, where a significant portion of the population already questions whether their votes count, a voter whose experience with the electoral process sees him or her fill out a ballot and surrender it to an election official only to see it not count may lead to further erosion of trust in the electoral franchise. To the extent that election inspectors and poll workers are able, within the confines of HAVA, to dissuade voters from voting a provisional ballot where other alternative remedies for electoral discrepancies clearly exist (such as redirecting a voter to the correct precinct), this too should be a priority for reform.

CONCLUSION

Within the current federal framework for regulating when voters must receive a provisional ballot, a framework that prevents states from disenfranchising large classes of voters by turning them away due to clerical errors of no fault of an individual registrant, there is a wide margin for states to enact electoral forms making it easier for citizens to cast their votes safely and effectively. Within that margin, one relatively easily implemented reform is the development of an

111. 148 CONG. REC. S10491-02 (daily ed. Oct. 16, 2002); *see also Blackwell*, 387 F.3d at 575.

112. *See* Michael W. Sances & Charles Stewart III, *Partisanship and Confidence in the Vote Count: Evidence from U.S. National Elections Since 2000*, 40 ELECTORAL STUDIES 176, 179 (2015).

113. *See generally id.* (asserting that while the national aggregate of voter distrust in electoral processes has remained relatively constant over time, the breakdown of data along partisan lines suggests that voters are more likely to distrust electoral processes when they have voted for a losing candidate).

114. 52 U.S.C. § 21082(a)(5) (requiring election officials to both establish a "free access system" so that voters can ascertain whether a provisional ballot ended up counting and provide voters with information on how to access that system).

intermediate tier of ballot scrutiny. States have built on HAVA's provisional ballot framework in various ways to make provisional ballots more ubiquitous. As a result, they likewise have the power to lend provisional ballots issued under those expanded sets of circumstances a presumption in favor of their validity. While the twin phenomena of "blue shift" and the 2020 electoral counting delay are attributable to a wide variety of factors, this simple reform, where implemented on a state-by-state basis, would mitigate both by enabling more ballots to be counted on Election Day.