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About the Author:

This Legislative Guide was written by Stuart Stromberg, J.D., The George Washington University Law School. Mr. Stromberg has been a Legal Counsel with the Legal Services Division of the Legislative Services Agency since 2017. He staffs the State Government and Veterans Affairs Committees and drafts legislation in those and other areas.

Mr. Stromberg can be reached by phone at 515.281.3430 or by email at:
stuart.stromberg@legis.iowa.gov

Iowa Legislative Services Agency
State Capitol
Des Moines, IA 50319

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ELECTIONS: VOTER IDENTIFICATION

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I. Introduction

The method by which voters verify that they are who they purport to be, either upon registration, prior to being furnished a ballot, or both, constitutes one of the most influential aspects of access to the franchise. States, having the primary responsibility for administering elections in the United States, must weigh the competing interests of election integrity and the enfranchisement of eligible voters when determining whether and to what extent to require documentation or other forms of proof prior to accepting or counting the ballot of a purported voter. Further complicating this formula are the influences of the United States Constitution, federal law, and state constitutions. These sources of law restrict a state's otherwise broad authority to regulate elections taking place within its borders.

Voter identification laws remain controversial and subject to litigation across the country. Most, if not all, voter identification laws nationwide have been challenged as violating the Fourteenth Amendment to the United States Constitution, the National Voter Registration Act of 1993, the Help America Vote Act of 2002, and various state constitutions. Each of these sources have been used to strike down or modify voter identification laws that were found to violate equal protection principles or federally mandated minimum standards of access to the franchise. These standards continually shift according to court rulings, and it can be difficult to identify concrete standards that might be applied in any given challenge to a voter identification law. However, the essential task for evaluating a constitutional challenge to an election regulation as articulated in *Crawford v. Marion County Election Board*, is to “weigh the asserted injury to the right to vote against the precise interests put forward by the State as justification for the burden imposed by its rule.”¹ Due to ambiguity in what sort of injury can be considered, how “precise” a court should be in identifying an interest, and what level of interest will justify what level of injury, much ink has been spilled attempting to hone the *Crawford* test into a useful standard.²

This Legislative Guide provides historical background of voter identification laws from the 1950s to recent state and federal court decisions. The Guide includes descriptions of voter identification laws and cases challenging them in Iowa and other states. For the purposes of the Guide, “voter identification” refers to any method by which the identity of a potential voter is proven, including through photo identification cards, documentary evidence not including photos, oaths by the voter or others, and signature matching systems.

Unless otherwise noted, references in the Guide to the Iowa Code are to the 2019 Iowa Code. The Guide is not intended to identify issues for consideration by the General Assembly, and nothing contained in the Guide should be interpreted as advocating a particular course of action with respect to voter identification law in this state.

¹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (citations omitted).

² See Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 678 (2017).



II. Historical Background

The first state to require a person to furnish proof of that person's eligibility to vote was South Carolina.³ This law, enacted in 1950, required voting officials to demand the production of the would-be voter's signed registration certificate. The voter would then sign his name, and a voting official would then compare the signatures. The South Carolina law also required the voting official to "require such other identification of the voter as he deem[ed] necessary."⁴ Election officials were also permitted to furnish ballots to any persons that they were "reasonably sure" were allowed to vote.⁵ By 1980, four more states required voters to furnish some form of identification, although all had provisions allowing a voter lacking a form of identification to cast a regular ballot.⁶

Signed into law in 2002, the Help America Vote Act (HAVA) introduced wide-ranging changes in the national voting system. HAVA requires that any voter who registers by mail to vote for the first time in a given jurisdiction present to an election official a current and valid photo identification or a document that shows the name and address of the voter.⁷ A person who votes by mail must submit a copy of such a photo identification or document.⁸ In the next year, five states enacted voter identification laws with similar requirements.⁹

Following the perceived failures of HAVA in ensuring the fair administration of the 2004 presidential election, President Jimmy Carter and former secretary of state James A. Baker III convened the Commission on Federal Election Reform.¹⁰ The Commission published a report in 2005 containing 87 recommendations to improve the administration of elections by making participation easier and enhancing ballot integrity.¹¹ Among these recommendations was a proposal that every voter be required to produce a REAL ID compliant driver's license or free, state-provided identification card before being allowed to cast a ballot.¹² Although the Commission found no evidence of extensive election fraud or multiple voting, it determined that any level of voting fraud posed a threat to election integrity and that implementing a voter ID system would improve voter confidence.¹³ The Commission also recommended that the identity of absentee voters be verified using signature matching.¹⁴

The first "strict" voter identification law, requiring a voter to produce a photo identification under nearly all circumstances before that voter's ballot will be counted, was enacted in Georgia in 2005.¹⁵ The law was not enforced until 2008 due to ongoing legal

³ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).

⁴ S.C. Code Ann. §23-322 (1952).

⁵ Id. at §23-323.

⁶ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).

⁷ 52 U.S.C. §21083(b).

⁸ Id.

⁹ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).

¹⁰ Dan Balz, Carter-Baker Panel to Call for Voting Fixes, Wash. Post, (Sept. 19, 2005), www.washingtonpost.com/wp-dyn/content/article/2005/09/18/AR2005091801364.html).

¹¹ Id.

¹² Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 21(2005), www.eac.gov/assets/1/6/Exhibit%20M.PDF.

¹³ Id. at 18-19.

¹⁴ Id. at 20.

¹⁵ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).



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challenges.¹⁶ It was in that year that the United States Supreme Court decided *Crawford*, confirming the constitutionality of Indiana’s similarly strict voter identification law.¹⁷ In the wake of *Crawford*, numerous states adopted various forms of voter identification laws, including Iowa in 2017.¹⁸

III. Voter Identification in Iowa

A. Voting in the Iowa Constitution

The Iowa Supreme Court has stated that “[v]oting is a fundamental right in Iowa,”¹⁹ and the Iowa Constitution contains provisions that expressly concern the right to vote. Article II, section 1, grants the franchise to “[e]very citizen of the United States of the age of twenty-one years” who meets certain residency requirements.²⁰ The Constitution also allows for the disqualification of “mentally incompetent persons” and “persons convicted of infamous crimes.”²¹ The General Assembly may not alter these voter qualifications.²² However, the General Assembly may impose regulations to determine whether a given person possesses the required qualifications.²³ Regulation of voting and election procedures is permissible “so long as the statutes are calculated to facilitate and secure, rather than subvert or impede, the right to vote.”²⁴

B. Voting in the Iowa Code

The National Conference of State Legislatures identifies Iowa’s voter identification law as a nonstrict, nonphoto identification scheme.²⁵ Broadly, this means that a voter needs to produce some form of identification, but it need not include the voter’s photo, and there is an alternative available for a voter who does not produce identification.²⁶ Iowa shares this classification with thirteen other states.²⁷ Nonstrict, nonphoto identification states comprise the largest share of states with voter identification laws.²⁸ Ten states are nonstrict photo identification states, which require voters to produce photo identification but allow at least some voters lacking such identification to cast a regular ballot.²⁹ Seven states are strict photo identification states, which require voters lacking acceptable photo identification to cast a provisional ballot.³⁰ Three states are strict nonphoto identification states, which require voters lacking acceptable nonphoto identification to cast a provisional ballot.³¹

A voter must show an acceptable form of identification at two points during the voting process: when the voter registers,³² and when the voter casts a ballot.³³

¹⁶ Id.

¹⁷ *Crawford*, 553 U.S. at 204.

¹⁸ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).

¹⁹ *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014).

²⁰ Iowa Const. art. II, §1.

²¹ Id. art. II, §5.

²² *Chiodo*, 846 N.W.2d at 852-53.

²³ *Edmonds v. Banbury*, 28 Iowa 267, 272 (1869).

²⁴ *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978).

²⁵ National Conference of State Legislatures, Voter Identification Requirements, www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Sept. 10, 2018).

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Iowa Code §§48A.8, 48A.18.

³³ Iowa Code §49.78(2)(a).

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1. Voter Registration

A person registering to vote in Iowa must either provide sufficient identification at the time of registration or prior to voting for the first time after registering.³⁴ A person applying for a driver's license must provide proof of that person's identity, residence, and social security number during the application process, which constitutes sufficient identification for voter registration purposes.³⁵ A person who registers to vote at a voter registration agency, which includes "state offices that have direct client contact and provide applications for public assistance," must provide as part of the application the person's name, date of birth, and address, plus the person's Iowa driver's license number, Iowa nonoperator's identification number, or the last four digits of the person's social security number.³⁶ If the person does not have a driver's license number, nonoperator's identification number, or social security number, that information may be omitted from the application and the registrar shall assign the person a unique identifying number.³⁷ If the provided information exactly matches information found in the records of the state Department of Transportation, the registrant is marked as an active voter.³⁸ If the information does not exactly match existing records, the person is marked as pending and informed that the person must provide identification enumerated in Iowa Code section 48A.8, subsection 2, discussed below, prior to voting in the county for the first time.³⁹

Iowa Code section 48A.8 allows a person to request and complete a voter registration application by mail.⁴⁰ A person who does so must provide the same information as a person registering at a registration agency.⁴¹ If the information furnished by the person is incomplete or does not match existing information in state Department of Transportation records, the person must furnish a current and valid photo identification and proof of residency before voting for the first time in the county in person.⁴² If the person instead votes for the first time by casting an absentee ballot by mail, the person must furnish a photocopy of a document proving residency.⁴³

As an alternative to registering in advance, a person may register to vote at the polls on election day.⁴⁴ To do so, a person must establish both identity and residence.⁴⁵ Both requirements may be satisfied by production of a current and valid Iowa driver's license, nonoperator's identification card, or one of several other forms of identification that have both a photo and expiration date.⁴⁶ If the proffered photo identification does not contain the voter's current address, the voter must also provide one of a number of documents that establish the voter's residency in the

³⁴ Iowa Code §§48A.8, 48A.18.

³⁵ Iowa Code §§321.182, 48A.11, 48A.18.

³⁶ Iowa Code §§48A.11, 48A.19.

³⁷ Iowa Code §48A.11.

³⁸ Iowa Code §48A.25A(1)(a).

³⁹ Iowa Code §48A.25A(1)(a).

⁴⁰ Iowa Code §48A.8(1).

⁴¹ Compare Iowa Code §48A.8(1) with §48A.11.

⁴² Iowa Code §48A.8(2).

⁴³ Iowa Code §48A.8(3). Acceptable documents for proving residency include a residential lease, property tax statement, utility bill, bank statement, paycheck, government check, or other government document. Iowa Code §48A.8(2).

⁴⁴ Iowa Code §48A.7A(1)(a).

⁴⁵ Iowa Code §48A.7A(1)(a).

⁴⁶ Iowa Code §48A.7A(1)(b)(1).



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precinct.⁴⁷ If a voter cannot produce sufficient identification, or chooses not to, the voter may also establish identity and residence by signed oath of a person registered to vote in the precinct, provided that that person furnish proof of identity that would be sufficient to receive a ballot.⁴⁸

2. In-person Voter Identification

After registration and before receiving and casting a ballot, a voter must present a precinct election official with identification.⁴⁹ The Iowa Code enumerates five primary documents a voter may use to establish the voter's identity: an Iowa driver's license, an Iowa nonoperator's identification card, a United States passport, a United States military or veterans identification card, or a current valid tribal identification card.⁵⁰ A precinct official presented with one of these forms of identification "shall use the information on the identification card, including the signature" to verify the identity of the voter.⁵¹ The signature on the identification card is presumed to be valid, and a veterans identification card that does not contain a signature is not subject to challenge for invalidity.⁵²

A voter who cannot present one of the previous "primary" forms of identification may instead present a "secondary" form of identification in the form of a previously signed voter identification card or a document or combination of documents that would be sufficient for election-day voter registration.⁵³ A registered voter who is not able to produce a document from either of the previous two categories may still receive and cast a ballot if the voter's identity is established by oath of another person registered to vote in the precinct.⁵⁴ Unlike the election-day voter registration process, which allows a voter to register by producing identification or by oath of a registered voter at the voter's option, for voter identification purposes, a voter may only produce a "secondary" form of identification if the voter is unable to produce a "primary" form of identification, and may only be identified via oath if the voter is unable to produce "primary" or "secondary" identification.⁵⁵ For all elections prior to January 1, 2019, a voter who "fails to establish the voter's identity" may sign a written oath attesting to the voter's own identity and thereafter cast a regular ballot.⁵⁶

After January 1, 2019, a voter who cannot satisfy the voter identification requirements must be allowed to cast a provisional ballot.⁵⁷ A provisional ballot is sealed in an envelope which describes what the voter must do before the vote is counted.⁵⁸ A voter who cast a provisional ballot because the voter failed to provide sufficient identification must bring the sealed envelope and a sufficient form of identification to either the voter's polling place before the polls close or to the county

⁴⁷ Iowa Code §48A.7A(1)(b)(2).

⁴⁸ Iowa Code §48A.7A(1)(c).

⁴⁹ Iowa Code §49.78(2)(a).

⁵⁰ Iowa Code §49.78(2)(a).

⁵¹ Iowa Code §49.78(2)(b).

⁵² Iowa Code §49.78(2)(b). A veterans identification card that does not contain a signature seems to be immune from challenge for any reason.

⁵³ Iowa Code §49.78(3).

⁵⁴ Iowa Code §49.78(4).

⁵⁵ Iowa Code §§48A.7A, 49.78(2)-(4).

⁵⁶ Iowa Code §49.78(8).

⁵⁷ Iowa Code §49.78(7).

⁵⁸ Iowa Code §49.81.

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auditor by a deadline placed on the envelope, typically the Monday following an election.⁵⁹

Iowa has implemented a program to provide free voter identification cards to registered voters lacking another form of identification. Under this program, a registered voter who is not listed by the Department of Transportation as possessing a driver's license or nonoperator's identification card shall be issued a free voter identification card by the state registrar of voters on an automatic and gratuitous basis.⁶⁰

3. Absentee Voter Identification

A voter writing to request an absentee ballot is not required to produce documentary proof of the voter's identity. A voter must include in a request for an absentee ballot certain biographical information, including the voter's voter verification number, although the commissioner of elections is required to fill in any missing information using the best means available.⁶¹ The commissioner may, but is not required to, reject the application if the commissioner determines that the signature on the application does not match the signature on file.⁶² However, the commissioner is required to reject a returned ballot as defective if it appears to the commissioner that the return envelope was signed by someone other than the registered voter.⁶³

C. Legal Challenges to Voter Identification in Iowa

Certain of Iowa's voter ID laws have been challenged by the League of United Latin American Citizens (LULAC). LULAC alleges, in pertinent part, that both signature matching requirements and the requirement that absentee ballot applications include a voter verification number deny the right to vote under the Iowa Constitution to certain eligible voters.⁶⁴ With respect to the signature matching requirement, LULAC particularly objected to the practice of county auditors not informing a voter that an absentee ballot is defective if the ballot or ballot request was received after 5:00 p.m. on the Saturday preceding an election, which LULAC alleges denies the voter an opportunity to cure the defect and cast a vote.⁶⁵ LULAC asked the Polk County District Court to grant a temporary injunction, preventing the law from being enforced until the final resolution of the case.⁶⁶ In order to grant a temporary injunction, a court must find that a proponent will suffer irreparable harm in the absence of the injunction, that the proponent is likely to succeed on the merits, and that, after weighing the equities, the circumstances warrant the temporary injunction.⁶⁷

The court found that the signature matching requirements would cause irreparable harm if allowed to go into effect.⁶⁸ The court accepted the plaintiff's arguments that the

⁵⁹ Iowa Admin. Code 721—21.15(49). An example of a provisional ballot envelope is available at sos.iowa.gov/elections/pdf/forms/provballotenvnolabels.pdf.

⁶⁰ Iowa Code §48A.10A.

⁶¹ Iowa Code §53.2(3).

⁶² Iowa Code §53.2(5).

⁶³ Iowa Code §53.18(3).

⁶⁴ League of United Latin American Citizens v. Pate, No. CVCV056403 at 1-3 (Polk Cnty. Dist. Ct. July 24, 2018)(order granting temporary injunction).

⁶⁵ Id. at 2.

⁶⁶ Id. at 2-3.

⁶⁷ Id. at 4.

⁶⁸ Id. at 8.



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requirement would completely disenfranchise voters whose ballots were received after 5:00 p.m. on the Saturday preceding an election and could disenfranchise voters who were notified of a rejection after 11 days before an election — the deadline for requesting an absentee ballot — and are unable to vote in person.⁶⁹ The court also accepted the plaintiff’s evidence that these burdens are more likely to fall on younger voters, older voters, and voters who do not speak English as a first language, and that 9 percent of all absentee ballots cast were received after 5:00 p.m. on the Saturday preceding an election.⁷⁰ With respect to the purported requirement to include a voter verification number on an absentee ballot application, the court found that it was likely to dissuade certain voters from submitting an application, as some voters would be hesitant or unable to include the information on the application and the language suggests that inclusion is mandatory, even though county auditors are instructed to fill in missing information.⁷¹

Having concluded that the enforcement of certain voter identification requirements would cause irreparable harm, the court next turned to the question of whether the plaintiffs would likely succeed on the merits. The court first found that voting is a fundamental right under the Iowa Constitution.⁷² Therefore, any restrictions on that right are subject to strict scrutiny, the highest level of scrutiny under Iowa law.⁷³ The state must prove that a law is “narrowly tailored to the achievement of a compelling state interest” in order for the law to survive review under strict scrutiny.⁷⁴ The court held that neither voter identification provision would likely survive this review.⁷⁵ With respect to the signature matching requirement, the court held that the high likelihood that an inexperienced county auditor would conclude that a genuine signature did not match, combined with the state’s failure to provide evidence that signature matching would prevent fraud, meant that the law was not narrowly tailored to the compelling state interest of promoting elections integrity.⁷⁶ With respect to the language printed on the absentee ballot request form that instructs voters that they must provide a voter verification number before being granted an absentee ballot, the court held that the plaintiffs would likely succeed in asserting that it is not narrowly tailored to achieve a compelling state interest, in part because it is not an accurate statement of the law.⁷⁷

Finally, the court balanced the harm of granting the injunction against the irreparable harm of not granting the injunction. The court found that the state would suffer little or no harm from reverting to the law as it stood before the enactment of the voter identification laws, as it had produced no evidence of election fraud that the laws would prevent.⁷⁸

On an interlocutory appeal, the Iowa Supreme Court upheld the injunctions on the enforcement of the signature matching and voter verification number requirements.⁷⁹ The Court remanded the case to the district court for further proceedings.⁸⁰

⁶⁹ Id. at 6-7.

⁷⁰ Id. at 7.

⁷¹ Id. at 8-9.

⁷² Id. at 14; see also Chiodo, 846 N.W.2d at 848.

⁷³ League of United Latin American Citizens, No. CVCV056403 at 14.

⁷⁴ State v. Simmons, 714 N.W.2d 264, 277 (Iowa 2006) (internal quotation marks omitted).

⁷⁵ League of United Latin American Citizens, No. CVCV056403 at 18-19.

⁷⁶ Id. at 16-18.

⁷⁷ Id. at 19.

⁷⁸ Id. at 21.

⁷⁹ League of United Latin American Citizens v. Pate, No. 18-1276 at 2 (Iowa Aug. 10, 2018)(order).

⁸⁰ Id.



IV. Legal Challenges to Voter Identification Outside Iowa

A full recounting of voter identification laws across the United States is outside the scope of the Guide. Likewise, an explanation of all legal challenges levied against voter identification laws and the outcomes thereof would be burdensome and of minimal use. Instead, the Guide now examines a selection of cases concerning voter identification laws similar to those found in Iowa. Although none of the cases hereinafter contained constitute binding authority in Iowa or the Eighth Circuit, they do provide information useful for evaluating potential challenges to voter identification laws in Iowa.

A. Illinois

Plaintiffs in Illinois brought a claim in a federal circuit court alleging that Illinois's signature matching requirement for casting an absentee ballot violated their procedural due process rights under the United States Constitution.⁸¹ The Illinois law requires an election judge to reject an absentee ballot if the signature on the ballot return envelope does not match the signature on the ballot application, after which notice of rejection is sent to the voter.⁸²

Ruling on cross motions for summary judgment, the court held that the signature matching requirement violated the plaintiffs' procedural due process rights.⁸³ The court ruled that, although there is no fundamental right to vote absentee, once a state grants that right, it is entitled to due process protections.⁸⁴ The court then balanced the right of absent voters to cast a ballot, the risk of erroneous deprivation of that right, and the state's interest in enforcing the signature matching requirement. Given that a voter whose absentee ballot was rejected was given no opportunity to correct the ballot or cast another ballot, the court found that the plaintiffs were completely deprived of the right to vote.⁸⁵ The court then found that a predeprivation hearing, at which a voter could prove the voter's identity, would greatly decrease the risk of erroneous deprivation.⁸⁶ Finally, the court concluded that the burden of such additional protections would not outweigh the benefit of protecting the right to vote.⁸⁷

The Iowa signature matching requirement differs from the law that was enjoined in Illinois in that it generally provides a voter whose absentee ballot is rejected as defective due to a signature mismatch an opportunity to cast another ballot.⁸⁸ However, as discussed above, this opportunity is not available under certain circumstances.⁸⁹ A federal court in New Hampshire also relied on this case as part of its analysis in enjoining the enforcement of that state's signature matching requirement.⁹⁰

B. Texas

Texas enacted a strict photo identification law in 2011, requiring voters to present a photo identification before casting a ballot and providing no alternatives for voters lacking

⁸¹ Zessar v. Helander, No. 05-C-1917 at *8 (N.D. Ill. Mar. 13, 2006).

⁸² Id. at *4.

⁸³ Id. at *18.

⁸⁴ Id. at *12; see also Paul v. Davis, 424 U.S. 693, 710-12 (1976).

⁸⁵ Zessar, No. 05-C-1917 at *14.

⁸⁶ Id. at *16.

⁸⁷ Id. at *18.

⁸⁸ Iowa Code §53.18(3).

⁸⁹ League of United Latin American Citizens v. Pate, No. CVCV056403 at 2.

⁹⁰ Saucedo v. Gardner, No. 17-cv-183-LM at 24-27 (D.N.H. Aug. 14, 2018).



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an acceptable photo identification.⁹¹ This law and its less-strict replacement, enacted in 2017, have been subject to continual legal challenges since enactment.⁹² The original law, Senate Bill 14, allowed only five forms of government-issued photo identification.⁹³ Enforcement of the voter identification portions of the law was permanently enjoined by a federal district court in 2014 because the court held that it had a discriminatory impact on racial minorities and was passed at least in part for a discriminatory purpose.⁹⁴ The Fifth Circuit Court of Appeals partially reversed these findings in 2016, at which point the district court created an interim remedy that reinstated the photo identification requirement but expanded the list of acceptable forms of identification and provided an alternative for voters lacking such identification to sign a declaration that they lacked such identification due to a “reasonable impediment” and thereafter cast a regular ballot.⁹⁵

In 2017, the Texas Legislature enacted Senate Bill 5 to replace Senate Bill 14.⁹⁶ Senate Bill 5 largely replicated interim remedy, except that it expanded the list of acceptable forms of identification, created mobile locations for obtaining “election identification certificates,” and removed “other” as a reason that a voter could sign a declaration of reasonable impediment.⁹⁷ In 2017, the district court permanently enjoined Senate Bill 14 and Senate Bill 5, vacated the interim remedy, and reinstated the law that existed prior to Senate Bill 14, which contained no photo identification requirement.⁹⁸ The district court did so because it found that Senate Bill 5 did not fully address the discriminatory results or purpose of Senate Bill 14.⁹⁹

The Fifth Circuit Court of Appeals disagreed with the district court. The Fifth Circuit found that Senate Bill 5 did not have a discriminatory impact on indigent minority voters.¹⁰⁰ It ruled this way because the bill expanded the list of acceptable forms of identification and a person lacking identification could sign a declaration, which would not be subject to challenge by an election judge, and thereafter cast a regular ballot.¹⁰¹ The Fifth Circuit also found that the district court had heard no evidence indicating that Senate Bill 5 had been passed with discriminatory intent, had erred in attributing the illegal animus in Senate Bill 14 to subsequent legislation, and had exceeded its discretion in failing to defer to the legislature’s proffered remedy.¹⁰²

The Iowa voter identification law is arguably more restrictive than that found in Texas. Although the lists of acceptable forms of identification are similar, Iowa’s “escape clause” for voters lacking identification is less robust.¹⁰³ It is unclear whether the inclusion of this alternative to voter identification was fundamental to the Fifth Circuit’s decision or if the

⁹¹ National Conference of State Legislatures, Voter ID History, www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited Sept. 6, 2018).

⁹² National Conference of State Legislatures, Voter Identification Requirements, www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Sept. 10, 2018).

⁹³ *Texas NAACP v. Steen*, No. 17-40884 at 3 (5th Cir. Apr. 27, 2018).

⁹⁴ *Id.*

⁹⁵ *Id.* at 3-4.

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 5-6.

⁹⁸ *Id.* at 6-7.

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Id.*

¹⁰² *Id.* at 14-15.

¹⁰³ Iowa Code §49.78(4) (allowing a person lacking identification to vote if another registered voter attests to that person’s identity).

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mere expansion of the list of acceptable forms of identification would have been sufficient to save Senate Bill 5.

C. Virginia

Virginia enacted a strict photo identification law in 2013.¹⁰⁴ A voter lacking a photo identification on election day can cast a provisional ballot, which will be counted upon presentation of a photo identification within three days in person, by fax, or by email.¹⁰⁵ If a voter does not possess any acceptable form of photo identification, the Board of Elections must provide one for free and without any requirement that the voter provide documentary proof of identity or residence.¹⁰⁶ Plaintiffs claimed that the law unduly burdened the right to vote, disproportionately burdened racial minorities, and was enacted with discriminatory intent in violation of section 2 of the Voting Rights Act and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.¹⁰⁷ A federal district court held that the law did not disproportionately burden racial minorities, that the burdens imposed by the law were no stricter than had been previously approved by the United States Supreme Court, and that there was no evidence that the law had been passed with discriminatory intent.¹⁰⁸

The Fourth Circuit affirmed the findings of the district court.¹⁰⁹ With respect to the plaintiffs' claim that the law violated section 2 of the Voting Rights Act because racial minorities are less likely to have a form of acceptable photo identification, the court found that the law's requirements amounted to a mere inconvenience for a voter who does not possess an acceptable form of identification, as it permitted such a voter to cast a provisional ballot and easily obtain a photo identification to cure the ballot.¹¹⁰ With respect to the plaintiff's claim that the law was passed with discriminatory intent in violation of the Fourteenth and Fifteenth Amendments, the court found that there was no evidence of discriminatory legislative intent because the law had gone through the typical legislative process, the legislature articulated nondiscriminatory reasons for passing the law, and there were no other events to "spark suspicion" of discriminatory intent.¹¹¹

Turning to the plaintiffs' allegation that the voter identification law unconstitutionally burdened the right to vote, the court applied the *Anderson-Burdick* test and found that the Virginia law imposed a lighter burden than, and advanced the same interests as, an Indiana law that had already been approved by the United States Supreme Court.¹¹² The court disposed of the plaintiffs' final claim, that the law unconstitutionally denied the right to vote to young voters, by finding that the plaintiffs had failed to produce evidence of discrimination against young voters.¹¹³

Virginia's voter identification law varies from Iowa's in ways that make it difficult to categorize as more or less strict. With respect to the accepted forms of identification, Virginia accepts a wider range of identifications, including forms of identification issued by

¹⁰⁴ Lee v. Virginia State Bd. of Elections, 843 F.3d 592, 594 (4th Cir. 2016).

¹⁰⁵ Id.

¹⁰⁶ Id. at 594-95.

¹⁰⁷ Id. at 594.

¹⁰⁸ Id. at 598.

¹⁰⁹ Id. at 594.

¹¹⁰ Id. at 599-601.

¹¹¹ Id. at 603-04 (internal quotation marks omitted).

¹¹² Id. at 606.

¹¹³ Id. at 607.



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nongovernment entities.¹¹⁴ However, Iowa provides a nondocumentary option for voter identification in the form of the oath of another registered voter,¹¹⁵ while Virginia provides no such option. Iowa and Virginia provide similar periods of time to cure a provisional ballot, but Virginia allows a voter curing a ballot that is defective due to a failure to present identification without appearing in person.¹¹⁶ Finally, while Iowa automatically provides a voter identification card to all registered voters who appear to lack a driver's license or nonoperator's identification card, Virginia allows a voter to obtain such a card without providing any documentation, and a voter may immediately be issued a temporary identification document.¹¹⁷

¹¹⁴ Compare Iowa Code §49.78(2) with Va. Code §24.2-643(B).

¹¹⁵ Iowa Code §49.78(4).

¹¹⁶ Compare Iowa Admin. Code 721—21.15(49) with Va. Code §24.2-653(A).

¹¹⁷ Compare Iowa Code §48A.10A with 1 Va. Admin. Code §20-40-90.