

Provisional Ballot Counting Laws and Wrong-Precinct Rejections

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I. The Problem

In 2002, Congress enacted the Help America Vote Act (“HAVA”), an initial federal effort to prevent a recurrence of the electoral dysfunction that plagued the 2000 presidential election. HAVA created a system of provisional voting, by which voters whose names were not found on the precinct voter rolls or were challenged by an election official could nevertheless cast a ballot that would be counted if the voter’s eligibility was later confirmed.¹ The law requires a voter to sign an affirmation that he or she is registered to vote in “the jurisdiction in which the individual desires to vote” and “eligible to vote in that election.”² This statutory right to cast a provisional vote only applies to votes cast in elections for federal office, but states may at their discretion include state and local races on a provisional ballot as well.³ Though HAVA offered scant guidance on the procedures states should implement, it did require separating provisional ballots from regular ballots and ultimately transmitting the provisional ballots to officials for verification of voter eligibility and counting or rejection.⁴ Crucially, two kinds of states are exempt from the requirement to offer provisional voting altogether: (1) states that do not have any registration system (only North Dakota), and (2) states with same-day registration (“SDR”) (*e.g.*, New Hampshire, Minnesota and Wisconsin).⁵

A provisional ballot may be rejected for a variety of specific reasons, most obviously if election officials confirm the voter is not registered in the state at all. According to the Advancement Project’s research, in the 2006 general election, 46 percent of the provisional ballots cast in Ohio (approximately 10,610) were rejected for being cast in the wrong precinct.⁶ In Cuyahoga and Franklin counties, the percentage of wrong-precinct rejections was 61 and 69 percent, respectively.⁷ According to the Ohio Secretary of State’s records, in the 2008 general election, 47 percent of the provisional ballots cast were rejected for lack of registration; 36 percent were rejected for being cast

¹ 42 U.S.C. § 15482.

² *Id.* § 15482(a)(1)-(2).

³ *Id.* § 15482(a).

⁴ *Id.* § 15482(a)(3)-(4).

⁵ 42 U.S.C. § 1973gg-2(b); *id.* § 15482(a) (“States described in section 1973gg-2(b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law.”).

⁶ The Advancement Project, PROVISIONAL VOTING: FAIL-SAFE VOTING OR TRAPDOOR TO DISENFRANCHISEMENT? (Sept. 2008), at 12, http://www.advancementproject.org/sites/default/files/Provisional-Ballot-Report-Final-9-16-08_1.pdf.

⁷ *Id.* at 14, 16.

in the wrong precinct; and only 1 percent was rejected for lack of ID.⁸ An astonishing 14,335 provisional ballots were thrown out because they had been cast in the wrong precinct.⁹ About half of these rejections—7,522 provisional ballots—occurred in just four large counties: Cuyahoga (3,423), Franklin (1,139), Hamilton (1,767), and Lucas (1,193).¹⁰ In the 2010 general election in Ohio, 4,790 of the 11,772 rejected provisional ballots (40.7 percent) statewide were rejected because the voter was not registered in Ohio.¹¹ However, the greatest share of the rejections resulted from a finding that the voter had cast a provisional ballot in the wrong precinct. 5,309 of the 11,772—or 45 percent—of the rejected provisional ballots statewide were rejected for that reason alone.¹²

This report focuses on the rejection of out-of-precinct provisional ballots, the variation in state laws on provisional ballot counting, and the nationwide spread of partial-counting schemes. Though Ohio has been ground zero for many of the most intense conflicts over provisional balloting, this article draws on a survey of the laws which govern provisional ballot processing in all fifty states plus the District of Columbia.

In 2004, the Sixth Circuit had occasion to rule on whether HAVA required Ohio election officials to count out-of-precinct provisional ballots, notwithstanding the state law requiring voters to vote in their designated precincts. In *Sandusky County Democratic Party v. Blackwell*, the court held that HAVA did not mandate the counting of out-of-precinct provisional ballots.¹³ In so holding, the Sixth Circuit wrote: “Indeed, in at least 27 of the states using a precinct voting system, including Ohio, a voter’s ballot

⁸ See Lawrence Norden & Jessie Allen, FINAL REPORT 2008-2009 OHIO ELECTION SUMMIT AND CONFERENCE (“OHIO SUMMIT REPORT”), at 40, available at http://brennan.3cdn.net/9ccb57cb5de1711173_nkm6bqc3y.pdf (citing Ohio Sec’y of State, 2008-2008 Provisional Ballot Data (unpublished data table) (on file with the Brennan Center for Justice) (annexed as Appendix 17), available at http://brennan.3cdn.net/21c3cb806eee7c3806_mlbsboc7o.pdf); Ohio Sec’y of State Website, Absentee and Provisional Ballots Statistics for November 4, 2008 General Election, available at <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>.

⁹ OHIO SUMMIT REPORT, at 45 (citing Ohio Sec’y of State, Election Results, General Election 2008, Provisional Ballot Statistics, <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>). This number includes ballots cast in the wrong county, because the Secretary’s office uses one combined figure for wrong-precinct/right-county and wrong-county rejections. However, based on the ACLU Voting Rights Project’s research on Ohio’s precinct-level provisional ballot statistics from the 2010 election, wrong-county casting and rejection is a much rarer occurrence. Unpublished chart collecting data from 83 of Ohio’s 88 county Board of Election offices (on file with ACLU Voting Rights Project).

¹⁰ See Ohio Sec’y of State, Election Results, General Election 2008, Provisional Ballot Statistics, <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>.

¹¹ See Ohio Sec’y of State Website, Provisional Ballots Statistics for November 2, 2010 General Election, available at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results.aspx>.

¹² *Id.*

¹³ 387 F.3d 565 (6th Cir. 2004).

will only be counted as a valid ballot if it is cast in the correct precinct.”¹⁴ The Sixth Circuit attempted to identify a rough consensus in how out-of-precinct provisional ballots are treated, but the picture is far more varied and increasingly complex. Today several of the states the court listed in footnote 1 and a host of other states will count the votes on an out-of-precinct provisional ballot that the voter would have been eligible to cast in his or her correct precinct.

This issue is not academic. It has real consequences for electoral outcomes. One recent dispute over a juvenile court judge election remains undecided as of this writing due to Ohio’s inflexible wrong-precinct rejection rule and the confusion surrounding the role of poll-worker error in counting such erroneously cast ballots. In *Hunter v. Hamilton County Board of Elections*, the Sixth Circuit weighed in on the equal protection challenge to the varying treatment of different out-of-precinct provisional ballots cast in Hamilton County.¹⁵ Following the denial of the defendants’ request for *en banc* review,¹⁶ the board of elections voted to file a petition for a writ of certiorari with the Supreme Court.¹⁷ Moreover, provisional ballots nearly had serious consequences during the 2004 presidential election, which was ultimately decided by Ohio. If the 2012 presidential election is as close, then it is not only possible, but probable, that provisional ballot counting rules will play a significant, if not dispositive, role in ascertaining the American people’s choice for President.

II. The Rules for Location-Based Rejection of Provisional Ballots: A Survey of 50 States Plus the District of Columbia

A. *Strict Wrong-Precinct Rejection Rules*

Today, 23 states will not count a single vote on a provisional ballot if it is cast in the wrong precinct. These include: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Nebraska,

¹⁴ *Id.* at 568 & n.1. The list contained in footnote 1 only included *nineteen* states plus the District of Columbia, not *twenty-seven* as the court represented.

¹⁵ Nos. 10-4481, 11-3059, 11-3060, 2011 WL 242344 (6th Cir. Jan. 27, 2011), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Hunter-6thOpinion.pdf>.

¹⁶ United States Court of Appeals for the Sixth Circuit, Orders Entered, Apr. 5, 2011, http://www.ca6.uscourts.gov/case_reports/rptOrdersEntered.pdf.

¹⁷ The four-member board voted along party lines 2 to 2, on the supposition that Plaintiff Tracie Hunter, the Democratic candidate, would benefit from the Sixth Circuit’s mandate to ascertain which out-of-precinct provisional ballots should be counted on the basis of poll-worker error. Republican Secretary of State John Husted broke the tie in favor of seeking Supreme Court review. See Sharon Coolidge, *Judge race’s next stop: U.S. Supreme Court*, CINCINNATI ENQUIRER, available at [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/04/Williams-application-10A989.pdf](http://communitypress.cincinnati.com/article/AB/20110404/NEWS0108/104050315/Judge-race-s-next-stop-U-S-Supreme-Court?odyssey=mod%7Cnewswell%7Ctext%7CE-Edition%7Cs; see also Defendant-Appellants’ Application to Recall and Stay Mandate of United States Court of Appeals for the Sixth Circuit Pending Certiorari, <a href=).

Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia.¹⁸¹⁹ This is the most severely restrictive form of provisional ballot counting scheme, because it discards even the federal and statewide choices of registered voters with proper identification for a purely location-based error. As a result, numerous registered voters see their ballots rejected in full. There are 88 counties in Ohio, more than 8,000 precincts statewide, and countless multiple-precinct polling places. It takes no imagination to understand how some combination of voter error and poll-worker error would lead a voter registered in Cleveland 4-N to cast a ballot in Cleveland 4-O, particularly given the frequency of precinct boundary adjustments and polling place location changes. The error might be simple misdirection at a polling place with four lines for four different precincts. On the aggregate level, such minute errors multiply into thousands of fully discarded ballots, a result that has the potential to alter the outcome of close elections.

B. *Intermediate Rejection Rules*

Further along the spectrum, Missouri and New York have moved to a slightly more relaxed and sensible scheme for counting provisional ballots. Election officials in those two states will not count provisional ballots if they are cast in the wrong *polling place*, but will count so-called “right-church, wrong-pew” ballots, which are cast in the

¹⁸ See ALA. CODE §§ 17-9-10, 17-10-2(b)(2); ARIZ. REV. STAT. ANN. § 16-584; ARK. CODE ANN. § 7-5-308(d)(2); 108.00.9 ARK. CODE R. § 909; C.G.S.A. § 9-232I; 15 DEL. C. § 4948(h)(7); FLA. STAT. ANN. § 101.048(2)(b); HAW. CODE R. § 3-172-140 (2010); 10 ILL. COMP. STAT. ANN. §§ 5/18A-15(b), 5/18A-15(e); IND. CODE ANN. § 3-11.7-5-3; IOWA CODE ANN. § 53.25; IOWA ADMIN. CODE § 21.361; 31 KY. ADMIN. REGS. 6:020 §§ 4(13)-(14); MICH. COMP. LAWS § 168.523A; MICH. DEP’T OF STATE, Procedure for Handling “Envelope” Ballots Returned to Clerk’s Office, at 2-3, *available at* http://www.michigan.gov/documents/Procedure_Handling_Env2_95243_7.pdf; MISS. CODE ANN. § 23-15-573; NEB. REV. STAT. ANN. § 32-1002(5)(e); NEV. REV. STAT. ANN. § 293.3085(4); OHIO REV. CODE ANN. §§ 3505.181(C)(2)(a), 3505.181(E)(1), 3505.182, 3505.183(B)(4)(a)(ii); *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011) (holding that out-of-precinct provisional ballots must be rejected in Ohio and that, contrary to certain directives promulgated by Secretary of State’s office, there is no exception to this rule); 26 OKLA. STAT. ANN. § 7-116.1(C); S.C. CODE ANN. §§ 7-13-820, 7-13-830; S.D. CODIFIED LAWS §§ 12-18-39, 12-18-40; S.D. ADMIN. R. 5:02:05:22; TENN. CODE ANN. § 2-7-112(a)(3)(B)(v); TEX. ELEC. CODE ANN. § 63.011(a); 1 TEX. ADMIN. CODE §§ 81.172(c)(1), 81.172(i)(4)(J); VA. CODE ANN. § 24.2-653(B); W. VA. CODE §§ 3-1-41(d), 3-1-41(f); WYO. STAT. ANN. § 22-3-118(d).

¹⁹ There is a narrow exception to Virginia’s wrong-precinct rejection rule for voters who have moved to a new precinct. These voters may cast their ballots in their former precincts of residence, unless their registration has already been transferred or canceled. See VA. CODE ANN. § 24.2-401 (“A person who is qualified to vote except for having moved his residence from one precinct to another within the Commonwealth may vote in the precinct from which he has moved in the following November general election and any intervening election unless his registration has been transferred or cancelled as provided in this chapter. In addition, a person may continue to vote in the precinct from which he has moved through the ensuing second general election for federal office, provided that (i) he has moved his residence from one precinct to another in the same registrar’s jurisdiction and the same congressional district; (ii) he has failed to respond to the notice provided in § 24.2-428; (iii) his registration has not been transferred or cancelled as provided in this chapter; and (iv) he has affirmed orally or in writing his new address before an officer of election at the polling place.”).

right polling place, but the wrong precinct within that polling place.²⁰ However, if the voter casts a provisional ballot at the wrong polling place, then it will not be counted. This rule at least eliminates the risk that a provisional ballot will be discarded in full if it is cast in the wrong precinct, simply because the voter was standing in the wrong line and was handed the wrong ballot form. Statistics on this problem are hard to come by, but Hamilton County in Ohio, which embraces Cincinnati, reported that in November 2008, 32 percent of its rejected provisional ballots (approximately 565 ballots) were cast in the wrong precinct, but at the right polling place.²¹

Another intermediate scheme is found in Utah. In that state, there is a wrong-precinct rejection rule with an exception mandating that a ballot be counted as long as “the ballot the voter voted is identical to the ballot voted in the voter’s precinct of residence.”²² In practice, this means that there must be no precinct-specific races in either the wrong (and voted) precinct or the correct precinct, and that the two precincts must be in the same state legislative districts (if there are state legislative elections at that time). This rule is still fairly strict, but at least there is an exception.

C. *Partial Counting Rules*

Fifteen states plus the District of Columbia have adopted a far more reasonable and pro-voter approach to handling the purely technical violation of casting a ballot in the wrong precinct, namely partial counting systems. These states either: (1) count certain specific top-ticket (typically federal and statewide) races, if the ballot was cast in the right county (*i.e.* the correct *jurisdiction*), but in the wrong precinct or polling place; or (2) more flexibly, count all the votes for candidates and measures for which the voter would have been eligible to vote in his or her actual assigned precinct.

Alaska, Colorado, Louisiana, Rhode Island, and the District of Columbia are the only examples of the first approach. In Colorado, election officials will count the votes for federal and statewide candidates and measures, so long as the voter voted in his or her county of residence.²³ In Louisiana, a provisional ballot is limited to only the federal races, and it will be counted as long as the voter votes within the parish in which he or

²⁰ See MO. ANN. STAT. § 115.430; *Panio v. Sunderland*, 4 N.Y.3d 123 (N.Y. 2005) (finding *per se* poll worker error where ballot is cast in right polling place, but wrong precinct, and holding said ballot must be counted). The New York Elections Code does not appear to have been amended to reflect the Court of Appeals of New York’s decision in *Panio*. See N.Y. ELEC. LAW § 8-302.

²¹ OHIO SUMMIT REPORT, at 46.

²² UTAH CODE ANN. § 20A-4-107.

²³ COLORADO ELECTION RULE 1-8.5-109 (“If an elector casts a provisional ballot at a polling place in a precinct other than the precinct in which the elector is registered but within the elector’s county of residence, the elector’s votes for federal offices for which the elector is eligible to vote and the elector’s votes for statewide offices and statewide ballot issues and ballot questions shall be counted.”).

she is registered, even if he or she votes in the wrong precinct *within* that parish.²⁴ In Alaska, “[i]f a qualified voter of the state votes a ballot for a house district other than the house district in which the voter is registered, that person may vote only for (1) statewide ballot measures and questions; (2) candidates for federal or statewide offices; (3) candidates for the state senate if the voter’s former residence and present residence are in the same senate district; and (4) candidates for judicial retention if the voter’s former residence and present residence are in the same judicial district.”²⁵ Note that Alaska is, in fact, more lenient than Colorado and Louisiana, because it does not require the voter to have cast his or her ballot in the right county in order to take advantage of partial counting. If a voter in Rhode Island casts his or her provisional ballot in the wrong precinct, only the votes for federal races will be counted, unless the voter is in Providence and voted outside his or her Congressional District, in which case the ballot is only effective for the presidential and Senate races.²⁶ Finally, in the District of Columbia, “[i]f a duly registered voter casts a Special Ballot in a precinct that does not serve his or her current residence address, the Board shall count that ballot for federal and District-wide election contests.”²⁷

A geographically and politically diverse array of 11 states has implemented the second approach, counting the votes in any races for which the voter would have been eligible in his or her correct precinct: California, Georgia, Kansas, Maryland, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, and Washington.²⁸ For instance, in Georgia, the official is instructed to “count such person’s votes which were cast for candidates in those races for which the person was entitled to vote but . . . not [to] count the votes cast for candidates in those races in which such person was not entitled to vote.”²⁹ There is no requirement that the voter cast his or her ballot in the right county in order to have his ballot partially counted. Washington’s scheme is similarly liberal. A provisional ballot will be partially counted according to the voter’s actual precinct, even if it was cast in the wrong precinct or wrong county. If it is

²⁴ LA. REV. STAT. ANN. § 18:566; *see also* Louisiana Secretary of State, Provisional Voting, *available at* <http://www.sos.louisiana.gov/tabid/176/Default.aspx>.

²⁵ ALASKA STAT. § 15.20.211(a); *see also* ALASKA ADMIN. CODE tit. 6, § 25.541 (“If the voter provides an address and the address is different from that appearing on the voter’s current registration record, the residence address provided will be considered in determining the voter’s eligibility to vote in the election, and in the senate, house, or judicial district in which the voter voted, in accordance with the provisions of AS 15.20.211.”).

²⁶ R.I. ADMIN. CODE § 23-1-10:6(B)(1).

²⁷ D.C. MUN. REGS. tit. 3, § 714.13 (2010).

²⁸ *See* ALASKA STAT. § 15.20.211(a); ALASKA ADMIN. CODE tit. 6, § 25.541; CAL. ELEC. CODE § 14310(c)(3); GA. CODE ANN. § 21-2-419(c)(2); KAN. STAT. ANN. § 25-3002(b)(3); MD. CODE ANN., ELEC. LAW § 11-303(e); MASS. GEN. LAWS CH. 54, § 76C; N.J. STAT. ANN. § 19:53C-17; N.M. STAT. ANN. § 1-12-25.4(F); OR. REV. STAT. ANN. § 254.408(6); N.C. GEN. STAT. ANN. § 163-182.2(a)(4); 25 PA. CONS. STAT. § 3050(a.4)(7); WASH. ADMIN. CODE 434-253-047(4)-(5).

²⁹ GA. CODE ANN. § 21-2-419(c)(2).

out-of-county, the ballot is simply forwarded to the voter's county of registration with a corresponding voter guide so that it can be accurately interpreted.³⁰ Oregon has a mail-in electoral system—if a voter claims he or she is registered to vote, but there is no evidence of active or inactive registration, the voter mails in an effectively provisional ballot. Partial counting is authorized under the following rule: “A vote shall be counted only if the elector is qualified to vote for the particular office or on the measure.”³¹ This method of vote reallocation shows a path to a compromise position between eliminating precincts entirely in favor of countywide vote centers and the anti-democratic rules of states like Ohio and Texas.

D. *Alternative Schemes Reducing or Eliminating the Need for Provisional Balloting*

Still other states have alternative election procedures, such as same-day registration (“SDR”) (also known as Election Day registration (“EDR”)) or no registration system whatsoever (North Dakota only), both of which significantly reduce (or in North Dakota’s case, eliminate) the need for provisional balloting and consequently earn them an exemption from HAVA’s provisional balloting requirement.³² The following eight states, in addition to the District of Columbia, have implemented SDR: Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming.³³ Minnesota has no provisional balloting system whatsoever, but some of the others such as Wisconsin and Wyoming do in order to accommodate first-time voters who registered by mail but fail to present identification at the polls.³⁴

³⁰ WASH. ADMIN. CODE 434-253-047(4)-(5)

³¹ OR. REV. STAT. ANN. § 254.408(6).

³² See *supra* note 5.

³³ See D.C. MUN. REGS. tit. 3, § 513; IDAHO CODE ANN. § 34-408A; IOWA CODE ANN. § 48A.7A; IOWA ADMIN. CODE § 721-21.7; ME. REV. STAT. ANN. tit. 21, § 122(4); MINN. STAT. ANN. § 201.061 subd. 3; MONT. CODE ANN. § 13-2-304; N.H. REV. STAT. ANN. § 654:7-a; WIS. STAT. ANN. § 6.55; WYO. STAT. ANN. § 22-3-102. North Carolina only has an extended period of early voting, in which a person can register and vote in the same visit, so it is not included in this list of specifically EDR states. Even though Maine is exempt from HAVA’s provisional ballot requirement, it has established a challenged ballot procedure, which same-day registrants will have to follow if they do not provide “satisfactory proof of identity and residency.” ME. REV. STAT. ANN. tit. 21, § 673. The ballot is not provisional and must be treated the same as a regular ballot; its validity will only be reviewed if it can affect the results of an election. *Id.* § 696.

³⁴ Wisconsin provides provisional ballots, but only where a first-time voter lacks the necessary HAVA-mandated identification, *i.e.* proof of residence, or where an Election Day registrant has a current and valid Wisconsin driver’s license, but is unwilling or unable to provide the license number. Moreover, in Wisconsin, provisional ballots are simply “not given when a voter is at the wrong polling place. If a voter appears at the wrong polling place, he or she will be directed to the proper location.” See Wisconsin Government Accountability Board, Elections Division, ELECTION ADMINISTRATION MANUAL FOR WISCONSIN MUNICIPAL CLERKS (updated Dec. 2010), at 48-49, available at http://gab.wi.gov/sites/default/files/publication/65/election_administration_manual_rev_12_10_pdf_18373.pdf. Similarly, in Wyoming, SDR obviates the need for provisional ballots except in the case where first-time voters who registered by mail are voting in person or by mail do not have or do not bring proof of

SDR allows voters to update their registration on Election Day, virtually eliminating the need for provisional balloting and severely reducing the likelihood that any such provisional ballots will be rejected for reason of being cast in the wrong precinct. According to a report published by Demos in January 2010, SDR states have earned the right to the HAVA exemption, since “[n]on-SDR states are . . . far more likely to distribute large numbers of provisional ballots.”³⁵ Poll workers in non-SDR states have a much more daunting task in evaluating each provisional ballot to confirm that the voter is in fact registered and eligible to vote. SDR effectively eliminates that challenge. As Demos reports:

After an election, officials must spend extra time and effort to comb through voter registration records and determine whether a provisional voter had actually registered and whether her ballot should be counted. This process can take days or weeks. SDR spares election officials from these efforts, and ensures that voters can cast ballots that will be counted.³⁶

The data reveals that provisional balloting declines precipitously in the wake of implementing SDR:

Provisional balloting dropped off sharply in Iowa and North Carolina in the 2008 presidential elections, the first in which Same Day Registration was available in these two states. Two-thirds fewer provisional ballots were cast in Iowa in 2008 than in 2004. North Carolina saw provisional balloting fall by more than 23,000 between the 2008 and 2004 presidential elections.³⁷

Those dramatic results and the corresponding decline in the number of provisional ballots rejected in full for being cast in the wrong precinct demonstrate precisely why SDR is a highly effective alternative to revising the rules governing provisional ballot counting to salvage any votes the voter would have been eligible to cast in his or her correct precinct.

residence. WYO. STAT. ANN. § 22-3-118(d). Voters must return by the close of business on the day following the election with proof of residence. As in Wisconsin, since the provisional ballot will not be provided to a same-day registrant without proof of residence and only serves to give first-time voters without ID a chance to have their ballots counted (*i.e.* only people with their names on the lists so as to reduce the risk of human error), the scheme should naturally exclude the possibility of an out-of-precinct provisional ballot. *Id.*; *see also* WYO. STAT. ANN. § 22-15-105; WY Rules and Regulations SOS EP Ch. 4 s 9. In Montana as well, SDR and a wrong-precinct rejection rule coexist. *See* MONT. CODE ANN. §§ 13-15-107, 13-13-601. Again, an out-of-precinct provisional ballot should be (and is) much less frequently cast in an SDR state, because, as long as the voter has a proper form of ID, he or she can register that day in the *correct* precinct, assuming the poll workers make no erroneous eligibility determinations.

³⁵ DEMOS, *Voters Win with Same Day Registration*, at 5 (Demos Policy Brief, Jan. 2010), available at http://www.demos.org/pubs/voterswin_feb032010.pdf.

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 6; *see also* IOWA SEC’Y OF STATE, IOWA SEC’Y OF STATE 2008 REPORT, at 6, available at <http://www.sos.state.ia.us/pdfs/2008report.pdf>.

In addition to the SDR states, Vermont allows a voter whose name does not appear on the poll list to sign a sworn, but unverified, attestation to timely registration, and cast a regular ballot, precluding the need for provisional ballots.³⁸ Vermont also does not require any form of voter ID, so the only situation in which a provisional ballot must be cast in the state is when a person claims to be a registered voter but refuses to sign the sworn attestation.

III. Policy Reasons to Support a Change to Partial Counting for Out-of-Precinct Provisional Ballots

The country is almost evenly divided between (1) states that reject out-of-precinct provisional ballots in full on the one hand; and, on the other hand, (2) states that have implemented a partial-counting scheme, adopted SDR or unverified affirmation of timely registration, which dramatically reduce the number of provisional ballots cast, have no registration system at all, or have implemented a wrong-polling place rejection rule. Today, in fact, there are more states in the latter group than in the former. Accordingly, the former group should reconsider their current laws for handling wrong-precinct provisional ballots. Here's why.

First, there is a reason that so many provisional ballots are cast in the wrong precinct, whereas fewer voters cast their ballots in the wrong county or parish: precinct boundaries and polling places change much more frequently than do county lines. This is largely to accommodate population shifts and control the flow of voters on Election Day. To be sure, provisional ballots are cast in the wrong county in every election, but that number pales in comparison to the total out-of-precinct provisional ballots.

Consider a hypothetical voter named Andy. Andy voted in 2000, 2002, 2004, and 2006 at a school across the street from him. However, in 2008, he was sent a notification informing him that his *side* of the street, the even-numbered side, had been drawn into a different precinct and polling location, a community center eight blocks away. So, in 2008, he voted at the community center without incident. Prior to the 2010 general election, for whatever reason, Andy did not receive another notification from the board of elections informing him that his polling place had in fact switched back to the school across the street. On Election Day, Andy shows up to vote at the community center and is told he is not on the precinct list. The poll workers do not inform him that he should be voting at the school. Confused and frustrated, Andy decides to vote a provisional ballot, since his state does not offer same-day registration. When the canvass board convenes to review the provisional ballots and certify the election results, they discover that Andy has cast his ballot in the wrong precinct and reject it in full. This scenario is common nationwide.³⁹

³⁸ VT. STAT. ANN. tit. 17, §§ 2145, 2147(a)(4), 2150(d)(6).

³⁹ There is an element of poll worker error here that is beyond the scope of this report, but might warrant a more refined rule. That more refined rule could credit out-of-precinct provisional ballots (*i.e.* all the votes for which the voter would have been eligible in their correct precinct) where there is no evidence that the poll worker informed the voter of his or her correct precinct, but reject the same ballot in full if the voter signed a release stating the poll worker informed him or her that he or she was supposed to vote at a

Second, there is another reason why out-of-precinct voting is much more common, and that is because multiple-precinct polling locations are prevalent throughout the country, particularly in socially dense urban areas. In a multiple-precinct polling location, a voter might cast a provisional ballot in the wrong precinct simply by virtue of being directed to the wrong line. Of course, some will blame the voter in this scenario for not knowing his precise precinct number (*e.g.* Columbus 7-A) and ensuring that he is provided with the specific ballot for that precinct number. That is one place to put the risk and burden of error, but it makes far more sense to rest that responsibility with the state, county, and municipal election authorities and its volunteer poll-worker force, who are charged with administering the election. A voter most likely stands in the wrong line and votes the wrong ballot because he or she followed a poll worker's instructions. Consider that, in the November 2010 election, 40 wrong-precinct rejections occurred at just one multiple-precinct polling location in Cleveland, the Cleveland Public Library, the highest number of provisional ballots cast in the wrong precinct in any of Ohio's 8,000-plus precincts.⁴⁰ Either that particular area of Cleveland has a disproportionate number of voters who cannot follow clear instructions, or an overloaded multiple-precinct polling location plus poll-worker errors made under stress caused that spike.

Consider a hypothetical voter named Brandy. During her lunch hour on Election Day, Brandy shows up at a polling place housed in the gymnasium of a local high school. The county board has seen fit to house six different precincts in this one polling location, and Brandy is not the only registered voter residing in those six precincts who decided to vote during his or her lunch hour. After a half-hour in line, Brandy finally reaches the first table. The poll-worker has open in front of her six different precinct lists. Finally, after a bit of searching, she locates Brandy's name on one of the lists, checks Brandy's newly minted state-issued photo ID, hands Brandy a slip of paper, and directs her to the table for Precinct 2E ballots. Unfortunately, in her haste, the poll-worker has misread "2F" as "2E" and is sending Brandy into the wrong line to cast the wrong ballot. Is this a situation that warrants rejecting a ballot in full? What did the voter do wrong? A failure to partially count Brandy's out-of-precinct ballot in this scenario does violence to the goal of ascertaining the will of the people. By contrast, partial counting could only enhance electoral integrity by demonstrating uniform treatment of similarly situated voters. It is a simple adjustment for human error in a complex system.

Third, precincts do not register voters; counties and parishes do. Precincts exist to make election administration more efficient, but the jurisdiction that verifies the identity and residence of voters is *not* the precinct, but rather the county or parish. Since counties and parishes are the guarantors of electoral integrity, it makes far more sense to let county

different precinct. If the poll worker told the voter to go to the correct precinct, as labeled on the provisional ballot envelope, but the voter refused, then that could be reasonable grounds for rejecting the ballot in full. However, any state legislature should consider the enormous burden on voters who are sent to multiple polling locations only to wait in multiple long lines and ultimately discover that they are in the wrong place.

⁴⁰ Unpublished chart collecting data from 83 of Ohio's 88 county Board of Election offices (on file with ACLU Voting Rights Project).

and parish boundaries—*not* precinct boundaries—set the jurisdictional limits within which a ballot is legitimately cast and legitimately counted, if not in full then at least in part.⁴¹

We should anticipate one counterargument given the current climate surrounding election laws generally. Surely, certain proponents of more stringent mechanisms controlling access to the ballot, such as the photo ID bills in Alabama, South Carolina, and Texas, among other states, will argue that partial counting invites fraud, because it will allow one voter to cast multiple provisional ballots in multiple precincts within the same county, and they will all be counted. That would be worrisome, if not for the fact that every county with a HAVA-mandated statewide registration database at its disposal has the ability to conduct a canvass that screens out duplicate votes by a single individual. In other words, if any person were to engage in such deliberate and patently illegal conduct, it would be discovered when the county canvassed its provisional ballots.

IV. The Solution

In light of the pro-voter trend towards adopting partial counting rules, the ACLU Voting Rights Project urges Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Nebraska, Nevada, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia to consider adopting this more reasonable and less arbitrary approach to processing provisional ballots. This proposal favors no party or group, does not in any way threaten electoral integrity, and will safeguard the fundamental right to vote from a procedural technicality that has already disenfranchised thousands of eligible voters, sowed the seeds of havoc and confusion, and exacerbated popular distrust of electoral results.

⁴¹ See Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 NYU J. LEGIS. & PUB. POL'Y 133 (2006).