

**WHY OPPONENTS ARE DESTINED TO LOSE THE
DEBATE ON PHOTO ID AND PROOF OF
CITIZENSHIP LAWS: SIMPLY PUT—PEOPLE WANT
SECURE AND FAIR ELECTIONS**

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INTRODUCTION

Not many would argue that banks should leave their front doors and vaults unlocked, even in towns lacking any reported cases of bank robbery. To the contrary, many banks and other places of business have security onsite despite the fact that they have never experienced a robbery or security incident. Yet, the line of reasoning that voting security laws are unnecessary because voter fraud is insufficiently widespread is consistently asserted by opponents of photo identification (ID) and proof of citizenship laws.¹ Besides the fact that the premise is demonstrably false, the conclusion drawn by the opponents of these laws is an untenable one. It is no wonder that during the 2011 legislative session more states than ever before enacted photo ID and proof of citizenship laws.²

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1. See, e.g., *Voter Fraud—The Solution in Search of a Problem*, COMMON CAUSE (Mar. 25, 2011), <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=6672655>; *Oppose Voter ID Legislation—Fact Sheet*, AM. CIV. LIBERTIES UNION (July 21, 2011), <http://www.aclu.org/voting-rights/oppose-voter-id-legislation-fact-sheet>; see generally *The Voter ID Laws is an Expensive Solution in Search of a Non-Existent Problem Before the S. Comm. On Elections & Local Gov't*, 2008 Leg., 82d Reg. Sess. (Kan. 2008) (statement of Dan Winter, Exec. Dir., Am. Civil Liberties Union of Kan. & W. Mo.).

2. See *Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES,

It is clear from the legislative activity in 2011 that proponents of voter ID and proof of citizenship laws are winning the debate in the court of public opinion. Beginning with Kansas, a total of seven state legislatures enacted laws to require photo identification at the time of voting, or to require proof of citizenship at the time of registration: Kansas, Wisconsin, Texas, Tennessee, South Carolina, Alabama, and Rhode Island.³ Then the voters of Mississippi added to this string of successes by passing a photo ID ballot issue in November 2011.⁴ Additionally, proponents of election security legislation are set to win the debate in the judiciary. This article outlines why photo ID and proof of citizenship laws are likely to become commonplace across the country by examining the Kansas Secure and Fair Elections Act (SAFE Act) in the context of the national debate on voter security laws.

I. THE KANSAS SAFE ACT

Kansas was the first state to pass a bill like the comprehensive SAFE Act, which was drafted by the Office of the Kansas Secretary of State. The SAFE Act made Kansas the first state to combine three elements: (1) a requirement that voters present photo IDs when they vote in person, (2) a requirement that absentee voters present a full driver's license number and have their signatures verified, and (3) a proof of citizenship requirement for all newly-registered voters.⁵ Although a few states, including Georgia, Indiana, and Arizona, had already enacted one or two of these reforms, Kansas was the first state to combine all three.⁶

A. Photo Identification Provisions

The SAFE Act requires voters to present a government-issued

<http://www.ncsl.org/default.aspx?tabid=16602> (last updated Sept. 8, 2011). In 2011, twelve state legislatures passed strict voter ID legislation; however, five governors vetoed the bills. *Id.* This is compared to four states in 2005, the session with the second most activity. *Id.*

3. See KAN. STAT. ANN. § 25-2908(d) (2011); WIS. STAT. § 6.79(2)(a) (2011); TEX. ELEC. CODE ANN. § 63.0101 (West 2011); TENN. CODE ANN. § 2-7-112 (2012); S.C. CODE ANN. § 7-13-710 (2011); ALA. CODE § 17-9-30 (2011); R.I. GEN. LAWS § 17-19-24.2 (2012).

4. On November 8, 2011, Initiative 27 requiring any government issued photo identification before being allowed to vote was passed by a vote of sixty-three percent to thirty-seven percent. Joe Scott, *Voter ID Initiative Approved*, THE DAILY MISSISSIPPIAN, Nov. 9, 2011, available at <http://www.thedmonline.com/article/voter-id-initiative-approved>.

5. Kris Kobach, Op-Ed., *Why We Need Voter ID Laws*, WASH. POST, July 13, 2011, at A15.

6. *Id.* Compare Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. No. 56, 2011 Leg., Reg. Sess. (Ala. 2011), with H.R. 2067, 84th Leg., Reg. Sess. (Kan. 2011) (Alabama was quick to follow, adopting the proof of citizenship requirement verbatim from Kansas' SAFE Act).

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photo ID when voting in person at a polling place, whether on Election Day or in advance of Election Day.⁷ The acceptable forms of ID are listed in Section 11 of the Act, specifically in subsection (h)(1) of K.S.A. 25-2908 as amended.⁸ A short list of narrow exceptions is found in subsection (i), including “[p]ersons with a physical disability that makes it impossible for [them] to travel to a county or state office [and] members of the uniformed service [or] merchant marine[s] who . . . are absent from [their] county [of residence] on election day.”⁹ Two aspects of the photo ID provision are important to note. First, an expired photo ID document may be used by any voter who is sixty-five years of age or older.¹⁰ Second, the state will provide a free non-driver ID (not a free driver’s license) to any voter who signs an affidavit stating that the person desires an identification card to vote in Kansas and that the person does not possess a valid form of ID.¹¹

B. Advance Ballot Protections

The SAFE Act closes a loophole that is present in other states’ photo ID laws: it applies equivalent security provisions to ballots that are submitted by mail. In some other states with photo ID laws, absentee ballots are left unchanged—a situation that simply encourages individuals and organizations intent on committing voter fraud to use absentee ballots.¹² The SAFE Act closes this loophole by taking two steps. First, a voter requesting an absentee ballot must provide his Kansas driver’s license or non-driver ID number on the absentee ballot application, or a photocopy of a qualifying ID if he does not possess one.¹³ Second, the relevant county election office must verify that the signature on the advance ballot application form matches the signature on file in the electronic record of the voter.¹⁴

C. Proof of Citizenship Provisions

The SAFE Act also includes provisions requiring newly-registered

7. Act of July 1, 2011, ch. 56, §§ 11(c)(4), 11(h)(1), 2011 Kan. Sess. Laws 795, 815, 816 (2011).

8. *Id.* § 11(h)(1), 2011 Kan. Sess. Laws at 816.

9. *Id.* § 11(i)(1)-(3), 2011 Kan. Sess. Laws at 817.

10. *Id.* § 11(h)(1), 2011 Kan. Sess. Laws at 816.

11. *Id.* § 1(g)(2), 2011 Kan. Sess. Laws at 796-97.

12. *See, e.g.*, IND. CODE ANN. § 3-11-8-25.1(e) (LexisNexis Supp. 2009) (the bill has no mail ballot provisions); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 201 (2008) (discussing the alternative of submitting an absentee ballot without the requirement of presenting photo ID).

13. Act of July 1, 2011, ch. 56, §§ 2(b)-(c), 2011 Kan. Sess. Laws at 797-98.

14. *Id.* § 2(e)(1), 2011 Kan. Sess. Laws at 798.

Kansas voters to provide proof of citizenship at the time they register to vote.¹⁵ For most voters, the relevant document will be a birth certificate, a passport, a naturalization document, a driver's license if the license indicates citizenship, or a photocopy of any of these documents.¹⁶ All currently-registered Kansas voters are exempted from this requirement in the bill.¹⁷

Arizona and Georgia already have similar provisions in their state statutes and have successfully implemented these provisions. Georgia did so in November 2008 and Arizona did so from December 2004 until October of 2010.¹⁸ The Arizona statute is currently in legal limbo due to two contradictory opinions yet to be reconciled by the Ninth Circuit of the U.S. Court of Appeals.¹⁹ However, the Ninth Circuit has decided to reconsider this matter en banc.²⁰ At the time of writing this article, en banc reconsideration was still pending.

Implementation will be relatively uncomplicated in Kansas due to the fact that the Kansas Department of Motor Vehicles was already planning to begin scanning photocopies of birth certificates into Kansas driver's license holders' files at approximately the same time that the SAFE Act takes effect. Within a few years, virtually all Kansas drivers who are U.S. citizens will have a digital copy of their birth certificate in the state's database, which will allow such individuals to satisfy the proof of citizenship requirement without actually furnishing a hard copy of the document.

II. THE PUBLIC DEBATE

Immediately after the Kansas law was signed in April of 2011, critics cried foul.²¹ As usual, the most prominent argument was that voter fraud is not significant enough to warrant such steps.²² Additionally, critics argued that large numbers of Americans do not

15. *Id.* § 8(l), 2011 Kan. Sess. Laws at 809.

16. *Id.* § 8(l)(1)-(4), 2011 Kan. Sess. Laws at 809-10.

17. *Id.* § 8(n), 2011 Kan. Sess. Laws at 811.

18. See *Voter Identification Requirements*, *supra* note 2; *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1169 (9th Cir. 2010).

19. See *Gonzalez v. Arizona (Gonzalez I)*, 485 F.3d 1041, 1052 (9th Cir. 2007) (upholding the district court's decision). *But see Gonzalez II*, 624 F.3d at 1169 (reversing the district court's decision in part based on preemption).

20. *Gonzalez v. Arizona*, Nos. 08-17094, 08-17115, 2011 WL 1651242, at *1 (9th Cir. Apr. 27, 2011).

21. See, e.g., Susan Jones, *New Law Requires Photo ID, Proof of Citizenship to Vote in Kansas*, CNSNEWS.COM (Apr. 25, 2011), <http://www.cnsnews.com/news/article/new-law-requires-photo-id-proof-citizens>.

22. See *id.*

possess photo IDs and that such laws will depress turnout among the poor and among minorities.²³

Contrary to the allegations raised by critics, voter fraud has become a well-documented reality in American elections. To offer an example, a 2010 state representative race in Kansas City, Missouri was stolen when one candidate received approximately thirty votes illegally cast by citizens of Somalia.²⁴ The Somalis, who did not speak English, were coached to vote in one candidate's favor by an adult male who accompanied them at the polling place.²⁵ The margin of victory? One vote.²⁶

In Kansas, 221 incidents of voter fraud were reported between 1997 and 2010.²⁷ The crimes included absentee ballot fraud, impersonation of another voter, and a host of other violations.²⁸ Because voter fraud is extremely difficult to detect and is usually not reported, the cases that we know about represent a small fraction of the total.

In addition, by early 2011, my office found sixty-seven aliens illegally registered to vote in Kansas; and that is just the tip of the iceberg.²⁹ When the total number of aliens on the voter rolls of Kansas is calculated, it will likely be in the hundreds. In Colorado, the Secretary of State's Office identified 11,805 aliens illegally registered to vote in the state, of whom 4947 voted in the 2010 elections.³⁰

23. See Editorial, *A Vote Against Voting*, WASH. POST, June 22, 2011, at A16; Jones, *supra* note 20.

24. Earl Glynn, *Potential Voter Fraud in Missouri Primary Election*, MO. WATCHDOG (Oct. 4, 2010), <http://Missouri.watchdog.org/4503/potential-voter-fraud-in-missouri-house-election>.

25. *Id.*

26. *Id.* Interpreters instructed voters "how to cast their vote and whom to vote for." *Id.*; see Hans A. von Spakovsky, Op-Ed., *Voter ID is a Sensible Precaution*, KAN. CITY STAR (July 28, 2011); also available at Hans von Spakovsky, Op-Ed., *Spakovsky: Voter ID is a Sensible Precaution*, STATESMAN.COM, <http://www.statesman.com/opinion/spakovsky-voter-id-is-a-sensible-precaution-1667416.html> (last updated July 28, 2011).

27. *Known Reported Incidents of Election Crimes, 1997-2010*, OFFICE OF THE KANSAS SECRETARY OF ST. 4 (Feb. 9, 2011), http://aclu.org/files/votingrights/kselection_crimes_reporting.pdf.

28. See generally *id.*

29. *Hearing on H.B. 2067 Before the Kan. S. Comm. on Ethics & Elections*, 2011 Leg., 84th Reg. Sess. (Kan. 2011) (testimony of Kris W. Kobach, Kan. Sec'y of State).

30. *Comparison of Colorado's Voter Rolls with Department of Revenue Non-Citizen Records*, ST. OF COLORADO, DEPARTMENT OF ST. 4 (Mar. 8, 2011), http://cha.house.gov/images/stories/documents/co_non_citizen_report.pdf. While 4,947 may seem like a low number when compared to the total number of illegal aliens, this is due to some aliens becoming citizens after being initially counted but before voting. Regardless, almost 5000 voters is a significant number.

In fact, [the Kansas Secretary of State's Office] presented . . . information [about voter fraud in Kansas] to the Kansas legislature in January, and the numbers were extensively reported [in the press]. The 221 incidents of voter fraud included absentee ballot fraud, impersonation of another voter[,], and other crimes. The vast majority of the cases were never investigated fully because Kansas county attorneys lack the time and resources to pursue voter fraud at the expense of other criminal investigations. Of the approximately [thirty] cases that were fully investigated, seven resulted in prosecutions. All seven yielded convictions.³¹

Yet this information is often ignored or claimed to be “miniscule” compared to the total number of votes cast.³²

But such use of these statistics is fundamentally flawed. First, most forms of voter fraud are extremely difficult to detect. We see only the tip of the iceberg; the number of instances is likely to be much higher than the number of reported cases. Second, asking what percentage of votes were cast illegally misses the point. The relevant question is: [d]oes the number of illegal votes exceed the margin of victory in a particular race? All too often, the answer is yes.³³

In addition to the John J. Rizzo example,

[A]n [eighteen-month] study by Minnesota Majority found that 341 felons in the Minneapolis-St. Paul area [had] illegally voted in the 2008 election. Compared with the 2.7 million votes cast in the state, 341 seems insignificant. But after the recount of the U.S. Senate race between Norm Coleman and Al Franken, Franken's margin of victory was only 312 votes. The illegal votes cast by felons were not discovered until after the recount, making 341 an awfully significant number.³⁴

Similar evidence of voter fraud is likely to be present in all fifty states. Not surprisingly, public confidence in the integrity of elections is at an all-time low. In a 2008 survey, sixty-two percent of American voters thought that voter fraud was very common or somewhat common.³⁵ When voters fear that elections are being stolen it erodes the legitimacy of our government. That's why the vast majority of

31. Kobach, *supra* note 6.

32. *A Vote Against Voting*, *supra* note 24.

33. *See generally* Royster v. Rizzo, 326 S.W.3d 104 (Mo. Ct. App. 2010); Tony Messenger, *KC Legislator may be Denied Seat Over Fraud Allegations*, STLtoday.COM (Dec. 27, 2010, 12:15 AM), http://www.stltoday.com/news/local/govt-and-politics/article_498eb9fd-e146-5986-878f-9c52a97a8f86.html.

34. Kobach, *supra* note 6.

35. *See generally* Cooperative Congressional Election Study of 2008, <http://projects.iq.harvard.edu/cces> (last visited Nov. 4, 2011).

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Americans support laws like Kansas's SAFE Act. A 2010 Rasmussen poll showed that eighty-two percent of Americans support photo ID laws.³⁶ Similarly, a 2011 Survey USA poll of Kansas voters showed that eighty-four percent support proof-of-citizenship requirements for voter registration.³⁷ Critics of these laws stand well outside the mainstream of public opinion. Additionally, they miss the point that many in the public fully understand—one incident of voter fraud is too much.

Similarly, clear facts do not stop critics from making other outrageous arguments. For example, NYU's Brennan Center, which stridently opposes all photo ID laws, claims that a whopping eleven percent of the American voting-age public does not possess a photo ID.³⁸ They base this number on a flawed survey they sponsored in 2006.³⁹ They then declared that millions of Americans must therefore lack photo IDs.⁴⁰

However, such inaccurate estimates do not have to be relied on when the actual numbers are readily available. In Kansas, the Secretary of State's Office obtained the statistics, and they tell a very different story. "According to the 2010 Census, there are 2,126,179 Kansans of voting age. [And] [a]ccording to the Kansas [DMV], fully 2,156,446 Kansans [already] have [a] driver's license or [a] non-driver ID. In other words, there are *more* photo IDs in circulation than there are eligible voters . . ."⁴¹ The notion that there are thousands of voter running around Kansas (or any state) without photo IDs is a myth.

The bottom line is that carrying a photo ID has become a part of American life. An individual cannot cash a check, board a plane, or enter a federal courthouse without one. For this reason, it is "not unreasonable to require [one in order] to protect our most important privilege of citizenship. [But] just in case any person lacks a photo ID,"

36. Hans A. von Spakovsky, *Voter Photo Identification: Protecting the Security of Elections*, THE HERITAGE FOUND. 5 (July 13, 2011), <http://www.heritage.org/research/reports/2011/07/voter-photo-identification-protecting-the-security-of-elections> (citation omitted).

37. *Results of SurveyUSA News Poll #17639*, SURV. USA (Nov. 4, 2010), <http://www.surveyusa.com/client/PollReport.aspx?g=a26cf8f3-4a0a-40e5-a503-66444130ca17>.

38. *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUST. AT NYU SCH. OF L. 3 (Nov. 2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

39. *Id.* at 1.

40. *Id.* at 3.

41. Kobach, *supra* note 6 (emphasis added).

the SAFE Act provides a free state ID to anyone who needs one.⁴² Other states have included similar provisions in their photo ID laws.⁴³

Finally, opponents of election security laws resort to declaring that they are part of a sinister plot to depress voter registration and turnout, especially among minority voters who are more likely to vote Democrat.⁴⁴

Once again, the facts do not support the claim. Georgia's photo ID requirement was in place for both the 2008 and 2010 elections, when turnout among minority voters was higher than average.⁴⁵ Likewise, Arizona's proof-of-citizenship requirement for registration has not impeded minority voters from registering.⁴⁶

Moreover, if such election security laws really were part of a Republican scheme to suppress Democratic votes, one would expect Democrats to fight such laws tooth and nail. But that did not happen in Kansas. Indeed, in the Kansas Legislature, two-thirds of the Democrats in the House and three-fourths of the Democrats in the Senate voted *in favor* of the SAFE Act.⁴⁷ They did so because they realized that fair elections protect every voter and every party equally. Another example illustrating the fact that many Democrats see the wisdom of these laws is the passage of voter ID laws in Democrat-controlled Rhode Island in

42. Act of Apr. 18, 2011, ch. 56, § 1(a), 2011 Kan. Sess. Laws 795, 795 (2011).

43. See GA. CODE ANN. § 21-2-417.1(a) (2008); *Voter Identification Requirements*, *supra* note 2; WIS. STAT. ANN. § 343.50(5)(a)(3) (West Supp. 2011); Jessica Vanegeren & Shawn Doherty, *Top DOT Official Tells Staff Not to Mention Free Voter ID Cards to the Public—Unless They Ask*, THE CAP. TIMES (Sept. 7, 2011), http://host.madison.com/ct/news/local/govt-and-politics/capitol-report/article_335f59fa-d8fe-11e0-8a23-001cc4c03286.html; IND. CODE ANN. § 9-24-16-10(b) (LexisNexis Supp. 2011); *Indiana's Photo ID Requirement Leads National Conversation in Safeguarding Elections*, INDIANA SECRETARY OF ST. (Jan. 27, 2011), <http://www.in.gov/sos/3841.htm>.

44. See Todd Fertig, *Voter ID Bill Could be Costly, Opponents Say*, THE WICHITA EAGLE (Mar. 10, 2011), <http://www.kansas.com/2011/03/10/v-print/1756993/voter-id-bill-could-be-costly.html>; Rebekah Dryden, *Kansas NAACP: Kobach's Voter ID Bill is so much more than that*, THE MADDOW BLOG (Feb. 14, 2011, 10:27 AM), http://maddowblog.msnbc.msn.com/_news/2011/02/14/6049356-kansas-naacp-kobachs-voter-id-bill-is-so-much-more-than-that; Erin Ferns Lee, *Fear Tactics Used to Promote Voter Suppression in 2011*, PROJECT VOTE (Jan. 7, 2011), <http://www.projectvote.org/blog/2011/01/fear-tactics-used-to-promote-voter-suppression-in-2011>.

45. Hans A. von Spakovsky, *Not a Race Card*, NAT'L REV. ONLINE (Aug. 29, 2011), <http://www.nationalreview.com/articles/print/275069>.

46. Kris W. Kobach, *The Case for Voter ID*, WALL STREET J., May 23, 2011, available at <http://online.wsj.com/article/SB10001424052748704816604576333650886790480.html>.

47. Staff Reports, *Kansas Secure and Fair Elections (SAFE) Act Signed by Governor*, AUGUSTA GAZETTE.COM (Apr. 18, 2011), <http://www.augustagazette.com/news/x1225330253/Kansas-Secure-and-Fair-Elections-SAFE-act-signed-by-Governor>.

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2011.⁴⁸ In fact, the best indication that the proponents of voter security laws are winning the public debate can be encapsulated in a quote from Rhode Island Democratic State Senator Harold Metts who said, “I’m all for party loyalty, but God gave me a brain and I use it.”⁴⁹

No candidate, Republican or Democrat, wants to emerge from an election with voters suspecting that he did not really win. Just ask Senator Al Franken of Minnesota whose constituents are still divided over whether his 2008 election was won fairly or not.⁵⁰ Election security measures like Kansas’s give confidence to voters and candidates alike that the system is fair. And instilling that confidence not only strengthens our republic, it makes sense to the general public at large.

III. THE JUDICIAL DEBATE

In addition to reflecting the will of the majority of the American public, proponents of voter security laws are also poised to win the debate in the courts. Photo ID provisions have already been reviewed and sustained against constitutional challenge by the United States Supreme Court. In 2008, the Court issued its decision in *Crawford v. Marion County Election Board*, in which the Court voted six to three to uphold Indiana’s photo ID law. Justice Stevens wrote the opinion for the majority.⁵¹ Proof of citizenship provisions have been both upheld and struck down in the Ninth Circuit.⁵² At the time this article was written, the Ninth Circuit had granted a rehearing en banc and is likely to issue a new decision.⁵³ This section briefly gives an overview of the judicial debate on these laws and outlines the reasons proponents of voter security laws are likely to prevail in court.

48. Editorial, *Bill Clinton Does ‘Jim Crow’*, WALL STREET J., Aug. 3, 2011, <http://online.wsj.com/article/SB10001424052702303678704576439934225691152.html>.

49. *Id.*

50. See generally Ed Barnes, *Felons Voting Illegally May Have Put Franken Over The Top, Minnesota Study Finds*, FOX NEWS.COM (July 12, 2010), <http://www.foxnews.com/politics/2010/07/12/felons-voting-illegally-franken-minnesota-study-finds>.

51. 553 U.S. 181, 203-04 (2008).

52. See *Gonzalez v. Arizona (Gonzalez I)*, 485 F.3d 1041, 1052 (9th Cir. 2007) (upholding the district court’s decision); *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1169, 1171, 1198 (9th Cir. 2010) (reversing the district court’s decision in part based on preemption).

53. *Gonzalez v. Arizona*, Nos. 08-17094, 08-17115, 2011 WL 1651242, at *1 (9th Cir. Apr. 27, 2011).

A. Photo ID

In 2008, the debate on photo ID centered on Indiana's photo ID law.⁵⁴ The Supreme Court upheld the law, acknowledging that the reasons behind the law constituted "important regulatory interests" and that the overall burden was "minimal and justified."⁵⁵ Many of the same arguments asserted in the public debate on photo ID laws were also alleged in the Court.⁵⁶

In particular, the opponents of Senate Enrolled Act No. 483 (SEA 483) also raised the argument that voter fraud was not prevalent enough to justify the imposition of photo ID laws.⁵⁷ However, the Court looked to other parts of the country providing sufficient evidence of voter fraud in addition to referring to incidents in Indiana.⁵⁸ The Supreme Court's discussion of this argument indicated that a lack of evidence of voter fraud would have been sufficient basis to cause a voter security law to be struck down.

Another interesting point related to the Court's discussion of the prevalence of voter fraud was the Court's incorrect assumption that the only types of voter fraud that photo ID laws prevent are incidents of in-person voter impersonation and that the record in *Crawford* did not contain evidence of this type of fraud.⁵⁹ Opponents of photo ID laws have seized on this statement and claimed that in-person voter impersonation is even rarer than other types of voter fraud.⁶⁰ Therefore, they argue, photo ID laws are completely unnecessary. This argument is flawed for numerous reasons.

First, it is faulty to argue that this type of fraud is rare. Voter impersonation has reportedly occurred in Kansas and is listed in the 221 cases submitted as testimony in support of the SAFE Act.⁶¹ These reports include a 2008 incident reported in Johnson County, Kansas where a voter appeared at the polls and was unregistered.⁶² The voter

54. See IND. CODE ANN. § 3-11-8-25.1 (LexisNexis Supp. 2009) (Indiana's photo ID law was Senate Enrolled Act No. 483 (SEA 483)).

55. *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)).

56. See *id.* at 191 (opponents claimed that the photo ID law was motivated by partisan politics).

57. *Id.*

58. *Id.* at 195-96.

59. *Id.* at 194.

60. Robin Carnahan, *Testimony for US Senate Rules Committee*, http://www.sos.mo.gov/elections/carnahan_senate_rules_testimony.pdf (last visited Sept. 27, 2011) (testimony of Missouri Secretary of State).

61. *Known Reported Incidents of Election Crimes*, *supra* note 28.

62. *Id.* at 2.

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allegedly picked another name off the poll book and registered to vote as that person and cast a ballot.⁶³ Additionally, without very alert election workers to report these incidents, they are very difficult to detect and catch. Therefore, it is incorrect to assume that this type of voter fraud is rare based solely on a lack of evidence.

Second, the Court was incorrect in asserting that photo ID laws only prevent in-person voter impersonation. In fact, the type of voter fraud that photo ID laws are most likely to stop is the creation and voting of fictitious identities. Allegations that ACORN created and submitted numerous fraudulent registrations were prevalent in the 2008 Election.⁶⁴ While photo ID laws, by themselves, cannot stop the registration of a fictitious identity, they do make it virtually impossible for someone to pose as that fictitious voter and cast a ballot.

Another type of election fraud that is impeded by photo ID laws is double voting in multiple jurisdictions. The Kansas Secretary of State's Office has compiled information regarding multiple cases of individuals casting votes in two jurisdictions during the same election.⁶⁵ A defense that is easily raised in these cases is that voter impersonation occurred. That defense is substantially more difficult to assert in jurisdictions where election workers check photo ID. Therefore, it is likely that photo ID laws will also help deter double voting in multiple jurisdictions.

Third, the argument that photo ID laws only prevent in-person voter impersonation overlooks a factor addressed by the Supreme Court in its discussion of voter fraud—increasing voter confidence in the integrity of the elections.⁶⁶ Voter fraud occurs in part because perpetrators believe they can get away with it. When sixty-two percent of Americans feel voter fraud is common, it is no surprise that unscrupulous individuals believe that they can get away with committing voter fraud.⁶⁷ Enacting a photo ID requirement, which is a highly visible and common safeguard against fraud in other areas of American life, heightens voter confidence and decreases the informality otherwise associated with the process of voting. The *Crawford* Court

63. *Id.*

64. *See, e.g.,* Tom Curry, *Parties Wage War Over Voter Fraud, Intimidation*, MSNBC.COM (Oct. 10, 2008), <http://www.msnbc.msn.com/id/27100918/39794356>; *see also generally Is ACORN Intentionally Structured as a Criminal Enterprise?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2009), available at http://oversight.house.gov/images/stories/Reports/20091118_ACORNREPORT.pdf.

65. *See Known Reported Incidents of Election Crimes*, *supra* note 28.

66. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

67. *Cooperative Congressional Election Study of 2008*, *supra* note 36.

recognized that increasing voter confidence was important because the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”⁶⁸

Echoing the public debate on the subject, the opponents of SEA 483 also argued before the lower courts and the Supreme Court that numerous individuals in Indiana lacked a photo ID.⁶⁹ The courts’ handling of this subject makes it very unlikely that any future facial challenges to photo ID laws will succeed. The District Court dismissed a report that attempted to estimate the number of individuals in Indiana who lack a photo ID as “utterly incredible and unreliable.”⁷⁰ The Supreme Court did not alter this assessment of the report and instead focused on a few individual cases and concluded that SEA 483 imposed “only a limited burden on voters’ rights.”⁷¹ As long as photo ID laws, like the SAFE Act, follow the guidelines set out in *Crawford*, it is unlikely that any court will strike them down.

B. Proof of Citizenship

While the Ninth Circuit has not yet issued a controlling opinion on Arizona’s proof of citizenship law, enacted by popular referendum (Proposition 200) in 2004, other jurisdictions have already enacted similar provisions.⁷² Georgia became the second state to enact a proof of citizenship requirement for registration. Georgia’s proof of citizenship law has been granted preclearance by the Justice Department and is currently in effect.⁷³ Kansas became the third state to enact such a requirement, with the passage of the SAFE Act in April 2011. In June 2011, Alabama followed suit. Alabama enacted H.B. 56, which contains proof of citizenship provisions identical to Kansas’s SAFE Act.⁷⁴ While Alabama’s law is now awaiting preclearance, it is important to note that the proof of citizenship provisions of H.B. 56 are

68. *Crawford*, 553 U.S. at 197 (citation omitted).

69. *Id.* at 200.

70. *Id.* (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 803 (S.D. Ind. 2006)).

71. *Crawford*, 553 U.S. at 202-03 (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

72. See *Gonzalez v. Arizona (Gonzalez I)*, 485 F.3d 1041, 1047 (9th Cir. 2007) (upholding the district court’s decision); *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1198 (9th Cir. 2010) (reversing the district court’s decision in part based on preemption).

73. See Press Release, Sec’y of State NEWS, Secretary of State Kemp Announces Approval of Georgia’s Proof of Citizenship Requirement for New Voter Registration Applicants (Apr. 4, 2011), available at http://www.sos.ga.gov/pressrel/2011_releases/April (follow hyperlink; then follow “Secretary of State Kemp Announces Approval” hyperlink).

74. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. No. 56, 2011 Leg., Reg. Sess. (Ala. 2011); H.R. 2067, 84th Leg., Reg. Sess. (Kan. 2011).

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not included in the cases challenging the immigration-related provisions of the same omnibus Alabama law.

The en banc review of Arizona's law that is pending in the Ninth Circuit concerns diametrically opposed rulings. The Ninth Circuit's first review of Proposition 200 was fairly straightforward. It reviewed the denial by the trial court of a preliminary injunction and found that the appellants had little likelihood of success on the merits.⁷⁵ The Ninth Circuit panel rejected numerous arguments asserted by the appellants, including claims that a proof of citizenship requirement constituted a "poll tax," presented a severe burden on a fundamental right, disproportionately burdened naturalized citizens, and that it was preempted by the National Voting Rights Act (NVRA).⁷⁶ Based on this decision and the denial of a preliminary injunction, Proposition 200's proof of citizenship requirement remained in effect until October 2010.⁷⁷

The case returned to the District Court. After the District Court ruled in Arizona's favor in its final decision, the plaintiffs appealed once again to the Ninth Circuit. However, this time, a different panel the Ninth Circuit reached a holding that was impossible to square with the holding of the first panel. The two-judge majority on the second panel performed judicial gymnastics and offered a tortured reading of the NVRA sufficient for them to strike down the law.⁷⁸ In so doing, the second panel disregarded the holding of the first panel that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote."⁷⁹ Instead, the second panel proceeded to find that the NVRA preempted Arizona's proof of citizenship requirement because Arizona failed to accept the National Voter Registration Form and added a new requirement for registration.⁸⁰ Such a reading of the NVRA ignores much of the actual text of the NVRA and the purpose for which it was passed. Chief Judge Alex Kozinski, the dissenting member of the second panel, cogently

75. *Gonzalez I*, 485 F.3d at 1046-47.

76. *Id.* at 1048-51.

77. *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1169 (9th Cir. 2010). There was a brief fifteen day period where the proof of citizenship requirement was enjoined by a motions panel of the Ninth Circuit. The Supreme Court vacated that injunction on October 20, 2006. *Purcell v. Gonzalez*, 549 U.S. 1, 3, 5-6 (2006).

78. *See Gonzalez II*, 624 F.3d at 1169, 1178-81.

79. *Id.* at 1198-99 (Kozinski, Chief J., dissenting) (quoting *Gonzalez I*, 485 F.3d at 1050-51) (criticizing the majority's newly created distinction between the law of the circuit and the law of the case used to avoid the binding effect of the Ninth Circuit's prior decision).

80. *Id.* at 1187, 1188, 1198.

explained these flaws in the majority holding.⁸¹

Regardless, even if the *Gonzalez II* Court's bizarre interpretation of the NVRA were correct, proof of citizenship laws need not prohibit state officials from accepting and using the National Voter Registration Form. For example, the Kansas SAFE Act clearly states that the National Voter Registration Form can be accepted and used to begin the registration process.⁸² However, an applicant's registration is held in "suspense" until proof of citizenship is provided.⁸³ Only after the proof of citizenship requirement is fulfilled can a voter be fully registered.⁸⁴ In this way, proof of citizenship laws can be crafted to meet even the untenable interpretation of the NVRA offered by the second panel of the Ninth Circuit. However, given its strained reasoning, it is unlikely that the *Gonzalez II* opinion will survive en banc review.

CONCLUSION

Voter security laws are here to stay. They are overwhelmingly popular with the public, and they are on solid constitutional footing in the courts. It is only a matter of time before critics realize that they have lost the battle over voter security laws like Kansas's SAFE Act. Although such laws may not be enacted in all fifty states, they will continue to be adopted in state after state. The arguments against these laws will fail because, simply put, people want secure and fair elections. And they realize that photo ID requirements and proof of citizenship requirements serve that objective. The enactment of laws like the SAFE Act in additional states will significantly strengthen the American election process—keeping it easy to vote, but making hard to cheat.

81. The NVRA's four purposes are:

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained.

Id. at 1209-10 (Kozinski, Chief J., dissenting) (quoting 42 U.S.C. § 1973gg(b) (2006)).

82. Act of Apr. 18, 2011, ch. 56, § 8(a)(1), 2011 Kan. Sess. Laws 795, 806 (2011).

83. *Id.* § 8(l).

84. *Id.*