

# **ELECTION DELAYS IN 2012**

**A REPORT BY THE**



**MAY 2013**

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ELECTION LAW**

**REPORT**

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## I. INTRODUCTION\*

Election Day 2012 featured numerous images of voters waiting hours to cast their ballot. President Obama recognized 102-year-old Floridian Desiline Victor in his February 2013 State of the Union Address, disparaging her three-hour wait to vote in Miami as a problem in need of fixing.<sup>1</sup> Skeptics question the extent of delays in 2012, suggesting media-hyped, exaggerated isolated incidents. The extent and causes of Election Day delays raise complicated questions about voting in this country. This Report will assess the problem of delays and review common causes and proposed solutions.

The ABA Standing Committee on Election Law presents this Report to provide an overview of research and proposals to address Election Day delays. The information and insights contained in this Report are intended as a starting point for further research into the problems delaying voters at the polls.<sup>2</sup> The Report surveys proposed solutions, but makes none of its own. . While it represents the collective work of the Standing Committee, not every member of the Standing Committee may agree with or endorse all of the information provided on potential causes or solutions. It is, however, the Standing Committee's goal to initiate a discussion that brings to the table all relevant viewpoints in the hope of assisting in developing a consensus as to best practices to run elections that are fair, accurate, and efficient.

This Report is a descriptive endeavor. It draws on available data, media reporting, work from the nonprofit community, and contributions from state election officials<sup>3</sup> to provide an overview of both public perceptions of the problem of election delays and realities on the ground. It should be noted at the outset that news reporting on election delays can do a disservice to the complexity of the problems election officials and voters faced. The local news may report that a machine malfunction caused delay, but may not cover the backstory: that the machine is ten years old and that the state has placed a mandatory freeze on buying new voting machines. However, what

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\* The Standing Committee on Election Law and its Advisory Commission gratefully acknowledge the efforts and patience of the William and Mary Law School's Election Law Program, specifically Professor Rebecca Green, and her students Emily Lippolis '14, Shanna Reulbach '13, and Andrew McCoy '13 for their tremendous efforts in the research for and drafting of this report.

<sup>1</sup> *State of the Union 2013: President Obama's Address to Congress (Transcript)*, WASH. POST (Feb. 12, 2013), [http://articles.washingtonpost.com/2013-02-12/politics/37059380\\_1\\_applause-task-free-enterprise](http://articles.washingtonpost.com/2013-02-12/politics/37059380_1_applause-task-free-enterprise). Ms. Victor experienced delays during early voting in Florida, not on Election Day. Election Day delays are not a new phenomenon. After delays plagued the 2008 presidential election, for example, scholars, election officials, and legislators debated how best to address the problem. *See, e.g.,* Justin Levitt, *Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19 (2010) (examining pre-election litigation strategies to prevent delays on Election Day); Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV 177 (2009) (canvassing constitutional and statutory provisions available to challenge delays).

<sup>2</sup> The Standing Committee on Election Law requested assistance from William & Mary Law School's Election Law Program to research and draft this report. William & Mary Law students Emily Lippolis '14, Shanna Reulbach '13, and Andrew McCoy '13 researched and drafted this report under Professor Rebecca Green's supervision.

<sup>3</sup> Students preparing this report circulated a survey to election administrators in all fifty states. Thirteen states responded to the survey. In addition, the students gathered inputs from election administrators attending William & Mary Election Law Society's Annual Symposium, *We Have to Fix That: Bipartisan Solutions to Election Delays*, on February 21, 2013. At the symposium, six Virginia election registrars participated in small group discussions providing feedback on Voter Flexibility, Voting Technology, and Event Management sections of this report.

appears in the local and national media affects public perception of elections, which is itself an important indicator of the health of our electoral system and the overall impact of delays.

Following a section reviewing data on delays in 2012, this Report distills the main factors identified as potential causes of Election Day delays into seven categories. While not an exhaustive list, these seven categories provide a lens to review the most common causes of Election Day delays: Event Management; Voting Flexibility; Voting Technology; Ballot Length; Statutory Instability; Poll Workers; and Voter Confusion. This Report also includes a section on Contingency Planning.<sup>4</sup> These categories overlap in various ways as the discussion in this Report describes.

**Whatever solutions are adopted need to take into account the particular features of each jurisdiction and its specific voting patterns. However, lawmakers should not wait for problems to surface and fix them after-the-fact. This has been too common a feature of the past 10 to 20 years of election law reform. With the perspective of history and an eye towards the future, lawmakers and elections professionals should anticipate what new potential challenges may lie over the horizon and devise elections laws and procedures to prevent significant Election Day problems. No election will be perfect. However, it must be fair.**

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<sup>4</sup> Superstorm Sandy, which battered mid-Atlantic and Northeastern states just over one week before Election Day, serves as yet another wake up call: contingency planning is imperative to efficient elections in this country

## II. 2012 ELECTION DELAY DATA

In a growing chorus, election observers have decried the lack of hard data on the causes of election delays (and other problems in the administration of American elections generally).<sup>5</sup> Finally, real data on delays exist. This section will review portions of that data.

The data presented in this section comes from two sources: the Survey of the Performance of American Elections (SPAЕ);<sup>6</sup> and the Cooperative Congressional Election Study (CCES).<sup>7</sup> Full reports based on this data will be released in the near future.<sup>8</sup> For the purposes of this report, we extract several highlights below.<sup>9</sup>

The first notable data finding is that based on a broad comparison with the 2008 election, voters in 2012 did not wait significantly longer at the polls on average. As depicted in **Table 1**, the percent of people waiting more than 30 minutes decreased compared to 2008.

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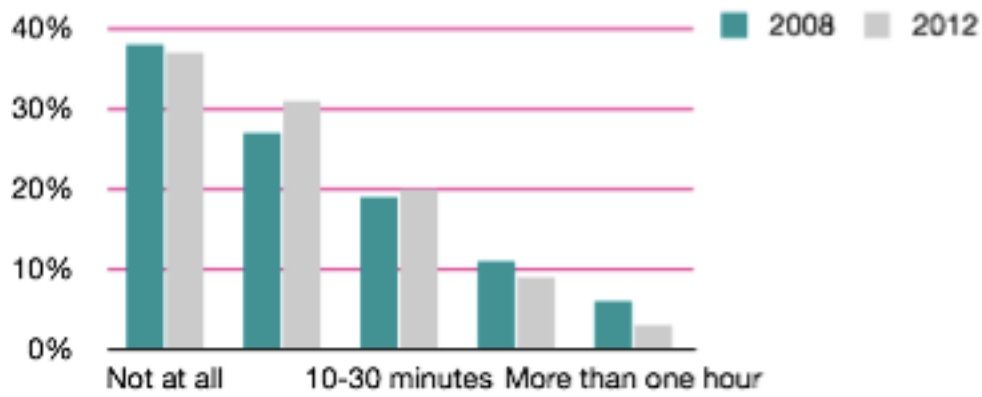
<sup>5</sup> See HEATHER GERKEN, *THE DEMOCRACY INDEX 59* (2009) (on the abysmal lack of data available to determine causes of problems on Election Day: “[W]e would presumably be worried if a large number of people tried to cast a ballot in the last presidential [election] but failed to do so. It might be a sign that registration systems weren’t functioning properly, that poll workers were doing a bad job, that ballots were designed poorly, or that machines were not working well. Yet 20 percent of states cannot tell you how many people cast a ballot that wasn’t counted, let alone how many were turned away before they filled out a ballot.”).

<sup>6</sup> Charles Stewart III, Kenan Sahin Distinguished Professor of Political Science at MIT, performed the analysis for the SPAЕ under a grant from the Pew Charitable Trusts, which bears no responsibility for the analysis. This survey is based on responses from 10,200 voters (200 per state and the District of Columbia). Professor Stewart is in the process of preparing a report that Pew plans to publish in April 2013, as well as an essay on the 2012 data for the University of Virginia’s *Journal of Law & Politics* (forthcoming).

<sup>7</sup> Stephen Ansolabehere of the Department of Government at Harvard University developed the concept and plan for the Cooperative Congressional Election Study available at <http://projects.iq.harvard.edu/cces>. The CCES is based on a survey of 56,000 voters (85-5,000 per state).

<sup>8</sup> Stewart’s work builds on Pew’s “Elections Performance Index,” which compiled data to rank state election performances in 2008 and 2010 based on seventeen measurable indicators. See Stephanie Bosh, *Elections Performance Index*, PEW CHARITABLE TRS. (Feb. 5, 2013), <http://www.pewstates.org/research/reports/elections-performance-index-85899445029> (The 17 factors are: Absentee Ballots Rejected, Absentee Ballots Unreturned, Data Completeness, Disability- or Illness-Related Voting Problems, Military and Overseas Ballots Rejected, Military and Overseas Ballots Unreturned, Online Registration Available, Post-election Audit Required, Provisional Ballots Cast, Provisional Ballots Rejected, Registration or Absentee Ballot Problems, Registrations Rejected, Turnout, Voter Registration Rate, Voting Information Look-Up Tools Available, Voting Technology Accuracy, and Voting Wait Time.).

<sup>9</sup> The ABA Standing Committee on Election Law would like to express its gratitude to Professor Stewart and the Pew Charitable Trusts for allowing this preliminary research to be included in this Report.

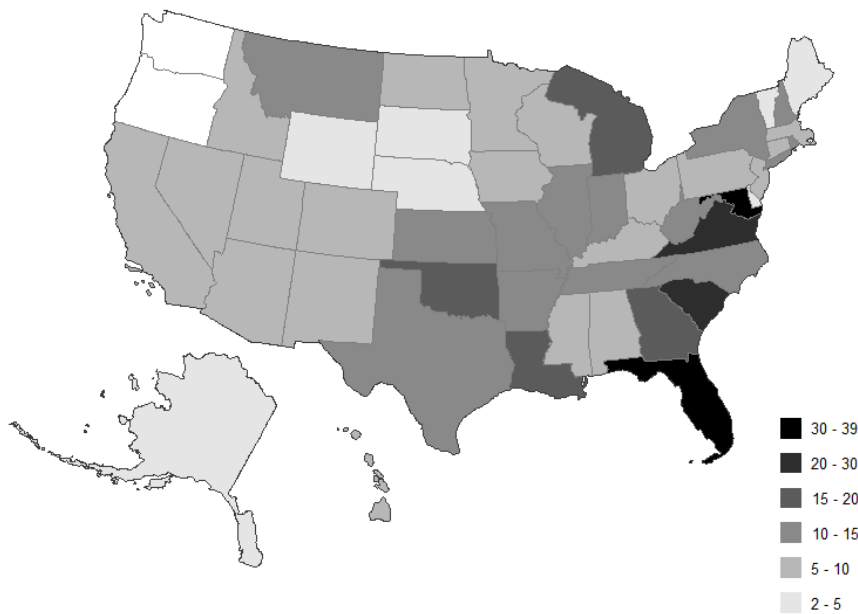


**Table 1. How Long Did Voters Wait?**  
Source: SPAE, 2008 and 2012

However, officials and journalists alike cited throughout this document reported massive delays scattered across the country in 2012 that impacted a significant number of voters that data aggregating the total wait times fails to capture.

**Image 1** depicts where Election Day delays were most prevalent in 2012.

**Image 1. Average Wait Times by State, 2012**

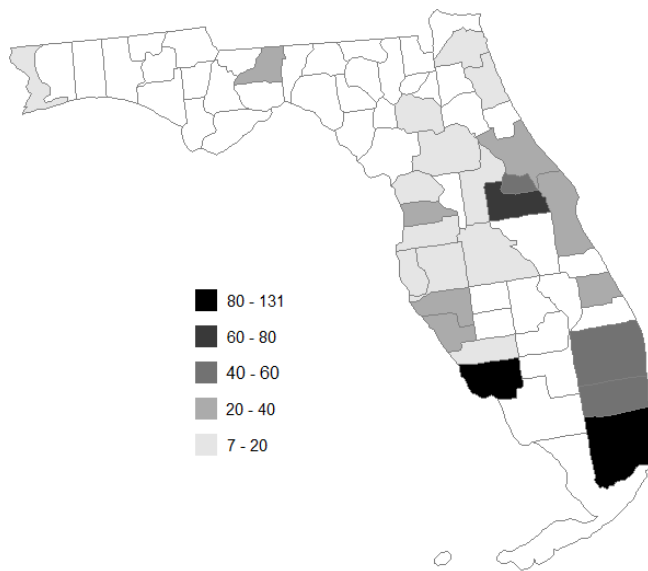


Source: SPAE, 2012

As **Image 1** shows, the longest waits occurred in Florida (45 minutes), the District of Columbia (33.8) Maryland (28.8), South Carolina (24.8), Virginia (23.6), Michigan (21.9), and Louisiana (20.4). Washington and Oregon hold all-mail elections and therefore have zero wait times.

Again, it is important to highlight that even within the states that experienced delays, some jurisdictions featured significantly longer waits than others. For example, in Florida certain counties had average waits upwards of 80 minutes, while neighboring counties had waits of only 7-10 minutes.<sup>10</sup> It should also be noted that some locations reported significantly higher voter turnout than in prior locations.<sup>11</sup> **Image 2** provides a visual representation of this phenomenon.

**Image 2. Florida 2012 Election Delays by County (min.)\***



Source: CCES, 2012

\*Counties shaded white did not have sufficient respondents to estimate average waiting times.

Florida’s average wait time of 45 minutes in 2012 glosses over the significantly higher wait times experienced in several areas. Notably, Miami, Lee County, and Orange County experienced over 80 minute wait times. Lee County arguably experienced the largest administrative meltdown of any county in Florida.<sup>12</sup>

**Table 2** describes another piece: the impact of population density on wait times. It shows that as the population density increases, wait times also increase. This could account for variation

<sup>10</sup> Many of the counties remain “white” indicating an insufficient number of respondents in those counties to estimate average wait times.

<sup>11</sup> State of Florida Secretary of State Ken Detzner, “Recommendations for Increased Accessibility & Efficiency in Florida Elections, February 4, 2013, at 4 (“During the 2012 General Election, more Floridians voted than in any previous elections in Florida history, with more than 8.5 million Floridians casting a ballot.”) (available at [http://www.dos.state.fl.us/pdf/2-4-2013\\_Recs\\_for\\_Increased\\_Accessibility\\_and\\_Efficiency\\_in\\_FL\\_Elections.pdf](http://www.dos.state.fl.us/pdf/2-4-2013_Recs_for_Increased_Accessibility_and_Efficiency_in_FL_Elections.pdf)) (hereinafter, Detzner Report). United States Election Project, 2008 General Election Turnout Rates (Note that the FL turnout *rate*, if not the raw number of voters, went down between 2008 and 2012, according to official statistics analyzed by George Mason law professor Michael McDonald.) [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html).

<sup>12</sup> Marisa Kendall, *Voters Call for Lee County Election Supervisor’s Resignation over Long Lines*, NEWSPRESS.COM (Nov. 7, 2012), <http://www.news-press.com/article/20121108/NEWS0107/311080033/Voters-call-Lee-County-election-supervisor-s-resignation-over-long-lines>.

within states where large cities may have experienced delays, whereas rural and suburban areas did not. However, population density is not a determinant factor as many urban centers experienced low wait times. For example, Los Angeles County averaged 7.7 minute waits on Election Day 2012.<sup>13</sup> **Table 2** also depicts early voting wait times, which were significant in the fourth quartile. Early voting in the second and fourth quartiles listed on **Table 2** had higher wait times than those on Election Day.

**Table 2: Wait Time by Population Density of Respondent’s Zip Code (Pop./mi<sup>2</sup>)**

	<b>Election Day</b>	<b>Early</b>	<b>Total</b>
1st quartile (1-75)	5.9	4.9	5.7
2nd quartile (75-570)	9.5	11.5	9.9
3rd quartile (570-2739)	12.7	12.5	14.9
4th quartile (2739-34000)	16.0	24.3	17.7

Source: CCES, 2012

Looking at individual voters’ race correlated with wait times, the CCES suggests that Black and Hispanic voters faced significantly longer wait times, as **Table 4** depicts.

**Table 4. Average Vote Times by Race (min.)**

White	11.6
Black	23.3
Hispanic	18.7
Asian Amer.	15.4
Native Amer.	13.3
Mixed	13.6
Other	13.3

Source: CCES, 2012

According to this data, Black voters experienced a 23.3 minute wait and Hispanic voters experienced a 18.7 minute wait, compared to a 11.6 minute wait by White voters. According to Professor Stewart, in statistical analyses of the difference between White and Black voting wait times that control for where voters live with greater specificity (e.g., entire state versus county,

<sup>13</sup> See CCES, 2012.



versus to ZIP code), the gaps between White and Black voters shrink.<sup>14</sup> As Professor Stewart explains, “White voters who live in areas with black voters wait longer to vote than white voters who live around other white voters.”<sup>15</sup> This suggests that while race may be a factor it is not the only factor at play. While this Report does not specifically discuss the relationship between race and delays, some commentators have suggested the issue should be explored further.<sup>16</sup> An analysis of this data is beyond the scope of this Report.

Comparing individual wait time by partisan affiliation also yielded interesting results. According to the data there appears to be divides between Democrat and Republican average wait times. **Table 5** below indicates that strong Democrats had the longest wait time (15.6 minutes) and strong Republicans the shortest (11.4 minutes).

**Table 5: Average Wait Time in Minutes by Partisan Identification**

Strong Dem.	15.6
Dem.	13.4
Lean Dem.	14.2
Independent	13.9
Lean Rep.	12.0
Rep.	11.6
Strong Rep.	11.4

Source: CCES, 2012

Like race, partisan correlations to wait times for voting are tied to multiple factors. Also like race, partisan impact of wait times at polling places has captured media interest.<sup>17</sup>

Another subject of study was when within the Election Day administrative process delays occurred. **Table 6** demonstrates that the majority of delays occurred before voters checked in to vote. This data suggests that delays in 2012 were most often the result of problems that impede

<sup>14</sup> Charles Stewart III, Remarks at the University of Virginia Journal of Law & Politics Annual Symposium (Mar. 23, 2013).

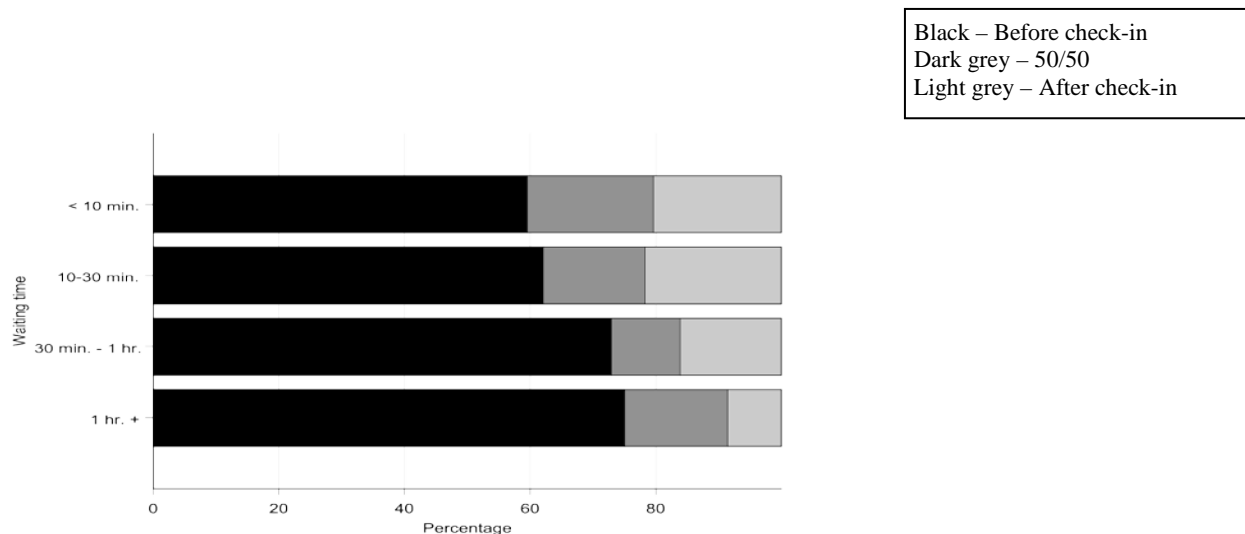
<sup>15</sup> *Id.*

<sup>16</sup> Jeremy M. Peters, Waiting Times at Ballot Boxes Draw Scrutiny, N.Y. TIMES (Feb. 4, 2013), <http://www.nytimes.com/2013/02/05/us/politics/waiting-times-to-vote-at-polls-draw-scrutiny.html>; *see also* Mukherjee, *supra* note 1 (noting that 2008 data reveals that “the time tax falls disproportionately on particular segments of the U.S. electorate” and that “blacks bore the brunt of the time tax burden.”).

<sup>17</sup> *Id.*

efficient voter check in such as voters attempting to vote at the wrong polling place, ID confusion, poll book inefficiencies, and voter registration errors.

**Table 6. Wait Times Before, During, and After Initial Check-In**



**Source: SPAE, 2012**<sup>18</sup>

Professor Stewart indicated that these findings could challenge scholars’ and policy analysts’ previous conclusions that the number of voting machines at precincts is the most important factor causing delays. If the problem were voting machine shortages, the longest lines would presumably form *after* the check-in station. The SPAE results demonstrate, however, that the longest wait times occur before or during check-in. This could be caused by confusion regarding new voter ID laws.<sup>19</sup> Another potential cause of delays identified was the decision of some jurisdictions not to reassign voters to new precincts following the post-census redistricting. For example, in Miami-Dade County, Florida, the local supervisor of elections decided to use split precincts to avoid voter confusion over newly assigned precincts. This combination required that additional steps be taken during the check-in process to ensure that each voter received the appropriate ballot style, causing further delays during check in.<sup>20</sup> Translating concerns about precinct efficiency into policy recommendations, the SPAE data suggests that more focus should be directed to inefficiencies in check-in procedures and check-in technologies.<sup>21</sup>

<sup>18</sup> The “dark grey” 50/50 category indicates respondents who answered, “My wait in line was fairly evenly distributed between checking in and waiting to cast my ballot.” SPAE, 2012.

<sup>19</sup> Adam Brandolph, *Voters Report Problems with Long Lines, Confusion over Voter ID Law*, TRIBLIVE NEWS (Nov. 6, 2012, 10:32 AM), <http://triblive.com/news/adminpage/2904078-74/outside-county-identification-judge-polls-order-asking-homestead-voters-allegheeny#axzz2JCjhzHx7>.

<sup>20</sup> Memorandum to Honorable Carlos A. Gimenez, Mayor, from Penelope Townsley, After Action Report – November 6, 2012 (December 19, 2012) at 2 (available at <http://www.miamidade.gov/mayor/library/elections-after-action-report.pdf>) (hereinafter Miami-Dade After-Action Report).

<sup>21</sup> Stewart, *supra* note 14.

Overall, data from the 2012 election relating to wait times requires further study and analysis. Still, these preliminary findings are helpful in orienting the discussion that follows.

### **III. CONTRIBUTORS TO DELAY**

The following sections provide an overview of the main contributors to election delays in 2012. This is by no means an exhaustive list, and indeed many of the factors discussed are intertwined.

One aspect of delays not singled out in the discussion below is election budgets—an inescapable precursor to smooth election administration in this country. However, assessing budget allocations and shortfalls in U.S. elections is a near impossible task for the simple reason that states do not report budget data on the amount of money spent on elections. Part of the reason is that states in which election administration is decentralized might not compile this information. Other reasons relate to the historic lack of data about elections in this country generally. As state election administrators begin to improve transparency of budgets and budget allocations for elections, a clearer picture will emerge about the impact of spending on election delays.<sup>22</sup>

#### **A. EVENT MANAGEMENT**

Elections are not different from any other event that attempts to engage a large number of people in a communal process. Events like weddings, concerts, and professional sports games require careful planning to ensure that the event runs smoothly. Arguably, elections require even more planning because of their vast scale and short timeframe.

#### **Examples of Event Management Issues Causing Delays**

From media reporting on the 2012 elections, it appears that many of the instances of delay can be attributed to problems in event management. Reports indicate that before the election, many precincts lacked sufficiently accurate estimates of the number of voters expected on Election Day.<sup>23</sup> These estimation problems may have led to understaffing in some precincts.<sup>24</sup> Some

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<sup>22</sup> Wisconsin provides a model for reporting on its election budget allocation and spending, making this data available on its website. See LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, 2012 ELECTION PROTECTION REPORT: OUR BROKEN VOTING SYSTEM AND HOW TO REPAIR IT 37 (2013), available at <http://www.866ourvote.org/newsroom/publications/document/EP-2012-Full-Report.pdf>; *November 2012 Presidential and General Election GAB-190: Election Voting and General Registration Statistics report*, ST. WIS. GOV'T ACCOUNTABILITY BOARD (2013), <http://gab.wi.gov/publications/statistics/gab-190/November-2012> (Total costs for the 2012 election in Wisconsin totaled slightly over \$10 million. Wages for local election officers and poll workers and ballots were the largest expenses, accounting for almost 75 percent of election costs. Other expenses included the following: training, memory devices, programming equipment, ballot bags, polling place rental, and documents, notices, and other miscellaneous expenses (i.e. postage for absentee ballots, envelopes for absentee and provisional ballots, meals and mileage for Canvassing Board, polling place specific costs, and recount costs.). Indeed, much about Wisconsin's election administration is worthy of praise. See Daniel Tokaji, *American's Top Model: Wisconsin Government Accountability Board*, U.C. IRVINE L. REV. (forthcoming, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2201587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201587).

<sup>23</sup> Lizette Alvarez, *Vote Count Confirms Obama Win in Florida*, N.Y. TIMES (Nov. 10, 2012), <http://www.nytimes.com/2012/11/11/us/politics/florida-to-address-delays-as-it-confirms-obama-victory.html>.

counties used vote centers instead of the precinct model,<sup>25</sup> but did not anticipate that the campaigns and promote the vote organizations would direct voters to only one.<sup>26</sup> Others planned inadequate spaces or numbers of locations for the activity of voting.<sup>27</sup>

While some states have developed careful planning mechanisms for coping with weather and other emergencies (indeed many state election statutes require such planning<sup>28</sup>), less drastic disruptions to voting also require adequate planning in advance. Election workers are often underprepared for mundane problems like machines breaking, power loss, or voters showing up at the wrong precinct or in high volume during particular periods of the day.

The 2012 election provided examples of delays potentially related to poor planning. For instance, when voting machines broke in Fredericksburg<sup>29</sup> and Spotsylvania Counties in Virginia, the media reported that only fifty back-up paper ballots were available to voters at each precinct, and hundreds of voters were turned away.<sup>30</sup> Some precincts in Virginia, like Eastern Henrico,<sup>31</sup> faced power outages<sup>32</sup> and lacked an “analog” back-up plan to allow voting to continue. Even absent freak emergencies, voting machines will undoubtedly break, voters will arrive at the wrong precinct, and poll workers will arrive late.<sup>33</sup> Problems always arise on Election Day.

Election managers’ ability to predict turnout can hinge on how states define precincts. Some states, like Kansas, define precincts geographically regardless of population.<sup>34</sup> Most states place

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<sup>24</sup> Sarah Wolfe, *Election Day: Long Voting Lines Reported Across United States*, GLOBAL POST (Nov. 6, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/121106/election-day-long-voting-lines-reported>.

<sup>25</sup> *Vote Centers*, WELD COUNTY, COLO. CLERK AND RECORDER, <http://www.co.weld.co.us/Departments/ClerkRecorder/ElectionInformation/VoteCenters.html>.

<sup>26</sup> Christopher N. Osher & Ryan Parker, *Metro Voters Experience Long Waits in Colorado*, DENVER POST (Nov. 6, 2012), [http://www.denverpost.com/breakingnews/ci\\_21939411/election%E2%80%91day%E2%80%91voting%E2%80%91begins%E2%80%91swing%E2%80%91state%E2%80%91colorado1/2](http://www.denverpost.com/breakingnews/ci_21939411/election%E2%80%91day%E2%80%91voting%E2%80%91begins%E2%80%91swing%E2%80%91state%E2%80%91colorado1/2).

<sup>27</sup> Juliet Lapidus, *Florida Voting, Like “A Third World Country”*, N.Y. TIMES (Nov. 5, 2012), <http://takingnote.blogs.nytimes.com/2012/11/05/florida-voting-like-a-third-world-country/>. See also Detzner Report at 5.

<sup>28</sup> See Maya Roy, *The State of Democracy After Disaster: How to Maintain the Right to Vote for Displaced Citizens*, 17 S. CAL. INTERDIS. L.J. 203, 222-26 (2007). Recent Election Day natural disasters suggest that many states’ contingency planning is inadequate. See *infra* Section IV.

<sup>29</sup> Molly Greenberg, *Polling Problems Reported in Central and Northern Virginia*, CAPITAL (Nov. 6, 2012), <http://inthecapital.com/2012/11/06/polling-problems-reported-in-central-and-northern-virginia/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Jen Brockman, *No Matter Who You Voted For, Long Voting Lines are Totally Unacceptable*, MSNBC (Nov. 8, 2012), <http://tv.msnbc.com/2012/11/08/no-matter-who-you-voted-for-long-voting-lines-are-totally-unacceptable/>.

<sup>34</sup> KAN. STAT. ANN. § 25-26a02(a) (2000) (“Each election precinct shall be composed of contiguous and compact areas having clearly observable boundaries using visible ground features.”).

a cap on the number of voters per precinct or booth (see **Map 1**). Capping the maximum number of people assigned to each precinct may ameliorate the problem of unexpected turnout. Although most states have per-precinct or per-booth voter cap laws, these laws will not prevent delays in elections with unprecedented voter turnout.<sup>35</sup> Inadequate deployment of other resources (such as poll workers, poll books, and voting machines) are also factors that voter cap statutes will not address.<sup>36</sup>

### Map 1



The following are further examples of delays caused by inadequate estimation in the 2012 presidential election:

- *The New York Times* reported that in Miami-Dade County, FL, disproportionate numbers of voters assigned to each precinct, led to delays in precincts with more voters.<sup>37</sup>
- *The Times* also reported that Broward,<sup>38</sup> Miami-Dade,<sup>39</sup> and Palm Beach Counties in Florida<sup>40</sup> all cited “inadequate polling facilities” as a reason for their Election Day delays.
- *AP* reported that Richmond and Aiken Counties in South Carolina lacked enough polling machines at some of their precincts.<sup>41</sup>

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<sup>35</sup> Sasha Abramsky, *Just Try Voting Here: 11 of America’s Worst Places to Cast a Ballot (or Try)*, MOTHER JONES (Oct. 2006), <http://www.motherjones.com/politics/2006/09/just-try-voting-here-11-americas-worst-places-cast-ballot-or-try>.

<sup>36</sup> Greenberg, *supra* note 30.

<sup>37</sup> Alvarez, *supra* note 24; see also Detzner Report *supra* note 11 at 7.

<sup>38</sup> Lapidus, *supra* note 28.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Meg Kinnard, *Group Calling for New Richland County Elections*, PEE DEE POL. (Nov. 12, 2012), [http://www.scnow.com/news/politics/article\\_426628e0-2cb6-11e2-82e6-0019bb30f31a.html](http://www.scnow.com/news/politics/article_426628e0-2cb6-11e2-82e6-0019bb30f31a.html).

- *The Capital* reported that Fairfax County, Virginia had half the usual number of machines at one precinct location.<sup>42</sup>
- The *Pilot Online* and the *Roanoke Times* reported that in Chesapeake<sup>43</sup> and Roanoke Counties in Virginia,<sup>44</sup> precincts were issued just two electronic poll books each, which substantially slowed down the check-in process.
- The *Global Post* reported that at Ohio State University, a lack of poll workers led to delays.<sup>45</sup>
- In Miami, Florida, *PBS Newshour* coverage suggested there were not enough optical scanners or privacy booths to keep up with the number of voters.<sup>46</sup>
- According to a Brennan Center report, neither Florida nor South Carolina caps the number of voters per precinct and instead rely on geographic boundaries; these states had some of the worst lines on Election Day.<sup>47</sup> To accurately assign the correct number of voters to each precinct, officials should start with the number of registered voters in the district. To do this well, officials need an accurate voter registration list. Many voter registration lists have not been modernized, leading to inaccuracies that cause delays at the polls.<sup>48</sup>

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<sup>42</sup> Greenberg, *supra* note 30. Importantly, the reason for the insufficient number of machines might not be an issue of poor planning. Cameron Quinn, general registrar in Fairfax County, VA, points out that far from an issue of planning, shortages of machines in Virginia are a consequence of state law that prevents election administrators from purchasing more DREs. According to Quinn, media reports on Fairfax County on Election Day were rife with inaccuracies. For example, one report stated that “there were only four voting machines at Centerville Elementary School” when usually there were eight. In fact, there were six machines in 2008 (appearances complicated by changed precincts due to redistricting). See *Long Lines, Scattered Glitches*, *infra* note 155.

<sup>43</sup> Veronica Gonzalez et. al., *Voters Face Delays Throughout Hampton Roads*, PILOT ONLINE (Nov. 7, 2012), <http://hamptonroads.com/2012/11/voters-face-delays-throughout-hampton-roads>.

<sup>44</sup> Mason Adams, *Roanokers Vent Their Voting Frustration to City Council*, ROANOKE TIMES, Nov. 20, 2012, available at <http://www.onwardvoice.com/roanokers-vent-their-voting-frustration-to-city-council/>. Again, this relies on the reporter’s understanding of the real cause of delay—the lack of equipment could well be the result of budget inadequacies, not poor planning.

<sup>45</sup> Wolfe, *supra* note 25.

<sup>46</sup> *Long Lines and Ongoing Vote Counts Among Election Day Problems*, PBS NEWS HOUR (Nov. 8, 2012), [http://www.pbs.org/newshour/bb/politics/july-dec12/election\\_11-08.html](http://www.pbs.org/newshour/bb/politics/july-dec12/election_11-08.html).

<sup>47</sup> Subsequent to the 2012 General Election, the Miami-Dade Supervisor of Elections committed to recommending changes in how precincts will be populated in future elections, by among other things, capping the number of voters per precinct to no more than 2,500 and assessing prior to every countywide election whether adjustments are needed based on turnout history and population growth. *Memorandum from Carlos A. Jimenez, Mayor, to Board of County Commissioners*, February 15, 2013, Mayor’s Advisory Group – Final Report at 4, available at [http://www.miamidade.gov/mayor-memo/Mayor's\\_Election\\_Advisory\\_Group%20-%20Final\\_Report.pdf](http://www.miamidade.gov/mayor-memo/Mayor's_Election_Advisory_Group%20-%20Final_Report.pdf) (hereinafter Miami-Dade Advisory Group).

<sup>48</sup> LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, *HOW TO FIX LONG LINES 2* (2013), available at [http://www.brennancenter.org/sites/default/files/publications/How\\_to\\_Fix\\_Long\\_Lines.pdf](http://www.brennancenter.org/sites/default/files/publications/How_to_Fix_Long_Lines.pdf).

How states address voter confusion is part of the event management process—do your guests know where to go and what to bring? These questions are explored in the Voter Confusion section below.<sup>49</sup>

## Proposed Solutions

Applying blanket event management solutions to all states and all precincts is ill-advised. Still, injecting management strategies borrowed from businesses adept at queuing customers may help election managers allocate resources to best address the needs of their jurisdiction. Thus far, commenters have suggested broad recommendations to enhance election administrators' party planning.

### (1) *Modernize voter registration*

Computerized voting rolls make for a better estimate of the number of voters who will be at each precinct and will allow officials to communicate more clearly with voters. Different models have been offered. The Voter Empowerment Act<sup>50</sup> proposed by Representative John Lewis (D-GA), calls for federal voter registration standards.<sup>51</sup> Online voter registration (and the ability to update or correct voter information online) has support for reducing ambiguity caused by handwritten forms and allowing the rolls to keep up with an increasingly mobile society.<sup>52</sup> One idea is to create a voter registration database that voters encounter every time they interact with a government agency.<sup>53</sup> Proponents of online registration suggest this would allow officials to predict more accurately the number of voters to expect at each precinct because it would update itself as voters change addresses or names.

### (2) *Look to other industries*

Many large companies, like Walt Disney World, have already done the research necessary to mitigate many of the “crowd management” and “business process” issues that create delays at the polls.<sup>54</sup> Profitable large businesses wisely keep careful data on how investments impact the

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<sup>49</sup> See *infra* Section III.G.

<sup>50</sup> Voter Empowerment Act of 2013, H.R. 12, 113th Cong., *available* at <http://www.democraticwhip.gov/sites/default/files/Voter%20Empowerment%20Act%20113th.pdf>.

<sup>51</sup> Brad Plumer, *Five Ways to Make Long Election Lines Shorter*, WASH. POST (Nov. 8, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/08/five-ways-to-cut-long-election-lines/>.

<sup>52</sup> Editorial, *Modernize Registration and Require Early Voting*, N.Y. TIMES (Feb. 11, 2013), [http://www.nytimes.com/2013/02/12/opinion/voting-should-be-easy-modernize-registration.html?ref=opinion&\\_r=0&\\_r=0](http://www.nytimes.com/2013/02/12/opinion/voting-should-be-easy-modernize-registration.html?ref=opinion&_r=0&_r=0); *Internet Voting Not the Solution to Long Lines, Machine Breakdowns on Election Day, Common Cause Tells Lawmakers*, COMMON CAUSE (Jan. 14, 2013), <https://www.commondreams.org/newswire/2013/01/14-2>.

<sup>53</sup> Plumer, *supra* note 52. The Virginia Department of Motor Vehicles allows voters to register to vote or change their voter registration address when they change their vehicle registration address. VA. DEP'T MOTOR VEHICLES, [http://www.dmv.state.va.us/general/#records/update\\_add.asp](http://www.dmv.state.va.us/general/#records/update_add.asp) (last visited Mar. 31, 2013).

<sup>54</sup> Brooks Barnes, *Disney Tackles Major Theme Park Problem: Long Lines*, N.Y. TIMES (Dec. 27, 2010), [http://www.nytimes.com/2010/12/28/business/media/28disney.html?\\_r=0](http://www.nytimes.com/2010/12/28/business/media/28disney.html?_r=0).

efficiency of their operations. Colorado Secretary of State Scott Gessler, for example, has suggested looking to the business world for solutions to election problems.<sup>55</sup>

### (3) *Collect accurate election data*

As many have pointed out, most prominently election scholar Heather Gerken in the *Democracy Index*,<sup>56</sup> gathering comprehensive data about election operations would allow state administrators to determine how to best allocate resources to fit their needs. Some states are already beginning to improve data inputs and engage in sophisticated tracking of Election Day processes.<sup>57</sup> According to Pew, South Dakota keys polling place size to wait times from the previous election,<sup>58</sup> implementing reforms at any precinct with a wait of longer than 30 minutes.<sup>59</sup> Maryland is another example of a state that keeps detailed data on Election Day processes, although Maryland is a state that reported delays in 2012.<sup>60</sup> Keeping close records of election data can help election administrators determine how best to deploy resources in innumerable ways.<sup>61</sup>

## B. VOTING FLEXIBILITY

For purposes of this section, voting flexibility relates to alternative methods of voting that states make available to electors aside from casting their ballot at the polls on Election Day. This section does not consider accommodations made for overseas and military voters, but rather focuses solely on whether and the extent to which states provide alternate methods of voting to voters residing in the state.

Vocabulary surrounding voting flexibility can be confusing. The same terms are used technically and colloquially as shorthand for different methods. For the purposes of this Report, “early voting” means in-person voting on days prior to the day of the general election. In addition, this Report draws the distinction between “no-excuse” early voting, in which a voter can come to a polling station prior to the election and cast a ballot without providing a reason for being absent on Election Day, and “excuse-required” early voting, in which the voter must provide a reason for being unable to come to the polls on Election Day. Absentee voting then refers to a citizen

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<sup>55</sup> William & Mary Election Law Symposium, “We Have to Fix That”: Bipartisan Solutions to Election Delay (February 21, 2013).

<sup>56</sup> GERKEN, *supra* note 5.

<sup>57</sup> Rebecca Green, *Petitions, Privacy, and Political Obscurity*, 85 TEMP. L. REV. 367, 401 (2013).

<sup>58</sup> S.D. CODIFIED LAWS § 12-14-4 (2013).

<sup>59</sup> *Elections Performance Index: Voting Wait Time*, PEW RES. CENTER (Feb. 5, 2013), <http://www.pewstates.org/research/data-visualizations/measuring-state-elections-performance-85899446194> (note that South Dakota had the 4th shortest average wait time in 2008).

<sup>60</sup> *Maryland Releases 2012 Elections Data*, PEW RES. CENTER (Mar. 28, 2013), <http://www.pewstates.org/research/analysis/maryland-releases-2012-elections-data-85899463902>.

<sup>61</sup> See *Measuring Elections: Data, Not Anecdotes*, NAT’L CONF. ST. LEGISLATURES (Mar. 2013), <http://www.ncsl.org/legislatures-elections/elections/the-canvass-March-2013.aspx>



voting via mailed-in ballot prior to Election Day. The no-excuse/excuse dichotomy also applies to absentee voting.<sup>62</sup>

These distinctions grow more complex when states apply their own names to their methods of voting flexibility. For example, Virginia practices what is technically excuse-required early voting. However, Virginia law calls this method “in-person absentee voting.”<sup>63</sup> This Report groups and analyzes state laws based on their technical practices, enumerated in the previous paragraph.

While this Report discusses voting flexibility and notes some reforms’ potential to reduce delays, it also recognizes that providing more voting options is not a solution without flaws. Introducing alternative methods of voting can cause confusion for voters who must keep more procedures straight.<sup>64</sup> Similarly, it becomes harder for states to administer elections when there are more laws and regulations to track, and more technical information that must be passed on to poll workers about voting alternatives.<sup>65</sup> Some of the measures of voting flexibility add to elections costs or risk security as well. The specific pros and cons of possible reforms are laid out below in the section entitled “Proposed Solutions.”

Lastly, it is difficult to find direct evidence that certain states experienced Election Day delays because they did not allow alternate methods of voting, such as no-excuse absentee, early voting, or all-mail elections. Unlike a technology malfunction for which a voter can report experiencing a concrete problem, there are no anecdotes on the subject of flexibility because those methods of voting were simply not an option for these electors. Therefore, the best evidence of a lack of alternative voting options causing delays are inferences drawn from the correlation between wait times and the state legislation in place in 2012, and from comparisons with past years if there have been changes to the laws.

### **Voting Flexibility in the States**

According to the National Conference of State Legislatures (NCSL), during the 2012 election cycle, 32 states allowed no-excuse early voting, 27 states offered no-excuse absentee ballots, and 2 states—Oregon and Washington—hosted all-mail elections. This left 15 states without any form of no-excuse pre-Election Day voting.<sup>66</sup> Viewing the NCSL map below,<sup>67</sup> it is notable that

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<sup>62</sup> See generally Jessica Myers, *Know the Difference Between Absentee and Early Voting*, OFFICIAL BLOG U.S. ELECTION ASSISTANCE COMMISSION (Oct. 4, 2012), <http://www.eac.gov/blogs/blog.aspx?PostId=158>.

<sup>63</sup> VA. CODE ANN. § 24.2-700 et seq (2013).

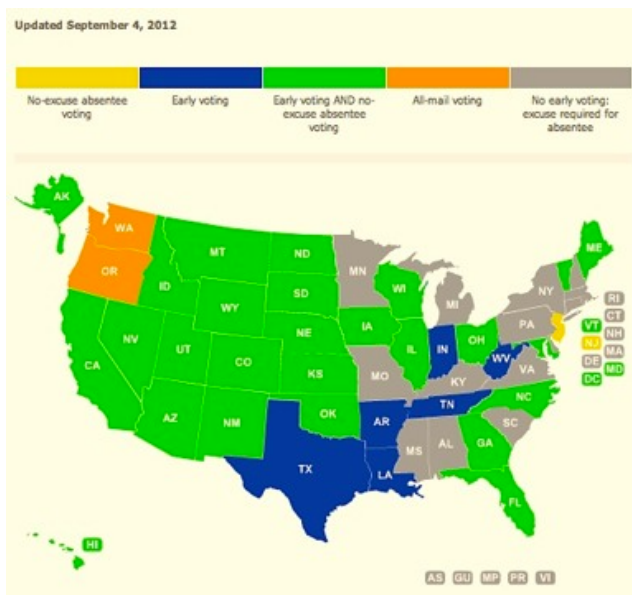
<sup>64</sup> See, e.g., John Matarese, *Absentee Ballot Postage Confusing Voters*, WCPO.COM (Oct. 16, 2012), [http://www.wcpo.com/dpp/money/consumer/dont\\_waste\\_your\\_money/absentee-ballot-postage-confusing-voters](http://www.wcpo.com/dpp/money/consumer/dont_waste_your_money/absentee-ballot-postage-confusing-voters) (stating that voters in Ohio were confused about how much postage absentee ballots required).

<sup>65</sup> Jace Larson, *Confusion About Voting Lists, Long Lines*, 9NEWS.COM (Nov. 6, 2012, 1:00 PM), <http://www.9news.com/news/article/298191/339/Confusion-about-voting-lists-long-lines> (poll workers mixed up lists of voters expected at the polls and those who already voted absentee).

<sup>66</sup> *Absentee and Early Voting*, NAT’L CONF. ST. LEGISLATURES (Sept. 4, 2012), <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx>.

<sup>67</sup> For the interactive version of the map, see *id.*

Pennsylvania, Virginia, and South Carolina, which saw some of the most severe delays,<sup>68</sup> do not offer any measures of no-excuse voting flexibility. However, the apparent correlation between the lack of options and election delays is far from perfect because some of the states offering the most flexibility, like Florida, experienced the longest wait times.<sup>69</sup> Similarly, some other states that offered only excuse-based absentee mail voting did not attract any media attention for delays, and there were certainly other factors contributing to the troubles in Virginia and Pennsylvania.<sup>70</sup> It is therefore challenging to draw conclusions from these findings.



Source: National Conference of State Legislatures, 2012

Florida provides an interesting case study that could be more helpful for making determinations on voting flexibility. Prior to 2011, the state allowed all voters 14 days of early voting; but legislation enacted in 2011 reduced the number of days to 8 and closed balloting sites on the Sunday before the election, which had previously been a very popular day to vote.<sup>71</sup> Miami-Dade and Palm Beach Counties did allow some early voting on that Sunday in response to a federal lawsuit, though the total number of voting days was still reduced by 5 but the total number of hours was still 96, as in the previous elections.<sup>72</sup> The total number of early votes cast shrank by 9.4% from 2008—a significant drop from 2.6 to 2.4 million.<sup>73</sup> Florida, with people

<sup>68</sup> Steven Rosenfeld, *What's Going on at the Polls? A Round-Up of Voting Problems*, ALTERNET (Nov. 6, 2012), <http://www.alternet.org/news-amp-politics/whats-going-polls-round-voting-problems>.

<sup>69</sup> *Id.*

<sup>70</sup> *See infra* Sections III.F-G.

<sup>71</sup> Patricia Mazzei, Amy Sherman & Kathleen McGrory, *A Voting Debacle in Doral Causes Chaos and Confusion*, MIAMI HERALD (Nov. 4, 2012), <http://www.miamiherald.com/2012/11/04/3081614/florida-democratic-party-files.html>.

<sup>72</sup> Lapidus, *supra* note 28.

<sup>73</sup> Mazzei & McGrory, *supra* note 72; Tim Padgett, *Despite Controversy, Early Voting Boosts Obama in Florida*, TIME SWAMPLAND (Nov. 5, 2012), <http://swampland.time.com/2012/11/05/81541/>.

still waiting to vote after midnight—long after President Obama had given his victory speech—was at the center of the voting delays controversy.<sup>74</sup> Again, causation is hard to pinpoint, but at least in theory the reduction in days of early voting could mean more people coming to the polls on Election Day. Increased volume could have added to delays.<sup>75</sup> Note that Florida experienced increased voter turnout overall.<sup>76</sup>

The National Association of Secretaries of State provides a list of no-excuse early voting dates for each state in 2012. Arizona, California, Indiana, Iowa, Montana, Nebraska, New Mexico, Ohio, Oklahoma and South Dakota start voting before the third week of October and continue into the first week of November.<sup>77</sup> Iowa's 2012 wait times were well below average.<sup>78</sup> New Mexico also had one of the lowest wait times, with an average of 4.2 minutes according to the SPAE.<sup>79</sup> These states offer maximum flexibility for voting prior to the election. While some localities in this category still witnessed delays from heavy turnout and other issues, populous states like California garnered little media attention for delays and according to SPAE had one of the lowest wait times nationally.<sup>80</sup>

Election flexibility can also manifest in relation to registration and voter list maintenance. By allowing multiple options for people to submit voter registration applications and change of address forms, states can make sure that their rolls are accurate prior to Election Day—or more controversially, provide for time-effective contingencies at the polls like same day registration or updates.<sup>81</sup> The District of Columbia, Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming offered same-day registration this election cycle,<sup>82</sup> and among them only New Hampshire had reports of major delays. The stated reason was that New Hampshire purges its voter rolls every 10 years, and this decennial purge took place in 2012. Reportedly, an unusually high number of people had to register at the polls, causing delays.<sup>83</sup> (It is unclear how

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<sup>74</sup> Alvarez, *supra* note 24.

<sup>75</sup> Such as ballot length. *See infra* Section III.D.

<sup>76</sup> Detzner Report, *supra* note 11.

<sup>77</sup> *Early Voting Dates and Absentee Ballot Deadlines for the 2012 General Election*, NAT'L ASS'N SECRETARIES ST., [http://nass.org/index.php?option=com\\_content&view=article&id=223&Itemid=391](http://nass.org/index.php?option=com_content&view=article&id=223&Itemid=391) (last visited Feb. 11, 2013).

<sup>78</sup> Iowa's average was 7.5 minutes. *How Long It Took Different Groups to Vote*, N.Y. TIMES (Feb. 4, 2013), [http://www.nytimes.com/interactive/2013/02/05/us/politics/how-long-it-took-groups-to-vote.html?\\_r=0](http://www.nytimes.com/interactive/2013/02/05/us/politics/how-long-it-took-groups-to-vote.html?_r=0).

<sup>79</sup> *Id.*

<sup>80</sup> Average wait time was 5.8 minutes. *Id.*

<sup>81</sup> BRENNAN CTR. FOR JUSTICE, THE CASE FOR VOTER REGISTRATION MODERNIZATION (2013), *available at* <http://www.brennancenter.org/sites/default/files/publications/Case%20Voter%20Registration%20Modernization.pdf>

<sup>82</sup> *Same-Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Feb. 11, 2013), <http://www.ncsl.org/legislatures-elections/elections/same-day-registration.aspx>.

<sup>83</sup> Amanda Loder, *Long Lines at Polls Not Because of Voter ID Law*, NHPR (Nov. 7, 2012, 6:01 PM), <http://nhpr.org/post/long-lines-polls-not-because-voter-id-law>.

long the delays would have been if people were voting provisionally instead of having the option to re-register.)<sup>84</sup>

Similarly, twelve states allow for online voter registration and online voter registration information updating: Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Kansas, Louisiana, Maryland, Nevada, Oregon, South Carolina, Utah and Washington.<sup>85</sup> Ideally, making it easier for voters to register and update their information will translate to less confusion and time spent at the polls sorting out who votes where. Most states with online voter registration/updating were not the major offenders in 2012, suggesting some correlation between ease of registration/updating and list accuracy.

Some states embracing multiple forms of flexibility seemed to have success in avoiding delays. For example, Nevada offers no-excuse early voting, no-excuse absentee, and online registration and updating; its election went comparatively smoothly, with 8.5 minute wait times according to the 2012 SPAE.<sup>86</sup> Conversely, Pennsylvania and Virginia offer none of these measures. Florida had early voting and absentee options, though on a reduced basis and amidst great voter confusion as discussed below.

### **How the Lack of Flexibility Contributed to Delays**

The relationship of delays to voter flexibility requires further study. Logic suggests that if the more people who are able to vote absentee or during a period of early voting, there will be fewer voters at the polls on Election Day. However, strained election budgets, shifting legislative landscapes, and inadequate voter education are likely to stymie improvements on Election Day wait times that increased voting flexibility might bring.

### **Proposed Solutions**

#### *(1) Expand early voting*

Common Cause and the ACLU propose enacting federal standards for early voting—guaranteeing it for all and eliminating confusion because everyone in the country would be subject to the same rules.<sup>87</sup> In theory, expanded early voting could reduce delays on Election

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<sup>84</sup> Cecilia Chan et al., *Phoenix-Area Voters Frustrated by Long Lines, Provisional Ballots*, AZCENTRAL.COM (Nov. 7, 2012, 4:01 PM), <http://www.azcentral.com/news/politics/free/20121106phoenix-area-voters-complain-given-provisional-ballots.html> (finding that it takes longer for voters to cast a provisional ballot than a regular ballot). Note that this might not be an acceptable alternative given the variation in how provisional ballots are counted. Edward B. Foley, *The Promise and Pitfalls of Provisional Voting*, 73 *Geo. Wash. L. Rev.* 1193 (2005).

<sup>85</sup> *Electronic (or Online) Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Feb. 11, 2013), <http://www.ncsl.org/legislatures-elections/elections/electronic-or-online-voter-registration.aspx>.

<sup>86</sup> *Id.* See also, *Absentee and Early Voting*, *supra* note 67; *How Long It Took Different Groups to Vote*, *supra* note 80.

<sup>87</sup> Martha T. Moore, *Groups Eager to Provide Solutions to Voting Problems*, USA TODAY (Nov. 20, 2012, 12:14 AM), <http://www.usatoday.com/story/news/politics/2012/11/18/voting-problem-answers/1712117/>.

Day. In the 2008 election, over 50% of registered voters in Arizona, Florida, Colorado, Georgia, Nevada, New Mexico and North Carolina's voted early.<sup>88</sup>

Critics of this proposal argue that it would cost the state more to employ officials to disburse and gather ballots for the days of early voting.<sup>89</sup> As resources for hosting elections are already limited,<sup>90</sup> including too few poll workers,<sup>91</sup> it may be hard to transition to early voting at this time. Definitive studies of the cost of early voting are unavailable, however, as some have suggested that the costs of early voting may be offset by reduced costs on Election Day itself.<sup>92</sup> While some scholars have also found evidence that early voting decreases overall voter turnout, other statistics support the opposite conclusion.<sup>93</sup> Following the documented delays in 2010, the Florida Legislature modified its 2011 early voting law by giving local supervisors the flexibility to expand the number of early voting days to 14 (the total number prior to the 2011 amendments) and to provide at least 8 hours but not more than 12 hours per day for early voting.<sup>94</sup> The expansion of early voting was part of a package of reforms adopted by the Florida Legislature to address the delays experienced in 2012.

A further means of expanding early voting may be to increase the number of locations in which early voting may take place. Inadequate facilities for early voting and an inadequate number of early voting locations were among some of the causes cited for long wait times during the early voting period in Florida. Up until now, Florida law limited early voting to the supervisor's main or branch office, city halls and public libraries.<sup>95</sup> In addition to providing the option of expanded days and hours for early voting, Florida's 2013 reforms now authorize supervisors to conduct early voting at any fairground, civic center, courthouse, county commission building, stadium or

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<sup>88</sup> Michael McDonald, *2012 Early Voting Statistics*, U.S. ELECTION PROJECT (Nov. 6, 2012), [http://elections.gmu.edu/early\\_vote\\_2012.html](http://elections.gmu.edu/early_vote_2012.html).

<sup>89</sup> Andrew J. Tobias, *Early Voting Makes Voting More Expensive*, DAYTON DAILY NEWS (Sept. 19, 2012, 6:00 PM), <http://www.daytondailynews.com/news/news/early-voting-makes-elections-more-expensive/nSFnn/>. In *Obama for America v. Husted*, 2012 U.S. Dist. LEXIS 124567, 2012 WL 3765060 (S.D. Ohio Aug. 31, 2012), the court found that the burden placed on the election officials did not outweigh the irreparable harm to voters if early voting was not restored in the three days before Election Day in 2012.

<sup>90</sup> STATE BUDGET CRISIS TASK FORCE, REPORT OF STATE BUDGET CRISIS TASK FORCE, 7-9 (2012).

<sup>91</sup> See *infra* Section III.F.

<sup>92</sup> Margaret Rosenfield, *Innovations in Election Administration 9: Early Voting*, 45-48 (1994).

<sup>93</sup> Gregory L. Giroux, *Arguments For and Against Early Voting Initiatives Are All Over the Map*, C.Q. (Oct. 1, 2004), [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.state.pa.us%2Fportal%2Fserver.pt%2Fdocument%2F486937%2Farguments\\_for\\_and\\_against\\_early\\_voting\\_initiatives\\_are\\_all\\_over\\_the\\_map\\_\\_congressional\\_quarterly\\_pdf&ei=qP8jUZ6NOrPp0QHQu4D4BA&usq=AFQjCNGBceX85-Y69KVznAvl3MOob4Hk-w&bvm=bv.42661473,d.dmQ](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.state.pa.us%2Fportal%2Fserver.pt%2Fdocument%2F486937%2Farguments_for_and_against_early_voting_initiatives_are_all_over_the_map__congressional_quarterly_pdf&ei=qP8jUZ6NOrPp0QHQu4D4BA&usq=AFQjCNGBceX85-Y69KVznAvl3MOob4Hk-w&bvm=bv.42661473,d.dmQ).

<sup>94</sup> Fl. Election Code CS/HB 7013 (passed May 3, 2013). As of the date of this Report, the bill had not yet been presented to the Governor for his approval, but early indications are that he will sign it into law.

<sup>95</sup> Fla. Stat. § 101.657(1) (2011).

convention center.<sup>96</sup> These reforms were hailed by the Florida League of Women Voters as important steps in preventing the long lines that marked the 2012 election.<sup>97</sup>

## (2) *Liberalize absentee voting*

Like early voting, more absentee voting decreases pressure on polling places on Election Day. There is evidence, however, that the total costs in processing and mailing absentee ballots is greater than the cost of in-person early voting.<sup>98</sup> A locality in Wisconsin reports that it costs \$1.78 per person to early vote, and \$4.18 per person to vote absentee by mail.<sup>99</sup> A study of larger jurisdictions should be undertaken to come to a definitive conclusion in regard to cost. The determination of which method would work best will rest with the individual states.

All absentee voting is not the same. The most liberal absentee provisions allow “no-excuse” absentee voting (voters are not required to provide a reason for absence at the polls). Alternatively, states may be able to opt for certain voters to enjoy liberalized absentee voting. For example, Virginia currently has legislation pending that would allow no-excuse absentee voting for people over 65.<sup>100</sup> Virginia poll workers reported that curbside voting (often elderly voters)<sup>101</sup> can be a major source of delays; according to Virginia election officials, election data on the numbers of curbside voters per locality matches up with the locations of the delays. Encouraging this population in particular to vote absentee would therefore have advantages.<sup>102</sup>

Absentee voting shares some of the same drawbacks as early voting. People who vote absentee by mail may choose to send their ballots long in advance of the election, missing out on final developments and new policy discussions. In states that allow voters to obtain absentee ballots in person “on demand” and cast them the same day, the administrative burden on elections staff, especially immediately prior to the election, has been said to contribute to other administrative problems.<sup>103</sup> In addition, fraud is more prevalent with voting by mail than in-person voting, raising concerns over the security of the election—a paramount concern for the credibility of any

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<sup>96</sup> *Supra* note 96

<sup>97</sup> Press Release, “The League of Women Voters of Florida Responds to the Legislature’s of Historic Election Reform,” May 3, 2013, <http://myemail.constantcontact.com/League-Responds-to-Legislature-s-Passage-of-Historic-Election-Reform.html?soid=1103316066537&aid=3jMeV4WnE48>.

<sup>98</sup> *Absentee Voting Information*, HOWARDS GROVE, WI., <http://www.howardsgrove.org/index.aspx?NID=864> (last visited Mar. 16, 2013). Note that a study of the larger jurisdiction must be made for any definitive conclusions as to the impact of method of voting on cost.

<sup>99</sup> *Id.*

<sup>100</sup> *SB 742*, VA. LIS, (Feb. 4, 2013), <http://leg1.state.va.us/cgi-bin/legp504.exe?131+sum+SB724>. Though there could be equal protection concerns. *See generally* *Obama for America v. Husted*, 697 F.3d 423 (6th 2012).

<sup>101</sup> Curbside voting is allowed for disabled voters and people over 65, and officials believe that about half of curbside voters use the option because they are over 65. Interview with policy analyst, Virginia State Board of Elections (Feb. 2013).

<sup>102</sup> *Id.*

<sup>103</sup> Detzner Report, *supra* note 11 at 9.

election scheme.<sup>104</sup> And even when there is no fraud, absentee ballots are more likely to be rejected or subjected to legal challenge.<sup>105</sup>

### (3) *Establish more convenient “vote centers”*

Some states have already experimented with the vote center model that locates polling places in areas viewed as more convenient to voters (for example, in shopping malls). Voters are allowed to vote in any vote center in the jurisdiction, instead of being assigned to a specific precinct. Counties in Indiana have the authority to establish vote centers. Bartholomew County experienced significant delays in 2012 and in response is looking into switching from precinct-based voting to vote centers. Indiana officials have reported that the convenience of vote centers, which also function as satellite absentee voting locations, have helped reduce lines.<sup>106</sup> There is no accepted answer as to why that is the case, but localities’ plans are suggestive of an ability to centralize resources and poll-worker knowledge.<sup>107</sup> However, in Galveston County, Texas, vote center workers almost universally did not start the computers in time for polls to open, causing hours of delays.<sup>108</sup> Colorado also experienced delays at vote centers.<sup>109</sup>

### (4) *Run all-mail elections*

Oregon and Washington have all-mail elections so no voters wait in line in those states. Research also indicates that all-mail elections are inexpensive to administer (despite the expenses of absentee balloting because there is no “Election Day” with its attendant personnel and equipment costs) and their convenience increases turnout (Oregon and Washington are consistently among the states with the highest turnout, and a recent research paper relates that Washington’s switch to all-mail voting caused participation to increase by 2-4% in each

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<sup>104</sup> Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES (Oct. 6, 2012), [http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0).

<sup>105</sup> *Id.* Among the reforms adopted in 2013 by the Florida Legislature is a requirement that local supervisors notify an absentee voter of a missing signature on the secrecy envelope and permit the elector to submit an affidavit attesting to having cast the ballot in order to receive a new absentee ballot before canvassing begins. *Supra* note 96. This will reduce the number of absentee ballots rejected as illegal due to voter’s omissions. *Id.*

<sup>106</sup> *Bartholomew County Eyes Voting Centers After Delays*, WISHTV.COM (Nov. 11, 2012, 10:14 AM), [http://www.wishtv.com/dpp/news/local/south\\_central/county-eyes-voting-centers-after-delays](http://www.wishtv.com/dpp/news/local/south_central/county-eyes-voting-centers-after-delays).

<sup>107</sup> MONROE CNTY., MONROE COUNTY VOTE CENTER COUNTY APPLICATION (Feb. 22, 2011), *available at* [http://www.co.monroe.in.us/TSD/DesktopModules/Bring2mind/DMX/Download.aspx?TabID=140&Command=Core\\_Download&EntryId=26326&PortalId=0&TabId=140](http://www.co.monroe.in.us/TSD/DesktopModules/Bring2mind/DMX/Download.aspx?TabID=140&Command=Core_Download&EntryId=26326&PortalId=0&TabId=140).

<sup>108</sup> T.J. Aulds, *Galveston County Polls Stay Open Late to Make Up for Morning Delays*, KHOU.COM (Nov. 6, 2012, 9:09 PM), <http://www.khou.com/news/local/Some-Galveston-County-polling-centers-delayed-in-opening-177469261.html>.

<sup>109</sup> Sam Levin, *Colorado’s Longest Wait to Vote? Reports of Three-Hour Delays at Aurora’s CentrePoint Plaza*, DENV. WESTWORD BLOGS (Nov. 6, 2012, 5:06 PM), [http://blogs.westword.com/latestword/2012/11/colorado\\_voting\\_longest\\_wait\\_aurora\\_centrepoint\\_plaza.php](http://blogs.westword.com/latestword/2012/11/colorado_voting_longest_wait_aurora_centrepoint_plaza.php).

county).<sup>110</sup> The downside of all-mail elections is concerns over fraud.<sup>111</sup> Oregon has experienced few incidents of individual fraud since it switched over in 1998.<sup>112</sup> Another reported downside of all-mail voting is a higher error rate, likely because people sitting at home voting do not have election officials in close proximity to answer their questions.<sup>113</sup> However, this information is taken only from anecdotal statements from partisan elected officials. An objective study of this experience in these states would be helpful to reach a conclusion about the safety versus the convenience of this method.

(5) *Institute an Election Day holiday*

Several observers have suggested making Election Day a holiday.<sup>114</sup> The theory is that an Election Day holiday would more evenly disburse crowds throughout the day, reducing clustered delay caused by voters attempting to vote before and after the workday.<sup>115</sup> An Election Day holiday would also free up more buildings and parking lots for use as (or in service of) polling sites. In many countries around the world, Election Day is a national holiday.<sup>116</sup> Skeptics of this proposal suggest that Americans would treat an Election Day holiday as a vacation and be less, not more, likely to vote.<sup>117</sup> They point to those states that provide government employees paid leave on Election Day and note that there has not been an increase in turnout.<sup>118</sup>

(6) *Schedule voting on the weekend*

Why Tuesday? is an interest group that, for many of the same reasons advanced for an Election Day holiday, supports national legislation to move elections to the weekend.<sup>119</sup> Detractors of this

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<sup>110</sup> Alan S. Gerber, Gregory A. Huber & Seth J. Hill, Identifying the Effects of Elections Held All-Mail on Turnout: Staggered Reform in the Evergreen State 3 (June 29, 2012) (unpublished manuscript), *available at* [http://huber.research.yale.edu/materials/28\\_paper.pdf](http://huber.research.yale.edu/materials/28_paper.pdf).

<sup>111</sup> Sarah Jane Capper & Michael Ciaglo, *The Real Vote-Fraud Opportunity Has Arrived: Casting Your Ballot by Mail*, NBCNEWS.com (Sept. 25, 2012, 10:13 AM), [http://openchannel.nbcnews.com/\\_news/2012/09/25/14092264-the-real-vote-fraud-opportunity-has-arrived-casting-your-ballot-by-mail?lite](http://openchannel.nbcnews.com/_news/2012/09/25/14092264-the-real-vote-fraud-opportunity-has-arrived-casting-your-ballot-by-mail?lite).

<sup>112</sup> Phil Keisling, *Sunday Dialogue: To Enhance Democracy, Expand Vote-by-Mail*, N.Y. TIMES (Oct. 20, 2012), [http://www.nytimes.com/2012/10/21/opinion/sunday/sunday-dialogue-to-enhance-democracy-expand-vote-by-mail.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2012/10/21/opinion/sunday/sunday-dialogue-to-enhance-democracy-expand-vote-by-mail.html?pagewanted=all&_r=2&).

<sup>113</sup> Alan Boyle, *Report Sees Decline in Voting Glitches...but Vote-by-Mail Sparks Concern*, NBCNEWS.COM (Oct. 18, 2012, 12:00 AM), [http://cosmiclog.nbcnews.com/\\_news/2012/10/17/14515701-report-sees-decline-in-voting-glitches-but-vote-by-mail-sparks-concern?lite](http://cosmiclog.nbcnews.com/_news/2012/10/17/14515701-report-sees-decline-in-voting-glitches-but-vote-by-mail-sparks-concern?lite); Keisling, *supra* note 118.

<sup>114</sup> See, e.g., Martin P. Wattenberg, *Should Election Day Be a Holiday?*, ATLANTIC MONTHLY (Oct. 1998), <http://www.theatlantic.com/magazine/archive/1998/10/should-election-day-be-a-holiday/305082/> (proposing making Veterans Day a voting holiday).

<sup>115</sup> *Early Voting, Absentee Voting and Election Day as a Holiday*, FAIR VOTE RIGHT TO VOTE INITIATIVE, <http://archive.fairvote.org/?page=66> (last visited Mar. 26, 2013).

<sup>116</sup> Chris Mautner, *Should Election Day Be on the Ballot?*, PATRIOT-NEWS (Nov. 5, 2012, 6:05 AM), [http://blog.pennlive.com/life/2012/11/post\\_31.html](http://blog.pennlive.com/life/2012/11/post_31.html).

<sup>117</sup> Henry S. Farber, *Increasing Voter Turnout: Is Democracy Day the Answer?* (CEPS, Working Paper No. 181, 2009), available at <http://www.princeton.edu/ceps/workingpapers/181farber.pdf>.

<sup>118</sup> *Id.*

<sup>119</sup> WHY TUESDAY?, <http://www.whytuesday.org/> (last visited Feb. 11, 2013).



idea point out that several major religions have days of worship on the weekend, so it may be harder to encourage people to vote and could create problems with discrimination. Also, many service jobs require people to work on the weekends, so some people would still be prevented from taking advantage of the flexibility.<sup>120</sup>

(7) *Hold elections online*

States, in partnership with the federal government, have been experimenting with Internet or email voting for overseas and military voters for over a decade.<sup>121</sup> New Jersey allowed voters affected by Superstorm Sandy to cast ballots by email and fax.<sup>122</sup> However, online voting has a ways to go before becoming a politically popular or technologically feasible option for wide-scale implementation in part because federal government and academic experts believe online/email voting is not completely secure.<sup>123</sup> Famously, a Michigan University student hacked a pilot Internet voting system during a test period in Washington, DC, making the system play the Michigan fight song every time a vote was cast.<sup>124</sup>

(8) *Allow same day registration*

Groups like Common Cause propose modernizing registration by undertaking several reforms: (1) automating registration and allowing agencies to swap information; (2) making state registration records portable so voters do not have to file separate changes of address with the election authorities; and (3) allowing voters to change their records over the Internet, and letting them make changes through Election Day.<sup>125</sup> The Brennan Center has offered a substantially similar proposal. A new federal bill, the Voter Empowerment Act, includes many of these suggested reforms.<sup>126</sup> Pew has indicated its support as well.<sup>127</sup> Nevertheless, Election Day

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<sup>120</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-69, VIEWS ON IMPLEMENTING FEDERAL ELECTIONS ON A WEEKEND (2012), available at <http://www.gao.gov/assets/590/587621.pdf>.

<sup>121</sup> See, e.g., FVAP, VOTING OVER THE INTERNET PILOT PROJECT ASSESSMENT REPORT (2001), available at <http://www.fvap.gov/resources/media/voi.pdf>.

<sup>122</sup> Brandon Griggs, *New Jersey Lets Sandy Victims Vote Via E-Mail*, CNN (Nov. 5, 2012, 12:04 PM), <http://www.cnn.com/2012/11/05/tech/web/new-jersey-voting-email>.

<sup>123</sup> Curt Anderson, *Long Lines, Confusion Reveal Flaws in US Elections*, MERCURYNEWS.COM (Nov. 7, 2012, 12:50 PM), [http://www.mercurynews.com/presidentelect/ci\\_21950532/long-lines-confusion-reveal-flaws-us-elections](http://www.mercurynews.com/presidentelect/ci_21950532/long-lines-confusion-reveal-flaws-us-elections).

<sup>124</sup> Mike DeBonis, *Hacker Infiltration Ends D.C. Online Voting Trial*, WASH. POST (Oct. 4, 2010), [http://voices.washingtonpost.com/debonis/2010/10/hacker\\_infiltration\\_ends\\_dc\\_on.html](http://voices.washingtonpost.com/debonis/2010/10/hacker_infiltration_ends_dc_on.html).

<sup>125</sup> Moore, *supra* note 89.

<sup>126</sup> *House Democrats Introduce Voter Empowerment Act*, OFFICE DEMOCRATIC WHIP STENY HOYER (May 17, 2012), <http://www.democraticwhip.gov/content/house-democrats-introduce-voter-empowerment-act>; Wendy R. Weiser, *Modernization Can Fix Long Voting Lines*, CENTER FOR JUST. (Nov. 12, 2012), <http://www.brennancenter.org/blog/modernization-can-fix-long-voting-lines>.

<sup>127</sup> *Upgrading Voter Registration*, PEW CHARITABLE TR. (Mar. 14, 2011), <http://www.pewstates.org/research/featured-collections/upgrading-voter-registration-85899376407>.

registration is controversial in some quarters, and opposed by those who believe it could increase fraud or other voting errors.<sup>128</sup>

(9) *Modernize (or eliminate) voter registration*

Creating a more efficient and accurate method of registration will address many problems at the polls on Election Day.<sup>129</sup> Or, perhaps states should follow North Dakota's example and eliminate voter registration altogether. Instead, poll workers check each voter's credentials at the polls. North Dakota has not reported any enhanced fraud concerns, and lines in North Dakota in 2012 were minimal (reporting an average of under 10 minute wait times in 2012).<sup>130</sup> Still, skeptics might point out that such a system would create massive delays in higher density states.

### C. VOTING TECHNOLOGY

Funding to the states to purchase new voting machines provided by the 2002 Help America Vote Act (HAVA) prompted deployment of various voting technologies, ranging from optical scanners and direct record electronic (DRE) voting machines to centralized state voter registries to electronic poll books. Drafters of the statute and election administrators nationwide hoped that these technologies would prevent the problems seen during the 2000 presidential election.<sup>131</sup> But technologies purchased and implemented in the wake of HAVA lacked continuing funding. With the downturn in the economy, as a general matter states have been unable to afford replacement machines leaving these states with technology that is now over a decade old and heavily used.<sup>132</sup> Predictably, breakdowns are more common as machines age, leading to fewer functioning machines, and causing delays at polling places. Problems with voting technology culminated in voting delays in several states on November 6, 2012.<sup>133</sup>

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<sup>128</sup> See e.g., Dee J. Hall, *Walker Signals Ending Same-Day Voter Registration*, Associated Press (Nov. 20, 2012) available at [http://host.madison.com/wsj/news/local/govt-and-politics/elections/article\\_64ecf9c0-3292-11e2-b4df-001a4bcf887a.html#.UKudIbhNr\\_4.twitter](http://host.madison.com/wsj/news/local/govt-and-politics/elections/article_64ecf9c0-3292-11e2-b4df-001a4bcf887a.html#.UKudIbhNr_4.twitter)

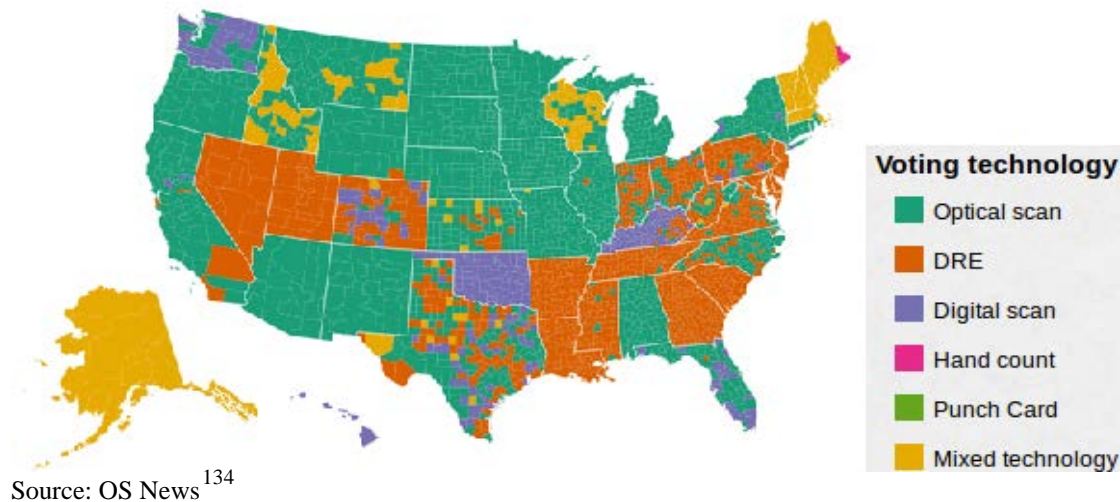
<sup>129</sup> See *infra* Sections III.F-G.

<sup>130</sup> Joseph Rendeiro, *No Voter Registration, No Voter Fraud – That's North Dakota!*, OHMYGOV (July 17, 2008, 10:00 AM), [http://blog.ohmygov.com/blogs/general\\_news/archive/2008/07/17/no-voter-registration-no-voter-fraud-that-s-north-dakota.aspx](http://blog.ohmygov.com/blogs/general_news/archive/2008/07/17/no-voter-registration-no-voter-fraud-that-s-north-dakota.aspx).

<sup>131</sup> R. MICHAEL ALVAREZ ET AL., *VOTING: WHAT HAS CHANGED, WHAT HASN'T, AND WHAT NEEDS IMPROVEMENT* 9 (2012).

<sup>132</sup> LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 23; Brad Plumer, *A Quarter of Americans Will Vote by Electronic Machine. Is That a Problem?* WASH. POST (Nov. 6, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/06/thirty-percent-of-americans-will-vote-by-electronic-machine-is-that-a-problem/>.

<sup>133</sup> *Id.*



Addressing deficiencies in U.S. voting technologies has been widely discussed since HAVA’s passage.<sup>135</sup> Some studies have attempted to identify states with the most pressing voting technology challenges.<sup>136</sup> The discussion below reviews voting technology problems from the November 6, 2012 election with an eye towards understanding the principal sources.

### Types of Voting Technology Most Responsible for Delays in 2012

The most recent data surveyed in Section II of this Report suggest that voting machines were less of a cause of delay in 2012 than previously assumed. Still, reporting on the 2012 election suggested three broad classes of technology used on Election Day impacted delays: DRE machines, optical scanners with paper ballots, and electronic poll books (EPBs) used at check in. Voters and election observers most frequently singled out DRE machines.<sup>137</sup> In some states voter confidence may have played a part in the delays by leading voters to wait in line for their preferred technology instead of using a less preferred technology.<sup>138</sup>

Each of these classes of technology faced unique and individual problems, though one problem appears common to all: an insufficient number of machines.<sup>139</sup> Voter complaints about an

<sup>134</sup> Howard Fosdick, *U.S. Voting Technology: Problems Continue*, OS NEWS (Nov. 8, 2012), [http://www.osnews.com/story/26538/U\\_S\\_Voting\\_Technology\\_Problems\\_Continue](http://www.osnews.com/story/26538/U_S_Voting_Technology_Problems_Continue).

<sup>135</sup> See e.g., PAUL HERNNSON, *VOTING TECHNOLOGY: THE NOT SO SIMPLE ACT OF CASTING A BALLOT* (2006); Robert M. Stein et al., *Voting Technology, Election Administration, and Voter Performance*, 7 *ELECTION L.J.* 123 (2008); Richard G. Smolka, *Voting Technology Found to Be a Challenge to Voters*, 8 *ELECTION L.J.* 65 (2009).

<sup>136</sup> Most notably, the PEW Election Performance Index (EPI) includes an indicator that measures voting technology accuracy. The states that scored highest on PEW’s ranking on the technology indicator (using data from the 2008 election) included Tennessee, Illinois, Kentucky, Wyoming, and Massachusetts.

<sup>137</sup> *Id.*

<sup>138</sup> This is a proposed connection that requires further study.

<sup>139</sup> Greg Gordon & Tony Pugh, *Voters Endure Delays, Lines and Misinformation to Cast Ballots*, MCCLATCHY (Nov. 6, 2012), <http://www.mcclatchydc.com/2012/11/06/173871/voters-endure-delays-lines-and.html>

inadequate number of voting machines were reported in 2004 and 2008, and some believe that insufficient machines decreased voter turnout in those elections.<sup>140</sup> The inadequate number of machines may be due, at least partially, to budget constraints in recent years.<sup>141</sup>

### *DRE Machines*

Complaints about DRE machines came in two general categories: insufficient supply of machines and machine malfunction.<sup>142</sup> One malfunction, “vote flipping,” gained significant notoriety despite the rarity of the complaint and the speed with which precincts addressed reported problems.<sup>143</sup> DRE vote-flipping is a glitch in which the voting machine reportedly “flips” the vote intended for one candidate to another. In 2012, sporadic DRE vote flipping issues were reported in North Carolina, Nevada, Texas, Colorado, Missouri, Virginia, and Ohio.<sup>144</sup> In one Greensboro, North Carolina example, the *Raleigh Telegram* reported that voting machines were casting votes voters did not intend. One voter “complained that they [sic] tried to vote for Mitt Romney three times but that the ballot cast was instead for Barack Obama.”<sup>145</sup>

More often more mundane malfunctions rendered DRE machines temporarily unavailable to voters.<sup>146</sup> Sources of problems included:

Improperly programmed cards used to clear vote tallies from machines before voting begins, requiring poll workers to reset the machines before votes could be cast;<sup>147</sup>

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<sup>140</sup> Benjamin Highton, *Long Lines, Voting Machine Availability, and Turnout: The Case of Franklin County, Ohio in the 2004 Presidential Election*, PS ONLINE, 65-66 (2006), available at [http://faculty.psdomain.ucdavis.edu/bhighton/copenhagen2012/readings/Highton\\_lines\\_ps\\_2006.pdf](http://faculty.psdomain.ucdavis.edu/bhighton/copenhagen2012/readings/Highton_lines_ps_2006.pdf); Noam M. Levey, *Long Lines Might Deter Voters, Election Watchers Say*, L.A. TIMES (Nov. 2, 2008), <http://articles.latimes.com/2008/nov/02/nation/na-voting2>.

<sup>141</sup> STATE BUDGET CRISIS TASK FORCE, *supra* note 92; Plumer, *supra* note 138; Ann E. Marimow, *Long Voting Lines Blamed on High Turnout, Too-Few Poll Workers and Voting Machines*, WASH. POST (Nov. 7, 2012), [http://articles.washingtonpost.com/2012-11-07/local/35504612\\_1\\_poll-workers-electronic-machines-touch-screen-machines](http://articles.washingtonpost.com/2012-11-07/local/35504612_1_poll-workers-electronic-machines-touch-screen-machines) (Virginia enacted a statute barring localities from purchasing new DRE machines, preventing some localities from replacing older machines or purchasing new ones to accommodate a growing population); Plumer, *supra* note 138).

<sup>142</sup> Mark Clayton, *Voting-Machine Glitches: How Bad Was It on Election Day Around the Country?*, CHRISTIAN SCI. MONITOR (Nov. 7, 2012), <http://www.csmonitor.com/USA/Elections/2012/1107/Voting-machine-glitches-How-bad-was-it-on-Election-Day-around-the-country>.

<sup>143</sup> Steve Watson, *Reports of Voting Machines Problem, Vote Flipping Begin to Pour In*, INFOWARS.COM (Nov. 6, 2012), <http://www.infowars.com/reports-of-voting-machine-problems-vote-flipping-begin-to-pour-in/>

<sup>144</sup> Eric Shawn, *Claims Increase of Machines Switching Votes in Ohio, Other Battlegrounds*, FOX NEWS (Nov. 2, 2012), <http://www.foxnews.com/politics/2012/11/02/claims-increasing-switched-votes-in-ohio/>

<sup>145</sup> *Some North Carolina Touch Screen Voting Machines Cast Wrong Ballots*, RALEIGH TELEGRAM (Nov. 6, 2012), <http://raleightelegram.com/201211063793/>

<sup>146</sup> *Id.*

<sup>147</sup> *Voting Machine Problems Delay Some Ind. Voters*, WANE.COM (Nov. 6, 2012), <http://www.wane.com/dpp/news/indiana/voting-machine-problems-delay-some-ind-voters-mbe>. The *Toledo Blade* reports that some 100 voters were unable to cast ballots this morning in Bedford, Ohio, because a voting machine

DRE machines set to the incorrect time;<sup>148</sup> and

Unexplained outages<sup>149</sup>

Miscellaneous malfunctions exacerbated delays in some states because of an insufficient initial supply of alternate machines.<sup>150</sup> Thus far, only anecdotal evidence of machine malfunction is available making it difficult for specific causes to be analyzed further.

### *Electronic Poll Books*

Most EPB-related delays appeared to be local and specific in nature. Given that, on average, wait times appear to have been longest for voters waiting to check in (see **Table 6** in Section II), policy makers should focus greater attention on efficiencies of EPBs. In 2012, examples of EPB malfunction included:

In Georgia poll workers noted that the EPBs accessed out-of-date voter registration information;<sup>151</sup>

In Kansas the EPBs were incompatible with the signature pads, causing them to not be used on Election Day, and the vendor software failed to incorporate the updated voter registry;<sup>152</sup>

In Virginia a number of poll workers had problems hooking up the EPBs at the beginning of the day and had trouble keeping the machines running properly.<sup>153</sup>

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was not working. Officials said that a memory card had to be replaced. Long lines led to people walking away. *Voting Machine Problems Lead to Voters Not Casting Ballots*, TOLEDO BLADE (Nov. 6, 2012), <http://www.toledoblade.com/local/2012/11/06/Voting-machine-snafu-leads-to-voters-not-casting-ballots.html>

<sup>148</sup> *Crawford Voting Officials Deal with Wrong Signs, Machine Problems*, ERIE TIMES (Nov. 6, 2012), <http://www.goerie.com/article/20121106/NEWS02/311069920/Crawford-voting-officials-deal-with-wrong-signs-machine-problems>

<sup>149</sup> In Dubuque, Iowa, more voters were delayed when machines failed to operate for around forty-five minutes after the polling station opened. Watson, *supra* note 149; *see also* Charles Reynolds, *Milford Township Experiences Early Voting Machine Problems*, EXAMINER (Nov. 6, 2012), <http://www.examiner.com/article/milford-township-experiences-early-voting-machine-problems#main-content>. In Fredericksburg, Virginia voters were turned away from one precinct after all of the voting machines broke down and poll workers ran out of paper ballots. *See Long Lines, Scattered Glitches in Md., Va., and D.C. on Election Day*, WTOP (Nov. 6, 2012, 10:06am), <http://www.wtop.com/41/3108307/Long-lines-scattered-glitches-in-Md-Va-DC-on-Election-Day>

<sup>150</sup> *Id.*

<sup>151</sup> Clayton, *supra* note 148.

<sup>152</sup> Rick Plumlee, *Vendors Must Fix Electronic Poll Books, Election Officials Say*, WICHITA EAGLE (Nov. 12, 2012, 1:06 AM), <http://www.kansas.com/2012/11/12/2565533/vendor-must-fix-electronic-poll.html>.

<sup>153</sup> Mike Saewitz, *Chesapeake's Electronic Poll Books Were Election Day Villains*, VA. PILOT (Nov. 6 2008), <http://hamptonroads.com/2008/11/chesapeake-electronic-poll-books-were-votingdelay-villains>.

## *Optical Scan Machines*

Fewer reports link Election Day delays to optical scan machines with paper ballots. Some delays stemmed from the lack of enough optical scanners, which does not implicate the technology itself.<sup>154</sup> Long ballots could lead to delays in the case of optical scanning because they take more time to scan.<sup>155</sup> For example, in Miami-Dade County, Florida the number of ballot pages scanned increased to 4,440,165 in 2012 from 1,751,278 in 2008.<sup>156</sup> Cuyahoga County, Ohio experienced some complaints when some optical scan machines jammed, leading to the replacement of at least one.<sup>157</sup> In some municipalities, it appears that optical scan machines failed to scan paper ballots after they were inserted, though these reports did not necessarily correspond with delays.<sup>158</sup>

### **Where Were Problems Reported?**

Based on an analysis of reports of technology problems on Election Day 2012, the states listed below experienced delays related to problems with at least one type of voting technology.<sup>159</sup>

Ohio	Virginia	Florida
Iowa	Wisconsin	Indiana
North Carolina	Massachusetts	Pennsylvania
Missouri	Georgia	Tennessee
South Carolina	Arkansas	California
Texas	Nevada	Colorado
Arizona	New York	Michigan

The states where most technology issues were reported in 2012 were Ohio (18 reports), Colorado (17), Pennsylvania (12), and Virginia (11). While potentially a measure of how “talked about”

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<sup>154</sup> Emily Monacelli, *Long Ballots, Voter Errors Caused Slow Voting Lines at WMU’s Bernhard Center*, MICH. LIVE (Nov. 7, 2012), [http://www.mlive.com/news/kalamazoo/index.ssf/2012/11/long\\_ballots\\_voter\\_errors\\_caus.html](http://www.mlive.com/news/kalamazoo/index.ssf/2012/11/long_ballots_voter_errors_caus.html).

<sup>155</sup> *Long Lines and Long Ballots Might Discourage Voters*, WSVN.COM (Nov. 5, 2012), <http://www.wsvn.com/news/articles/politics/21008984876196/long-lines-and-long-ballots-might-discourage-voters/>.

<sup>156</sup> Miami-Dade After Action Report, at 2.

<sup>157</sup> J. Nicholas Hoover, *Election 2012: New Voting Tech Caused Some Headaches*, INFO. WEEK (Nov. 7, 2012), <http://www.informationweek.com/government/information-management/election-2012-new-voting-tech-caused-som/240062512>

<sup>158</sup> Chloe Morrison, *Local Democrats Report Polling Machine Malfunctions, Election Commission Leaders Say Issues Have Been Corrected*, NOOGA.COM (Nov. 6, 2012), <http://www.nooga.com/158258/local-democrats-report-polling-machine-malfunctions-election-commission-leaders-say-issues-have-been-corrected/>

<sup>159</sup> LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 23. While this was the main listing of generally reported problems, individual reports were garnered from most of the sources cited in this piece.

technology issues were in 2012, note however, that these figures are highly unscientific since they are based on unconfirmed news reporting and multiple sources may have been reporting on the same malfunctions.

## Proposed Solutions

### (1) *Increase the number of available machines*

Increasing the number of available machines would increase the voting capacity of each precinct, allowing more voters to cast ballots simultaneously.<sup>160</sup> Note, however, that the vast majority of precincts throughout the country did not experience delays in 2013. Increasing the number of machines, therefore, should be targeted to those precincts historically experiencing delays.

### (2) *Authorize the use of emergency paper ballots*

At precincts with DRE-only voting, the use of emergency paper ballots labeled as such and not to be confused with provisional ballots, could mitigate delays.<sup>161</sup> Where delays build up during peak hours, the use of emergency paper ballots could act as a release valve.<sup>162</sup>

### (3) *Develop a National Clearinghouse*

The Brennan Center proposed the development of a national clearinghouse of voting machine problems.<sup>163</sup> This would involve poll workers updating a central database when machines malfunction, listing the cause of the malfunction and the solution used to fix it. The database would then generate data for election administrators pinpointing common malfunctions and allowing jurisdictions to pre-train poll workers on best practices for addressing machine malfunction.

### (4) *Improve existing machines.*<sup>164</sup>

The development and certification of new voting technology is expensive and, without a guaranteed market for the machine, entails large risks for developers. The state or federal government could mitigate some risks through partial funding for the research or lowering the costs of certification.<sup>165</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> SAVE OUR VOTES, HOW CAN WE PREVENT LONG LINES FROM DISENFRANCHISING VOTERS IN THIS YEAR'S ELECTION?, *available at*, <http://voteraction.org/files/7-23-emergencyballots-sov.pdf>.

<sup>162</sup> *Id.*

<sup>163</sup> Lawrence Norden, *Simple Solutions to Fix Voting Machines*, BRENNAN CENTER FOR JUST. (Nov. 7, 2012), <http://www.brennancenter.org/blog/simple-solutions-fix-voting-machines>. Note that the Election Assistance Commission already performs this function to some extent. *See* [http://www.eac.gov/testing\\_and\\_certification/voting\\_system\\_reports.aspx](http://www.eac.gov/testing_and_certification/voting_system_reports.aspx).

<sup>164</sup> Interview with Kirk Showalter, City of Richmond General Registrar, Greg Riddlemoser, Stafford County General Registrar & Al Ablowich, Member of the Virginia Beach Electoral Board (Feb. 21, 2013).

<sup>165</sup> *Id.*

(5) *Create an enterprise fund*

Some propose states employ an enterprise fund dedicated to the purchase and maintenance of future voting machines.<sup>166</sup> This could ease the financial burden on localities by allowing the purchase of voting machines over time instead of forcing a large one-time financial commitment. However, this would require a funding plan to prepare for state budget shortfalls, and the idea leaves open the question of where the money for such a fund should come from.

(6) *Negotiate better service terms with vendors or penalize non-performance*

In at least one state, Florida, it has been proposed that vendors be subjected to administrative fines or penalties for poor performance. Currently, the Florida Elections Division can only decertify equipment of vendors who fail to perform, therefore lacking flexibility to address various issues.<sup>167</sup>

## D. BALLOT LENGTH

Ballot design first arose as a publicly visible election administration issue as the nation watched the infamous butterfly ballot disaster unfold in Palm Beach County, Florida in 2000.<sup>168</sup> Much of the research since 2000 on ballot design has focused on the problem of consequent lost votes and voter confusion.<sup>169</sup> Distinct from ballot design, ballot *length* has arisen as a prominent cause of election delay, particularly in recent years. This section will examine the extent to which ballot length caused delays on Election Day 2012.

Most research on ballot length is focused on the impact of ballot length on voter confusion, abstention from referenda, and low voter awareness.<sup>170</sup> Long ballots tend to be confined to western states where initiatives and referenda are more frequently used.<sup>171</sup> Paul Herrnson has

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<sup>166</sup> FAIRFAX CNTY., VA, FINAL REPORT OF THE BI-PARTISAN ELECTION PROCESS IMPROVEMENT COMMISSION 12 (2013), available at <http://www.fairfaxcounty.gov/electioncommission/election-commission-report.htm>.

<sup>167</sup> Detzner Report, *supra note* 11 at 10. This recommendation was not taken up by the Florida Legislature as part of its 2013 reforms.

<sup>168</sup> *Bad Ballot Design Results in Staggering Number of Lost Votes*, BRENNAN CENTER FOR JUST. (July 21, 2008), <http://www.brennancenter.org/press-release/bad-ballot-design-results-staggering-numbers-lost-votes>.

<sup>169</sup> *Id.*; see also Jessie Scanlon, *Wanted: A Legible Voting Ballot*, SLATE (Oct. 6, 2003), [http://www.slate.com/articles/business\\_and\\_tech/design/2003/10/wanteda\\_legible\\_voting\\_ballot.html](http://www.slate.com/articles/business_and_tech/design/2003/10/wanteda_legible_voting_ballot.html).

<sup>170</sup> Peter Selb, *Supersized Votes: Ballot Length, Uncertainty, and Choice in Direct Legislation Elections*, 135 PUB. CHOICE, June 2008, at 319, 321.

<sup>171</sup> *Id.* (The longest ballots noted in the study were in Oregon, which averaged 6.6 propositions per ballot between 1960 and 2004, and California, which averaged 11.7 propositions per ballot in the same period. In 1988, with voter turnout at its lowest, California's ballot length peaked when 29 propositions appeared. Oregon's ballot length peaked in 2000, during a modest increase in voter turnout from its lowest point in 1996, with 31 propositions, granting this ballot the record for length). Bucking the trend of mostly western states with long ballot initiatives, Florida also had a notoriously long ballot in the 2012 election. See Brady Dennis, *Florida's Lengthy Ballot Could*



noted that longer ballots tend to lead to more voting errors.<sup>172</sup> The concern with voters' ability to decipher ballots and weigh in on all the issues may have overshadowed problems with election delays until recently. Delays associated with lengthy ballots may have been obscured because between 1960 and 1996 voter turnout was declining,<sup>173</sup> which may have offset any delays at the voting booth due to lengthy ballots. Some posited that long ballots, which usually contain more initiatives, led to "choice fatigue," leading voters to abstain from measures appearing later on the ballot, an effect known as "roll off."<sup>174</sup> Abstention, which may somewhat standardize voting time because voters will only vote on a certain number of issues, may explain the focus on lost votes instead of delays.<sup>175</sup> It should be noted that in 2008 a few Oregon precincts faced delays in ballot tabulation because the ballot, 3 inches longer than usual, took longer to run through the optical scan machine.<sup>176</sup>

In 2012, the length of ballots in several locations drew national attention as delays grew in the areas with the longest ballots.<sup>177</sup> The idea that long ballots create long lines seems logical. The average person reads approximately 300 words per minute,<sup>178</sup> meaning that a 4,000 word ballot<sup>179</sup> will take the average person 13 minutes and 20 seconds to read. Parsing the complex language of propositions may take longer since comprehension limits maximum reading speed.<sup>180</sup> Another suggestion is that recent delays may be due to an increase in the saliency of propositions.<sup>181</sup> Some argue that increased use of electronic voting machines has led to a decline in roll off.<sup>182</sup> Others posit the opposite effect, claiming that technology that uses a full-face ballot

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*Cause Serious Problems*, WASH. POST (Nov. 5, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/05/floridas-lengthy-ballot-causing-serious-problems/>.

<sup>172</sup> Sara Blumberg, *Long Ballot Could Give Rise to Lots of Mistakes*, CAPITAL GAZETTE (Nov. 4, 2012), [http://www.capitalgazette.com/news/election/long-ballot-could-give-rise-to-lots-of-mistakes/article\\_ccebec1f-c7a7-57b6-b7eb-2184832a6d8f.html](http://www.capitalgazette.com/news/election/long-ballot-could-give-rise-to-lots-of-mistakes/article_ccebec1f-c7a7-57b6-b7eb-2184832a6d8f.html).

<sup>173</sup> Michael P. McDonald, *Turnout in the 2012 Presidential Election*, HUFFINGTON POST (Feb. 11, 2013), [http://www.huffingtonpost.com/michael-p-mcdonald/turnout-in-the-2012-presi\\_b\\_2663122.html](http://www.huffingtonpost.com/michael-p-mcdonald/turnout-in-the-2012-presi_b_2663122.html) (There was a notable jump in voter turnout during the 1992 presidential election with another drop for the 1996 mid-term election.).

<sup>174</sup> Ned Augenblick & Scott Nicholson, *Ballot Position, Choice Fatigue, and Voter Behavior 2* (2012), *available at* [http://faculty.haas.berkeley.edu/ned/Choice\\_Fatigue.pdf](http://faculty.haas.berkeley.edu/ned/Choice_Fatigue.pdf).

<sup>175</sup> *Bad Ballot Design Results in Staggering Number of Lost Votes*, *supra* note 174.

<sup>176</sup> Ann Erelina, *Late, Long Ballots Delay Multnomah County Count*, OREGONIAN, (Nov. 5, 2008 9:25 PM), [http://www.oregonlive.com/politics/index.ssf/2008/11/late\\_and\\_long\\_ballots\\_delay\\_mu.html](http://www.oregonlive.com/politics/index.ssf/2008/11/late_and_long_ballots_delay_mu.html).

<sup>177</sup> Locations discussed in "Where Ballot Length Issues May Have Caused Delays" in this section.

<sup>178</sup> Brett Nelson, *Do You Read Fast Enough to Be Successful?*, FORBES (June 4, 2012), <http://www.forbes.com/sites/brettnelson/2012/06/04/do-you-read-fast-enough-to-be-successful/>.

<sup>179</sup> The length of the Florida ballot garnered most of the national attention on this issue.

<sup>180</sup> Jessica Love, *Reading Fast and Slow*, AM. SCHOLAR, Spring 2012, *available at* <http://theamericanscholar.org/reading-fast-and-slow/#.US42W-ukct0>.

<sup>181</sup> Augenblick & Nicholson, *supra* note 180.

<sup>182</sup> Stephen M. Nichols, *State Referendum Voting, Ballot Roll-Off, and the Effect of New Electoral Technology*, 30 ST. & LOCAL GOV. REV. 106, 106 (1998).

(such as DREs and lever voting machines) can increase the residual vote rate.<sup>183</sup> The increased use of social media has allowed smaller groups to compete effectively against wealthier groups during initiative campaigns.<sup>184</sup> This could lead to campaign activity that would not be feasible without social media, which could increase issue salience, and mitigate the impacts “choice fatigue.”

### Where Ballot Length Issues May Have Caused Delays

Florida captured national attention because of delays related to the length of its ballot, one of the longest in state history.<sup>185</sup> Its ballot contained eleven constitutional amendments that increased the length of its ballots to about four pages per language offered and around 4,000 words. It was reported that each ballot took seventy seconds to print at polling station and voters were warned that the ballot itself could take as long as thirty minutes to complete.<sup>186</sup> Some complained the proposed amendments were difficult to understand because they were written in dense legal language and that amendment summaries and titles were often confusing or unhelpful in alerting voters to the goal of the amendment.<sup>187</sup>

California had eleven initiatives on the ballot, though complaints largely seemed confined to three ballot measures that were allegedly confusing.<sup>188</sup> One of these initiatives reportedly confused voters because voting “yes” kept the status quo while voting “no” led to a change, the reverse of normal initiative operation.<sup>189</sup> Some found the other two initiatives confusing because they both focused on school funding through tax increases, but the size and target of the taxes and the operation of increased funding differed.<sup>190</sup> Despite some reports complaining about the length of the ballot, no evidence links ballot length to delays in California on Election Day. This may be due to an increase in the number of absentee ballots cast this year.<sup>191</sup>

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<sup>183</sup> David C. Kimble & Martha Kropf, *Voting Technology, Ballot Measures and Residual Votes*, 36 AM. POL. RES. 479, 499 (2008).

<sup>184</sup> Matt Silverman, *How Political Campaigns Are Using Social Media for Real Results*, MASHABLE (June 9, 2010), <http://mashable.com/2010/06/09/political-campaigns-social-media/>.

<sup>185</sup> Suevon Lee, *Five of the Most Confusing Ballots in the County*, PROPUBLICA (Nov. 5, 2012), <http://www.propublica.org/article/five-of-the-most-confusing-ballots-in-the-country>.

<sup>186</sup> Timothy J. Gibbons, *Long Ballots on First Coast Expected to Lead to Long Lines on Election Day*, FLA. TIMES-UNION (Oct. 23, 2012), <http://jacksonville.com/news/metro/2012-10-23/story/long-ballots-first-coast-expected-lead-long-lines-election-day>; Mike Lang, *Ernst: Ballot is Longest in Florida History*, HERALD-TRIBUNE (Sept. 30, 2012 3:28 PM), <http://www.heraldtribune.com/article/20120930/COLUMNIST/120939977>.

<sup>187</sup> *Id.*

<sup>188</sup> Suevon Lee, *supra* note 191.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Brian van der Brug, *Voting Ends in California, and the Waiting Continues*, L.A. TIMES (Nov. 6, 2012), <http://latimesblogs.latimes.com/california-politics/2012/11/california-polls-closed.html>.

Maryland had ballots of varying length. The state-wide ballot included seven initiatives (an unusually high number).<sup>192</sup> To make matters worse, some counties added up to fifteen additional initiatives.<sup>193</sup>

Massachusetts also faced delays blamed on ballot initiatives.<sup>194</sup> The Massachusetts ballot featured only three initiatives, though their summaries alone totaled 1,800 words,<sup>195</sup> almost half the word count of the Florida ballots.

Michigan reported delays in recording votes because the length of the ballot slowed down optical scan processing.<sup>196</sup>

Finally, Wisconsin reported delays due to poor ballot design.<sup>197</sup> Part of the problem was the elimination of straight ticket voting, which left some voters confused about how to vote during this election.<sup>198</sup> The ballots also led to more over-votes, which were rejected by optical scan machines and elicited a warning from DRE machines.<sup>199</sup> Voters were allowed to correct problems, though this took additional time.<sup>200</sup>

## Proposed Solutions

### (1) *Increase voter education efforts*

Increased voter education about ballot measures prior to Election Day is the most obvious solution to the problem of long ballots causing delay. The extent to which voters will pay attention to education efforts, however, is unclear. (Voter education efforts are already used in almost every district.) Florida sent sample ballots with every voter registration card and warned voters to come to the polls knowing how they plan to vote.<sup>201</sup>

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<sup>192</sup> Rachel Baye, *Experts: Lengthy Maryland Ballots Could Challenge Voters*, WASH. EXAMINER (Oct. 27, 2012), <http://washingtonexaminer.com/experts-lengthy-md.-ballot-could-challenge-voters/article/2511864>.

<sup>193</sup> Blumberg, *supra* note 178.

<sup>194</sup> Billy Baker, *At Mass., Long Lines and Ballots*, BOS. GLOBE (Nov. 7, 2012), <http://www.bostonglobe.com/metro/2012/11/07/behind-long-lines-big-turnout-meets-complex-ballot/mIGBAbsZaUVA4to36ZF6cM/story.html>.

<sup>195</sup> *Id.*

<sup>196</sup> Monacelli, *supra* note 160.

<sup>197</sup> LEGAL COORDINATING COMM., WIS. ELECTION PROTECTION, 2012 ELECTION PROTECTION REPORT 21 (2013).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Gibbons, *supra* note 192.

(2) *Increase the use of absentee or early voting*

Increased absentee voting may mitigate delays related to long ballots. California significantly increased its use of absentee ballots,<sup>202</sup> which may explain why delays in California were not as widely reported despite having a ballot as long as Florida's. One Florida election official noted that stable absentee or early vote rates (64% in 2008) would help things run smoothly despite the long ballot.<sup>203</sup> Increases in absentee and early voting do create increase burdens. The longer ballot led to increases in postage for absentee ballots, leading to almost \$100,000 of extra expense on postage alone.<sup>204</sup>

(3) *Shorten the ballot*

This is the simplest way to end delays related to long ballots. This could be accomplished through legislative restraint.<sup>205</sup> In Massachusetts the three proposal summaries totaled more than 1,800 words, averaging over 600 words per measure.<sup>206</sup> In Florida the amendments totaled 2,371 words across eleven amendments,<sup>207</sup> averaging 215 words per amendment. The Maryland ballot questions total 482 words over seven questions,<sup>208</sup> averaging sixty-eight words per question. Florida used to impose a 75-word limit on ballot amendments, regardless of whether they were voter- or legislature-initiated, but has not applied it to the legislature since 2002.<sup>209</sup> The Florida Legislature reinstated the 75-word limit on its own ballot amendments as part of its 2013 election reform.<sup>210</sup> Reinstating that limit, and being more cautious on which measure make it to the ballot could shorten ballots and limit delays.

(4) *Hold voting referendums and ballot propositions in non-presidential election years*

Some have suggested including ballot propositions and voter referendums on the ballot in only non-presidential election years to prevent delays caused by long ballots in presidential years when voter turnout is high. The downside to this tactic, however, is that fewer voters will then weigh in on the ballot measure. This concern may be allayed if the ballot measure is sufficiently high-profile, such as the recent Proposition 8 measure in California).

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<sup>202</sup> van der Brug, *supra* note 197.

<sup>203</sup> Gibbons, *supra* note 192.

<sup>204</sup> Lang, *supra* note 192.

<sup>205</sup> *Editorial: To Shorten Lines, Trim the Ballot*, NWF DAILY News (Jan. 23, 2013), <http://www.nwfdailynews.com/opinion/editorials/editorial-to-shorten-lines-trim-the-ballot-1.82970>.

<sup>206</sup> Baker, *supra* note 200.

<sup>207</sup> Lloyd Dunkelberger, *Are Florida's Ballots Too Long?*, HERALD-TRIBUNE (Dec. 7, 2012), <http://politics.heraldtribune.com/2012/12/07/long-ballot-prompts-calls-for-amendment-wording-limit/>.

<sup>208</sup> Baye, *supra* note 198.

<sup>209</sup> Dunkelberger, *supra* note 213.

<sup>210</sup> CS/HB 2013 *at supra* note 96.

## E. LEGAL INSTABILITY

Legal instability immediately prior to elections causes voter and poll worker confusion, which can lead to delays. The 2012 election occurred immediately following the decennial redistricting, which in itself can cause confusion among voters about where to cast their vote.<sup>211</sup> Explained one election official in Illinois, “There are instances of people going to the wrong polling places, as we expected.... This is always the way it is after redistricting.”<sup>212</sup> To make matters worse, a raft of redistricting litigation delayed finality of newly drawn lines, leading to dramatically increased uncertainty in some states. Texas provides an extreme example.<sup>213</sup> On June 24, 2011, the Texas Legislature passed its redistricting maps and submitted them to a federal court in the District of Columbia for preclearance under Voting Rights Act §5. The litigation forced a one-month delay of the primary election, which caused great confusion not only for voters, but for candidates as well.<sup>214</sup> On August 28, 2012, the court refused to preclear each of the three maps. The delay (and eventual denial) forced the federal court in San Antonio to draw interim maps, which exacerbated confusion and led to delays on Election Day.<sup>215</sup>

Strict photographic voter ID laws have gained much media attention over the last several years, and multiple states were party to lawsuits that produced murky results on what ID laws could be enforced and when.<sup>216</sup> According to a representative for the Lawyers’ Committee for Civil Rights Under Law, the majority of complaints her organization received on Election Day were related to confusion about ID requirements.<sup>217</sup> Given the national attention focused on the voter ID debate, it is little wonder that poll workers and voters were confused about documentation

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<sup>211</sup> Cara Kenefick, Long Voter Lines Due to Redistricting, Newport Patch [Rhode Island] (Nov. 7, 2012), <http://newport.patch.com/articles/long-voter-lines-due-to-redistricting> (“While voter turn out did not spike dramatically, some voters met long lines, and even longer waits, to cast their votes due to redistricting following the 2010 Census. Throughout the day, voters at the Park Holm Senior Center and Donovan Manor reported waiting in line for more than two hours.”)

<sup>212</sup> Jodi S. Cohn & David Kidwell, New Polling Places, Unresponsive Website, Create Confusion in Chicago, CHICAGO TRIB. (Nov. 6, 2012), [http://articles.chicagotribune.com/2012-11-06/news/chi-chicago-election-day-illinois\\_1\\_elections-website-judges-at-two-sites-election-judges](http://articles.chicagotribune.com/2012-11-06/news/chi-chicago-election-day-illinois_1_elections-website-judges-at-two-sites-election-judges)

<sup>213</sup> Justin Levitt, Ten Lawyers Leaping: A New Year’s Redistricting Review (January 3, 2012) available at (“The longer the delay [in resolving redistricting litigation], the larger the burden on local administrators, who have to redraw precincts, reallocate pollsite resources, and print and mail ballots, including to overseas voters in line with federal law.”)

<sup>214</sup> Zahira Torres, *Texas Delays Primary Election by a Month*, EL PASO TIMES (December 17, 2011) available at [http://www.elpasotimes.com/news/ci\\_19566779](http://www.elpasotimes.com/news/ci_19566779); Laurel Brubaker Calkins, *Texas Republicans, Democrats Delay State Primaries, Skip Super Tuesday*, Bloomberg (Dec. 16, 2011), <http://www.bloomberg.com/news/2011-12-16/texas-republicans-democrats-agree-to-postpone-state-s-primary-election.html>.

<sup>215</sup> Kendra Lyn, Local Polling Place Problems, NBC DALLAS FORT WORTH (November 7, 2012) available at <http://www.nbcdfw.com/news/politics/Local-Polling-Place-Problems-177491761.html> (citing delays caused by redistricting confusion in Texas).

<sup>216</sup> *Recent Litigation*, NAT’L CONF. ST. LEGISLATURES/NC SL, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Litigation> (last visited Mar. 6, 2013).

<sup>217</sup> *Election Day Voting Suits Targeted Voter ID Confusion, Ballots*, NEWSMAX (Nov. 7, 2012, 12:33 AM), <http://www.newsmax.com/Politics/2500-ACLU-ALLTOP-AMERICAME/2012/11/07/id/463129>.

necessary to vote.<sup>218</sup> But states where voter ID litigation was brought witnessed the most reports of voter ID-related confusion, to wit Pennsylvania.<sup>219</sup>

Pennsylvania's protracted voter ID litigation stretched into October, leaving residents about a month to learn the holding of the lawsuit and plan accordingly.<sup>220</sup> As a result, voters were waiting over two hours to vote in precincts in Allegheny County and over an hour in Delaware County.<sup>221</sup> The Election Protection Hotline reported receiving complaints throughout Election Day that poll workers were demanding IDs and turning voters away from the polls in violation of the court injunction, which stated that ID could be requested but not required.<sup>222</sup> There were published anecdotal reports of this practice in Allegheny County, where some precincts even posted signs telling people that they would be asked for identification and had to present it in order to vote.<sup>223</sup> One voter reported that a poll worker did not know what kind of photo ID was acceptable, and refused to take his military ID, asking for a driver's license instead. Pennsylvania polling sites' long delays were reportedly in part caused by these extended, confused exchanges surrounding litigation of the voter ID law.<sup>224</sup> And even when voters complied with poll workers' inaccurate requests, they voted provisionally,<sup>225</sup> which takes longer than the regular voting process.<sup>226</sup>

Students as a group faced increased issues with identification, too. Each state has different domicile requirements and some students are able to register using their dorm addresses with very little corroborating documentation. Each state also has different rules on whether college IDs can be used at the polls. Students may not have state identification readily available and feel uncertain about what they need and can present in order to vote, creating confusion.<sup>227</sup> Virginia,

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<sup>218</sup> See, e.g., Jessica Parks, *Pa's New Voter ID Law Causes Confusion, Voters Say* (November 7, 2012), available at [http://articles.philly.com/2012-11-07/news/34974527\\_1\\_voter-id-law-poll-workers-general-election](http://articles.philly.com/2012-11-07/news/34974527_1_voter-id-law-poll-workers-general-election).

<sup>219</sup> Brandolph, *supra* note 20; *Election Day Voting Suits*, *supra* note 223.

<sup>220</sup> CNN Wire Staff, *Judge Blocks Pennsylvania Voter ID Law for November Election*, CNN (Oct. 2, 2012, 3:44 PM), <http://www.cnn.com/2012/10/02/politics/pennsylvania-voter-id> (announcing a decision about a month out from Election Day).

<sup>221</sup> Brandolph, *supra* note 20; *Election 2012: Strong Turnout, Confusion Reported at Pa. Polls*, DAILY TIMES (Nov. 6, 2012), <http://www.delcotimes.com/articles/2012/11/06/news/doc50991d33ccbba596356546.txt>.

<sup>222</sup> Deborah Charles, *Complains About Voter IDs, Ballots, Long Lines in Election*, CHI. TRIBUNE (Nov. 6, 2012), [http://articles.chicagotribune.com/2012-11-06/news/sns-rt-us-usa-campaign-votingbre8a6098-20121106\\_1\\_id-requirements-vote-by-provisional-ballot-election-protection](http://articles.chicagotribune.com/2012-11-06/news/sns-rt-us-usa-campaign-votingbre8a6098-20121106_1_id-requirements-vote-by-provisional-ballot-election-protection).

<sup>223</sup> Brandolph, *supra* note 20.

<sup>224</sup> *Id.*

<sup>225</sup> Amanda Terkel & Luke Johnson, *Pennsylvania Election Day Plagued by Confusion over Blocked Voter ID Law*, HUFFINGTON POST (Nov. 8, 2012, 10:58 AM), [http://www.huffingtonpost.com/2012/11/06/pennsylvania-voter-id\\_n\\_2083626.html](http://www.huffingtonpost.com/2012/11/06/pennsylvania-voter-id_n_2083626.html).

<sup>226</sup> Chan, *supra* note 86.

<sup>227</sup> *Student Voting Guide*, BRENNAN CENTER JUST. (Aug. 31, 2010), <http://www.brennancenter.org/analysis/student-voting-guide>.

for example, changed its laws to allow college IDs in early 2012,<sup>228</sup> which led to delays at some precincts. Students and poll workers alike were unsure if student IDs could be accepted.<sup>229</sup> Poll workers around Radford University reportedly told students that student IDs were not accepted, causing confusion and waits.<sup>230</sup> Whenever there is an identification problem, even if it is resolved by the voter digging through her wallet to find the correct document, it takes a little extra time to reach the voting booth.

Aside from confusion about redistricting and voter ID, changes to early voting in states like Ohio or disputes relating to changes to early voting in states like Florida in close proximity to the election are other examples of statutory instability that can contribute to delays. Each placed greater stress on the local election authorities when administering elections in their respective jurisdictions or confusion by voters. If 2012 is to be a lesson, legislators should take caution in changing voting laws too close to elections. Voters are easily confused by new rules and poll workers need time to absorb new laws and train under new regimes.

## F. POLL WORKERS

Although poll workers throughout the country rise to a difficult challenge and fill a needed role, human error and lapses in poll worker training affected wait times at the polls in 2012.

### *Problems Processing Voters*

Poll workers have nothing to do with ensuring that voters' current addresses are in the voter registration system or that voters show up at their assigned precincts. However, poll worker speed in responding to voters who appear at the wrong polling place can determine whether lines move efficiently on Election Day. In Chesapeake, Virginia, officials reported delays due to poll workers offering lengthy explanations of why voters were at the wrong polling place, or allowing these situations to turn into arguments.<sup>231</sup> Some poll workers in Ohio also wrongly gave voters provisional ballots without attempting to determine the voter's real precinct.<sup>232</sup>

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<sup>228</sup> Pete Williams, *Justice Department Approves Virginia Voter ID Law*, NBCNEWS.COM (Aug. 21, 2012, 11:34 AM), [http://firstread.nbcnews.com/\\_news/2012/08/21/13395636-justice-department-approves-virginia-voter-id-law?lite](http://firstread.nbcnews.com/_news/2012/08/21/13395636-justice-department-approves-virginia-voter-id-law?lite).

<sup>229</sup> *Campus Polling Sites See Long Lines, Some Inaccurate Information*, FAIR ELECTIONS LEGAL NETWORK, <http://www.fairelectionsnetwork.com/news/campus-polling-sites-see-long-lines-some-inaccurate-information> (last visited Mar. 6, 2013); Reuters, *U.S. Voters Complain of Long Lines, Confusion at Polls*, HAARETZ (Nov. 7, 2012, 9:38 AM), <http://www.haaretz.com/news/u-s-elections-2012/u-s-voters-complain-of-long-lines-confusion-at-polls-1.475875>.

<sup>230</sup> *Campus Polling Sites See Long Lines, Some Inaccurate Information*, *supra* note 235.

<sup>231</sup> Joanne Kimberlin et al., *Voting Lines Were Clogged at Swamped Voter-ID Points*, PILOTONLINE.COM (Nov. 8, 2012), <http://hamptonroads.com/2012/11/voting-lines-were-clogged-swamped-voterid-points>.

<sup>232</sup> Jason Cherkis, *Election Problems Included Confusion, Intimidation, Untrained Poll Workers*, HUFFINGTON POST (Nov. 12, 2012), [http://www.huffingtonpost.com/2012/11/08/election-problems-confusion-intimidation\\_n\\_2095384.html](http://www.huffingtonpost.com/2012/11/08/election-problems-confusion-intimidation_n_2095384.html).

In Colorado, poll workers ran into issues when the electronic poll book contained two separate voter lists: one of voters who were expected at the polls, and one of voters who voted early or received a mail-in ballot. This attempt to make life easier for poll workers in some cases backfired when poll workers searched for voters' names alphabetically but mistakenly referred to the wrong list. In Aurora, Colorado this problem contributed to an hour-and-a-half delay by 9:30 AM.<sup>233</sup> In one high profile example, a New York City poll worker checking in Mayor Bloomberg could not find his name on the roles. After unsuccessfully searching, the poll worker passed the poll book to the mayor for him to look for his own name. Not only did the move violate New York elections regulations, it added to the wait time.<sup>234</sup>

### *Limited Understanding of Technology*

In past election cycles, news outlets and organizations have published stories of elderly poll workers making technological errors like forgetting to plug in or turn on electronic poll books or voting machines.<sup>235</sup> While problems of this level did not appear as prevalent in 2012, poll workers still faced challenges in operating equipment that lengthened lines. For example, Poll Watch USA posted voter complaints online from 166 locations around the East Coast and Midwest. Various voters reported hold ups because ballot scanners got jammed and poll workers lacked the ability to get them working again. In some places, DRE machines stopped working, and poll workers stood by because they had not been trained to troubleshoot problems, such as dislodging jams.<sup>236</sup> In Texas, workers at vote centers reportedly did not know that they needed to turn machines on with enough time to boot up, causing voting to start late.<sup>237</sup> While some problems will always require sophisticated technical assistance (and indeed poll workers should rightly be wary of attempting to fix machines without proper training), better knowledge of technology would help poll workers eliminate or reduce delays in many instances.

### *Voter Interface*

Another contributor to delays is poor voter-poll worker interface, particularly with language minorities. In the 2012 election, one Annandale, Virginia poll worker required a group of elderly Korean voters to state their full names and addresses out loud in English even when they had IDs to nonverbally confirm their identities. And when they could not get through the exercise fast enough, the poll worker reportedly told them to wait in a separate line and took care of other

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<sup>233</sup> Jace Larson, *Confusion About Voting Lists, Long Lines*, 9NEWS.COM (Nov. 6, 2012, 1:00 PM), <http://www.9news.com/news/article/298191/339/Confusion-about-voting-lists-long-lines>.

<sup>234</sup> David Firestone, *Problems at the Polls*, N.Y. TIMES OPINION PAGES (Nov. 6, 2012, 2:17 PM), <http://takingnote.blogs.nytimes.com/2012/11/06/problems-at-the-polls/>. Poll worker' error also featured prominently in Ohio when a poll worker testified at trial to directing voters with odd-numbered addresses to the wrong voting location on the mistaken belief that the number 798 was an odd number because it begins with a seven. *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 820 (S.D. Ohio 2012) (the appeal was dismissed on July 12, 2012).

<sup>235</sup> Project HAVA News, *New Technology, Old Problems*, 4 HAVA Q., Dec. 2008, <http://www.ccfi.us/HQ1208text.html>.

<sup>236</sup> *Reports of Problems at the Polls*, POLLWATCH USA (Nov. 6, 2012), <http://pollwatchusa.org/viz>.

<sup>237</sup> See *infra* Section III.F, "Following the Schedule."



voters first. Many of the Korean voters in this precinct reported feeling uncomfortable and bullied. The episode delayed voting (and damaged the civic experience for a group of otherwise excited elderly voters).<sup>238</sup>

Some Pennsylvania voters in Bucks County felt that poll workers' "confusion" over voter ID requirements was really a form of intimidation, meant to scare people without IDs from voting. While there is no evidence of such intention, voter intimidation can contribute to delays.<sup>239</sup>

### *Enforcing Polling Place Procedure*

In order to run elections efficiently, polling places have procedures in place to manage queues. This can be difficult to accomplish in practice, particularly when multiple options/processes are located at a single polling place. In Milwaukee, Wisconsin, a state that allows Election Day registration, some voters reported waiting in the wrong line only to find out later that they had waited in vain and would have to repeat the time in another line. Poll workers eventually directed voters to the proper lines, but delays were experienced nonetheless.<sup>240</sup>

When election officials are proactive about managing lines, there is evidence that they can have a positive effect on delays. In Arapahoe County, Colorado, where voters can appear at the vote center of their choosing, election officials attempted to direct voters from crowded stations to less crowded ones. Workers weaved through lines with iPads, showing voters maps to polling centers with shorter waits. Some voters left for the other centers once they found out they could vote elsewhere faster.<sup>241</sup> These voters benefited from these directions, and even those who remained at the crowded vote centers experienced shorter lines due to the departures.

Polling place layout can also impact voting delays. In Manhattan, a voter experiencing delays lodged a complaint with Poll Watch USA stating that the layout of the polling station was making problems worse. Voters using optical scan ballots had to cross from one end of the room to the other to get to a privacy booth and then across to another corner to turn in the ballot.<sup>242</sup> An intuitive setup would help voters know where they are supposed to go, and reduce the time poll workers have to spend directing them—leaving more time to process voters.

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<sup>238</sup> Cherkis, *supra* note 238.

<sup>239</sup> James McGinnis, *Voter ID Causes Confusion to Election Day*, PHILLYBLURBS.COM (Nov. 7, 2012, 9:51 AM), [http://www.phillyburbs.com/my\\_town/doylestown/voter-id-causes-confusion-to-election-day/article\\_6724fefc-edd6-542f-9621-66f02132d83e.html](http://www.phillyburbs.com/my_town/doylestown/voter-id-causes-confusion-to-election-day/article_6724fefc-edd6-542f-9621-66f02132d83e.html); *see also*, *Elections 2012*, SAALT (2012), [http://saalt.org/wp-content/uploads/2012/09/KYR\\_English.pdf](http://saalt.org/wp-content/uploads/2012/09/KYR_English.pdf).

<sup>240</sup> Karen Herzog & Jan Uebelherr, *Some Glitches, Long Lines and Voter ID Confusion at Polls*, JSONLINE (Nov. 7, 2012), <http://www.jsonline.com/news/statepolitics/five-hours-into-election-long-lines-some-problems-surface-ur7hbv1-177502851.html>.

<sup>241</sup> Christopher N. Osher & Ryan Parker, *Metro Voters Experience Long Waits in Colorado*, DENVERPOST.COM (Nov. 6, 2012, 11:21 PM), [http://www.denverpost.com/breakingnews/ci\\_21939411/election-day-voting-begins-swing-state-colorado](http://www.denverpost.com/breakingnews/ci_21939411/election-day-voting-begins-swing-state-colorado).

<sup>242</sup> *Reports of Problems at the Polls*, *supra* note 242.

### *Following the Schedule*

In the Miami Valley area of Ohio, several polling places struggled to open on time, as poll workers overslept or did not show up. This means that people were waiting in lines that were not moving from the very start of the day.<sup>243</sup> Galveston County, Texas vote centers faced the same problem. There, as noted above,<sup>244</sup> poll workers failed to boot voting machines in time for voters arriving at 7:00 AM (some machines were reportedly not functional until 9:00 AM).<sup>245</sup>

### *Not Enough Poll Workers*

Some voting jurisdictions lacked sufficient numbers of poll workers (and in most cases, not for lack of trying). The problem of poll worker shortage prompted the U.S. Election Assistance Commission to start a grant program aimed at recruiting college student poll workers.<sup>246</sup> According to 2008 data, the average wage for poll workers was \$100 for the day (a 16 hour work day, it should be noted). This wage does not incentivize people to take a day off from their regular jobs or come to training sessions before the election. And even if people do sign up to work the polls, there is a problem with absenteeism, as people might decide that the hours just are not worth it in the end.<sup>247</sup>

The states that responded to this Report's survey indicated the following wages for poll workers:

<b>State</b>	<b>Poll Worker Pay</b>
Virginia	\$75/day
South Carolina	\$120/day
Mississippi	\$125/day
North Dakota	\$7.25/hour*
Iowa	\$7.25/hour
Arkansas	\$9.50/hour

\*Workers earn more if they attend additional training

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<sup>243</sup> *Local Polls Close with Lines of Voters Still Waiting*, WHIOTV.COM (Nov. 6, 2012, 8:11 PM), <http://www.whiotv.com/news/news/local/polls-open-at-630-am-tuesday/nSx7z/>.

<sup>244</sup> *See supra* Section III.F, "Limited Understanding of Technology."

<sup>245</sup> T.J. Aulds, *Galveston County Polls Stay Open Late to Make Up for Morning Delays*, KHOU.COM (Nov. 6, 2012, 10:09 PM), <http://www.khou.com/news/local/Some-Galveston-County-polling-centers-delayed-in-opening-177469261.html>.

<sup>246</sup> *Help America Vote College Program*, U.S. ELECTION ASSISTANCE COMMISSION, [http://www.eac.gov/payments\\_and\\_grants/help\\_america\\_vote\\_college\\_program.aspx](http://www.eac.gov/payments_and_grants/help_america_vote_college_program.aspx) (last visited Mar. 24, 2013).

<sup>247</sup> *Poll Workers*, ELECTION PROTECTION, <http://www.866ourvote.org/issues/poll-workers> (last visited Mar. 9, 2013).

Poll worker shortages were connected to delays in 2012. Six survey respondent states indicated poll worker shortages played at least some role in causing delays. While this is not statistically significant because of the small respondent pool, it is still noteworthy that at least 6 of 50 states had this problem.

Anecdotal evidence also suggests that shortages relate to delays. In an Akron, Ohio precinct, three poll workers handled 150 voters when the polls opened. As a result, voters reportedly had to wait about 90 minutes to vote, starting the day off behind pace.<sup>248</sup> A Manhattan polling place reporting a shortage of poll workers experienced hour long delays.<sup>249</sup> Virginia, which has received a large share of election delay press coverage, experienced the problem throughout the state.<sup>250</sup> And in Minnesota the shortage of poll workers meant that voter registration cards (Minnesota allows Election Day registration) could not be handed to voters while they waited in line, which created longer delays as these voters filled their registration forms out at the table.<sup>251</sup> Lastly, Rhode Island reportedly lacked a sufficient number of poll workers. Officials blamed this on a lack of monetary resources.<sup>252</sup> The ability to recruit and hire enough poll workers is essential to avoiding delays.

## Proposed Solutions

### (1) *Better or more training*

Improving training procedures for poll workers has been a common proposal of various voter groups for many years. Project Vote, for example, argues for statewide standards for training and that workers obtain step-by-step knowledge of the procedures for each scenario that could play out on Election Day.<sup>253</sup> Election Protection believes national standards should be put in place.<sup>254</sup> Some jurisdictions, like New York City, require poll workers to pass a test at the end of their training to check that they have understood their duties, which could be emulated

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<sup>248</sup> Jaeh Lee, *Lines of 150 People and 90 Minute Waits in Akron, Ohio*, MOTHER JONES (Nov. 6, 2012, 5:55 PM), <http://www.motherjones.com/mojo/2012/11/lines-akron-ohio-long-150-people-90-minute-wait>.

<sup>249</sup> Erin Durkin, *Election Day 2012: New Yorkers Encounter Closed Polling Places, Long Lines in Aftermath of Superstorm Sandy*, DAILY NEWS (Nov. 6, 2012, 11:08 PM), <http://www.nydailynews.com/news/politics/sandy-election-day-issues-nyc-article-1.1197480>.

<sup>250</sup> Ben Pershing, *Virginia Lawmakers Split on Election Reform Plans*, WASH. POST (Dec. 13, 2012), [http://articles.washingtonpost.com/2012-12-13/local/35812585\\_1\\_poll-workers-easier-registration-bills-move](http://articles.washingtonpost.com/2012-12-13/local/35812585_1_poll-workers-easier-registration-bills-move).

<sup>251</sup> LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 23 (17% of Minnesota voters register on Election Day.).

<sup>252</sup> David Klepper, *Providence Mayor: Long Lines at Polls Unacceptable*, BOS. GLOBE (Nov. 8 2012), <http://www.boston.com/news/local/rhode-island/2012/11/08/providence-mayor-long-lines-polls-unacceptable/kd1LSQOk6NIZNStcZfwKYI/story.html>

<sup>253</sup> PROJECT VOTE, ELEMENTS OF A SUCCESSFUL POLL WORKER TRAINING PROGRAM (2007), *available at* [http://www.projectvote.org/images/publications/Policy%20Briefs/Project\\_Vote\\_Policy\\_Brief\\_9\\_Elements\\_of\\_Successful\\_Poll\\_Worker\\_Training.pdf](http://www.projectvote.org/images/publications/Policy%20Briefs/Project_Vote_Policy_Brief_9_Elements_of_Successful_Poll_Worker_Training.pdf).

<sup>254</sup> *Poll Workers*, *supra* note 253.

elsewhere.<sup>255</sup> The 2005 bipartisan Carter-Baker Commission report also recommended improved training.<sup>256</sup> Training is the most basic way to enhance poll workers' performance and reduce their impact on delays.

### (2) *More pay*

Another helpful change would be paying poll workers more for their work. This could incentivize more people to work the polls, more people to actually show up for their shifts, and could help convince younger people who have regular jobs to work.<sup>257</sup> Increasing poll worker pay would be very simple to implement, but the reality is that election budgets are tight. However, it might be a worthy allocation, and some very populous cities have managed to pay workers \$200 or more for their time.<sup>258</sup>

### (3) *Recruit younger poll workers*

As one commenter observed when the problem of the aging poll worker population first emerged in earnest during the 2004 election,

The computerization of U.S. elections presents special challenges for an aging and under-trained work force at the polls. The average poll worker age in 2004 was 72. Staffing polling places with tech-savvy volunteers, and properly training existing poll workers on new machines, is essential as states introduce high-tech voting equipment and computerized voter registries. The magnitude of that human resource challenge can be alarming. A survey in Cuyahoga County, Ohio found that 21 percent of poll workers there in the 2006 primary admitted to being "not very comfortable" or "not at all comfortable" with computers.<sup>259</sup>

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<sup>255</sup> *Poll-Worker Initiative*, CITY U. N.Y., <http://www.cuny.edu/employment/student-jobs/jobs/poll-worker-initiative.html> (last visited Mar. 19, 2013).

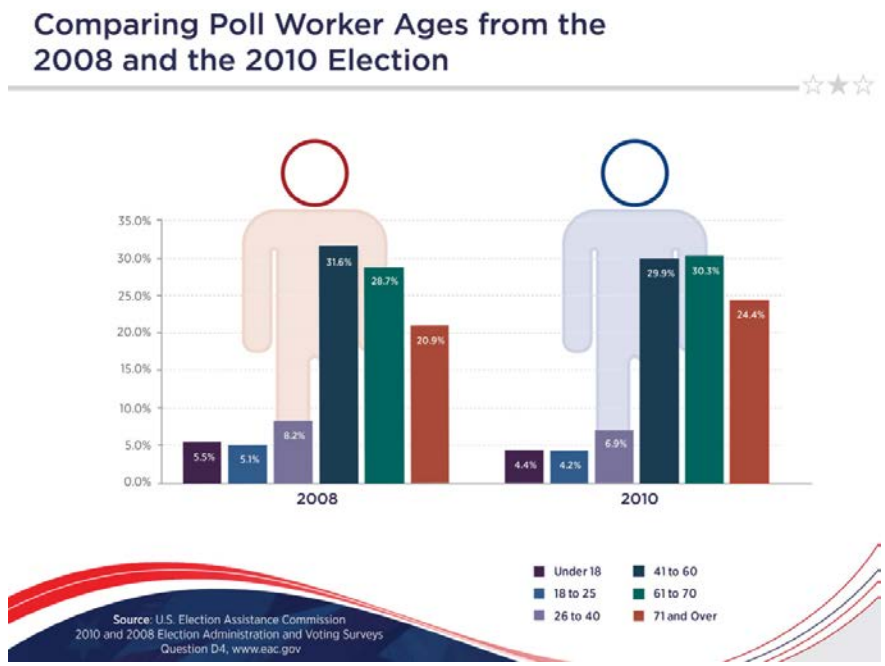
<sup>256</sup> *Voting Rights Network Responds to Carter-Baker Commission Report*, COMMON DREAMS NEWSCENTER (Sept. 20, 2005), <http://www.commondreams.org/news2005/0920-05.htm>.

<sup>257</sup> PEW CHARITABLE TRUSTS, *HELPING AMERICANS VOTE* (Sept. 2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election\\_reform/ERIPBrief19\\_final.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/ERIPBrief19_final.pdf).

<sup>258</sup> *Poll Worker Pay*, PEW CHARITABLE TRS. (Oct. 17, 2012), <http://www.pewstates.org/research/analysis/poll-worker-pay-85899424014>.

<sup>259</sup> *Poll Worker Training, Staffing Shortages, Expected to Create Problems on November 7*, DEMOS (Oct. 25, 2006), <http://www.demos.org/press-release/statement-poll-worker-training-staffing-shortages-expected-create-problems-november-7>.

In response, some groups have argued that it would be helpful for jurisdictions to try to hire younger poll workers who would presumably be more comfortable using voting technology. States have used various techniques to try to recruit more youngsters. For example, they have lowered the minimum age to allow high school students to participate, considered giving college credit for assistance, convinced employers to give people paid leave to work the polls, and generally targeted their efforts.<sup>260</sup> The national average age for poll workers is about 75 according to one source (and a little younger according to the below chart), so getting younger people with “energy and enthusiasm,” plus the technical know-how, could help close the generational gap and alleviate delays.<sup>261</sup> The Election Assistance Commission thought this was a worthy enough cause to begin the grant program mentioned above.<sup>262</sup>



*(4) More accessible technical support*

Some have suggested that jurisdictions should have more technical experts available to troubleshoot voting machine and poll book breakdowns. Many jurisdictions already use standby technicians, and may assign one tech per certain number of precincts. By increasing this

<sup>260</sup> *Poll Workers*, supra note 253.

<sup>261</sup> Deborah Barfield Berry, *Election Officials Try to Recruit Younger Poll Workers*, ABC NEWS, <http://abcnews.go.com/Politics/story?id=5915198&page=1> (last visited Mar. 19, 2013).

<sup>262</sup> *Help America Vote College Program*, supra note 252.

number, “roamers” could respond to multiple issues at one time and assist poll workers in keeping lines moving.<sup>263</sup>

#### (5) *Modernized registration*

Maintaining good lists leading up to Election Day will reduce the strain on poll workers and eliminate opportunities for human error that lead to delays.<sup>264</sup> Organizations such as the Brennan Center, Common Cause, and Pew, as discussed in the “Voting Flexibility” section of this Report, have made recommendations for automating voter registration to improve election efficiency.<sup>265</sup> The improvements needed in the state-wide voter databases, the cost of maintaining them and the lack of federal funding for that purpose should be addressed to assist with modernization of the registration process.

### G. VOTER CONFUSION

A perennial problem in voting in the United States is poorly informed voters. At some level, some percentage of voters will always be misinformed; the goal however, should be to take steps to keep that number as low as possible. To this end, all states have voter education programs that vary considerably in nature. Some states post information on election websites and take little additional action to inform voters. Other states, particularly those with recent changes to voting laws, were more proactive in 2012. Below is a summary of categories in which voter confusion caused delays in 2012.

#### *Voters Do Not Know Their Polling Place*

When voters go to the wrong polling place, officials often spend valuable time redirecting them to the proper location. Precincts with only paper poll books are often unable to direct voters to their proper voting location. As an example, a number of University of Pittsburgh students had been switched to new precincts but were unaware. Poll workers at their original polling station did not receive the supplemental polling place list until later in the day so they were not able to offer the students any direction.<sup>266</sup> One of these Pittsburgh student voters reportedly cried at the polls because she was upset and confused.<sup>267</sup> Voters at the wrong polling place have the opportunity to cast a provisional ballot; but the process of completing a provisional ballot takes

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<sup>263</sup> *Election Judge Position Descriptions*, BOARD OF ELECTIONS MONTGOMERY COUNTY, MD., <http://www.montgomerycountymd.gov/Elections/ElectionJudge/jobdescription.html> (last visited Mar. 20, 2013).

<sup>264</sup> See *supra* Section III.B, “Modernize voter registration.”

<sup>265</sup> See *supra* Section III.B.

<sup>266</sup> Brandolph, *supra* note 20 (no information provided on why there was a precinct change).

<sup>267</sup> *Id.*

more time than voting a regular ballot, adding to potential for delays (not to mention that provisional ballots cast at the wrong polling place may not be counted).<sup>268</sup>

Because the 2012 election followed a round of redistricting, the problem of voter confusion about polling place was especially acute. Generally, states and smaller subdivisions go to great lengths to inform voters of changes. Despite this, some voters fail to realize that they cannot go to the same precinct they reported to four years ago. For example, Alabama mails notices and voter cards to all registered electors, but still saw incidents of people going to the wrong place.<sup>269</sup> Virginia sent voter cards to all registered voters whose precinct has changed and provided online maps and polling place information as a fallback.<sup>270</sup> Texas mails each voter a new card with polling information every two years.<sup>271</sup> However, in states like Texas where district maps have been the subject of litigation, multiple rounds of cards may be sent out,<sup>272</sup> creating greater potential for confusion.

Another major cause of “wrong precinct” problems is voters’ failure to notify election administrators of a change of address when they move. Voters who have moved (particularly locally) might mistakenly proceed to their old precinct or present mismatching ID.<sup>273</sup> In Florida, new laws prevented people from making address changes to their voter registration information at the polls when they previously could do so.<sup>274</sup> This presented particular problems for students who, for example, might move residence halls each year. Those unaware of the new law who had failed to change their information prior to book closing could not vote.<sup>275</sup> Confusion related to the impact of changes of address slows the voting process and reduces public confidence in election administration.

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<sup>268</sup> Chan, *supra* note 86. Some states will count certain races on the ballot, such as President and statewide offices, even if the ballot is cast in the wrong precinct. *See e.g.*, 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.”).

<sup>269</sup> Leada Gore, *Madison County Election Official: Voting Confusion a Result of Redistricting After 2010 Census*, AL.COM (Nov. 6, 2012, 10:14 AM), [http://blog.al.com/breaking/2012/11/madison\\_county\\_election\\_offici.html](http://blog.al.com/breaking/2012/11/madison_county_election_offici.html).

<sup>270</sup> *Redistricting Information*, PRINCE WILLIAM COUNTY, VA, <http://www.pwcgov.org/government/dept/vote/Pages/Redistricting.aspx> (last visited Mar. 24, 2013).

<sup>271</sup> *Redistricting Delays Voter Cards, Texas Primary*, HUNTSVILLE ITEM (Feb. 25, 2012), <http://itemonline.com/local/x1875166181/Redistricting-delays-voter-cards-Texas-primaries>.

<sup>272</sup> TEX. REDISTRICTING, <http://txredistricting.org/> (last visited Mar. 24, 2013).

<sup>273</sup> *Id.*

<sup>274</sup> Reuters, *supra* note 235. Note that only voters who move across county lines are now required to update addresses ahead of the election. The rule for voters who move inter-county did not change. *See* [http://election.dos.state.fl.us/publications/pdf/2011/2011-2012\\_VoterRegGuide.pdf](http://election.dos.state.fl.us/publications/pdf/2011/2011-2012_VoterRegGuide.pdf).

<sup>275</sup> FLA. STAT. § 101.045 (2013); Reuters, *supra* note 235.

### *Voters Do Not Understand Ballot Initiatives*

As discussed in the Ballot Length section,<sup>276</sup> long constitutional amendments or other initiatives on the ballots can result in voters struggling to understand the meaning of the proposals. This leads to delays.

### *Voting Technology Confusion*

When poll workers must stop checking people in to assist voters in the voting booth with questions about how to operate voting machines, lines can lengthen. Another section of this Report analyzes voting equipment and fully addresses delays caused by difficulties with voting systems.<sup>277</sup>

### *Language Minority Voters*

Under the Voting Rights Act (VRA), some localities are required to provide bilingual materials to voters.<sup>278</sup> There are many areas, however, that do not provide adequate assistance despite having large limited English proficient (LEP) populations—even some that fall under the VRA’s requirements but do not properly comply.<sup>279</sup> When a voter has difficulty reading English, it slows her interactions with poll workers and her activities in the voting booth. Language minorities are also susceptible to intimidation when poll workers are not sensitive to their challenges or are frustrated by the language barrier. In the 2012 election, there were many reports of LEP voters feeling harassed at the polls.<sup>280</sup> This creates waits and leads to negative voting experiences. The problem is compounded because there are pockets of LEP voters in major urban areas where resources are already strained.<sup>281</sup>

### *Misinformation*

During the 2012 election, several media outlets reported unidentified groups engaging in misinformation campaigns. In Pennsylvania, a group sent fliers to peoples’ homes indicating

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<sup>276</sup> See *supra* Section III.D.

<sup>277</sup> See *supra* Section III.C.

<sup>278</sup> 42 U.S.C. §§ 1973b(f), 1971aa-1a (2006).

<sup>279</sup> *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. Dep’t Just., <http://www.justice.gov/crt/about/vot/litigation/caselist.php#sec203cases> (last visited Mar. 6, 2013) (listing DOJ enforcement actions against noncompliant jurisdictions); Elise Foley, *Maricopa County Puts Out Another Spanish-Language Flyer with Wrong Election Date*, HUFFINGTON POST (Oct. 23, 2012, 5:14 PM), [http://www.huffingtonpost.com/2012/10/23/maricopa-county-election\\_n\\_2006768.html](http://www.huffingtonpost.com/2012/10/23/maricopa-county-election_n_2006768.html) (stating that the Arizona county translated election materials, but did so improperly, listing the wrong date for the election); Tova Wang, *2012 Election Lessons Learned: How Voters Stood Up Against Suppression, ID, and Intimidation*, DEMOS (Nov. 15, 2012), <http://www.demos.org/publication/2012-election-lessons-learned-how-voters-stood-against-suppression-id-and-intimidation> (noting a lack of compliance with the VRA and also finding that many states do not have translations on their websites, making an important resource unusable for language minorities).

<sup>280</sup> Cherkis, *supra* note 238.

<sup>281</sup> *Id.*



incorrectly that photo ID is necessary to vote. There were also signs near polling places that stated “You need photo ID to vote” (though these may have been put up mistakenly by the state). Some Hispanic voters in Florida reported that they received robocalls telling them to vote on Wednesday.<sup>282</sup> In contentious elections, particularly in swing states, misinformation campaigns are a common tactic. In the past, there have been reported incidences in Virginia and Florida of fliers telling people they can vote by phone or that Election Day has been moved for certain populations only.<sup>283</sup> At worst, misinformed voters might miss Election Day. In other instances, misinformed voters may simply have lengthened interactions with poll workers as they provide the proper information.

### *Disputes with Poll Workers*

Poll watchers monitor events at polling locations. Typically, poll watchers stand behind or near poll workers as they check in voters. Often poll watchers are associated with a particular candidate or political party. While not a widespread cause of delay in 2012, isolated incidents suggest that poll watchers can in fact contribute to delays. For example, in some precincts in Milwaukee County, poll watchers were reportedly overly aggressive and poll workers requested their removal, creating confusion and tension. Ejecting the poll watchers when they became distracting took time, and reportedly election officials found it difficult to restore order.<sup>284</sup> Poll watchers will counter that they are there to ensure that poll workers are following the rules. Interest groups also battled before the election over whether poll watchers trained by ideological groups like True the Vote should be credentialed, amidst concerns about voter intimidation.<sup>285</sup>

### *Challengers*

Leading up to the 2012 elections, it was reported that several groups were poised to challenge voter eligibility at the polls.<sup>286</sup> Well-organized groups like the abovementioned True the Vote and Code Red USA taught volunteers to use national databases to challenge voter registration

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<sup>282</sup> Josh Gerstein & Bob King, *Voters Face Long Lines, Scattered Problems*, POLITICO (Nov. 6, 2012, 9:17 PM), <http://www.politico.com/news/stories/1112/83416.html>; Reuters, *supra* note 235.

<sup>283</sup> *Troubling Reports of Misinformation in Phone Calls to Suppress Minority Vote in Florida and Virginia*, DAILY KOS (Oct. 16, 2012, 11:04 AM), <http://www.dailykos.com/story/2012/10/16/1144897/-Troubling-Reports-of-Misinformation-in-Phone-Calls-To-Suppress-Minority-Vote-in-Florida-and-Virginia>.

<sup>284</sup> Herzog & Uebelherr, *supra* note 246.

<sup>285</sup> Deborah Charles, *Will Poll Watchers Help or Hinder Voting*, REUTERS (Nov. 2, 2012, 5:26 PM), <http://www.reuters.com/article/2012/11/02/us-usa-campaign-pollwatchers-idUSBRE8A116G20121102> (noting interest groups battling on both sides of the poll watcher question).

<sup>286</sup> Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES (Sept. 16, 2012), [http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html?_r=1&pagewanted=all).

records before Election Day.<sup>287</sup> Some expressed concerns that challenges from these groups fronted as partisan tactics to prevent certain demographics from voting.<sup>288</sup>

Most states allow anyone to challenge a voter's eligibility prior to or on Election Day. On Election Day, the challenge process creates extra hurdles election officials and voters must jump through, leading to confusion and delay about which rules apply. Groups like Demos, Common Cause, and the Brennan Center have gathered historical information and released reports that express great concern over challenger laws.<sup>289</sup> However, there were no readily available media reports of people being prevented from voting (or choosing not to vote) because of Election Day challenges at polling places in 2012. Nor were there reported incidents of mass voter-eligibility challenges during the 2012 election. This raises questions about the extent of the problem.

## Proposed Solutions

### (1) *Improve voter outreach*

One of the simplest ways to remedy confusion is to provide better or more direct information to voters prior to Election Day. There are indications that state and local election officials already make great efforts to educate voters, spreading information through means such as social media, community meetings, mailings, public service announcements on TV and radio, website postings, newspapers, and billboards. However, this information is not reaching all voters or is not at the forefront of their minds come Election Day.

Taking this into account, many have suggested that states should find better ways to communicate information prior to and on the day of the election. One possibility is providing mailings on how to work voting machines and what forms of identification are required.<sup>290</sup> Some promote greater availability of sample ballots to allow voters read and decide on long questions before reaching the polling booth; voters can carry them into the booth with marks on them, which is particularly helpful in states with ballot initiatives.<sup>291</sup> Additionally, as most states already do, the same information should be provided online, including regular updates. Voters should be able to use the Internet to find out everything they need before and on Election Day.<sup>292</sup>

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<sup>287</sup> *Id.*

<sup>288</sup> LIZ KENNEDY ET AL., DEMOS & COMMON CAUSE, BULLIES AT THE BALLOT BOX (2012), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/BULLIESATTHEBALLOTBOX-FINAL2.PDF>.

<sup>289</sup> *Id.*; NICOLAS RILEY, BRENNAN CENTER FOR JUSTICE, VOTER CHALLENGERS (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Challengers.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf).

<sup>290</sup> *Technology for Reaching Voters*, ACE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/ace-en/topics/et/etg> (last visited Mar. 28, 2013).

<sup>291</sup> See generally AP, *Counties Hope to Quell Pa. Voting Law Confusion*, SENTINEL (Feb. 19, 2013, 2:07 PM), [http://cumberlink.com/news/local/govt-and-politics/counties-hope-to-quell-pa-voting-law-confusion/article\\_8266e3bc-7ac7-11e2-b9f1-0019bb2963f4.html](http://cumberlink.com/news/local/govt-and-politics/counties-hope-to-quell-pa-voting-law-confusion/article_8266e3bc-7ac7-11e2-b9f1-0019bb2963f4.html); see also *Frequently Asked Questions*, MO. SECRETARY ST. (last visited Mar. 24, 2013); *Voting FAQ*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/faq.html> (last updated Oct. 1, 2012).

<sup>292</sup> PEW CHARITABLE TRUSTS, BEING ONLINE IS STILL NOT ENOUGH (2011), <http://www.pewstates.org/research/reports/being-online-is-still-not-enough-85899376525>.

There are also smartphone apps available that allow voters to look up their polling places and share information about the polling conditions with other app users.<sup>293</sup> A voter could type her address into her smartphone to find out which precinct she votes in and then tell others if there is currently a delay there. (Of course, those without Internet access or smartphones would not benefit from these innovations and must be reached in other ways.) At the polls, voter education could continue with demonstration voting systems and explanatory posters.<sup>294</sup>

### (2) *Modernize registration*

While another section of the report deals with proposals to modernize voter registration in greater length,<sup>295</sup> it is worth mentioning here again that any method that makes it easier for voters to change their address (and remember to change their address) will help ensure that they go to the right precinct.<sup>296</sup> Voters could also be offered the opportunity to register or update their information at the polls,<sup>297</sup> though Election Day registration remains controversial.<sup>298</sup>

### (3) *Improve language assistance*

Jurisdictions with sizable language minority populations, even those not required by the Voting Rights Act to provide of multilingual voting materials, should provide translated ballots and informational materials.<sup>299</sup> All jurisdictions are covered by the Help America Vote Act, which requires voting systems to be accessible to LEP voters,<sup>300</sup> so compliance would also assist language minorities. Some have suggested that one solution to overcoming the obstacle of increased costs in providing these features is to tap into language minority interest groups to assess community needs and search these groups for volunteers willing to provide free translation services. Community members could also work as translators at the polls to facilitate in-person conversations.<sup>301</sup> Lastly, others point out that DREs make it easier for language minorities to vote because they can be programmed to generate ballots in multiple languages.<sup>302</sup>

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<sup>293</sup> *Election Polling Places (ArcGIS 10)*, ARCGIS, <http://www.arcgis.com/home/item.html?id=14290c7441b34ea984ad9310f4cf6435> (July 1, 2012).

<sup>294</sup> *Technology for Reaching Voters*, *supra* note 298.

<sup>295</sup> *See supra* Section III.B.

<sup>296</sup> *See e.g.*, *supra* note 54.

<sup>297</sup> *See generally*, Reuters, *supra* note 235.

<sup>298</sup> *Election Day Registration*, PROJECT VOTE, <http://www.projectvote.org/election-day-reg.html> (last visited Mar. 24, 2013) (the primary concerns are fraud and providing benefits to one political party only).

<sup>299</sup> Angelo N. Ancheta, *Language Assistance and Local Voting Rights*, 44 IND. L. REV. 161 (2010).

<sup>300</sup> 42 U.S.C. § 15481 (2006).

<sup>301</sup> James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Provisions of the Voting Rights Act*, 10 NYU J. LEG. & PUB. POL'Y 195 (2006).

<sup>302</sup> Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711 (2005).

#### (4) *Improve poll worker training*

Even if a voter does come to the polls confused about some piece of the voting process, the delay will not be a major one if poll workers know the laws and how to communicate with the public. The above section on poll workers discusses proposals for improvement on this issue.<sup>303</sup> Finally, the question of the impact of challenge practices, particularly at polling locations where it is difficult to get election judges from more than one political party, should be explored further as a potential cause of delay.

## **X. CONTINGENCY PLANNING**

What happens if there is a hurricane on Election Day? When a national disaster threatens voter access, as Hurricane Sandy did for many on the East Coast in the 2012 election, public perception of electoral fairness is undermined.<sup>304</sup> While the impact of Sandy on the presidential election was not considered to be outcome determinative,<sup>305</sup> it is easy to imagine the turmoil had the storm hit just a week later.<sup>306</sup> In the past twelve years, the United States has experienced at least three major disasters that threatened the integrity of voting on Election Day: elections in New York City disrupted by the September 11<sup>th</sup> attacks, displacement caused by Hurricane Katrina, and Superstorm Sandy. Despite these wake up calls, most states still lack a clear plan should a catastrophic emergency arise on or just before Election Day.

### **Voting Contingency Issues 2001-Present**

The 2001 attacks on the World Trade Center happened on a Primary Election day. Officials scrambled to find then-Governor Pataki to issue an executive order canceling all elections in New York that day.<sup>307</sup> In the meantime Justice Steven Fisher, the appointed supervisor of the 2001 New York City elections, issued an order to cancel elections.<sup>308</sup> Since there were no challenges to the authority of the Justice or the Governor to cancel the elections, the question of what kind of procedure to follow should an emergency arise on Election Day was never answered by the New York legislature.<sup>309</sup>

Hurricanes Katrina and Rita also significantly impacted the 2005 elections in Louisiana. After Katrina, Governor Kathleen Blanco postponed the remaining 2005 elections and the early 2006

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<sup>303</sup> See *supra* Section III.F.

<sup>304</sup> See *Letter to Governor Cuomo from NY LEAD Calling for Fair Elections*, BRENNAN CENTER FOR JUST. (Dec. 5, 2012), <http://www.brennancenter.org/analysis/letter-governor-cuomo-ny-lead-calling-fair-elections>.

<sup>305</sup> Bill Turque, *Question 8: Will damage from Superstorm Sandy Have an Impact on the Election?*, WASH. POST (Nov. 4, 2012), <http://www.washingtonpost.com/wp-srv/special/politics/8-questions-election-day/question8.html>.

<sup>306</sup> See Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523 (2005).

<sup>307</sup> *Id.* at 525-26.

<sup>308</sup> *Id.* at 527.

<sup>309</sup> *Id.*

elections.<sup>310</sup> The Secretary of the State of Louisiana had originally planned for displaced citizens to be able to vote in out-of-state satellite polling places that would allow them the ability to vote regardless of where they ended up after the storm.<sup>311</sup> However, the legislature could only find enough resources for ten in-state satellite polling locations and for a modest extension of absentee voting.<sup>312</sup> While this election strategy was not found to violate Section 2 of the Voting Rights Act,<sup>313</sup> it still did not ensure the enfranchisement of all who were displaced by the storm.

In 2012, New Jersey and New York elections suffered the brunt of election turmoil after Superstorm Sandy. There was widespread voter confusion as officials scrambled to determine the best way to address voter disenfranchisement.<sup>314</sup> At the time, top officials such as New Jersey Governor Chris Christie, rightly asserted that voting was not their top priority as people went missing and homeless in the wake of the storm.<sup>315</sup> Still, election officials scrambled to establish new polling places as the election neared.

New Jersey responded by expanding upon existing laws and procedures to make voting easier for victims of Sandy. For example, New Jersey extended the deadline for residents to request mail-in ballots; extended early-voting hours; and lifted the requirement that poll workers live in the county where they work. When it appeared those measures would not be enough, the state announced that displaced residents could vote by email or fax as “overseas” voters;<sup>316</sup> extended the deadline for submitting ballots via email and fax; and opened up provisional voting across the state.<sup>317</sup> However, in allowing voters to cast ballots by email or fax, Governor Christie placed the burden on county clerks to manage the extra work and technical problems that inevitably resulted. Still, turnout was a record low of 67% in New Jersey.<sup>318</sup> In Bergen County alone, 152 polling places in 36 towns were relocated.<sup>319</sup> In New York City, fifty-nine polling places were relocated, affecting approximately 143,000 voters.<sup>320</sup> Polling places were also

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<sup>310</sup> Roy, *supra* note 29.

<sup>311</sup> *Id.* at 208.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 209-10.

<sup>314</sup> Dan Merica, *Sandy Has Election Officials Scrambling; Some Worry About Turnout*, CNN (Nov. 3, 2012), <http://www.cnn.com/2012/11/02/politics/election-challenges>.

<sup>315</sup> Andrew Restuccia, *Chris Christie Says Sandy First: ‘I Don’t Give a Damn About Election Day,’* POLITICO (Oct. 30, 2012), <http://www.politico.com/news/stories/1012/83049.html>.

<sup>316</sup> Aaron C. Carter, *Hurricane Sandy: A Catalyst to Ingenuity and Accommodation in Voting*, ST. ELECTIONS BLOG (Jan. 2, 2013), <http://electls.blogs.wm.edu/2013/01/02/hurricane-sandy-a-catalyst-to-ingenuity-and-accommodation-in-voting/>.

<sup>317</sup> Malia Rulon Herman, *Sandy Storm Exposes Need for Voting Contingency Plans*, USA TODAY (Jan. 9, 2013), <http://www.usatoday.com/story/news/nation/2013/01/09/sandy-hampered-election-efforts/1821635/>.

<sup>318</sup> *Id.*

<sup>319</sup> *Hurricane Sandy’s Impact on Election Day*, PEW CHARITABLE TRS. (Nov. 6, 2012), <http://www.pewstates.org/research/analysis/hurricane-sandys-impact-on-election-day-85899428035>.

<sup>320</sup> *Id.*

moved in six other counties upstate.<sup>321</sup> Five days before the election, the state elections board extended the date to receive absentee ballots by nearly a week.<sup>322</sup> About thirteen hours before the polls opened, Gov. Andrew Cuomo signed an executive order allowing affidavit voting for displaced voters.<sup>323</sup> However, the city had only 250 printed per district and was not able to order extras in time. Many polling places therefore ran out of affidavits that would have allowed voters to cast a ballot outside their precinct.<sup>324</sup> Not all poll workers were informed of the executive order, leading to delays and confusion as voters struggled to cast their ballots.<sup>325</sup> The scramble to cope with circumstances caused “bureaucratic red tape,” keeping at least one official from securing permission to move voting machines to safety before the storm.<sup>326</sup> One of the major challenges facing relocated precincts related to establishing the type of generator needed at each polling place. Election officials discovered they need figures on kilowatts and voltage to deploy the correct type.<sup>327</sup> All of these factors led to widespread confusion for both election officials and poll workers, leaving voters to trek from polling location to polling location looking for a precinct in which to cast their ballot.<sup>328</sup> New York City’s voter turnout for 2012 is estimated at 49% of eligible voters, down from 59% in 2008.<sup>329</sup>

### Current State Contingency Planning

Most state codes contain a broad contingency plan to overcome emergency situations that affect individual precincts on Election Day. These can range from postponement of elections (for primaries, state, or local elections) to moving certain precincts to other localities. However, there is no controlling authority to determine what happens should multiple states need to reschedule a presidential election at the same time.<sup>330</sup> Furthermore, politicians are reluctant to suggest

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<sup>321</sup> Poll Site Changes Due to Hurricane Sandy, N.Y. ST. BOARD ELECTIONS, <http://www.elections.ny.gov/CountyBOEStormInfo.html>.

<sup>322</sup> Gregory Wallace, *New York Adjusts Absentee Vote Deadline After Sandy*, CNN (Nov. 1, 2012), <http://politicalticker.blogs.cnn.com/2012/11/01/new-york-adjusts-absentee-vote-deadline-after-sandy/>.

<sup>323</sup> Claire Suddath, *Post-Sandy Voting Rules Cause Confusion in New York City*, BLOOMBERG BUSINESSWEEK (Nov. 6, 2012), <http://www.businessweek.com/articles/2012-11-06/post-sandy-voting-rules-cause-confusion-in-new-york-city>.

<sup>324</sup> Beth Fouhy & Maryclaire Dale, *Voting in New York, New Jersey After Hurricane Sandy: Officials Assist Displaced Voters for Tuesday’s Election*, HUFFINGTON POST (Nov. 6, 2012), [http://www.huffingtonpost.com/2012/11/06/new-york-voting-hurricane-sandy-tuesday-election\\_n\\_2081759.html](http://www.huffingtonpost.com/2012/11/06/new-york-voting-hurricane-sandy-tuesday-election_n_2081759.html).

<sup>325</sup> Suddath, *supra* note 331.

<sup>326</sup> Malia Rulon Herman, *Sandy Storm Exposes Need for Voting Contingency Plans*, USA TODAY (Jan. 9, 2013), <http://www.usatoday.com/story/news/nation/2013/01/09/sandy-hampered-election-efforts/1821635/>.

<sup>327</sup> *Id.*

<sup>328</sup> Suddath, *supra* note 331.

<sup>329</sup> Sam Roberts, *Voter Turnout Was Lower Than in 2008, According to Early Count*, N.Y. TIMES (Nov. 7, 2012), <http://cityroom.blogs.nytimes.com/2012/11/07/voter-turnout-was-lower-than-in-2008-according-to-early-count/>.

<sup>330</sup> Jack Maskell, *Postponement and Rescheduling of Elections to Federal Office*, CRS (Oct. 4, 2004), <http://www.fas.org/sgp/crs/RL32623.pdf>.

canceling or postponing an election for fear of accusations of partisan motivation.<sup>331</sup> The following is a sampling of different contingency plans by state:

- In New York, “[t]he State Board of Elections may order an additional day for voting, not more than twenty days after the original election, when a disaster causes fewer than 25% of eligible voters to actually be able to vote.”<sup>332</sup>
- In Georgia, “[i]f the governor declares a state of emergency, the secretary of state may postpone the date of any election by not more than 45 days.”<sup>333</sup>
- In Florida “[t]he governor may suspend or delay any election after declaring a state of emergency. The rescheduled election must be held within 10 days of the original election, or as soon as possible thereafter. The Division of Elections must adopt an “elections emergency contingency plan.”<sup>334</sup>
- In Iowa, “[t]he secretary of state, in the role of state commissioner of election, may exercise emergency powers over any election affected by a disaster of natural or other origin. The secretary of state must adopt rules setting out the extent of the emergency powers and when they will be exercised. The current rules stipulate that no federal election may be postponed or suspended.”<sup>335</sup>
- In Maryland, “[t]he governor may declare a state of emergency, providing for the postponement of the election in all or part of the state in the emergency proclamation.”<sup>336</sup>
- In North Carolina, “[t]he Executive Director of the State Board of Elections may exercise emergency powers to conduct an election where the normal schedule for the election has been disrupted by a natural disaster, extremely inclement weather, or armed conflict.”<sup>337</sup>
- In Virginia, “[t]he governor may postpone an election not more than 14 days in areas affected by a declared state of emergency.”<sup>338</sup>

Many of these codes allow for postponement of an election during a declared state of emergency, but not many states outline a detailed procedure to ensure voter enfranchisement once an election is delayed. Officials and constituents need answers, for instance, on whether early and absentee

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<sup>331</sup> Alan Greenblatt, *There's No Contingency Plan If Disaster Strikes On Election Day*, National Public Radio (Oct. 31, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/10/30/163959178/theres-no-contingency-plan-if-disaster-strikes-on-election-day>.

<sup>332</sup> N.Y. ELEC. LAW § 3-108 (McKinney 2001).

<sup>333</sup> GA. CODE ANN. § 21-2-50.1 (West 2003).

<sup>334</sup> FLA. STAT. ANN. § 101.733 (West 2004).

<sup>335</sup> IOWA CODE ANN. § 47.1 (West 2004).

<sup>336</sup> MD. CODE ANN., ELEC. LAW § 8-103 (West 2004).

<sup>337</sup> N.C. GEN. STAT. § 163-27.1 (2004)

<sup>338</sup> VA. CODE ANN. § 24.2-603.1 (2004)

votes cast before the emergency are valid, and if the term of those who end up winning the eventual election should be extended to match the delay.<sup>339</sup> Aside from the many process questions that inevitably result when elections are disrupted, states would do well to consider constitutional and statutory issues raised by contingency plans developed.<sup>340</sup>

## Proposed Solutions

### (1) *Increase early voting*

Some have suggested that early voting be a part of a state's contingency plans to ease congestion on disaster-stricken polling places on Election Day.<sup>341</sup> New Yorkers and New Jerseyites were not offered the opportunity to vote early pre-Sandy, so there was no way to cast a ballot in anticipation of the storm.<sup>342</sup>

### (2) *Update technology*

Updated voter technology may help accommodate contingency planning. Cleta Mitchell has suggested allowing the Department of Defense to take the lead in advancing online voting in order to reach soldiers stationed in remote and dangerous areas.<sup>343</sup> Lessons learned in the military context might be adapted to keep voters enfranchised during an emergency.

### (3) *Allow federal oversight of state election contingency planning*

Some commentators have called for a federal commission to oversee elections.<sup>344</sup> Perhaps the federal government should include election management as part of its disaster relief planning.

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<sup>339</sup> Goldfeder, *supra* note 314.

<sup>340</sup> Richard L. Hasen, *How Many More Near-Election Disasters Before Congress Wakes Up?*, DAILY BEAST (Oct. 30, 2012), <http://www.thedailybeast.com/articles/2012/10/30/how-many-more-near-election-disasters-before-congress-wakes-up.html>.

<sup>341</sup> NORDEN, *supra* note 49, at 4.

<sup>342</sup> *Id.*

<sup>343</sup> William & Mary Election Law Symposium, *supra* note 56. Note that online voting is extremely controversial. See e.g., Michael Agresta, *Will the Next Election Be Hacked?*, WALL ST. J. (Aug. 17, 2012), <http://online.wsj.com/article/SB10000872396390444508504577595280674870186.html>.

<sup>344</sup> Richard L. Hasen, *Nationalize Oversight and Control*, N.Y. TIMES (Nov. 9, 2012), <http://www.nytimes.com/roomfordebate/2012/11/08/does-our-voting-system-need-to-be-fixed/nationalize-oversight-and-control-of-elections>.



## XI. CONCLUSION

Voting delays garnered significant attention during the 2012 election. Proposed solutions quickly followed, and will no doubt continue to flow. The impulse to address these delays is admirable, though the causes and extent of Election Day delays are still poorly understood. This Report identifies broad and overlapping categories of the main causes of Election Day delays in 2012. This is by no means an exhaustive accounting of potential causes of delay. Instead, it strives to provide a useful framework for determining what problems exist and what potential solutions have been suggested thus far.

As noted in the Introduction, this Report relied heavily on media reports and aggregate data to determine both where delays occurred and what caused them. Media reports, while useful for identifying delays as they happened, often lack sufficient specificity about the exact cause and nature of delays. Delays tended to be reported at the state or county level, as opposed to specific polling places, and rely on categorical causes, such as “machine malfunction,” instead of information about specific causes. A similar problem arises from aggregate data.

Finally, all delays are not equal. No single national or even statewide solution will eliminate Election Day delays entirely—other than Oregon and Washington’s switch to voting by mail, which would surely give rise to other kinds of delays in more populous states. Acknowledging this, promoting discussion is important in helping localities address this issue and to thinking through what role state and federal governments can play.

Ensuring more efficient elections will require legislators and policymakers to acknowledge that there is much we do not understand about the causes of Election Day delays. What is clear is that efforts to understand the causes of Election Day delays are essential to improve public confidence in elections in this country.