

Dēmos
A NETWORK FOR IDEAS & ACTION

A Fallible 'Fail-Safe'

An Analysis of Provisional
Balloting Problems in the
2006 Election

Scott Novakowski



About Dēmos

Dēmos: A Network for Ideas & Action is a non-partisan public policy research and advocacy organization committed to building an America that achieves its highest democratic ideals. We believe this requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement; an economy where prosperity and opportunity are broadly shared and disparity is reduced; and a strong and effective public sector with the capacity to plan for the future and provide for the common good. Founded in 2000, Dēmos' work combines research with advocacy—melding the commitment to ideas of a think tank with the organizing strategies of an advocacy group.

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About The Democracy Program

The Democracy Program works to strengthen democracy in the United States by reducing barriers to voter participation and encouraging civic engagement. Dēmos supports state and national reform efforts by conducting research on current and long-range issues; advancing a broad agenda for election reform; providing advocates and policymakers with technical support; and strengthening reform networks. Through our recent alliance with the National Voting Rights Institute, we are now able to utilize complementary channels of policy, advocacy and litigation to achieve our goals.



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Introduction

Following the widespread problems of the 2000 presidential election, numerous election reforms have been proposed, debated, and enacted in Congress and states across the country. Provisional balloting was one such reform, implemented as part of the federal Help America Vote Act of 2002 (HAVA). To ensure that no voter is turned away from the polls on Election Day, Congress included in HAVA a so-called “fail-safe” voting provision, requiring states to offer provisional ballots to individuals who believe they are registered to vote but whose names do not appear on the voter rolls or whose eligibility is challenged. This provision is also extended to those who do not meet federal identification requirements. Such ballots are counted if election officials subsequently determine that the individual was a legitimate voter under state law.¹

Provisional balloting can and does work in states that have adopted fair standards for the casting and counting of these ballots. Indeed, in the 2004 presidential election an additional 1 million voters were able to vote—and have their votes counted—because of provisional balloting. Yet, provisional ballots can fall short of their promise when states adopt restrictive standards and poll workers are not adequately trained.

Clear and consistent state standards for handling provisional ballots become even more important in closely-contested elections. While provisional ballots may comprise only a fraction of the national vote, they determined the outcome of various electoral races in 2006. For example:

- ▷ Thirty-nine provisional ballots were rejected in Nebraska’s 12th State Senate District election where Steve Lathrop beat Jean Stothert by 14 votes.²
- ▷ The candidates for County Commissioner in Brooks County, Georgia, were locked in a 318-318 vote tie on election night, and provisional ballots played a decisive role in the outcome.³
- ▷ In South River, New Jersey, Councilman Anthony Razzano beat his opponent by one vote, shifting power in the Borough Council away from Democrats to an even split between Democrats and Republicans. Nine provisional ballots were rejected in that race.⁴

Comprehensive data on the casting and counting of provisional ballots in the 2006 election is not yet available.⁵ This report provides a snapshot of provisional balloting problems experienced by voters across the nation in November 2006. The goal of this report is to highlight the recurring need to reform provisional balloting implementation and other election administration procedures so that no voter is wrongfully disfranchised in 2008 and future elections.

Provisional Ballot History

Millions of citizens were denied their right to vote in the 2000 presidential election. It has been estimated that between 1.5 and 3 million votes were lost in the 2000 election because of registration problems alone.⁶ Defective voter lists were the source of many of these problems.

Provisional balloting was part of the response to the mass disfranchisement of the 2000 election. While HAVA expanded the use of provisional balloting to all states without Election Day Registration, the concept itself was not new. Twenty-six states had allowed for some form of provisional balloting prior to 2002.⁷

While HAVA requires that provisional ballots be offered to all those whose names are not on the registration lists, the details of implementation are left to the states. Regrettably, many states used the discretion afforded them to adopt unnecessarily stringent requirements for deciding when a provisional ballot will be counted. What Congress had characterized as a “fail-safe” voting procedure fell short of expectations in the 2004 election. While provisional ballots enfranchised many voters, over one in three of the nearly 2 million provisional ballots cast were not counted. Thirteen states each rejected over 10,000 provisional ballots; 23 states each counted less than 50 percent of provisional ballots.⁸ As this report demonstrates, many of the provisional balloting problems documented in 2004 occurred again in the 2006 general election.⁹

Methodology

This report is based on data collected by the Election Protection Coalition, the nation’s largest non-profit, non-partisan voter protection initiative led by the Lawyers’ Committee for Civil Rights Under Law, the NAACP, the National Bar Association, and the People for the American Way Foundation. Formed in response to the widespread disfranchisement witnessed in the 2000 election, Election Protection works to ensure that all eligible voters have the opportunity to participate in the political process.

Over 2,000 volunteers from more than 50 non-profit organizations and nearly three dozen of the nation’s largest law firms participated in Election Protection activities in November 2006. Volunteers in 14 call centers across 19 states staffed a national toll-free hotline for voters to report election problems. An innovative, web-based software application—the Election Incident Reporting System (EIRS)—was used to categorize and record those incidents. Over 20,000 calls were received through the hotline on November 6th and 7th, 2006; 17,705 of these callers were connected to an Election Protection volunteer.¹⁰

Dêmos analyzed 520 EIRS provisional balloting incident reports. Of these, 450 described actual problems.¹¹ This report is based on a review of those incidents, supplemented by media reports. It is important to note that the majority of incidents were self-reported to a national toll-free hotline. Where possible, Dêmos contacted county elections officials

and asked that they provide additional information and insights on the reported incidents. While this analysis does not represent a definitive account of problems experienced by voters in November 2006, it does identify ongoing problems with the administration of provisional balloting and highlights the need for further improvement.

OVERVIEW OF RESULTS:

The provisional balloting incidents recorded by Election Protection hotline volunteers are cause for national concern. Many voter registration lists in use on Election Day 2006 were riddled with errors while poll workers and election officials were often confused about the proper application of provisional ballots two election cycles after HAVA went into effect. Provisional balloting problems broke down along the following lines:

- ▷ Over one-third of problems involved voters being denied a provisional ballot when they were likely entitled to one, or individuals being required to cast a provisional ballot when they should have voted with a regular ballot.
- ▷ Almost 40 percent of the incidents involved problems with voter lists and other breakdowns in election administration occurring prior to Election Day.
- ▷ Fourteen percent of reports involved provisional ballots and electronic voting machine malfunctions.
- ▷ Fifteen percent of incidents involved poll workers either requiring voters to cast provisional ballots even though they had provided proper ID, requesting ID unnecessarily or, in the case of voters who genuinely lacked the appropriate ID, failing to inform such voters of the necessary steps to validate their provisional ballots (e.g., presenting valid ID to elections officials within a prescribed number of days after the election). Almost 80 percent of these incidents happened in Ohio.

Many voter registration lists in use on Election Day 2006 were riddled with errors while poll workers and election officials were often confused about the proper application of provisional ballots two election cycles after HAVA went into effect.

Provisional Ballot Problems

To illustrate the types of provisional balloting problems experienced by voters in the 2006 election, Dēmos has codified the EIRS incident reports captured by Election Protection volunteers using seven main themes:

1: No provisional ballot was offered, or voter was refused a provisional ballot

Almost one-quarter of incidents involved reports of poll workers failing or refusing to offer provisional ballots to voters who believed that they were eligible to vote. While the rules used to count provisional ballots may vary by state and may be interpreted differently from county to county,¹² federal law requires that a provisional ballot be provided to all voters whose names do not appear on the voter rolls or who can not present proper

identification.¹³ Election Protection not only received reports of poll workers failing to offer or refusing to provide provisional ballots, it also received a dozen reports of polling places without any provisional ballots on site.

Among the incidents reported to the Election Protection hotline:

- ▷ A husband and wife in Cuyahoga County, Ohio, claimed to have informed election officials of their address change in advance of Election Day, but only the husband's name appeared on the rolls when they arrived at their polling site. The wife reported being denied a provisional ballot by poll workers.
- ▷ A Jackson County, Missouri, voter had moved into the county and submitted a voter registration form several months prior to the election. She called the day before the election to confirm her registration and was told she could vote if she brought proper ID to the polling place. Despite these steps, the voter's name was not on the rolls at her polling place and she was not permitted to vote, not even by provisional ballot.
- ▷ A voter in Hamilton County, Ohio, went to her usual polling place to discover that her name was missing from the voter list. She was told by poll workers that she could vote provisionally but that no provisional ballots were available. The voter was directed to another polling place where she was refused a provisional ballot.
- ▷ At the Woodland United Presbyterian Church in Duval County, Florida, a voter whose wife was on the rolls was told to go to another polling place. When poll workers learned that the voter had called the Election Protection hotline for assistance, he reported being locked out of the polling place and prevented from voting.
- ▷ A voter in Shelby County, Tennessee, moved to a new address and updated her voter registration information prior to Election Day only to find her name absent from the voter rolls. The poll worker did not call the county election commission to check the voter's registration status and did not offer the voter a provisional ballot.

News accounts and blog posts substantiated the misapplication of provisional balloting requirements by inadequately trained poll workers. Ron Rivest of the CalTech/MIT Voting Technology Project reported that poll workers in Cobb County, Georgia, had uniformly failed to offer provisional ballots to voters on Election Day. Rivest was told that voters whose names were not on the rolls could not vote, even by provisional ballot. One sympathetic poll manager regretfully admitted that he had turned away 10 voters by 10:00 am.¹⁴

The Hartford Courant reported that 150 University of Connecticut students in Mansfield, Connecticut, were left off the voter rolls on Election Day despite claiming to have pre-registered. Only one-third to one-half of the students cast provisional ballots.¹⁵ One student reported being initially turned away from the polls after her name did not appear on the list. Upon realizing she could vote provisionally, the student returned to the polling place only to encounter poll workers unfamiliar with the provisional balloting process.¹⁶ The perseverant voter was eventually given a provisional ballot by a polling place moderator.

Comprehensive data on the number of voters turned away from the polls on Election Day is not available. Likewise, the impact of those lost votes on election results is unknown. What is clear is that the reliability of HAVA's "fail-safe" voting provision remains in doubt.

2: Voters eligible for a regular ballot were required to vote by provisional ballot

Multiple incidents involved confused poll workers requiring voters eligible to vote by regular ballot to vote provisionally instead. In fact, observers have indicated a trend whereby provisional ballots are increasingly being used as "ballots of convenience" by inadequately trained poll workers or those looking for a quick fix to Election Day problems.¹⁷ Vague and inconsistent standards adopted by the states for counting provisional ballots increase the likelihood such ballots will be rejected.¹⁸ The use of provisional ballots for purposes other than those prescribed by HAVA thus unnecessarily jeopardizes the votes of eligible citizens.

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Election Protection incident reports suggest that provisional ballots were inappropriately used in states across the country:

- ▷ A caller reported that long lines at the Cochran Avenue Baptist Church poll site in Los Angeles County, California, prompted poll workers to distribute provisional ballots to all voters.
- ▷ According to a caller, a polling place in San Francisco, California, closed 15 minutes early and moved the polling station out to the sidewalk where provisional ballots were issued to everyone arriving to vote.
- ▷ Calls from both Duval County, Florida, and New York City reported that voters who moved to a new address within the same precinct were required to cast provisional ballots. The laws of both states allow voters moving within the same precinct to update their addresses at the polling place and cast regular ballots.¹⁹
- ▷ A voter in Hudson County, New Jersey, reported being required to cast a provisional ballot even after a phone call to the board of elections verified the voter was indeed registered.

There were a disproportionate number of reports concerning improperly-issued provisional ballots in Ohio. Directives issued by then-Secretary of State J. Kenneth Blackwell, and a lawsuit filed in the weeks leading up to Election Day, created significant confusion among poll workers and voters as to what constituted proper ID at the polls. The parties agreed to a consent order on November 1, 2006, that specified that a valid driver's license would be accepted as proper ID, even if the license bore an old address.²⁰ Despite this agreement, voters who arrived at the polls with a driver's license bearing an old address were instructed to vote by provisional ballot. Forty-five such incidents were reported to the Election Protection hotline.

3: Voter list problems interfered with voting

Inaccurate voter registration lists continue to plague elections. In 40 percent of Election Protection calls, voters complained they had been omitted from the voter rolls despite having registered before Election Day, or had been improperly designated on the voter rolls as having to cast a provisional ballot. State implementation of new federal voter registration procedures likely contributed to these problems. Under HAVA, the identity of newly registered voters must be confirmed by matching information recorded on voter registration applications with government records. As with provisional balloting, states were given discretion in crafting information-matching policies and procedures. Some states adopted model policies while others issued standards making it more difficult for eligible voters to get on the voter rolls. Thirteen of the 25 states from which list problems were reported use a list matching process that can create a significant, high, or very high risk of voting list error.^{21 22} Seventy-eight incidents were reported from these 13 states.

Among the problems reported on Election Day:

- ▷ A voter in Maricopa County, Arizona, reported that despite having confirmed her registration status and polling place location with the county recorder the day before the election, her name was left off the rolls at her polling place.
- ▷ A voter in Philadelphia, Pennsylvania, claimed to have been directed to five different polling places before she was issued a provisional ballot. The voter's name was not found on any of the voting lists at any of the polling places.
- ▷ A voter in Franklin County, Ohio, who had cast ballots in the 2005 general election and the 2006 primary found his name missing from the rolls at his polling place. A poll worker informed him that a confirmation letter sent to his home was returned as undeliverable. The voter had neither received the letter nor moved to a new address.
- ▷ A Beckley, West Virginia, resident went to the precinct listed on her voter registration card only to find that her name was not on the voter rolls, even though she had voted there in the past. She was referred to the precinct next door; again she was not found on the list. The voter was told by a poll worker that she could vote with a provisional ballot, but that it would not count. She left without voting.

If recent experience is any indication, a sizeable percentage of these provisional ballots were likely rejected despite voters taking all appropriate steps to ensure that they were registered to vote.²³

4: Absentee ballot problems and appropriate use of provisional ballots

Absentee ballots are provided to voters unable to vote in person on Election Day, or if permitted under state law, voters who prefer to vote by mail. Absentee ballots may be the only recourse for elderly or disabled citizens, or those traveling out of town. Absentee ballots are typically mailed to voters' residences in advance of elections to be completed and returned on or before Election Day. That process can often break down. Some voters never receive their absentee ballots or receive them too late for timely submission. In such incidents, the absentee balloter's only option may be to go to the polls and cast a provisional ballot, if permitted under state law. In other cases, voters never request an

absentee ballot, but are mistakenly designated on the voter list as having made such a request. HAVA's provisional balloting stipulations do not specifically address absentee balloting problems.

Election Protection volunteers fielded 29 calls about absentee ballot problems. Seventeen voters reported being marked in the poll books as having requested an absentee ballot, when in fact they had not. With no way of disproving such requests, these voters were forced to cast a provisional ballot. Twelve calls were received from voters who had requested absentee ballots that never arrived. In most cases, they had to travel to their polling place to vote provisionally. As discussed earlier, vague and inconsistent standards for counting provisional ballots may unnecessarily place an otherwise valid vote at risk. Furthermore, many voters request absentee ballots due to sickness, a disability, or because they are out of town on Election Day. Requiring absentee voters to travel to their polling place to cast a provisional ballot runs counter to the purpose of absentee balloting.

Examples of absentee ballot problems from the Election Protection EIRS database:

- ▷ A disabled voter in Cuyahoga County, Ohio, claimed she had requested an absentee ballot four times prior to the election, with no response. She was forced to travel to a polling place on Election Day and voted provisionally.
- ▷ A Los Angeles County, California, voter requested an absentee ballot which she received but misplaced. Having traveled to the polling place, the voter was not offered a provisional ballot and left without voting. Under California law, a voter in this situation should have been offered a provisional ballot to be counted once election officials confirmed her absentee ballot was not returned.

5: Improperly administered provisional ballots disenfranchise voters

Provisional ballots are liable to be ruled invalid if voters are not properly instructed on how to complete them. The misapplication of provisional balloting rules and procedures by inadequately trained or confused poll workers in November 2006 likely cost many individuals their votes. Forty-two provisional ballots in Boulder County, Colorado, did not bear the voters' signatures and were presumably rejected.²⁴ Students at the University of Colorado registering for the first time were not informed that they had to present ID in order to vote. At the polling place, election judges offered them two options: obtain and present documents from the University that would substantiate their identity and vote a regular ballot, or cast a provisional ballot. The election judges failed to make clear that these provisional ballots would not be counted.²⁵ Unlike other states, Colorado does not allow provisional voters who have not shown ID to substantiate their identity—and save their vote—by returning to the elections office within a prescribed number of days with appropriate ID.²⁶

Vague and inconsistent standards for counting provisional ballots may unnecessarily place an otherwise valid vote at risk.

Other incidents from the Election Protection database:

- ▷ A voter at the Redwood School in Essex County, New Jersey, found that she was not on the rolls, despite voting in the last election. Although the poll worker properly provided her a provisional ballot, the voter was told she must vote for candidates belonging to the same party. Ironically, a challenger at the polling place had to inform the voter that she could vote for the candidates of her choice.
- ▷ Callers in Hudson County, New Jersey, Cuyahoga County, Ohio, and Harford County, Maryland, complained that their provisional ballots were not placed in sealed envelopes, exposing them to tampering or getting lost. A Hudson County caller reported that she never signed an affidavit attesting to her eligibility to vote. The unsigned affidavit likely invalidated the provisional vote.

6: Jurisdictional restrictions often void provisional ballots

Eligible voters whose names are not on the voter list or do not have the necessary ID are permitted by law to cast a provisional ballot. However, at least 30 states and the District of Columbia did not count provisional ballots cast in the wrong precinct, even if the individual voted in the county where she registered.²⁷ When multiple precincts are located in the same polling place, an error as simple as getting in the wrong line can cost a citizen her vote.

Some examples of jurisdictional problems captured by Election Protection volunteers:

- ▷ A voter in Franklin County, Ohio, was never notified that her polling place had been relocated. The poll worker at her old poll site directed the voter to cast a provisional ballot. She apparently failed to inform the voter that Ohio rejects provisional votes cast at the wrong precinct.
- ▷ A Texas Precinct Chair called the Election Protection hotline to voice her concern that confused voters might cast ballots that were sure to be discounted. Voters in the county had historically been able to vote outside of their home precinct. In November 2006, however, voters were directed to go to their correct polling place or cast a provisional ballot at the polling place at which they appeared. Unfortunately, Texas invalidates any provisional ballots cast in the wrong precinct.

7: Voting machine problems and provisional ballots

The introduction of new voting machines over the last several years has led to widespread disruptions of federal, state and local elections. Indeed, scores of voting machine problems affected various aspects of election administration in November 2006.²⁸

Fourteen percent of incidents reported to the Election Protection hotline were related to electronic voting machines and provisional ballots.²⁹ Several dozen reports involved the use of provisional ballots when all or most of the electronic voting machines at a polling place were not properly working. Forty callers reported being issued provisional ballots after they were prohibited from casting a regular ballot due to malfunctioning electronic voting machines. Twelve callers were turned away from the polls or made to wait until the machines could be repaired. While state law varies on the use of emergency paper or provisional ballots in these situations, provisional ballots were inappropriately used in at least nine reported incidents. These nine incidents occurred in New York and New Jersey, states that both call for emergency paper ballots when voting machines break down.

Emergency paper ballots are superior to provisional ballots in the instance of machine malfunction since they are treated as regular ballots cast by voters whose eligibility has already been determined and is not subject to challenge.

Some examples of machine-related problems reported to the Election Protection hotline:

- ▷ Half of the voting machines at the Dover Bible Church in Tuscarawas County, Ohio, were not working on Election Day. A caller reported that poll workers were directing voters unable to stand in the long line to cast provisional ballots at the board of elections office.
- ▷ Several voters from Essex County, New Jersey, called to report that voting machines were down and voters were given provisional ballots rather than the emergency paper ballots required under New Jersey state law.
- ▷ A poll worker from Richland County, South Carolina, called to report that voting machines were not working when she opened the polling place in the morning. She handed out “fail-safe” provisional ballots until the machines were fixed. The poll worker called the Election Protection hotline to ask if these ballots would be counted, a troubling indication of inadequate training.

Conclusion and Recommendations:

Dēmos’ analysis of incidents reported to the Election Protection hotline in November 2006 shows ongoing problems in the administration of provisional ballots. Poll workers are confused about federal provisional balloting requirements, forcing otherwise eligible voters to cast provisional ballots, or using them as a panacea for voting machine malfunction and other Election Day mishaps. Voters are at times issued provisional ballots that are sure to be discounted thereafter.

The data also suggests continuing challenges in producing accurate voter lists for Election Day. Unacceptably high numbers of voters are forced to vote provisionally when election officials lose or fail to process voter registration applications and change of address notices, or when the names of duly registered voters are otherwise omitted from the voter rolls. Any instance where the opportunity to cast a regular vote is lost can jeopardize a citizen’s most fundamental right to meaningfully participate in the democratic process.

Congress should put an end to “placebo ballots” by setting voter-protective standards that provide provisional voters with clear instructions and adequate time to verify their eligibility.

Voter complaints logged by Election Protection volunteers show that the current administration of provisional balloting does not meet the needs of many eligible voters. Further reform is necessary. Dēmos recommends the following policy changes to ensure that every eligible voter is able to cast a meaningful ballot on Election Day:

IMPROVE POLL WORKER TRAINING:

Reports made to the Election Protection hotline indicate that poll workers across the nation continue to be confused about the proper use of provisional ballots. In many cases voters were never informed of the opportunity to cast a provisional ballot, or were flatly refused the right to do so. Others were given provisional ballots when they were likely entitled to vote by regular ballot. States and localities must ensure that all poll workers are fully trained in provisional balloting procedures.

Improving poll worker performance will require additional federal, state, and local funds. The Count Every Vote Act (CEVA) introduced in the 110th Congress by Sen. Hillary Rodham Clinton and Rep. Stephanie Tubbs-Jones would authorize new federal spending to help states train poll workers on the appropriate use of provisional ballots, the process for casting such ballots, and other election procedures. The CEVA also calls for a study on appropriate methods to recruit high school students to serve as poll workers.³⁰

REQUIRE EMERGENCY PAPER BALLOTS:

When voting machines malfunction, emergency paper ballots should be provided to voters. Such ballots should automatically be counted as would a regular ballot. Bills introduced by Rep. Rush Holt, Sen. Dianne Feinstein, and Sen. Hillary Rodham Clinton and Rep. Stephanie Tubbs-Jones in the 110th Congress require that states issue emergency paper ballots where electronic voting machines malfunction.^{31 32 33} These proposals preserve the intent of provisional ballots as a ballot of last resort, not to be used when a voter is eligible to vote with a regular ballot.

IMPROVE VOTER REGISTRATION LIST MAINTENANCE AND DATA-MATCHING STANDARDS:

EIRS reports indicate that a significant number of voters who believed that they were duly registered to vote were omitted from the rolls on Election Day in 2006. Legislation introduced by Sen. Feinstein would ensure that no otherwise eligible voter is prevented from being added to the rolls because of errors or inconsistencies in data or variations in name, such as maiden names, nick names, or middle names.³⁴ Absent federal action, as states implement their HAVA-mandated computerized, statewide voter registration databases we recommend that they adopt data-matching standards that minimize the risks of typographical error and other data entry flaws that keep eligible voters off the rolls. Nebraska, New Jersey and Oregon have been cited as states whose database standards help to ensure that all eligible voters are able to cast a ballot.³⁵

CLARIFY ABSENTEE/PROVISIONAL BALLOTING RULES:

As discussed above, HAVA's provisional ballot requirement does not address the issue of a voter whose absentee ballot did not arrive prior to Election Day. Some states allow a voter who has requested but not received an absentee ballot to cast a provisional ballot at the polling place. Others offer no such contingency.³⁶ HAVA should be amended to allow for provisional voting at the polls for individuals who have requested but not received

absentee ballots before Election Day. These provisional ballots should be counted once election officials confirm that the absentee ballots were never cast.

COUNT PROVISIONAL BALLOTS CAST IN THE CORRECT COUNTY:

States are divided on whether to count a provisional ballot cast in the wrong precinct. At least 30 states and the District of Columbia rejected such votes in the November 2006 election. An error as simple as getting in the wrong line at a polling place could cost an eligible citizen her vote. HAVA should be amended to clarify that provisional votes must be counted for all races in which the voter is eligible, even if the ballot was cast in the wrong precinct. Three pieces of federal legislation seek to correct this problem.³⁷ Should Congress fail to act on this issue, responsibility falls to the states to pass legislation to ensure ballots cast outside the voter's precinct are counted. Utah recently passed legislation requiring provisional ballots to be counted if cast anywhere in the state, providing other eligibility requirements are met.³⁸ State legislatures in Indiana, South Carolina, Texas, Rhode Island, and New York introduced bills in 2006 that would require counting such ballots.

PROVIDE CLEAR STANDARDS FOR VOTER IDENTIFICATION AND VALIDATION OF BALLOTS:

While HAVA sets minimum identification requirements for first-time voters registering by mail, and provides for provisional voting by individuals who cannot meet the requirements, it does not prescribe how states later process such provisional ballots. As a result, Colorado must offer provisional ballots to newly registered voters without proper ID, but it is free to later discount all such votes as invalid. Other states allow individuals to validate their provisional votes after Election Day by presenting acceptable ID to election officials. Congress should put an end to "placebo ballots" by setting voter-protective standards that provide provisional voters with clear instructions and adequate time to verify their eligibility.

PASS ELECTION DAY REGISTRATION (EDR) INTO LAW:

Ultimately, states should embrace Election Day Registration (EDR), which provides a ready remedy to provisional balloting problems. With EDR, individuals whose names were left off the voter rolls can simply re-register and cast a valid ballot on Election Day. States with EDR report issuing very few provisional ballots in their elections and consistently rank among the highest states in the nation in voter turnout.^{39 40} Seven states had EDR in the 2006 general election. Iowa enacted EDR in early 2007 and, most recently North Carolina enacted a form of Same Day Registration in which voters can register and cast a ballot during periods of early voting.

These basic reforms are a strong foundation for ensuring that no eligible voter is turned away from the polls and vote counts are as accurate as possible. Making provisional ballots a true "fail-safe" will require some effort on the part of election officials and legislators. Voters should be able to fully expect that if they properly registered to vote, their name will be on the voter list at the polls, and if they are asked to cast a provisional ballot in 2008, that it will be properly counted. Americans deserve no less.

Endnotes

1. 42 U.S.C. § 15482. Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming are exempt from HAVA's provisional ballot requirement because they have Election Day Registration, although Wisconsin and Wyoming offer provisional ballots to voters who cannot meet identification requirements. North Dakota is also exempt because it does not have voter registration.
2. Joanne Young, "Fresh Faces: Steve Lathrop," *Lincoln Journal Star*, February 18, 2007.
3. Alicia Eakin, "Brooks County Commission Seat Decided by One Vote," *WALB News*, November 8, 2006.
4. Rebecca Lerner, "Razzano Wins Council Seat," *Home News Tribune*, November 18, 2006.
5. National data on provisional ballot casting and counting rates as well as why rejected ballots were not counted was collected by the U.S. Election Assistance Commission as part of their 2006 Election Administration and Voting Survey. We expect this report to be released in late 2007. See <http://www.eac.gov> for more information.
6. CalTech/MIT Voting Technology Project, *Voting: What Is, What Could Be* (July 2001).
7. These 26 states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia, Washington, and West Virginia. See Electionline.org, "The Provisional Voting Challenge" (December 2001), <http://electionline.org/Portals/1/Publications/Provisional%20Voting.pdf>.
8. Kimball W. Brace and Michael P. McDonald, *2004 Election Day Survey* (U.S. Election Assistance Commission, 2005), http://www.eac.gov/election_survey_2004/toc.htm.
9. Dēmos, *Continuing Failures in 'Fail-Safe' Voting: A Preliminary Analysis of Provisional Voting Problems* (December 2004), <http://www.demos.org/pub383.cfm>.
10. Lawyers Committee for Civil Rights Under Law, *Report on the Legal Program to Board of Directors and Trustees, Staff, and Pro Bono Partners* (December 2006), http://lccr.3cdn.net/de006e85f11146dfee_vjm6btkj2.pdf.
11. The remaining calls were from voters seeking information, duplicate reports, or did not contain a specific problem.
12. For examples of county-to-county variation in provisional ballot counting procedures, see Electionline.org, "Solution or Problem? Provisional Ballots in 2004," (March 2005), p. 8-10, <http://www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf>. It should be noted, however, that these in-state variations seem to involve violations or differing interpretations of state policy among different counties rather than individual counties enacting different procedures as a matter of law.
13. See 42 U.S.C. § 15482(a). In *Sandusky County Democratic Party et al. v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004), the court determined that HAVA's "primary purpose...[is] to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers," and that "any individual affirming that he or she 'is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office shall be permitted to cast a provisional ballot.'" The court in *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fl. 2004), held similarly. Moreover, in a letter to Arizona Secretary of State Janice Brewer in September 2005, the U.S. Department of Justice concluded that Arizona must offer a provisional ballot to any voter claiming to be entitled to vote. See http://www.usdoj.gov/crt/voting/hava/az_id.htm.
14. Ronald L. Rivest, *Trip Report: Election Day 2006* (Caltech/MIT Voting Technology Project, Fall 2006).
15. "Voter Turnout High Statewide, Few Problems Reported," *Associated Press*, November 8, 2006.
16. "Election Foibles: Provisional Ballots," Connecticut Local Politics, November 15, 2006, <http://connecticutlocalpolitics.blogspot.com/2006/11/election-foibles-provisional-ballots.html>.

17. David Niven, "Did We Need So Many Provisional Ballots?," *The Other Paper*, November 16, 2006.
18. Electionline.org, "Provisional Ballot Verification" (August 2006), <http://www.electionline.org/Default.aspx?tabid=1113>.
19. See FLA. STAT. ANN. § 101.045(2) and N.Y. ELEC. LAW § 8-302(3)(b)
20. District Court documents and news stories related to the case, *Northeast Ohio Coalition for the Homeless v. Blackwell*, are available at <http://moritzlaw.osu.edu/electionlaw/litigation/NEOCHv.Blackwell.php>.
21. These 13 states are Arizona, California, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, Pennsylvania, Texas, Utah, and Washington.
22. Justin Levitt, Wendy R. Weiser and Ana Muñoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (Brennan Center for Justice, March 2006).
23. In 2004, over one in three of the nearly 2 million provisional ballots cast were not counted. See Kimball W. Brace and Michael P. McDonald, *2004 Election Day Survey* (U.S. Election Assistance Commission, 2005), http://www.eac.gov/election_survey_2004/toc.htm.
24. Nicole Danna, "Check That Tally," *ColoradoDaily.com*, November 13, 2006.
25. *Ibid.*
26. 8 C.C.R. § 1505-1 (Rule 26.5.2).
27. These states are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine*, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming along with the District of Columbia. Six states are not subject to HAVA's provisional voting requirements, but two of these six (Wisconsin and Wyoming) authorize some measure of provisional voting. See Electionline.org, "Provisional Ballot Verification" (August 2006), <http://www.electionline.org/Default.aspx?tabid=1113>. *Maine is not included in electionline.org's list. Maine offers its voters "challenge ballots" which under certain circumstances may not be counted if the voter is in the wrong precinct. However, Maine's system of Election Day Registration greatly reduces the need for challenge ballots.
28. VotersUnite.Org, VoteTrustUSA, Voter Action, and Pollworkers for Democracy, *E-Voting Failures in the 2006 Mid-Term Elections: A Sampling of Problems Across the Nation* (January 2005), <http://www.votersunite.org/info/E-VotingIn2006Mid-Term.pdf>.
29. "Election voting machines" here refers to both Direct Recording Electronic (DRE) machines and Optical Scanners that read paper ballots.
30. *The Count Every Vote Act of 2007*, S. 804, 110th Congress (March 7, 2007), by Sen. Hillary Clinton, and H.R. 1381 by Rep. Stephanie Tubbs-Jones.
31. *The Voter Confidence and Increased Accessibility Act*, H.R. 811, 110th Congress (February 5, 2007), by Rep. Rush Holt.
32. *The Ballot Integrity Act of 2007*, S. 1487, 110th Congress (May 24, 2007), by Sen. Dianne Feinstein.
33. Dēmos and other organizations go one step further calling for a "paper ballot standard." Dēmos calls for a paper ballot as the minimum requirement for democratic elections. Such a requirement is necessary to ensure that every legally registered voter can vote, that every vote is recorded precisely as the voter intends, and that every vote is counted and can, if necessary, be re-counted. Paper ballots include those counted by an optical-scan system or by hand, and marked by hand or by a ballot marking device. For more information see <http://www.demos.org>.
34. See endnote 32.
35. Levitt, Weiser and Muñoz.

36. For example, Tennessee law does not allow a voter issued an absentee ballot to vote at a polling place by regular or provisional. One hotline caller from Benton, Tennessee whom never received the absentee ballot she had requested in advance was not permitted to cast a ballot on Election Day, provisional or regular.
37. *The Count Every Vote Act* would require election officials to count provisional ballots cast in the correct county. See note 26. *The Voting Opportunity and Technology Enhancement Rights Act of 2007*, S. 730, 110th Congress (March 1, 2007), by Sen. Dodd, and S. 1487, would allow provisional ballots to be cast and counted everywhere in the state.
38. See UTAH CODE ANN. § 20A-4-107
39. For example, in 2004, Wyoming reported issuing only 95 provisional ballots, a tiny fraction of one percent of the 198,781 in-person ballots cast in the state in that election. In contrast, nationwide in 2004, provisional ballots accounted for 2.6 percent of in-person ballots cast. Kimball W. Brace and Michael P. McDonald, *2004 Election Day Survey* (U.S. Election Assistance Commission, 2005), http://www.eac.gov/election_survey_2004/toc.htm.
40. Dêmos, *Voters Win With Election Day Registration* (January, 2007), <http://www.demos.org/pub1280.cfm>, and R. Michael Alvarez and Jonathan Nagler, *Election Day Voter Registration in Iowa* (March 2007), <http://www.demos.org/pub1370.cfm>.

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