



## ENSURING VOTER ACCESS WHILE PROTECTING ELECTION INTEGRITY

### When are restrictions on voter access justified?

#### Overview

In the aftermath of the 2020 election, five states have adopted legislation that significantly increases burdens on voters, and another 24 states have seen such legislation pass in at least one house. At the same time, at least 10 states have sought to expand access to voting, maintaining that their electoral processes are secure and that voter access can be enhanced without risking the integrity of elections.<sup>1</sup>

Debates about this question are not new: Governments are obliged both to protect the integrity of elections and to ensure equitable access to voting for all eligible voters. The recent adoption of laws that limit access signals that many state legislatures are now prioritizing the former at the expense of the latter, often using unsubstantiated claims of massive election fraud to justify these restrictions.

The election integrity discourse revolves around concerns about ineligible persons casting ballots and the need to guard against fraud. Ostensibly to address these concerns, state legislatures are pursuing provisions that will limit voter access by scaling back absentee voting and same-day voter registration. These policies—some of which stem directly from a recent report by The Heritage Foundation—are demonstrably misguided given contemporary experience.

The Heritage Foundation contends that “errors and omissions by election officials and careless, shoddy election practices and procedures” have caused problems for voters and that reform is necessary “to ensure voters will have faith in our elections.”<sup>2</sup>

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<sup>1</sup> Brennan Center for Justice: Voting Laws Roundup: March 2021. Available at: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

<sup>2</sup> Hans A. von Spakofsky. Feb. 2, 2021. “9 Election Reforms States Can Implement to Prevent Mistakes and Vote Fraud.” Available at: <https://www.heritage.org/election-integrity/commentary/9-election-reforms-states-can-implement-prevent-mistakes-and-vote>.

In reality, voter fraud does not happen very often in the United States. A detailed analysis by the Brennan Center for Justice establishes that the 1,300 incidents of fraud cited in the Heritage Foundation database are “miniscule” in the context of the billions of votes cast during the same period of time. Moreover, the database “confirms what numerous studies have consistently shown: Voter fraud is vanishingly rare,” and the U.S. has measures in place to catch and punish election fraud and other offenses.<sup>3</sup>

The Heritage Foundation report lays out a series of principles to address the perceived problems. While many of the general principles are unobjectionable, the proposed legislative solutions are likely to prevent or discourage many eligible voters from participating in the process. Indeed, many seemingly neutral policies—setting voter registration deadlines, limiting absentee voting to individuals with a prescribed excuse, limiting the number of days for early in-person voting, and limiting the number and prescribing the placement of dropboxes for mail voting—result in increased restrictions on voter access without substantially minimizing the opportunity to commit fraud.

### **Voting Rights are Human Rights: Best Practices from International Human Rights Law**

In considering reforms that restrict voter access and participation, an important starting point is the international standard that all eligible citizens have the fundamental right to participate in the selection of their representatives. A corollary to this right is the affirmative obligation of governments to take measures to ensure the full and effective enjoyment of the right to vote.<sup>4</sup> Under the principle of universal suffrage, everyone should have equal access to voting, including individuals with reduced mobility and other disabilities.

Both international human rights law and democratic best practice say that governments should enable the participation of the broadest possible pool of eligible voters and make the casting of a ballot as simple as possible. The Human Rights Committee (HRC), which is responsible for interpreting the International Covenant on Civil and Political Rights explicitly calls for the removal of “administrative restrictions, such as proof of residence or identity documentation requirements that might directly or indirectly prevent certain groups of citizens from exercising voting rights.”<sup>5</sup> In addition, the HRC has stated that “the onus is on States to demonstrate that any restrictions” on the right to vote “are not discriminatory in their purpose or effect.”<sup>6</sup> And more generally, the HRC encourages governments to take proactive measures to strengthen

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<sup>3</sup> The Heritage Foundation. Feb. 1, 2021. “The Facts About Election Integrity and the Need for States to Fix their Election Systems.” Available at: <https://www.heritage.org/election-integrity-facts>.

<sup>4</sup> United Nations, International Covenant on Civil and Political Rights (ICCPR), Articles 2 and 25.

<sup>5</sup> A/HRC/27/29, para. 13 (citing HRC GC 25, para. 11).

<sup>6</sup> A/HRC/27/29, para. 60 (citing CERD GR 20).

the voting rights of women, minorities, and groups that have suffered past discrimination in exercising the right to vote.<sup>7</sup>

As noted above, governments also have the obligation to ensure that the integrity of the process is not compromised, either by fraud or by malfeasance, and that committing fraud is both difficult and easily detectable. Advocates for many of the legislative reforms in states across the U.S. defend their initiatives as critical to ensuring that only eligible voters can register to vote and cast a ballot and that no one can tamper with a vote once it is cast.

However, legislation that ostensibly is aimed at reducing the opportunity to commit fraud can have a negative impact on voter access and participation, particularly for underrepresented voters. As a result, such measures sometimes fail to properly balance the burdens and benefits and may do little to instill public confidence in election processes.

The key question is whether proposed state legislative measures represent the least restrictive approach possible to secure the integrity of elections. The guiding principle should be to ensure that any measure that restricts voting rights is implemented on the basis of objective and reasonable criteria. This means that the measure should address an objectively valid concern and that it should avoid unnecessary reductions in access. Measures that appear likely to increase burdens and reduce voter access, without preventing clear or specific threats to election integrity, do not meet these criteria.

Similarly, measures that curtail practices that citizens have relied upon in previous elections, unless those measures are absolutely essential for effective electoral administration, unnecessarily restrict voter access and ultimately diminish trust in the process.

Unfortunately, voter confidence in many states has been undermined by widespread unsubstantiated claims of fraud and irregularities. In this context, legislation aimed at boosting confidence could be appropriate, but only if it places no additional unnecessary burden on voters—who should not be penalized for unsubstantiated problems. In addition, the mere introduction of such legislation should not serve to undermine confidence among other segments of the population.

Leaving aside the proposed U.S. state-level legislative initiatives, by far the most important step to increase voter confidence is for all candidates to abide by and publicly defend transparent election results and judicial decisions on election challenges.

The remainder of this document responds to recommendations in the Heritage Foundation report. While most of the high-level principles are sound, many of the specific proposals advanced by the report are flawed and will result in unnecessary restrictions on voter participation.

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<sup>7</sup> See, for example, United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Article 3, and United Nations CCPR Committee, General Comment 28, para. 21.

## Accuracy of Voter Registration Lists

**What Heritage Says:** *Verify the accuracy of voter registration lists. Computerized statewide voter-registration lists should be designed to be interoperable so that they can communicate seamlessly with other state record databases to allow frequent exchanges and comparisons of information.*

**Carter Center Response:** This principle is straightforward, and the accompanying proposals have been widely endorsed by many groups. Several current practices improve the accuracy of voter lists, including online voter registration (OVR); registration drives led by nonpartisan groups; interstate data-sharing partnerships aimed to improve voter list maintenance, such as the Electronic Registration Information Center (ERIC, which includes 30 states and D.C. as members); and interoperability with motor vehicle offices and other government agencies.

Online voter registration minimizes typos and ensures that all relevant details, such as a social security number (SSN) or driver's license (DL) number, are completed by the registering voter and included in the database. Many states automatically verify a voter's social security number and driver's license, along with their address, by comparing the information with that contained in their motor vehicle records prior to processing an electronic registration. Nonpartisan registration efforts such as these help eliminate problems that can arise when partisan actors conduct registration, including the improper registration of ineligible voters and the discarding of applications from those assumed to support opponents.

The Heritage Foundation report goes too far, however, when it argues for eliminating automatic voter registration (AVR) on the grounds that “no one should be automatically registered without their consent or knowledge.” AVR programs do inform voters of the registration during or after their transaction with the DMV or other government services and offer the chance to opt out.<sup>8</sup> More generally, as the National Council of State Legislatures notes, “automatic registration also leads to cleaner voter registration rolls because the process updates existing registrations with current addresses.”

**Bottom Line:** Maintaining accurate voter lists is an important part of the election process. Many states already have good practices for doing this. Online voter registration is helpful, as is the nonpartisan Electronic Registration Information Center (ERIC). Automatic voter registration, which several states have adopted, also helps produce cleaner voter rolls.

## Citizenship Verification

**What Heritage Says:** *Verify citizenship of voters. Only lawful citizens can vote in federal elections. States should, therefore, require proof of citizenship to register to vote, as well as*

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<sup>8</sup> Kennedy, Liz, Lew Daly and Brenda Wright. 2015. “Automatic Voter Registration: Finding America’s Missing Voters.” Available at: [https://www.demos.org/sites/default/files/publications/AVR\\_0.pdf](https://www.demos.org/sites/default/files/publications/AVR_0.pdf).

*verify the citizenship of registered voters with the records of the Department of Homeland Security, including access to the E-Verify system.*

**Carter Center Response:** The Constitution guarantees only citizens the right to vote, and therefore measures to ensure that only citizens can vote are reasonable and appropriate. However, in practical terms, proving citizenship can be challenging for election officials and voters who lack easy access to key documents.

States vary in the documentation they require to prove citizenship. In some cases, a birth certificate is sufficient, but birth certificates are processed by local jurisdictions and can be difficult to replace.<sup>9</sup>

The courts have maintained that requiring a birth certificate to participate in the voting process increases the burden for voters. In *Fish v. Kobach I*, the 10<sup>th</sup> Circuit Court of Appeals ruled that, given the provisions of the National Voter Registration Act of 1993, states can require only “the minimum amount of information necessary to ... enable State election officials to assess the eligibility of a prospective voter” and that “a signed attestation under penalty of perjury that the applicant meets the state's eligibility criteria, including citizenship,... is the presumptive minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties.”<sup>10</sup> In a subsequent decision, the same court found the underlying Kansas law requiring presentation of documentary proof of citizenship unconstitutional as an undue burden on the right to vote under the 14<sup>th</sup> Amendment.<sup>11</sup>

States may require proof of citizenship and legal residence to obtain a state-issued identification, particularly a driver’s license. Where undocumented and legal immigrants are allowed to acquire driver’s licenses, states can include their non-citizen status on the license and in the corresponding official records. States can then match the driver’s license number and/or social security number with governmental records to verify citizenship status during the voter registration process. Regardless, registration by non-citizens is rare, and states can prosecute non-citizens who try to register to vote. They also can optimize their voter registration protocols to process only U.S. citizens.

**Bottom Line:** Determining voter eligibility, including citizenship, requires a combination of information, such as one’s legal name, date of birth, driver’s license and/or social security number, signature, and perhaps attestation. Requiring documentation of citizenship through presentation of a birth certificate, however, imposes unnecessary burdens on voters.

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<sup>9</sup> Gaskins, Keesha and Sundeep Iyer. 2012. “The Challenge of Obtaining Voter Identification.” Brennan Center for Justice. Available at: [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Challenge_of_Obtaining_Voter_ID.pdf).

<sup>10</sup> *Fish, et al v. Kobach, (Fish)* 840 F.3d 710 (10<sup>th</sup> Cir. 2016)

<sup>11</sup> *Fish v. Schwab (Fish II)*, No.18-3133, Decided April 29, 2020 (10th Circuit).

## Voter ID

**What Heritage Says:** *Require voter ID. A voter should be required to validate his or her identity with government-issued photo ID to vote in person or by absentee ballot (as states such as Alabama and Kansas require). Government-issued IDs should be free for those who cannot afford one.*

**Carter Center Response:** Requiring a photo ID either for in-person or absentee balloting can be an important safeguard for election integrity, and the Supreme Court has ruled that such a requirement is not unconstitutional.<sup>12</sup> Consequently, voters in several states have adapted to the reality of presenting a photo ID, even as the photo ID requirement remains highly contentious among voting rights activists.

That said, if a photo ID is required, the state should provide the most expansive list of acceptable identifications as set forth in the 2002 Help America Vote Act, so that no eligible voter is disenfranchised. And where an eligible citizen lacks easy access to, or cannot afford, an accepted state ID, the state should be obliged to provide them for free and make them easily accessible. For example, states should make applying for state-approved photo IDs available at sites such as post offices, libraries, and courthouses.

**Bottom Line:** Voter ID can facilitate the verification of a voter's identity at the polling place and eliminate the risk of voter impersonation. However, for voter ID to be equitable and non-discriminatory, the list of acceptable forms of ID should be expansive, and IDs should be accessible to every eligible voter for free.

## Absentee Ballots

**What Heritage Says:** *Limit absentee ballots. Absentee ballots should be reserved for those individuals who are too disabled to vote in person or who will be out of town on Election Day and on all early-voting days.*

**Carter Center Response:** This is an unnecessary restriction on voter access and runs contrary to the successful experiences of five states that for years have administered elections almost exclusively through vote-by-mail procedures. In addition, many other states successfully expanded the use of absentee ballots during the 2020 election in response to the pandemic. To fulfill their responsibility to make elections accessible to more people, states should *expand* rather than reduce absentee voting. Indeed, states that conduct voting by mail have higher voter satisfaction and low election costs.

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<sup>12</sup> Supreme Court of the United States, Crawford v. Marion County. Available at: <https://www.supremecourt.gov/opinions/07pdf/07-21.pdf>.

Vote-by-mail procedures include multiple safeguards. In most cases, requests for mail-in ballots require verification of personal data that is included in the voter register. Hence, there is no credible election integrity argument against allowing no-excuse vote by mail.

**Bottom Line:** Absentee voting is a convenient voting method used by millions of Americans, and there is little evidence of absentee voter fraud. When voters have attempted to request an absentee ballot fraudulently, the security protocols have worked and individuals [have been caught](#) and charged.

### **Vote Trafficking, Harvesting, or Collecting**

**What Heritage Says:** *Prevent vote trafficking. Vote trafficking (also called “vote harvesting”) by third parties should be banned. That would ensure that candidates, campaign staffers, party activists, and political consultants are prohibited from picking up and potentially mishandling or changing absentee ballots and pressuring or coercing vulnerable voters in their homes. In other words, a political group can’t offer to pick up ballots and then bring them to the polling place and/or mail them, with no third party supervising that group’s behavior in the interim.*

**Carter Center Response:** There is a broad consensus that “vote trafficking,” which refers to vote selling or buying, should be illegal and prosecuted when it occurs. However, the practice of “ballot collection” or “vote harvesting” is more contentious.

Election experts confirm that vulnerable voters who need assistance benefit from ballot collection. At the same time, there are legitimate concerns that this practice can lead to the intimidation of voters by activists collecting ballots on behalf of a candidate or party, the improper discarding of ballots believed to be cast for an opposing candidate or party, and the unauthorized filling in of a blank ballot on behalf of an individual.

Today, several states permit the practice of ballot harvesting, albeit with clear limits on who can and cannot pick up and submit ballots other than their own. In some states, the transmission of ballots is limited to family members or is permitted only for persons who would otherwise be unable to deposit their ballot at a post office or drop box.

More generally, states that permit ballot harvesting should require those who pick up and transmit ballots to register with the state and to disclose how many ballots they have picked up and from which voters. In this manner, if there is any wrongdoing, those collecting the ballots can be held accountable. In addition, the delivery of collected ballots should be conducted only during specified hours, during which election officials and/or authorized observers can monitor the delivery process.

**Bottom Line:** Ballot collection gives voters with limited access to the post office or limited ability to cast a vote without assistance a way to participate in elections. By requiring non-

family members who collect ballots to register in advance, state legislatures can provide important safeguards without eliminating ballot collection altogether.

## Election Observation

**What Heritage Says:** *Allow election observers complete access to the election process. Political parties, candidates, and third-party organizations should all be allowed to have observers in every aspect of the election process because transparency is essential to a fair and secure system. The only limitation on such observers is that they cannot interfere with the voting and counting process.*

*However, a representative of the election office should be present to answer the questions of the observers. They should be legally allowed to be in a position—exactly like election officials—to observe everything going on, other than the actual voting by individuals. Election officials should be prohibited from stationing observers so far away that they cannot observe the process, including such procedures as the opening of absentee ballots and the verification process.*

**Carter Center Response:** The principle of transparent access for election observers reflects a widely recognized international norm and best practice, and deserves widespread adoption in the U.S.<sup>13</sup> Currently, although all states have policies that provide access for partisan observers, some states do not allow nonpartisan observers and accredited media. The Carter Center strongly encourages state legislatures to consider measures to facilitate increased nonpartisan observation.

The guiding principle for access is that both partisan and nonpartisan observers should have “meaningful access,” such that they can generally see and accurately understand what is transpiring. However, this does not mean observers should have the same access as election officials and voters, who are directly involved in the voting process. Observers should be allowed to be close enough to fully witness the process but should keep a respectful distance and should not be so close to voters that they might compromise voter privacy or intimidate the voter—or impede the work of election officials. In addition, observers should not abuse their position to frivolously challenge a voter’s eligibility or otherwise discourage voter participation.

Ultimately, election officials are responsible for balancing transparency and the efficient functioning of the voting process. Deference should be given to election officials’ discretion, unless this prevents effective observation.

**Bottom Line:** Election observation helps ensure transparent electoral processes. All states grant access to partisan observers, and all should extend access to nonpartisan, international, or

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<sup>13</sup> Declaration of Principles for International Election Observation, 2005.

academic observers. The role of observers is different from that of election officials, who administer the election process. Protecting voters' privacy and security is of utmost importance, so election officials should be able to impose reasonable limits on how close to the voting process observers can be.

### **Voting Assistance**

**What Heritage Says:** *Provide voting assistance. Any individuals providing assistance to a voter in a voting booth because the voter is illiterate, disabled, or otherwise requires assistance should be required to complete a form, to be filed with poll election officials, providing their name, address, contact information, and the reason they are providing assistance. They should also be required to provide a photo ID.*

**Carter Center Response:** There is broad consensus that voting assistance should be available to any voter who needs it. It is reasonable to require those providing such assistance to complete a form with their name, address, contact information, and the reason they are providing assistance. They also should provide a photo ID. Limits should be placed on the number of people to whom an individual can provide assistance.

**Bottom Line:** Imposing some requirements on individuals providing voting assistance can serve as an additional security check and can increase accountability for those willing to offer these services.

### **Early Vote Counting**

**What Heritage Says:** *Prohibit early vote counting. To avoid premature release of election results, the counting of ballots, including absentee and early votes, should not begin until the polls close on Election Day. However, if a state insists on beginning the count before Election Day, it should ban the release of results until the evening of Election Day, subject to criminal penalties.*

**Carter Center Response:** International best practice and election experts agree that election results should not be released until the polls close throughout a given jurisdiction. Indeed, most states already have extensive rules against reporting election results before all the polls close. The 2020 election demonstrated that election officials take this prohibition seriously.

While The Heritage Foundation is correct to underscore the importance of respecting this guideline, it goes too far in arguing against validating and counting ballots prior to Election Day. There is nothing wrong with such practices, so long as procedures are in place to ensure that the results will not be released publicly.

Indeed, allowing the validating and counting of early ballots can help ensure that election results are released as soon as possible after the polls close, helping prevent anxiety-producing delays and potentially increasing transparency and enhancing public confidence.

States also should be encouraged to release voter turnout numbers as they become available, as this increases transparency and can deter late and potentially fraudulent ballot drops.

**Bottom Line:** Prohibiting early vote counting is not an effective way to prevent the premature release of election results. Prohibiting early vote counting delays the certification and release of election results, which can increase concerns about election integrity.

### Legal Standing for State Legislatures

**What Heritage Says:** *Provide state legislatures with legal standing. State legislatures must **ensure** that they have legal standing—either through a specific state law or through a constitutional amendment if that is required—to sue other state officials, such as governors or secretaries of state, who make or attempt to make unauthorized changes in state election laws.*

*For example, if a secretary of state extends the deadline set by state law for the receipt of absentee ballots, legislatures should have legal standing to contest that unilateral change that overrides state law. They should be classified as a necessary party in any lawsuit. And voters should be provided by state law with the ability to file a writ of mandamus against any state or local official who fails to abide by, or enforce, a state election-law requirement.*

**Carter Center Response:** Because legislators are interested parties in election disputes, state legislatures as a body should not have an exclusive role in interpreting election law or in resolving election disputes. Rather, both U.S. jurisprudential traditions and democratic practice assign those responsibilities to an independent judiciary, which should take into account both federal and state constitutional requirements.

The role of the legislature is to set broad policy, while election administrators implement that policy and the judiciary resolves factual disputes and questions of law. More generally, best practice discourages allowing state legislatures to second-guess the decisions of designated election officials to institute and implement election procedures once an election process is underway, as this undermines the latter's role and introduces confusion and disruption into the election process. In addition, it creates the risk of the majority party in the legislature tilting election procedures in its own interests.

**Bottom Line:** The general principle of relying on courts to resolve factual disputes between interested parties should apply in cases involving the interpretation of election laws and the conduct of the elections.

## Same-Day Registration, Automatic Voter Registration and Private Funding of Election Officials and Government Agencies

**What Heritage Says:** *States should not permit same-day registration, automatic voter registration, and private funding of election officials and government agencies. Registration should be required before Election Day to give election officials sufficient time to verify the accuracy of the registration information contained on a registration form and to confirm the eligibility of the potential voter. . . All individuals should be asked at the time of the state agency transaction, such as the application for a driver's license, whether they want to register to vote.*

**Carter Center Response:** Same-day registration has been used by some states for decades, even before the National Voter Registration Act was adopted in 1993. This practice enhances access to registration and voting and can be implemented in a manner that maintains the integrity of the process and avoids excessive Election Day burdens on election officials. To avoid delays at the polling site on Election Day, same-day registrants can be allowed to vote provisionally and have their vote counted only after their information has been validated. Automatic registration, meanwhile, allows for eligible voters to conveniently register. Once registered, they are more likely to turn out to vote, which should be the goal.

Though it proved critical to ensuring the effective conduct of elections during the 2020 pandemic, governments should not have to rely on private funding to conduct elections. There are legitimate concerns about allowing private actors, operating outside traditional government procurement and other ethics regulations, to play a direct role in providing critical infrastructure to facilitate the voting process. Instead, governments should provide sufficient funding to effectively implement elections, ensuring equitable access for all eligible voters.

**Bottom Line:** Same-day registration and automatic voter registration represent widely recognized practices designed to expand access to the voting process. They should be maintained, not opposed.

### Conclusion

Ensuring that all eligible voters can participate requires both guaranteeing the integrity of the electoral process and facilitating access. States should seek to harmonize these two principles rather than address them as if they are mutually exclusive. When conflicts emerge, any restriction on the right to access must be proportional to the perceived benefit, should represent the least restrictive approach possible, and should be based on objective and reasonable criteria.