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The Perfect Match: Solving the Due Process Problem of Signature Matching with Federal Agency Regulation

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The Perfect Match: Solving the Due Process Problem of Signature Matching with Federal Agency Regulation

ABSTRACT

Local election commissions in the United States disenfranchise Americans when they erroneously reject voters' mail-in ballots for failed signature matches. Disenfranchisement is not only problematic because it is dangerous to the health of American democracy, but also because signature matching violates the procedural due process protections voters are entitled to when they exercise their right to vote. Furthermore, the practice of signature matching is one of many ballot access restrictions that disproportionately impact minority voters under the guise of voter fraud prevention. Expanding the Election Assistance Commission's mandate to allow it to develop more accurate methods of ballot verification can reduce the risk of erroneously depriving a person of the right to vote. Currently, most voting-rights-related suits are brought under the Fourteenth Amendment as equal protection or substantive due process claims. The few procedural due process claims that are made assert that the right to vote is protected as a liberty interest.

The right to vote is more properly framed as a property interest because eligible people are entitled to the right through state statutes. Moreover, an executive agency is well equipped to solve a procedural due process problem because the law demands that the agency's rules and regulations be supported with adequate data and sound reasoning, thereby reducing the risk of erroneous deprivation of the right at stake. Ensuring that every eligible voter who wishes to cast a ballot can do so is essential to maintaining the public's faith in democracy, and thereby essential to maintaining democracy itself.

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American democracy would be unrecognizable without the right to vote.¹ Nevertheless, millions of otherwise eligible Americans are deprived of access to the franchise for a host of reasons.² One reason that has garnered more attention in recent years, especially leading up to and after the 2020 Presidential Election, is the practice of signature matching.³ Many local election officials use signature

1. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964)

(“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

2. See P.R. Lockhart, *How Shelby Cnty. v. Holder Upended Voting Rights in America*, VOX (June 25, 2019, 7:29 PM), <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> [<https://perma.cc/R9DR-G5SQ>].

3. See Nathaniel Rakich, *Why Rejected Ballots Could Be a Big Problem in 2020*, FIVETHIRTYEIGHT (Oct. 13, 2020, 7:00 AM), <https://fivethirtyeight.com/features/why-rejected-ballots-could-be-a-big-problem-in-2020/> [<https://perma.cc/JST7-R3HK>]; Connor Clerkin, Lane Corrigan, Zahavah Levine, Aviel Menter, Christopher Meyer, Alexander Perry & Theodora Raymond-Sidel, *Mail Voting Litigation During the Coronavirus Pandemic*, STAN-MIT HEALTHY ELECTIONS PROJECT 1 (Oct. 29, 2020), <https://healthyelections.org/sites/default/files/2020->

matching as a fraud prevention technique for absentee and mail-in ballots.⁴ It seems simple—an official compares the signature on the absentee ballot to a signature the election commission has on file—but results all too often in the ballot’s rejection, without enough notice or time for the voter to cure the ballot so that it can be counted.⁵

The problem of signature matching is exacerbated by the United States’ history of disenfranchising minority communities.⁶ Historically, state and local legislatures have crafted restrictive regulations to disenfranchise minority voters, often under the pretext of voter fraud prevention, despite comprehensive federal legislation that prohibits such maneuvers.⁷ Courts often uphold these restrictive measures, even though there is thin evidence of voter fraud.⁸ Signature matching is particularly harmful because it is extremely ineffective; most rejected ballots are legitimate and not the product of voter fraud.⁹

This Note challenges the practice of signature matching from a procedural due process perspective. It argues that voters whose ballots are rejected for failing a signature match are not given the adequate process to correct their ballots that they are entitled to under the US Constitution. This Note further argues that voting is a property interest for the purposes of procedural due process and, as such, warrants protection by the Fifth and Fourteenth Amendments of the

11/Mail_Voting_Litigation.pdf [https://perma.cc/V7H8-DULF] (providing a comprehensive review of signature matching challenges made leading up to the 2020 Presidential Election).

4. See Ali Bloomgarden, Arushi Gupta, Garrett Jensen, Zahavah Levine, Chris Middleton & Kyra Sikora, *Behind the Scenes of Mail Voting: The Rules and Procedures for Signature Verification in the 2020 General Election*, STAN.-MIT HEALTHY ELECTIONS PROJECT 5 (Mar. 10, 2021), https://healthyelections.org/sites/default/files/2021-06/Signature_Verification.pdf [https://perma.cc/E79A-8U2Z].

5. See *infra* Section I.F.

6. See Kyle Wiggers, *Automatic Signature Verification Software Threatens to Disenfranchise U.S. Voters*, VENTUREBEAT (Oct. 25, 2020, 10:25 AM), <https://venturebeat.com/2020/10/25/automatic-signature-verification-software-threatens-to-disenfranchise-u-s-voters/> [https://perma.cc/85T7-8FQG]; Pema Levy, *The 200-Year History of Using Voter Fraud Fears to Block Access to the Ballot*, MOTHER JONES (Jan. 3, 2019), <https://www.motherjones.com/politics/2019/01/the-200-year-history-of-using-voter-fraud-fears-to-block-access-to-the-ballot/> [https://perma.cc/N9ZW-QNFR] (explaining the historical use of voter ID laws to suppress the Black vote in the South).

7. See *infra* Part I.

8. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–96 (2008) (upholding an Indiana voter ID requirement for in-person voting despite no evidence of voter impersonation ever occurring in Indiana).

9. See Brief for Plaintiffs at 2, *League of Women Voters v. LaRose*, 489 F. Supp. 3d 719 (S.D. Ohio 2020) (No. 2:20-cv-3843) [hereinafter Ohio Motion].

Constitution.¹⁰ Finally, this Note proposes that, in order to safeguard eligible voters from misidentified failed signature matches, the Election Assistance Commission's mandate should be expanded to allow it to formulate regulations regarding the most technologically sound ways to prevent absentee ballot voter fraud.¹¹

The problem of erroneously rejecting absentee ballots is not a trivial one.¹² Confidence in the US voting system depends on its accuracy and reliability, and absentee ballot voters are already less confident than in-person voters that their votes will be counted.¹³ This uncertainty can dissuade people from voting at all.¹⁴ The issue has been exacerbated by attacks on the security and legitimacy of the US election system in the wake of the 2020 Presidential Election.¹⁵ Elections are fundamental to democracies; loss of the public's faith in the legitimacy of elections could lead to a constitutional crisis.¹⁶ Adding safeguards to absentee voting and eliminating procedural hurdles that often lead to the rejection of these ballots will increase confidence in US elections and bestow eligible voters with a fundamental democratic right, thereby strengthening American democracy.¹⁷

10. See U.S. CONST. amends. V, XIV.

11. 52 U.S.C. § 20922.

12. See Rakich, *supra* note 3.

13. See Molly E. Reynolds, *Understanding the Election Scandal in North Carolina's 9th District*, BROOKINGS (Dec. 7, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/07/understanding-the-election-scandal-in-north-carolinas-9th-district/> [<https://perma.cc/X8AA-C6HY>].

14. See *id.*; *Voter Confidence*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voter-confidence> [<https://perma.cc/HGV2-BE4D>] (Apr. 2, 2021).

15. See Jemima McEvoy, *Trump's Election Fraud Battle Has Inspired a 'Surge' of Legislation to Restrict Voting: Report*, FORBES (Feb. 8, 2021, 4:44 PM), <https://www.forbes.com/sites/jemimamcevoy/2021/02/08/trumps-election-fraud-battle-has-inspired-a-surge-of-legislation-to-restrict-voting-report/?sh=3a7baeb16cf8> [<https://perma.cc/L9LA-KHGZ>].

16. See Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence*, 40 PS: POL. SCI. & POL. 655, 655 (2007).

17. See *id.* at 657–58.

I. BACKGROUND—THE FIGHT FOR THE FRANCHISE

To fully understand the procedural defects of absentee voting, one must look to its historical development. Although absentee voting originated in the Civil War, it took several years for this method of voting to become commonplace.¹⁸ It was not until the civil rights movement of the 1960s that major federal legislation emerged, shaping the voting landscape more broadly.¹⁹ Two statutes of particular importance are The Voting Rights Act of 1965 (VRA) and the Help America Vote Act of 2002 (HAVA).²⁰

A. *The Voting Rights Act and Civil Rights*

The VRA is a landmark piece of civil rights and election law legislation.²¹ Racial animus and violent discrimination ran rife in the time leading up to the passage of the VRA.²² It was a pivotal moment for civil rights, preceded by a long struggle to fight suppression of the Black vote, particularly in the South.²³

Despite the passage of the Fifteenth Amendment in 1870, Black voters faced numerous obstacles when attempting to exercise their right to vote.²⁴ The 1960s were the last decade of the “Jim Crow” era—a legal regime of racial segregation and discrimination.²⁵ Segregationist beliefs were entrenched in US society and affected not just voting but every facet of US public life.²⁶ The Civil Rights Act of 1964 (CRA), heralded as an integral piece of legislation in the fight for equality, failed to remedy voting rights discrimination.²⁷ Getting the CRA passed meant compromising with segregationist politicians on

18. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 150 (2000).

19. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* 6 (2016).

20. See *id.* at 6, 218.

21. See *id.* at 6.

22. See *id.* at 17, 21–22, 31.

23. See *id.* at 6.

24. U.S. CONST. amend. XV, § 1 (protecting US citizens from the denial or abridgement of their right to vote on the basis of their race); see BERMAN, *supra* note 19, at 6, 36.

25. See *Jim Crow Laws*, HISTORY (Mar. 26, 2021), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [https://perma.cc/A6NL-6WL6].

26. See *id.* (explaining that laws enforcing segregation applied to various institutions, including schools, restaurants, and hospitals); BERMAN, *supra* note 19, at 17.

27. See BERMAN, *supra* note 19, at 33.

voting rights—a testament to the franchise’s power.²⁸ Segregationists’ effective efforts to keep Black Americans off the voter rolls, in conjunction with pivotal clashes between activists and law enforcement, spurred President Lyndon B. Johnson to try his hand at comprehensive voting rights legislation.²⁹ His efforts resulted in the VRA,³⁰ one of the most comprehensive pieces of voting rights legislation to date;³¹ it prohibits the state from denying anyone the right to vote because of his or her race.³²

The connection between the fight to expand voting rights as a matter of civil rights and the related struggle to guarantee absentee privileges to all eligible voters is potent.³³ When the VRA outlawed barriers to voter registration and voting itself (i.e., poll taxes and literacy tests), those opposed to expanding the franchise came up with new ways to impose barriers to ballot access.³⁴ Absentee ballots—less regulated compared to their in-person counterparts—offered an avenue to do so.³⁵ State concerns about fraud are legitimate because free and fair elections are an integral part of a healthy democracy.³⁶ However, there is evidence that concern about fraud is merely pretext to deny minority populations the right to vote.³⁷

B. The Rise of Voter Fraud Prevention

The racist and partisan roots of many “fraud prevention” mechanisms are still salient today.³⁸ With the expansion of absentee voting came concerns about fraud and election security.³⁹ States were not concerned about fraud at the beginning of absentee voting’s expansion.⁴⁰ Absentee ballots being identical to conventional ballots

28. See *id.* at 14.

29. See *id.* at 4–6.

30. See *id.*

31. See *id.*

32. See 52 U.S.C. § 10301(a).

33. See Liz Crampton, *Inside the Democratic Strategy to Expand Voting Rights State by State*, POLITICO (Apr. 20, 2021, 7:55 PM), <https://www.politico.com/news/2021/04/20/voting-rights-states-482493> [<https://perma.cc/X9PM-A6DX>].

34. See, e.g., KEYSSAR, *supra* note 18, at 211–12.

35. See 52 U.S.C. §§ 10301–10304.

36. See GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS*, at vii, xi (2006).

37. Levy, *supra* note 6.

38. See Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L. REV. 633, 643–50 (2019).

39. See Ohio Motion, *supra* note 9, at 1.

40. See KEYSSAR, *supra* note 18, at 122.

was enough to assuage those with fraud-related fears.⁴¹ This laissez-faire attitude began to shift as more and more minorities and immigrants registered to vote.⁴² Due to a mixture of legitimate concern and racial animus, fraud prevention measures that restricted voting-rights were passed as early as the end of the nineteenth century.⁴³ Amid rising tensions between “old-stock Americans” and the flood of European immigrants to the United States, lawmakers who sought to entrench their power and avoid upset by a rapidly growing electorate passed restrictive registration and voting laws couched in the language of fraud prevention.⁴⁴ These lawmakers enacted a diverse portfolio of restrictive voter-eligibility requirements.⁴⁵ While many voter fraud prevention measures of this era were used for legitimate ends, their codification early in US history normalized disenfranchisement.⁴⁶ Since then, the courts have further legitimized such tactics as an effective means of voter fraud prevention despite evidence of their dubious nature.⁴⁷ The courts were right in one respect—they were effective, but not at fraud prevention.⁴⁸ Rather, they succeeded at preventing millions of eligible voters from exercising their democratic rights.⁴⁹

The VRA addressed the particular problem of state governments that enacted restrictive voting regulations with an aim to disenfranchise Black and other minority communities.⁵⁰ However, successful legal challenges to some of the VRA’s foundational

41. *See id.*

42. *See* BERMAN, *supra* note 19, at 213–17.

43. *See* KEYSSAR, *supra* note 18, at 111.

44. *See id.* at 110–11. Many lawmakers were unabashed about their desire to keep the poor, immigrants, and non-white people off of the voter rolls. *See id.* at 98.

45. *See id.* at 103–04. These requirements included requiring literacy tests, lengthening mandatory residency periods, abolishing noncitizen aliens’ right to vote, restricting elections to property owners or taxpayers, and imposing onerous registration procedures. *See id.*

46. *See id.* at 123–24 (explaining that voter registration was used to break down corrupt political machines).

47. *See id.* at 127; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–91 (2008). For example, the Union League Club was founded in 1879 by Chicago elites who were concerned that they would lose political power to Democrats. *See* KEYSSAR, *supra* note 18, at 124. The club launched a campaign of polling place “investigators” to find and stop illegal voting, but all of the alleged perpetrators who were apprehended were later acquitted. *See* KEYSSAR, *supra* note 18, at 124, 129 (referring to a study by Paul Kleppner, which found very little evidence of fraud during this time period).

48. *See* KEYSSAR, *supra* note 18, at 128.

49. *See id.*

50. *See* 52 U.S.C. § 10301.

provisions have weakened it over time.⁵¹ No longer hindered by VRA restrictions on different types of voting laws, states rushed to enact restrictive voter fraud prevention measures, including restrictions on the use of absentee ballots.⁵² For example, in 2017, Republican lawmakers in Georgia passed a law requiring information on a voter's registration to exactly match the voter's supporting documents.⁵³ These measures disproportionately impact voters of color, who more often lack the requisite ID to comply with strict voter-ID laws than white voters, or who typically use mail-in voting in greater numbers.⁵⁴ More recently, in the wake of the 2020 election, South Carolina, Pennsylvania, and Connecticut have proposed new legislation that adds a signature match requirement for all absentee ballots.⁵⁵ The Pennsylvania bill only gives voters whose ballots have been rejected six days to cure a signature after notification of a mismatch.⁵⁶

Evidence of voter fraud has not increased since the introduction of voter restrictions in the late nineteenth century, yet its use as a pretextual reason to shrink the franchise has remained steady throughout modern times.⁵⁷ Absentee ballot fraud rhetoric, like

51. See generally *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (invalidating the coverage formula that determined which states needed their new voting laws "precleared" by the Department of Justice).

52. See Lockhart, *supra* note 2.

53. See Stanley Augustin, *Georgia Largely Abandons Its Broken "Exact Match" Voter Registration Process*, LAW.'S COMM. FOR C.R. UNDER L. (Apr. 5, 2019), <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/> [https://perma.cc/X6Q5-RSBS]. This "exact match" system has been largely abandoned by the Georgia Legislature since 2019, but residual burdens on voters remain. See *id.*

54. See, e.g., *id.*; Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [https://perma.cc/495K-NVJK]; Amy Gardner, *Rejection of Hundreds of Absentee Ballots in Suburban Atlanta County Draws Legal Challenges*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/politics/rejection-of-hundreds-of-absentee-ballots-in-suburban-atlanta-county-draws-legal-challenges/2018/10/16/dafce19a-d177-11e8-b2d2-f397227b43f0_story.html [https://perma.cc/NY66-TUDR]. It should be noted, however, that Black voters were less likely to vote by mail in the 2020 Presidential Election. See *The Voting Experience in 2020*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/> [https://perma.cc/36W3-XWPH].

55. See *Voting Laws Roundup: January 2021*, BRENNAN CTR. FOR JUST. (Jan. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021> [https://perma.cc/C4Q3-AQJ3]. The 2020 election cycle saw significant victories by the Democratic party and a rash of unsubstantiated claims of voter fraud by Republican lawmakers, including former President Trump. See McEvoy, *supra* note 15.

56. See *Voting Laws Roundup: January 2021*, *supra* note 55.

57. See Richard L. Hasen, *Opinion: Trump Is Wrong About the Dangers of Absentee Ballots*, WASH. POST (Apr. 9, 2020),

in-person ballot fraud rhetoric, is not new.⁵⁸ This language was especially prominent leading up to and after the 2020 Presidential Election, in part because of the expectation that the COVID-19 pandemic would drive the use of absentee ballots higher than ever before.⁵⁹

Absentee ballot fraud is more prevalent than in-person voter fraud, but its occurrence is still rare.⁶⁰ A study found that between 2000 and 2012, 491 fraudulent absentee ballots were cast out of billions of votes cast during that time period.⁶¹ There have been so few fraudulent ballots because absentee ballot fraud is incredibly difficult to orchestrate, even without additional safeguards like signature matching.⁶² Fraud perpetrated with absentee ballots often includes vote buying; however, in the United States, the use of the secret ballot has made vote buying virtually impossible.⁶³ When significant absentee ballot fraud does occur, it is detected swiftly and remedied easily.⁶⁴ Moreover, the connection between absentee ballot fraud and a signature match's ability to thwart fraud is weak at best.⁶⁵ A signature match serves to confirm the identity of the voter.⁶⁶ Voter impersonation is primarily a concern for in-person votes cast at polling places and, again, is exceedingly rare.⁶⁷

<https://www.washingtonpost.com/opinions/2020/04/09/trump-is-wrong-about-dangers-absentee-ballots/> [<https://perma.cc/6D8P-WGU8>]; Levy, *supra* note 6.

58. See BERMAN, *supra* note 19, at 216–18.

59. See Hasen, *supra* note 57.

60. See *id.*

61. See *id.*

62. See RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 60 (2012).

63. See Susan Orr & James Johnson, *Voting by Mail Is Convenient, but Not Always Secret*, *THE CONVERSATION* (Aug. 24, 2020, 8:20 AM), <https://theconversation.com/voting-by-mail-is-convenient-but-not-always-secret-144716> [<https://perma.cc/5WHV-MUMP>]. Vote buying is when a political operative pays voters to vote for his preferred candidate. See Frederic Charles Schaffer & Andreas Schedler, *What Is Vote Buying?*, in *ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING* 17, 17 (Frederic Charles Schaffer ed., 2007). The secret ballot foils vote buying schemes because the operative cannot verify that a voter selected the operative's preferred candidate. See *id.* at 20.

64. See HASEN, *supra* note 57 (explaining that North Carolina's bipartisan election board voted to hold the election anew after overwhelming evidence that a Republican operative had arranged to alter and destroy absentee ballots).

65. See *infra* Section I.D.

66. See Clerkin et al., *supra* note 3, at 2.

67. See HASEN, *supra* note 57.

C. HAVA and Federal Election Administration Regulation

HAVA sought to address the plethora of issues that arose in the 2000 Presidential Election, namely, out-of-date and unreliable punch-card technology.⁶⁸ It became the first piece of major federal legislation to address election administration. It created the Election Assistance Commission (EAC) and authorized \$3.9 billion of funding to update outdated voting machine technology.⁶⁹

More than twenty years later, the fate of the agency is still somewhat tenuous—it was conceived by compromise, like most significant pieces of legislation, so there was some debate about the scope of the agency’s ability to compel states to adopt particular election procedures.⁷⁰ More recently, some members of Congress have expressed the desire to eliminate the agency altogether, but others have emphasized its importance in the wake of speculation about foreign interference in the 2016 Presidential Election.⁷¹ The EAC has significant potential as a solution to signature matching, but its current ability to create and enforce election administration regulations is limited.⁷²

D. How Signature Matching Works (or Doesn’t)

Advocates who wish to expand absentee voting have made significant strides in the last several decades, but much work remains if the ultimate goal is to guarantee every eligible US citizen the right to vote.⁷³ Today, all states allow civilians to vote by mail, but the requirements among different states vary widely.⁷⁴ As of the 2020 Presidential Election, all fifty states require a signature on their

68. See Trenton I. Weaver, *E-nie, ME-nie, MInE – VOTE: How to Encourage Internet Voting Innovation*, 12 ISJLP 327, 327–31 (2016); Atkeson & Saunders, *supra* note 16, at 655.

69. See Atkeson & Saunders, *supra* note 16, at 655.

70. See KARON L. SHANTON, CONG. RSCH. SERV., R45770, THE U.S. ELECTION ASSISTANCE COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 3–4 (June 14, 2019), <https://sgp.fas.org/crs/misc/R45770.pdf> [<https://perma.cc/CJN7-GKG8>] [hereinafter EAC OVERVIEW].

71. *Id.* at 17, 19, 23.

72. See *infra* Part IV.

73. See *Voting by Mail and Absentee Voting*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/8W3T-A8JU>] (Mar. 16, 2021).

74. *Absentee/Mail-in Voting*, BALLOTPEDIA, https://ballotpedia.org/Absentee/mail-in_voting [<https://perma.cc/7KRD-BX9T>] (last visited Oct. 27, 2021).

absentee ballots; thirty-two require a signature match to be counted.⁷⁵ Only eighteen states require voters to be notified when their signature does not match.⁷⁶ Four states do not allow for corrections whatsoever.⁷⁷

The methods used for conducting signature matching vary from state to state.⁷⁸ Proponents of signature matching claim that it protects the security of ballots by requiring a voter to legally declare that the ballot is his or hers and verify that he or she is indeed the person who signed the ballot.⁷⁹ Whether a state achieves that goal through signature matching is in doubt.⁸⁰ For illustrative purposes, this Note examines the state of Ohio where litigation challenging the use of signature matching is prevalent.⁸¹

An Ohio statute requires election officials to compare the signature on the outside of mail-in absentee envelopes with the signature on the voter's registration form.⁸² If there is a signature mismatch, the Board of Elections must "give the voter an opportunity to supplement the voter's identification envelope" to cure the defect and notify the voter of the rejection by "written mail."⁸³ In the wake of the COVID-19 pandemic, a directive passed by the Ohio governor expanded the county boards' notification abilities by allowing them to "utilize telephone and email addresses."⁸⁴ Despite this seemingly straightforward instruction, it has not been implemented effectively.⁸⁵

75. See *How Do Election Workers Match Signatures? (2020)*, *BALLOTPEDIA*, [https://ballotpedia.org/How_do_election_workers_match_signatures%3F_\(2020\)](https://ballotpedia.org/How_do_election_workers_match_signatures%3F_(2020)) [<https://perma.cc/EJH5-WL4K>] (last visited Oct. 27, 2021).

76. See *VOPP: Table 15: States that Permit Voters to Correct Signature Discrepancies*, *NAT'L CONF. OF STATE LEGISLATURES* (Sept. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx> [<https://perma.cc/6PDZ-YV8R>]. Whether the state actually gives the voter a meaningful opportunity to cure their ballot is another issue. See *infra* Section I.F.

77. See *How Do Election Workers Match Signatures? (2020)*, *supra* note 75.

78. See *id.*

79. See David A. Graham, *Signed, Sealed, Delivered—Then Discarded*, *ATLANTIC* (Oct. 21, 2020, 5:47 PM), <https://www.theatlantic.com/ideas/archive/2020/10/signature-matching-is-the-phrenology-of-elections/616790/> [<https://perma.cc/9MAY-JMCB>].

80. See Ohio Motion, *supra* note 9, at 10.

81. See, e.g., Ohio Motion, *supra* note 9; *League of Women Voters of Ohio v. Larose*, 489 F. Supp. 3d 719, 738–39 (S.D. Ohio 2020).

82. See OHIO REV. CODE ANN. § 3509.06(D)(1) (LexisNexis 2021); Ohio Motion, *supra* note 9, at 6.

83. See Ohio Motion, *supra* note 9, at 7–8.

84. See *id.* at 8.

85. See *id.* at 8–9.

Ohio's signature matching process has material defects and inconsistencies across counties in both the methods used to signature match and the notification process to cure ballots.⁸⁶ Election officials have broad discretion to challenge the signature on a mail-in ballot because of a perceived mismatch; there is no process or set of standards they must adhere to when comparing signatures.⁸⁷ The method of signature matching used in Ohio, and most commonly nationwide, is simply "eyeballing" it—an election worker manually compares the signature on the ballot to a signature on file.⁸⁸ The comparison signature on file can come from a number of places: from the voter's registration form, from an old ballot application, or captured by a stylus—at a government office like the Bureau of Motor Vehicles, for example.⁸⁹ Different Ohio counties use different types of signatures to conduct matching, and each has varying levels of accuracy.⁹⁰ The lack of uniformity by which signatures are collected across counties means that a voter's risk of ballot rejection is arbitrarily determined by the county in which he or she resides.⁹¹

86. See *id.* at 6, 7 nn.6–7, 33.

87. See *id.* at 6, 7 n.6, 33–34.

88. See ELECTION ASSISTANCE COMM'N, SIGNATURE VERIFICATION AND CURE PROCESS 3 (2020), https://www.eac.gov/sites/default/files/electionofficials/vbm/Signature_Verification_Cure_Process.pdf [<https://perma.cc/G5ZQ-KPBX>] [hereinafter EAC SIGNATURE GUIDANCE]; Wiggers, *supra* note 6.

89. See Ohio Motion, *supra* note 9, at 7 n.7.

90. See Ohio Motion, *supra* note 9, at 7 n.7; Sabri Ben-Achour, *Robots Will Be Verifying Some of Our Ballots. Can We Trust Them?*, MARKETPLACE (Oct. 30, 2020), <https://www.marketplace.org/shows/marketplace-tech/vote-by-mail-ballots-mismatched-signatures-verification-software-disenfranchisement/> [<https://perma.cc/VH2B-CMWY>]; *Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity*, STAN. L. SCH. L. & POL'Y LAB 2 (May 15, 2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf [<https://perma.cc/LK7B-TTNE>] [hereinafter *Stanford Report*]. Moreover, stylus signatures are characteristically distinct from wet signatures made by a pen on a paper absentee envelope, which makes for a dubious comparison. See Wiggers, *supra* note 6.

91. See Ohio Motion, *supra* note 9, at 33–34. Moreover, the processes by which different counties make rejection determinations vary as well, exacerbating the lack of uniformity in Ohio signature matching procedures and outcomes. See *id.* at 7 n.6. Inconsistent matching standards and procedures are not unique to Ohio. See *Stanford Report*, *supra* note 90, at 2.

There is evidence that the shortcomings of Ohio's signature match regime harm voters.⁹² According to a study of recent Ohio elections, for every one ballot that was correctly rejected for mismatch, an additional thirty-two valid ballots were erroneously rejected; in other words, 97 percent of those signatures that "failed" were legitimate ballots erroneously rejected.⁹³ In another study, there was a 26 percent error rate among election workers, roughly three and a half times the error rate of forensic document examiners.⁹⁴ These findings are not surprising considering that forensic document examiners receive years of training, whereas election workers might attend an hour-long workshop, if that.⁹⁵ In addition, trained handwriting analysts need several signature samples to make a comparison; Ohio only conducts comparisons to the one signature on file from the voter's registration application.⁹⁶ The fatigue of ballot counters, who often work long hours counting thousands of ballots while under pressure from election commissions and the public to get results as quickly as possible, can make determinations even less accurate.⁹⁷

92. See Diana Harrison, Ted M. Burkes & Danielle P. Seiger, *Handwriting Examination: Meeting the Challenges of Science and the Law*, FED. BUREAU OF INVESTIGATION: FORENSIC SCI. COMM'N (Oct. 2009), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/oct2009/review/2009_10_review02.htm [https://perma.cc/9UGG-PTSK] (explaining that laypeople are less likely than forensic document examiners to identify handwriting accurately); Amicus with Dahlia Lithwick, *Dozens of Baby Bush v Gores*, SLATE, at 13:37 (Aug. 29, 2020) (accessed through Spotify) ("[S]ignature match verification schemes are total junk science . . ."); Graham, *supra* note 79 ("As voting by mail surges across the country, many elections, including the presidential race, could hinge on a process that one expert recently described to me as 'witchcraft.'").

93. See Ohio Motion, *supra* note 9, at 10.

94. *Id.*

95. See Graham, *supra* note 79; Fla. Dep't of State, *Signature Recognition Workshop Refresher Course*, YOUTUBE (June 25, 2020), <https://www.youtube.com/watch?v=jP7TDDFUHi4&feature=youtu.be> [https://perma.cc/MJF2-LKZP]; Or. Sec'y of State, *2019 04 26 10 03 Signature Verification Training*, YOUTUBE (Apr. 30, 2019), <https://www.youtube.com/watch?v=UKiYGONnNT0> [https://perma.cc/C734-YS5N]; *Signature Verification Guide*, COLO. SEC'Y OF STATE (Sept. 13, 2018), <https://www.sos.state.co.us/pubs/elections/docs/SignatureVerificationGuide.pdf>, [https://perma.cc/D5LV-XRHN]; *Signature Verification Expert Witnesses*, FORENSISGROUP <https://www.forensisgroup.com/expert-witness/signature-verification/> [https://perma.cc/HB7A-T6UT] (last visited Oct. 31, 2021) (explaining the services signature verification experts provide).

96. See Ohio Motion, *supra* note 9, at 10.

97. See Miles Parks, *Why Vote Counting in Pennsylvania and Michigan Takes So Long*, NPR (Nov. 4, 2020, 6:00 AM), <https://www.npr.org/2020/11/04/931136905/we-ll-be-working-24-hours-vote-counting-to-continue-through-the-week> [https://perma.cc/DH9D-9K7E]; cf. Claudette Allingham, *Signature Verification: Man vs. Machine*, PARASCRIPT BLOG (Mar. 28, 2013), <https://www.parascript.com/blog/signature-verification-man-vs-machine/> [https://perma.cc/HSJ5-7KM8] ("Similarly, a signature verification operator in a bank who has to

Furthermore, signature matching disproportionately harms different demographic groups.⁹⁸ For example, the young, old, ill, and non-native English speakers are at a higher risk of erroneous deprivation because of increased signature variability.⁹⁹ Young people are less likely to have consistent signatures because cursive instruction is now nearly obsolete in schools.¹⁰⁰ Additionally, the signature collected for comparison when a teen gets his or her driver's license can vary significantly from the one a voter uses as an adult to vote by mail.¹⁰¹ Alternatively, older people or ill people are more likely to show a decline in handwriting.¹⁰² Non-native English speakers are also at a higher risk of having their ballots rejected because a weaker command of English writing can lead to less consistent signatures.¹⁰³ Similarly, first-time mail-in voters and people who have undergone name changes (including married women, transgender people, and domestic abuse survivors) are also much more likely to have their ballots rejected.¹⁰⁴

Concerningly, minority voters' ballots are disproportionately rejected.¹⁰⁵ For example, in 2018, people of color comprised only 28 percent of Florida's absentee voters, but 47 percent of all ballots rejected for signature mismatch.¹⁰⁶ In North Carolina, the rejection rate of minority votes was more than double that of white votes during early voting in the 2020 Presidential Election.¹⁰⁷ Therefore, signature matching is another barrier, among many others, that serves to disproportionately disenfranchise minority voters.¹⁰⁸

look at 200-300 signatures per hour, not only has a lower accuracy than a forensic expert, but also makes more mistakes at the end of the day than in the morning.”)

98. See Lila Carpenter, *Signature Match Laws Disproportionately Impact Voters Already on the Margins*, ACLU (Nov. 2, 2018, 2:45 PM), <https://www.aclu.org/blog/voting-rights/signature-match-laws-disproportionately-impact-voters-already-margins> [<https://perma.cc/Q85K-LABZ>].

99. See Ohio Motion, *supra* note 9, at 10.

100. See Graham, *supra* note 79.

101. See *id.*

102. See *id.*

103. See Ben-Achour, *supra* note 90.

104. See Graham, *supra* note 79; Wiggers, *supra* note 6.

105. See, e.g., Wiggers, *supra* note 6; Sophie Chou, ProPublica & Tyler Dukes, WRAL News, *In North Carolina, Black Voters' Mail-in Ballots Much More Likely to Be Rejected than Those from Any Other Race*, PROPUBLICA (Sept. 23, 2020, 2:30 PM), <https://www.propublica.org/article/in-north-carolina-black-voters-mail-in-ballots-much-more-likely-to-be-rejected-than-those-from-any-other-race> [<https://perma.cc/436X-BPU7>].

106. See Wiggers, *supra* note 6.

107. See Chou & Dukes, *supra* note 105.

108. See Johnson & Feldman, *supra* note 54.

Disproportionate ballot rejection cuts along party lines as well.¹⁰⁹ A Pew Research study conducted after the 2020 Presidential Election found that 58 percent of Biden voters voted by mail, compared to 32 percent of former President Trump voters.¹¹⁰ The correlation of minority and young voter support with Democratic candidates compounds the problem for those groups.¹¹¹ Ballots for Democratic candidates are therefore more likely to be rejected than ballots for Republican candidates.¹¹²

E. Signature Matching Technology

There are better, more technologically sound methods to match signatures, but state election commissions do not commonly utilize them.¹¹³ They are also not without their own shortcomings, as discussed below.

Automated Signature Verification (ASV), often used by banks to verify checks, uses software to match signatures.¹¹⁴ Currently, eight states use ASV to conduct absentee ballot signature matches.¹¹⁵ With ASV, a camera captures the voter's signature on the ballot as a worker scans it for counting.¹¹⁶ The software then compares that image to the

109. See *The Voting Experience in 2020*, *supra* note 54.

110. See *id.*

111. See, e.g., Yair Ghitza & Jonathan Robinson, *What Happened in 2020*, CATALIST, <https://catalist.us/wh-national/> [<https://perma.cc/7WWH-EH4U>] (last visited Oct. 31, 2021) (finding that 39% of Biden-Harris voters were voters of color compared to 15% of Trump-Pence voters); Kelly Beadle, Ruby Belle Booth, Alison Cohen, Peter de Guzman, Bennett Fleming Wood, Noorya Hayat, Kei Kawashima-Ginsberg, Sarah Keese, Rey Junco, Kathleen Lanzilla, Kristian Lundberg, Alberto Medina & Lauren Soherr, *Election Week 2020: Young People Increase Turnout, Lead Biden to Victory*, TUFTS UNIV.: CTR. FOR INFO. & RSCH. ON CIVIC LEARNING & ENGAGEMENT (Nov. 25, 2020), <https://circle.tufts.edu/latest-research/election-week-2020> [<https://perma.cc/RET7-LM9E>] (finding that young voters preferred Biden to Trump by a 25-point margin).

112. See, e.g., Chou & Dukes, *supra* note 105 (explaining that Black voters were twice as likely to have mail-in ballots rejected); Ohio Motion, *supra* note 9, at 10 (arguing that young voters' mail-in ballots are more likely to be rejected); Ghitza & Robinson, *supra* note 111 (finding that more voters of color voted for the Democratic candidate for President than the Republican candidate in 2020); Beadle et al., *supra* note 111 (finding that more young voters voted for the Democratic candidate for President than the Republican candidate in 2020).

113. See Ben-Achour, *supra* note 90.

114. See *What Is Automated Signature Verification*, SQN BANKING SYS., <https://sqnbankingsystems.com/blog/what-is-automated-signature-verification/> [<https://perma.cc/V9P4-ZJK3>] (last visited Oct. 31, 2021).

115. See Ben-Achour, *supra* note 90.

116. See EAC SIGNATURE GUIDANCE, *supra* note 88, at 2.

signature the local election commission has on file.¹¹⁷ The software looks at specific characteristics like a signature's height, width, symmetry, and stroke directions—it can detect discrepancies between signatures that the human eye cannot distinguish, which leads to more accurate determinations.¹¹⁸ ASV eliminates errors produced by the “eyeball” method, which stem from human fatigue or lack of expertise.¹¹⁹ It is also a relatively inexpensive technology, making it accessible to many local governments.¹²⁰

Nevertheless, even this more accurate method has worrisome flaws,¹²¹ with accuracy rates ranging from 74 to 96 percent.¹²² There are few studies on ASV in the specific context of absentee ballot signature matching; the only statistics that currently exist come from ASV software manufacturers themselves.¹²³ Like many pieces of technology meant to be neutral in their implementation, ASV can perpetuate the human biases present in its algorithms, and has security concerns.¹²⁴ The technology does not eliminate the disadvantages signature matching poses for foreign-language speakers and the young, elderly, and disabled, who may have more difficulty with script or whose signatures change over time.¹²⁵

Algorithms are trained with a limited amount of human-created data; they can replicate human biases or simply not include enough information to create an algorithm that can read a wide variety of signatures.¹²⁶ Shorter or hyphenated names are more likely to be rejected by ASV because the text of these names have fewer “turning points and intersections,” which are technical signature characteristics that the software reads in forensic signature

117. See *id.*; OHIO SEC'Y OF STATE, ELECTION OFFICIAL MANUAL, at 9-16 (2021).

118. See Ben-Achour, *supra* note 90; *Protect Against Fraud and Reduce Costs*, PARASCRIPT, <https://www.parascript.com/signature-verification/> [<https://perma.cc/8W3W-YM9R>] (last visited Oct. 27, 2021).

119. See *Protect Against Fraud and Reduce Costs*, *supra* note 118.

120. See *id.*

121. See *What is Automated Signature Verification*, *supra* note 114; EAC SIGNATURE GUIDANCE, *supra* note 88, at 5; Portia Allen-Kyle, *With Vote-by-Mail on the Rise, Automated Signature Matching Is Not a Panacea for Election Officials*, MEDIUM: PORTIA ALLEN-KYLE (July 6, 2020), <https://portiaallenkyle.medium.com/with-vote-by-mail-on-the-rise-automated-signature-matching-is-not-a-panacea-for-election-officials-c7277ce04aba> [<https://perma.cc/8858-W792>].

122. See Ben-Achour, *supra* note 90.

123. See *id.*

124. See Portia Allen-Kyle, *supra* note 121.

125. See *id.*

126. See Ben-Achour, *supra* note 90; Wiggers, *supra* note 6.

matching.¹²⁷ One study even found that ballot rejections increased by 74 percent in California counties that introduced ASV without requiring an initial review via the eyeball method.¹²⁸

F. Ohio's Inadequate Notice and Cure Procedures

Proponents of signature matching might counter that Ohio's notice provisions rectify any erroneous ballot rejections due to inaccurate matching methods.¹²⁹ However, the notice procedures in many jurisdictions do not adequately remedy these errors.¹³⁰ This is primarily due to the inadequate time allotted to cure ballots and improper utilization of notice procedures by county election boards.¹³¹ In Ohio, election boards stop notifying voters about signature mismatches six days after election day, and voters only have until seven days after election day to cure the error.¹³² This means that those notified about a signature mismatch towards the end of the notification period have little time to cure their ballot;¹³³ in some instances, mail delays can make it virtually impossible to do so.¹³⁴ In other instances, it is quite literally impossible to do so regardless of the postal service's efficiency; ballots received up to ten days after election day are counted, but those arriving after the notice period ends on the sixth day will not have an opportunity to cure at all.¹³⁵ Some voters will not receive notification of their failure if it is not discovered until after the notice period ends.¹³⁶ The arbitrariness of Ohio's notice and cure deadlines is highlighted by the fact that elections in Ohio do not need to be certified until twenty-one days after election day.¹³⁷ There is ample leeway in Ohio's election schedule

127. See Wiggers, *supra* note 6; Jodi Sita, Bryan Found & Douglas K. Rogers, *Forensic Handwriting Examiners' Expertise for Signature Comparison*, 47 J. FORENSIC SCI. 1, 1, 6 (explaining that more "complex" signatures—those with more turning points and intersections—can be more confidently matched or rejected).

128. See *Stanford Report*, *supra* note 90, at 35.

129. See, e.g., Clerkin et al., *supra* note 3, at 44 (explaining that states with notice and cure procedures have such procedures to allow for the correction of an erroneous rejection).

130. See *id.* at 41–44.

131. See Ohio Motion, *supra* note 9, at 1–2.

132. See *id.* at 3.

133. See *id.* at 20–22.

134. See, e.g., *id.* at 20.

135. See *id.* at 22.

136. See *id.* at 21.

137. See Ohio Motion, *supra* note 9, at 22.

to give voters more time to cure their ballots, but the state chooses not to utilize it.¹³⁸

Despite efforts in some states to improve notification and cure processes, erroneous deprivations remain a risk due to the increasing popularity of mail-in voting.¹³⁹ For example, in Ohio's 2016 presidential primary, only 8.7 percent of total votes were absentee mail-in ballots.¹⁴⁰ In comparison, Ohio's 2020 presidential primary had a staggering 85.3 percent of votes cast via absentee mail-in ballot, albeit primarily due to COVID-19 concerns.¹⁴¹

In Georgia, rejections for failed signature match increased 350 percent from the 2018 midterm primaries to the 2020 presidential primaries.¹⁴² In the lead-up to the 2018 midterm elections, more than 1,200 Georgia absentee ballots were rejected for a host of reasons, including failed signature matches.¹⁴³ Altogether, around 750,000 ballots were rejected for failed signature matches in the 2016 and 2018 presidential elections, and in the 2020 primaries, over 500,000 ballots were rejected for failed signature matches, among other reasons.¹⁴⁴

In the 2020 presidential election, approximately 560,000 ballots were rejected in total.¹⁴⁵ Failing a signature match was the top reason for rejections, accounting for 32.8% of all rejected ballots.¹⁴⁶ Compared to the 2018 and 2016 federal elections, this is an increase in

138. *See id.*

139. *See, e.g.,* Pia Deshpande, *Ohio's 2020 Presidential Primary and Comparisons to 2016*, STAN.-MIT HEALTHY ELECTIONS PROJECT 13 (July 27, 2020), [https://healthyelections.org/sites/default/files/2020-08/Ohio%20Election%20Memo\(1\).pdf](https://healthyelections.org/sites/default/files/2020-08/Ohio%20Election%20Memo(1).pdf) [<https://perma.cc/SMU6-3KGV>].

140. *Id.*

141. *Id.*

142. *Number of Absentee Ballots Rejected for Signature Issues in the 2020 Election Increased 350% from 2018*, GA. SEC'Y OF STATE, https://sos.ga.gov/index.php/elections/number_of_absentee_ballots_rejected_for_signature_issues_in_the_2020_election_increased_350_from_2018 [<https://perma.cc/MH35-HR4Z>] (last visited Oct. 27, 2021).

143. *See* Gardner, *supra* note 54.

144. *See* Wiggers, *supra* note 6; Pam Fessler & Elena Moore, *More than 550,000 Primary Absentee Ballots Rejected in 2020, Far Outpacing 2016*, NPR (Aug. 22, 2020, 5:00 AM), <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016> [<https://perma.cc/5SML-8PE6>].

¹⁴⁵ *Election Results, 2020: Analysis of Rejected Ballots*, BALLOTEDIA https://ballotpedia.org/Election_results,_2020:_Analysis_of_rejected_ballots#Reasons_for_rejection [<https://perma.cc/ADR8-6YBC>] (Sept. 10, 2021).

¹⁴⁶ *See id.*

the share of ballots that were rejected for failing a signature match.¹⁴⁷ One analysis points out that although the total number of rejected ballots increased, the rate of rejection decreased in 2020 compared to 2016.¹⁴⁸ Despite this, the number of ballots rejected is often beyond the margin of error in races that seem to get closer with every election cycle.¹⁴⁹

II. SIGNATURE MATCHING AS A PROCEDURAL DUE PROCESS VIOLATION

The practice of signature matching, as executed, violates procedural due process under the Fifth and Fourteenth Amendments.¹⁵⁰ Procedural due process requires that the government first provide adequate notice to parties when it seeks to deprive them of a constitutionally protected interest (life, liberty, or property), and second, that it provides an opportunity to be heard in the event the party seeks to challenge the deprivation.¹⁵¹

The seminal case for analyzing procedural due process challenges is *Mathews v. Eldridge*.¹⁵² The respondent, Eldridge, received disability benefits from a program established under Title II of the Social Security Act.¹⁵³ After receiving reports from his doctors, the state agency charged with monitoring his medical condition determined he was no longer disabled and notified him that it had made a tentative decision to terminate his benefits.¹⁵⁴ Eldridge countered that he was still injured, but the agency did not alter its determination.¹⁵⁵ This determination was accepted by the Social Security Administration, at which point Eldridge was notified of the

¹⁴⁷ See *id.*; *Rejected Absentee/Mail-In Ballots in the 2016 and 2018 Elections*, BALLOTPEDIA https://ballotpedia.org/Rejected_absentee/mail-in_ballots_in_the_2016_and_2018_elections.

¹⁴⁸ See Rakich, *supra* note 3; Nathaniel Rakich, *Why So Few Ballots Were Rejected in 2020*, FIVETHIRTYEIGHT (Feb. 17, 2021, 6:00 AM), <https://fivethirtyeight.com/features/why-so-few-absentee-ballots-were-rejected-in-2020/> [<https://perma.cc/9XJT-7Y5B>]; *Election Results, 2020: Analysis of Rejected Ballots*, BALLOTPEDIA https://ballotpedia.org/Election_results,_2020:_Analysis_of_rejected_ballots#Reasons_for_rejection [<https://perma.cc/ADR8-6YBC>] (Sept. 10, 2021).

¹⁴⁹ See Mark Nichols, Soo Rin Kim & Ivan Pereira, *750,000 Mail-in Ballots Were Rejected in 2016 and 2018. Here's Why That Matters*, ABC NEWS (Oct. 19, 2020, 5:03 AM), <https://abcnews.go.com/Politics/750000-mail-ballots-rejected-2016-2018-matters/story?id=73645323> [<https://perma.cc/45DS-NBG9>].

¹⁵⁰ See U.S. CONST. amends. V, XIV.

¹⁵¹ U.S. CONST. amend. V.

¹⁵² See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁵³ See *id.* at 323.

¹⁵⁴ See *id.* at 324.

¹⁵⁵ See *id.*

agency's final determination to terminate his benefits.¹⁵⁶ He had six months to seek reconsideration by the state agency, but he instead brought an action in court.¹⁵⁷ Eldridge argued that the agency failed to give him adequate notice and opportunity to cure under the Constitution's due process requirements because due process requires that his benefits not be terminated until after the evidentiary hearing stage of any administrative proceeding.¹⁵⁸

The Supreme Court concluded that the government met its constitutional obligations.¹⁵⁹ According to the Court, the procedures used by the agency were adequate relative to the potential injustice that would be done from an erroneous deprivation of benefits from a deserving recipient.¹⁶⁰ The Court developed a three-factor balancing test to determine whether procedural due process was met: (1) the importance of the interest affected; (2) the risk of erroneous deprivation of that interest with the current procedures in place and value of any additional procedural safeguards; and (3) the government's interest in the fiscal or administrative burdens that additional process would entail.¹⁶¹ With these factors in mind, the Court concluded that although Eldridge's interest in disability benefits was not insignificant, it did not reach the level of need-based financial benefits, like welfare, that might be considered essential to one's continued well-being.¹⁶² Therefore, the degree of deprivation was not high enough to reach the threshold of a due process violation.¹⁶³ Furthermore, Eldridge's medical condition could be adequately assessed without an evidentiary hearing, and medical documentation (e.g., written submission, x-rays, and lab results) is very reliable evidence.¹⁶⁴ Thus, the value of added procedure, such as an evidentiary hearing or a more detailed explanation of the reasons for termination in the agency's notice to Eldridge, would not have reduced any potential erroneous deprivation.¹⁶⁵ Additional procedures in such cases would only impose unnecessary costs on the government

156. *See id.*

157. *See id.* at 324–25.

158. *See id.* at 325.

159. *See id.* at 349.

160. *See id.* at 339–43.

161. *See id.* at 334–35.

162. *See id.* at 342; *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005) (holding that financial-need based benefits for heat during the winter rose to the level of importance requisite to find the agency's notice without reasons inadequate).

163. *See Mathews*, 424 U.S. at 342–43.

164. *See id.* at 344–45.

165. *See id.*

agency—it may even lead to instances where undeserving individuals receive benefits from a limited pool of funding.¹⁶⁶

Inherent in the Court’s analysis is an emphasis on the importance of making accurate deprivation determinations.¹⁶⁷ Procedural due process jurisprudence does not take deprivation lightly—it wants to reduce the erroneous deprivation of rights as much as possible.¹⁶⁸ To achieve that, government actors must provide enough process to allow only those deprivations that are deserved in the eyes of the law.¹⁶⁹

A. *The Right to Vote as a Property Interest*

The seminal cases on procedural due process center around the deprivation of property interests, namely, those anchored in some entitlement to a benefit from the government.¹⁷⁰ Lower courts that have reached the issue typically analyze whether voting is a liberty interest for the purposes of procedural due process, and they are split in their outcomes.¹⁷¹ However, there is a stronger argument that the right to vote is a property interest created by a statutory entitlement.¹⁷²

“Property,” for the purposes of procedural due process, is not limited to “real property.”¹⁷³ The Court first expanded the traditional notion of constitutional property in *Goldberg v. Kelly* when it established that welfare benefits are a protectable property interest.¹⁷⁴ It went on to expand this understanding of property to include implied reliance interests.¹⁷⁵ For example, successive employment contracts that typically lead to a tenure offer at a public university create an

166. See *id.* at 348.

167. See *id.*

168. See *id.* at 349.

169. See *id.*

170. See, e.g., *id.* at 320; *Kapps v. Wing*, 404 F.3d 105, 108 (2d Cir. 2005); *Goldberg v. Kelly* 397 U.S. 254, 255 (1970).

171. Compare *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 846–47 (S.D. Ohio 2012) (finding no liberty interest in the right to vote), and *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 691 (M.D. Tenn. 2020) (finding no liberty interest in the right to vote), with *Doe v. Rowe*, 156 F. Supp. 2d 35, 48 (D. Me. 2001) (finding a liberty interest in the right to vote), and *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744, 777 (W.D. Tex. 2020) (finding a liberty interest in the right to vote).

172. Brief of Plaintiff-Appellee Tracie Hunter at 29–30, *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795 (S.D. Ohio 2012) (No. 11-3059).

173. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571–72 (1972).

174. See *Goldberg*, 397 U.S. at 261–62, 262 n.8.

175. See *Perry v. Sindermann*, 408 U.S. 593, 600–02 (1972).

entitlement protected by due process.¹⁷⁶ However, a mere “unilateral expectation” of entitlement does not constitute a property interest—property interests are created by contract, are established by positive law (e.g., state statute), or are implied by the proper circumstances, as in the example of tenure.¹⁷⁷ But the most common, and often most crucial, way that the Court identifies a new property interest is specific to those created by state statute.¹⁷⁸ A claim of entitlement exists when a state limits government officials’ discretion to mandate a specific outcome based on fixed eligibility criteria.¹⁷⁹ The Court established this type of interest in the context of utility benefits for low-income individuals.¹⁸⁰ Criteria that constrained the government’s discretion to fixed outcomes about who would be eligible for benefits created an individual entitlement, or property interest, that due process protected.¹⁸¹ The Court’s reasoning relied on values that are the basis for due process: those entitled to benefits must know whether they need to bring a challenge and how to tailor that challenge effectively, or else they will be deprived of that interest.¹⁸²

The right to vote follows the basic framework of property-interest creation by state statute.¹⁸³ In the same way non-discretionary language creates property interests via benefit regulation, non-discretionary language in state election procedure statutes creates a property interest in the right to vote.¹⁸⁴ Ohio, again, can be an illustration of this concept:

Each person who will be of the age of eighteen years or more at the next ensuing November election, who is a citizen of the United States, and who, if he continues to reside in the precinct until the next election, will at that time have fulfilled all the requirements as to length of residence to qualify him as an elector shall, unless otherwise disqualified, be entitled to be registered as an elector in such precinct. When once registered, an elector shall not be required to register again unless his registration is canceled.¹⁸⁵

176. See *Roth*, 408 U.S. at 576–77.

177. See *Roth*, 408 U.S. at 577–78.

178. See *Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir. 2005).

179. See *id.*

180. See *id.* at 118.

181. See *id.* at 113–14.

182. See *id.* at 123–24; *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014).

183. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); Ben F.C. Wallace, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647, 667 (2016).

184. See *Goldberg v. Kelly*, 397 U.S. 254, 261–62, 262 n.8 (1970); *Kapps*, 404 F.3d at 113; Wallace, *supra* note 183, at 655.

185. OHIO REV. CODE ANN. § 3503.07 (LexisNexis 2021).

By effectively cabining government officials' discretion regarding voter-registration eligibility (persons eighteen or over who reside in the proper precinct for enough time) the state creates an individual entitlement to vote.¹⁸⁶

The Southern District of Ohio found that although people have a right to vote generally, they do not have a right to vote by absentee ballot.¹⁸⁷ Absentee voting is therefore not protected by procedural due process.¹⁸⁸ This view ignores the fact that there are specific individual entitlements for absentee voting.¹⁸⁹ Take Ohio again: "Any qualified elector may vote by absent voter's ballots at an election."¹⁹⁰ With one sentence, the state entitles an individual to some process when their right to vote absentee is curtailed, for a failed signature match or otherwise.¹⁹¹ Constitutional requirements of procedural due process aside, the Ohio legislature itself contemplated that individuals have some right to cure a rejected ballot by codifying the right to do so.¹⁹² Ohio law requires election officials to notify voters of inconsistencies on their absentee ballots, giving credence to the idea that voting is an individual entitlement in the eyes of the Ohio legislature.¹⁹³

The court also ignores the reality of voting today; mail-in only and absentee voting are steadily overtaking the traditional process of

186. See *Kapps*, 404 F.3d at 113. At least one lower court has found that plaintiffs challenging the state's signature matching processes under procedural due process have a statutory entitlement in the right to vote absentee. See, e.g., *Frederick v. Lawson*, 481 F. Supp. 3d 774, 789 (S.D. Ind. 2020).

187. See *League of Women Voters of Ohio v. Larose*, 489 F. Supp. 3d 719, 738–39 (S.D. Ohio 2020) (finding that the right to vote absentee is not an interest protected under due process because "Ohio voters have multiple options to exercise their right to vote even if their ballot is rejected due to signature mismatch . . .").

188. See *id.* at 737–39. Conversely, an Arizona court ruled that despite absentee voting's less fundamental status as a "privilege and convenience for those unable to vote in person," it still required the state to comport with due process. See *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). The court stated that, "While it is true that absentee voting is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege." *Id.*

189. See *Larose*, 489 F. Supp. 3d at 738.

190. OHIO REV. CODE ANN. § 3509.02(A) (LexisNexis 2021).

191. See *id.*

192. *Id.* § 3509.06.

193. See *id.* § 3509.06(D)(3)(b) ("If the election officials find that the identification envelope statement of voter is incomplete or that the information contained in that statement does not conform to the information contained in the statewide voter registration database concerning the voter, the election officials shall mail a written notice to the voter, informing the voter of the nature of the defect. The notice shall inform the voter that in order for the voter's ballot to be counted, the voter must provide the necessary information to the board of elections in writing and on a form prescribed by the secretary of state . . .").

in-person voting.¹⁹⁴ The pandemic accelerated mail-in voting's popularity because it was the only safe option for millions of voters in the 2020 election cycle.¹⁹⁵ Moreover, there is no indication that the popularity of mail-in voting will decline once the pandemic ends because mail-in voting is more convenient than in-person voting.¹⁹⁶

The precise method by which a vote is cast does not change the character of the individual property interests at stake. When a state makes mail-in voting an option, and an individual chooses that option, his or her ability to participate in the franchise cannot be made more uncertain because of that choice.¹⁹⁷ Thus, the state's differential treatment of the right at stake based on the method by which that right is exercised is purely arbitrary.¹⁹⁸

In *Richardson v. Secretary of State*, the lower court found the statutory entitlement argument persuasive, but its decision was overturned on appeal.¹⁹⁹ The US Court of Appeals for the Fifth Circuit declined to extend property-interest protection to the right to vote, primarily because it lacked precedent on point for the issue.²⁰⁰ The circuit court did not address the merits of this question in its own right and provided a relatively scant discussion of the procedural due process claim.²⁰¹ It further opined that the proper standard of review for such a question is the *Anderson-Burdick* sliding scale, and applying *Mathews* would be a form of judicial overreach.²⁰² While it is true that *Anderson-Burdick* is the constitutional equal protection test

194. See *Larose*, 489 F. Supp. 3d at 737–39; *Voting by Mail and Absentee Voting*, *supra* note 73.

192. See Drew Desilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread/> [https://perma.cc/4C5B-6CZW].

196. See *Voting by Mail and Absentee Voting*, *supra* note 73 (finding that the use of mail-in voting has increased steadily over the years, with a sharp uptick in 2020).

197. See, e.g., *Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir. 2005) (discussing how the preclusion of discretion is crucial to the finding of a property interest).

198. See *id.*

199. See *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 794–95 (W.D. Tex. 2020).

200. See *Richardson v. Hughs*, 978 F.3d 220, 233 (5th Cir. 2020).

201. See *id.* at 233–35.

202. See *Hughs*, 978 F.3d at 233, 235. The court in *Hughs* believes *Mathews* does not account for the state's interest in regulating voting, but this is patently untrue. See *id.* at 235. The *Mathews* test expressly considers costs to the state in affording process in view of the particular interest potentially deprived. See *infra* Section II.A. The *Anderson-Burdick* sliding scale is the standard of review courts use to determine whether ballot access restrictions violate 14th Amendment Equal Protection. See *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

for challenged regulations that restrict ballot access,²⁰³ the possible application of one legal test to a question does not foreclose the use of another; signature matching can and should be evaluated under both the *Anderson-Burdick* sliding scale and *Mathews*.

Other courts have contemplated whether the right to vote is a liberty interest, but this argument is weakened by the fluid nature of the legal definition of “liberty.”²⁰⁴ Throughout history, the Supreme Court has solidified the idea that constitutional liberty goes beyond its most traditional conception of freedom from bodily restraint or intrusion; liberty interests encompass other rights, like those “essential to the orderly pursuit of happiness by free men.”²⁰⁵ The Court has established voting as a fundamental right but not as a liberty interest under due process.²⁰⁶ On the one hand, Fourteenth Amendment due process jurisprudence leaves room for the Court to find that the right to vote is a liberty interest, but there is currently much disagreement among the lower courts that have addressed this issue.²⁰⁷ On the other hand, the creation of protectable entitlements in the *Goldberg* line of cases is well established and relatively straightforward.²⁰⁸

At least one state supreme court has contemplated the right to vote as a protectable property interest under due process.²⁰⁹ In *State v. Staten*, the Tennessee Supreme Court declared:

It matters not by what name it is designated—the right to vote, the elective franchise, or the privilege of the elective franchise—the person who, under the Constitution and laws of the State, is entitled to it, has a property in it, which the

203. See, e.g., *Burdick*, 504 U.S. at 434 (applying the *Anderson-Burdick* test to a challenged regulation).

204. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing cases in which courts have attempted to define liberty).

205. See *id.* The Court recognizes the following rights, in particular, as liberty interests: the right to contract, have a job, pursue an education, marry, have a home, raise children, and practice religion freely. *Id.* The Court went on to explain a well-known principle of due process doctrine, that the state cannot interfere with liberty interests without a legitimate reason to do so. *Id.* at 399–400.

206. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

207. Compare *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020) (finding a liberty interest in the right to vote), *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 734, 777 n.27 (W.D. Tex. 2020) (finding a liberty interest in the right to vote), and *Doe v. Rowe*, 156 F. Supp. 2d 35, 47–49 (D. Me. 2001) (finding a liberty interest in the right to vote), with *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 687 (M.D. Tenn. 2020) (finding no liberty interest in the right to vote).

208. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577–78 (1972).

209. See *State v. Staten*, 46 Tenn. (6 Cold.) 233, 257–58 (1869).

law maintains and vindicates, as vigorously as it does any right of any kind which men may have and enjoy.²¹⁰

The court squarely addressed procedural due process and held that the right to vote cannot be deprived without due process of law.²¹¹

While no US Supreme Court case dispositively holds that the right to vote is a property or liberty interest for the purposes of procedural due process, the Court has long established the importance of the franchise.²¹² Throughout history, the Court has recognized the right to vote as fundamental because it is “preservative of all rights.”²¹³ The Court’s emphasis on the importance of the right to vote in a democratic society, taken together with its broad articulation of property interests, forms a strong argument for the right to vote as a property interest under due process.²¹⁴ As such, the right to vote deserves the constitutional protections set forth in the Fifth and Fourteenth Amendments.²¹⁵

B. Applying Mathews to the Right to Vote

If voting is a property interest, then existing signature matching processes are inadequate to conform with the Constitution. Applying *Mathews*, the interest at issue is extraordinarily important.²¹⁶ For example, if the interest in the receipt of utility subsidies is high enough to warrant a guarantee of a hearing for those denied benefits—like it was in the landmark case of *Kapps v. Wing*—then the interest in the ability to ensure one’s participation in a foundational piece of American democracy rises to, at least, the same level.²¹⁷ Beyond what the Court has cemented in its jurisprudence about the right to vote, there is no doubt among scholars, politicians, and laypersons alike as to the franchise’s fundamental importance to democracy.²¹⁸ Signature matching is an inaccurate fraud prevention measure and thereby raises the risk of erroneous ballot rejection.²¹⁹

210. See *id.* at 243.

211. See *id.*

212. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

213. See *Yick Wo*, 118 U.S. at 370.

214. See *id.* at 370–74; e.g., *supra* Section II.A.

215. See U.S. CONST. amends. V, XIV.

216. See *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

217. See *Kapps v. Wing*, 404 F.3d 105, 119–20.

218. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05; *Reynolds v. Sims*, 377 U.S. 533, 561–62; *Yick Wo*, 118 U.S. at 370.

219. See *supra* Section I.D.

The value of adding safeguards to prevent erroneous deprivation corresponds to the value of the franchise itself—eligible voters should not be deprived of effective participation in the political process, regardless of their demographic group. Effective participation in the franchise is necessary to maintain accurate representation in government and sow seeds of confidence and legitimacy in the US democratic system.²²⁰ While the state's interest in preventing voter fraud is high, the federal government is better suited to do so because it has superior infrastructure to implement improved fraud prevention technologies.²²¹ An agency-focused solution will be the most effective and cost-efficient.²²²

III. THE REGULATORY STATE CAN CURE ERRONEOUS DEPRIVATIONS OF THE RIGHT TO VOTE

A. Strengthen Executive Agency Power Over State Election Administration

State election commissions should not use signature matching to verify absentee ballots unless the technology can be significantly improved. The question of what kind of technology should replace signature matching is answered by the regulatory state.²²³

The EAC exists to ensure that elections are conducted fairly and securely.²²⁴ With a legislative boost from Congress, the EAC could protect procedural due process by using evidence and data-backed regulations that use effective methods of voter fraud prevention.²²⁵ It could promulgate regulations that require the use of technologies already in existence, like ASV, blockchain, or internet voting. Alternatively, it can direct experts to research novel technologies that can reduce erroneous deprivation.²²⁶

Congress creates agencies to fill regulatory gaps when it lacks the expertise or capacity to legislate in a particular area.²²⁷ The Administrative Procedure Act (APA) and countless enabling statutes

220. See Fabienne Peter, *Political Legitimacy*, STAN. ENCYC. OF PHIL. (Apr. 24, 2017), <https://plato.stanford.edu/entries/legitimacy/#SouPolLeg> [<https://perma.cc/HB5T-S643>].

221. See *infra* Part III.

222. See *id.*

223. See *infra* Section III.A.

224. See EAC OVERVIEW, *supra* note 70, at 2–3.

225. See *infra* Part III.

226. See *id.*

227. See generally JACOB A. STEIN & GLENN A. MITCHELL, 1 ADMINISTRATIVE LAW § 1.02 (2021).

enacted by Congress give executive branch agencies mandates to act as mini governments with both quasi-legislative and quasi-judicial functions.²²⁸ Due process requirements are especially relevant to administrative agencies when they engage in their quasi-judicial or adjudicatory functions.²²⁹

When agencies make individual determinations that affect protected interests (i.e., life, liberty, or property), the Constitution demands due process.²³⁰ This quality is precisely why an administrative agency should be tasked with developing solutions to a due process violation, such as the erroneous deprivation of the right to vote. The protection of procedural due process is inherent within the regulatory state's legal infrastructure; it acts as a filter for nonsensical regulations not supported by data.²³¹ The APA requires that regulations adhere to certain thresholds of effectiveness and reasonableness.²³² The notice and comment rulemaking process—the primary way executive agencies like the EAC regulate—requires that an agency publish the data it relied on when it selected a particular regulation.²³³ Regulations that would lead to a high risk of erroneous deprivation will not meet those standards, and if they do, parties can challenge them post hoc through litigation.²³⁴

The agency must also make rational connections between its chosen policy and the legislative goals set out by Congress in its authorizing statute.²³⁵ For a regulation to be reasonable, the agency must make rational connections to the data offered, show that it considered alternatives, and explain why it ultimately decided on the chosen policy over those alternatives.²³⁶ Signature matching can only

228. See *id.* § 1.02(1).

229. See *id.* § 1.02(3).

230. See U.S. CONST. amends. V, XIV.

231. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 247 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 401–02 (D.C. Cir. 1973).

232. See *State Farm*, 463 U.S. at 33–34, 43–44.

233. See *N.S. Food Prods.*, 568 F.2d at 251 (invalidating an FDA regulation because the agency stifled effective comment and did not provide an adequate statutorily required “Statement of Basis and Purpose” by failing to publish the data it relied on); *Portland Cement*, 486 F.2d at 393 (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.”).

234. See 5 U.S.C. § 704.

235. See *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852, 854 (D.C. Cir. 1987) (ruling that a published regulation’s “Statement of Basis and Purpose” must address how the regulation achieves the objectives of the statute that authorizes the regulation).

236. See *id.*; *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 262 (2016).

survive the notice and comment rulemaking process and subsequent judicial review if the EAC can produce and explain data to justify the technique's effectiveness as a fraud prevention measure.²³⁷ Further, the agency approach allows for new regulations as more data and better practices emerge, instead of waiting for a lengthy legislative process to update the law.²³⁸

Congress should statutorily authorize the EAC to promulgate election administration regulations through the notice and comment rulemaking process that is common to most agencies.²³⁹ A revitalized EAC could employ experts to research and develop effective fraud prevention regulations focused on more effective signature matching technology or alternative methods altogether.

B. Two Frameworks for EAC Regulations

There are two pillars in the *Mathews* inquiry around which solutions can be built.²⁴⁰ The first involves improving notice and opportunity to cure without necessarily reducing the risk of erroneous deprivation.²⁴¹ Legally, this can cure the defect,²⁴² but it is more complicated overall. It involves more steps from point A (casting a vote) to point B (counting that vote) when a ballot is rejected; the onus is then on the voter to cure his ballot.²⁴³

Improving notification processes and opportunities to cure is an important goal in the short term and should be part of any comprehensive plan to reduce due process violations. Some states and groups have already begun to explore improved notification processes.²⁴⁴ For example, the Every Vote Counts Act in California requires election officials to notify voters at least eight days before an election is certified that their vote was rejected for failed signature match.²⁴⁵ A Stanford University study suggests ways to continue improving upon this Act and proposes methods to notify the voter of

237. See *State Farm*, 463 U.S. at 43–44; *N.S. Food Prods.*, 568 F.2d at 251; *Portland Cement*, 486 F.2d at 393; *Dole*, 809 F.2d at 852; *Elec. Power Supply*, 577 U.S. at 262.

238. See Cynthia Scheopner, *Administrative Procedure Act*, BRITANNICA, <https://www.britannica.com/topic/Administrative-Procedures-Act> [https://perma.cc/S6D6-K2B2] (last visited Oct. 26, 2021).

239. See 5 U.S.C. § 553.

240. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

241. See *id.*

242. See *id.*

243. See *Stanford Report*, *supra* note 90, at 14.

244. See *id.*

245. See *id.*

his or her mismatched signature.²⁴⁶ These include (1) providing a return envelope for the documents required to cure with postage; (2) providing notification letters in the voter's language; (3) developing standard statewide signature verification guidelines; (4) collecting several signatures from voters when they register to vote; (5) developing a lifetime database of signatures to allow election workers to see how signatures change over time; (6) explicitly informing absentee voters that their signature will be compared and verified; (7) allowing voters to view the signature the state has on file for them; and (8) providing Department of Motor Vehicles with higher resolution stylus pads.²⁴⁷ These recommendations are realistic and practical ways to increase due process protection of absentee voting, but none go far enough to safeguard the right to vote.²⁴⁸

While improving notification procedures is not harmful and should be part of any regulatory overhaul to improve ballot-count accuracy, there are more opportunities for ballots to be rejected if the state solely improves or increases notification and cure processes. Focusing on improving the technology of signature matching, or verifying absentee votes to prevent fraud in some other capacity, can cure the procedural due process defects via the reduction of erroneous deprivation,²⁴⁹ which is why an expanded EAC is critical.

C. The EAC is an Appropriate Solution to the Problem of Signature Matching

At present, HAVA strictly limits the EAC's rulemaking power.²⁵⁰ It is limited to producing guidance on topics outside of voter registration.²⁵¹ It also lacks enforcement power and must leave that job to the Department of Justice or state-based enforcement mechanisms.²⁵² As such, the EAC's primary powers involve doling out federal funds to improve state election administration, as well as collecting and sharing information about election administration to

246. See *id.* at 4–5.

247. See *id.*

248. See *id.*

249. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

250. There have been a few proposals to eliminate the limit placed on the EAC's rulemaking power put forth by Congresspeople interested in expanding the agency's role. See EAC OVERVIEW, *supra* note 70, at 4, 23.

251. See *id.* at 4.

252. See *id.*

help develop improvements.²⁵³ Hence, there is no doubt that the EAC is the sole agency that focuses on election administration; the Federal Election Commission, alternatively, focuses on campaign finance, not election administration.²⁵⁴ Despite the fact that the EAC is weak as a regulatory body, it is the only agency with a mandate appropriately tailored to handle the regulation of practices like signature matching.²⁵⁵

The EAC does promulgate guidance on how states should meet their new obligations under HAVA, but like all guidance, it is non-binding.²⁵⁶ States choose whether to abide by the EAC's recommendations, and there is no penalty if they do not.²⁵⁷ The EAC has produced relatively basic guidance about signature matching in particular.²⁵⁸ It primarily details clerical considerations about running an organized operation.²⁵⁹ It gives helpful suggestions, like color-coding trays for ballots at different stages in the verification process and hand counting the total number of accepted and rejected ballots to make sure it matches the number in the electronic registration database.²⁶⁰ However, noticeably absent from the guidelines is how a person is supposed to conduct a signature comparison.²⁶¹ The guidance generally assumes the election commission will have ASV at its disposal, which does not align with the reality of most local election commissions: only eight states currently use it.²⁶² The ASV guidance is scant and mentions nothing about ASV's ability to match signatures more accurately.²⁶³ Rather, the focus of ASV's benefit is how it can make the counting process faster and more efficient.²⁶⁴

There is no information about acceptable error rates or proper sample sizes against which to check the technology's accuracy.²⁶⁵ The section that addresses the potential lack of an ASV system only

253. See *id.* at 5, 7.

254. See *id.* at 11.

255. See *id.* at 4–5; 52 U.S.C. § 20922.

256. See EAC OVERVIEW, *supra* note 70, at 4.

257. See *id.*

258. See EAC SIGNATURE GUIDANCE, *supra* note 88, at 1.

259. See *id.*

260. See *id.*

261. See *id.* at 3.

262. See Wiggers, *supra* note 6.

263. See EAC SIGNATURE GUIDANCE, *supra* note 88 at 2–3.

264. See *id.*

265. See Wiggers, *supra* note 6.

addresses how to reduce delays in the checking process.²⁶⁶ There is no instruction about the method a person should use to compare signatures manually.²⁶⁷ The guidance wisely recommends election officials be trained and describes a “Tiered System of Review” to ensure ballots are not erroneously rejected.²⁶⁸ As the evidence shows, however, the manual methods used are so ineffective that putting more sets of eyes on a signature is unlikely to make the process more accurate.²⁶⁹ The recommended cure process suggests notifying voters whose ballots have been rejected, but there are no guidelines about adequate time and opportunity for the voter to cure the ballot.²⁷⁰ Even if there were more helpful guidelines, states have no obligation to adhere to non-binding guidance, so the EAC’s ability to protect voters from due process violations is virtually non-existent.²⁷¹

Despite the EAC’s relative inability to regulate, Congress contemplated the idea that states can be commandeered to comport with some specific election administration requirements.²⁷² For example, HAVA sets mandatory standards with which states must comply; these include (1) mandating that voting systems enable voters to verify and correct their ballots, (2) requiring first-time voters who register by mail to provide identification, (3) offering provisional ballots, (4) making certain voter information available at the polls, and (5) maintaining computerized voter registration systems.²⁷³ It therefore would not be unprecedented for Congress to expand the EAC’s power into new regulatory enforcement territory.²⁷⁴

Although the EAC needs a legislative boost, it has the infrastructure to take on new regulatory responsibilities.²⁷⁵ The agency currently has a broad mandate to conduct election administration research and has avenues for stakeholders to share their expertise.²⁷⁶ Therefore, the EAC is already equipped to begin gathering the data it needs to develop effective regulations.²⁷⁷

266. See EAC SIGNATURE GUIDANCE, *supra* note 88 at 2–3.

267. See *id.* at 3.

268. See *id.* at 3–4.

269. See *supra* Section I.D.

270. See EAC SIGNATURE GUIDANCE, *supra* note 88 at 5–6.

271. See EAC OVERVIEW, *supra* note 70, at 4.

272. See *id.* at 1 n.4.

273. See *id.*

274. See *id.* at 23–24.

275. See *id.* at 7–8.

276. See *id.*

277. See *id.*

The EAC's ability to promulgate such regulations is not hindered by the limitations of federalism or equal sovereignty either, at least with regard to federal elections.²⁷⁸ It has long been established that the federal government maintains broad power to regulate elections in regard to their time, place, and manner (TPM) under the Elections Clause of the Constitution.²⁷⁹ Although states tend to have substantial control over the administration of their elections, they are mostly shielded from federal intervention in determining voter qualifications, as opposed to determining the time, place, and manner of their elections.²⁸⁰ States can require that absentee voters provide signatures in order to cast a ballot.²⁸¹ However, states do not have complete control over how that signature can be used.²⁸² While the Court has not spoken directly to the issue of whether the TPM umbrella includes signature matching, it bears a closer resemblance to those regulations within the umbrella, as opposed to those that count as qualifications.²⁸³ For example, the Supreme Court struck down Arizona's requirement that voters show "proof" of citizenship to register to vote.²⁸⁴ The National Voter Registration Act (NVRA) required states to use its near-uniform, federal form in which an otherwise eligible voter merely had to attest to his or her citizenship under penalty of perjury.²⁸⁵ The Court explained that federal law preempted any further requirement by the state.²⁸⁶ Because of this

278. *Cf. Shelby Cnty. v. Holder*, 570 U.S. 529, 534–35, 544–46 (2013) (explaining that the preclearance mechanism of the Voting Rights Act of 1965 did not violate the limitations of federalism or equal sovereignty because it was implemented in response to “[t]he ‘blight of racial discrimination in voting’”).

279. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

280. *See id.* at 17.

281. *Cf. id.* at 17–20 (holding that citizenship is a “qualification” that the states could permissibly impose upon otherwise eligible voters).

282. *See* Daniel P. Tokaji, *Shelby County v. Holder: Don't Forget the Elections Clause*, SCOTUS BLOG (Feb. 13, 2013, 11:43 AM), <https://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause/> [<https://perma.cc/8XZQ-39RY>]; *cf. Inter Tribal Council*, 570 U.S. at 19–20 (holding that the state could not require voters to show proof of citizenship in order to vote because that goes beyond the time, place, and manner requirements Congress set out in the National Voter Registration Act).

283. *See, e.g., Inter Tribal Council*, 570 U.S. at 17–19; *Fish v. Kobach*, 840 F.3d 710, 749–50 (10th Cir. 2016) (holding that the National Voter Registration Act preempted a Kansas law requiring proof of citizenship to register to vote because voter registration is a time, place, and manner regulation); *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 724 (7th Cir. 2021) (holding that the National Voter Registration Act preempted an Indiana law prescribing voter registration cancellation procedures that conflicted with those in the Act).

284. *See Inter Tribal Council*, 570 U.S. at 15.

285. *See id.* at 4–5.

286. *See id.* at 8–9.

preemption, Arizona's additional requirement that one must show proof was unconstitutional.²⁸⁷

In the case of signature matching, a hypothetical federal requirement that an absentee ballot has a signature is analogous to the requirement that a voter attests to his or her citizenship and therefore falls under the TPM umbrella.²⁸⁸ A voter qualification, on the other hand, could be that the identity of the voter is valid; in other words, the person who fills out the ballot must be the person for whom the ballot is meant. However, supplying a signature on a ballot is not a qualification in and of itself, the same way attesting to one's citizenship on the federal form was not a qualification; it is simply a method of verifying the genuineness of the ballot.²⁸⁹ Therefore, the agency should be free to ensure states are using signatures on absentee ballots appropriately.²⁹⁰

Furthermore, HAVA itself mandates that in-person voting systems give voters the ability to verify and correct their ballots.²⁹¹ This verification mandate is analogous to the notification and curing procedures that would help remedy the procedural due process problems endemic in the low-quality signature matching procedures currently used by states.²⁹² It is already evident that, at the very least, it is within Congress's purview to mandate analogous notification and cure procedures that give voters enough time to correct their rejected ballots with ease.²⁹³ Accordingly, the EAC has the agency infrastructure and the constitutional authority to best regulate and improve the practice of signature matching.²⁹⁴

IV. CONCLUSION

The historical fight for voting rights and the doctrine that has developed in election and constitutional law, respectively, make it clear that the practice of signature matching improperly thwarts the franchise.²⁹⁵ Examined against the background of the struggle for minorities and Black people to obtain a right owed to them under the

287. *See id.* at 15.

288. *See id.* at 4–5.

289. *See id.* at 4–5, 8–9.

290. *See id.*

291. *See* EAC OVERVIEW, *supra* note 70, at 1 n.4.

292. *See id.*; Clerkin et al., *supra* note 3, at 42–43.

293. *See* EAC OVERVIEW, *supra* note 70, at 1 n.4.

294. *See supra* Section III.C.

295. *See supra* Section I.D.

US Constitution, it is clear that such an ineffective practice has no place in a democracy that seeks to accurately capture its people's choice for who will best represent them.²⁹⁶ At best, signature matching appeases those concerned about election fraud.²⁹⁷ At worst, it unjustly disenfranchises voters and reduces the public's faith in the legitimacy of democratic elections—the evidence of the latter is overwhelming and increasing.²⁹⁸

The right to vote is a cognizable property interest under procedural due process.²⁹⁹ Property interests warrant the procedural due process protections enumerated in the Fifth and Fourteenth Amendments, and any erroneous deprivation of a person's property interest is a violation of his or her constitutional rights.³⁰⁰ Furthermore, there are particular groups—namely, the old, young, ill, non-native English speakers, Democratic party voters, and minorities—to whom the practice poses a greater threat.³⁰¹ The burden these groups face is troublesome, and it only appears to be growing as the prevalence of mail-in voting increases.³⁰² The expansion of mail-in voting should be a welcome development in election administration, as it gives more people flexibility as to where and when they cast their ballots.³⁰³ Stifling the progress of voting expansion with a pretextual “fraud prevention” measure only serves to weaken democracy.³⁰⁴

There are ways to streamline and improve the process of signature matching itself.³⁰⁵ However, a better solution would reach more aspects of election administration in order to ensure that procedural due process and other constitutional rights violations do not continue to go unaccounted for.³⁰⁶ An expanded EAC can achieve this end through effective and efficient means.³⁰⁷ The regulatory state's demand for data, and a rational connection between that data and the proposed regulation, ensure that only those regulations that

296. See *supra* Section I.A.

297. See *supra* Section I.D.

298. See *supra* Section I.D.

299. See *supra* Section II.A.

300. See *supra* Section II.A.

301. See *supra* Section I.D.

302. See *supra* Section I.F.

303. See *Voting by Mail and Absentee Voting*, *supra* note 73.

304. See *supra* Section I.B.

305. See *supra* Section I.E.

306. See *supra* Section III.A.

307. See *supra* Section III.A.

further Congress's goals are enacted.³⁰⁸ The EAC can use its agency infrastructure to gather research and expertise about fraud detection methods that do not infringe on individuals' constitutional rights.³⁰⁹ These methods include improved signature matching and notification practices, as well as pioneering methods that have yet to be developed.

The implications of allowing this practice to go unchecked are significant, both constitutionally and existentially.³¹⁰ Such a blatant due process violation is unsustainable under US precedents and under the broader value of democratic representation that the US system of government embodies. The public's faith in that system is fundamental to the maintenance of American democracy.³¹¹ Without legitimacy, the right to vote means nothing.

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308. See *supra* Section III.A.

309. See *supra* Section III.A.

310. See *supra* Section II.A.

311. Atkeson & Saunders, *supra* note 16, at 659.

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