

HOW UNFOUNDED FEAR DISENFRANCHISES VOTERS WITH DISABILITIES

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Despite a patchwork of federal laws intended to ensure equal access to the franchise for all Americans, millions of Americans with disabilities continue to face myriad obstacles to exercising their right to vote. While much has rightly been written about the impact of restrictive voting measures on racial minorities and socioeconomically disadvantaged voters, the suppressive effect of voting restrictions on voters with disabilities is often overlooked. There is a persistent gap in voter participation between those with and without disabilities in the United States that has not been remedied by the Americans with Disabilities Act or other federal protections for voters with disabilities.

This Article is the first to frame the failure to ensure equal access to the ballot box for Americans with disabilities as a manifestation of the fear of the disability con: the suspicion that some people fake disabilities to take advantage of special rights and benefits. It argues that the success of the expanded voting measures adopted during the 2020 election shows that the choice between election accessibility and security is a false one. Although barriers to voting for Americans with disabilities are nothing new, states' diverging responses to the aftermath of the 2020 election and unsubstantiated claims of voter fraud shine a light on the inadequacy of current federal protections to safeguard the right to vote of Americans with disabilities. After analyzing recent court decisions, this Article calls on federal and state legislators to embrace a policy of accessibility instead of one based on unfounded fear.

INTRODUCTION

Accompanied by one of her caregivers and relieved to have found an available handicap parking space, Laura Halvorson ventured into the Igo Library in San Antonio, Texas, to cast her ballot in the 2022 midterm election.¹ Ms. Halvorson has muscular dystrophy and,

1 Neelam Bohra, *New Voting Laws Add Difficulties for People with Disabilities*, N.Y. TIMES (Nov. 8, 2022), <https://www.nytimes.com/2022/11/08/us/voters-disabled-midterm-elections.html>.

apart from medical appointments, had not been in a public place in years due to her heightened vulnerability to COVID-19.² Though she had voted by mail in the past, Ms. Halvorson was alarmed by reports that more stringent ballot verification procedures—purportedly intended to prevent voter fraud—led election officials to reject more than 18,000 ballots from Texas’s two most populous counties in the March 2022 primaries.³ Unable to write on her own, Ms. Halvorson feared that her ballot might also be thrown out and felt strongly that the 2022 midterms were “too important to wait to find out if [her] vote counted.”⁴ Though she knew that voting in person might seriously jeopardize her health and that she was likely to encounter significant barriers because of her disability, Ms. Halvorson concluded that it was the only way she could be certain her vote counted.⁵ Ms. Halvorson conducted a week’s worth of research and discovered that newly adopted voting machines allowed voters with disabilities in Texas to connect a remote control to make their selections.⁶ When Ms. Halvorson called her county clerk to verify that her local polling place would have these machines, she received no response.⁷

Luckily, Ms. Halvorson found that the new machines were available and braved a tightly packed line with many unmasked people to retrieve the needed remote control.⁸ She found that the remote was initially unresponsive once she reached the voting machine, and efforts to obtain help from poll workers were unavailing because they did not seem to know how the remote worked.⁹ She was eventually able to get the remote to respond, but the screen was difficult for her to read and the enlarged text appeared to cut off candidates’ party affiliations.¹⁰ While voting seemed to be fast and easy for others, with “at least two dozen people enter[ing] and exit[ing] the voting area within minutes,” it took Ms. Halvorson around thirty minutes to cast her ballot.¹¹ Despite the obstacles she faced and the grave health risk it was for her to vote in person, Ms. Halvorson recounted that she “felt fortunate that her experience was not worse” but also observed that voting “should be smooth for literally everybody.”¹²

Ms. Halvorson’s story is not unique but rather sadly illustrative of a broader trend for 38.3 million eligible voters with disabilities in the United States who make up nearly

2 *Id.*

3 *Id.*; see also Nick Corasaniti, *Mail Ballot Rejections Surge in Texas, With Signs of a Race Gap*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/politics/texas-primary-ballot-rejections.html>.

4 Bohra, *supra* note 1.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

one-sixth of the electorate.¹³ Voting has always been more difficult for people with disabilities, and a disability voting gap has persisted as a result.¹⁴ Even so, more-accessible-voting measures during the 2020 presidential election offered a glimmer of hope for the disability community. Spurred by the extraordinary circumstances and health and safety risks caused by the coronavirus pandemic, voters in the 2020 presidential election made “record use of nontraditional voting methods” to achieve a record turnout with 154.6 million total recorded voters.¹⁵ The disability community also saw a record turnout, with 17.7 million Americans with disabilities voting in the 2020 election and the disability voting gap narrowing from 6.3% in the 2016 presidential election to 5.7%.¹⁶ Not only did the “2020 presidential election feature record turnout,”¹⁷ it was also “the most secure in American history.”¹⁸ While some states have made more-accessible-voting measures permanent, others have opted to make voting more difficult. Emboldened by former President Donald Trump’s false claims that the 2020 election was stolen,¹⁹ many states have enacted new, restrictive voter laws, ostensibly to combat voter fraud. Voting rights advocates contend that these measures are in reality a form of voter suppression that have an outsize impact on marginalized communities, especially racial minorities.²⁰ They also have a disproportionate impact on Americans with disabilities, though that is likely not their intent. These fear-based limitations on voting consequently threaten to thwart much of the progress that was made in expanding the franchise of voting to more members of the disability community during the 2020 election.

This Article proceeds in four parts to show how the fear of voter fraud endangers the voting rights of people with disabilities in the United States. Part I introduces the disability

13 LISA SCHUR & DOUG KRUSE, PROJECTING THE NUMBER OF ELIGIBLE VOTERS WITH DISABILITIES IN THE NOVEMBER 2020 ELECTIONS 1 (Sept. 24, 2020), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Disability_electorate_projections_2020.pdf.

14 See Lisa Schur et al., *Disability, Voter Turnout, and Polling Place Accessibility*, 98 SOC. SCI. Q. 1374, 1377 (2017).

15 Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Presidential Election Voting Report (Feb. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/2020-presidential-election-voting-report.html>.

16 LISA SCHUR & DOUGLAS KRUSE, FACT SHEET: DISABILITY AND VOTER TURNOUT IN THE 2020 ELECTIONS 1 (July 2021), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/FactSheet_Disability_Voter_Turnout_2020.pdf.

17 Press Release, U.S. Census Bureau, *supra* note 15.

18 Press Release, Cybersecurity & Infrastructure Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

19 See generally JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION (July 2022), <https://drive.google.com/file/d/1aQorZ61AYFqZU-EDQBBzjqfvAoC5nKcB/view> (refuting claims that the results of the 2020 election were illegitimate).

20 See, e.g., BRENNAN CTR. FOR JUST, THE IMPACT OF VOTER SUPPRESSION ON COMMUNITIES OF COLOR (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

community and the barriers to the ballot box that voters with disabilities frequently face. Part II provides an overview of the federal laws put in place to safeguard the voting rights of Americans with disabilities. Part III discusses some contemporary voter restrictions implemented to combat voter fraud and recent court cases to analyze how successfully current protections preserve the voting rights of Americans with disabilities. Part IV concludes by calling for a broad policy of accessibility and examining potential solutions for increasing access to the ballot box for Americans with disabilities.

I. VOTERS WITH DISABILITIES AND THEIR BARRIERS TO THE BALLOT BOX

According to the Centers for Disease Control and Prevention, approximately twenty-six percent of American adults (around 61 million Americans) have some form of disability.²¹ Voters with disabilities constitute almost one-sixth of the electorate, totaling around 38.3 million eligible voters.²² Despite the prevalence of disability, the challenges and experiences of people with disabilities are not well understood by many Americans. This is, at least in part, because disability and its impacts are complex and multifaceted. This part provides a brief overview of the disability community and the obstacles Americans with disabilities encounter as they seek to exercise their right to vote.

Disability takes many forms, including mobility impairments, blindness and visual impairments, cognitive impairments, and deafness or being hard of hearing.²³ In addition, disability is intersectional, reaching widely across racial, socioeconomic, and political lines and other sources of identity.²⁴ Disabilities of different forms and severities experienced by different people can lead to vast differences in the effects of disability, including in the context of voting. For example, one survey found that 22.1% of voters with visual impairments and 5.1% of those with a hearing impairment experienced some difficulty voting by mail in the 2020 election, while 2.1% of those without a disability did.²⁵

Notwithstanding the diversity of the disability community and the needs of its members, they share many common interests and impediments. Some common barriers to voting for people with disabilities are a lack of access to transportation, polling place

21 *Disability Impacts All of Us Infographic*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2022), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

22 SCHUR & KRUSE, *supra* note 13, at 1.

23 *Disability Impacts All of Us Infographic*, *supra* note 21.

24 Jill Feder, *What Is Intersectionality?*, ACCESSIBILITY.COM (Sept. 24, 2021), <https://www.accessibility.com/blog/disability-language-intersectionality>.

25 LISA SCHUR & DOUGLAS KRUSE, *DISABILITY AND VOTING ACCESSIBILITY IN THE 2020 ELECTIONS: FINAL REPORT ON SURVEY RESULTS SUBMITTED TO THE ELECTION ASSISTANCE COMMISSION* 7 fig.3 (2021), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Disability_and_voting_accessibility_2020_election_Final_Report_survey_results.pdf.

inaccessibility, inaccessible ballots and voting machines, untrained poll workers, and long lines.²⁶ Obstacles to voting accessibility can also compound on each other, making barriers that might otherwise appear inconsequential insurmountable. Given the size and diversity of the disability community, the obstacles to the ballot box faced by voters with disabilities vary widely. While someone with a mobility impairment may be kept from the ballot box by physical barriers, such as a lack of ramps, someone with a visual impairment may be unable to see and mark a physical ballot without assistance or the aid of an accessible voting machine. Because the barriers to voting faced by Americans with disabilities are not uniform, neither are the solutions. For instance, voting by mail may dramatically improve voting access for many with mobility impairments, but someone with a visual impairment may be able to cast a private and independent ballot only by using an accessible voting machine in person.²⁷

The 2020 election showed that it is possible for states to broaden voting access and remove many barriers for voters with disabilities through policies such as expanded voting by mail and increased early voting windows without sacrificing election integrity. While some states are accordingly making voting easier, others are restricting voting access out of a fear of voter fraud. Proponents of stricter voting measures discount their impact on voters with disabilities and insist that, as one Texas legislator put it, accessible voting measures must be limited to prevent others from “using those opportunities to cheat.”²⁸

At its core, this is a manifestation of what Professor Doron Dorfman has termed the fear of the disability con: “the cultural anxiety that individuals fake disabilities to take advantage of rights, accommodations, or benefits.”²⁹ The fear of the disability con makes it more difficult for people with disabilities to exercise their rights because they may have to overcome suspicion that they are faking their disability to receive special “disability perks.”³⁰ Suspicion of people with disabilities also allows policy makers to justify restricting more accessible forms of voting by stoking fears that these nontraditional voting

26 See Lisa Schur et al., *Accessible Democracy: Reducing Voting Obstacles for People with Disabilities*, 14 ELECTION L.J. 60, 63–64 (2015).

27 See *id.* at 64.

28 Bohra, *supra* note 1.

29 Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1053 (2019) [hereinafter *Fear of the Disability Con*]. Professor Dorfman has meticulously shown how the fear of the disability con applies in a wide variety of contexts, such as disabled parking, policies regarding lines, the use of service animals, accommodations for learning disabilities, and public health policies during the coronavirus pandemic. See *id.*; Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 561 (2020); Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1366–67 (2021); Doron Dorfman, *Pandemic “Disability Cons,”* 49 J.L. MED. & ETHICS 401, 402 (2021). This Article applies the framework of the fear of the disability con to the realm of voting rights.

30 See *Fear of the Disability Con*, *supra* note 29, at 1054.

methods are prone to abuse and likely to be exploited to commit voter fraud. This fear “demonstrates the limited success of the American disability rights movement and US legislation in changing perceptions around disability” despite antidiscrimination protections for people with disabilities.³¹

In contrast to other antidiscrimination laws, which solely provide “negative rights” by prohibiting certain behavior, laws protecting people with disabilities from discrimination imbue “positive rights that compel[] . . . state and private actors to provide certain means for disabled people to enjoy their other rights.”³² Because a failure to provide these positive rights to people with disabilities is itself discrimination, government and private actors must do more than refrain from taking affirmative steps to discriminate against people with disabilities.³³ This positive-rights scheme recognizes that without affirmative steps, people with disabilities are inherently disadvantaged by living in a society that was not built with them in mind. Though the full scope of their rights is not always clear, including in the context of voting, people with disabilities have the affirmative right to accessible voting systems and polling places, assistance in voting, and private and independent ballots.

II. CURRENT VOTING RIGHTS PROTECTIONS FOR AMERICANS WITH DISABILITIES

Although the Supreme Court has declared “[o]ther rights . . . illusory if the right to vote is undermined,”³⁴ the right to vote is too often out of reach for many members of the disability community. Without an express constitutional right to vote and with voting procedures largely in the hands of the states, the voting rights of Americans with disabilities are vaguely protected by a patchwork of federal laws. This part will overview each of the primary provisions protecting the voting rights of Americans with disabilities: the Voting Rights Act of 1965 (VRA), section 504 of the Rehabilitation Act of 1973 (Rehab Act), the Americans with Disabilities Act (ADA), the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA), the National Voter Registration Act of 1993 (NVRA), and the Help America Vote Act of 2002 (HAVA). As will be shown, though these statutes do something to “help ensure fairness in the voting process for people with disabilities,”³⁵ they leave intact many barriers to voting for people with disabilities.

31 *Id.*

32 *Id.* at 1057–58.

33 *See, e.g.*, 42 U.S.C. § 12112(a), (b)(5)(a) (requiring employers to provide reasonable accommodations for otherwise qualified employees and job candidates with disabilities).

34 *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

35 *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP’T OF JUST. (Oct. 14, 2014), https://archive.ada.gov/ada_voting/ada_voting_ta.htm.

A. Voting Rights Act of 1965

In addition to protecting racial and language minorities from voting discrimination, the landmark VRA allows people with disabilities to receive assistance in casting a ballot. Specifically, the VRA states: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”³⁶ Though the right to receive assistance is critical, Professor Rabia Belt has observed that “[t]he VRA is notable for what it does not include,” as it fails to specifically list any disability other than blindness, does not define “disability,” guarantees no other right for voters with disabilities apart from assistance, and does not expound on what assistance eligible voters are entitled to receive.³⁷

Recent Supreme Court rulings have raised alarm among voting rights activists that courts have “dismantled and gutted crucial parts of the VRA.”³⁸ In *Shelby County, Alabama v. Holder*,³⁹ the Court declared section 4(b) of the VRA unconstitutional on the basis that the “country has changed” since 1965 and required Congress to create a new formula to “ensure that the legislation it passes to [curb racial discrimination in voting] speaks to current conditions.”⁴⁰ This ruling liberated covered states from the Department of Justice’s preclearance oversight, enabling these states to change voting laws without federal intervention. More recently, in *Brnovich v. Democratic National Committee*,⁴¹ the Court erected a new set of “guideposts” in its “totality of circumstances” analysis under section 2 of the VRA.⁴² The Court’s novel and narrow interpretation of section 2 led it to find that a pair of restrictive Arizona voting policies were not racially discriminatory.⁴³ The first was a regulation mandating that all ballots cast outside the precinct where a voter is registered be entirely discarded, and the second was a criminal statute forbidding anyone except a family member or caregiver from returning an early ballot on behalf of someone else.⁴⁴ Voting rights advocates warn that this decision “rewrote the law that applies to Section 2 lawsuits” and that it will now “be even more difficult for voting rights advocates to challenge discriminatory voting laws.”⁴⁵ The overall weakening of the VRA is likely to negatively impact

36 52 U.S.C. § 10508.

37 Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1499 (2016).

38 Sophia Lin Lakin, *Fifty-Seven Years After Its Enactment, the Voting Rights Act Is in Peril*, AM. C.L. UNION (Aug. 5, 2022), <https://www.aclu.org/news/voting-rights/fifty-seven-years-after-its-enactment-the-voting-rights-act-is-in-peril>.

39 *Shelby Cnty., Alabama v. Holder*, 570 U.S. 529 (2013).

40 *Id.* at 557.

41 *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

42 *Id.* at 2336–40.

43 *Id.*

44 *Id.*

45 *Brnovich v. Democratic National Committee*, BRENNAN CTR. FOR JUST. (July 1, 2021), <https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee>.

access to the ballot box by voters with disabilities, as states now enjoy largely unbridled discretion in implementing new voting restrictions.

B. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act

Although they are “broad antidiscrimination statutes that do not specifically address voting,” the Rehab Act and ADA help to provide Americans with disabilities access to the ballot box.⁴⁶ The Rehab Act, the “most robust legal defense for the rights of people with disabilities” before the passage of the ADA,⁴⁷ requires that “[n]o otherwise qualified individual with a disability . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” on the basis of disability.⁴⁸ Under title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁴⁹ The Rehab Act incorporates the ADA’s expansive definition of “disability”: “a physical or mental impairment that substantially limits one or more major life activities; . . . a record of such an impairment; or . . . being regarded as having such an impairment.”⁵⁰ Title III of the ADA protects individuals with disabilities from discrimination in places of public accommodation, prohibiting discrimination on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”⁵¹ Although the Rehab Act and ADA both contain sweeping accessibility mandates that could be read to require states to ensure that every polling place is accessible and to guarantee all voters with disabilities a secret and independent ballot, courts and administrative agencies have found these rights not to be absolute.⁵²

46 Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 358 (2003).

47 Belt, *supra* note 37, at 1500.

48 29 U.S.C. § 794.

49 42 U.S.C. § 12132.

50 42 U.S.C. § 12102(1); 29 U.S.C. § 705(9)(B); *see also* 42 U.S.C. § 12102(4)(A) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).

51 42 U.S.C. § 12182(a).

52 Waterstone, *supra* note 46, at 360–61; *see also* Am. Ass’n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004) (“[C]asting a vote independently and secretly would be preferred over casting a vote with the assistance of a family member or other aide,” but voting accommodations need not be “comparable in every way with the voting rights enjoyed by persons without disabilities.”); Nelson v. Miller, 170 F.3d 641, 649–53 (6th Cir. 1999) (finding that the Michigan Secretary of State could deny blind voters voting assistance beyond what was required by statute without committing discrimination under the ADA); Lightbourn v. Cnty. of El Paso, 118 F.3d 421, 426–31 (5th Cir. 1997) (holding that the ADA was not an “election law” and therefore did not create a duty for the Texas Secretary of State to ensure that local election officials complied with the ADA).

The Rehab Act applies only to programs or activities that receive federal assistance. It is not sufficient for a litigant to merely assert that a state receives federal funds; rather, “[a] plaintiff must allege that the specific program or activity with which he or she was involved receives or directly benefits from federal financial assistance.”⁵³ Because states historically received little federal funding to administer elections, it was difficult for litigants to enforce their voting rights under the Rehab Act before the passage of HAVA.⁵⁴

Numerous exceptions similarly limit the reach of the ADA. Title III does not apply to private spaces, which are often used as polling places, and various other exceptions, such as undue hardship, may limit the extent to which places of public accommodation must comply with the ADA’s accessibility requirements.⁵⁵ Notwithstanding the ADA’s accessibility requirements, a survey of 178 polling places during the 2016 election conducted by the Government Accountability Office found that sixty percent of the examined polling places had at least one impediment to voters with disabilities outside the voting area, most commonly “steep ramps located outside buildings, [a] lack of signs indicating accessible paths, and poor parking or path surfaces.”⁵⁶

A disturbing trend has also emerged of states beginning to close polling places under the guise that they do not comply with the ADA and compliance is financially infeasible.⁵⁷ This is unnecessary and only promotes inaccessibility. The Department of Justice cautions states against closing polling places, and most jurisdictions are able to come into compliance in “cost-effective ways, while preventing unnecessary poll closures.”⁵⁸ “Reducing access to the polls” through closures “effectively reduces access to democracy for some of the most marginalized groups in the United States,” including people with disabilities.⁵⁹ This “diabolical move” of weaponizing the ADA to close polling places was enabled by the Supreme Court’s *Shelby County* decision and only makes it harder for people with disabilities to vote while also disproportionately affecting racial minorities and low-income voters.⁶⁰

53 *Lightbourn*, 118 F.3d at 427.

54 See Michael Ellement, *Enfranchising Persons with Disabilities: Continuing Problems, an Old Statute, and a New Litigation Strategy*, 39 T. MARSHALL L. REV. 29, 30–31 (2013).

55 See 42 U.S.C. § 12182(b)(2)(A)(i)–(v).

56 U.S. GOV’T ACCOUNTABILITY OFF., VOTERS WITH DISABILITIES: OBSERVATIONS ON POLLING PLACE ACCESSIBILITY AND RELATED FEDERAL GUIDANCE (Dec. 4, 2017), <https://www.gao.gov/products/gao-18-4>.

57 See NAT’L DISABILITY RTS. NETWORK, BLOCKING THE BALLOT BOX: ENDING MISUSE OF THE ADA TO CLOSE POLLING PLACES 36–44 (2020), https://www.ndrn.org/wp-content/uploads/2020/01/NDRN_Blocking_the_Ballot_Box_2020.pdf.

58 *Id.* at 10.

59 Chelsea N. Jones, *States Are Closing Polling Places. That Hurts Democracy*, WASH. POST (June 17, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/06/17/vra-black-voting-rights-georgia-texas-suppression/>.

60 Kira Lerner, *The ADA Is Being Used to Disenfranchise Minority Voters*, THINKPROGRESS (Aug. 24, 2018, 1:46 PM), <https://archive.thinkprogress.org/ada-voter-suppression-cd7031080bfd/>.

C. *Voting Accessibility for the Elderly and Handicapped Act of 1984*

In enacting the VAEHA, Congress sought “to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.”⁶¹ But the VAEHA’s own terms constrain its ability to achieve its aims. The VAEHA applies only to federal elections, provides only for declaratory injunctive relief,⁶² empowers states to define accessibility standards themselves,⁶³ and allows states to “bypass access issues” by providing voters with an alternative voting option if the chief election officer determines that no polling places are accessible.⁶⁴

D. *National Voter Registration Act of 1993*

The NVRA requires that “State-funded programs primarily engaged with providing services to persons with disabilities” also proffer people with disabilities voting registration materials and assistance in completing voter application forms.⁶⁵ The NVRA is commonly called the “Motor-Voter” Act because it requires state departments of motor vehicles to give citizens the opportunity to register to vote.⁶⁶ Because many people with disabilities do not have driver’s licenses, the NVRA’s requirement that state offices providing services to people with disabilities offer voter registration materials and assistance plays an important role in promoting the accessibility of voter registration.⁶⁷ Although voter registration has increased since the passage of the NVRA, its overall success “is a matter of some debate,” as voter turnout has not increased correspondingly.⁶⁸

E. *Help America Vote Act of 2002*

Passed after the 2000 presidential election laid bare the “shortcomings of the American electoral system,”⁶⁹ HAVA poured \$3.86 billion into states to modernize voting systems, with a particular focus on voting machines.⁷⁰ HAVA requires that voting systems “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity

61 52 U.S.C. § 20101.

62 52 U.S.C. § 20105(a), (c).

63 See 52 U.S.C. § 20107(1) (“[A]ccessible’ means accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved.”).

64 Belt, *supra* note 37, at 1501; see also 52 U.S.C. § 20102(b)(2)(B)(ii).

65 52 U.S.C. § 20506(a)(2)(B), (a)(4)(A)(ii).

66 *Automatic Voter Registration*, NAT’L CONF. OF STATE LEGISLATORS (Feb. 7, 2023), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>; see also 52 U.S.C. § 20506(a)(2)(A).

67 Belt, *supra* note 37, at 1503.

68 Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 469–70 (2008).

69 Christina J. Weis, *Why the Help America Vote Act Fails to Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 421, 421 (2005).

70 Belt, *supra* note 37, at 1503.

for access and participation (including privacy and independence) as for other voters.”⁷¹ To that end, HAVA mandates that every polling place have at least one voting machine “equipped for individuals with disabilities.”⁷² HAVA also established the Election Assistance Commission (EAC), “an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.”⁷³

While HAVA may appear to usher in meaningful progress for voters with disabilities, the act remains “rife with problems.”⁷⁴ HAVA predicated states’ receipt of federal funds⁷⁵ on a set of indeterminate standards of providing accessible voting systems and the right to a private and independent ballot but failed to establish “specific, stringent accessibility standards” on the federal level.⁷⁶ As with the VAEHA, failure to articulate federal accessibility standards again rests broad discretion in local and state election officials and leads to vastly different accessibility standards across the country.⁷⁷ According to a survey of polling places during the 2016 election, sixty-five percent of participating polling places had a purportedly accessible voting station that could actually impede the ability of a voter with a disability to cast a private and independent vote.⁷⁸ HAVA also declined to define “disability” and specifically mentions only blind and visually impaired voters.⁷⁹ Finally, HAVA provides no private right of action, limiting private parties to filing an administrative complaint or hoping that the Department of Justice will intervene.⁸⁰ This renders HAVA’s accessibility requirements functionally toothless, as the Department of Justice has not exercised its authority to enforce HAVA on behalf of voters with disabilities.⁸¹

71 52 U.S.C. § 21081(a)(3)(A); *see also* 52 U.S.C. §§ 21081(a)(1)(A)(i)–(ii) (requiring voting systems to allow voters to verify the votes selected on the ballot and change or correct choices made on the ballot “in a private and independent manner” before the vote is cast).

72 52 U.S.C. § 21081(a)(3)(B).

73 *About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-the-useac> (last visited Nov. 16, 2022).

74 Belt, *supra* note 37, at 1504.

75 52 U.S.C. § 21003.

76 Weis, *supra* note 69, at 423.

77 Belt, *supra* note 37, at 1504.

78 U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 56.

79 Belt, *supra* note 37, at 1504.

80 *See id.* at 1504–05; Weis, *supra* note 69, at 454–55; 52 U.S.C. §§ 21111–21112.

81 *See* Belt, *supra* note 37, at 1505 (“The DOJ has given administrative guidance to localities but to date has only brought twelve cases total under the statute, none of which concern disability.). Though the lack of any HAVA cases concerning disability is jarring, HAVA has not been heavily enforced in any context. *See* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 *ELECTION L.J.* 203, 204 (2013) (“[T]he volume of litigation under this statute has not been overwhelming. Searching Westlaw’s database of cases, my research assistant and I found a total of 71 cases.”). And even if the Department of Justice did bring a HAVA cause of action on behalf of voters with disabilities, HAVA’s remedies are limited to declaratory or injunctive relief. 52 U.S.C. § 21111.

Although these statutes have played an important role in expanding access to the polls for voters with disabilities, the voting gap between voters with and without disabilities persists. The rights of voters with disabilities remain uncertain in many instances. Apart from the ADA and the Rehab Act, the statutes do not define “disability,” leaving their scope unclear. The VRA does not detail what type of assistance voters with disabilities are entitled to receive in voting. The VAEHA and HAVA set forth no comprehensive federal accessibility standard for voting systems and procedures, placing these critical determinations in the hands of state and local election officials. The Department of Justice and EAC have sought to clarify the substance of federal voting accessibility requirements by disseminating direction and educational materials to state and local officials.⁸² Much like the statutes this guidance seeks to implement, however, its scope is not always clear,⁸³ and the helpfulness of educational resources has received “mixed feedback” from state and local officials.⁸⁴ Even when their vaguely articulated rights are clearly violated, the remedies of voters with disabilities are often limited and spread across multiple statutes. Without clearer and more robust protections from Congress, voters with disabilities are largely at the mercy of local and state election officials and state legislatures to vindicate their voting rights.

III. THE FEAR OF VOTER FRAUD AND THE DISENFRANCHISEMENT OF VOTERS WITH DISABILITIES

In the aftermath of the 2020 election, the growing but unsubstantiated fear of voter fraud has led many states to adopt more restrictive voting policies. But the fear of voter fraud is not the whole story. Some states have expanded access to voting since the 2020 election, making permanent the more-accessible procedures used during the 2020 election.⁸⁵ This underscores that accessibility to the ballot box is a choice. The 2020 election marked significant gains for voters with disabilities—aided in large part by increased access to alternative voting methods such as absentee and early voting—but these new levels of accessibility are imperiled by recent efforts to restrict voting access. The choices states make about voting will prove especially consequential for people with disabilities. As history shows, many voters with disabilities are likely to be shut out of the voting process

82 See U.S. GOV'T ACCOUNTABILITY OFF., *VOTERS WITH DISABILITIES: STATE AND LOCAL ACTIONS AND FEDERAL RESOURCES TO ADDRESS ACCESSIBILITY OF EARLY VOTING* 39–50 (June 2021), <https://www.gao.gov/assets/gao-21-352.pdf>.

83 See *e.g.*, *id.* at 39–40 (“While DOJ officials told us the ADA requirements apply to early in-person polling places as well as polling places used for voting on Election Day, the guidance documents do not clearly specify that they also apply to early voting, as we have reported previously.”).

84 *Id.* at 46–47.

85 Scot Schraufnagel et al., *Cost of Voting in the American States: 2022**, 21 *ELECTION L.J.: RULES, POLS., & POL'Y* 220, 221 (2022), <https://www.liebertpub.com/doi/10.1089/elj.2022.0041>.

unless their rights and needs are adequately and actively defended. This part describes the dangerous path on which some states have embarked to limit voting access and reviews recent cases to explain how current federal protections for voters with disabilities are not strong enough to withstand the ongoing assault on voting rights.

A. *The Rekindled Fear of Voter Fraud and Its Disparate Impacts*

According to one estimate, twenty-four states have passed fifty-six new laws restricting voting rights since the 2020 election.⁸⁶ As a solution in search of a problem, these new laws “are unnecessary, lack substance, and create confusion” while not making elections more secure.⁸⁷ Proponents of these measures maintain they are “necessary to shore up public confidence in the integrity of elections” and are justified regardless of whether the policies in fact improve election integrity.⁸⁸ Even if these policies boost confidence for some, other voters are likely to “imagine rigged elections via voter suppression” and lose trust in the electoral process as a result of more restrictive voting measures.⁸⁹

The Elections Clause of the Constitution vests expansive power in state legislatures to prescribe “[t]he Times, Places and Manner of holding” federal elections, though it also empowers Congress to “at any time by Law make or alter such Regulations.”⁹⁰ The Supreme Court has broadly construed states’ power over elections to encompass “authority to provide a complete code for congressional elections,” including “in relation to notices, registration, [and] . . . prevention of fraud and corrupt practices.”⁹¹ Since the 2020 election, “we have seen a divide develop and deepen across the country” over how states ought to exercise their authority over elections—whether to contract or expand voting rights.⁹²

86 Elena Mejia & Alex Samuels, *Has Your State Made It Harder to Vote?*, FIVETHIRTYEIGHT (June 16, 2022, 6:00 AM), <https://projects.fivethirtyeight.com/voting-restrictions-by-state/>.

87 Schraufnagel et al. *supra* note 85, at 226.

88 Amy Gardner et al., *How GOP-backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/>.

89 Schraufnagel et al., *supra* note 85.

90 U.S. CONST. art. I, § 4, cl. 1. Though the Elections Clause is not the basis for most federal voting rights legislation, Professor Samuel Issacharoff has argued that “federal power under the Elections Clause is sufficiently broad to sweep . . . under the ambit of federal regulation” the majority of “major voting concerns of recent years.” Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 112–13 (2013).

91 *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

92 Jake Horton, *US Midterms: How Will New Voting Laws Affect the Election?*, BBC NEWS (Nov. 3, 2022), <https://www.bbc.com/news/60309566>.

These new restrictions to voting access take various forms, affecting everything from voter registration to how votes are verified and counted.⁹³ Though this trend of limiting access to the ballot is disturbing, it is nothing new. Disparities in voting access long pre-date the false assertions of fraud in the 2020 election, but many voters seem to underestimate the impact even “seemingly small and surmountable barriers” have on voter turnout.⁹⁴ In addition to having a documented disparate impact on racial minorities,⁹⁵ voter restrictions disproportionately disenfranchise voters with disabilities.⁹⁶ According to one study, “having a disability decreases turnout by anywhere from 6.4% to 8.9%, even controlling for variables such as education, family income, and other well-known predictors of turnout.”⁹⁷ The same study found that voters with disabilities in more restrictive states were less likely to vote.⁹⁸ Although even seemingly minor impediments to voting can compound to keep all voters from participating in elections, voters with disabilities are especially affected by a multitude of barriers that can combine to make voting untenable. For example, a voter with a disability who is unable to drive may be forced to choose between voting and returning home due to a disruption in public transportation. Or, because “disability is a fluid state and not a dichotomous one,”⁹⁹ the ability of a voter with a

93 Twenty-nine laws target voter registration through policies such as “purging” voter rolls and ending same-day voter registration; fourteen laws make applying for a mail-in ballot more difficult through policies like limiting who is eligible to vote by mail and prohibiting election officials from mailing ballots to voters who have not requested them; fourteen laws make it harder to return absentee ballots by shortening the time voters have to return absentee ballots and forbidding the practice of returning a ballot on behalf of someone else; fourteen laws make it more difficult to vote early by decreasing the time voters have to vote early and enacting stricter voter identification requirements for early voting; fourteen laws make election-day voting more challenging by practices like imposing stricter voter identification requirements, discontinuing curbside voting for those without a disability, and requiring anyone assisting another voter to fill out a form disclosing their relationship to that person; and sixteen laws alter the voter verification process through strict signature matching policies and limiting the time voters have to “cure” their ballots in states that allow voters to correct errors with their ballots after they have been cast. Meija & Samuels, *supra* note 86. An increase in polling place closures also threatens to diminish voter turnout. Jones, *supra* note 59.

94 Asaf Mazar et al., *Why Americans Don't Fight Back When States Make It Harder to Vote*, WASH. POST (Nov. 7, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/11/07/voter-suppression-voting-laws-public-opinion/>.

95 Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, HUM. RTS. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/.

96 Sam Levine, *US Voters with Disabilities Face Maze of New Restrictions*, GUARDIAN (Oct. 28, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/oct/28/a-chilling-effect-disabled-voters-new-voting-restriction-rules>; see also Matt Vasilogambros, *How Voters with Disabilities Are Blocked from the Ballot Box*, STATELINE (Feb. 1, 2018), <https://pew.org/2E6e72K>.

97 Blaine Stum, *Disabled Elections and Research: Disability Status and Voter Turnout in America* (May 10, 2021) (manuscript at 2), <https://ssrn.com/abstract=3844062>.

98 *Id.*

99 Sharon N. Barnartt, *Disability as a Fluid State: Introduction*, in *DISABILITY AS A FLUID STATE 2* (Sharon N. Barnartt ed., 2010).

disability to make it to the polls or a drop box may be uncertain if the voter's condition fluctuates unpredictably.

B. *The Limited and Uncertain Relief Available to Voters with Disabilities*

In many ways, the recent steps states have taken to diminish voting access simply shine a light on an old problem. State laws and state constitutions—without robust federal laws to preempt them—can impose suppressive limitations on voting access. Two recent sets of cases, one in Wisconsin and the other in Delaware, underscore how states, perhaps unwittingly, disenfranchise voters with disabilities.

1. ***Wisconsin Absentee Ballot Litigation***—Wisconsin's law setting forth the process for returning an absentee ballot instructs that the “envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.”¹⁰⁰ In 2020, the Wisconsin Election Commission (WEC) issued a memo interpreting the provision to mean that a “family member or another person may . . . return the [absentee] ballot on behalf of a voter.”¹⁰¹ Two Wisconsin voters filed a lawsuit challenging the WEC's interpretation of the statute and asking for the memo to be invalidated.¹⁰² Not taking into account the impact on voters with disabilities, a Wisconsin trial court found that Wisconsin law required voters to mail or return absentee ballots themselves—without assistance from a third party.¹⁰³

The WEC rescinded its memo, and the trial court ruling took effect in time for Wisconsin's April 2022 election.¹⁰⁴ Municipal clerks in different counties subsequently issued contradictory guidance about whether the law permitted voters to receive assistance in mailing or delivering absentee ballots. In one county, absentee ballots were delivered with a sticker warning voters that absentee ballots could “ONLY be mailed or returned by the voter, NO ONE else may return your ballot.”¹⁰⁵ Another county gave similar direction on its website, stating that “no one but the absentee voter is able to return their completed ballot.”¹⁰⁶ Meanwhile, a third county instructed voters that absentee ballots “*can* be returned by someone who is not the voter.”¹⁰⁷

100 Wis. STAT. § 6.87(4)(b)1 (2023).

101 *Carey v. Wis. Elections Comm'n*, 22-cv-402-jdp, 2022 WL 3910457, at *2 (W.D. Wis. Aug. 31, 2022).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at *3.

106 *Id.*

107 *Id.*

The Wisconsin Supreme Court ultimately affirmed the trial court’s ruling.¹⁰⁸ Although the majority claimed it declined to “decide at this time whether the law permits a voter’s agent to place an absentee ballot in the mail on the voter’s behalf” because the WEC’s memo did “not address whether voters who mail an absentee ballot must personally place the ballot into a mailbox or if a voter’s agent may do so,” the majority left undisturbed the portion of the trial court’s order prohibiting voters from receiving assistance in mailing an absentee ballot.¹⁰⁹ The majority also determined that the statute in question mandated that “voter[s] must personally deliver” their own absentee ballots to the county clerk if they opt to directly return the ballot instead of mailing it.¹¹⁰ The majority treated dismissively arguments that Wisconsin law was preempted by federal laws protecting the rights of voters with disabilities, describing the arguments as underdeveloped and concluding without explanation that “[w]hatever accommodations federal law requires” were permitted by another provision of the statute allowing voters to receive help marking their ballots.¹¹¹

Following the Wisconsin Supreme Court’s ruling, the WEC still could not come to a consensus about what assistance voters with disabilities were legally allowed to receive.¹¹² Confusion continued to grow as the WEC ultimately appeared to punt the question to local clerks by issuing a new memo explicitly declining to state a view on what help voters with disabilities could receive in mailing or delivering absentee ballots and pointing local clerks to “a noncomprehensive list of legal considerations that clerks may wish to discuss with counsel.”¹¹³

With the status of their right to vote imperiled and unclear, four Wisconsin voters with disabilities, who were physically incapable of mailing their ballots or delivering their ballots to the county clerk without assistance, sued in federal court seeking to enjoin enforcement of Wisconsin’s absentee ballot law against them.¹¹⁴ The suit asserted that the Wisconsin absentee voting law violated the VRA, ADA, Rehab Act, First Amendment, and Fourteenth Amendment.¹¹⁵ The district court, finding that under the VRA, “disabled voters who need assistance in returning an absentee ballot are entitled to ask a person of their choosing for . . . assistance,” issued a declaration of the plaintiffs’ rights and enjoined enforcement of the Wisconsin absentee voting law against them.¹¹⁶ The district court also

108 *Teigen v. Wis. Elections Comm’n*, 976 N.W.2d 519, 547 (Wis. 2022).

109 *Id.* at 525–26.

110 *Id.* at 525.

111 *Id.* at 547.

112 *Carey*, 2022 WL 3910457, at *3.

113 *Id.* at *4.

114 *Id.* at *1.

115 *Id.*

116 *Id.* at *2.

declared that “[v]oters shouldn’t have to choose between exercising their federal rights and complying with state law. But that is the position that plaintiffs find themselves in, . . . in part because [the WEC] ha[s] refused to provide needed clarification.”¹¹⁷ Because the plaintiffs could receive “complete relief” under the VRA, the district court did not reach the plaintiffs’ other arguments.¹¹⁸ In the end, the WEC approved new guidance that allowed clerks to accept ballots from voters with disabilities mailed or delivered with third-party assistance without requiring clerks to verify the disability status of the voter or the identities of the voter or third party providing assistance.¹¹⁹

Though it is reassuring that the district court ultimately vindicated the rights of the voters with disabilities, their battle for voting rights reveals some critical areas for concern. First, it is possible that, like the Wisconsin Supreme Court, other courts may not read the assistance assured to voters with disabilities as broadly. Although the district court found the VRA is “clear” in entitling voters with disabilities to assistance in mailing or delivering their ballots,¹²⁰ the VRA does not define “disability” or detail the assistance to which voters with disabilities are entitled. In addition, the extent of the “complete relief” the VRA afforded the plaintiffs is murky. The reading of Wisconsin’s absentee ballot law endorsed by the Wisconsin Supreme Court prohibited voters with disabilities from receiving *any* assistance in mailing or delivering their absentee ballots. In response, the district court found that voters with disabilities were entitled to receive assistance.

It remains unclear how the court would have resolved the case if the Wisconsin absentee ballot law had instead allowed voters with disabilities to receive assistance with some limitations. The court’s ruling largely left it up to state and local officials to decide the extent of the assistance voters with disabilities could receive, as evidenced by deliberations among the WEC about whether they should require those aiding voters with disabilities to fill out an attestation form to prove their identities.¹²¹ As a result, state legislatures and election officials might be able to craft policies that do not totally prohibit providing assistance to voters with disabilities but nonetheless impede their access to the ballot. For example, though the challenge brought under the VRA in *Brnovich* concerned a disparate racial impact under section 2, it seems likely that the Arizona criminal statute at issue in that case (forbidding anyone except a family member or caregiver from returning

117 *Id.*

118 *Id.*

119 See Mitchell Schmidt, *Wisconsin Elections Commission Approves Guidance for Disabled Voters Following Court Order*, WIS. ST. J. (Sept. 7, 2022), https://madison.com/news/local/govt-and-politics/wisconsin-elections-commission-approves-guidance-for-disabled-voters-following-court-order/article_90f9576c-bca4-5672-84d8-ebf910e91a35.html.

120 *Carey*, 2022 WL 3910457, at *2.

121 Schmidt, *supra* note 119.

an early ballot on behalf of someone else) does not violate the VRA’s provision allowing Americans with disabilities to receive help voting.¹²² By carving out an exception for caregivers and family members, the law technically permits people with disabilities to receive assistance returning their ballots but may nevertheless make it impossible for those who lack access to help from a caregiver or family member to legally cast a vote. “Voters shouldn’t have to choose between exercising their federal rights and complying with state law,”¹²³ but laws like this Arizona criminal statute could force some voters with disabilities into that impossible position.

2. Delaware Absentee and Early Voting Litigation—A dispute over the meaning of the Delaware Constitution illustrates how state constitutions, if not preempted by federal accessibility standards, can hamper state legislatures’ ability to expand voting access. The Delaware Supreme Court recently ruled that a vote-by-mail statute and a same-day-registration statute violated the Delaware Constitution.¹²⁴

The Delaware Constitution lists those who are eligible to vote absentee, specifying that those unable to vote in person due to public service, the circumstances of their occupation, “sickness or physical disability,” “absence from the district while on vacation,” “or the tenets or teachings of his or her religion” may vote absentee.¹²⁵ The vote-by-mail statute enacted by the Delaware General Assembly permitted all registered voters to request an absentee ballot.¹²⁶ According to the Delaware Supreme Court, the 2022 vote-by-mail statute ran afoul of a “time-honored understanding” that the legislature “is not free to limit or enlarge upon the categories of citizens specifically enumerated” in the Delaware Constitution as permitted to vote absentee.¹²⁷ During the 2020 election, the legislature had invoked its emergency powers to allow for absentee ballots to be mailed to all registered voters during that election; however, the legislature did not rely on emergency powers to enact the new vote-by-mail statute in 2022.¹²⁸ Vice Chancellor Cook concluded that though he would rule differently if he “were writing on a blank slate,” precedent “compelled [him] to agree” that the vote-by-mail statute was unconstitutional.¹²⁹ Although the vice chancellor

122 See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2336–40 (2021). At least some courts would likely find that a statute restricting the assistance to which voters with disabilities are entitled would not violate the ADA or Rehab Act given the reluctance of courts to broadly construe these statutes to require absolute accessibility to polling places and a secret and independent ballot. See *Waterstone*, *supra* note 46, at 360–61.

123 *Carey*, 2022 WL 3910457, at *2.

124 *Albence v. Higgin*, No. 342, 2022 WL 17591864, at *2 (Del. Dec. 13, 2022).

125 DEL. CONST., ART. 5, § 4A.

126 *Higgin v. Albence*, No. 2022-0641-NAC, 2022 WL 4239590, at *4 (Del. Ch. Sept. 14, 2022).

127 *Albence v. Higgin*, No. 342, 2022 WL 17591864, at *2 (Del. Dec. 13, 2022).

128 *Higgin v. Albence*, No. 2022-0641-NAC, 2022 WL 4239590, at *2 (Del. Ch. Sept. 14, 2022).

129 *Id.* at *23.

observed that “[g]iven the fundamental nature of the voting rights at issue,” this precedent may be worth revisiting,¹³⁰ the Delaware Supreme Court disagreed and affirmed the finding that the vote-by-mail statute was unconstitutional.

Reversing the Court of Chancery,¹³¹ the Delaware Supreme Court found that the legislature’s same-day-registration statute transgressed the Delaware Constitution’s command that voter registration begin “not more than one hundred and twenty days, nor less than sixty days before, and end[] not more than twenty days, nor less than ten days before, each General Election.”¹³² The Delaware General Assembly made a botched attempt to amend the Delaware Constitution to expand absentee voting and allow for same-day voter registration in 2022 and passed the ultimately unconstitutional statutes when those efforts failed.¹³³ With the current terms of the Delaware Constitution barring legislation enacting these policies, a constitutional amendment is the state legislature’s only remaining option for enacting these expanded voting measures.

Though the Delaware Supreme Court’s ruling is supported by the text of the Delaware Constitution, it should be unsettling to those concerned with disability voting rights. While the Delaware Constitution allows voters to vote absentee if they are unable to vote in person because of “sickness or physical disability,”¹³⁴ it does not define “sickness” or “disability.” This provision has not been amended since its adoption in 1943,¹³⁵ nearly fifty years before the passage of the ADA, further obscuring what disabilities its language covers. Not only is it unclear who falls under this exception to the general rule that absentee voting is impermissible, but voters with disabilities qualified to vote absentee might, to receive an absentee ballot, be required to show that they cannot attend the polls in person. In fact, a 1923 Delaware absentee-voting statute¹³⁶ required citizens voting absentee because of sickness or disability to include with their absentee ballot application a “certificate[] of a duly licensed practicing physician certifying as to such sickness or disability.”¹³⁷ It is not difficult to imagine how the increased fear of voter fraud coupled with the fear of the disability con could lead state legislators in Delaware or in another state

130 *Id.* at *28.

131 *Id.* at *1.

132 DEL. CONST., Art. 5, § 4; *see also* Albence v. Higgin, No. 342, 2022 WL 17591864, at *24 (Del. Dec. 13, 2022).

133 Higgin v. Albence, No. 2022-0641-NAC, 2022 WL 4239590, at *4–5 (Del. Ch. Sept. 14, 2022).

134 DEL. CONST., Art. 5, § 4A.

135 Albence v. Higgin, No. 342, 2022 WL 17591864, at *21 (Del. Dec. 13, 2022).

136 The striking down of this statute on the basis that “no power [then] exist[ed] in the Legislature to provide for absentee voting,” *State v. Lyons*, 5 A.2d 495, 503 (Del. Gen. Sess. 1939), prompted the adoption of Article 5, Section 4A of the Delaware Constitution to expressly authorize absentee voting. *See* Albence v. Higgin, No. 342, 2022 WL 17591864, at *9 (Del. Dec. 13, 2022) (“Though not a verbatim version of the ill-fated 1923 Act, the operative provisions of Section 4A were functionally equivalent to the statute’s.”).

137 *Id.* at *7 n. 54 (quoting 33 Del. Laws ch. 103, § 3, 259).

to enact a similar requirement today.¹³⁸ Conditioning the right to vote of citizens with disabilities in this way would be especially cruel given that the mere act of requesting an absentee ballot, to say nothing of receiving third-party certification of a disability, is frequently inaccessible.¹³⁹ Short of amending its constitution to allow for expanded absentee voting, the Delaware legislature should at least ensure that the process of requesting an absentee ballot is accessible.

IV. BREAKING DOWN BARRIERS TO THE BALLOT BOX FOR VOTERS WITH DISABILITIES

Because the barriers to voting for Americans with disabilities are complex, varied, and multifaceted, no single policy or piece of legislation will remedy every problem. Disability takes many forms and can present myriad challenges to participating in the democratic process without intervening efforts. Though focused measures aimed at increasing voter accessibility for voters with disabilities are necessary, they must be part of a greater effort. When voters with disabilities must meet certain criteria or jump through hoops to exercise rights that enable them to access the ballot box, these procedures themselves introduce additional barriers to voting. This part advocates for a general policy of accessibility to remove impediments to voting for people with disabilities and highlights some specific actions policy makers should take to adopt a policy of real accessibility.

Although thirty-five states and the District of Columbia offer “no-excuse absentee” voting, fifteen states, Puerto Rico, and the Virgin Islands allow only certain voters with an “excuse” for not voting in person to vote absentee.¹⁴⁰ Valid excuses vary from state to state. Of the states that provide “no-excuse absentee” voting, eight mail ballots to all citizens without requiring voters to request an absentee ballot.¹⁴¹ While every state or territory except Puerto Rico that allows only voters who provide a prescribed excuse to vote by mail permits voters to vote by mail due to disability or illness,¹⁴² “[b]est practices in

138 Election officials also play a pivotal role in ensuring that requirements like this do not create additional hurdles that must be overcome to cast a ballot for voters with disabilities, as evidenced by the WEC’s even split over and near adoption of a requirement that those helping voters with disabilities mail or deliver an absentee ballot fill out an attestation form to prove their identities. See Schmidt, *supra* note 119.

139 Abigail Abrams, *Absentee Ballot Applications Are Not Accessible to Voters with Disabilities in 43 States*, TIME (Sept. 30, 2020, 8:30 AM), <https://time.com/5894405/election-2020-absentee-ballot-applications-disability-rights/> (“More than 40 states have absentee ballot applications that are not fully accessible to millions of visually impaired voters and those with other disabilities.”).

140 NAT’L CONF. OF STATE LEGISLATORS, VOTING OUTSIDE THE POLLING PLACE: ABSENTEE, ALL-MAIL AND OTHER VOTING AT HOME OPTIONS (July 12, 2022), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

141 *Id.*

142 NAT’L CONF. OF STATE LEGISLATORS, *supra* note 140 at Tbl.2 <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx>.

voting by mail are clearly the no-excuse and all-vote-by-mail systems.”¹⁴³ Some voters may be reticent to report a disability on a public form because of continuing stigma.¹⁴⁴ In addition, what qualifies as a satisfactory disability or illness is not always clear and may differ from state to state. People with disabilities are also not immune from the fear of voter fraud or the fear of the disability con.¹⁴⁵ These falsehoods are all the more pernicious because they could cause voters with disabilities not to vote or take advantage of more-accessible voting methods if they believe that more-accessible voting measures are prone to fraud or abuse. As previously noted, the procedures for requesting an absentee ballot are often inaccessible,¹⁴⁶ preventing qualified and willing voters with disabilities from obtaining an absentee ballot. Though states still need to ensure that absentee ballots themselves are accessible, mailing every registered voter an absentee ballot eliminates the barrier of requesting a ballot and would improve accessibility even in states with “no-excuse absentee” voting.

In addition to creating barriers to the ballot box for voters with disabilities, accessibility being the exception rather than the rule promotes the fear of the disability con. When absentee voting, receiving assistance in mailing or delivering a ballot, getting help filling out a ballot, and similar accessibility measures are seen as “special rights,” they are more likely to be viewed with suspicion.¹⁴⁷ In contrast, when these methods of voting are normalized and open to everyone, they simultaneously become more accessible and less prone to being targets of cynicism.

Federal and state policy makers must work to increase accessibility at every stage of the voting process, from researching candidates to registering to vote to casting a ballot to verifying and curing ballots. To accomplish this, federal lawmakers can start by passing the John Lewis Voting Rights Amendment Act to revitalize the VRA and restore the federal government’s ability to provide oversight over discriminatory practices and changes in laws by states.¹⁴⁸ The federal government should also provide meaningful guidance on accessibility standards and the definition of “disability” in HAVA and the VAEHA to provide a comprehensive federal standard for accessibility. People with a variety of disabilities must be included in the process of creating these accessibility standards to ensure that their needs are met. Election officials should remain flexible and ready to adapt as new solutions emerge to make voting more accessible. For their part, state governments should

143 Schur et al., *supra* note 26, at 66.

144 *Id.*

145 See *Fear of the Disability Con*, *supra* note 29, at 1074 (“[D]isabled persons who experienced suspicion themselves are more suspicious of disability con.”).

146 Abrams, *supra* note 139.

147 See *Fear of the Disability Con*, *supra* note 29, at 1054.

148 See *John Lewis Voting Rights Advancement Act*, HUM. RTS. CAMPAIGN (Jan. 6, 2023), <https://www.hrc.org/resources/voting-rights-advancement-act>.

also make accessibility a priority through measures like expanding access to early and absentee voting, amending state laws and constitutions as necessary, and ensuring that enough polling places are open and proximate to voters. In the end, real accessibility will require continuous effort and a deep commitment to systemic change. But a truer democracy is well worth the work.

CONCLUSION

Policy makers should continue to endeavor to protect election integrity and to prevent and punish voter fraud, but if they are not careful, policy makers are prone to quashing democracy in their attempts to defend it. Many states are making decisions about how their elections are administered on the basis of lies and fear. If this continues, catastrophic consequences are bound to follow. The 2020 election proved that elections can be both accessible and secure. This underscores that accessibility is a choice—one democracy depends on states to make. As usual, making voting more accessible for voters with disabilities will improve voting for everyone.¹⁴⁹ Broadening the access of people with disabilities to the ballot further provides no side a clear political advantage because, given its breadth, the disability community has no clear political leaning.¹⁵⁰ Addressing the obstacles to participating in the voting process fairly and with dignity for Americans with disabilities can also alert us to and help remove barriers to voting for other marginalized groups.¹⁵¹ Above all, people with disabilities deserve to have an equal voice in our society. Every issue is a disability issue,¹⁵² and the voices of Americans with disabilities are indispensable in realizing the full measure of a vision of an America where all are granted equal rights and opportunities under the law.

149 See Carole Martinez, *Accessibility for All: Why Removing Barriers Benefits Us All*, INCLUSIVE CITY MAKER (Oct. 15, 2021), <https://www.inclusivecitymaker.com/accessibility-for-all-removing-barriers-benefits-us-all/>.

150 See Ruth Igielnik, *A Political Profile of Disabled Americans*, PEW RSCH. CTR. (Sept. 22, 2016), <https://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans/>.

151 See Belt, *supra* note 37, at 1493.

152 Included: The Disability Equity Podcast, *Voting: Crip the Vote*, at 26:12 (Oct. 21, 2020), <https://included.libsyn.com/13-voting-crip-the-vote>.