



**I-1  
Identification  
and Citizenship  
Requirements  
for Voter  
Registration and  
Voting**

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# **Kansas Legislator Briefing Book 2014**

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## **Ethics and Elections**

### **I-1 Identification and Citizenship Requirements for Voter Registration and Voting**

For as long as voting has been a reality in the United States, the tension between voting access and security has existed. In the most recent chapter of this tension, voter identification and voter registration requirements have grown in scope in an attempt to increase voting security. This paper outlines the federal and state requirements in these two areas, as well as court decisions and relevant recent occurrences.

#### **Part One—Voter Identification Requirements**

##### **National Voter Identification (ID) Requirements**

The federal Help America Vote Act (HAVA) mandates that all states require identification from first-time voters who registered to vote by mail and did not provide identification with their mail-in voter registration. Public Law 107-252, Section 303, further specifies how a voter may meet these requirements:

(a) For those voting in person, by presenting to the appropriate official a current and valid photo ID, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the voter's name and address.

(b) For those voting by mail, by submitting with the ballot a copy of a current and valid photo ID, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the voter's name and address.

##### **Kansas Law**

Prior to the 2011 Legislative Session, Kansas law required persons voting for the first time in the county to provide ID unless they had done so when they registered. At that time, acceptable ID forms included a current, valid Kansas driver's license, nondriver's ID card, utility bill, bank statement, paycheck, government check, or other government document containing the voter's current name and address as indicated on the registration book. A voter's driver's license copy or number, nondriver's ID card copy or number, or the last four digits of the voter's Social Security number were acceptable when the voter was applying for an advance ballot to be transmitted by mail.

In 2011, the law changed significantly through the passage of HB 2067. Relatively minor amendments were made in 2012 SB 129. Effective January 1, 2012, all those voting in person are required to provide photo identification at every election (with the exception of certain voters such as active duty military personnel absent from the country on Election Day), and all voters submitting advance ballots by mail will be required to include the number on or a copy of a specified form of photo ID for every election. Free nondriver's ID cards and free Kansas birth certificates are available to anyone 17 or older for the purposes of meeting the new photo voter ID requirements. Each applicant for a free ID must sign an affidavit stating he or she plans to vote and possesses no other acceptable ID form. The individual also must provide evidence of being registered to vote. (For a detailed summary of HB 2067, see <http://www.kslegresearch.org/Elections.htm>.)

## Other State Laws

Analysis of other states' laws is complicated both by lawsuits and, at least prior to the June 2013 U.S. Supreme Court decision *Shelby County v. Holder*, by the requirement for some states to obtain preclearance pursuant to Section 5 of the Voting Rights Act of 1965.

According to research conducted by the National Conference of State Legislatures (NCSL), a total of 34 states have passed voter ID laws. Not all 34 states' laws are in effect; some have delayed implementation dates and some are facing court challenges. Two key distinctions among the states' varying laws are described below:

- Whether the law is "strict" or not, *i.e.*, whether a voter is allowed to cast a valid ballot without first presenting ID. For example, Kansas' law is a strict one. Voters who do not show ID at the polls are given a provisional ballot.
- Whether the law requires a photo ID.

Based on these distinctions, Kansas' law would be labeled a strict law requiring photo ID. NCSL

reports the following ten additional states have strict photo ID laws:

- Those currently in effect: Georgia, Indiana, and Tennessee.
- Those not currently in effect: Arkansas, Mississippi, North Carolina, Pennsylvania, Texas, Virginia, and Wisconsin.

While not affecting Kansas directly, the preclearance issue is currently important in the elections arena. As alluded to previously, "preclearance" refers to the federal law provision that prohibits any state that is a jurisdiction covered by section 5 of the Voting Rights Act of 1965 (as administered under 28 C.F.R. Part 51 App.) from implementing any change in its voting procedures without first obtaining "preclearance" from either the U.S. Attorney General or a three-judge panel of the U.S. District Court, D.C. [42 U.S.C. § 1973c(a)]. For example, Texas' recently enacted photo ID law was denied preclearance by both the U.S. Attorney General and a federal district court. However, in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), the section of the Voting Rights Act of 1965 from which the current preclearance states originally were identified was ruled unconstitutional.

According to SCOTUSblog (a blogsite written by attorneys on actions of the U.S. Supreme Court) regarding the decision:

"In an opinion by Chief Justice John Roberts that was joined by Justices Scalia, Kennedy, Thomas, and Alito, the Court did not invalidate the principle that preclearance can be required. But much more importantly, it held that Section 4 of the Voting Rights Act, which sets out the formula that is used to determine which state and local governments must comply with Section 5's preapproval requirement, is unconstitutional and can no longer be used. Thus, although Section 5 survives, it will have no actual effect unless and until Congress can enact a new statute to determine who should be covered by it. (Source: <http://www.scotusblog.com/2013/06/details-on-shelby-county-v-holder-in-plain-english/>)."

For a detailed analysis of other states' laws, please refer to <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

## Part Two—Voter Registration Requirements

### National Voter Registration Requirements

The U.S. Voting Rights Act of 1965 allows all U.S. citizens to vote at any election in any state (if they are otherwise qualified by law Title 42, Chapter 20, Subchapter I, Section 1971.)

The National Voter Registration Act of 1993, which expanded the locations at which a person may register to vote, requires that a voter registration application form used in conjunction with a driver's license application include a statement containing each eligibility requirement (including citizenship) for that state. (Title 42, Chapter 20, Subchapter I-H, Section 1973gg-3.)

Finally, HAVA (Public Law 107-252, Section 303) requires voter registration applicants provide one of the following when registering:

- The applicant's driver's license number, if the person possesses a current and valid driver's license.
- The last four digits of the applicant's social security number, if the person does not possess a driver's license.
- The applicant's state assigned identification number for voter registration purposes, for those applicants with neither a drivers license or a social security number.

### Current Kansas Law

Prior to the 2011 Legislative Session, state law required an applicant for voter registration fill out a form specified by law and sign under penalty of perjury. Among a list of information items, the application form had to contain a box to check to indicate whether the applicant was a U.S. citizen. 2011 HB 2067 made it mandatory for an applicant

to provide documentary proof of citizenship when registering to vote for the first time in Kansas. Documents acceptable for this purpose comprise a long list; among them are the following:

- Driver's license or nondriver's ID card issued by the appropriate agency in any U.S. state, if the agency indicates on the license or nondriver's ID card that the person has provided satisfactory proof of U.S. citizenship;
- Birth certificate that verifies U.S. citizenship to the satisfaction of the county election officer or Secretary of State;
- Pertinent pages of a U.S. valid or expired passport;
- Naturalization documents or the number of the naturalization certificate, with further instructions if only the number is provided; and
- Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.

For a complete list of allowable documents, see KSA 25-2309(I).

A person may request a free copy of his or her Kansas birth certificate for the purpose of registering to vote.

### U.S. Supreme Court Decision and Response by the Kansas Secretary of State

On June 17, 2013, the U.S. Supreme Court held that a similar proof-of-citizenship law in Arizona "cannot stand in the face of the [National Voter Registration Act]." Options were allowed by the Court for the future, however, and the Kansas Secretary of State has pursued these options by establishing a two-tiered system of voting depending on the facts related to a prospective voter's registration. (Note: Again, the Kansas proof-of-citizenship requirement applies only in instances of voters registering to vote for the first time in Kansas.)

Following is the SCOTUSblog summary of the case in point (*Arizona v. Inter-Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013)):

As part of an effort to increase voter registration and turnout, in 1993 Congress passed the National Voter Registration Act. The Act requires states to “accept and use” a specific federal form for voter registration; that form asks, among other things, whether the would-be voter is a citizen of the United States and over the age of eighteen. In 2004, Arizona voters approved a law that requires election officials in that state to refuse to register any would-be voter who cannot prove that he is in fact a citizen. Arizona residents, along with voting and civil rights groups, challenged the state law, arguing that it could not stand because it conflicted with, and was trumped by, the NVRA. The challengers won in the lower court, and the Supreme Court granted review last fall to consider not only whether the state law can survive, but also whether the lower court used the right test in making its decision: that court held that because the Constitution allows Congress to make or change election rules established by the states, Congress can veto any state laws relating to elections, even if it doesn’t make clear that it intends to do so.

Today the Court held, in a seven-to-two decision by Justice Scalia, that Arizona’s law cannot stand in the face of the NVRA. The Court first recognized that under the Elections Clause of the U.S. Constitution, Congress has the power to dictate when, where, and how elections are held, and state election laws that conflict with federal ones are therefore preempted and without effect. The Court thus held that by requiring states to “accept and use” the federal form, the NVRA effectively required the states to treat the federal form as sufficient evidence of citizenship without any additional proof, so that Arizona’s proof-of-citizenship requirement was contrary to the NVRA, and therefore invalid. The Court recognized that the words “accept and use” do not necessarily carry such a broad meaning – they could mean only that the state was required to consider the federal form – but based on the context and the

other provisions in the NVRA, the Court concluded that the requirement to “accept and use” the federal form has the stronger effect of requiring states to treat the federal form as sufficient. On the question of which legal test to apply, the Court made it clear that while preemption under the Supremacy Clause (which provides that federal law generally trumps contrary state law) requires Congress to clearly state its intent to preempt state requirements, preemption under the Elections Clause is more easily found because federal elections law will always displace state law.

*Finally, the Court held that in the future, Arizona can ask the federal Election Assistance Commission, which creates the federal form, to include a requirement of additional proof of citizenship in the form, and to bring different legal challenges if the EAC refuses to do so.*

Justice Kennedy drafted a separate opinion concurring in part and in the judgment; Justices Thomas and Alito each filed a dissenting opinion, arguing that Arizona’s requirement should not have been held preempted.

(Source: <http://www.scotusblog.com/2013/06/details-arizona-v-inter-tribal-council-of-arizona-inc/>) (*Emphasis added*)

Since the June 2013 decision, Kansas Secretary of State Kris Kobach has begun to establish a two-tiered system of voting. The two-tiered system would allow or prohibit voting in Kansas’ state and local elections, depending on which voter registration form has been completed by a prospective voter and whether the voter has supplied Kansas-required proof of citizenship when registering to vote. (According to an October 2013 article in the *New York Times*, the State of Arizona is establishing a similar two-tier system.) The tiers are as follows:

- A voter who has supplied the state-required proof of citizenship will be allowed to vote in any federal, state, or

local election in Kansas, regardless of whether the voter registered using the federal NVRA application or the state application.

- A voter who has not supplied proof of citizenship may vote *only in federal elections* if the voter has used the NVRA application to register.
- In the *Arizona v. Inter-Tribal Council* decision, Arizona was given the option of asking the federal Election Assistance Commission (EAC) to include an additional requirement related to proof of citizenship in its registration application form. Since Kansas' law is similar, it is anticipated the same would apply to Kansas. However, as of the publication of this paper it is impossible for either state to seek such

addition from the EAC because of a lack of a quorum on the Commission. A review of the EAC website on November 14, 2013, confirms there are currently no members appointed to the EAC.

Source: [http://www.eac.gov/about\\_the\\_eac/commissioners.aspx](http://www.eac.gov/about_the_eac/commissioners.aspx)

In November 2013, the ACLU filed a lawsuit in Shawnee County District Court asking the court to prevent the implementation of the two-tiered system on the grounds that the system violates the *Kansas Constitution's* equal protection guarantee, violates the separation of powers set forth in the *Kansas Constitution*, and violates the Kansas Rules and Regulations Filing Act.

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