



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

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Elections and Ethics

H-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 a 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 or 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 are required to include the ID 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 2011 HB 2067, see <http://www.kslegresearch.org/KLRD-web/Publications/StateLocalGovt/Summary-2011-VoterID-HB2067-quick-sheet.pdf>.)

Other State Laws

Analysis of other states' laws is complicated by relevant court actions. According to research conducted by the National Conference of State Legislatures (NCSL), as of December 14, 2015, a total of 36 states have passed voter ID laws. However, not all 36 states' laws are in effect. NCSL reported that in August 2015, a federal appeals court ruled at least part of Texas' strict voter ID law cannot be enforced, and it is uncertain whether the law will continue to be in effect. State courts have struck down laws in Arkansas, Missouri, and Pennsylvania, and North Carolina's law, enacted in 2013, becomes effective in 2016.¹

Two key distinctions among the states' varying laws are described below:

- Whether the law is "strict," *i.e.*, whether a voter is allowed to cast a valid ballot without first presenting ID.
- Whether the law requires a photo ID.

¹ For a more detailed analysis of issues covered in voter ID court cases, see "Voter ID in the Courts: An introduction to legal challenges to voter ID laws." Karen Shanton for NCSL, May 2014.

NCSL reports seven states, in addition to Kansas, had strict photo ID laws in effect in 2014: Georgia, Indiana, Mississippi, Tennessee, Texas², Virginia, and Wisconsin. Other categories reported included the following, also in effect in 2014:

- Strict, non-photo ID laws: Arizona, North Dakota, and Ohio.
- Non-strict, photo ID laws: Alabama³, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, and South Dakota.
- Non-strict, non-photo ID laws: Alaska, Arkansas⁴, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Hampshire, Oklahoma⁵, South Carolina⁶, Utah, and Washington.

² As noted previously, a federal appeals court reportedly has struck down at least part of Texas' voter ID law and the law's future is uncertain.

³ NCSL reports Alabama's law also might be called a strict photo ID law, because voters who do not show a photo ID generally are asked to cast a provisional ballot and then provide the required ID later. What makes this provision different from, for example, Kansas law is there is an alternative: two election officials may sign sworn statements saying they know the voter.

⁴ NCSL reports Arkansas strict photo ID law was struck down by the Arkansas Supreme Court; this action left a pre-existing non-strict, non-photo ID law in effect.

⁵ NCSL reports while most Oklahoma voters show a photo ID before voting, the state's law also permits a non-photo voter registration card issued by the appropriate county elections board to serve as proof of ID in lieu of a photo ID.

⁶ South Carolina reportedly has a photo ID requirement but an alternative is offered for people with a "reasonable impediment" to obtaining a photo ID, according to NCSL. South Carolina's law also has been challenged in court.

Part Two—Voter Registration Requirements

National Voter Registration Requirements

The 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, 42 USC §1971).

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

Finally, HAVA (Public Law 107-252, Section 303) requires voter registration applicants to 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; or
- The applicant's state assigned identification number for voter registration purposes, for those applicants with neither a driver's license nor a social security number.

Kansas Law

Prior to the 2011 Legislative Session, state law required an applicant for voter registration to 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 checkbox to indicate whether the applicant was a U.S. citizen. Enacted legislation (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 including:

- 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 2015 Supp. 25-2309(I).

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

Court Decisions and Response by the Kansas Secretary of State

Challenge to Arizona's Proof-of-Citizenship Law

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

Summary of Case

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>)

Kansas’ Response, Court Decisions, and Current Status of the Two-Tiered System

After the June 2013 decision, Secretary Kobach established 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 a September 2014 summary in *The Voting News* of an *Arizona Daily Sun* article, the State of Arizona established a similar two-tier system.) The tiers are as follows (again, this applies only to voters registering to vote for the first time in Kansas):

- 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. Due to the similarity of the two states' laws, Kansas joined with Arizona in seeking the additional requirement (*Kobach et al. v. The United States Election Assistance Commission*). Although a Wichita district court judge ruled the EAC must add the state-specific proof of citizenship requirement to the two states' federal forms, the 10th Circuit Court of Appeals in Denver overturned this ruling, stating Kansas cannot force the EAC, a federal agency, to add the requirements. (<http://thevotingnews.com/appeals-court-overturns-state-proof-of-citizenship-requirements-on-federal-voting-forms-the-wichita-eagle/>)

The two-tiered system itself has been challenged. In November 2013, the American Civil Liberties Union (ACLU) filed a lawsuit in Shawnee County District Court asking the court to prevent the implementation of the two-tiered system on the grounds the system violates the *Kansas Constitution's* equal protection guarantee, violates the separation of powers set forth in the *Kansas Constitution*, and is void because it was based on informal directive rather than on the Kansas Rules and Regulations Filing Act (<http://dockets.justia.com/docket/kansas/ksdce/5:2013cv04150/95753>). In July 2014, a Shawnee County judge rejected the ACLU's request to block the policy for the 2014 election. The U.S. Supreme Court declined to hear Secretary Kobach's appeal of this appeals court decision, thereby leaving in place the two-tier voting system. Motions continue to be filed on the case (see Legal Documents section at <https://www.aclu.org/cases/belenky-v-kobach>).

At the time of publication, a court opinion and order relating to the 2011 law was anticipated. Information about any decisions or other responses from the courts will be published at: <http://www.kslegresearch.org/KLRD-web/State&LocalGovt.html>.

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