

**PART I. PRINCIPLES OF NON-PRECINCT VOTING:  
EARLY IN-PERSON VOTING AND OPEN ABSENTEE VOTING**

1           **Introductory Note on Scope:** The principles of this Part are intended for use by  
2 jurisdictions that wish to use absentee-voting or early-voting options as a supplement to in-person  
3 precinct-based voting on Election Day. These principles are not designed for jurisdictions (like the  
4 states of Colorado, Oregon, and Washington, as well as some local jurisdictions in other states)  
5 that conduct elections entirely “by mail.” (The locution “all-vote-by-mail” is frequently used for  
6 these elections, although this is something of a misnomer, given that these elections are generally  
7 structured to allow voters to return voted ballots either by mail or by dropping them off in person.)

8           Furthermore, the principles of this Part are designed to apply to absentee- and early-voting  
9 processes that are available to all voters. Different principles may apply to forms of absentee voting  
10 designed for narrower classes of voters, such as absentee voting available only to military and  
11 overseas voters, or only to voters with disabilities or medical conditions that make it difficult or  
12 impossible for them to vote in person at the polls on Election Day. For these classes of voters, the  
13 burdens and benefits of absentee voting may well need to be balanced differently than for voters  
14 who could readily vote in person on Election Day.

15           Nevertheless, many of the principles of this Part, particularly those designed for early in-  
16 person voting, could also be applicable to in-person precinct-based voting on Election Day. When  
17 relevant, the Comment portions of this Part include brief remarks about this potential additional  
18 applicability.

19           The principles of this Part apply both to voting for the purpose of electing public officials,  
20 as well as to voting for the purposes of determining ballot initiatives, referenda, and other measures  
21 placed before the electorate, or whether to recall a public official. Following common parlance,  
22 this Part often uses the term “election” to cover all of these types of citizen participation in  
23 democratic government, even though it may be somewhat inapt to speak of the “election” of a  
24 ballot measure or of a recall of a public official.

25           **Relationship to Principles of the Law, Election Administration: Parts II and III:** The  
26 principles of this Part are intended to operate either independently of or in conjunction with Parts  
27 II and III of this Principles of the Law, Election Administration project. Part II concerns principles  
28 applicable to disputed elections generally, while Part III specifically concerns procedures

1 necessary for disputed presidential elections given their uniquely challenging scheduling  
2 constraints.

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4 **§ 101. Definitions**

5 (a) **“Absentee voting” means voting that occurs on or before Election Day by**  
6 **allowing a voter to obtain a paper or electronic ballot for all offices and matters for**  
7 **which the voter would be eligible to vote on Election Day, and then allowing the voter**  
8 **to mark the ballot outside the presence of election officials and return it by an**  
9 **approved method to the voter’s Local Election Authority for verification and**  
10 **counting.**

11 (b) **“Chief Elections Officer” means the state’s highest authority, often the**  
12 **Secretary of State and in some states a multimember body, responsible for**  
13 **supervising the administration of elections in the state.**

14 (c) **“Early in-person voting” means voting that occurs before Election Day by**  
15 **allowing a voter to appear in person, at a location designated by the voter’s Local**  
16 **Election Authority as an early-voting location, and there to obtain and cast in the**  
17 **presence of election officials a secret ballot for all offices and matters for which the**  
18 **voter would be eligible to vote on Election Day.**

19 (d) **“Election Day” means the single day established by law for voters to cast**  
20 **their ballots in a particular election by presenting themselves in person at a voting**  
21 **precinct. In jurisdictions permitting early in-person voting, Election Day is the last**  
22 **day on which voters may cast a ballot in that particular election. For federal elections,**  
23 **Congress has established Election Day as the first Tuesday after the first Monday in**  
24 **November in each even-numbered calendar year.**

25 (e) **“Local Election Authority” means a local agency of government**  
26 **responsible for administering, through a clerk’s office, board of elections, or**  
27 **comparable administrative body, the voting processes established by law for the**  
28 **election of public officials and determination of ballot issues.**

29 (f) **“Local election jurisdiction” means the geographic area served by a Local**  
30 **Election Authority.**

1           **(g) “Open absentee voting” means absentee voting available to any voter,**  
2           **without a showing that the voter faces an impediment to voting in person at the voter’s**  
3           **assigned precinct on Election Day.**

4           **(h) “UOCAVA voter” means a voter eligible to take advantage of the voting**  
5           **processes available to military and overseas citizens under the Uniformed and**  
6           **Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff et seq., and**  
7           **associated state legislation.**

8           **(i) “Voter” means an individual who satisfies the eligibility standards and the**  
9           **voter-registration requirements necessary to vote in a given election in the**  
10           **individual’s local election jurisdiction.**

11 **Comment:**

12           *a. Confronting inconsistencies of usage.* Voting terminology is not consistent across  
13 jurisdictions. In many states, “absentee voting” describes a type of voting by mail, while in other  
14 states the same term includes voting that occurs in person before Election Day. For purposes of  
15 these Principles, the definition of “absentee voting” distinguishes it as a type of voting that is  
16 allowed to occur outside the presence of election officials, in contrast to early in-person voting,  
17 which should always occur in the presence and under the supervision of election officials.

18           Although election officials supervise the casting of ballots in all forms of “in-person  
19 voting,” it is important to note that the voter is still afforded the privacy of a secret ballot, typically  
20 either by voting behind a curtain or by standing at a voting machine that is situated and screened  
21 for the purpose of protecting the voter’s privacy (as well as by voting using equipment that prevents  
22 the subsequent association of an identifiable voter with the voter’s ballot selections). Indeed, a  
23 main purpose and feature of in-person voting is to assure that the voter receives the benefit of this  
24 privacy, both for the individual voter’s own sake and for the sake of the integrity of the election as  
25 a whole, as discussed further in connection with § 103 below.

26           Traditionally, absentee voting was available only to voters who claimed some impediment  
27 to voting in person at a precinct polling place on Election Day. Over time, the number of grounds  
28 for requesting an absentee ballot has expanded in many jurisdictions, until in recent decades an  
29 increasing number of states have made absentee voting available to any voter, regardless of  
30 whether the voter claimed any difficulty in voting on Election Day. This is what these Principles  
31 call “open absentee voting,” often popularly termed “no excuse absentee voting.” Many of the  
32 principles concerning open absentee voting also could apply to excuse-based versions of absentee

1 voting, but this Part focuses on open absentee voting because of its widespread use to increase  
2 voting convenience and to reduce Election Day pressure at the polls.

3 States with open absentee voting also are distinct from states with “all-vote-by-mail”  
4 elections, in which little or no in-person precinct voting occurs and instead all voters receive a  
5 mailed ballot, to vote at their convenience and return by Election Day, either by mailing back the  
6 voted ballot or by dropping it off at a designated location. As explained in the Scope Note at the  
7 outset, the Principles of this Part are not designed for jurisdictions with all-vote-by-mail elections.

8 In many states, the term “early voting” is used as an equivalent of what these Principles  
9 call “early in-person voting,” which describes a type of voting that occurs before Election Day at  
10 a designated voting location in the presence of election officials. But “early voting” can also be  
11 used to describe voting by absentee ballot, a type of voting that also generally occurs before  
12 Election Day (even if some states permit absentee voters to return their ballots, and therefore even  
13 to vote them, on Election Day itself). To avoid ambiguity, this project uses “early in-person voting”  
14 to describe more precisely what is often popularly called “early voting.” This is a method of voting  
15 that mimics the Election Day in-person voting process, except that it occurs before Election Day,  
16 and typically in only a few centralized locations in each local election jurisdiction rather than in  
17 every precinct.

18 *b. Absentee voting and electronic voting.* Although absentee voting traditionally has  
19 involved returning voted ballots to election officials either by mail or by hand, this Section’s  
20 definition of “absentee voting” is sufficiently broad also to encompass voting in which absentee  
21 ballots are returned electronically, in order to accommodate states that choose to permit electronic  
22 return. The American Law Institute, however, is not taking a position on whether states should  
23 allow the electronic return of voted ballots. As the Reporters’ Note explains further, the reliability  
24 and security of electronic voting remain controversial, even as some jurisdictions have begun to  
25 allow some forms of electronic voting, at least for some voters (primarily military and overseas  
26 voters).

27 Much less controversy surrounds the electronic transmission of absentee-ballot  
28 *applications* (which today are almost universally available online), and somewhat less controversy  
29 surrounds the electronic transmission of blank absentee ballots (which federal law already requires  
30 states to offer to military and overseas voters). In years to come, technological developments and  
31 social and cultural changes could lead to the widespread adoption of remote electronic voting as  
32 well. Of course, such a development could dramatically reshape the entire election administration

1 landscape, to the point that both early in-person voting and open absentee voting might become  
2 obsolete, replaced by an all-electronic remote-voting system. But until that occurs, it will remain  
3 important to ensure that early- and absentee-voting processes are sound.

4 *c. New voting modalities.* Meanwhile, a different type of transition in voting modalities is  
5 already underway, which also has the potential to blur the lines between absentee, early, and  
6 Election Day voting. Much of the voting equipment that most Local Election Authorities  
7 purchased more than a decade ago with federal funds under the Help America Vote Act of 2002 is  
8 reaching the end of its useful life. As election authorities scramble to figure out how to replace this  
9 equipment without new federal funding, election officials increasingly are seeking ways to conduct  
10 elections using off-the-shelf hardware rather than customized voting equipment.

11 One approach under consideration would be to rely on electronic tablets or comparable  
12 personal electronic devices as a ballot-marking tool, loaded with a specialized software application  
13 that allows voters electronically to mark and then, when connected to a printer, to print a machine-  
14 readable paper ballot. If widely adopted, this approach could result in all voters—absentee, early,  
15 and Election Day—marking their ballots in the same way, whether remotely or in a designated  
16 voting center, and then delivering their ballots either (1) by appearing at a designated voting  
17 location to print, review, and turn them in, on or before Election Day, or (2) by printing and  
18 reviewing the ballots at home or elsewhere before returning them by mail or courier.

19 For purposes of these Principles, one important issue to consider in connection with the  
20 development of this or any other potential new mode of voting involves the distinction that the  
21 above definitions observe between voting that occurs under official supervision and voting that is  
22 unsupervised. As further described in the Comment to § 103, supervision is an effective means of  
23 reducing errors, fraud, and inappropriate influence. To the extent that voting processes are  
24 unsupervised, alternative means of reducing or mitigating these problems should be identified.

25 *d. Local Election Authority.* In most states, the Local Election Authorities responsible for  
26 administering the voting processes will be county clerks' offices or county boards of election (or  
27 similar bodies organized at county level). In a handful of states, including Connecticut,  
28 Massachusetts, Michigan, New Hampshire, and Wisconsin, the Local Election Authorities will be  
29 municipal or township level clerks' offices or boards of election (or similar bodies). Minnesota is  
30 something of a hybrid, with municipalities and counties sharing responsibility for polling-place  
31 operations.

**REPORTERS' NOTE**

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2 The variation in terminology across jurisdictions complicates the effort to achieve  
3 uniformity and consistency. For instance, Maine currently offers what this Section's definitions  
4 would classify as "early in-person voting," but which Maine calls "in-person absentee voting."  
5 Maine Department of the Secretary of State, *Early Voting in Maine*,  
6 <http://www.maine.gov/sos/cec/elec/voter-info/earlyvoting.html> (last visited June 13, 2018).  
7 Indeed, Maine is one of a number of states that are often classified as having early voting, even  
8 though they "do not have Early Voting in the traditional sense," because "within a certain period  
9 of time before an election they do allow a voter to apply in person for an absentee ballot." National  
10 Conference of State Legislatures, *Absentee and Early Voting*, [http://www.ncsl.org/legislatures-](http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx)  
11 [elections/elections/absentee-and-early-voting.aspx](http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx) (Aug. 17, 2017). These usage inconsistencies  
12 also complicate efforts to compare data and monitor and measure the effectiveness of various  
13 voting arrangements.

14 Similar confusion sometimes affects discussion about "electronic" voting, a phrase that  
15 variously can mean (1) voting over the internet, (2) voting by email, (3) voting by fax machine, or  
16 even (4) in-person voting on an electronic touch screen. Distinguishing between these usages is  
17 critical, particularly in discussions of voting security. As detailed in the Reporters' Note for § 109,  
18 many states allow UOCAVA voters to use email or fax to return voted absentee ballots, and Alaska  
19 briefly experimented with an option that allowed all voters to upload pdfs of voted ballots to a  
20 secure website (after waiving their right to a secret ballot). In 2012, New Jersey also permitted  
21 voting by email and fax as an emergency response to the disruptions to voters and polling places  
22 that Hurricane Sandy caused. See Michael T. Morley, *Election Emergencies: Voting in the Wake*  
23 *of Natural Disasters and Terrorist Attacks*, 67 *Emory L.J.* 545, 566 (2018). But voting over the  
24 internet remains a rarity, in part because of serious concerns about its integrity and security. See,  
25 e.g., U.S. Vote Foundation, *The Future of Voting: End-to-End Verifiable Internet Voting*, July  
26 2015, available at <https://www.usvotefoundation.org/E2E-VIV> (last visited June 13, 2018)  
27 (describing results of a two-year analysis of the prospects of secure internet voting); Verified  
28 Voting Blog, *Statement on the Dangers of Internet Voting in Public Elections*, Feb. 15, 2013,  
29 available at [https://www.verifiedvoting.org/statement-on-the-dangers-of-internet-voting-in-](https://www.verifiedvoting.org/statement-on-the-dangers-of-internet-voting-in-public-elections/)  
30 [public-elections/](https://www.verifiedvoting.org/statement-on-the-dangers-of-internet-voting-in-public-elections/); National Institute of Standards and Technology, *Security Considerations for*  
31 *Remote Electronic UOCAVA Voting*, Feb. 2011, available at  
32 <http://www.nist.gov/itl/vote/upload/NISTIR-7700-feb2011.pdf>.

33 One specific basis for substantial concern about the security of internet voting arose out of  
34 a 2010 pilot project in Washington, D.C., when election officials conducted a test of internet voting  
35 and invited outside experts to attempt to break the test's security protocols. To the chagrin of the  
36 test's organizers, University of Michigan graduate students in computer science, along with their  
37 professor, succeeded in penetrating the security barriers and manipulating the results at will,  
38 apparently without detection. See Sarah Wheaton, *Voting Test Falls Victim to Hackers*, N.Y.  
39 *TIMES*, Oct. 8, 2010, at A12, available at  
40 <http://www.nytimes.com/2010/10/09/us/politics/09vote.html>.

1 Other countries, however, have tried to move towards internet voting. Beginning in 2005,  
2 for instance, Estonia has conducted several national elections over the internet. See Brad Plumer,  
3 *Estonia Gets to Vote Online. Why Can't America?*, WASH. POST, Nov. 6, 2012, available at  
4 <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/06/estonians-get-to-vote-online-why-cant-america/>.  
5 Meanwhile, in Canada a number of local elections have been conducted over  
6 the internet since 2003. See Nicole Goodman, *Issues Guide: Internet Voting 2*, Nov. 2012,  
7 available at [http://www.parliament.uk/documents/speaker/digital-democracy/Internet\\_Voting\\_Issues\\_Guide\\_December\\_7\\_\\_2012.pdf](http://www.parliament.uk/documents/speaker/digital-democracy/Internet_Voting_Issues_Guide_December_7__2012.pdf) (“There have been more  
8 instances of binding local elections using Internet voting in Canada than any other country  
9 worldwide.”). But serious concerns also have been raised about these efforts. See, e.g., Vanessa  
10 Teague & J. Alex Halderman, *Security Flaw in New South Wales Puts Thousands of Online Votes at Risk*,  
11 FREEDOM TO TINKER, Mar. 22, 2015, at <https://freedom-to-tinker.com/blog/teaguehalderman/ivote-vulnerability/> (finding flaws in new internet voting  
12 system deployed in New South Wales in March 2015); Drew Springall, et al., *Security Analysis of the Estonian Internet Voting System*,  
13 in PROCEEDINGS OF THE 21<sup>ST</sup> ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY (CCS’14),  
14 Nov. 2014, available at <https://jhalderm.com/pub/papers/ivoting-ccs14.pdf> (finding several sources of vulnerability in  
15 Estonian internet voting system and recommending its discontinuation). Meanwhile, most experts  
16 in the United States remain skeptical, and there is clearly no consensus about the security of  
17 internet voting. For a succinct yet relatively comprehensive comparison of the risks and benefits  
18 of internet voting, see *A Comparative Assessment of Electronic Voting, Part II: Benefits, Drawbacks, and Risks Associated with Internet Voting* (at  
19 <http://www.elections.ca/content.aspx?section=res&dir=rec/tech/ivote/comp&document=benefit&lang=e>),  
20 a report produced by Elections Canada, Canada’s nonpartisan independent agency that  
21 administers its federal elections. Because of the United States’ status as a leading global  
22 superpower, its electoral systems are an especially inviting target for international attempts to  
23 disrupt U.S. governance; consequently, even if other nations prove successful in implementing  
24 electronic voting, their experience may not easily transfer to the United States, at least not without  
25 an assessment of the additional risks.

26 With respect to the possibility that existing categories and modes of voting may become  
27 obsolete, an experiment now underway in Los Angeles County—the nation’s largest local election  
28 jurisdiction—is particularly worthy of observation. Election administrators there are in the middle  
29 of a multi-year effort (expected to be in widespread use by 2020) to develop a means of conducting  
30 elections using ballot-marking software that could be used on a variety of platforms, including  
31 voter-owned devices such as iPads and electronic tablets. Voters could mark their ballots at the  
32 time and place of their choosing, at their leisure, and then deliver their votes by taking their  
33 marking device to a designated voting station to print their official ballot. See J.B. Wogan, *L.A. County Designs a Whole New Voting System*,  
34 GOVERNING (July 7, 2014), available at <http://www.governing.com/topics/politics/gov-why-los-angeles-county-wants-to-design-a-new-voting-system.html>.  
35 Other election jurisdictions likewise have been considering ways to deploy  
36 “off-the-shelf” solutions, including voter-owned equipment, once their existing voting devices  
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1 become obsolete. See Katy Owens Hubler, *Voting: What's Next*, STATE LEGISLATURES, July-Aug.  
2 2014 (describing Johnson County, Kansas election administrator's exploration of similar options);  
3 see also *The American Voting Experience: Report and Recommendations of the Presidential*  
4 *Commission on Election Administration* 41 ("PCEA Report") (2014) (describing possibility of  
5 marking sample ballot at home, then electronically transferring pre-selected choices to actual  
6 physical ballot at polling place). One concern in connection with these experiments is the extent  
7 to which ballot secrecy might be compromised: when a ballot is marked electronically, a voter's  
8 selections will be captured in electronic memory, which might be vulnerable to subsequent  
9 exposure.

## 10 § 102. Obligation to Avoid Partisanship and Undue Burden in the Voting Process

11 (a) **Decisions about how to structure early in-person voting and open absentee**  
12 **voting should be made without partisanship.**

13 (b) **States and Local Election Authorities should avoid imposing undue**  
14 **burdens on voters seeking to participate in the voting process, and states should**  
15 **ensure that local election jurisdictions have sufficient resources to enable each voter**  
16 **who desires to vote in person the opportunity to do so without an undue burden.**  
17 **Ordinarily, a wait of greater than 30 minutes at the polls constitutes an undue burden.**

### 18 **Comment:**

19 *a. Partisanship in election administration.* Decisions about election administration and the  
20 mechanics of voting are inevitably fraught with concern that they may unfairly advantage a specific  
21 political party (or candidate or issue). Ideally, therefore, the responsibility for these decisions ought  
22 to rest with independent civil servants not affiliated with any political party (or candidate or issue).  
23 Yet most states administer their elections under the direction of an elected Secretary of State,  
24 elected on a partisan ballot, who functions as the state's Chief Elections Officer. In turn, most local  
25 election jurisdictions are under the administration of partisan officials (often working in boards  
26 composed of representatives of each major political party). Unfortunately, the risk of partisanship  
27 in election administration is exacerbated when an elected official aligned with a political party  
28 exercises discretionary control over aspects of the voting process.

29 States therefore ought to take seriously the need to minimize the potential for partisan  
30 influence in election processes. States that continue to rely on partisan elected officials as election  
31 administrators should implement other procedures to check the ability of these officials to use their  
32 position for the benefit of a specific party (or candidate or issue). For instance, at least in some  
33 states or political cultures this concern can be moderated somewhat by processes that involve  
34



1 multiple political parties jointly overseeing election administration, as when canvassing boards  
2 composed of representatives of all major or relevant political parties work together to certify  
3 election results, or when changes to election laws receive bipartisan legislative support or reflect  
4 widely agreed-upon best practices. More generally, the ideal of avoiding partisanship in all aspects  
5 of election administration simply must be recognized and promoted as a foundational principle.

6 Transparency in election administration is another important safeguard against partisan  
7 manipulation. A transparent process allows and invites the public to observe both the process by  
8 which the rules and procedures of election administration are structured, and how those rules and  
9 procedures are implemented.

10 Decisions about how to structure early in-person voting and open absentee voting, though  
11 they represent only a portion of the election process, also must be governed by this foundational  
12 principle of avoiding partisanship in election administration. Even if this ideal of nonpartisanship  
13 is largely unenforceable except through additional specific provisions, it nonetheless remains an  
14 overarching aspiration worthy of explicit recognition. Structural decisions should be shaped by a  
15 desire to facilitate political participation in a manner that ensures public confidence in the integrity  
16 of the outcome. The remaining principles of this Part provide some reference points for achieving  
17 this result.

18 *b. Undue burden.* In recent years, voters in many locations have confronted polling-place  
19 lines of several hours or more. Significant polling-place delays can discourage any voter, but they  
20 are especially problematic because of their disproportionate impact on voters with limited free  
21 time or little schedule flexibility, whom they may effectively disenfranchise.

22 Long voting lines can be the result of various factors, including lengthy ballots,  
23 misallocations of polling equipment among various polling places, equipment failures, poll-  
24 worker problems, voter ignorance, and higher-than-expected voter turnout. Many of these factors  
25 are amenable to advance planning and management in order to protect the ability of voters to  
26 exercise their fundamental voting rights without burdensome delay or other difficulty.  
27 Accordingly, this Section establishes the aspirational principle that a sound election system  
28 ordinarily will not require voters to wait longer than 30 minutes to vote, whether on Election Day  
29 or during a period of early in-person voting. (The failure to meet this aspirational principle, without  
30 more, is not intended to create any actionable legal claim.)

31 With respect to Election Day voting, states may find that they can best achieve this goal  
32 not only through the careful deployment of additional equipment and personnel on Election Day,

1 but also through the development of alternatives to Election Day voting. Indeed, open absentee  
2 voting and early in-person voting have both become more common in recent years partly because  
3 of their potential to reduce or eliminate these substantial Election Day waiting times.

4 Election officials typically will face the greatest difficulty meeting this aspirational goal on  
5 the first and last days of the early-voting period, as well as at the beginning and end of Election  
6 Day. Local officials of course should do their best to allocate their resources to minimize waiting  
7 times during all periods of peak demand, including at the ends of the regular- and early-voting  
8 periods, and state officials should ensure that local election officials have the necessary resources  
9 to do so. Sound resource management should include not only reasonable steps to anticipate voter  
10 turnout accurately, including through effective use of the data collected under § 111, but also  
11 efforts to publicize expected and actual wait times at all hours of the voting period, and otherwise  
12 to channel voter turnout into manageable patterns.

13 The principle of avoiding unduly burdening voters is especially relevant to determining the  
14 days and hours of early voting, under § 104, as well as the location(s) where early voting occurs,  
15 under § 105.

16 *c. Applicability to traditional Election Day voting.* Election Day voting also should be  
17 structured to avoid both partisan bias and undue burdens on voters. As the Presidential  
18 Commission on Election Administration recommended in its 2014 final report, the aspirational  
19 principle of eliminating waiting times greater than 30 minutes is fully applicable to Election Day  
20 voting. Indeed, this Section contemplates that early in-person voting and open absentee voting, as  
21 alternatives to Election Day voting, may be desirable in part to help avoid undue Election Day  
22 burdens. Sound resource management, aided by effective collection and use of data, as further  
23 addressed in § 111, can also assist in this regard on Election Day.

#### 24 **REPORTERS' NOTE**

25 Although excessive partisanship in election administration is difficult enough to identify,  
26 let alone to remedy, the problem should be acknowledged. This Section's aspirational principle of  
27 avoiding partisan manipulation of the mechanics of early and absentee voting stops short of some  
28 recent efforts to impose an enforceable nonpartisanship requirement in matters of election  
29 administration, as for instance in Florida's Fair Districts amendment of 2010. That state  
30 constitutional amendment, which provides that Florida's congressional and state legislative  
31 districts are to be drawn without "intent to favor or disfavor a political party," was the basis for a  
32 2015 state supreme court decision invalidating the congressional district map. See *League of*  
33 *Women Voters v. Detzner*, No. SC14-1905 (Fla. July 9, 2015), available at  
34 <http://www.floridasupremecourt.org/decisions/2015/OP-SC14>

1 -1905\_LEAGUE%20OF%20WOMEN%20VOTERS\_JULY09.pdf. In contrast, the ALI's  
2 aspirational principle declares the importance of avoiding partisanship in matters of early and  
3 absentee voting, and then leaves it to legislators, election administrators, and other public officials  
4 to strive to conform to that principle.

5 This Section's adoption of a 30-minute period as a reasonable polling-place waiting time  
6 matches the recommendation concerning Election Day voting of the Presidential Commission on  
7 Election Administration, as contained in its January 2014 final report. See *The American Voting*  
8 *Experience: Report and Recommendations of the Presidential Commission on Election*  
9 *Administration* (2014). The Commission's central task was to address the problem of long lines  
10 that had occurred at scattered polling places in the 2012 presidential election on Election Day itself  
11 (as had also occurred in the 2008 and 2004 presidential elections). See *id.* at 1, 13. As part of  
12 addressing this issue, the Commission undertook first to establish what a reasonable Election Day  
13 wait time was, concluding "that, as a general rule, no voter should have to wait more than half an  
14 hour in order to have an opportunity to vote" on Election Day. *Id.* at 14. The Commission's report  
15 then included a number of recommendations intended to help local jurisdictions reduce waiting  
16 times at polling places to achieve this standard. See *id.* at 36-45.

17 Although the Presidential Commission's focus was on reducing Election Day lines, not on  
18 reducing early-voting waiting times, this Section adopts the same standard for early voting. Of  
19 course, as the Commission noted, longer polling-place waiting times may be more tolerable for  
20 early voters than for Election Day voters, given Election Day voters' relative lack of personal  
21 choice about when to go to the polls, compared to early voters' ability to choose the most  
22 convenient voting opportunity from among a range of possibilities. See *id.* at 56. Nevertheless,  
23 longer waits at the polls also may discourage some potential early voters from voting. Moreover,  
24 there is independent value in having a single standard of a generally acceptable waiting period for  
25 both early and Election Day voting, provided election officials can meet the standard without  
26 inappropriate difficulty.

27 Some local election officials have hesitated to embrace the Commission's 30-minute  
28 standard, largely out of concern that jurisdictions having difficulty meeting the standard would  
29 require additional resources beyond the control of local officials. Their concern has been  
30 heightened by the apprehension that if those resources were not forthcoming, local officials would  
31 bear the brunt of the blame for not meeting the standard. But most jurisdictions already meet this  
32 standard for most voters, and the Commission concluded that the standard should be generally  
33 achievable if the Commission's various recommendations for improving polling-place operations  
34 were adopted. Similar polling-place practices likewise should minimize waiting times at early-  
35 voting locations.

36 Like the principle of avoiding partisan considerations, the 30-minute principle also is  
37 aspirational. It acknowledges that extraordinary situations may sometimes make it difficult to meet  
38 this standard. For instance, the Presidential Commission suggested that an equipment breakdown,  
39 or a full busload of voters arriving en masse at a polling place, could put the 30-minute standard  
40 out of reach for some voters, notwithstanding appropriate polling-place preparation and

1 management. See *id.* at 14. Nevertheless, election authorities should prepare for such  
2 contingencies, and strive to meet the 30-minute standard whenever feasible.  
3

**§ 103. Decision to Adopt Early In-Person Voting or Open Absentee Voting**

States and Local Election Authorities should make voting convenient and accessible while protecting its security and integrity, including by providing voters well-structured alternatives to Election Day voting whenever appropriate. Whether to adopt early in-person voting or open absentee voting (or both) is a policy judgment left to the discretion of each state, subject to the principles described in § 102, any applicable federal laws or requirements, and the state's ability to manage either (or both) of these alternative voting processes effectively, fairly, securely, and with integrity.

**Comment:**

*a. State discretion.* Unique historical, political, and cultural traditions may shape a state's choice of voting methods, including a state's decision whether to allow its voters to use nontraditional methods of voting without appearing at a precinct on Election Day. This Section encourages states to consider alternatives to Election Day voting in order to enable as many voters as possible to participate conveniently by reducing Election Day waiting periods at the polls and by providing additional voting opportunities for voters for whom Election Day voting is difficult or inconvenient. This Section does not address considerations relevant to determining how to structure an absentee-voting process for the much smaller subset of voters who are not able to vote in person on Election Day.

Early in-person voting and open absentee voting both have the potential to further the goal of enabling more voters to vote conveniently, and may also provide other advantages, as described below in Comments *c* and *d*. These nontraditional voting methods also have some disadvantages, including prolonging the voting season, thereby complicating political campaigns and increasing campaign costs; diminishing the virtues of civic participation that can come from gathering at the polls on Election Day; and causing some voters to vote on the basis of incomplete information. In addition, early in-person voting and open absentee voting each has its own specific disadvantages, as also described below in Comments *c* and *d*.

Thus, this Part does not take a position on whether a state should adopt either early in-person voting or open absentee voting. Each state should decide what voting options are most appropriate for it, in light of each state's unique electoral traditions and political culture. Comments *c* and *d* below describe a few specific considerations, which may affect individual states differently.

1           *b. Applicable federal law.* Federal law that applies to the conduct of elections includes  
2 provisions requiring that any voting system used in a federal election “be accessible for individuals  
3 with disabilities,” see 52 U.S.C. § 21081(a)(3), and provisions requiring language assistance in  
4 jurisdictions with sufficiently large groups of voters with limited English proficiency, see 52  
5 U.S.C. § 10503. Each of these types of required accommodation applies to both early in-person  
6 voting and to open absentee voting, and these Principles presume that states offering either early  
7 in-person voting or open absentee voting will incorporate mechanisms to allow the full  
8 participation of voters covered by these provisions.

9           *c. Considerations relevant to early in-person voting.* Early in-person voting obviously  
10 assists voters whose schedules make Election Day voting difficult or inconvenient. In addition, by  
11 providing voters with alternative voting days, early voting can reduce Election Day crowds and  
12 other pressures at the polling place. However, an early-voting option must be designed so that its  
13 days and hours, taken as a whole in conjunction with Election Day voting, provide all types and  
14 classes of voters with substantively equivalent voting opportunities. Accordingly,  
15 §§ 104 through 106 of this Part include principles intended to ensure that a state that chooses to  
16 offer early in-person voting does so fairly, particularly by establishing a variety of voting times  
17 that can accommodate the schedules of the full range of voters. As discussed further in § 104, these  
18 early-voting times should include meaningful amounts of evening and weekend voting hours, in  
19 addition to regular daytime hours.

20           A state considering whether to offer early in-person voting will want to balance its benefits,  
21 in terms of voter convenience and reduced Election Day pressures, with its potential disadvantages.  
22 In addition to the disadvantages that absentee and early in-person voting share, identified in  
23 Comment *a* above, early in-person voting’s additional downsides include: possible increases in  
24 personnel costs to staff the days and hours of early voting, depending on the staffing model used;  
25 the prospect of long lines at early-voting centers; and more opportunities for misconduct  
26 (deliberate or accidental) by election officials charged with conducting the early-voting operations.  
27 Extending the voting period increases the burden of protecting ballots and voting equipment from  
28 tampering or damage. Because early voting produces a significant increase in the interval between  
29 casting and counting votes, a jurisdiction’s chain-of-custody procedures must be especially robust  
30 to safeguard the integrity of those votes during the entire early-voting period.

31           *d. Considerations relevant to open absentee voting.* Like early in-person voting, open  
32 absentee voting also affords voters the convenience of an alternative to Election Day voting, and

1 may thereby also reduce Election Day crowds. In addition, open absentee voting allows voters to  
2 vote from home, at a chosen hour, and without time pressure. These circumstances may make it  
3 easier for many voters to consider their choices carefully, and even to seek additional background  
4 information while they are in the midst of marking their ballot. Absentee voting may also be  
5 cheaper and more efficient for governments to administer than traditional in-person voting. Yet  
6 because absentee voting happens away from the supervision of election officials, it also has several  
7 potential downsides compared to in-person voting. These downsides, summarized in the following  
8 paragraphs, are most pronounced for absentee voters who could have voted in person if they  
9 wished, rather than for voters for whom absentee voting is their only reasonable voting option. In  
10 the latter case, the necessity of an absentee-voting option will usually trump the disadvantages.  
11 But when what is at issue—as in this Part—is open absentee voting available for convenience to  
12 all voters, the question of how to weigh its advantages and disadvantages is likely to be more  
13 difficult. For states that decide to offer open absentee voting, §§ 107 through 110 of this Part  
14 provide guidance for maximizing its benefits while minimizing its drawbacks.

15 One downside of open absentee voting involves three categories of “lost” votes. First, an  
16 absentee ballot may simply be lost in the mail or delayed beyond the deadline, thereby completely  
17 disenfranchising the voter who cast it. Second, in every election, local election officials receive a  
18 number of voted absentee ballots that are ineligible for counting because voters have failed to  
19 properly complete the transmission envelope (or authentication sleeve), whether by forgetting to  
20 sign the transmission envelope, omitting other information necessary to confirm the voter’s  
21 identity, providing incorrect information, or failing to have the ballot properly witnessed. Although  
22 states can and should reduce these lost votes by developing mechanisms to permit voters to correct  
23 these absentee-voting errors, as § 110(g) provides, these particular errors simply do not occur when  
24 a voter appears in person before an election official to receive and cast a ballot, whether at an  
25 Election Day polling place or at an early-voting location. Any problems determining the eligibility  
26 of an in-person voter can be resolved on the spot, without the possibility of a lost vote through the  
27 voter’s clerical error in completing an absentee-ballot-transmission envelope. Once an in-person  
28 voter is allowed to vote, the voter generally can be confident that the ballot will be counted (except  
29 in the case of a voter required to cast a provisional ballot rather than a regular ballot).

30 Third, absentee ballots are much more susceptible to lost votes as a result of “residual  
31 voting” problems. These are problems pertaining to the marking of the ballot itself. When an in-  
32 person voting process is well structured, in-person voters are more able to identify whether they

1 have accidentally voted for too many candidates in a particular race (“overvoted”), as well as  
2 whether they have unintentionally neglected to make a choice in any race (“undervoted”).  
3 Electronic voting machines and optical scanning equipment used at the moment the voter submits  
4 the marked ballot can alert in-person voters to these “residual voting” problems before a voter  
5 completes the voting process, thereby allowing the voter to correct the mistakes. In contrast,  
6 absentee balloting does not permit correction of residual voting errors (something that is true even  
7 if, as § 110(g) provides, the absentee-voting process gives absentee voters a subsequent  
8 opportunity to correct clerical errors on their transmission envelopes). This problem is also present  
9 when absentee voters drop off their ballots at a designated location rather than mailing them; the  
10 residual voting problem would not arise, however, with the use of technology permitting voters to  
11 mark their ballots at home and then insert or upload them in a vote-tabulating machine at a  
12 designated polling site, provided the tabulating machine was set up to alert voters to overvotes and  
13 undervotes.

14 In addition, absentee voting poses a greater risk than in-person voting of voter fraud, as  
15 well as undue influence. First, because of the lack of voting privacy, an absentee voter can be  
16 coerced or pressured into voting the ballot in a certain way, whether through intimidation, other  
17 undue influence, or outright vote buying. In contrast, in-person voting, because of ballot secrecy,  
18 grants each voter the privacy to cast a ballot without any unwanted external pressure or influence.  
19 Requirements that an absentee voter obtain a witness to the proper casting of the ballot, or  
20 personally affirm that the votes have not been procured through fraud or undue influence, may  
21 reduce but cannot eliminate the potential for this type of fraud and undue influence. However, as  
22 discussed in the Comments to § 109, witness requirements may undercut the convenience that  
23 open absentee voting is designed to provide.

24 Second, an absentee ballot can be misdirected to and cast by someone other than the  
25 legitimate voter for whom the ballot is intended. This second type of voter fraud is most troubling  
26 when someone is able to submit multiple false absentee-ballot applications on behalf of a number  
27 of unknowing voters, or otherwise to come into possession of a number of absentee ballots. Careful  
28 processing of absentee-ballot applications and returned absentee ballots may help reduce but  
29 cannot eliminate the incidence of this second type of fraud.

30 *e. Applicability to traditional Election Day voting.* The principle that states should make  
31 voting convenient and accessible while protecting its security and integrity, though for purposes



1 of this Part specifically intended to foster the development of sound alternatives to Election Day  
2 voting, of course is also generally applicable to all aspects of the voting process.

### 3 **REPORTERS' NOTE**

4 Since 1969, when the Supreme Court resolved the case of *McDonald v. Board of Election*  
5 *Commissioners*, settled law has been that a voter does not have a constitutional right to an absentee  
6 ballot. 394 U.S. 802 (1969). Instead, absentee voting has been understood to be an accommodation  
7 that states could choose to provide for selected categories of voters. Likewise, the questions of  
8 whether to offer and how to structure early in-person voting have also been presumed to be matters  
9 of state policy, not of federal law.

10 This project continues to presume state discretion in these matters, and to presume that  
11 federal law will impose no obligation for states to provide a certain form or amount of either early  
12 or absentee voting. However, this presumption has been challenged in several recent cases  
13 involving reductions of the period of early voting. Most significantly, in a set of companion cases  
14 in North Carolina, plaintiffs challenged a number of changes to the state's voting laws that the  
15 state legislature enacted immediately after the Supreme Court's 2013 decision in *Shelby County*  
16 *v. Holder* (570 U.S. 529) relieved North Carolina of the requirement that it receive federal pre-  
17 clearance of any change to its voting processes. Among these 2013 changes was a reduction of the  
18 period of early voting from 17 days to 10 days. In 2016, the Fourth Circuit invalidated the reduction  
19 after concluding that "the North Carolina General Assembly enacted the challenged provisions of  
20 the law with [racially] discriminatory intent," in violation of the Equal Protection Clause and  
21 section 2 of the Voting Rights Act. *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir.  
22 2016).

23 Plaintiffs in an Ohio case similarly argued that the state's reduction of the period of early  
24 voting from 35 days in previous elections to 28 days for the 2014 election violated both Equal  
25 Protection and section 2 of the Voting Rights Act. At the preliminary-injunction stage, the claim  
26 was initially successful at the district-court and circuit-court levels, see *NAACP v. Husted*, 768  
27 F.3d 524 (6th Cir. 2014), but the decision was vacated as moot after the Supreme Court stayed the  
28 preliminary injunction, see *Husted v. NAACP*, 135 S. Ct. 42 (2014). Eventually the parties reached  
29 a settlement providing for 29 days and uniform statewide hours of early voting, including 12 hours  
30 of weekend voting on the final two weekends before a presidential election. A subsequent suit by  
31 different plaintiffs raising a similar challenge to Ohio's reduction of early voting from 35 days to  
32 28 days also initially succeeded at the district-court level, but was reversed by the Sixth Circuit in  
33 2016. See *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

34 Future judicial reviews of reductions in early voting are likely to turn on specific facts,  
35 with the determination of legality under either the Equal Protection Clause or the Voting Rights  
36 Act depending on the perceived reason for the reduction, as evidenced in the difference between  
37 the North Carolina and Ohio cases described above. If a state scaled back early voting in  
38 conformance with a set of best practices or neutral guidelines (potentially including these  
39 Principles), a court might be reluctant to intrude upon state discretion, even if it would be prepared  
40 to invalidate a comparable reduction apparently done for a racial or partisan motive. Meanwhile,  
41 whether to offer early-voting options in the first instance is likely to remain a matter of state policy,  
42 unless a plaintiff can show that the limited availability of voting on Election Day (for instance  
43 because of resource constraints associated with operating polling places) amounts to a form of  
44 disenfranchisement, cf. *League of Women Voters v. Ohio*, 548 F.3d 463 (6th Cir. 2008), or the  
45 Supreme Court were to revisit its absentee-voting jurisprudence in light of the increasingly

1 widespread use of non-precinct voting. Assuming that a state offers robust voting opportunities on  
2 Election Day, of the type historically understood to be constitutionally sufficient, a state would not  
3 be constitutionally obligated to add early voting.

4 This Principles project thus presumes that states will retain the discretion to decide whether  
5 to adopt either early in-person voting or open absentee voting, but takes no position on the  
6 advisability of either option for any given state.

7 Recent trends, however, have run strongly in favor of both of these options. Thirty-five  
8 U.S. jurisdictions now allow early in-person voting or open absentee voting for at least some  
9 elections, as a supplement to their traditional in-person Election Day voting: Twenty-seven states  
10 and the District of Columbia allow both early in-person voting and open absentee voting, while an  
11 additional seven states allow early in-person voting but not open absentee voting. (In addition, as  
12 noted in the Introductory Note on Scope, Washington, Oregon, and Colorado now vote entirely by  
13 mail, as is also true for some purely local elections in other states). See National Conference of  
14 State Legislatures, *Absentee and Early Voting*, <http://www.ncsl.org/legislatures>  
15 [-elections/elections/absentee-and-early-voting.aspx](http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx) (August 17, 2017). However, in 2014 voters  
16 in Connecticut and Missouri rejected ballot measures that also would have paved the way for early  
17 voting. For a more complete history of the development of early voting and absentee voting, see,  
18 e.g., Paul Gronke & Eva Galanes-Rosenbaum, *The Growth of Early and Non-Precinct Place*  
19 *Balloting: When, Why, and Prospects for the Future*, in AMERICA VOTES! A GUIDE TO ELECTION  
20 LAW AND VOTING RIGHTS 261, 268-272 (Ben Griffith ed., 2008); Paul Gronke, *Early Voting*  
21 *Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 423-424 (2008); JOHN C.  
22 FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS (2006).

23 Informed opinion also increasingly supports these nontraditional voting options. For  
24 instance, in its 2014 report, the Presidential Commission on Election Administration encouraged  
25 states to adopt methods of open absentee voting and early voting. See *The American Voting*  
26 *Experience: Report and Recommendations of the Presidential Commission on Election*  
27 *Administration* (“PCEA Report”) 54-58 (2014). The Lawyers’ Committee for Civil Rights also has  
28 spoken in favor of both of these options, including in its presentation to the Presidential  
29 Commission. See Lawyers’ Committee for Civil Rights Under Law, *Recommendations and Case*  
30 *Studies Presented to the Presidential Commission on Election Administration* 4, 14 (2013),  
31 available at [http://web.mit.edu/supportthevoter/www/files/2013/06/Recommendations-to-the-](http://web.mit.edu/supportthevoter/www/files/2013/06/Recommendations-to-the-Presidential-Commission-on-Election-Administration.pdf)  
32 [Presidential-Commission-on-Election-Administration.pdf](http://web.mit.edu/supportthevoter/www/files/2013/06/Recommendations-to-the-Presidential-Commission-on-Election-Administration.pdf).

33 . Also in 2014, the Bipartisan Policy Center’s Commission on Political Reform similarly  
34 encouraged states to adopt early voting. See Bipartisan Policy Center’s Commission on Political  
35 Reform, *Governing in a Polarized America: A Bipartisan Blueprint to Strengthen Our Democracy*  
36 42-43 (2014), available at [http://bipartisanpolicy.org/library/governing-polarized-america-](http://bipartisanpolicy.org/library/governing-polarized-america-bipartisan-blueprint-strengthen)  
37 [bipartisan-blueprint-strengthen](http://bipartisanpolicy.org/library/governing-polarized-america-bipartisan-blueprint-strengthen)  
38 [-our-democracy/](http://bipartisanpolicy.org/library/governing-polarized-america-bipartisan-blueprint-strengthen); see also Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice  
39 (Report, Oct. 31, 2013), at 5-7, available at  
40 [https://www.brennancenter.org/sites/default/files/publications/VotingReport\\_Web.pdf](https://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf)  
41 (promoting advantages of early in-person voting).

1           It may be unrealistic, however, to expect these options to increase voter participation, rather  
2 than simply to enhance voting convenience. To date, empirical evidence has been mixed about  
3 whether expanded opportunities for early voting and open absentee voting increase turnout.  
4 Although one literature review in 2008 concluded that “convenience voting has a small but  
5 statistically significant impact on turnout, with most estimates of the increase in the 2% -4% range,”  
6 this figure apparently was driven mostly by turnout increases in jurisdictions conducting elections  
7 entirely by mail. See Paul Gronke, Eva Galanes-Rosenbaum, Peter A. Miller & Daniel Toffey,  
8 *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 442-443 (2008); see also Alan S. Gerber,  
9 Gregory A. Huber & Seth J. Hill, *Identifying the Effects of Elections Held All-Mail on Turnout:  
10 Staggered Reform in the Evergreen State*, 1 POL. SCI. RES. & METH. 91 (2012) (finding two percent  
11 to four percent turnout increase as a result of Oregon shifting to all-vote-by-mail elections). Three  
12 of the same authors found no turnout increases from early voting or open absentee voting. See Paul  
13 Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, *Early Voting and Turnout* (2007); see also  
14 Robert M. Stein & Gregory Von Nahme, *Voting at Non-Precinct Polling Places: A Review and  
15 Research Agenda*, 10 ELEC. L.J. 307, 307 (2011) (“few researchers have found that any form of  
16 non-precinct voting has had a significant or large effect on voter turnout”); FORTIER, *supra*, at 40-  
17 45 (summarizing literature on turnout effects of absentee and early voting). Furthermore, one  
18 recent study suggested that robust early voting in some instances “rob[s] Election Day of its  
19 stimulating effects” and results in a net *decrease* in total electoral participation, as more voters  
20 stay away from the polls on Election Day than take advantage of early-voting opportunities. See  
21 Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws,  
22 Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL.  
23 SCI. 95, 108 (2014); but see Michael P. McDonald, Enrijeto Shino & Daniel A. Smith,  
24 *Convenience Voting and Turnout: Reassessing the Effects of Election Reforms* (unpublished  
25 manuscript 2015) (criticizing methodology of Burden, et al., study). Finally, some recent empirical  
26 research suggests that although early voting alone may not increase turnout, at least some states  
27 may achieve modest increases in turnout by increasing the number of early-voting locations. See  
28 Elliott B. Fullmer, *Early Voting: Do More Sites Lead to Higher Turnout?*, 14 ELEC. L.J. 81 (2015).

29           Some earlier studies of the impact of absentee voting by mail also concluded that the  
30 practice generally did not expand the electorate. See Adam J. Berinsky, Nancy Burns & Michael  
31 W. Traugott, *Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Vote-  
32 by-Mail Systems*, 65 PUB. OP. Q. 178, 194 (2001). However, some contrary results have suggested  
33 that absentee voting does increase turnout, but primarily in local elections, with little turnout  
34 effects in presidential elections, for which the turnout ceiling may already have been reached. For  
35 instance, one study comparing California “mail-ballot” precincts with “polling place” precincts  
36 found a slight decrease in voter turnout among precincts in which all voters returned their ballots  
37 by mail in presidential and gubernatorial elections in 2000 and 2002, but a 7.6 percent increase in  
38 turnout in local special elections, which have lower turnout rates to begin with. See Thad Kousser  
39 & Megan Mullin, *Does Voting by Mail Increase Participation? Using Matching to Analyze a  
40 Natural Experiment*, 15 POLITICAL ANALYSIS 428, 441-442 (2007); see also Robert M. Stein &  
41 Patricia A. Garcia-Monet, *Voting Early But Not Often*, 78 SOC. SCI. Q. 657, 665, 669 (1997)

1 (finding early voting to have only “very marginal” effect on turnout in 1992 Texas presidential  
2 election, but predicting greater impact in local elections).

3 While evidence of increased voter turnout from either early or absentee voting is  
4 inconclusive, reliable evidence exists that absentee voting produces lost votes. The Election  
5 Assistance Commission’s 2012 Election Administration and Voting Survey reported that in the  
6 2012 general election, nationwide over 250,000 absentee ballots returned by voters were rejected  
7 by election officials (in addition to close to 700,000 more absentee ballots that were undeliverable  
8 or spoiled). See U.S. Election Assistance Commission, *2012 Election Administration and Voting*  
9 *Survey*, Sept. 2013, at 11, 39 & Table 32, available at  
10 <https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Although the  
11 primary reason ballots were rejected was that they missed the deadline, substantial numbers of  
12 ballots also were rejected because they lacked signatures or contained nonmatching signatures; in  
13 combination, these two categories of signature problems accounted for more rejected ballots than  
14 did missed deadlines. See *id.* at 11, 41-46 & Tables 33a-c. An analysis of the 2008 presidential  
15 election similarly concluded that an estimated 800,000 absentee ballots were rejected nationwide,  
16 amounting to about 2.8 percent of an estimated total of approximately 29 million absentee ballots  
17 returned to election officials for counting. See Charles Stewart III, *Adding Up the Costs and*  
18 *Benefits of Voting By Mail*, 10 ELEC. L.J. 297, 299 (2011); Charles Stewart III, *Losing Votes by*  
19 *Mail (“Losing Votes”)*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 573, 589 (2010).

20 A recent analysis of California absentee voting also concluded that one percent of returned  
21 absentee ballots, representing almost 70,000 voters, went uncounted in the 2012 general election,  
22 and that in the 2010 general and 2014 primary elections close to three percent of returned absentee  
23 ballots were uncounted. See The California Civic Engagement Project, *California’s Uncounted*  
24 *Vote-By-Mail Ballots: Identifying Variation in County Processing*, Sept. 2014, at  
25 [https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-](https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/UCDavisVotebyMailBrief2.pdf)  
26 [files/UCDavisVotebyMailBrief2.pdf](https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/UCDavisVotebyMailBrief2.pdf); see also California Voter Foundation, *Improving*  
27 *California’s Vote-by-Mail Process: A Three-County Study* (Aug. 14, 2014), available at  
28 <http://calvoter.org/issues/votereng/votebymail/study/execsummary.html> (concluding that 0.8  
29 percent of returned absentee ballots went uncounted in three California counties across four  
30 elections). Primary causes again included ballots arriving late, ballots lacking a voter signature,  
31 and ballots bearing a signature determined not to match the voter signature on file. See *id.* Even  
32 when the number of lost absentee ballots is only a fraction of a percent of the total votes cast, in a  
33 close race the lost ballots can easily surpass the margin of victory.

34 For instance, the 2008 Minnesota race for a U.S. Senate seat between Al Franken and Norm  
35 Coleman offers a prime example of the problem of lost absentee ballots, in the context of a margin  
36 of victory completely dwarfed by the number of lost absentee ballots. After a seven-month battle  
37 in state court, which turned primarily on disputes about whether to count approximately 2000  
38 rejected absentee ballots, Franken ultimately won the race by 312 votes. Yet Minnesota election  
39 officials had rejected a total of about 12,000 returned absentee ballots, most of which the  
40 contestants conceded were ineligible for counting under state law. See Edward B. Foley, *The Lake*

1 *Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELEC.L.J. 129, 145-154  
2 (2011).

3 For other descriptions of the problem of lost absentee votes, see, e.g., Pam Fessler, *Want*  
4 *Your Absentee Vote to Count? Don't Make These Mistakes*, National Public Radio, Oct. 22, 2014,  
5 at [http://www.npr.org/2014/10/22/358108606/want-your-absentee-vote-to-count-don't](http://www.npr.org/2014/10/22/358108606/want-your-absentee-vote-to-count-don't-make-these-mistakes)  
6 [-make-these-mistakes](http://www.npr.org/2014/10/22/358108606/want-your-absentee-vote-to-count-don't-make-these-mistakes) (reporting on general problem of lost absentee votes, and quoting director  
7 of California Voter Foundation: "It's absolutely heartbreaking. Because the only thing worse than  
8 people not voting is people trying to vote and having their ballots go uncounted. . . . And most of  
9 these people have no idea that their ballots are not getting counted"); Adam Liptak, *Error and*  
10 *Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at  
11 [http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0)  
12 [-impact-elections.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0) (discussing general problem, and quoting Florida  
13 election official: "The more people you force to vote by mail, the more invalid ballots you will  
14 generate."); Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the*  
15 *Racial Gap in Voided Ballots*, 47 AM. J. POL. SCI. 46, 50 (2003) (reporting that in 2000 election in  
16 Louisiana, absentee ballots accounted for four percent of total turnout but 31 percent of voided  
17 ballots).

18 In addition to the problem of returned but uncountable absentee ballots, many more  
19 absentee ballots are sent to voters but never returned. For instance, in the 2012 presidential  
20 election, of the roughly 33 million absentee ballots sent out to voters, almost 5.4 million ballots  
21 were not returned. See U.S. Election Assistance Commission, *2012 Election Administration and*  
22 *Voting Survey*, supra, at 10-11, 39 & Table 32. In the 2008 election, an estimated 2.9 million  
23 absentee ballots were sent out but never received back by election officials. See Stewart, *Losing*  
24 *Votes*, supra, at 589. These "lost votes" could occur because (1) the ballot never reached the voter,  
25 (2) the ballot reached the voter but the voter did not attempt to vote and return it, or (3) the voter  
26 voted and attempted to return the ballot but it was never received by election officials. See id. at  
27 582, 590; see also *PCEA Report*, supra, at 58 (describing need for increased safeguards for voting-  
28 by-mail, including online ballot-tracking system, because of various ways ballots can be lost).

29 Unfortunately, it is difficult to determine how many of these lost votes are traceable to each  
30 of the various possible causes, and problems with mail delivery in either direction presumably  
31 cause only a fraction of this total. For the remainder, a voter's choice not to vote an absentee ballot  
32 perhaps should not be treated any differently from a voter's choice to stay away from the polls,  
33 except insofar as a voter's specific request for an absentee ballot indicates that the voter at least  
34 once had some interest in casting a ballot in that particular election. Of course, voters can change  
35 their minds about voting after submitting an absentee-ballot application; yet there must be a  
36 presumption in favor of participation for anyone making the effort to submit the application. Thus,  
37 some significant fraction of these 2.9 million unreturned absentee ballots represents voters whose  
38 reliance on absentee voting resulted in their not casting a counted vote in the 2008 election. Cf. id.  
39 at 590 (describing implausibility of attributing all of these nonreturned ballots to voters' decisions  
40 not to vote, and concluding that regardless of caveats, "the magnitude of the [lost absentee vote]  
41 phenomenon demands attention").

1           In response to the variety of ways that absentee balloting can result in lost votes, in 2016  
2 the Bipartisan Policy Center issued a report with a host of helpful recommendations for voters,  
3 election administrators, legislators, and the U.S. Post Office. See *The New Realities of Voting by*  
4 *Mail in 2016*, June 2016, at [http://cdn.bipartisanpolicy.org/wp](http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Voting-By-Mail.pdf)  
5 [-content/uploads/2016/06/BPC-Voting-By-Mail.pdf](http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Voting-By-Mail.pdf). The Bipartisan Policy Center, in conjunction  
6 with Democracy Works, also is maintaining a website at <http://electionmail.org> where problems  
7 with the mail delivery of absentee ballot materials can be reported and addressed.

8           With respect to the possibility of uncorrected overvoting and undervoting on absentee  
9 ballots, to date no empirical analysis concerning the races at the top of the ticket has found that the  
10 problem is any greater among absentee voters than in-person voters, though studies have been  
11 limited by the lack of detailed data. See Stewart, *Losing Votes*, supra, at 591-592. With respect to  
12 down-ballot races, absentee voting in theory might reduce intentional undervoting, if some  
13 absentee voters are able to take additional time to consider their choices for down-ballot races,  
14 when these same voters might have deliberately skipped these races had they been voting in the  
15 voting booth under time pressure. Nevertheless, in an analysis of the 2008 election in San  
16 Francisco, absentee voters were roughly twice as likely not to return all pages of a multi-page  
17 ballot than were in-person voters. See Stewart, *Losing Votes*, supra, at 593-595. Unfortunately,  
18 data for analysis has again been difficult to obtain.

19           Of course, if in-person voting methods are poorly designed or implemented, well-designed  
20 absentee ballots could provide a superior option. See, e.g., Laurin Frisina, Michael C. Herron,  
21 James Honaker & Jeffrey B. Lewis, *Ballot Formats, Touchscreens, and Undervotes: A Study of*  
22 *the 2006 Midterm Elections in Florida*, 7 ELEC.L.J. 25, 26, 31-32 (2008) (observing that in 2006  
23 race for Florida's 13th congressional district, absentee (optical-scan) ballots had far fewer  
24 undervotes than votes cast in person (both early and on Election Day) on touchscreen machines in  
25 Sarasota County, because touchscreen machines confusingly displayed multiple races on same  
26 screen). But this is an unlikely juxtaposition.

27           Apart from the potential for lost votes, there also is widespread consensus that absentee  
28 voting is much more vulnerable to voting fraud and voter coercion than in-person voting. See  
29 FORTIER, supra, at 53-56 (2006); U.S. ELECTION ASSISTANCE COMMISSION, *ELECTION CRIMES: AN*  
30 *INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 7* (2006); see also *Building*  
31 *Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (Carter-  
32 Baker Commission), Sept. 2005, at 46, available at  
33 <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> (“Absentee ballots remain the largest source  
34 of potential voter fraud.”). For instance, Professor Heather Gerken, an election-law expert, has  
35 noted that “all the evidence of stolen elections involves absentee ballots and the like,” and  
36 Professor Justin Levitt (former Deputy Assistant U.S. Attorney General), also an election-law  
37 expert, has described absentee voting as “a system known to succumb to fraud more frequently.”  
38 See Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012,  
39 at A1, available at [http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&r=0)  
40 [-ballots-could-impact-elections.html?pagewanted=all&r=0](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&r=0) (quoting Professors Gerken and  
41 Levitt). Similarly, Professor Daniel Lowenstein, another election-law expert, observed that

1 “absentee balloting . . . provides far more opportunity for fraud and intimidation than on-site voter  
2 fraud.” See Natasha Khan & Corbin Carson, *New Database of US Voter Fraud Finds No Evidence*  
3 *that Photo ID Laws are Needed*, NBC NEWS, Aug. 11, 2012, at  
4 [http://investigations.nbcnews.com/\\_news/2012/08/11/13236464-new-database-of-us-voter-fraud](http://investigations.nbcnews.com/_news/2012/08/11/13236464-new-database-of-us-voter-fraud)  
5 [-finds-no-evidence-that-photo-id-laws-are-needed](http://investigations.nbcnews.com/_news/2012/08/11/13236464-new-database-of-us-voter-fraud) (quoting Professor Lowenstein). As Judge  
6 Posner has observed, “absentee voting is to voting in person as a take-home exam is to a proctored  
7 one.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

8 Specific examples of fraud and coercion in absentee voting abound, particularly in  
9 municipal elections. For instance, in 2012, a Florida woman was charged with possessing 31  
10 completed absentee ballots and forging an elderly voter’s signature. See Adam Liptak, *supra*. Also  
11 in 2012, Florida election officials detected a computer hacker’s fraudulent attempt to obtain several  
12 thousand absentee ballots through the Miami-Dade elections website. See Patricia Mazzei, *The*  
13 *Case of the Phantom Ballots: An Electoral Whodunit*, MIAMI HERALD, Feb. 23, 2013, at  
14 <http://www.miamiherald.com/news/politics-government/article1947622.html>. In 2005, the Detroit  
15 City Clerk ran an “ambassador” program in which emissaries of the Clerk’s office, dispatched to  
16 the residences of absentee voters ostensibly to assist them with the voting process, were observed  
17 encouraging voters to vote for specific candidates, including the Clerk. See *Taylor v. Currie*, 743  
18 N.W.2d 571, 575-576 (Mich. Ct. App. 2007); STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD  
19 B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN*  
20 *STATES* 97 (2007). In the Miami mayoral race in 1997, a Florida appellate court invalidated all  
21 absentee ballots on the basis that a large number of ballots favoring the apparent victor had been  
22 cast fraudulently. See *In re Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997*  
23 *Election for Miami, Fla.*, 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998). In a Georgia county  
24 commissioner’s race in 1996, “supporters on both sides openly bid against each other to buy  
25 absentee votes,” among other absentee-balloting fraud. *United States v. McCranie*, 169 F.3d 723,  
26 726 (11th Cir. 1999).

27 A systematic investigation of voter fraud conducted by News21, as part of the Carnegie-  
28 Knight Initiative on the Future of Journalism Education, found 491 reported cases of absentee-  
29 voting fraud since 2000 (compared to 10 cases of in-person voter-impersonation fraud). See Khan  
30 & Carson, *supra*. Additional examples of improper influence or fraud in absentee voting include  
31 *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1206 (Ill. App. Ct. 2004) (describing candidate’s  
32 improper “target[ing] [of] elderly individuals in an effort to persuade or influence them into voting  
33 for [candidate],” “punch[ing] the ballots for voters,” observing “how they cast their ballots and  
34 rendering their ability to vote in secret null,” and “mail[ing] most of the ballots in violation of the  
35 Election Code”), and *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004) (affirming the trial  
36 court’s findings that “pervasive fraud” had “perverted the absentee voting process” and “subjected  
37 the naïve, the neophytes, the infirm and the needy to unscrupulous election tactics”).

38 Given the instances of absentee-voting fraud, states ought to be concerned about the risks  
39 of absentee ballots falling into the wrong hands. A number of the principles of §§ 107-110 of this  
40 Part are designed to help reduce these risks.

1 As a final note, though absentee voting is typically viewed as cheaper to administer than  
2 in-person voting, at least some jurisdictions report that early in-person voting is cheaper than  
3 absentee voting. See James Nord, *Most States Have Both Early and No-Excuse Absentee Balloting,  
4 But Not Minnesota*, MINNPOST.COM, June 17, 2013, at [#### 14 § 104. Days and Hours of Early In-Person Voting](http://www.minnpost.com/effective-<br/>5 democracy/2013/06/most-states-have-both-early-and-no-excuse-absentee-balloting-not-minneso-<br/>6 (reporting cost estimates of Ramsey County and Blue Earth County Elections Managers). The<br/>7 separate question of whether early in-person voting is cheaper than traditional polling-place voting<br/>8 receives mixed answers from election officials. See Diana Kasdan, <i>Early Voting: What Works,</i><br/>9 <i>The Brennan Center for Justice</i> (Report, Oct. 31, 2013), at 8. However, careful empirical studies<br/>10 of the financial effects of early in-person voting and open absentee voting have not been done. Cf.<br/>11 Gronke, et al., <i>Convenience Voting</i>, supra, at 448-449 (quoting election administration expert Thad<br/>12 Hall as saying, “The costs of elections has been referred to as the ‘holy grail’ of election<br/>13 administration research because so little is known about the subject.”).</p></div><div data-bbox=)

15 (a) For a regular federal, statewide, or local election, and for a run-off or  
16 special election for either a federal office or a statewide office, a uniform statewide  
17 period of early in-person voting should begin by the 10th calendar day before Election  
18 Day, and should continue daily through the second calendar day before Election Day.

19 (b) For a run-off or special election not covered in subsection (a), as soon as is  
20 practicable after the offices to be decided are fixed, the state’s Chief Elections Officer,  
21 in consultation with Local Election Authorities, should establish the days of a uniform  
22 period of early in-person voting, to include the final weekend before Election Day.

23 (c) For each day of a uniform period of early in-person voting established  
24 under subsection (a) or (b), the state’s Chief Elections Officer, in consultation with  
25 Local Election Authorities, should establish and publicize in advance the hours  
26 during which voters in each local election jurisdiction may participate in early voting.  
27 These hours may vary from local election jurisdiction to local election jurisdiction,  
28 according to the following principles consistently applied throughout the state:

29 (1) The specific hours of early voting for a given local election  
30 jurisdiction should reasonably accommodate the daily schedules of the voters  
31 in that jurisdiction, including where appropriate by providing weekday early-  
32 voting opportunities outside of regular business hours, as well as weekend  
33 early-voting hours, for voters for whom early voting during regular business  
34 hours is difficult.  
35



1                   **(2) In local election jurisdictions serving urbanized areas (as classified**  
2                   **by the U.S. Census Bureau), the specific hours of early voting should include**  
3                   **a substantial amount of weekday early-voting hours outside of regular**  
4                   **business hours, and a meaningful amount of weekend early-voting hours on**  
5                   **each weekend day.**

6                   **(3) The total number of hours of early in-person voting, and the**  
7                   **distribution of those hours, should be designed to ensure compliance with the**  
8                   **principles of § 102.**

9                   **(4) Local election jurisdictions should avoid unnecessary variation in**  
10                  **their early-voting hours from day to day during the early-voting period.**

11                  **(5) In any statewide election, variations among local election**  
12                  **jurisdictions in the number of hours available for early in-person voting**  
13                  **should be designed to provide all voters in the state, regardless of locality,**  
14                  **substantively equivalent opportunities to cast a ballot through early in-person**  
15                  **voting, with the recognition that this equivalence is not necessarily achieved**  
16                  **through an equal number of hours.**

17                  **(d) On all days of early in-person voting, a voter who is waiting in line to vote**  
18                  **at an early in-person voting location at the time designated as the end of that day's**  
19                  **period of voting hours should be allowed to vote that day.**

20 **Comment:**

21                  *a. Applicability to different types of elections.* The minimum period of early in-person  
22 voting specified in subsection (a) applies to: (1) all regular primary elections and regular general  
23 elections for all federal, statewide, and local offices or issues; and (2) any run-off election or  
24 special election for a federal or statewide office. Subsection (b) permits the state's Chief Elections  
25 Officer to depart from the minimum period of subsection (a) for run-off and special elections for  
26 local offices, including run-off or special elections for seats in the state legislature. The Chief  
27 Elections Officer may establish a uniform period of early in-person voting for each of the elections  
28 covered under subsection (b) on an election-by-election basis, taking into account the  
29 circumstances of the particular election as well as resource constraints; this subsection does not  
30 require that the Chief Elections Officer specify the same uniform period for every election covered  
31 under the subsection.

1           *b. Federal law and early-voting periods.* Some recent litigation in federal courts, invoking  
2 both the Equal Protection Clause and the Voting Rights Act, has sought to establish a right under  
3 federal law to certain periods of early voting, or at least a right that such periods not be shortened  
4 without cause after having once been adopted. (See the Reporters' Note to § 103.) But until  
5 comparable claims are definitively resolved otherwise, this Section will assume that federal law  
6 does not impose one standard for how much early voting a state must provide (assuming the state  
7 has opted to permit any early voting), and that instead this is a policy matter for the state to decide.  
8 This Section further recognizes that this policy choice is not amenable to a one-size-fits-all policy  
9 recommendation, but, as with the choice of whether to offer early voting at all, also will implicate  
10 different concerns in different states as a result of culture, history, and demographics. Nevertheless,  
11 this Section identifies several principles that should guide a state's structuring of its early-voting  
12 period.

13           *c. Policy preferences influencing early-voting period.* As mentioned in Comment *a* to  
14 § 103, one downside of early in-person voting (as well as of absentee voting) is that many early  
15 voters will cast their ballots without the benefit of late-breaking news and information about  
16 candidates and issues. The longer the early (or absentee) voting period, the greater the potential  
17 information gap between early (or absentee) voters and Election Day voters. A prolonged early-  
18 voting period therefore is undesirable (as also is a prolonged period of open absentee voting, which  
19 similarly encourages voters to cast their absentee ballots well before Election Day). At the same  
20 time, the early in-person voting period needs to be long enough to provide a critical mass of voters  
21 with a meaningful alternative to Election Day voting. Early voting also should be structured to  
22 accommodate the schedules of the full range of voters, and not in a way that provides additional  
23 convenience to only some subset of the electorate. For some voters, it may suffice to have the  
24 alternative of several additional weekdays on which to vote. But for other voters, the only  
25 meaningful alternative may be to have the opportunity to vote on weekends. The period from the  
26 10th day through the second day before a typical Tuesday election therefore is an appropriate  
27 period because it includes two full weekends and five weekdays, without extending too far in  
28 advance of Election Day.

29           Although a prolonged period of early voting may not be desirable, this Section takes no  
30 position on the ideal number of early-voting days, nor does it specify an outer limit before which  
31 date it is too early to start early voting. States that wish to extend early in-person voting earlier  
32 than the 10th day before Election Day should consider the trade-offs in doing so. In addition to the

1 information gap described above, these trade-offs also include increased costs to local election  
2 jurisdictions, as well as making it more difficult for candidates to introduce themselves to voters  
3 in a timely fashion and other complications to the campaign cycle, which can lead to increased  
4 expenses for candidates. But for states that also offer open absentee voting, another relevant  
5 consideration, which could support a longer period of early voting, is to align the period of absentee  
6 voting with the period of early in-person voting. By providing early in-person opportunities as  
7 soon as absentee voting is available, states with both options would enable the earliest voters to  
8 take advantage of the increased reliability of in-person voting, rather than offering only the  
9 absentee-voting option to those who are not willing or able to wait until a later date when a shorter  
10 period of early voting begins.

11       This Section's prescribed early-voting period does not include the Monday before Election  
12 Day so that election officials will have a full day to transition from early voting to precinct voting.  
13 Though some election officials have expressed an interest in having two full days (or longer) for  
14 this transition, many have indicated that the transition work can be accomplished in one day (and  
15 indeed early voting in a number of states already occurs even on the final Monday before Election  
16 Day). To the extent that some jurisdictions today are genuinely unable to complete this transition  
17 work in one day, improvements in the technology of election administration will likely make it  
18 easier and faster in the future. Moreover, including the final weekend in the period of early voting  
19 is valuable for several reasons. For those voters for whom a weekend voting option is important,  
20 the last weekend permits them to vote based on information much more contemporaneous with the  
21 information available to Election Day voters, compared to the information available if their only  
22 weekend voting option is nine or 10 days before the election. Voter interest in final-weekend voting  
23 is confirmed by high voter turnout on these days in those jurisdictions in which it has been offered.  
24 Excluding the final Sunday from the early-voting period would be likely both to increase voter  
25 confusion about early-voting opportunities and also to reduce the effectiveness of early voting in  
26 easing Election Day crowds.

27       *d. Policy preferences influencing early-voting hours.* While it is important, both for  
28 purposes of fundamental fairness and for purposes of voter awareness, for a state to establish a  
29 uniform *period* of early in-person voting, subsection (c) reflects the view that providing voters  
30 with equal access to early-voting opportunities can be accomplished without requiring equal *hours*  
31 of early voting at every location. A number of election officials and administrators have expressed  
32 the view that they can better serve the needs of their local voters by retaining some flexibility in

1 when they must staff an early-voting location, noting in particular that the needs of voters in urban  
2 and suburban areas can be very different from the needs of voters in rural areas. Subsection (c)  
3 therefore offers this flexibility, with some constraints to ensure that early voting provides a  
4 meaningful alternative to Election Day voting and that the total hours of early voting (in  
5 combination with the number and placement of early-voting locations, as governed by § 105)  
6 suffice to meet demand. This Section provides that state election officials should work with Local  
7 Election Authorities to structure specific early-voting hours to meet the needs of the voters that  
8 each Local Election Authority serves. Subsection (c)(2) further provides that specifically in urban  
9 and suburban jurisdictions (areas the U.S. Census Bureau classifies as “urbanized”), early-voting  
10 hours should include ample early-morning, evening, and weekend voting opportunities. At least  
11 under current voting processes and systems, these densely populated jurisdictions should offer  
12 voters a minimum of six hours of voting on each weekday of early voting, including substantial  
13 numbers of hours outside regular business hours, and a minimum of 12 total hours of voting during  
14 each weekend of early voting, with at least four hours of voting on each weekend day. State  
15 oversight of this process should promote similarity among similarly situated local election  
16 jurisdictions, while still permitting appropriate local variation.

17 Of course, a state could choose to mandate uniform hours of early voting. But the principle  
18 specified in subsection (c) seeks to generate a robust system of early voting without mandating a  
19 one-size-fits-all approach that could burden some Local Election Authorities, especially in rural  
20 areas, or else underserve urban and suburban voters. In large population centers where more voters  
21 must be accommodated, Local Election Authorities may offer more early-voting hours. Local  
22 Election Authorities also may offer more early-voting hours during general elections than during  
23 primary elections, or during presidential elections than during other elections, because of the  
24 greater number of voters who tend to participate in these elections. Consistent with the principle  
25 of § 102(b), the precise hours should be set so that the resources of a Local Election Authority are  
26 effectively used to provide voters with meaningful alternatives to Election Day voting and spare  
27 voters from burdensome waiting times. Election officials also should ensure that early-voting  
28 hours are well-publicized.

29 *e. Applicability to traditional Election Day voting.* The hours of Election Day voting should  
30 also be well-publicized, but should be uniform throughout the state, in contrast to the flexibility  
31 this Section offers to set early-voting hours to meet the needs of local jurisdictions. The principle  
32 that voters who are waiting to vote at their polling place at the time the polls are scheduled to close

1 are permitted to cast their ballot after the closing time is already universally recognized on Election  
2 Day.

### 5 REPORTERS' NOTE

6 Of the 35 jurisdictions that currently offer some amount of early in-person voting, at least  
7 13 (Alaska, Arkansas, California, D.C., Indiana, Iowa, Kansas, Maine, Minnesota, Nebraska,  
8 Oklahoma, Vermont, and Wyoming) have statutes that permit early voting to occur on the day  
9 before Election Day, at least for general elections. Meanwhile, in 2012, 2014, and 2016, Ohio also  
10 offered early in-person voting on the day before Election Day, but did so as a result of court order,  
11 rather than pursuant to state statute. See *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir.  
12 2012); Ohio Secretary of State, Directive 2014-30, Sept. 29, 2014. (In 2008 and 2010, Ohio also  
13 offered early in-person voting on the last weekend before the election, at least in some localities  
14 within the state.) In 2015, Ohio entered into a consent decree that includes a commitment to offer  
15 early voting on the weekend and Monday before Election Day for all elections through 2018. Three  
16 other states with early voting on the Monday before Election Day (Arkansas, Minnesota, and  
17 Oklahoma) do not have early-voting hours on the preceding Sunday. Six other early-voting states  
18 currently provide for an end to early voting on the final Saturday (Florida, Hawaii, Illinois, New  
19 Mexico, North Carolina, and West Virginia), while seven states (Arizona, Georgia, Idaho,  
20 Massachusetts, Texas, Utah, and Wisconsin) end early voting on the final Friday. In several states,  
21 Local Election Authorities decide when to conduct early voting. See *Vote.org, Early Voting*  
22 *Calendar*, <https://www.vote.org/early-voting-calendar/> (Jan. 11, 2018); National Conference of  
23 State Legislatures, *Absentee and Early Voting*, [http://www.ncsl.org/legislatures-](http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx)  
24 *elections/elections/absentee-and-early-voting.aspx* (Aug. 17, 2017).

25 Because early in-person voting generally occurs in large, multi-precinct early-voting  
26 centers (as discussed in § 105), rather than in individual voting precincts, election officials will  
27 often require some time to transition between early voting and Election Day voting. The amount  
28 of time necessary for this transition will vary depending on the size of the election jurisdiction, the  
29 voting systems in use, the number of early-voting centers, the methods for tracking registered  
30 voters, the staff available, and other factors. Nevertheless, this Section reflects the view that a state  
31 that chooses to implement early voting should be able to complete this transition work in one day,  
32 the Monday before Election Day. To the extent that this is not yet achievable for a particular  
33 jurisdiction, improvements in record-keeping processes and software, as well as in other voting-  
34 related systems and technology, are likely in the near future to reduce the required transition time,  
35 so that a one-day transition will become increasingly achievable for future elections (perhaps even  
36 to the point that every jurisdiction choosing to offer early voting could allow it to continue through  
37 the day before Election Day, as a number of early-voting states already do).

38 According to the Presidential Commission on Election Administration, the average period  
39 of early voting (among states that offer it) is 19 days; however, there is “considerable variation.”  
40 See PCEA Report, *supra*, at 56. Vermont, the earliest state, permits early voting to begin 45 days

1 before Election Day. See Vermont Secretary of State, *Absentee Voting*, at  
2 <https://www.sec.state.vt.us/elections/voters/absentee-voting.aspx> (last updated Feb. 13, 2018).  
3 Meanwhile, the final report of the Bipartisan Policy Center’s Commission on Political Reform  
4 recommended that all states provide seven to 10 days of early voting, see Bipartisan Policy  
5 Center’s Commission on Political Reform, *Governing in a Polarized America: A Bipartisan*  
6 *Blueprint to Strengthen Our Democracy (“Bipartisan Blueprint”)* 42-43 (2014); while a 2013  
7 report from the Brennan Center recommended two weeks of early voting, see Diana Kasdan, *Early*  
8 *Voting: What Works*, The Brennan Center for Justice (Report, Oct. 31, 2013), at 12. The  
9 Commission on Political Reform also recommended that early voting be offered on all seven days  
10 of the week. See *Bipartisan Blueprint*, supra, at 42; see also Kasdan, supra, at 12 (noting that eight  
11 of nine states with the highest early-voting turnout in the last two presidential elections held  
12 weekend early voting).

13 While the principles of this Section call for an early-voting period of at least 10 days, some  
14 observers have recommended that the early-voting period be *no longer* than 10 days. See, e.g.,  
15 JOHN FORTIER, *ABSENTEE AND EARLY VOTING* 75 (2006). A primary reason for a shorter early-  
16 voting period is to preserve greater uniformity in the information that voters use to make their  
17 choice, rather than to have larger information disparities across time. See, e.g., Fiona Stokes, *Early*  
18 *Voting Put on Hold on St. Croix*, V.I. DAILY NEWS, Oct. 27, 2014, available at  
19 <https://www.highbeam.com/doc/1P2-37325625.html> (discussing problem of striking candidate  
20 from ballot after early voting has begun). Candidates may have greater difficulty introducing  
21 themselves to voters in a timely manner, for instance through candidate debates, forums, rallies,  
22 and advertising, when the voting period extends across many weeks. Some empirical research  
23 confirms that a longer period of pre-Election Day voting can adversely affect election outcomes  
24 because Election Day voters will have additional information not available to some early voters,  
25 including that certain candidates have dropped out. See Marc Meredith & Neil Malhotra,  
26 *Convenience Voting Can Affect Election Outcomes*, 10 ELEC.L.J. 227 (2011). A longer period of  
27 early voting also may impose additional costs on groups formally observing the election, as  
28 provided in § 106(e), who may need to recruit additional polling-place observers to serve  
29 throughout the period. The American Law Institute, however, has not taken a position on the ideal  
30 number of early-voting days.

31 Although the general trend has been an expansion in the availability of early voting, in the  
32 2012 and 2014 election cycles several early-voting states chose to reduce their early-voting  
33 periods. In 2014, for instance, many Florida counties reduced the number of days and hours of  
34 early voting, while increasing the number of early-voting locations. See Aaron Deslatte, *Early-*  
35 *Voting Sites Increase; But Hours, Days Drop*, ORLANDO SENTINEL, Sept. 28, 2014, at  
36 <http://www.orlandosentinel.com/news/politics/os-early-voting-reforms-20140928-story.html>. In  
37 2013, North Carolina also reduced its early-voting days. See League of Women Voters of North  
38 Carolina v. North Carolina, 769 F.3d 224, 230-232 (4th Cir. 2014) (describing enactment of House  
39 Bill 589). In 2012, the Ohio legislature eliminated the final weekend and final Monday of early  
40 voting (the change at the center of the case of Obama for America v. Husted, mentioned above),  
41 but a federal district court issued a preliminary injunction restoring these early voting periods for

1 the 2012 election. See *Obama for America v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff'd*,  
2 697 F.3d 423 (6th Cir. 2012). In June 2014, the district court issued a permanent injunction  
3 requiring Ohio to offer early voting on the final three days before Election Day. See *Obama for*  
4 *America v. Husted*, 2014 WL 2611316 (S.D. Ohio 2014).

5         The Ohio legislature also approved many other changes to election administration before  
6 the 2012 election, including a reduction of the start of early voting from 35 days before Election  
7 Day to 28 days before Election Day. However, after this measure became the subject of a public  
8 referendum, the Ohio legislature repealed it, see Sub. S.B. 295, Ohio Gen. Assembly (2012), and  
9 early voting in 2012 once again began 35 days prior to Election Day, as it had in 2008. In 2014,  
10 the Ohio legislature again reduced the early-voting period from 35 days to 28 days, while the  
11 Secretary of State imposed uniform statewide early-voting hours that in some Ohio counties  
12 resulted in a reduction from previous elections in the available hours of early voting. See Am. S.B.  
13 238, Ohio Gen. Assembly (2014); Ohio Secretary of State, Directive 2014-17, June 17, 2014.

1           Shortly before the November 2014 election, a federal district court issued a preliminary  
2 injunction against enforcing Ohio’s reductions in early-voting opportunities, on the basis that the  
3 reductions were likely to violate both section 2 of the Voting Rights Act and the Constitution’s  
4 Equal Protection Clause. See *NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014). The Sixth  
5 Circuit initially affirmed the district court’s restoration of the 35-day early-voting period. See  
6 *NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014). But on the day before early voting would have  
7 started, the Supreme Court stayed the district court’s preliminary injunction, effectively allowing  
8 the reduced 28-day early-voting period to govern the November 2014 election. See *Husted v.*  
9 *NAACP*, 135 S. Ct. 42 (2014). In response to the stay, the Sixth Circuit then vacated its affirmation  
10 of the preliminary injunction. See *NAACP v. Husted*, Case No. 14-3877, Order, Oct. 1, 2014 (6th  
11 Cir.), available at [http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio53\\_000.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio53_000.pdf).  
12 The request for permanent injunctive relief was eventually settled with an agreement, through  
13 2018, for a uniform statewide four-week period of early-voting days and hours. See *NAACP v.*  
14 *Husted*, Case No. 2:14-CV-404, Settlement Agreement, Apr. 16, 2015 (S.D. Ohio), available at  
15 <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NAACP111-2.pdf>.

16           What *hours* of early voting to offer is a separate question from how many days to provide.  
17 Substantial variation also exists with respect to this characteristic across the jurisdictions now  
18 conducting early voting, with 14 states requiring or permitting Local Election Authorities to offer  
19 early voting outside regular business hours. See Kasdan, *supra*, at 13. However, providing early  
20 voting outside regular business hours is “standard among the states with the highest [early in-  
21 person voting] turnout in the last two presidential elections.” *Id.* Some states (Florida, Georgia,  
22 Illinois, Nevada, New Mexico, North Carolina, Tennessee, Utah) leave the hours to each local  
23 election jurisdiction, while others (Arkansas, D.C., Louisiana) establish uniform statewide hours.  
24 See *id.* at 13-14, 29 n.72.

25           While it is important that the days on which early voting is offered be uniform throughout  
26 a state, in most states it is neither necessary nor cost-effective to require that all local election  
27 jurisdictions provide the same hours of early voting. Cf. *Corning v. Board of Elections of Albany*  
28 *County*, 88 A.D.2d 411 (N.Y. App. Div. 1982) (upholding variation across counties in Primary  
29 Election Day voting hours against Equal Protection challenge two decades before *Bush v. Gore*),  
30 *aff’d*, 57 N.Y.2d 746 (N.Y. 1982). Instead, as long as the variation is consistent with the principle  
31 of subsection (c)(5) that voters in all jurisdictions have substantively equivalent opportunities to  
32 cast a ballot, each local election jurisdiction’s early-voting hours should be set to suit local needs,  
33 and to meet the principle of § 102(b) that waiting times not exceed 30 minutes. In most states,  
34 substantial variation exists in the size of local election jurisdictions, and urban districts with  
35 significantly more voters may require additional hours of early voting to meet demand. Setting a  
36 uniform statewide standard sufficient to accommodate the early-voting needs of large urban or  
37 suburban populations could unreasonably burden rural election jurisdictions. See National  
38 Conference of State Legislatures, *Worlds Apart: Urban and Rural Voting*, THE CANVASS, Oct.  
39 2014, at [http://www.ncsl.org/research/elections-and-campaigns/states-and](http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-september-october-2014.aspx#World%27s%20Apart)  
40 [-election-reform-the-canvass-september-october-2014.aspx#World%27s%20Apart](http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-september-october-2014.aspx#World%27s%20Apart). Accordingly,  
41 early-voting hours should be set primarily to provide substantial equality in voting opportunity



1 between voters, not equality between characteristics of election jurisdictions. See Richard L.  
2 Hasen, *When is Uniformity of People, Not Counties, Appropriate in Election Administration? The*  
3 *Cases of Early and Sunday Voting*, UNIVERSITY OF CHICAGO LEGAL FORUM 4-7 (2016). But within  
4 each local jurisdiction, the established hours should be consistent over multiple days, as much as  
5 is reasonably possible. See Kasdan, *supra*, at 13.

### 7 **§ 105. Locations of Early In-Person Voting**

8 **Local Election Authorities should establish and publicize in advance the voting**  
9 **location(s) where voters in each local election jurisdiction may participate in early in-**  
10 **person voting, according to the following principles:**

11 (a) **Voting locations should have sufficient equipment and staff to avoid**  
12 **waiting times of greater than 30 minutes, consistent with the principle of**  
13 **§ 102(b).**

14 (b) **When appropriate, whether for administrative efficiency, voter**  
15 **convenience, or to advance the principles of § 102, a Local Election Authority**  
16 **should establish multiple voting locations.**

17 (c) **When establishing voting locations other than its regular business**  
18 **office(s), a Local Election Authority should select locations that are easy for**  
19 **voters to reach by their ordinary means of transportation without long travel**  
20 **times.**

21 (d) **Voting locations should be accessible and in compliance with the**  
22 **Americans with Disabilities Act and other governing law.**

#### 23 **Comment:**

24 *a. Local flexibility to meet demand.* Local Election Authorities must have the flexibility to  
25 locate their early-voting centers in ways that respond to the geographic and demographic features  
26 of their respective jurisdictions, and to their anticipated voter turnout for each specific election.  
27 Large urban jurisdictions face circumstances substantially different from smaller rural  
28 jurisdictions. Nevertheless, it is important that all Local Election Authorities follow some common  
29 guiding principles. In particular, Local Election Authorities should make every reasonable effort  
30 to anticipate and meet the demand for early voting in a manner that avoids substantial wait times.  
31 Careful collection and analysis of data from past local elections, as provided in § 111, coupled  
32 with use of well-designed models of turnout, can assist local jurisdictions to anticipate demand.  
33 As provided in § 102(b), 30 minutes of waiting time should be the outside limit. To the extent that

1 this may be most difficult on the first or last days of early voting, when demand typically is the  
2 greatest, efforts should be made to publicize and encourage voters to take advantage of lighter days  
3 of the early-voting period.

4 *b. Selection of appropriate locations.* In many local election jurisdictions, the site of early  
5 voting is likely to be the regular business office of the Local Election Authority, such as a county  
6 clerk's office. In urban jurisdictions, as well as in jurisdictions with multiple scattered population  
7 centers, election officials may conclude that they can better serve early voters at another location,  
8 or by establishing multiple locations, including in privately owned facilities. This Section makes  
9 clear that these locations should be conveniently located and well-publicized. They should also be  
10 accessible to voters with disabilities, in compliance with the Americans with Disabilities Act, and  
11 also should comply with other governing law, including the Voting Rights Act. Consistent with  
12 the principle of § 102(a), decisions concerning where to establish these alternative locations must  
13 not be made in order to favor the voters of one party or candidate. Especially in large urban centers,  
14 GIS (geographic information system) and other analytical tools may assist in making siting  
15 decisions.

16 *c. Applicability to traditional Election Day voting.* The principles of this Section are  
17 equally applicable to the location of Election Day polling places.

**REPORTERS' NOTE**

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2 Because early voting typically occurs in only a fraction of the voting locations that are used  
3 for Election Day voting, it requires early voters to find and travel to a location other than their  
4 assigned voting precinct. Early voters thus face two distinct costs: identification (or search) costs,  
5 and transportation costs. See Robert M. Stein & Greg Vonnahme, *Polling Place Practices and the*  
6 *Voting Experience*, in THE MEASURE OF AMERICAN ELECTIONS 166, 171 (Barry C. Burden &  
7 Charles Stewart III eds., 2014). Minimizing each of these costs is important to successful early  
8 voting.

9 While there is little definitive evidence that the availability of early voting in general  
10 increases voter turnout, a recent study reported that increasing the number of early-voting locations  
11 could produce modest increases in turnout. See Elliott B. Fullmer, *Early Voting: Do More Sites*  
12 *Lead to Higher Turnout?*, 14 ELEC. L.J. 81 (2015). There also is some evidence that the specific  
13 location of early-voting centers can affect turnout, and in particular that placing early-voting  
14 centers in locations that voters already frequent, such as shopping centers, can increase turnout.  
15 See Robert M. Stein & Patricia A. Garcia-Monet, *Voting Early But Not Often*, 78 SOC. SCI. Q. 657,  
16 668 (1997); see also Diana Kasdan, *Early Voting: What Works*, The Brennan Center for Justice  
17 (Report, Oct. 31, 2013), at 15 & n.95 (citing several studies of impact of polling location on  
18 turnout). But there also is some evidence to suggest that early-voting locations can be marginally  
19 more difficult for voters to find. See Stein & Vonnahme, *supra*, at 180. Thus, it is important that  
20 Local Election Authorities select suitable early-voting locations and publicize these locations  
21 effectively.

22 Several early-voting states—especially those with high early-voting rates—have statutory  
23 requirements concerning the location of early-voting sites. For instance, Florida provides that  
24 county election supervisors may establish satellite early-voting locations in specified types of  
25 public buildings, and that such “sites must be geographically located so as to provide all voters in  
26 the county an equal opportunity to cast a ballot, insofar as practicable.” FLA. STAT. ANN.  
27 § 101.657. New Mexico provides that its county clerks must “ensure that voters have adequate  
28 access to alternate voting locations for early voting . . . , taking into consideration population  
29 density and travel time . . . .” N.M. STAT. ANN. § 1-6-5.6. New Mexico also is one of several states  
30 that establish a required number of early-voting locations on the basis of the population. See GA.  
31 CODE ANN. § 21-2-382(b); N.M. STAT. ANN. § 1-6-5.7(B); TEX. ELEC. CODE ANN.  
32 § 85.062(d). West Virginia requires consideration of the “neutrality” of satellite early-voting  
33 locations, evaluated in terms of distance from the main early-voting location, population  
34 distribution, party ratios, and turnout. See W. VA. CODE R. § 153-13-3.3; see also Kasdan, *supra*,  
35 at 15 (“Fair and equitable siting policies are critical to the successful administration of [early in-  
36 person voting].”).

37 In contrast, an inappropriate approach would be to select early-voting sites with a deliberate  
38 intent to exclude certain categories of voters. For instance, in a recent case, a North Carolina court  
39 reviewed a county board of elections’ adoption of a new early-voting plan. The court concluded  
40 that the “major purpose” of the plan was to eliminate the early-voting location on the campus of

1 Appalachian State University, solely “to discourage student voting.” See *Anderson v. North*  
2 *Carolina State Board of Elections*, No. 14-CVS-012648, Order at 2 (N.C. Super. Ct. Oct. 13, 2014),  
3 available at [http://electionlawblog.org/wp-content/uploads/20141013](http://electionlawblog.org/wp-content/uploads/20141013-NC-early-vote.pdf)  
4 [-NC-early-vote.pdf](http://electionlawblog.org/wp-content/uploads/20141013-NC-early-vote.pdf). Concluding that this action infringed upon the constitutional right to vote, the  
5 court ordered the county to restore at least one early-voting site to the university’s campus. See *id.*  
6 at 2-3. The North Carolina Supreme Court subsequently stayed the order, pending appeal, but the  
7 state board of elections used its own authority to restore the campus early-voting site for the 2014  
8 general election. See Laura Leslie, *App State Voting Site Survives Legal Fight*, NC CAPITOL, Oct.  
9 22, 2014, at <http://www.wral.com/app-state-gets-early-voting-site-/14105557/>.

10 Local Election Authorities naturally will have additional flexibility in identifying  
11 appropriate early-voting locations if they are able to use private facilities, such as unused office  
12 buildings, shopping centers, malls, and religious facilities, in addition to government locations.  
13 See, e.g., Kasdan, *supra*, at 14 (describing local election administrators’ view that “non-  
14 government facilities were valuable early voting sites”). Although some states limit early-voting  
15 locations to public buildings, most states with high rates of early voting allow use of private  
16 facilities. See *id.*

17 Particularly in large population centers, there also may be an inverse relationship between  
18 the number of early-voting locations available and the hours of early voting needed to minimize  
19 waiting times. Local Election Authorities should be free to meet demand for early voting either  
20 with additional voting locations or with extra hours, as most appropriate. Cf. Aaron Deslatte,  
21 *Early-Voting Sites Increase; But Hours, Days Drop*, ORLANDO SENTINEL, Sept. 28, 2014, at  
22 <http://www.orlandosentinel.com/news/politics/os-early-voting-reforms-20140928-story.html>  
23 (discussing Florida’s decision to give Local Election Authorities more discretion to control both  
24 the hours and days of early voting and the number of early-voting locations).

## 25 26 **§ 106. Processes of Early In-Person Voting**

27 **(a) Wherever possible, Local Election Authorities should use the same voting**  
28 **equipment, ballots, forms, and other materials for early in-person voting that they**  
29 **use for Election Day voting.**

30 **(b) Early in-person voters should be subject to the same voter identification**  
31 **requirements applicable to Election Day voting, and also should be subject to the**  
32 **same punishments for voter impersonation or voting fraud applicable to Election Day**  
33 **voting.**

34 **(c) Local Election Authorities should update their poll books or voter files**  
35 **daily during the period of early voting.**

36 **(d) Any individual who seeks to vote at an early-voting location but is not**  
37 **allowed to cast a regular ballot should be permitted to cast a provisional ballot, to be**  
38 **evaluated according to the same eligibility rules as provisional ballots cast on Election**

1           **Day, subject to the qualification that no provisional ballot cast at an early-voting**  
2           **location serving the voter’s local election jurisdiction should be rejected because the**  
3           **ballot was cast outside the voter’s assigned precinct.**

4           **(e) Local Election Authorities should provide opportunities for outside**  
5           **observers to monitor early in-person voting that are substantially equivalent to the**  
6           **opportunities provided for monitoring Election Day voting.**

7           **(f) Local Election Authorities must structure early-voting operations to afford**  
8           **voters privacy when voting and instill confidence that voting will be secure and fair.**

9           **(g) Local Election Authorities must not tally votes cast through early in-person**  
10           **voting until the close of polls on Election Day.**

11           **(h) The state’s Chief Elections Officer must establish procedures to ensure that**  
12           **Local Election Authorities will secure all voting equipment, ballots, and other**  
13           **materials used for early in-person voting against tampering, loss, and damage**  
14           **throughout the period of early in-person voting.**

15   **Comment:**

16           *a. Make early voting like Election Day voting.* Early in-person voting can offer voters the  
17 same protections that in-precinct Election Day voting offers, particularly with respect to a secret  
18 ballot, the identification and correction of overvotes and undervotes, and the opportunity to cast a  
19 provisional ballot when a voter’s eligibility to vote is questioned. In order to best provide these  
20 protections, the early in-person voting experience should be as similar as possible to that of  
21 Election Day voting. Of course, voting fraud must be similarly prohibited, and election authorities  
22 should ensure that their protocols for detecting attempts at voter impersonation are also in place  
23 for all periods of early voting. Accordingly, Local Election Authorities ordinarily should use the  
24 same identification requirements, privacy protections, voting equipment (whether optical-scan  
25 ballots, electronic touch screens, or otherwise), and polling-place management processes that they  
26 use on Election Day.

27           In particular, if early voters cast a paper-based absentee ballot that is not  
28 contemporaneously fed through a scanner in order to identify overvotes and undervotes, one of the  
29 potential advantages of early in-person voting is lost. Contemporaneous scanning of early ballots  
30 to detect such residual votes therefore should be encouraged. To the extent that a voter might  
31 experience it as a violation of the voter’s privacy to have a poll worker involved in the process of  
32 machine scanning of a voted ballot to identify overvotes or undervotes, election jurisdictions could

1 consider allowing voters to forgo the option of a contemporaneous scan, if they wish, or instead to  
2 feed their optical-scan ballots through an automated scanner without supervision, with instructions  
3 that after scanning they are free to void their ballot and request a new one for any reason.

4 Daily updating of poll books and other records is important not only for purposes of  
5 security and integrity, but also for purposes of resource allocation. As the early-voting period  
6 progresses, accurate records about participation can assist local election officials in deploying staff  
7 and equipment. Local Election Authorities might also choose to make these records  
8 contemporaneously available to the public, for instance for purposes of get-out-the-vote drives,  
9 but should feel no obligation to do so if it would unduly add to the administrative burdens.

10 Early voters who are denied a ballot, whether because they are unable to satisfy an  
11 identification requirement, because their name cannot be found in the poll book, or for any other  
12 reason, should be allowed to cast a provisional ballot, just like Election Day voters who are denied  
13 a regular ballot. However, poll workers should be trained to help early voters who are denied a  
14 ballot to determine whether their best option is to cast a provisional ballot, or instead is to seek to  
15 remedy whatever deficiency has caused them to be denied a ballot, for instance by obtaining an  
16 acceptable form of identification. Voters who are confident that they can remedy the deficiency  
17 and easily return to an early-voting location or an Election Day polling place to cast a regular ballot  
18 on or before Election Day should be encouraged to do so, rather than to cast a provisional ballot.  
19 As Election Day draws closer, however, early voters denied a regular ballot may find the  
20 alternative of voting a provisional ballot increasingly attractive, as the remaining early-voting  
21 opportunities dwindle. Uniform procedures should be established for poll workers in these  
22 situations, to ensure that poll workers give voters accurate and complete information and do not  
23 substitute their judgment for that of the voter. In particular, if a voter must cast a provisional ballot  
24 because the poll workers cannot identify the voter as properly registered, the poll workers should  
25 help the voter understand how to make an inquiry with the Local Election Authorities concerning  
26 the status of the voter's registration. Maximizing the time available for a voter to resolve  
27 uncertainty about the voter's registration status increases the likelihood that, if the mistake is the  
28 government's, it will be corrected at least within the period available for the verification of  
29 provisional ballots, even if not soon enough to permit the voter to cast a regular ballot.

30 Provisional ballots cast on Election Day often give rise to issues of whether they were cast  
31 in the correct precinct. In contrast, because early in-person voting generally occurs in only a limited  
32 number of locations, rather than in precinct-based voting locations, no provisional ballot cast

1 through early in-person voting should be rejected because it was not cast in the correct precinct,  
2 provided it was cast in an early-voting center specified to serve the voter who cast it. If they wish,  
3 states and Local Election Authorities, by using electronic voting systems or ballot-on-demand  
4 printers, are free to create early-voting locations that can serve voters from anywhere in the state.

5 In order to comply with subsection (f), Local Election Authorities should select early-  
6 voting sites, under § 105, that have the physical capacity to afford privacy to early voters, and that  
7 will maximize election officials' ability to maintain the security and fairness of the voting process  
8 by conducting that process in a regular, consistent, and professional manner.

9 *b. Applicability to traditional Election Day voting.* Most of the principles of this Section  
10 are either peculiar to the early-voting process, or depend on conducting early voting according to  
11 established Election Day processes. Of note, however, is that Election Day processes should also  
12 be structured to obtain the benefits of identifying and correcting overvotes and undervotes.  
13 Additionally, just as early-voting poll workers should be trained to assist early voters with the  
14 provisional balloting process, poll workers on Election Day should be similarly trained. The  
15 principle that voting operations must afford voters privacy and instill confidence in the security  
16 and fairness of the process also is critically important to Election Day voting as well.

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## REPORTERS' NOTE

Many “best practices” and other recommendations exist for the conduct of in-precinct Election Day voting. See, e.g., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 32 (2014); U.S. Election Assistance Commission, *Election Management Guidelines: Polling Place and Vote Center Management*, available at [https://www.eac.gov/assets/1/6/Chapter\\_9\\_Polling\\_Place\\_and\\_Vote\\_Center\\_Management.pdf](https://www.eac.gov/assets/1/6/Chapter_9_Polling_Place_and_Vote_Center_Management.pdf). Many of these same recommendations are applicable to early in-person voting.

However, because early voting typically occurs in only a fraction of the locations in which Election Day voting occurs, early-voting centers must be able to produce a number of different ballot formats or styles, supplying to each voter the specific ballot appropriate for the voter’s precinct. Jurisdictions using electronic touch-screen equipment usually can do this quickly and easily. With the right equipment and preparation, jurisdictions using optical-scan ballots printed “on-demand” also can produce the appropriate paper-ballot form for a given voter easily and relatively quickly, though the printing time can be 20 to 30 seconds per voter, not nearly as fast as the several seconds required to load the correct electronic ballot on a touch-screen machine. See Connie B. McCormack, *Florida’s Transition from Touch Screens to Op Scan Paper Ballots for Early Voting: A Snapshot Review in Two Counties*, Sept. 23, 2008, at 2.

The use of the same equipment for early voting as for Election Day voting will have less value if a Local Election Authority is using optical-scan ballots without in-precinct scanning. Jurisdictions relying on optical-scan ballots without in-precinct scanners therefore should move to using in-precinct scanners for both Election Day and early voters, if possible. But even for jurisdictions that already use in-precinct scanning, it may require additional resources and planning to develop the ability also to scan all early ballots at the moment the voters finish marking them at an early-voting location, given the number of ballot styles that a single early-voting center may need to process. Because current scanning equipment may be limited in terms of the number of ballot styles that any one machine can accommodate, multiple scanners may need to be available.

It is important to distinguish between the process of scanning ballots at the time they are voted for the purpose of identifying overvotes and undervotes, and the potentially independent process of scanning ballots to record and tally the votes as part of determining the election outcomes. In order to protect against potential election distortions, including both the shaping of campaign behavior and the possibility of voting fraud in response to the leaking or publicizing of early-vote results, early votes should not be tallied until the close of the polls on Election Day. This means not only that daily interim results should not be released, but also that protocols should be established that prevent even the inadvertent calculation of machine tallies until Election Day. That is not to prevent Local Election Authorities, if they wish, from running voted optical-scan ballots through a scanner on an ongoing basis throughout the period of early voting for the purpose of uploading the voters’ selections to an electronic file, as long as the electronic processing software and related protocols do not allow the generation or reporting of a running tally until the conclusion of Election Day voting. With that proviso, Local Election Authorities are free to stage



1 the uploading of the contents of early ballots to a tabulating program as they wish. But regardless  
2 of whether a jurisdiction uploads early votes on a rolling basis (without generating any reports or  
3 allowing anyone to access any running tallies), or waits until the close of the polls to begin  
4 tabulating them, state and local election officials must ensure that the early-voting equipment and  
5 ballots are secure throughout the early-voting period. Determining the most appropriate security  
6 measures will depend on the mode(s) of voting.

7 The poll books or lists of those who have voted should be updated daily throughout the  
8 early-voting period. A primary reason for doing so is to increase election officials' ability to  
9 prevent a voter from casting multiple ballots on different days, an action that otherwise might go  
10 undetected until all early-voting records are reconciled much later in the process. Additionally, a  
11 process of regular updating can help election officials anticipate turnout patterns, and ease the task  
12 of preparing accurate poll books for Election Day use. Accordingly, most early-voting jurisdictions  
13 are already doing this. See Kasdan, *supra*, at 16.

14 Today, a key feature of Election Day voting is that poll workers must supply a provisional  
15 ballot to any voter who wishes to vote but who is denied the opportunity to cast a regular ballot,  
16 as required by the Help America Vote Act of 2002 ("HAVA"). Specifically, HAVA section 302(a)  
17 provides:

18 If an individual declares that such individual is a registered voter in the jurisdiction  
19 in which the individual desires to vote and that the individual is eligible to vote in  
20 an election for Federal office, but the name of the individual does not appear on the  
21 official list of eligible voters for the polling place or an election official asserts that  
22 the individual is not eligible to vote, such individual shall be permitted to cast a  
23 provisional ballot . . . .

24 42 U.S.C. § 15482(a), 116 Stat. 1666, § 302(a) (2002). Though there may be ambiguity about  
25 whether Congress intended for HAVA's provisional ballot alternative also to apply to early voting,  
26 the HAVA text itself is in no way limited to Election Day voting. Moreover, sound practice would  
27 suggest that a provisional ballot should be available to any voter who has attempted to vote but  
28 been denied a ballot. It is then up to the voter to decide, in both Election Day and early voting,  
29 whether to vote the provisional ballot, or instead to seek to remedy whatever eligibility defect  
30 exists before the opportunity to vote a regular ballot expires. Unfortunately, in both Election Day  
31 and early voting, election officials are not always aware of or do not always follow HAVA's  
32 provisional-balloting requirements. Accordingly, subsection (d) of this Section is intended to help  
33 ensure that Local Election Authorities also make provisional ballots easily available to any early  
34 voters who might use them.

### 35 § 107. Period of Open Absentee Voting

36 **(a) For a regular federal, state, or local election, absentee ballots for voters**  
37 **who wish to participate in open absentee voting should be transmitted to voters no**  
38 **later than four weeks (28 days) before Election Day, or in the case of a voter who**  
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1       **applies for an absentee ballot after that date, within one business day of receiving the**  
2       **absentee-ballot application.**

3               **(b) For a run-off or special election for a federal, state, or local office, absentee**  
4       **ballots for voters who wish to participate in open absentee voting should be**  
5       **transmitted to voters by the later of either four weeks (28 days) before Election Day**  
6       **or as soon as is practicable after the offices to be decided are fixed, or in the case of a**  
7       **voter who applies for an absentee ballot after that date, within one business day of**  
8       **receiving the absentee-ballot application.**

9       **Comment:**

10           *a. Prolonged period of absentee voting not desirable.* Under federal law, absentee ballots  
11 for military and overseas voters must be available at least 45 days before a regularly scheduled  
12 election. The period of open absentee voting for other voters could easily mirror this period (and  
13 in a number of states does so in fact). Yet for the vast majority of voters not facing the difficulties  
14 that typical military and overseas voters face in receiving and returning their ballots in a timely  
15 fashion, it remains important to keep election season from expanding too dramatically.  
16 Furthermore, the 45-day requirement remains a challenge for some jurisdictions, even though most  
17 states have been readily able to comply with it for their military and overseas voters.

18           Specifying that absentee ballots for use by open absentee voters need not be ready sooner  
19 than 28 days before Election Day helps preserve a more traditional election season than would  
20 adopting a more extended period of absentee voting. This enhances the degree to which voters act  
21 on the basis of similar information and permits campaigns to target potential supporters more  
22 efficiently. As noted in Comment *c* to § 104, “The longer the early (or absentee) voting period, the  
23 greater the potential information gap between early (or absentee) voters and Election Day voters.  
24 A prolonged early-voting period therefore is undesirable (as also is a prolonged period of open  
25 absentee voting, which similarly encourages voters to cast their absentee ballots well before  
26 Election Day).” These same considerations of course might counsel an even shorter period of open  
27 absentee voting, akin to the period (a minimum of 10 days) that § 104 recommends for early in-  
28 person voting. Yet it may simply not be realistic to restrict the period for open absentee voting so  
29 narrowly, given not only the existence of deeply engrained expectations of month-long absentee  
30 voting in many jurisdictions, but also the time required for Local Election Authorities to conduct  
31 the administrative tasks associated with processing a large volume of open absentee voting (tasks  
32 that include processing absentee-ballot applications, confirming voter eligibility, sending ballots

1 out, matching returned ballots with applications, reconfirming voter eligibility, and contacting  
2 voters whose voted ballots are deficient to inform them of opportunities to correct their ballots),  
3 as well as the additional time required for voters to receive and return their ballots by mail.

#### 4 **REPORTERS' NOTE**

5 For the 27 states and the District of Columbia that have open absentee voting, the period  
6 of absentee voting (measured from the date when absentee ballots are available) ranges from 11  
7 days before Election Day (Iowa) to 60 days before Election Day (North Carolina). See *Early*  
8 *Voting Calendar, Fall 2016*, EARLY VOTING INFORMATION CENTER, at  
9 [http://www.reed.edu/earlyvoting/2016\\_g\\_calendar.html](http://www.reed.edu/earlyvoting/2016_g_calendar.html). At least 12 states and the District of  
10 Columbia begin absentee voting 45 days or more before Election Day, while only six states begin  
11 absentee voting less than 28 days before Election Day. See *id.* But as described in Comment *c* to  
12 § 104, a prolonged period of pre-Election Day voting is undesirable to the extent that it results in  
13 some voters casting different votes than they might have cast in light of additional information that  
14 would have been available to them had they waited until closer to Election Day to vote.  
15 Determining the period of absentee voting will therefore involve a balancing of voter convenience  
16 (and election-official convenience as well) with this interest in grounding the fundamental act of  
17 democratic governance in a shared civic understanding.

18 Maintaining an accurate, user-friendly website about the absentee-voting process that  
19 includes up-to-date information about all the candidates and issues is one helpful step that election  
20 officials can take to reduce some of the potential problems of a long period of absentee voting.  
21 See, e.g., National Conference of Commissioners on Uniform State Laws (also known as the  
22 Uniform Law Commission), UNIFORM MILITARY AND OVERSEAS VOTERS ACT § 16(d) (2010), at  
23 [http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova\\_final\\_](http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova_final_10.pdf)  
24 [10.pdf](http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova_final_10.pdf) (requiring any Local Election Authority that maintains a website to post updated election  
25 notices to its site). In some locations this may be best accomplished at the local level, while in  
26 other cases it may be best handled (or at least coordinated) at the state level. In addition, when  
27 candidates and issues change (for instance through court action or candidate withdrawal), or ballot  
28 defects are identified after some absentee ballots have been sent out, election officials should take  
29 other reasonable steps to alert voters, including by email to the extent possible.

#### 30 **§ 108. Applications for Open Absentee-Voting Ballots**

31 **(a) The state's Chief Elections Officer should develop an official absentee-**  
32 **ballot application for use throughout the state for all federal, state, and local elections**  
33 **that is simple and clear. The application should not require an applicant to provide**  
34 **any more information than is necessary to determine the applicant's voting eligibility**  
35 **and the subsequent validity of a voted absentee ballot. A downloadable version of the**  
36 **application should be publicly available on the internet.**  
37

1           **(b) A state with both open absentee voting and early in-person voting should**  
2 **not automatically send an absentee-ballot application to all voters, but instead should**  
3 **send an application only to those voters who request one. A state with open absentee**  
4 **voting but without early in-person voting may send an absentee-ballot application to**  
5 **all voters in the state.**

6           **(c) A voter should be allowed to return a completed absentee-ballot application**  
7 **to the voter’s Local Election Authority starting at least 30 days before Election Day,**  
8 **and continuing through no later than three days before Election Day (except in the**  
9 **case of a voter with a permanent disability or other condition that makes it difficult**  
10 **or impossible to vote in person, or a voter covered by the Uniformed and Overseas**  
11 **Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq., for whom states may develop**  
12 **separate procedures to allow the later return of a completed absentee-ballot**  
13 **application).**

14           **(d) A voter should be allowed to return a completed absentee-ballot**  
15 **application to the voter’s Local Election Authority only by mail delivery, a**  
16 **commercial courier service, or personally by hand, except in a jurisdiction that has**  
17 **chosen to allow the electronic return of completed absentee-ballot applications. The**  
18 **voter’s agent also may hand-deliver the completed application, but no agent should**  
19 **be permitted to deliver more than two completed applications on the same day. A**  
20 **completed application returned by mail or courier may not be accompanied in the**  
21 **same envelope by another voter’s completed absentee-ballot application.**

22           **(e) Each state must ensure that its criminal law retains specific prohibitions**  
23 **against any person submitting an absentee-ballot application in the name of any other**  
24 **person, and against submitting an absentee-ballot application with knowledge of its**  
25 **falsity, including knowledge that the applicant is not a qualified voter.**

26           **(f) Unless the applicant expresses a contrary preference on the application, an**  
27 **application for an absentee ballot for a primary election should also constitute an**  
28 **application for an absentee ballot for the ensuing general election, and an application**  
29 **for an absentee ballot for any general, primary, or special election should also**  
30 **constitute an application for any run-off election necessary to conclude the election.**  
31 **Absentee-ballot applications should include a clear notice to the applicant of this**  
32 **effect.**

1           **(g) Only a voter with a permanent disability or other condition that makes it**  
2           **difficult or impossible to vote in person, as well as a voter covered by the Uniformed**  
3           **and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq., should be able**  
4           **to request status as a “permanent” absentee voter for all future elections conducted**  
5           **by the voter’s jurisdiction, and thereby receive an absentee ballot for each future**  
6           **election without needing to reapply for an absentee ballot.**

7           **(h) A voter other than one described in subsection (g) should be able to request**  
8           **status as a “standing” absentee voter for all future elections conducted by the voter’s**  
9           **jurisdiction, for the limited purpose of automatically receiving an *application* for an**  
10           **absentee ballot for each future election. In order to receive the absentee ballot itself,**  
11           **the voter should be required to complete a new absentee-ballot application for each**  
12           **election in which the voter desires to cast an absentee ballot, except as provided in**  
13           **subsection (f).**

14 **Comment:**

15           *a. Simplicity of application process.* A simple, uniform absentee-ballot application is  
16 important for several reasons. It will assist local election officials to process applications quickly  
17 and accurately, thereby reducing potential problems. In addition, many questions concerning the  
18 validity of absentee ballots involve discrepancies between information about the voter already on  
19 file with the Local Election Authority, information collected with the ballot application, and  
20 information subsequently supplied by the voter on the ballot-transmission envelope. A lean and  
21 user-friendly absentee-ballot application can help diminish these problems by reducing confusion  
22 and by priming voters to supply the same pertinent and accurate information at each stage. Online  
23 absentee-ballot applications, already in use in several jurisdictions, hold additional promise for  
24 streamlining the application process and assisting voters to provide all necessary information  
25 completely and accurately. Necessary information includes contact information for  
26 communicating efficiently with the applicant, although election authorities should ensure that  
27 phone numbers, email addresses, and other private voter information remain private.

28           As part of developing simple, uniform absentee-ballot applications and transmission  
29 envelopes, states should continue to explore improved methods of voter identification. Thumb-  
30 print matching or unique voter ID numbers could soon replace the voter signatures and driver’s-  
31 license and social-security numbers commonly used to identify absentee voters today. Whatever  
32 method a state chooses should be convenient, reliable, and easily available to all voters.

1           *b. Automatic transmission of absentee-ballot applications.* Because of the greater security  
2 and reliability of in-person voting over absentee voting, as discussed in the Comments to § 103,  
3 open absentee voting should be used with moderation in states that also offer early in-person  
4 voting. Among other concerns, widespread distribution of absentee ballots increases the potential  
5 that absentee ballots will be intercepted and cast fraudulently. Accordingly, this Section provides  
6 that states that offer both early in-person voting and open absentee voting should not automatically  
7 send an absentee-ballot application to all voters. However, a state without early in-person voting  
8 may choose to do so.

9           This Section permits a single application for an absentee ballot to suffice for multiple  
10 elections only within the same election cycle, and requires most voters affirmatively to opt back  
11 into the absentee-voting process in future election cycles, rather than being classified as a  
12 permanent absentee voter. However, it does allow voters to request classification as a “standing”  
13 absentee voter, a voter sufficiently interested in absentee voting in future elections to be sent a new  
14 absentee-ballot *application* for each election. Election authorities also may choose to inform voters  
15 that the absentee-ballot application is readily available online, and thereby relieve voters from  
16 requiring the Local Election Authority to send a new application for each election or election cycle.  
17 But automatic transmission of absentee ballots themselves for subsequent elections, without a  
18 voter’s specific request, can readily result in having excess ballots in circulation, partly as a result  
19 of voters who move between elections. This can give rise to two distinct problems: (1) an increase  
20 in the number of voters who, when they appear at the polls, are required to vote a provisional ballot  
21 because the Local Election Authority has previously sent them an absentee ballot; and (2) the  
22 possibility that absentee ballots will not reach their intended recipient and will be voted  
23 fraudulently.

24           *c. Other steps to minimize absentee-voting mischief.* In addition to disfavoring the  
25 automatic transmission of unvoted absentee ballots to voters who have not requested them for a  
26 specific election cycle, this Section includes other provisions designed to reduce the potential for  
27 misuse of the absentee-voting process. In particular, subsection (d) prohibits batch submission of  
28 absentee-ballot applications, whether personally or by mail, because of the risk that the  
29 applications may be part of an effort to acquire multiple absentee ballots to be voted fraudulently.  
30 The subsection provides a limited exception that permits designated agents (such as spouses, other  
31 relatives, or friends) to deliver no more than two applications on the same day. Meanwhile,  
32 subsection (e) makes explicit that it must be unlawful to submit a fraudulent absentee-ballot

1 application in any manner. States presumably will have specified criminal penalties, consistent  
2 with their overall criminal law, for violations of this principle. States should also develop other  
3 screens and protocols for identifying suspicious absentee-ballot applications, and devote  
4 appropriate resources to reviewing these suspicious applications.

#### 5 **REPORTERS' NOTE**

6 As is also discussed in the Reporters' Note to § 109, an essential virtue in the absentee-  
7 voting process is simplicity and clarity in the associated paperwork. The relatively high rate at  
8 which voted absentee ballots go uncounted remains a concern, and one of the primary causes is  
9 voter error in completing the paperwork. For instance, in the November 2012 presidential election,  
10 nationwide over 250,000 absentee ballots returned by voters were rejected. See U.S. Election  
11 Assistance Commission, *2012 Election Administration and Voting Survey*, Sept. 2013, at 11, 39 &  
12 Table 32, available at  
13 <https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Ballots that  
14 lacked signatures and ballots with nonmatching signatures were the second- and third-most-  
15 common reasons that absentee ballots were rejected, after ballots that missed the deadline. See *id.*  
16 at 11, 41-46 & Tables 33a-c. Accordingly, both the absentee-ballot application and the absentee-  
17 ballot-transmission envelopes should be carefully designed to be user-friendly and to guide voters  
18 to the successful completion of the voting process, ensuring not only that voters sign both the  
19 application and the ballot, but that other identifying information is correct.

20 However, minimizing the number of invalid ballots is not the only goal of a simplified  
21 application process. Another is to facilitate the number of voters able to take advantage of the  
22 option of open absentee voting. One obvious way to increase absentee participation would be to  
23 send an absentee ballot to every voter. (In essence, this is what the handful of states that have  
24 adopted "all-vote-by mail" elections are doing; those states no longer conduct polling-place voting,  
25 making the mailed ballot the only voting option.) But automatically putting an absentee ballot in  
26 the hands of every voter, without the cessation of all in-precinct voting on Election Day (as has  
27 occurred in the few all-vote-by-mail states), would risk confusion among voters, complicate the  
28 work of election officials (who would essentially need to give a provisional ballot to every voter  
29 who appeared in person to vote on Election Day, until it was clear which voters had not returned  
30 their absentee ballots), and heighten concerns that actual ballots could be intercepted and misused.

1           Accordingly, a much more attractive option would be to send an absentee  
2 ballot to all voters. Although subsection (b) otherwise leaves it to state discretion to decide whether  
3 to do so, it urges states not to do so if they also offer early in-person voting, because the risks of  
4 lost ballots, residual votes, improper influence, and vote fraud are all lower in in-person voting.  
5 See Reporters' Note to § 103, *supra*. Open absentee voting may still offer a unique form of  
6 convenience for some voters, who prefer it over early in-person voting, but these voters then should  
7 personally opt to participate in this mode of voting. Subsections (g) and (h) allow states to create  
8 mechanisms for certain voters who wish always to vote absentee to receive either ballots or  
9 applications for absentee ballots automatically, but in most cases obligate the voter affirmatively  
10 to submit the application itself each election cycle, in order to limit the number of actual ballots in  
11 circulation for a given election to only those voters who either have explicitly requested them for  
12 that election, or have a demonstrated need for them because of a continuing impediment that makes  
13 it difficult or impossible for them to vote in person. Jurisdictions that send absentee-ballot  
14 applications automatically should adopt best practices to manage their registered voter files in  
15 order to minimize the number of applications sent to outdated addresses.

16           Subsection (f) represents a modest departure from this principle, but only for a single  
17 election cycle (primary election, general election, and run-off election, if necessary) involving the  
18 same set of offices and issues, and only with clear notice to the voter. However, under subsection  
19 (f) there is still some risk that a voter who requested and voted an absentee ballot for a primary  
20 election will forget having made that request, overlook the arrival of the absentee ballot for the  
21 general election, and be required to vote a provisional ballot in the general election when  
22 attempting to vote an in-person ballot (either early or on Election Day). To reduce this risk, states  
23 should consider including a checkbox on the absentee-ballot application that the voter can mark in  
24 order to opt out of the default posture of subsection (f), and instead elect to receive an absentee  
25 ballot only for the primary election. This Section contemplates but does not require this option on  
26 the application, although states should consider its desirability.

27           Subsection (d) also is intended to help limit the number of actual ballots in public  
28 circulation, outside the control of election officials, to only those individuals who have in fact  
29 decided to take advantage of open absentee voting. Of course, it is perfectly conceivable that any  
30 number of otherwise valid absentee-ballot applications could be bundled for efficient hand  
31 delivery, without giving rise to any improprieties. But when absentee-ballot applications are  
32 allowed to be submitted in batches, the risk is much greater that the applications may be part of a  
33 scheme to manipulate the absentee-voting process in some manner, for instance by gaining access  
34 to a sufficient number of votes to swing an election. See, e.g., Adam Liptak, *Error and Fraud at*  
35 *Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at  
36 [http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0)  
37 [-impact-elections.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0) (describing arrest of Florida voter for possessing 31  
38 marked absentee ballots); Scott Fallon & Josh Gohlke, *Candidate Subject to Fraud Probe:*  
39 *Absentee Ballot Requests Called Faulty in Paterson*, N.J. REC., May 9, 2002 (describing  
40 investigation of mayoral candidate who sent requests for 275 absentee ballots); cf. *Taylor v. Currie*,



1 743 N.W.2d 571, 575-576 (Mich. Ct. App. 2007) (removing city clerk from election duties for  
2 absentee-voting-process abuses, abetted by sending absentee-ballot applications to all voters).

3 Another option for returning absentee-ballot applications involves electronic submission.  
4 Although most states have been reluctant to adopt electronic methods of returning voted ballots,  
5 most states are now embracing electronic methods of providing absentee-ballot applications to  
6 voters, and several private organizations now operate websites with downloadable absentee-  
7 ballot applications for each U.S. jurisdiction. See, e.g., U.S. Vote Foundation, *Absentee Ballot*  
8 *Request and Voter Registration Services for All U.S. Voters in All States at Home and Abroad*, at  
9 <https://www.usvotefoundation.org/vote/voter-registration-absentee-voting.htm> (last visited June  
10 14, 2018). A growing minority of states, including Alaska, Florida, Louisiana, Maryland,  
11 Minnesota, and Utah, also permit voters to *return* absentee-ballot applications electronically. See  
12 National Conference of State Legislatures, *Absentee and Early Voting, No-Excuse Absentee*  
13 *Voting*, available at [http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-](http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx)  
14 [voting.aspx](http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx) (Aug. 17, 2017); State of Alaska Division of Elections, *By-Mail Ballot Delivery*,  
15 available at <http://www.elections.alaska.gov/Core/votingbymail.php> (last visited June 14, 2018);  
16 *Maine.gov, Absentee Ballot Request*, at [https://www.maine.gov/cgi](https://www.maine.gov/cgi-bin/online/AbsenteeBallot/index.pl?c=1)  
17 [-bin/online/AbsenteeBallot/index.pl?c=1](https://www.maine.gov/cgi-bin/online/AbsenteeBallot/index.pl?c=1), then click on “All Other Voters Online Request” (last  
18 visited June 14, 2018).

19 Meanwhile, some states have been developing electronic options for transmitting blank  
20 (unvoted) ballots. Since 2010, federal law has required states to offer electronic transmission of  
21 both applications and blank ballots to military and overseas voters. See 42 U.S.C. § 1973ff-1(a)(6),  
22 (a)(7), & (e). But the continuing degree of concern surrounding the security of electronic  
23 transmission of voting materials—and the prospect of more ballots than necessary being in public  
24 circulation outside of official control—merit caution concerning the general use of electronic  
25 means of transmitting unvoted ballots (as discussed above in the Reporters’ Note to § 101).

## 26 § 109. Voting and Returning Open Absentee Ballots

27 (a) **The state’s Chief Elections Officer should assist Local Election Authorities**  
28 **to develop absentee ballots and absentee-ballot-transmission envelopes that are**  
29 **simple and clear, in conjunction with the development of simple and clear absentee-**  
30 **ballot applications under § 108. To the extent feasible, the information required on**  
31 **ballot-transmission envelopes should correspond to the information required on the**  
32 **absentee-ballot applications.**

33 (b) **Identification and authentication requirements for a voted absentee ballot**  
34 **should not impose unnecessary burdens on the voter or require the voter to provide**  
35 **any more information than is necessary to determine the validity of a voted absentee**  
36 **ballot and to permit efficient communication with the voter.**

37 (c) **Authentication requirements for a voted absentee ballot should include the**  
38 **voter’s oath or affirmation that the voter cast the ballot without any coercion or other**  
39 **undue influence that affected the voter’s choices.**  
40

1           **(d) Any requirement that, in addition to the voter’s oath or affirmation**  
2 **described in subsection (c), a witness also attest to the authenticity of a voted absentee**  
3 **ballot should not require that the witness be a notary public or a registered voter, and**  
4 **should otherwise be structured to minimize the burden on the voter.**

5           **(e) A voter should be allowed to return a voted absentee ballot to the voter’s**  
6 **Local Election Authority only by mail delivery, a commercial courier service, or**  
7 **personally by hand, except in a jurisdiction that has chosen to allow the electronic**  
8 **return of voted absentee ballots. The voter’s agent also may hand-deliver the voted**  
9 **absentee ballot, but no agent should be permitted to deliver more than two voted**  
10 **absentee ballots on the same day. A voted absentee ballot returned by mail or courier**  
11 **may not be accompanied in the same transmission envelope or mailing envelope by**  
12 **another voted absentee ballot, except as provided in § 110(e)(8).**

13           **(f) Each state must ensure that its criminal law retains specific prohibitions**  
14 **against any person voting an absentee ballot in the name of any other person, or**  
15 **submitting an absentee ballot with knowledge of its invalidity.**

16           **(g) To be valid, a voted absentee ballot either must be received by an**  
17 **appropriate election official by the close of the polls on Election Day, or be**  
18 **postmarked before Election Day and received by the appropriate election official by**  
19 **the close of business on the day before the deadline for completion of the local canvass.**  
20 **Absentee ballots received after Election Day without a postmark (other than those**  
21 **ballots cast by military or overseas voters covered by their own special absentee-**  
22 **voting rules) must not be counted.**

23           **(h) The state’s Chief Elections Officer, in cooperation with Local Election**  
24 **Authorities, should develop a tracking system that will allow any voter who has**  
25 **applied for an absentee ballot to determine the status of the ballot. The system should**  
26 **permit voters to determine, either online or by telephone: (i) whether the application**  
27 **has been received; (ii) whether the application is valid; (iii) whether and when an**  
28 **absentee ballot has been sent to the voter; (iv) whether the voter’s completed**  
29 **absentee-ballot-transmission envelope and accompanying voted ballot have been**  
30 **received; (v) whether the transmitted ballot is valid and will be counted; (vi) for an**  
31 **invalid ballot, what remedial steps, if any, are available for the voter to correct any**  
32 **deficiencies; and (vii) whether the ballot has been counted. Within 48 hours of any**

1           **official determination or action described in items (i) through (vii) above, Local**  
2           **Election Authorities should update the tracking information to reflect that**  
3           **determination or action.**

4   **Comment:**

5           *a. Voter-friendly absentee balloting materials and requirements.* As noted in the Comment  
6 to § 108, many questions concerning the validity of absentee ballots involve discrepancies between  
7 information supplied by the voter on the ballot-transmission envelope and information already on  
8 file with local election officials. Other questions concerning the validity of absentee ballots involve  
9 voter failures to properly complete the ballot-transmission envelope. Both problems are  
10 exacerbated if the transmission envelope or other accompanying documentation is unnecessarily  
11 complex. These materials, like their counterparts in the ballot application, also should be simple,  
12 user-friendly, and designed to correspond to the absentee-ballot application. One approach to the  
13 design of these materials is the sample absentee-ballot-transmission envelope in the Illustration  
14 below (which represents an internal envelope that in turn would typically be placed within an outer  
15 mailing envelope to protect the privacy of the voter's identifying information).

16           Election officials also should be alert to the possibility that new technologies will provide  
17 superior methods for verifying both the identity of absentee voters and the validity of their ballots.  
18 For instance, the use of bar codes on absentee-ballot envelopes may facilitate the matching of  
19 absentee-ballot applicants with voted absentee ballots, reducing the number of lost absentee votes.  
20 Other innovations to reduce the errors that contribute to lost votes are also likely. In addition,  
21 jurisdictions that wish to facilitate matching of ballots with applications by affixing on the  
22 absentee-ballot return envelope an official label containing the absentee voter's name and address  
23 should be allowed to do so, as long as the voter is still required to supply specific identifying  
24 information, such as the voter's date of birth and state-identification-card (driver's-license)  
25 number or social-security number (last four digits). However, third parties should not be allowed  
26 to prepare or complete any portions of a voter's absentee-ballot envelope (other than when a voter  
27 asks a friend or family member, functioning as the voter's agent, to help complete the ballot  
28 envelope).

29           In some jurisdictions, requirements that an absentee voter complete the ballot in the  
30 presence of a notary, who could attest to both the identity of the voter and the fact that the voter  
31 was not paid or pressured to vote in a particular way, have given way to simpler witness  
32 requirements, or to no witness or notary requirement at all. It therefore is more important than ever

1 that the voter’s oath or affirmation on the transmission envelope provide clear notice to the voter  
2 of the expectation that the voter will cast the ballot without improper pressure or influence. If  
3 signed (or otherwise authenticated, for instance with a thumbprint) under penalty of perjury, a clear  
4 statement to this effect (as also exemplified in the sample in the Illustration below) ought to  
5 mitigate the need for a requirement that a third party witness the voter’s casting of the absentee  
6 ballot. Nevertheless, this Section permits a state that wishes to do so to continue to impose witness  
7 requirements as one means of reducing the risk of absentee-ballot fraud and undue influence,  
8 provided the voter can meet the witness requirement without substantial inconvenience, cost, or  
9 other burden.

10 Local Election Authorities also should ensure that absentee voters receive clear instructions  
11 concerning the ballot return process, including notice of the deadline for returning an absentee  
12 ballot, and of the amount of postage required (although local election jurisdictions also should  
13 consider paying for postage deficiencies, rather than returning a ballot with insufficient postage to  
14 the sender). Among other places, the deadline could be printed on the ballot return envelope, as in  
15 the Illustration below. These instructions should also explain how voters can access the tracking  
16 system described in subsection (h) to determine the status of their voted ballot. Many states and  
17 local election jurisdictions already are using or developing some form of absentee-ballot tracking  
18 systems.

19 *b. Steps to minimize absentee-voting mischief.* This Section provides that voters should be  
20 responsible for returning their own absentee ballot, in order to reduce the risk of fraudulent casting  
21 of absentee ballots by persons other than eligible voters, especially in batches or groups.  
22 Subsection (f) also makes explicit that it must be unlawful to submit a fraudulent absentee ballot.  
23 States presumably will have specified criminal penalties, consistent with their overall criminal law,  
24 for violations of this principle.

25 In addition, in order to reduce the risk that absentee votes will be unfairly or fraudulently  
26 cast after unofficial Election Day results are known, this Section provides that all absentee ballots  
27 must establish their timeliness on their face, either by a postmark no later than the day before  
28 Election Day, or by arriving at the local election office before the close of the polls on Election  
29 Day. To the extent that automated postal equipment may not always provide a sufficient postmark,  
30 and when compliance with the ballot return deadline might otherwise be at risk, ballot instructions  
31 could encourage voters to either purchase a dated postage label at a U.S. Postal Service vending  
32 machine or customer-service window, or ask a postal worker to “hand-cancel” (put a postmark on)

1 a mailed absentee ballot. A dated waybill from a commercial courier service showing that the  
2 voted absentee ballot was sent to the local election office before Election Day, as well as a U.S.  
3 Postal Service ID Tag (if one has been added to the envelope) with a bar code that establishes that  
4 the ballot was mailed before Election Day, should be treated like a valid postmark. But no one  
5 (other than a voter already in line at poll closing time) should be permitted to cast a ballot after the  
6 polls close.

7 The Section offers an additional accommodation to absentee voters who vote right before  
8 Election Day by permitting their ballots, if properly postmarked, to arrive after Election Day, up  
9 through the day before the local canvassing deadline. Of course, for these late-arriving ballots it  
10 may be difficult or impossible to provide voters an opportunity to correct deficiencies under  
11 § 110(g).

12  
13 **Illustration:**

14  
15 **Sample Absentee-Ballot-Transmission Envelope**

16  
17 [see page 68]

18  
19 **REPORTERS' NOTE**

20 Many of the principles in this Section represent a balancing of convenience and risk.  
21 Furthermore, this balancing reflects the fact that when a close race (one within the “margin of  
22 litigation”) becomes the subject of an election contest, legal claims are often likely to involve the  
23 absentee-voting process. For instance, several recent election contests have depended at least in  
24 part on disputes about the eligibility of hundreds or thousands of initially uncounted absentee  
25 ballots, with the question of their eligibility in turn involving fact-intensive ballot-specific inquiries  
26 about the adequacy of signatures or other identifying information on the absentee-ballot-  
27 transmission envelopes, or the timeliness of their casting. See, e.g., Edward B. Foley, *The Lake*  
28 *Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELEC.L.J. 129, 145-154  
29 (2011) (discussing several thousand initially rejected absentee ballots at issue in *Coleman v.*  
30 *Franken* election contest); RICHARD L. HASEN, *THE VOTING WARS* 26-28 (2012) (discussing  
31 dispositive impact of late-arriving absentee ballots in 2000 Florida presidential election); cf. *Ohio*  
32 *ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 512-517 (Ohio 2008) (addressing issue of whether  
33 to count approximately 1000 provisional ballots of questionable eligibility, an issue analogous to  
34 many questions of absentee-ballot eligibility); *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 470-  
35 471 (6th Cir. 2008) (describing same issue). When local election rules call for extraneous

1 information on these envelopes, or are unclear about what constitutes a valid absentee ballot, it  
2 multiplies the number of absentee ballots that can become the focus of post-election litigation.  
3 Accordingly, this Section calls for simplification in the process of casting an absentee ballot,  
4 subject to important protections intended to guard against potential problems or abuses.

5 In particular, to manage one of the primary vulnerabilities of absentee voting—that voters  
6 may be improperly influenced or coerced in the marking of their ballots—it remains essential that  
7 each voter swear or affirm at the time of casting the ballot, by signing a declaration on the ballot-  
8 transmission envelope, that the votes represent the voter’s personal preferences, “not the results of  
9 coercion or improper influence.” Another means of policing this concern is to require that a witness  
10 also sign a supporting statement on the ballot-transmission envelope confirming that the voter’s  
11 execution of the ballot was independent, uncoerced, and uninfluenced. Indeed, for similar reasons it  
12 was once commonplace to require a notary public to witness the execution of an absentee ballot,  
13 although today these requirements are widely seen as unduly burdensome. As a result, no state  
14 permitting open absentee voting has a notarization requirement (Mississippi, which restricts absentee  
15 voting to voters with an impediment to voting in person, is today the only state that requires a notary  
16 public to witness an absentee ballot), while only three states with open absentee voting (Alaska,  
17 Minnesota, and Wisconsin) have a witness requirement. But a witness requirement can be an effective  
18 means of solemnizing the process of casting an absentee ballot appropriately, provided the witness  
19 undertakes the responsibility seriously, and the requirement is structured so as not to unnecessarily  
20 burden the absentee voter.

1 For fraud-prevention reasons similar to those described in the Reporters' Note to § 108, it  
2 also is important that absentee voters be personally responsible for returning their voted absentee  
3 ballots, and that they not allow their voted ballots to be returned in batches. See, e.g., Ben  
4 Kochman, *Bronx Politician Hector Ramirez Busted on Voter Fraud Charges*, N.Y. DAILY NEWS,  
5 May 20, 2015, available at [http://www.nydailynews.com/new-york/nyc-crime/bronx-politician-  
7 -hector-ramirez-busted-fraud-charges-article-1.2229187](http://www.nydailynews.com/new-york/nyc-crime/bronx-politician-<br/>6 -hector-ramirez-busted-fraud-charges-article-1.2229187) (describing scheme to collect, vote, and  
8 return dozens of voters' absentee ballots); Michael Moss, *Absentee Votes Worry Officials as Nov.*  
9 *2 Nears*, N.Y. TIMES, Sept. 13, 2004 (describing election officials' worries about misdirection and  
10 other manipulations of voted absentee ballots). The Section provides a limited exception that  
11 permits agents (such as spouses, other relatives, or friends) to deliver no more than two voted  
12 absentee ballots on the same day. The exception is structured in terms of limiting the number of  
13 ballots a single agent can return, rather than in terms of limiting who can serve as the agent.  
14 Although some states, such as Arizona, limit who can serve as the agent rather than how many  
15 ballots can be returned simultaneously, see *Democratic National Committee v. Reagan*, 2018 WL  
16 2191664 (D. Ariz. 2018), a numerical restriction is easier than an identity restriction for election  
17 officials to administer. See also *Keeley v. Ayala*, 179 A.3d 1249, 1259-1264 (Conn. 2018) (holding  
18 that state law permitting absentee voter to return absentee ballot through an agent requires voter to  
19 designate the agent).

20 This Section seeks to further reduce the potential for absentee-voting fraud by requiring  
21 that voted absentee ballots either be received by the Local Election Authority before the polls  
22 close, or that they bear a postmark no later than the day before Election Day and arrive before the  
23 last day of the local canvass. Without these constraints, close races might generate increased  
24 temptation to engage in figurative ballot-box stuffing by harvesting and casting previously uncast  
25 absentee ballots in the hours and days immediately after a preliminary result is announced on  
26 Election Night. Of course, the obvious alternative is to require that all absentee ballots be received  
27 by Election Day at the offices of the Local Election Authority. But provided that it can be done  
28 securely, permitting late-arriving absentee ballots allows more absentee voters to participate in the  
29 election without having to cast their ballots so far in advance of Election Day. The postmark  
30 requirement for late-arriving ballots therefore represents another balancing of risk and voter  
31 convenience. Although a postmark requirement may result in the occasional invalidation of an  
32 absentee ballot that was in fact cast before Election Day but failed to be accurately postmarked,  
33 local election jurisdictions can take steps to minimize these lost ballots, for instance through  
34 careful design of the return envelopes, coordination with the U.S. Postal Service, and careful  
35 instruction to the voters. See *Ohio Secretary of State, Directive 2016-03*, Jan. 29, 2016.

36 For a few states, requiring the acceptance of absentee ballots only through the day before  
37 their local canvassing deadline will not provide the complete benefit. While today most states  
38 provide from one to three weeks for the canvass, a handful of states encourage or require the  
39 canvass to occur within only a couple of days after Election Day (while at the other extreme a few  
40 states have a month-long canvass). States with short local canvassing periods could consider  
extending them, as any additional time between the deadline for late-arriving absentee ballots and

1 the deadline for completion of the canvass will provide absentee voters greater opportunity to  
2 correct errors in their absentee ballots, as contemplated in § 110(g).

3 As noted in the Comments to § 101, the ALI has not taken a position on the advisability of  
4 returning voted absentee ballots electronically. However, many states are moving to electronic  
5 options for their UOCAVA voters. For instance, Colorado, Delaware, the District of Columbia,  
6 Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Montana, Nebraska,  
7 Nevada, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Utah, Washington,  
8 and West Virginia allow UOCAVA voters, in at least some circumstances, to return voted ballots  
9 via email or fax, and Alabama, Arizona, Missouri, and North Dakota also have developed or  
10 piloted an online system for UOCAVA voters to return voted ballots. See National Conference of  
11 State Legislatures, *Electronic Transmission of Ballots*, available at  
12 <http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx> (Feb. 28, 2018). In  
13 New Jersey, UOCAVA voters can vote by email, but they must also send a hard copy of the ballot  
14 via postal mail. See *id.* Meanwhile, Utah also allows voters with a disability to return voted ballots  
15 via email or fax, and Alaska briefly experimented with allowing any eligible voter, UOCAVA or  
16 otherwise, to return a ballot by email, fax, or online. See *id.*

#### 17 18 **§ 110. Processing and Counting Voted Absentee Ballots**

19 **(a) Voted absentee ballots should be collected, processed, and counted at one**  
20 **central location in each local election jurisdiction.**

21 **(b) Each Local Election Authority should establish an absentee-ballot-**  
22 **counting board, evenly balanced in its representation of the relevant major political**  
23 **parties, to conduct the processing and counting of voted absentee ballots. Members**  
24 **of the absentee-ballot-counting board should be specially trained in their duties**  
25 **before the period of absentee voting begins.**

26 **(c) Before the period of open absentee voting begins, the state's Chief Elections**  
27 **Officer should determine whether gaps exist in the statutorily prescribed procedure**  
28 **for absentee-ballot-counting boards to follow in determining whether a voted**  
29 **absentee ballot is valid and eligible for counting, and should fill any gaps by**  
30 **prescribing clear rules designed to further the following purposes:**

31 **(1) ensure confidence that each counted ballot was properly cast by an**  
32 **eligible voter;**

33 **(2) ensure that no tampering has occurred to any ballot;**

34 **(3) prevent the invalidation of any ballot for noncompliance with**  
35 **procedures that do not directly bear on purpose (1) or (2); and**



1                   **(4) identify precisely those categories of errors or deficiencies affecting**  
2                   **the validity of a voted absentee ballot that voters may correct, and how they**  
3                   **may be corrected.**

4                   **(d) Although the absentee-ballot-counting board must not count voted**  
5                   **absentee ballots before Election Day, it should begin verifying the validity of as many**  
6                   **voted absentee ballots as possible and processing those ballots on a rolling basis before**  
7                   **Election Day. By the end of Election Day, the counting board should have verified the**  
8                   **validity of all absentee ballots received before Election Day.**

9                   **(e) If it is timely, a voted absentee ballot should be classified as valid unless:**

10                   **(1) the voter is not registered to vote or not qualified to vote, except if a**  
11                   **preponderance of the evidence establishes that a qualified voter submitted a**  
12                   **valid registration application that, because of an error committed by a**  
13                   **government official, did not successfully result in the voter appearing in the**  
14                   **state's voter-registration database;**

15                   **(2) no name or other identifier appears on the absentee-ballot-**  
16                   **transmission envelope, making it impossible to verify its validity;**

17                   **(3) the absentee-ballot-transmission envelope lacks the voter's**  
18                   **signature or authentication (including the oath or affirmation specified in**  
19                   **§ 109(c));**

20                   **(4) the voter has failed to provide an acceptable form of voter**  
21                   **identification, if any is required;**

22                   **(5) the absentee-ballot-transmission envelope lacks the signature of a**  
23                   **witness, if a witness is required;**

24                   **(6) the absentee ballot is one of multiple ballots cast by the same voter**  
25                   **in the same election;**

26                   **(7) the voter returned the absentee ballot using an intermediary other**  
27                   **than as allowed in § 109(e);**

28                   **(8) the absentee ballot is accompanied by another voted absentee ballot**  
29                   **inside the same absentee-ballot-transmission envelope or mailing envelope, as**  
30                   **prohibited in § 109(e), except that two voted absentee ballots authenticated as**  
31                   **having been submitted by two voters in the same household are not invalid**  
32                   **under this rule unless the preponderance of evidence suggests that the ballots**

1           were cast under circumstances inconsistent with the ballots containing the  
2           voluntary choices of the eligible voters who cast the ballots;

3           (9) the absentee-ballot-transmission envelope arrived unsealed and the  
4           preponderance of evidence suggests that the ballot was cast under  
5           circumstances inconsistent with the ballot containing the voluntary choices of  
6           the eligible voter who cast the ballot; or

7           (10) clear and convincing evidence otherwise establishes that the  
8           absentee ballot was cast under circumstances inconsistent with the ballot  
9           containing the voluntary choices of the eligible voter who cast the ballot,  
10          including duress, coercion, or bribery.

11          (f) When an absentee-ballot-counting board determines that a voted absentee  
12          ballot is invalid, within 24 hours the Local Election Authority should inform the voter  
13          of this determination, using the contact information that the voter has specified on  
14          the ballot-transmission envelope.

15          (g) If the invalidity is a result of the voter's clerical error or other correctable  
16          error or deficiency on the transmission envelope, including the lack of the voter's  
17          signature or authentication on the envelope, the voter's failure to provide an  
18          acceptable form of voter identification, or the lack of a witness signature (if required),  
19          the Local Election Authority must allow the voter an opportunity to correct the  
20          problem before the earlier of the 10th day after Election Day or the completion of the  
21          local canvass of the election, and must inform the voter of this opportunity, using the  
22          contact information that the voter has specified on the ballot-transmission envelope.  
23          If a voter sufficiently corrects an error or deficiency, the ballot must then be  
24          validated, counted, and included in the local canvass.

25          (h) A voter who does not take advantage of the error-correction opportunity  
26          provided in subsection (g) may not subsequently seek to correct an invalid ballot  
27          during any other post-election dispute-resolution processes, and an uncorrected  
28          ballot must not be counted.

29          (i) Members of the public, representatives of candidates and political parties,  
30          journalists, and other interested observers should have a reasonable opportunity to  
31          observe and participate in the process by which the absentee-ballot-counting board  
32          determines the validity of voted absentee ballots, as well as in the process by which

1       **the board counts absentee ballots, provided that these observers do not harass or**  
2       **interfere with members of the absentee-ballot-counting board or other public**  
3       **employees assisting in these processes.**

4               **(j) The state’s Chief Elections Officer should establish clear rules for Local**  
5       **Election Authorities to follow to ensure that voted absentee ballots are protected**  
6       **against loss, damage, or manipulation, including clear chain-of-custody procedures**  
7       **for all voted absentee ballots and ballot-transmission envelopes.**

8       **Comment:**

9               *a. Consistency in processing absentee ballots is essential.* A lack of consistency in the  
10       processing of absentee ballots invites controversy and suspicion concerning election outcomes  
11       whenever the margin of victory is smaller than the number of absentee ballots cast, as confirmed  
12       by many of the problems identified and examples discussed in the Reporters’ Notes to §§ 103 and  
13       108-110, as well as in Part II: Principles for the Resolution of Ballot-Counting Disputes.  
14       Accordingly, because open absentee voting inevitably entails a substantial number of absentee  
15       ballots, it is critical to establish a sound process for counting these absentee ballots. This Section  
16       provides that a sound process begins by centralizing the counting function away from local  
17       precincts, in order to reduce variation and to “professionalize” the counting function through  
18       specialized training of local counting boards, balanced among relevant political parties (including  
19       the possibility of minor-party representation on a counting board, when such representation is  
20       appropriate).

21               Additionally, clear and easily administrable standards for the counting boards to follow in  
22       identifying a valid ballot must be established, in advance. Subsection (e) identifies 10 categories  
23       of invalid absentee ballots, and provides that all other timely received absentee ballots are valid.  
24       The 10 categories are designed to match a similar set of principles in Part II of Principles of the  
25       Law, Election Administration. As explained in more detail in Part II, a person challenging the  
26       validity of an absentee ballot either on the basis that it arrived in an unsealed envelope, or that it  
27       does not reflect the voluntary choices of the eligible voter who cast it, bears the burden of proving  
28       the invalidity of the ballot. Because an unsealed ballot-transmission envelope creates an initial  
29       indication that the ballot may not be reliable, such a ballot should be invalidated if a preponderance  
30       of evidence suggests that the ballot does not accurately reflect the selections made by the voter  
31       because it was cast under circumstances inconsistent with the ballot containing the eligible voter’s  
32       voluntary choices. Multiple ballots returned in the same envelope, in violation of the principle of

1 § 109(e), are presumptively invalid, although subsection (e) of this Section recognizes a specific  
2 exception to this rule for voters in the same household, again unless a preponderance of additional  
3 evidence suggests that the ballots were cast under circumstances inconsistent with the ballots  
4 containing the eligible voters' voluntary choices. Otherwise, clear and convincing evidence is  
5 required to invalidate a ballot on the basis that the ballot was cast under circumstances inconsistent  
6 with it containing the eligible voter's voluntary choices.

7 In addition to employing a dedicated absentee-ballot-counting board, a sound process for  
8 counting absentee ballots also provides an opportunity for public oversight of all phases of the  
9 counting process, as specified in subsection (i). This includes an opportunity for representatives of  
10 candidates and political parties to participate in all of the board's determinations of the validity of  
11 voted absentee ballots, whether the board makes these determinations before Election Day, on  
12 Election Day, or after Election Day.

13 *b. Opportunity to correct errors.* It also is important that the additional steps required to  
14 ensure confidence in the legitimacy of absentee voting not function to disenfranchise legitimate  
15 voters. One tool for reducing unnecessary disenfranchisement is to allow voters to correct errors  
16 in their absentee-ballot-transmission envelopes, provided this correction can occur in a reasonable  
17 time. Subsection (g) establishes the 10th day after Election Day as the final day for this error  
18 correction, at least in the many jurisdictions whose canvassing process is 10 days or longer. This  
19 deadline would provide even those voters whose absentee ballot arrived at the Local Election  
20 Authority after Election Day (as permitted under § 109(g)) some chance to correct errors.

21 This error-correction opportunity pertains only to errors on the transmission envelope,  
22 because election officials can identify these errors before removing the voted ballot from the  
23 transmission envelope. Errors in the marking of the absentee ballot itself, including overvoting in  
24 a particular race, or failure to specify a vote in a given race (undervoting), are not correctable.

25 In order to facilitate the rapid resolution of post-election disputes, subsection (h) provides  
26 that a voter who does not correct the voter's own error during the correction period should be  
27 precluded from seeking to correct the error during subsequent proceedings. However, if election  
28 officials have incorrectly determined that a voter's absentee ballot is invalid, the voter should be  
29 allowed to seek to correct the election officials' error at any stage of post-election proceedings.  
30 Thus, the limitation of the error-correction opportunity in subsection (h) applies only to errors that  
31 are committed by the voter, for which an error-correction opportunity exists under subsection (g).

1           *c. Maintaining the integrity of absentee-balloting materials.* Finally, given the likelihood  
2 that absentee ballots will be intensively scrutinized in a disputed election, all absentee ballots, as  
3 well as the transmission envelopes and other documentation establishing their validity, must be  
4 protected for subsequent review and analysis for at least as long as it is possible to file a contest or  
5 otherwise challenge the validity of the election in question. It therefore is essential for the state's  
6 Chief Elections Officer to establish clear chain-of-custody procedures, particularly for the subset  
7 of absentee ballots whose eligibility for counting is in doubt, as well as protocols for maintaining  
8 the integrity of these ballots.

9           **Illustrations:**

10           A critical element of processing absentee ballots is for each Local Election  
11 Authority to follow uniform standards, clearly defined in advance. These standards, which  
12 need to be set in each state, should specify what errors or deficiencies render a ballot  
13 uncountable, and to what extent and how absentee voters may correct these errors or  
14 deficiencies. By way of illustration:

15  
16           1. Absentee-ballot defects that, with sufficient notice and opportunity, presumably  
17 could be corrected include ballots that arrive without:

- 18           - the voter's signature;  
19           - an identifiable address of the voter, if other contact information is available; or  
20           - a required identification number.

21           2. Absentee-ballot defects that presumably are not correctable include ballots that  
22 arrive:

- 23           - after Election Day, if without a valid postmark (except for military and overseas  
24 ballots, for which the voter's affirmation of voting the ballot by the deadline is  
25 sufficient);  
26           - as part of a prohibited bulk submission; or  
27           - without a valid witness signature, when required.

28 For those defects in Illustration 1, the state should establish a process for notifying the voter of the  
29 defect and permitting the voter to correct it, provided the correction can be made before the local  
30 canvassing deadline.

**REPORTERS' NOTE**

1  
2 In many states, the processing and counting of voted absentee ballots occurs in the precincts  
3 to which the absentee voters are assigned. While this may make sense from the standpoints of both  
4 distributing the workload and keeping the votes where they belong, it has proven to be less  
5 satisfactory than a more centralized approach. Minnesota's difficulty processing absentee ballots  
6 fairly and consistently in the 2008 election, which became apparent in the contest over its U.S.  
7 Senate seat, is instructive. One key problem was that Minnesota tasked poll workers in each local  
8 precinct, at the end of a long Election Day, to conduct the processing and counting of the absentee  
9 ballots cast by voters in that precinct. The result was wide variation in standards and an  
10 unacceptably high error rate. See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's*  
11 *Disputed 2008 U.S. Senate Election*, 10 ELEC. L.J. 129, 139-141, 162 (2011). In response,  
12 Minnesota amended its absentee-ballot-counting process to require central counting by a specially  
13 trained absentee-ballot-counting board. See MINN. STAT. ANN. § 203B.121 (2011).

14 These Principles likewise call for centralized processing and counting, conducted publicly  
15 by a counting board with balanced representation of all relevant major parties (which ordinarily  
16 should include all parties fielding candidates with a realistic prospect of winning their election).  
17 Centralization not only will eliminate precinct-by-precinct variations, but also will facilitate the  
18 thorough training of absentee-ballot-counting boards, the more rapid incorporation of  
19 improvements in technology, and a more open and public process. None of these improvements,  
20 however, lessens the need to establish, in advance of the election, clear rules—preferably in  
21 statute—for the processing and counting of absentee ballots.

22 Subsection (e) specifies the deficiencies that should disqualify an absentee ballot. Notably,  
23 this subsection omits inconsequential clerical errors a voter makes on the absentee-ballot-  
24 transmission envelope. A 2016 federal-circuit-court decision unanimously invalidated an Ohio  
25 statute that required strict accuracy in completion of the transmission envelope. See *Northeast*  
26 *Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016). The Ohio statute required  
27 that absentee voters include their correct address and date of birth, among other identifying  
28 information, on the exterior of the transmission envelope. The trial of the case showed both that  
29 (1) voters occasionally make innocent clerical errors when writing their address or birthdate on  
30 these envelopes, and (2) despite errors of this kind, local boards of elections usually have no  
31 difficulty in verifying the eligibility of the absentee voter because of other identifying information  
32 provided on the envelope (the voter's Social Security or driver's-license number, for example).  
33 The trial court ruled that disqualification of absentee ballots in these circumstances, solely because  
34 of innocent clerical errors, was unconstitutional disenfranchisement of eligible voters in violation  
35 of the Fourteenth Amendment, and the Sixth Circuit panel unanimously affirmed on this point.

36 Furthermore, as with early in-person voting, no interim tallying of votes should occur, for  
37 the reasons discussed in the Reporters' Note to § 106. Instead, both for reasons of efficiency and  
38 in order to facilitate the notification of voters whose absentee ballots are deficient, local election  
39 officials should promptly determine the validity of the voted ballots, on a rolling basis as absentee  
40 ballots arrive, but then either hold the ballots themselves for counting until the close of the polls,  
41 or feed the ballots through a tabulating machine that can record the ballot choices without allowing

1 election officials or anyone else to access any running tallies until the close of polls on Election  
2 Day. Of course, as with early in-person ballots, election officials must secure the absentee ballots  
3 and any tabulating equipment throughout the period of absentee voting.

4 The final safeguard for absentee voting is that voters be provided an opportunity to correct  
5 clerical mistakes or inadvertent omissions that would otherwise render their absentee ballots  
6 invalid. As noted in the Reporters' Note to § 103, absentee votes "lost" to such mistakes often  
7 occur in sufficient volume to affect the outcomes in close races. Yet without notice of a deficiency,  
8 many absentee voters are unaware when their ballot has not been counted. This Section  
9 accordingly calls for a process that will notify absentee voters of such deficiencies, and that also  
10 will allow the voters to remedy these deficiencies, provided they can do so without delaying the  
11 official canvass. Some states may wish to adjust their canvassing timeline and processes in order  
12 to facilitate this error correction.

13 This error-correction process not only will protect each individual voter by reducing the chances  
14 of the voter's effective disenfranchisement, but also should shrink the number of absentee ballots  
15 potentially at issue in a post-election dispute. However, in furtherance of this second goal, it is  
16 important that voters not be able to defer their opportunity to correct deficient absentee ballots  
17 until an election contest is underway. Instead, the corrections must be made before the canvass  
18 ends, at which point the opportunity to correct should lapse.

## 20 § 111. State and Local Data-Collection Responsibilities

21 (a) **Local Election Authorities should maintain detailed records concerning**  
22 **open absentee voting and early in-person voting, including:**

23 (1) **The number of early in-person voters at each early in-person voting**  
24 **location on each day of the early in-person voting period, and the hours that**  
25 **the location was open each day;**

26 (2) **The waiting times that voters experienced at specified regular times**  
27 **throughout each day of the early in-person voting period;**

28 (3) **The number of provisional ballots cast at early-voting locations, the**  
29 **reason(s) for their use, and their resolution;**

30 (4) **The number of valid votes cast for each candidate and for or against**  
31 **each ballot issue through early in-person voting;**

32 (5) **The number of absentee-ballot applications the local election**  
33 **jurisdiction received, the date when the jurisdiction received each application,**  
34 **and the jurisdiction's disposition of each application;**

1                   **(6) The number of voted absentee ballots returned, and the date when**  
2                   **the local election jurisdiction received each voted absentee ballot;**

3                   **(7) The number of voted absentee ballots initially deemed ineligible for**  
4                   **counting;**

5                   **(8) The number of those ballots included in paragraph (7) because of**  
6                   **errors that the election authority permits voters to correct;**

7                   **(9) The number of those ballots identified in paragraph (8) that were**  
8                   **corrected and counted;**

9                   **(10) The number of valid votes cast for each candidate and for or**  
10                   **against each ballot issue through the absentee ballots; and**

11                   **(11) The estimated costs and cost savings associated with any**  
12                   **alternatives to Election Day voting in use in the local election jurisdiction.**

13                   **(b) To permit more extensive analysis of the extent of early in-person voting**  
14                   **and open absentee voting, whenever appropriate the data maintained under**  
15                   **subsection (a) should be reported at the precinct level, rather than at the aggregated**  
16                   **level of the local election jurisdiction.**

17                   **(c) As soon as reasonably possible, and no later than 180 days after an election,**  
18                   **state election officials should collect and organize the data gathered in subsection (a)**  
19                   **and make the data publicly available for study and analysis, including in electronic**  
20                   **form for data that is maintained electronically.**

21                   **(d) For purposes of comparison, Local Election Authorities also should**  
22                   **maintain and make publicly available for study and analysis detailed records**  
23                   **concerning Election Day voting, including:**

24                   **(1) The number of voters voting at each precinct on Election Day;**

25                   **(2) Waiting times that voters experienced at each precinct at specified**  
26                   **regular times throughout Election Day; and**

27                   **(3) The number of provisional ballots cast at each precinct on Election**  
28                   **Day, the reason(s) for their use, and their resolution.**

29                   **(e) State and local election officials should study and analyze the data collected**  
30                   **in subsection (a), and should review independent studies and analyses of this data, in**  
31                   **order to adjust early in-person voting procedures and open absentee voting**





1 -lines/. Government officials and interest groups also have increasingly recognized the value of  
2 good data about election administration. See, e.g., U.S. Election Assistance Commission, *4 Tips*  
3 *for Making Election Data Pay Off*, August 3, 2017, at  
4 [https://www.eac.gov/documents/2017/08/03/four-tips-for-making-election-data-pay-off-](https://www.eac.gov/documents/2017/08/03/four-tips-for-making-election-data-pay-off-contingency-plan-election-administration-pre-election-security/)  
5 [contingency-plan-election-administration-pre-election-security/](https://www.eac.gov/documents/2017/08/03/four-tips-for-making-election-data-pay-off-contingency-plan-election-administration-pre-election-security/); The Pew Center on the States,  
6 *Election Administration by the Numbers: An Analysis of Available Datasets and How to Use Them*,  
7 i-ii (2012), available at  
8 [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2012/PewElectionsByThe](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewElectionsByTheNumberspdf.pdf)  
9 [Numberspdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewElectionsByTheNumberspdf.pdf). The Presidential Commission on Election Administration also has called for  
10 better data collection and analysis, bemoaning the “data vacuum” in election administration and  
11 urging the deployment of data analytics in the understanding and improvement of election  
12 administration. See *The American Voting Experience: Report and Recommendations of the*  
13 *Presidential Commission on Election Administration* 67 (2014).

14 Undoubtedly, the “data vacuum” concerning matters of election administration has been  
15 improving in recent years. The United States Election Assistance Commission has been collecting  
16 important data about the conduct of federal elections, particularly in the form of its biennial  
17 *Election Administration and Voting Surveys*. See, e.g., U.S. Election Assistance Commission, *The*  
18 *EAC Election Administration and Voting Survey 2016 Comprehensive Report*, June 2017,  
19 available at <https://www.eac.gov/research-and-data/election-administration-voting-survey/>; U.S.  
20 Election Assistance Commission, *The 2014 EAC Election Administration and Voting Survey*  
21 *Comprehensive Report*, June 2015, available at  
22 [https://www.eac.gov/assets/1/1/2014\\_EAC\\_EAVS\\_Comprehensive\\_Report\\_508\\_Compliant.pdf](https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf);  
23 U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, Sept.  
24 2013, available at  
25 <https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf>. Additionally, in  
26 2008, 2012, 2014, and 2016, the Survey of the Performance of American Elections (“SPAЕ”), a  
27 private academic study, collected information from the perspective of the voters. See Caltech/MIT  
28 Voting Technology Project, *Survey of the Performance of American Elections*, available at  
29 <https://dataverse.harvard.edu/dataverse/SPAЕ>. Yet as a coauthor of the SPAЕ put it, “even the best  
30 source of nationally comparable data about election administration contains important gaps and  
31 inconsistencies.” Stewart, *Losing Votes*, supra, at 597. For instance, much of the currently available  
32 data is reported inconsistently, or is aggregated at the county level (or at the municipal level in  
33 states that conduct elections at that level), rather than at the precinct level, or is not even reported  
34 at the level of the local election jurisdiction. See *Election Administration by the Numbers*, supra,  
35 at 11-15; THE MEASURE OF AMERICAN ELECTIONS, supra, at 14-15.

36 Data collection and analysis will inevitably continue to improve. Nevertheless, this Section  
37 aims to promote more rapid improvements in early and absentee voting by specifying key  
38 categories of data that local and state election authorities should maintain, and by providing that  
39 election authorities share this data publicly. The categories of data specified in  
40 § 111(a) reflect the key desires of many empirical researchers, and when systematically collected

- 1 and analyzed should promote better understanding and refinement of the processes of early and
- 2 absentee voting.