

**DOCUMENTING DISFRANCHISEMENT: VOTER IDENTIFICATION AT
INDIANA'S 2008 GENERAL ELECTION**

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I. INTRODUCTION

The approach to election administration in the legal academy has taken a decidedly empirical turn. The push is now on for a more “data-driven” focus so that efforts at election reform can be accurately assessed and properly advocated.¹ Perhaps nowhere is the absence of data more stark than in the contentious, highly partisan debate over laws that require persons appearing at polling places on election day to present photo identification as a condition of casting a countable ballot.² Of the numerous elections that have been conducted using photo identification in Georgia and Indiana—the two States with the most stringent photo identification requirements—only one prior study has attempted to quantify how many prospective voters arrived at a polling place without a proper photo identification, cast a provisional ballot, and then ultimately had that provisional ballot rejected.³ This is the case despite the fact that other research approaches to gauging the impact of photo identification, such as estimating effects on turnout, may not be able to demonstrate photo identification’s impact quite as well, if at all.⁴

At its most foundational level, the debate surrounding photo identification can presumably be resolved by balancing photo identification’s ability to preserve the integrity of elections by preventing in-person voter fraud against the extent to which the law limits access to

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¹ HEATHER GERKEN, THE DEMOCRACY INDEX 5-6 (2009) (advocating for the creation of a “Democracy Index” that would use comparative data on state and local election performance in order to generate pressure for reform); Daniel P. Tokaji, *The Moneyball Approach to Election Law*, ELECTION LAW @ MORITZ, Oct. 18, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php> (“In calling for a ‘Moneyball Approach to Election Reform,’ I mean to suggest a research-driven inquiry, in place of the anecdotal approach that has too often dominated election reform conversations. While anecdotes and intuition have their place, they’re no substitute for hard data and rigorous analysis.”).

² Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 635 (2007) (noting that “political sound bites and media reports, rather than comprehensive academic analysis, have shaped the photo-identification debate,” and advocating an empirical approach to voter identification); see also Adam Liptak, *Fear But Few Facts in Debate on Voter I.D.’s*, NY TIMES, Sept. 24, 2007, at A12 (noting that there are “not a lot of facts” in the debate over photo identification).

³ See generally Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J. L. & POL. 475 (2008). Other studies have attempted to quantify provisional ballots rejected for lack of identification, but not in the States that are alleged to have the most restrictive and contentious identification laws. See, e.g., STEVEN F. HUEFNER ET. AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 49 (2007) (detailing provisional balloting in Ohio).

⁴ See generally Robert S. Erickson and Lorraine Minnite, *Modeling Problems in the Voter-Identification – Voter Turnout Debate*, 8 ELECTION L. J. 85 (2009) (detailing the difficulty of estimating the impact of voter identification laws through analyses of turnout).

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democracy by preventing legitimate voters from casting countable ballots.⁵ Accordingly, aimed at shedding additional empirical light on one side of this access versus integrity debate, we present and examine previously unavailable data regarding the extent to which Indiana's photo identification requirement prevented prospective voters from casting a countable ballot at the 2008 general election. To be precise, we surveyed all 92 counties in Indiana to determine how many persons arrived at the polls without valid identification, cast a provisional ballot, and then had that provisional ballot counted.

To cut right to the highlight reel: out of the roughly 2.8 million persons who cast ballots at Indiana's 2008 general election, 1,039 arrived at the polls without valid identification and then cast a provisional ballot. Of those 1,039 persons without valid identification who cast a provisional ballot, 137 ultimately had their provisional ballot counted.

There are several reasons why this research is important to the debate surrounding photo identification. First, in the recent United States Supreme Court litigation related to Indiana's photo identification law, the plaintiffs challenging the law were primarily criticized for their failure to generate firm evidence of disfranchisement.⁶ Our research helps begin to fill this gap in the plaintiffs' case⁷ and presents the clearest evidence yet that photo identification has a disfranchising impact on hundreds of persons who want to have their democratic voice heard. Second, this research, when viewed in conjunction with previous research from Indiana's 2008 primary election, provides the first opportunity to search for trends in the operation of photo

⁵ Speaking generally, the extent of vote fraud and the extent of vote denial are considered "the central empirical questions that should guide the decision over the constitutionality of voter ID laws." Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1740 (2008). Of course, it's not crystal clear that photo identification should be rejected as a matter of constitutional law or legislative prerogative if the number of legitimate voters excluded is greater than the number of illegitimate voters prevented from casting fraudulent ballots. For instance, it might be argued that if an increase in public confidence in democracy due to photo identification could be demonstrated, then the increase in public confidence outweighs the disfranchisement of voters. Conversely, it's also not crystal clear that photo identification should be adopted if the number of legitimate voters excluded is smaller than the number of fraudulent votes prevented. One could argue that the harm of disfranchisement is much worse than the harm of illegitimate voting—an argument that might be considered the election administration analogue to "it is better that ten guilty persons escape, than that one innocent suffer." Thanks to Dan Cole who pointed out this latter argument at a faculty colloquia.

⁶ *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621-23 (criticizing the plaintiffs for failing to gather adequate evidence quantifying the magnitude of the burden Indiana's law imposes on certain voters); *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951-52 (7th Cir. 2007) ("But there is something remarkable about the plaintiffs considered as a whole . . . [t]here is not a single plaintiff who intends not to vote because of the new law—that is, who would vote were it not for the law."); *Ind. Democratic Party v. Rokita*, 458 F.Supp.2d 775, 822 (S.D. Ind. 2006) ("Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting . . .").

⁷ The Supreme Court's opinion seems to leave open the possibility of a future constitutional challenge to Indiana's photo identification law if evidence of disfranchisement can be generated. See Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1668-69 (2009) (noting that the Supreme Court left open the possibility of a successful future challenge to Indiana's law if deficiencies in the record could be fixed).

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identification. Third, our research allows for a comparison of the impact of Indiana's photo identification law with the impact of voter identification laws in other States and shows Indiana to be among the Nation's leaders in rejecting provisional ballots for lack of valid identification. Thus empirically demonstrating that Indiana's law is more stringent than the voter identification laws in other States. Fourth, Indiana's law may well be the key photo identification law that needs to be studied because its recent endorsement by the United States Supreme Court means that it may well serve as a model for the many other States considering photo identification.⁸ Thus, this research contains insights for legislators in those States and for the state and federal courts that may ultimately assess the constitutional validity of such laws. Fifth, this research has implications for the larger debate generated by Yale's Heather Gerken about creating a Democracy Index that leads to data-driven election reform⁹ because it documents some of the barriers to gathering data about photo identification and, therefore, highlights what might be a significant hurdle to creating a viable, credible Democracy Index.

II. BACKGROUND, RESEARCH APPROACH, AND BARRIERS TO DATA COLLECTION

Indiana's photo identification requirement, which may well be the most stringent voter identification requirement in the Nation,¹⁰ has been extensively detailed in other literature¹¹ and, thus, need not be fully explicated here again. For present purposes, it suffices to note that Indiana requires nearly every single prospective voter who arrives at a polling place on election day to present a photo identification issued by the State of

⁸ Voter identification in general and photo identification in particular is actively being considered by a number of other States. See Center for Democracy & Election Management, *The State of Elections In The Fifty States* 12 (July 15, 2009) ("In the 2009 legislative session, new voter ID legislation was introduced in Colorado, Oklahoma, Kansas, Texas, Tennessee, Alabama, South Carolina, Rhode Island, North Carolina, Missouri, Massachusetts, Mississippi and Michigan"); Terrence Stutz, *Texas Senate at odds over voter ID legislation, two-thirds rule*, DALLAS MORNING NEWS (Jan. 14, 2009) (discussing proposal for photo identification in Texas); Jake Grovum, *GOP Legislators Want Photo IDs for Voting In Minnesota*, STAR-TRIBUNE (Jan. 26, 2009) (discussing proposal for photo identification in Minnesota).

⁹ *Supra* note 1.

¹⁰ As of November 2008, Florida was the only other State (apart from Indiana and Georgia) to have implemented at an election a requirement that prospective voters present photo identification. However, Florida's law would seem to be less stringent because a person's provisional ballot can be counted even without the person presenting identification so long as the signature on the provisional ballot form matches the signature on the voter registration record. See FLORIDA DIVISION OF ELECTIONS, <http://election.dos.state.fl.us/gen-faq.shtml#link3> (last visited May 15, 2009). Arizona also has what may be considered to be a very restrictive voter identification requirement. However, Arizona allows prospective voters to present two forms of *non-photo* identification in lieu of a photo identification; thus, at least in theory (though perhaps not in practice), Arizona's requirement is less stringent than Indiana's or Georgia's. See *Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS, slip op. at 5 (D. Ariz. Aug. 20, 2008) (describing the mechanics of Arizona's identification law). In the spring of 2009, Utah adopted an identification requirement similar to Arizona's. H.B. 126, Gen. Sess. (Utah 2009).

¹¹ See Pitts, *supra* note 3, at 481-85; Edward B. Foley, Crawford v. Marion County Election Board: *Voter ID, 5-4? If So, So What?*, 7 ELECTION L.J. 63, 64-65 (2007).

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Indiana (*e.g.*, a driver's license) or by the federal government (*e.g.*, a passport).¹² A prospective voter who fails to produce photo identification must be offered a provisional ballot,¹³ and a prospective voter who chooses to cast a provisional ballot then has a 10-day post-election window at which to appear at the local election office and validate the ballot¹⁴ either: (1) by signing an affidavit saying he or she can't afford identification due to indigency or has a religious objection to being photographed,¹⁵ or (2) by presenting a valid photo identification.¹⁶

The provisional balloting process provides the most direct and tangible opportunity to assess the impact of photo identification on election day for both theoretical and practical reasons. In terms of theory, one approach to measuring disfranchisement is to determine how many persons were deterred from going to the polls because they knew they lacked identification.¹⁷ However, one major flaw of such an approach is that it relies on self-reports from voters about why they did not cast a ballot and such reports may not be very reliable.¹⁸ Another approach to measuring disfranchisement is to determine access to identification by measuring, for example, how many registered voters lack a driver's license or state identification card.¹⁹ However, this approach is subject to criticism because it does not definitively show that persons who lack photo identification would actually go to the polls. In contrast, a research approach that measures the number of persons who went to the polls and cast provisional ballots does not rely on self-reported statements of voters but on their actions. In addition, persons who went to the polls and cast a provisional ballot because they lacked identification demonstrate a firm commitment to having their democratic voice resonate.

¹² IND. CODE § 3-11-8.25.1(a) (2006) (“[A] voter who desires to vote an official ballot at an election shall provide proof of identification.”). IND. CODE § 3-5-2-40.5 (2006) (defining proof of identification). Although several types of identification can satisfy the photo identification requirement, “the legislature expected the most common form of ID used to satisfy the new statute would be an Indiana driver’s license or a non-driver identification card issued by the Indiana Bureau of Motor Vehicles (BMV).” Foley, *supra* note 11, at 65.

¹³ If the prospective voter does not offer valid identification, the poll worker challenges the prospective voter and informs him or her of eligibility to cast a provisional ballot instead of a regular ballot. IND. CODE §§ 3-11-8-20, 3-11-8-25.1(c), 3-11-8-27.5 (2006).

¹⁴ IND. CODE § 3-11.7-5-1(b) (providing for ten-day time period); IND. CODE § 3-11.7-5-2.5(a) (2006) (appearance before circuit court clerk or county election board).

¹⁵ IND. CODE § 3-11.7-5-2.5(c)(2)(A)-(B) (2006).

¹⁶ To be more precise, before the county election board will count the provisional ballot, a voter must (1) appear before local election officials within ten days and present proper identification, and (2) affirm under penalty of perjury that she is the same voter who filled out on election day the provisional ballot in question. IND. CODE § 3-11.7-5-2.5(b) (2006).

¹⁷ For an example of such an approach, see R. Michael Alvarez et. al, *2008 Survey of the Performance of American Elections* 59 (2009), available at <http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf> (last visited July 28, 2009).

¹⁸ Richard Sobel, *Voter-ID Issues in Politics and Political Science*, 42 PS: POL. SCI. & POL. 81, 83 (2009) (“[P]eople do not always accurately report voting or their reasons for failing [to vote].”).

¹⁹ For an example of such an approach, see generally Matt A. Barreto et. al., *The Disparate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111 (2009).

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Provisional balloting also serves as the most direct evidence of photo identification's impact because, as a practical matter, it generates quite a bit of bureaucratic paperwork. If a prospective voter does not have a valid photo identification, a poll worker must challenge the voter and give the prospective voter the option to cast a provisional ballot.²⁰ If the prospective voter opts to enter the provisional balloting process, the poll worker is required to fill out a form that provides the reason for the provisional ballot being cast.²¹ After election day, election officials are required to fill out two additional forms. One of these forms indicates whether the voter returned within the 10-day window to validate the provisional ballot (*i.e.*, by presenting a valid identification, claiming indigency, or citing a religious objection).²² The other form indicates whether the provisional ballot was counted in the final canvass of the votes and, if not counted, the reason why the ballot was not counted.²³ Moreover, election officials are required to retain copies of these materials for nearly two years following an election.²⁴

In light of the paper trail generated during the provisional balloting and canvassing process and the intense controversy surrounding Indiana's photo identification law,²⁵ it would be reasonable to assume that data on the number of provisional ballots cast and the number of provisional ballots not

²⁰ IND. CODE § 3-11-8-22.1(f) (2006) (stating that the prospective voter "shall be provided with a provisional ballot . . . rather than a regular official ballot if the voter wishes to cast a vote").

²¹ This form is the PRE-4 form. The PRE-4 form requires the challenging poll worker to record the reason why the voter was challenged, *i.e.* the reason the voter was ineligible to cast a regular ballot and must cast a provisional ballot. The PRE-4 form provides eight different choices the poll worker can select as the reason for the challenge, and the poll worker is required to check the box next to the appropriate choice. One of those eight choices is that "[t]his voter was unable or declined to present proof of identification when required by law to do so." For a copy of the PRE-4 form, see Pitts, *supra* note 3, at 515-18.

²² This form is the PRO-10 form. The PRO-10 is the form filled out by a prospective voter returning to validate a ballot at the local election office in the days following the election. This form requires the voter to attest under penalty of perjury that she is the same person who filled out the provisional ballot in question on election day. For a copy of the PRO-10 form, see Indiana Secretary of State, http://www.in.gov/sos/elections/pdfs/PRO-10_2006.doc (last visited July 27, 2009).

²³ This form is the PRO-2 form. In most counties the PRO-2 form is not a separate form but is an envelope that will eventually contain the actual provisional ballot on which the voter makes his or her selections. On the PRO-2, the challenged voter fills in her name and her general contact information. After filling out the forms necessary to cast a provisional ballot, the provisional voter then fills out an actual ballot, that ballot is placed inside the envelope, and the envelope is sealed. IND. SEC'Y OF STATE & IND. ELECTION DIV., 2008 INDIANA ELECTION DAY HANDBOOK 23-24 (2007), available at http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf. (detailing provisional ballot process within polling place). Later, the election board canvasses the provisional ballots to determine which ones are valid. If the provisional ballot is determined to be valid, the envelope is opened and the provisional ballot is counted. IND. CODE § 3-11.7-5-4 (2006) (opening of envelope); § 3-11.7-5-8 (counting of provisional ballot). If the provisional ballot is determined to be invalid, the envelope remains sealed. IND. CODE § 3-11.7-5-3(a) (2006). In either instance, the local election board is supposed to mark on the PRO-2 form whether the provisional ballot was counted and, if not counted, the reason why the provisional ballot was not counted. For a copy of the PRO-2 form, see Pitts, *supra* note 3, at 514.

²⁴ Ind. Code §§ 3-11.7-5-24; 3-10-1-31 (2006).

²⁵ The intensity of the controversy is demonstrated by the vast number of amicus briefs that were filed in the challenge to Indiana's law at the United States Supreme Court. A total of 39 amicus briefs were filed; 23 filed on behalf of the petitioners in the case, 15 filed on behalf of the respondents, and one filed in support of neither party. See Michael J. Pitts, *The Amicus Briefs in the Indiana Voter Identification Case: I Read . . . So You Don't Have To*, available at <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=227> (Jan. 9, 2008).

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counted because of a lack of photo identification would readily be made available to the public by government officials. In theory, election officials in each of Indiana's 92 counties could report the data to a central clearinghouse, presumably the Indiana Secretary of State's Office. This central clearinghouse could then compile and disseminate the data from each county. Academic researchers or other interested persons could then analyze the data to assess photo identification's impact and to make policy recommendations to legislators or legal arguments to judges.

Unfortunately, there is currently no federal or state mandate to collect and make publicly available this data. While counties are required to report to the Secretary of State the total number of provisional ballots cast and the total number of provisional ballots counted,²⁶ there is no requirement that counties report the *reasons* why provisional ballots were cast (*e.g.*, voter not on registration list, voter lacked photo identification, *etc.*) and the reasons why provisional ballots were not counted. Indeed, in past election-day surveys conducted by federal and public interest entities, Indiana officials refused to provide this information. For example, in the 2006 Election Administration and Voting Survey conducted by the federal Election Assistance Commission²⁷ and in the 2009 Pew Provisional Ballot Study,²⁸ Indiana failed to report the reasons why provisional ballots were cast and not counted.

Interestingly, legislation opening up access to data related to provisional ballots has failed to become law at each of the last two Indiana legislative sessions. In 2008, the legislature failed to adopt a bill that would have required counties to self-report the reasons why provisional ballots were cast.²⁹ In 2009, the legislature adopted a similar proposal that would have additionally required counties to provide public access to the documents created during the provisional balloting process. However, the 2009 legislation was vetoed by the Governor.³⁰

The lack of ready access to data and the defeat of legislative initiatives to collect data and make the provisional balloting process transparent is an important point for several reasons. First, the lack of any self-reported data imposes a substantial cost in terms of data collection. As will be detailed a bit more below, it takes weeks and weeks to collect data and it's difficult to collect a full and complete set of data from all 92 Indiana counties (although our efforts have resulted in a nearly complete data set). Second, the lack of transparency in the provisional balloting process makes it difficult to verify the accuracy of any self-reports by election administrators and makes it impossible to conduct further research beyond local election officials' self-

²⁶ Individual counties are required to report these numbers on a form mandated by the State that is called the CEB-9 form. Indiana Election Commission, County Election Report (Form CEB-9), available at <http://www.in.gov/sos/elections/pdfs/CEB-9.pdf>.

²⁷ See U.S. ELECTION ASSISTANCE COMMISSION, THE 2006 ELECTION ADMINISTRATION AND VOTING SURVEY 45-48 (2007).

²⁸ Pew Provisional Ballot Study. (forthcoming, Aug. 31, 2009).

²⁹ H.B. 1196, 115th Gen. Assem. (Ind. 2008).

³⁰ S.B. 209, 116th Gen. Assem. (Ind. 2009). In the interest of full disclosure, one of the author's (Pitts) testified before both the Indiana Senate and House on behalf of the legislation.

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reported numbers. For example, self reports of the total number of persons who did not have photo identification and voted provisionally does not allow further research into the characteristics of those voters, whereas if provisional balloting materials were made available to the public it would then be possible to send a questionnaire to those persons who lacked identification and voted to gather important demographic data such as race, ethnicity, age, and partisan affiliation.

Perhaps more importantly, in light of the significant academic attention being paid to Professor Heather Gerken's proposal for a Democracy Index that uses empirical data to rank performance by the States in the hopes of generating support for improvements in the conduct of American elections,³¹ the lack of data and transparency shows how difficult it might be to create an effective Index. It's impossible to create a viable Democracy Index that ranks all the States in terms of their performance if one does not have all the key variables with which to work and one does not have the ability to verify the data. While the biggest political barrier to the creation of the Democracy Index may well be over what variables go into the Democracy Index (*i.e.*, whether to rank a State with photo identification as doing well because it's taking steps to preserve the integrity of elections or as doing poorly because it's erecting additional barriers to access),³² there may be a significant political fight about even allowing access to data in the first place. True enough, Professor Gerken recognizes that eliminating existing barriers to data collection is a necessary precursor for a Democracy Index.³³ However, recent experience in Indiana indicates this barrier may be much higher and more difficult to surmount than one might expect at first blush.³⁴

III. SURVEY RESULTS

The lack of a central collection point for data about provisional ballots related to photo identification means that the only way to collect this information is by surveying election officials in every single one of Indiana's 92 counties. During the months of January, February, and March of 2009, we conducted a phone and e-mail survey of each county election office. The survey asked local election officials to provide four key pieces of data: (1) how many total provisional ballots were cast; (2) how many provisional ballots were cast because the voter lacked valid identification; (3) how many total provisional ballots were counted; and (4) how many

³¹ *Supra* note 1.

³² Michael S. Kang, *To Here From Theory in Election Law*, 87 TEX. L. REV. 787, 795 (2009) ("The challenges facing the Democracy Index are many, beginning with the fundamental question of how it should be composed.")

³³ Gerken, *supra* note 1, at 113.

³⁴ To be clear, just because it may be difficult to get government officials to provide access to data does not mean that the Democracy Index is not a worthwhile project over the long haul. It does, however, mean that it may take many, many years to achieve the goal, something that Professor Gerken seems to implicitly recognize. Gerken, *supra* note 1, at 113 ("Even a modest reform like [the Democracy Index] will take work to bring it to life.").

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provisional ballots cast because the voter lacked identification were ultimately counted (*i.e.*, how many persons who cast a provisional ballot because they did not have valid identification returned post-election to provide proper identification). For readers who are interested, we provide a more detailed statement of how the survey was conducted in Appendix A.

Ultimately data was received from every county in Indiana, save two,³⁵ providing a nearly complete snapshot of the impact of photo identification at the 2008 general election. The aggregate data from the survey is reflected in Table 1. We provide individual county results in Appendix B.

Table 1
Identification's Impact at 2008 Indiana General Election

Total Ballots Cast ³⁶	Total Provisional Ballots Cast	ID-related Provisional Ballots Cast	Total Provisional Ballots Counted	ID-related Provisional Ballots Counted
2,805,982	7,094	1,039	2,035	137

A few things are worth noting at the outset. First, the overall number of provisional ballots cast is small when compared to the total number of ballots cast. Provisional ballots make up only 0.25% of the total ballots cast.³⁷ Second, the number of identification-related provisional ballots in relation to the total number of ballots cast is even smaller. Identification-related provisional ballots account for 0.037% of the total ballots cast.³⁸ Third, identification-related ballots comprise a little less than 15% of all

³⁵ The two counties that did not provide data were Ohio County and Warrick County. In Ohio County, a new county clerk took office shortly after the November 2008 general election and related that the provisional balloting materials could not be located. In Warrick County, local officials told us the provisional balloting materials are kept under lock and key and cannot be accessed without both the Democrat and Republican members of the election board present, and local election officials refused to gather the board to access the documents and provide answers to our survey. However, the failure of these two counties to report is not likely to have a meaningful impact on the results presented here because these counties reported a very low number of provisional ballots to the Indiana Secretary of State. Ohio County reported a total of 9 provisional ballots, of which 3 were counted; Warrick County reported a total of 8 provisional ballots, of which none were counted.

³⁶ The total number of ballots cast was calculated using the CEB-9 forms that are available from the Indiana Secretary of State. The CEB-9 form is a report filled out by each county that includes, among other things, the total number of ballots cast in the county, the total number of provisional ballots cast in the county, and the total number of provisional ballots counted in the county. Appendix C of this article provides the information gleaned from each individual county's CEB-9 form for the 2008 general election.

³⁷ This percentage was calculated by dividing the total provisional ballots cast (7,094) by the total ballots cast (2,805,982). It's worth noting that Indiana's overall rate of provisional balloting at the 2008 general election was well below the national average. Nationally, 120,698,778 ballots were cast and 2,037,887 provisional ballots were cast, which means provisional ballots were 1.69% of the ballots cast. See Pew, *supra* note 28.

³⁸ This percentage was calculated by dividing the identification-related provisional ballots cast (1,039) by total ballots cast (2,805,982).

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provisional ballots cast.³⁹ Fourth, the vast majority of the provisional ballots cast due to a lack of identification were ultimately not counted—only a little more than 13% of provisional ballots cast due to a lack of identification were included in the final canvass.⁴⁰ Put differently, 902 persons arrived at a polling place without valid identification, cast a provisional ballot, and then had that ballot go uncounted.⁴¹ Fifth, the number of persons who had their provisional ballot go uncounted due to identification-related problems amounts to 0.032% of the total ballots cast.⁴²

Of course, like any survey, a canvass of local election officials is likely to have some margin of error.⁴³ Thus, the optimal next step would be to physically review the documents related to provisional balloting from each of the counties or, at the very least, to physically review a random sample of such documents to calculate a margin of error. Unfortunately, this next step currently is impossible because Indiana’s provisional balloting materials have been deemed off-limits to the public⁴⁴ and legislation that would have provided public access to provisional balloting materials was vetoed by the governor in May of 2009.⁴⁵ In short, at this point a survey of local election officials is the only way to gather data about the impact of photo identification on election-day provisional balloting and, unfortunately, we have no ability to definitively verify the survey’s accuracy. That said, previous research demonstrates that the survey results are likely to provide a reasonable estimate of photo identification’s impact.⁴⁶

Apart from unavoidable methodological issues, it’s worth emphasizing a couple of other reasons why the survey may both overstate and understate photo identification’s impact at the 2008 general election. The survey likely *overstates* the number of provisional ballots cast and not counted due to a lack of photo identification because it’s likely that included among the 1,039 identification-related provisional ballots are some provisional ballots cast because a prospective voter could not satisfy a separate identification

³⁹ This percentage was calculated by dividing the identification-related provisional ballots cast (1,039) by the total provisional ballots cast (7,094).

⁴⁰ This percentage was calculated by dividing the identification-related provisional ballots counted (137) by the identification-related provisional ballots cast (1,039).

⁴¹ This percentage was calculated by subtracting the identification-related provisional ballots counted (137) from the identification-related provisional ballots cast (1,039).

⁴² This percentage was calculated by dividing the number of voters who had their provisional ballot go uncounted for lack of identification (902) by the total ballots cast (2,805,982).

⁴³ Factors that might contribute to this margin of error include: (1) local election officials might “make up a number out of whole cloth because they were too busy”; (2) local officials might “concoct numbers due to personal ideological perspectives regarding photo identification”; (3) local officials might have “misunderstood the nature of the data sought”; (4) local officials might have “miscounted the number of ballots for any one of the pieces of data sought”; (5) local officials might have provided “numbers ‘off the top of their head’ rather than taking the time to verify the accuracy of their memories”; and (6) the fact that “misperception and misstatement can always be present in oral and written communication.” Pitts, *supra* note 3, at 488-492.

⁴⁴ Heather W. Neal, *Informal Inquiry 08-INF-28 Regarding Provisional Ballot Materials*, available at http://www.in.gov/pac/files/Informal_Inquiry_08-INF-28.pdf (last visited Apr. 2, 2009).

⁴⁵ S.B. 209, 116th Gen. Assem. (Ind. 2009).

⁴⁶ Pitts, *supra* note 3, at 496-97 (noting that a survey of local election officials from the primary about instances of voters not having valid identification closely corresponded to a sample of actual provisional balloting documents obtained from the local officials).

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requirement at work in Indiana elections: the identification requirement for *first-time* registrants mandated by the Help America Vote Act (HAVA).⁴⁷ Without delving too far into the picayune details (which can be found in the footnote), it's possible for a first-time Indiana voter to comply with the photo identification requirement but *not* to comply with the HAVA-related identification requirement.⁴⁸ However, previous research indicates that the HAVA-related identification requirement likely only amounts to a small amount of the identification-related provisional ballots;⁴⁹ in addition, prior research also indicates that many of the provisional ballots that pollworkers characterize as HAVA-related may actually be related to photo identification.⁵⁰

Our research likely *understates* the impact of photo identification for several reasons, the most prominent of which is that the survey cannot

⁴⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002), enacted in relevant part at 42 U.S.C. § 15483(b)(2002).

⁴⁸ The lack of a “one-size-fits-all” identification requirement is a bit counterintuitive. HAVA requires first-time voters that are registering by mail to provide identification at the polls but the types of identification that can meet this requirement are different from the types of identification that can meet the photo identification requirement. Photo identification requires a government-issued photo identification; HAVA identification, however, allows for some forms of *non-photo* identification. 42 U.S.C. § 15483(b)(2)(A)(ii)(I)-(II) (allowing voters the choice of presenting either a “current and valid photo identification” or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter”); IND. CODE § 3-7-33-4.5(b)(1). Moreover, while both allow a photo identification to meet the requirement, the photo identification law does not require the address on the photo identification to match the voter’s address on the voter registration list; however, the HAVA identification requirement requires the addresses to match. IND. SEC’Y OF STATE & IND. ELECTION DIV., 2008 INDIANA ELECTION DAY HANDBOOK 12 (2007). In short, the requirements of the photo identification law and the HAVA identification law are not the same, so a voter may comply with the photo identification requirement but not the HAVA identification requirement.

We did not ask local officials to distinguish between photo identification provisional ballots and HAVA identification provisional ballots for two reasons. First, previous research indicated that very few provisional ballots in Indiana are HAVA-related. See *infra* note 49 and accompanying text. Second, we think making the survey as simple as possible likely contributes to greater overall accuracy in the data because it reduces the burden on election officials and, therefore, likely increases the response rate of the survey.

⁴⁹ Previous research indicates that HAVA-related identification ballots accounted for only 10% of all identification-related ballots at the 2008 primary election. See Pitts, *supra* note 3, at 498-99 (estimating that in the 2008 Indiana primary election of 446 ID-related provisional ballots, 47 were HAVA-related).

⁵⁰ See Pitts, *supra* note 3, at 496-97 n.79 (noting that “[s]ome poll workers may have misclassified photo identification problems as HAVA-related identification problems”). However, it is possible that the general election resulted in greater interest and more first-time registrants than the primary election and that this increased the number of HAVA-related identification problems from the primary election to the general election.

Our research also likely *overstates* the number of persons prevented from casting a countable ballot because the survey may capture some provisional ballots that were not counted for a reason apart from insufficient identification. In other words, some provisional ballots may have been cast for multiple reasons, including lack of photo identification, but those ballots may not have been counted for some other reason. Put into a more concrete example, a provisional ballot may have been cast because the prospective voter lacked photo identification and *also* because the prospective voter’s name did not appear on the registration list. Ultimately, this provisional ballot may have been rejected because of the lack of registration and *not* the lack of photo identification. Again, though, previous research indicates that the number of provisional ballots cast and/or not counted for more than a single reason is small. See Pitts, *supra* note 3, at 490 n.63 (finding in the 2008 Indiana primary election, after reviewing provisional ballots materials for 283 voters, that only twenty provisional ballots appeared to be cast for multiple reasons).

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account for the number of persons who avoided the polls entirely because they knew that they did not have valid photo identification. In essence, the theory is that prospective voters have knowledge of the photo identification law, know (or think) that they do not have a valid photo identification and, therefore, do not show up at the polling place. If this is the case, relying on provisional balloting as a measure of photo identification's impact potentially misses counting thousands of persons who were impacted by photo identification at the 2008 general election because they were deterred by the law from going to the polls in the first place.

While we agree that there are likely some voters who know the details of the photo identification law and, thus, don't show up at the polls, there are at least some theoretical and practical reasons to conclude that, perhaps, the number of such persons at Indiana's 2008 general election was not that large. On a theoretical level, as one commentator has put it, "the blunt fact in America is that few citizens carefully monitor politics and government . . . especially in regards to electoral laws."⁵¹ In addition, as a practical matter, Indiana did not spend an inordinate amount of money (\$1.25 million) on photo identification-related education efforts.⁵² So, it's tough to know how much knowledge there is on the part of the electorate about photo identification, particularly among those groups (the poor, the elderly, the young, the disabled) who are thought to be the most likely impacted.⁵³ In fact, one might suspect that individuals in these groups would be the most difficult to reach through government-funded education efforts.⁵⁴ Moreover, the State of Indiana issued a couple of hundred thousand free photo identification cards during 2007 and 2008, and it's possible that many of the persons who were registered and desired to cast a ballot secured a free photo identification card during that time.⁵⁵

Indeed, to date, not much empirical evidence exists to demonstrate that there are large numbers of persons who are not showing up at Indiana's polling places because they know they cannot meet the photo identification requirement. For instance, no one has ever put a poll in the field in Indiana to measure how many persons did not show up at Indiana's polls because they lacked photo identification. Moreover, in one national study of voters (involving the 2008 Presidential primaries on Super Tuesday), all of the voters who said lack of identification was a reason for not voting indicated

⁵¹ See David Anderson, *A Peek Inside: How Provisional Ballots Can Cast Light Upon Voter ID and Turnout*, (Delivered at 2008 APSA Annual Meeting) available at http://www.allacademic.com/one/www/www/index.php?cmd=www_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_submit=true&search_module=multi_search&search=Search&search_field=title_idx&fulltext_search=A+Peek+Inside%3A+How+Provisional+Ballots+Can+Cast+Light+Upon+Voter+ID+and+Turnout (emphasis added) (citing CARPINI & KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1997)).

⁵² Jason D. Mycoff, et. al., *The Empirical Effects of Voter Identification Laws: Present or Absent*, 42 PS: POL. SCI. & POL. 121, 122 (2009).

⁵³ See generally Barreto et. al., *supra* note 19.

⁵⁴ It's possible that private education efforts and outreach, such as by the major political parties and public interest organizations, may have reached some of these persons.

⁵⁵ Mycoff et. al. *supra* note 52, at 122 ("Between January 1, 2007, and May 6, 2008, the BMV issued 257,100 free identification cards.").

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that there were other reasons why they did not cast their ballot, such as “bad weather” and “forgot to vote.”⁵⁶ At present, the best empirical data that voter identification rules generally serve to deter prospective voters is a nationwide survey of voters at the 2008 general election suggesting that more than 2.2 million votes were “lost” because the voter decided to remain at home due to a lack of identification.⁵⁷

The statistic that 2.2 million votes were lost due to voter identification, though, seems likely to be inflated for a number of reasons. First, voter surveys of voting behavior may not be reliable.⁵⁸ Second, the Report is not a bit vague with regard to how this 2.2 million number was generated. For instance, the Report does not separate out those who said lack of voter identification was their *only* reason for not voting from those who said lack of identification was *one of several* reasons for not voting; and the Report says that, on average, non-voters reported 2.4 reasons for not voting.⁵⁹ Third, it would appear that “Wrong ID” was the first choice provided in the survey responses for “Not Voting” and it’s likely that what Professors Cass Sunstein and Richard Thaler refer to as “choice architecture” may have led to a higher number of responses here.⁶⁰ Fourth, the survey was nationwide and included persons from Indiana, but none of the respondents from Indiana indicated that not having the right kind of identification was a reason for avoiding the polls.⁶¹ That said, we wish to reiterate that it seems likely

⁵⁶ Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127, 129 (2009).

⁵⁷ Alvarez et. al, *supra* note 17, at 59.

⁵⁸ *Supra* note 18 and accompanying text.

⁵⁹ Alvarez et. al., *supra* note 17, at 33.

⁶⁰ RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 3 (describing choice architecture). In a similar vein, listing lack of voter identification first in the survey may have produced additional responses in the same way that the “ballot order effect” sometimes produces more votes for the first candidate listed on the ballot in an election contest. R. Michael Alvarez, et. al., *How Much Is Enough? The “Ballot Order Effect” and the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L. J. 40, 41 (2005) (recognizing a ballot order effect exists but cautioning that the direction and strength of the effect may be contextual).

⁶¹ Alvarez et. al., *supra* note 17, at 66. The Report also is a bit curious in the way in which it presents what goes into a voter’s decision to cast a ballot which may (it’s difficult to tell from the face of the Report) also lead to inflation of the number of prospective voters deterred by identification requirements. To fully explain this, it’s necessary to reproduce an extensive portion of the Report:

The 2008 *Survey of the Performance of American Elections* asked those who did not vote for the reasons they failed to vote. Some of these reasons reflect personal attributes of voters that cannot fairly be said to be affected by election administration, such as not liking the candidates or being out of town.

- Suppose for a moment that the voting chain for in-person voters (Election Day or early) starts with the potential voter deciding to vote or searching for identification to take with him or her to the polls. Based on the number of non-voters who said that lacking a proper identification was a “major factor” in not voting, we estimate that 9.3% of non-voters failed to vote because of lack of identification.
- Next, a voter with proper identification might nonetheless be unable to find the polling place. This factor accounts for another 8.2% of non-voters in our survey.

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at least some number of voters did not go to Indiana's polls because of a lack of photo identification, even if that number would be so small as to not show up in a nationwide voter survey. Moreover, we think it's important to further study the potential deterrent impact of photo identification.⁶²

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- A voter who had proper identification and actually got to the polling place may have been turned away because of long lines. This accounts for another 11.4% of non-voters.
 - Finally, a potential voter may have endured long lines, only to be turned away because of a registration problem. Registration problems accounted for 9.5% of non-voters by this method.

Id. at 58.

This portion of the Report is a bit confusing and perhaps subject to critique along a couple of lines. First, at another point in the Report, it says that 43% of non-voters said they did not vote because they did not like the choices offered to them, 32% said that "too busy" was a factor, and 21% said "illness" was a factor. It would seem to us that these are the places where voters would start in terms of deciding whether to vote and it's ambiguous as to whether the Report eliminated all these potential voters who cited these factors as well as lack of identification (recall that most non-voters gave multiple responses for their reason for not voting, *supra* note 59 and accompanying text). In other words, it's not clear that a person who said a major factor was both that she did not like the choices presented and that she did not have identification was eliminated as a person who did not vote because of a lack of identification; and it's at least debatable whether or not such a person should be eliminated from the total number of persons who did not vote because of a lack of identification. Second, it's not clear that a prospective voter would start thinking about voting by searching for identification. We're not sure why a voter would start by searching for identification rather than by searching for their polling place or seeing how long the line at the polling place is. In other words, we're not sure the underlying assumption holds up. Put more concretely, it's not clear that a person who said they did not vote both because they couldn't find their polling place and because they did not have proper identification should be counted as a person who did not vote because they lacked identification.

⁶² Our research also cannot account for flaws in the provisional balloting process created by poll workers or for voters who refused to engage in the provisional balloting process. In some instances, a person may have gone to the polls and not had valid photo identification. When a person arrives at the polling place without valid identification, the poll worker is supposed to offer the opportunity to cast a provisional ballot. See *supra* note 13 and accompanying text. However, sometimes poll workers fail to offer that opportunity. Deborah Hastings, Associated Press, *Indiana Nuns Lacking ID Denied At Poll By Fellow Sister*, May 6, 2008, available at <http://www.wsbt.com/news/local/18703844.html>; see also AALDEF, *Asian American Civil Rights Group Reports Widespread Voter Problems on Election Day* (Nov. 2, 2004), available at http://www.aaldef.org/article.php?article_id=184 (reporting that at the 2004 general election in New York City, Asian American voters whose names were not found on the registration list were not offered provisional ballots). In other instances, a person may have gone to the polls, not had a valid photo identification, been offered a provisional ballot, and then refused to engage in the provisional balloting process due to the length of time provisional balloting takes. Cf. ROBERT E REILING ET. AL., TIPPECANOE COUNTY BOARD OF ELECTIONS AND REGISTRATION, TIPPECANOE COUNTY GENERAL ELECTION 2008, at 3 (2008), available at http://www.tippecanoe.in.gov/egov/docs/1232543026_407623.pdf (recognizing that the "casting of provisional ballots does require considerable pollworker time"). And in yet other instances, a provisional ballot may have been cast but the forms that accompanied the provisional ballot were not filled out properly to indicate that lack of identification was the reason for the provisional ballot being cast. ADVANCEMENT PROJECT, *PROVISIONAL VOTING: FAIL-SAFE OR TRAP DOOR TO DISENFRANCHISEMENT*. (2008), available at <http://www.advancementproject.org/pdfs/Provisional-Ballot-Report-Final-9-16-08.pdf> ("The investigation also revealed that when voters were permitted to vote provisionally, most poll workers did not assist voters in ensuring that their ballots were complete and properly submitted . . . [a]s a result, many ballots of eligible voters were rejected simply because their envelopes were incomplete."). See also Pitts, *supra* note 3, at 496 n.78 (reporting that one of the primary reasons that provisional ballots were not counted in Indiana's 2008 primary election was because the forms accompanying the provisional ballot were not properly filled

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In sum, we must be modest and admit our research does not provide an absolutely complete gauge of the total impact of photo identification on the electorate.⁶³ However, despite the fact our research is not a totally complete gauge of photo identification's impact, it represents a tangible quantification of its impact and adds an important piece of the voter identification puzzle.

IV. IMPLICATIONS

First and foremost, our research provides additional fodder for those who oppose photo identification and think it has a disfranchising impact on the electorate. Photo identification opponents can point to this data and legitimately claim that about 900 voters were disfranchised by photo identification at an important, historic election. On the other hand, proponents of photo identification might concede that in the “small picture” individual voters are likely harmed by photo identification but retort that photo identification has no impact on the overwhelming majority of voters.⁶⁴

Photo identification proponents also may claim that it's possible all those “disfranchised” voters were illegitimate—perhaps the voters who were prevented from casting a ballot were frauds who did not show identification because they were impersonating someone else; however, it seems unlikely these voters were fraudulent for several reasons. First, if one was engaging in the criminal act of voter impersonation, it seems unlikely that a person would leave a paper trail of the crime by engaging in the provisional balloting process after being identified by the poll workers as not having identification.⁶⁵ Second, as several researchers have noted, there is currently

out). In short, there were likely more persons who actually went to the polls without valid identification but who are not captured by our research.

⁶³ Moreover, as should be plain, our research has little to say about whether the electorate benefitted from photo identification. The primary rationales for photo identification are that it deters fraud and that it leads to greater public confidence in the integrity of the election. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616-17 (2008). Obviously, one cannot glean from a study of provisional ballots cast whether any fraud was prevented and whether Indiana voters were more confident in the results of the general election because of photo identification. However, research suggests there is little of the type of fraud that photo identification is designed to prevent and that photo identification may not make for a more confident electorate. Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENTER FOR JUSTICE (2007), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf (analyzing instances of voter fraud cited by courts, federal commissions, political party entities, election officials, authors, journalists, and bloggers and concluding that “only a tiny portion of the claimed illegality is substantiated — and most of the remainder is either nothing more than speculation or has been conclusively debunked”); Ansolabehere & Persily, *supra* note 5, at 1738, 1759 (stating that “actual evidence of voter impersonation fraud is rare and difficult to come by” and finding that “voter identification requirements will [not] raise levels of trust in the electoral process”).

⁶⁴ For additional discussion of the ramifications of this type of research for the wider photo identification debate, see Pitts, *supra* note 3, at 499-504.

⁶⁵ This assumes that in-person voter fraud is the only illegitimate voting prevented by photo identification. It's possible that photo identification also prevents voting by persons who are not truly residents of Indiana (*i.e.*, because they don't actually meet the States residency requirements). The residency requirements for voting in Indiana, though, are somewhat ambiguous due to the fact-specific nature of residency rules. BRENNAN CENTER FOR JUSTICE, STUDENT VOTING PROJECT INDIANA, available at <http://www.brennancenter.org/studentvoting/states/indiana/> (last visited July

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very little evidence of in-person voter fraud in Indiana or elsewhere.⁶⁶ Third, the little empirical evidence available where someone tried to assess the legitimacy of persons who cast provisional ballots because they lacked photo identification found compelling reasons to think that most of those voters were likely to be legitimate.⁶⁷

We suppose it's also possible that supporters of photo identification would argue that an uncounted provisional ballot does not necessarily amount to "disfranchisement," although we are not particularly sympathetic to this view. The theory would go something like this: voters who show up at the polling place without photo identification know that they cannot meet the requirement and, therefore, are voting in an attempt to keep their option open to validate their vote after the election; if, after the election, the initial results show that there are no close contests, then the voter who cast the provisional ballot may consciously decide *not* to take further steps to validate the ballot; and, if the voter could have taken steps to validate the ballot and did not, the voter is not disfranchised by photo identification.

In one sense, we reject this theory because we're not sure the average voter actually thinks this deeply and rationally about the act of casting a ballot. After all, the act of voting at all (let alone provisionally) is not a rational act in the view of economists.⁶⁸ In another sense, a vote not counted is a vote not counted, regardless of whether the vote could impact the results of the election. The harm may be more individualized but we doubt any person who goes to a polling place and attempts to vote would be pleased to learn that their vote was not counted regardless of whether it made a difference to the electoral outcome.

Aside from the documentation of disfranchisement, perhaps the most important implication of our research is that we now have the ability to begin to assess patterns of photo identification's impact when it comes to provisional balloting. The data collected from the November general

31, 2009) (recognizing how residency rules in the context of college students are individualized determinations).

⁶⁶ See, e.g., Levitt, *supra* note 63.

⁶⁷ During the recent Supreme Court litigation over photo identification, the Marion County Election Board's brief included statistics on the impact of photo identification at the November 2007 election. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), Brief for Respondent Marion County Election Board at 8-9. According to the Marion County Election Board, 34 persons presented themselves at the county's polls and cast a provisional ballot because of a lack of photo identification. Of those 34, two later had their ballots counted after returning to the county clerk's office with photo identification. *Id.* The brief further related:

All thirty-four individuals appeared at the polling place for the precinct in which they were registered. All signatures appearing on their provisional ballot envelopes matched the poll book signatures. Two of those whose votes were not counted had voted in fifteen previous elections at their precincts. Six others had voted in fourteen elections at their precincts. Four others had voted in thirteen prior elections at their precincts. One had voted in twelve elections at her precinct, and another had voted in ten elections at her precinct. Only six had no history of voting in a Marion County election, and the remaining persons had voted a handful of times at the precinct where they were registered and appeared on November 6, 2007.

Id. (footnote omitted).

⁶⁸ Stephen J. Dubner & Steven D. Levitt, *Why Vote?* N.Y. TIMES (Nov. 6, 2005).

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election can be compared with similar data collected from Indiana's 2008 *primary* election.⁶⁹ Tables 2 and 3 present that comparison.

Table 2
Comparing 2008 Primary with 2008 General
(Raw Data)

	Primary	General
Total Ballots Cast	1,727,023	2,805,982
Total Provisional Ballots Cast	2,771	7,094
Total ID-related Provisional Ballots ⁷⁰	446	1,039
Total Provisional Ballots Counted	752	2,035
Total ID-related Provisional Ballots Counted ⁷¹	94	137

⁶⁹ Primary election data is taken from Pitts, *supra* note 3, at 499, 527.

⁷⁰ This number combines the total number of photo identification and HAVA-related identification ballots from the primary election because the general election data does not break down the two distinct identification categories. The number of photo identification-related provisional ballots at the primary was 399; the number of HAVA-related provisional ballots was 47. Pitts, *supra* note 3, at 499.

⁷¹ This number combines the total number of photo identification and HAVA-related identification ballots *counted* from the primary election because the general election data does not break down the two distinct identification categories. The number of photo identification-related provisional ballots at the primary that were counted was 78; the number of HAVA-related provisional ballots that were counted was 16. Pitts, *supra* note 3, at 499.

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Table 3
Comparing 2008 Primary with 2008 General
(Rates)

	Primary	General
Provisional Ballots Cast as a Percentage of Total Votes Cast	0.16% ⁷²	0.25% ⁷³
ID-related Provisional Ballots Cast as a Percentage of Total Votes Cast	0.026% ⁷⁴	0.037% ⁷⁵
ID-related Provisional Ballots Cast as a Percentage of Total Provisional Ballots Cast	16.1% ⁷⁶	14.6% ⁷⁷
Total Provisional Ballots Counted as a Percentage of Total Provisional Ballots Cast	27.1% ⁷⁸	28.7% ⁷⁹
ID-related Provisional Ballots Counted as a Percentage of ID-related Provisional Ballots Cast	21.1% ⁸⁰	13.2% ⁸¹

When comparing data across the two elections, three major points seem to emerge. First, there was an overall increase in the rate of provisional balloting from the primary to the general and also an overall increase in the rate of identification-related provisional ballots. At the primary election, the total number of provisional ballots cast in relation to the overall number of ballots cast was 0.16%; in contrast, at the general election, the total number of provisional ballots cast in relation to the overall number of ballots cast was 0.25%. In turn, the rate of identification-related provisional ballots in relation to total ballots cast also increased from 0.026% to 0.037%.

It's not clear why the overall rate of provisional ballots would have increased from the primary to the general election, although one can speculate about some possible explanations related to poll worker and voter

⁷² This percentage was calculated by dividing the total provisional ballots cast at the primary (2,771) by the total ballots cast at the primary (1,727,023).

⁷³ This percentage was calculated by dividing the total provisional ballots cast at the general (7,094) by the total ballots cast at the general (2,805,982).

⁷⁴ This percentage was calculated by dividing the identification-related provisional ballots cast at the primary (446) by the total ballots cast at the primary (1,727,023).

⁷⁵ This percentage was calculated by dividing the identification-related provisional ballots cast at the general (1,039) by the total ballots cast at the general (2,805,982).

⁷⁶ This percentage was calculated by dividing the identification-related provisional ballots cast at the primary (446) by the total provisional ballots cast at the primary (2,771).

⁷⁷ This percentage was calculated by dividing the identification-related provisional ballots cast at the general (1,039) by the total provisional ballots cast at the general (7,094).

⁷⁸ This percentage was calculated by dividing the total provisional ballots counted at the primary (752) by the total provisional ballots cast at the primary (2,771).

⁷⁹ This percentage was calculated by dividing the total provisional ballots counted at the general (2,035) by the total provisional ballots cast at the general (7,094).

⁸⁰ This percentage was calculated by dividing the identification-related provisional ballots counted at the primary (94) by the identification-related provisional ballots cast at the primary (446).

⁸¹ This percentage was calculated by dividing the identification-related provisional ballots counted at the general (137) by the identification-related provisional ballots cast at the general (1,039).

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behavior. In terms of poll worker activity, it's possible that poll workers had become more comfortable with provisional balloting (perhaps because of greater awareness that may have been the result of better training) and were more likely to offer provisional ballots. It's also possible that poll workers were more overwhelmed at the general election and were quicker to offer provisional ballots to voters whereas with more time at the primary election, poll workers may have made extra efforts to resolve problems without resorting to provisional balloting. In terms of voters, among other possibilities, it's possible that prospective voters were more likely to accept provisional ballots because they were more knowledgeable about provisional voting, had a more intense desire to cast a ballot at the general, or were more willing to take the time to engage in provisional balloting because they had already invested a lot of time in voting due to long lines.

More interestingly, the increase in the number of *identification-related* provisional ballots signals that the market among voters may not necessarily be adjusting for the relatively nascent (photo identification was enacted in 2005) identification rules. Other commentators have theorized that there may be a "learning curve" when it comes to voter identification; that voters may adjust to a new voter identification requirement after several elections and, therefore, the number of persons who arrive at a polling place without identification and the number of people who lack identification will decrease as time goes by.⁸² However, the comparison of primary election with general election data suggests an increased impact both in raw numbers and in relation to the total ballots cast at the election. Certainly more work is needed to determine what's going on here; in particular, it would be helpful to survey voters who lacked identification for the reasons why they lacked identification. Again, though, because of existing barriers to data collection, it's currently impossible to survey these individuals.⁸³

The second major point that emerges is that while there was an overall increase in the rate of provisional balloting and identification-related provisional balloting from the primary to the general election, *within the universe of provisional ballots*, the rate of identification-related ballots remained relatively stable. At the primary election, identification-related provisional ballots comprised a little more than 16% of the total provisional ballots cast; at the general election, identification-related provisional ballots comprised a little less than 15% of the total provisional ballots cast. This is interesting in the first instance because it means that the increase in identification-related provisional ballots did not entirely account for the increased rate of provisional ballots. Indeed, the increase in identification-related provisional ballots moved in roughly the same way as the increase in provisional ballots that were cast for other reasons, such as the voter's name not appearing on the registration list.

⁸² Timothy Vercellotti and David Andersen, *Voter-Identification Requirements and the Learning Curve*, 42 PS: POL. SCI. & POL. 117, 117 (2009) ("Rules that have been in place for one or more election cycles may condition voters to bring the necessary identification, raising the possibility that, at least for some voters, there may be a learning curve regarding voter-identification requirements.").

⁸³ *Supra* note 44 and accompanying text.

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Again, it's not clear why this happened, but it may be evidence that the increase in provisional balloting was related to changes in the mindsets of poll workers and voters. Most provisional ballots are cast because of what be categorized as registration issues—either the prospective voter's name does not appear on the registration list or the prospective voter is in the incorrect precinct.⁸⁴ There would seem to be little reason why voters who lacked identification would move in concert with voters who were not on the list or who were in the wrong precinct. So perhaps this means that what shifted from the primary election to the general election is increased poll worker facility with provisional balloting and/or increased voter willingness to take provisional ballots. Importantly, if the increase in provisional ballots generally and identification-related provisional ballots in particular was caused by changes in poll worker and voter facility with provisional ballots, then this would provide evidence that perhaps the above-mentioned voter identification “learning curve” has set in.

The third major point that emerges is that the number of identification-related provisional ballots that were counted decreased by a substantial margin from the primary to the general election. At the primary election, a little more than 21% of identification-related provisional ballots actually found their way into the final tally; at the general election, only about 13% of such ballots were counted. In contrast, the overall count rate of provisional ballots remained more stable. At the primary election, a little more than 27% of the overall number of provisional ballots were counted while at the general election, a little less than 29% of provisional ballots were counted.⁸⁵

It's not exactly clear why fewer identification-related provisional ballots were counted at the general. A few possible answers would focus on election administrators who create the final tally of votes and the provisional voters themselves.⁸⁶ The counting of provisional ballots is notoriously ambiguous and is largely left to the discretion of the 92 separate county

⁸⁴ Election Assistance Commission, *supra* note 27, at 21 (showing that the majority of provisional ballots nationwide are rejected because the voter was not on the registration list or was in the wrong precinct); Huefner et. al., *supra* note 3, at 49 (stating that most provisional ballots in Ohio were rejected because the voter was not registered or was in the wrong precinct).

⁸⁵ It's worth noting that comparing the validation rate of photo identification provisional ballots with provisional ballots cast for other reasons (*e.g.*, the voter's name did not appear on the registration list) may well amount to the proverbial apples to oranges comparison. This is because validating a photo identification-related provisional ballot would require some post-election action by the prospective voter (*i.e.*, returning to the local election office within the 10-day post-election window). In contrast, other reasons for casting a provisional ballot do not require post-election action on the part of the voter. For example, when a person casts a provisional ballot because their name is not on the registration list, it's the responsibility of election officials, not the prospective voter, to take steps to validate the provisional ballot.

⁸⁶ One might also theorize that perhaps poll workers played some role. Perhaps the nature of the general election in terms of time pressure led to more mistakes made by poll workers in the paperwork that accompanies provisional ballots and resulted in canvassing boards being less able to verify provisional ballots. However, if poor record-keeping by poll workers is the issue, one might have expected a corresponding decrease in the count rate for all provisional ballots, rather than just for identification-related provisional ballots.

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election boards.⁸⁷ Perhaps, then, some of these local boards changed their counting rules regarding identification-related provisional ballots from the primary election to the general election. In terms of voters, perhaps fewer persons went back to verify their ballot because the margin of victory at the top of the ticket at the general election was a little wider than that at the primary election.⁸⁸ In the Democratic primary, Sen. Hillary Clinton defeated President Barack Obama by about 14,000 votes; in the general election, President Obama defeated Sen. John McCain by about 30,000 votes.⁸⁹ Another theory might be that there were fewer close contests “down-ballot” at the general election than at the primary election and that the higher number of validated ballots at the primary election results from more “down-ballot” close contests.

At the very least, though, the data from the general election seems to confirm that the post-election verification process does not re-capture very many “lost” votes. When a voter casts a provisional ballot due to a lack of identification, there is a very high likelihood that the provisional ballot will go uncounted. One can look at the low validation rate from a couple of different perspectives. From one perspective, this shows that photo identification and the post-election validation process is just too burdensome

⁸⁷ On its face, the law would seem to be clear that a provisional ballot cast for lack of photo identification can only be counted if the voter returns post-election to either show a valid identification or to sign an affidavit that allows for waiver of the photo identification requirement in very limited circumstances. *Supra* notes 13 to 16 and accompanying text. However, there’s a lot more nuances involved with provisional balloting than meets the eye. For example, there do not appear to be any clear rules as to what is supposed to occur when the forms that accompany the provisional ballot are not filled out completely. Assume for instance, that one of the accompanying forms is properly filled out but another form is not filled out. *Supra* notes 21 to 23 and accompanying text (describing the various forms used in provisional balloting). It’s not clear whether a provisional ballot that has partially complete paperwork should be counted or not. Under Indiana law, one way to view these ballots is that they should be counted because it’s the failure to act by the election officer. Ind. Code § 3-11.7-5-1.5(a). Another way to view these ballots is that a provisional ballot cannot be counted unless the affidavit has been properly executed by the voter. Ind. Code § 3-11.7-5-2(a)(1). Bottom line, it looks like there’s a lot of discretion here for county election boards and our attempt to pin down a definitive answer to this question with the Indiana Election Division was unsuccessful.

⁸⁸ It’s possible that the lower count rate occurred because there was an increase in the rate of HAVA-related identification problems at the general election. As previously mentioned, it’s possible for first-time registrants to satisfy the HAVA-related requirement but not satisfy the photo identification requirement. *Supra* note 49. At the primary election, only about 10% of identification-related ballots were HAVA-related. If, however, HAVA-related provisional ballots were a much higher proportion of identification-related provisional ballots at the general election, that could drive the overall count rate down. Why? Because voters who fail to provide HAVA-related identification do not have a 10-day window to validate the provisional ballot. Indeed, a HAVA-related provisional ballot can only be counted if it is validated by the close of the polls on election day. Ind. Code § 3-11.7-5-2(c). In other words, there is a much more lenient validation opportunity for failing to meet the photo identification requirement than for failing to meet the HAVA-related identification requirement. Thus, one would expect that as the proportion of HAVA-related ballots increased, the count rate would decrease. That said, previous research from the primary election actually (and somewhat counter-intuitively) showed that HAVA-related identification ballots were counted at a higher rate than photo identification-related ballots. Pitts, *supra* note 3, at 499. However, the higher count rate for HAVA-related provisional ballots at the primary may, in the end, just demonstrate that poll workers are misclassifying photo identification issues as HAVA-related identification issues on the paperwork that accompanies provisional ballots. Pitts, *supra* note 3, at 496 n.79.

⁸⁹ Statewide election results are available on the Indiana Secretary of State’s website at <http://www.in.gov/sos/elections/elections/index.html> (last visited May 20, 2009).

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for voters. If most of the people who show up desiring to vote do not end up having their vote counted, then securing an identification post-election and/or making a return trip to the central election office is too difficult. From another perspective, one might argue that the low validation rate does not show that photo identification and the post-election validation process is too burdensome because voters may be acting rationally by not returning to validate their ballots in the absence of a close election. Here what is necessary is more research to survey these individuals about the reasons for their behavior, but, again, such research is stymied by existing barriers to data collection.

Finally, in addition to comparing the impact of photo identification across multiple elections in Indiana, it's also interesting to compare the impact of voter identification on provisional balloting at Indiana's 2008 general election with the impact of voter identification on provisional balloting nationally at the exact same election. After the 2008 general election, the Pew Center on the States conducted a survey of state election officials to gather data related to provisional balloting.⁹⁰ For purposes of our research, the important data points provided by Pew include: the total number of ballots cast; the total number of provisional ballots cast; the total number of provisional ballots rejected; and the total number of provisional ballots rejected because of insufficient identification.

Comparing data from Indiana to Pew's nationwide data has some limits worth mentioning. First, not every state reported to Pew its reasons for not counting provisional ballots. Indeed, only 33 States reported reasons for not counting provisional ballots.⁹¹ Second, Pew only gathered data on the number of provisional ballots *rejected* for insufficient identification and did not gather data on the number of provisional ballots *cast* for identification-related reasons.⁹² Third, the rules regarding provisional balloting and voter identification vary quite a bit from State to State. For example, unlike Indiana, in Florida, a voter without photo identification does not need to take any post-election action to validate her provisional ballot; instead, election officials have this post-election responsibility. Thus, the utility of comparing data across States may be limited.

That said, a few interesting insights emerge. If Indiana had been included among the 33 States that reported the reasons why provisional ballots were rejected, it would have ranked as the State with the third most provisional ballots rejected for insufficient identification, behind only Ohio (1,990) and Kansas (1,152). Moreover, if one looks at the number of provisional ballots rejected for insufficient identification in relation to the total number of provisional ballots rejected, Indiana (17.8%) would be second behind only Wyoming (75%).⁹³ Indeed, combining the numbers

⁹⁰ Pew Study, *supra* note 28 (forthcoming, Aug.31, 2009).

⁹¹ Pew Study, *supra* note 28 (forthcoming, Aug.31, 2009).

⁹² Pew Study, *supra* note 28 (forthcoming, Aug.31, 2009).

⁹³ Wyoming had an abberationally high percentage due to its very small overall number of provisional ballot rejections. Wyoming rejected a total of 36 provisional ballots and 27 of those rejections were due to insufficient identification.

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from all 33 States only 1.4% of provisional ballot rejections were for insufficient identification—putting Indiana well above the national average. Finally, when one looks at the number of provisional ballots rejected for insufficient identification in relation to total ballots cast, Indiana would again rank third (.032%) behind Kansas (.093%) and Ohio (.035%). In sum, based on just about any metric, Indiana would appear to be among the leaders in the country in rejecting voters for insufficient identification.⁹⁴

V. CONCLUSION

We must be modest about how our research informs the photo identification debate. This modesty is necessitated by the existing hurdles to putting together verifiably accurate data about the reasons why provisional ballots were cast and not counted. We need more and better data—a move that will likely only come through legislation at the State or national level. This modesty is also necessitated by the “snapshot” picture we have. Even though research now exists that tracks identification-related provisional ballots from two separate elections in Indiana, it’s possible that these two elections were anomalies. For example, the presence of the historic candidacy of President Obama may make the 2008 primary and general unrepresentative of a “typical” election. Modesty is also necessitated because provisional balloting may only represent part of the story related to access to democracy and to the integrity of elections. In short, as Yale’s Heather Gerken has noted when it comes to empirical work related to election administration, “[p]roblems in the data should be discussed forthrightly.”⁹⁵

That said, tracking provisional ballots in Indiana and in other places with different types of identification requirements is an approach that more researchers should take. For certain, studies of the effects of voter identification on turnout,⁹⁶ studies of access to identification,⁹⁷ and surveys

⁹⁴ It bears noting that a few other States who are thought to have restrictive identification laws, such as Georgia and Arizona, did not report data to Pew regarding the reasons for rejecting provisional ballots.

⁹⁵ Gerken, *supra* note 1, at 97.

⁹⁶ EAGLETON INST. OF POL. & MORITZ COLL. OF LAW, REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002 PUBLIC LAW 107-252 (2006) *available at* <http://www.s4.brown.edu/voterid/Voter%20id%20report%20final.pdf> (analyzing the effect of voter identification requirements on turnout); DAVID B. MULHAUSEN & KERI WEBER SIKICH, HERITAGE FOUND., NEW ANALYSIS SHOWS VOTER IDENTIFICATION LAWS DO NOT REDUCE TURNOUT (2007), *available at* <http://www.heritage.org/research/LegalIssues/cda07-04.cfm> (contending that voter identification laws do not have a negative impact on voter turnout); JEFFREY MILYO, INST. PUB. POLICY, THE EFFECTS OF PHOTOGRAPHIC IDENTIFICATION ON VOTER TURNOUT IN INDIANA: A COUNTY-LEVEL ANALYSIS I (2007), *available at* <http://truman.missouri.edu/uploads/Publications/10-2007.pdf> (study examining the effect of Indiana’s “mandatory photo ID” law on voter turnout); R. Michael Alvarez et. al, *The Effect of Voter Identification Laws on Turnout* (Cal. Inst. of Tech., Working Paper No. 1267R, 2008), *available at* <http://www.hss.caltech.edu/SSPapers/sswp1267R.pdf> (contending that trends in aggregate data do not demonstrate that voter identification requirements reduce participation, but that individual-level data shows that strict voter identification requirements have a negative impact on registered voter participation).

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of voters about public confidence in elections⁹⁸ and reasons for not voting⁹⁹ all need to be part of the emerging picture of the costs and benefits of photo identification. However, the place where the most definitive and tangible impact of photo identification can be measured on the access side of the access/integrity voter identification debate is actual persons who demonstrate a firm desire on election day to cast a ballot and who are willing to endure provisional balloting to have their voice heard. It is our hope that this study helps move the research agenda a bit more in that direction.

⁹⁷ John Pawasarat, Univ. of Wis.-Milwaukee Emp. & Training Inst., *The Driver License Status of the Voting Age Population in Wisconsin* (2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf> (examining, though not for purposes of assessing the impact of voter identification requirements, Wisconsin residents' access to government-issued photo identification); M.V. Hood, III & Charles S. Bullock, III, *Worth A Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555 (2008) (examining the extent to which Georgia's registered voters lack a valid driver's license or state identification card); Matt A. Barreto et al., *supra* note 19, at 112 (conducting a telephone survey "to determine the rates of access to valid photo identification among voters and non-voters in Indiana") (footnote omitted); Robert Pastor et al., *Voter IDs Are Not the Problem: A Survey of Three States* 10 (Am. U. Ctr. for Democracy & Election Mgmt., Working Paper No. 5, 2008), available at <http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf> (conducting a survey of registered voters in Indiana, Maryland and Mississippi "to determine the percentage and characteristics of voters that currently lack government-issued photo identification").

⁹⁸ Ansolabehere & Persily, *supra* note 5, at 1759.

⁹⁹ Ansolabehere, *supra* note 56, at 129; Alvarez, et. al., *supra* note 17, at 59.

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Appendix A **Statement of Methodology**

The data presented in this article is a result of a survey of county election officials from all of Indiana's 92 counties. The survey occurred during the months of January, February, and March of 2009. The survey was conducted by Matthew Neumann and Suzy St. John, both law students at Indiana University School of Law – Indianapolis. The survey was conducted by phone and e-mail and asked local election officials to provide four pieces of data: (1) the total number of provisional ballots cast; (2) the number of provisional ballots cast because of lack of identification; (3) the total number of provisional ballots ultimately counted; and (4) the number of provisional ballots cast because the voter lacked identification that were ultimately counted (*i.e.*, how many persons who cast a provisional ballot because they did not have identification returned post-election to provide proper identification).

The current survey builds off a prior survey of local election officials conducted by Mr. Neumann following the 2008 primary election that asked for the same type of information. During the 2008 primary election survey, Mr. Neumann identified persons in local elections offices who were able to provide information related to provisional ballots. Included in this database of persons were phone numbers and, in many instances, e-mail addresses. Initially, every person on the list for whom an e-mail address was readily available was contacted via e-mail. In those counties for which no e-mail address was readily available, a phone call was made either to the contact in the database or to the election office generally. In addition, follow-up e-mails and phone calls were necessary to track down the information.

By the end of March, responses had been received from 90 of the 92 counties. Survey data from local election officials, however, is imperfect and might be inaccurate for any number of reasons.¹⁰⁰ We won't reiterate all the potential issues that could lead to inaccurate data here. However, one thing that is different from the prior survey was the use of two different students contacting local officials. Moreover, mistakes could be introduced because these communications with local election officials are not "scripted" in the way a typical survey conducted by, say, a pollster, is scripted. Questions may have been phrased or clarified in slightly different ways depending on the nature of the conversation. For example, one researcher asked how many identification-related ballots were counted while another asked how many identification-related ballots were counted because the voter returned to validate the provisional ballot. It's possible, though very unlikely, that these slightly different phrasings could contribute to different answers.

To try and assess the accuracy of the data, a comparison of two of the data points gathered in the survey was compared with the exact same

¹⁰⁰ *Supra* note 42.

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information that the counties reported to the Indiana Election Division on their post-election CEB-9 form. Put differently, the survey asked county election officials to provide the total number of provisional ballots cast and the total number of provisional ballots counted. These numbers, unlike numbers related to voter identification issues, are publicly available from the State.

A comparison of the survey data with the data reported to the State revealed that, in the aggregate, there was little difference between what county officials reported in the survey and what they reported to the State. The survey indicated that 7,094 total provisional ballots were cast, of which 2,035 were counted. The CEB-9 forms submitted to the State indicated that 7,231 total provisional ballots were cast, of which 2,052 were counted. After looking at the CEB-9 reports in more detail, it was apparent that twenty-eight counties reported to us numbers that did not exactly match the CEB-9 form. Of those twenty-eight counties, ten were negligible errors, meaning that the difference between our survey and the CEB-9 form was only one or two ballots.

After determining the number of counties who had more significant errors when comparing the survey answers with the numbers reported to the State, we contacted those counties to gather explanations for the discrepancies. In the end, we received an explanation from fourteen (out of eighteen) counties as to why the numbers did not match. Five counties informed us that the numbers reported to the State were incorrect. Nine counties told us that the numbers reported to us were incorrect. The most important example of this situation would be St. Joseph County. St. Joseph reported 77 total provisional ballots in the survey. However, St. Joseph reported 174 total provisional ballots to the State of Indiana. Subsequent communications revealed that the number reported to the State was the correct number. Although we had similar experiences with a few other counties, the discrepancy in St. Joseph's numbers was by far the largest of any county.

In the end, we chose not to include these "updated" numbers for provisional ballots cast and counted in our final data. In other words, the data in Appendix B is the initial survey without any "updated" numbers. We mention this only because interestingly, if the "updated" number of total provisional ballots from St. Joseph County and the missing ballots from Ohio and Warrick Counties (the two counties that did not respond to our survey) were added, there would be almost no difference between the number of total provisional ballots reported in our survey and the total number of provisional ballots reported to the state. Ultimately, although errors undoubtedly remain in the survey, the errors in the total provisional ballots cast and counted appear to be negligible in the aggregate.

Unfortunately, we have no way of verifying the accuracy of the voter identification numbers given by local officials. Indeed, some of these would seem to be wrong on their face. For example, it seems highly unlikely every single one of Madison County's 44 provisional ballots was cast due to a voter identification issue, especially in light of the fact that Madison County

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misreported in a similar manner the number of identification-related ballots in a survey conducted related to the primary election.¹⁰¹ In a few instances where we thought there might be misreported data related to identification issues, we pressed local officials for explanations and confirmation of their data. In one important instance, local officials changed their answer. In St. Joseph County, election officials initially informed us that 21 provisional ballots were related to identification and that 4 of those ballots were counted; later, election officials informed us that they had 71 provisional ballots that were related to identification and that 2 of those ballots were counted. We have, however, decided not to use this updated information in our survey and instead report the discrepancies here in the event other researchers wish to massage the data.

As we related in the main body of the Article, in a perfect world we could at least access a random sample of the actual provisional balloting documents ourselves to determine what the margin of error of the survey might be. Unfortunately, that is not possible because those materials have been deemed off-limits to the general public. When all is said and done we think the survey is likely to accurately reflect the aggregate story of voter identification and provisional balloting in Indiana because: (1) the total number of provisional ballots and provisional ballots counted from our survey closely tracks those same numbers reported to the State; and (2) the numbers of identification-related provisional ballots cast and counted does not appear to be overly inconsistent with the data generated at the primary election. We do, however, think the data from individual counties may be slightly off in several instances.

¹⁰¹ See Pitts, *supra* note 3, at 490 (stating that subsequent to the 2008 Indiana primary election “Madison County reported 37 total provisional ballots cast and said that all 37 had been cast due to a lack of identification”).

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Appendix B **Survey of Local Officials: Individual County Data**

County	Total Provisional Ballots Cast	ID-related Provisional Ballots Cast	Total Provisional Ballots Counted	ID-related Provisional Ballots Counted
Adams	8	0	0	0
Allen	186	23	28	0
Bartholomew	48	1	30	1
Benton	6	0	3	0
Blackford	7	0	2	0
Boone	44	6	14	0
Brown	12	0	3	0
Carroll	28	1	12	0
Cass	32	8	19	7
Clark	301	19	55	8
Clay	1	0	0	0
Clinton	3	1	0	0
Crawford	3	1	0	0
Daviess	3	2	3	2
Dearborn	19	5	2	0
Decatur	5	2	2	2
DeKalb	30	0	9	0
Delaware	85	55	33	5
Dubois	3	2	0	0
Elkhart	245	18	43	0
Fayette	3	1	1	1
Floyd	149	34	18	3
Fountain	21	0	8	0
Franklin	13	7	1	1
Fulton	4	1	0	0
Gibson	3	3	0	0
Grant	22	4	3	0
Greene	8	0	0	0
Hamilton	82	6	2	2

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Hancock	91	0	19	0
Harrison	66	10	18	1
Hendricks	83	1	7	0
Henry	8	8	2	2
Howard	74	7	16	3
Huntington	7	3	3	3
Jackson	15	3	2	1
Jasper	20	0	0	0
Jay	15	2	3	0
Jefferson	27	1	0	0
Jennings	25	0	7	0
Johnson	88	11	8	1
Knox	8	8	0	0
Kosciusko	36	3	11	0
LaGrange	37	3	9	3
Lake	1,938	109	1,046	11
LaPorte	61	15	4	0
Lawrence	51	8	3	0
Madison	44	44	3	3
Marion	1,133	174	177	15
Marshall	13	4	5	2
Martin	23	0	8	0
Miami	11	1	8	0
Monroe	427	69	162	0
Montgomery	36	3	23	3
Morgan	118	8	31	4
Newton	6	0	0	0
Noble	20	2	0	0
Ohio	NA	NA	NA	NA
Orange	14	0	2	0
Owen	12	6	0	0
Parke	29	11	18	1
Perry	9	6	1	1
Pike	3	0	0	0
Porter	111	36	14	8
Posey	35	11	16	7
Pulaski	2	2	0	0

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Putnam	20	20	0	0
Randolph	18	9	1	0
Ripley	2	0	0	0
Rush	0	0	0	0
St. Joseph	77	21	4	4
Scott	14	0	1	0
Shelby	3	2	1	0
Spencer	19	3	2	2
Starke	18	18	2	2
Steuben	27	2	6	0
Sullivan	9	8	1	0
Switzerland	5	1	0	0
Tippecanoe	420	50	55	4
Tipton	2	2	0	0
Union	18	1	8	0
Vanderburgh	204	72	14	14
Vermillion	1	0	1	0
Vigo	73	13	8	2
Wabash	5	0	0	0
Warren	7	1	4	1
Warrick	NA	NA	NA	NA
Washington	21	14	7	7
Wayne	28	26	0	0
Wells	9	1	1	0
White	23	5	2	0
Whitley	1	1	0	0
Total	7,094	1,039	2,035	137

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Appendix C **CEB-9 Data Reported to the State of Indiana**

County	CEB-9 Total Ballots Cast	CEB-9 Total Provisional Ballots Cast	CEB-9 Total Provisional Ballots Counted
Adams	13,795	8	0
Allen	152,403	185	23
Bartholomew	31,588	48	30
Benton	3,943	6	3
Blackford	5,564	8	2
Boone	26,966	44	14
Brown	8,239	12	3
Carroll	8,928	28	12
Cass	16,017	32	19
Clark	55,958	301	55
Clay	11,663	1	0
Clinton	12,648	3	0
Crawford	4,924	3	0
Daviess	10,827	3	3
Dearborn	22,712	19	2
Decatur	10,677	5	1
DeKalb	17,460	28	9
Delaware	50,964	83	23
Dubois	19,048	3	0
Elkhart	71,937	245	43
Fayette	9,668	3	1
Floyd	37,254	149	18
Fountain	7,710	20	7
Franklin	12,264	13	1
Fulton	9,148	5	0
Gibson	15,528	3	0
Grant	26,912	30	3
Greene	14,010	8	0
Hamilton	130,829	81	2
Hancock	34,488	82	16

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Harrison	18,581	66	18
Hendricks	65,930	83	16
Henry	21,795	8	2
Howard	39,308	90	16
Huntington	16,561	32	3
Jackson	17,742	15	2
Jasper	13,157	20	0
Jay	8,542	15	3
Jefferson	13,768	28	0
Jennings	12,294	25	7
Johnson	59,437	88	8
Knox	16,829	8	0
Kosciusko	30,864	36	11
LaGrange	9,596	37	9
Lake	215,058	1,938	1,046
LaPorte	48,121	62	4
Lawrence	19,011	26	0
Madison	58,187	44	3
Marion	381,759	1,133	177
Marshall	18,872	13	5
Martin	5,095	23	15
Miami	14,333	11	8
Monroe	63,774	422	166
Montgomery	15,588	36	23
Morgan	29,263	118	31
Newton	6,153	9	3
Noble	17,447	20	0
Ohio	3,035	9	3
Orange	8,316	14	2
Owen	8,377	17	0
Parke	7,083	29	18
Perry	8,681	9	1
Pike	6,225	3	0
Porter	74,793	111	14
Posey	13,019	35	16
Pulaski	6,053	2	0
Putnam	14,900	20	0

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Randolph	11,046	18	1
Ripley	12,415	3	0
Rush	7,805	0	0
St. Joseph	119,525	174	2
Scott	9,078	11	1
Shelby	17,965	3	1
Spencer	10,428	19	2
Starke	9,670	18	2
Steuben	14,241	27	6
Sullivan	8,998	9	1
Switzerland	3,747	12	0
Tippecanoe	69,574	420	50
Tipton	8,053	3	0
Union	3,393	28	10
Vanderburgh	79,072	204	14
Vermillion	7,269	1	1
Vigo	44,294	94	27
Wabash	14,145	5	0
Warren	4,131	7	4
Warrick	29,195	8	0
Washington	11,619	21	7
Wayne	29,085	28	0
Wells	13,286	9	1
White	10,927	23	2
Whitley	15,402	1	0
Total	2,805,982	7,260	2,052