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## Video Games and the Federal Trade Commission Act: An Analysis of the Practices of Video Game Developers and Their Effects on Players

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# SIGNED, SEALED, DELIVERED? PROBLEMS WITH THE USE OF SIGNATURE MATCHING TO VERIFY MAIL VOTER IDENTITY

Sara Jensen<sup>†</sup>

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## INTRODUCTION

As the recount battle accelerated across Florida counties following the United States presidential election of 2000, the director of the National Association of Election Officials recounted a prayer: “God, please let the winner win in a landslide.”<sup>1</sup> This sentiment would reverberate twenty years later, as U.S. officials prepared to administer a presidential election amidst a deadly global pandemic, a series of natural disasters, ongoing civil unrest, and widespread postal service delays.<sup>2</sup> Despite a level of apprehension bordering on full-blown panic,

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1. Toni Locy, *Both machine, man needed to tally votes*, USA TODAY (Nov. 19, 2000, 9:38 PM), <https://www.wanttoknow.info/001119usatoday.orig>; Fresh Air, *‘Election Meltdown Is A Real Possibility’ In 2020 Presidential Race, Author Warns*, NPR, at 19:21 (Jan. 29, 2020, 2:02 PM), <https://www.npr.org/2020/01/29/800778189/election-meltdown-is-a-real-possibility-in-2020-presidential-race-author-warns> (“Lord, let this election not be close.”); *Election Administrator’s Prayer*, POLITICAL DICTIONARY, <https://politicaldictionary.com/words/election-administrators-prayer/> (last visited Jan. 6, 2021) (“‘Please, please, please let the winners win big.’ or ‘Lord, let this election not be close.’”).

2. See Paul Blumenthal, *The Nightmare Scenario That Keeps Election Lawyers Up At Night – And Could Hand Trump A Second Term*, HUFFPOST (Sept. 20, 2020, 5:45 AM), [https://www.huffpost.com/entry/election-2020-nightmare\\_n\\_5f65163fc5b6de79b674a9d5](https://www.huffpost.com/entry/election-2020-nightmare_n_5f65163fc5b6de79b674a9d5); Jackson Ryan, *The coronavirus pandemic explained, one year on*, CNET (Jan. 23, 2021, 2:19

the technical administration of the 2020 presidential election was widely seen to have gone smoothly relative to expectations.<sup>3</sup> But, just under the surface, longstanding problems lurked.<sup>4</sup>

One such problem is the practice of “signature matching.”<sup>5</sup> In the most basic sense, signature matching describes the spectrum of practices utilized by some states and counties to attempt to verify the identities of mail voters by matching the signature on their ballot or ballot envelope to a signature on file with election officials.<sup>6</sup> If the sig-

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PM), <https://www.cnet.com/how-to/the-coronavirus-pandemic-explained-one-year-later/>; Adam B. Smith, *2020 U.S. billion-dollar weather and climate disasters in historical context*, CLIMATE.GOV (Jan. 8, 2021), <https://www.climate.gov/disasters2020>; Jesse Costa & Robin Lubbock, *2020 Photos: The Year In Protest*, WBUR (Dec. 24, 2020), <https://www.wbur.org/news/2020/12/24/2020-protest-photos>; Kristen Holmes & Marshall Cohen, *The Postal Service controversy, explained*, CNN (Aug. 21, 2020, 9:55 AM), <https://www.cnn.com/2020/08/21/politics/usps-funding-controversy-explained/index.html>.

3. See Christina A. Cassidy et al., *States cite smooth election, despite Trump’s baseless claims*, ASSOCIATED PRESS (Nov. 11, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-general-elections-elections-4060823b211ce91959b26f46efb73636>; Matt Vasilogambros, *Election Experts Warn of November Disaster*, PEW (July 8, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/08/election-experts-warn-of-november-disaster>; Allison Ross, *What’s going on with the U.S. Postal Service and should Florida be worried?*, TAMPA BAY TIMES (Aug. 17, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/08/17/whats-going-on-with-the-us-postal-service-and-should-florida-be-worried/>; Clara Hendrickson, *Absentee ballot drop boxes, envelopes big problem for Detroit, advocates say*, DETROIT FREE PRESS (Aug. 27, 2020, 6:30 AM), <https://www.freep.com/story/news/local/michigan/detroit/2020/08/27/detroit-absentee-voting-ballots-november-election/5600917002/>; *Mail-in ballot mix-ups: How much should we worry?*, NBC (Oct. 8, 2020, 7:04 AM), <https://www.nbcnews.com/politics/2020-election/mail-ballot-mix-ups-how-much-should-we-worry-n1242592>; Pam Fessler, *Trump’s Calls For Poll Watchers Raise Fears About Voter Intimidation*, NPR (Sept. 30, 2020, 3:25 PM), <https://www.npr.org/2020/09/30/918766323/trumps-calls-for-poll-watchers-raises-fears-about-voter-intimidation>; Benjamin Siegel, *How experts worry the coronavirus outbreak could cloud the 2020 general election*, ABC (Apr. 2, 2020, 1:01 PM), <https://abcnews.go.com/Politics/experts-worry-coronavirus-outbreak-cloud-2020-general-election/story?id=69908301>.

4. See Andrew Selsky, *Oregon elections director fired after he details problems*, ASSOCIATED PRESS (Nov. 9, 2020), <https://apnews.com/article/oregon-elections-director-fired-text-4fbcddeb7f13601f95a34df78bc1fad2>; Ann Gerhart & Jake Crump, *Election results under attack: Here are the facts*, WASH. POST (Mar. 11, 2020, 7:10 PM), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/>.

5. See Maya Lau & Laura J. Nelson, *‘Ripe for error’: Ballot signature verification is flawed — and a big factor in the election*, L.A. TIMES (Oct. 28, 2020, 5:27 AM), <https://www.latimes.com/california/story/2020-10-28/2020-election-voter-signature-verification>.

6. See Ali Bloomgarden et al., *Behind the Scenes of Mail Voting: The Rules and Procedures for Signature Verification in the 2020 General Election*, STANFORD-MIT HEALTHY ELECTIONS PROJECT 10 (Oct. 28, 2020) [https://healthyelections.org/sites/default/files/2020-10/Signature\\_Verification\\_0.pdf](https://healthyelections.org/sites/default/files/2020-10/Signature_Verification_0.pdf); *Signature Verification and Cure Process*, U.S. ELECTION ASSISTANCE COMM’N, [https://www.eac.gov/sites/default/files/electionofficials/vbm/Signature\\_Verification\\_Cure\\_Process.pdf](https://www.eac.gov/sites/default/files/electionofficials/vbm/Signature_Verification_Cure_Process.pdf) (last visited Apr. 6, 2021); see also Lisa Cavazuti & Cynthia McFadden, *80 million Americans may vote by mail in this election. Here’s how most states verify their identities*, NBC (Oct. 14, 2020, 4:02 PM), <https://www.nbcnews.com/politics/2020-election/80-million-americans-may-vote-mail-election-here-s-how-n1243377>.

nature is judged a mismatch, some states mandate that election officials offer the voter a limited opportunity to “cure” their ballot by providing additional identifying information.<sup>7</sup> Some states, however, did not mandate statewide notice and cure policies until compelled to do so through litigation.<sup>8</sup> But signatures may vary for any number of innocuous reasons.<sup>9</sup> Handwriting is subject to natural changes over time due to factors such as age or disability, or simply different writing surfaces.<sup>10</sup>

On the most basic level, the practice of signature matching as it is currently performed in several states is fundamentally flawed. A practice that allows for some combination of unregulated software and nonexpert election officials to discard ballots with no more evidence than the arbitrary judgment that a signature does not “match” cannot be allowed to continue. In the aftermath of the 2020 election, Congress has an obligation pursuant to Article I, section IV of the Constitution to enact basic nationwide protections guaranteeing that ballots properly cast by eligible voters, are evaluated in such a manner as to guard against arbitrary disqualification under the pretext of fraud preven-

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7. See Lau & Nelson, *supra* note 5.

8. See Press Release, Marc Elias, Founder, Democracy Docket, Another Victory For Voting Rights: Michigan Secretary of State Revises Signature Match Process As a Result of Federal Lawsuit (Apr. 21, 2020), [https://thedemocracydocket.perkinscoieblogs.com/wp-content/uploads/sites/41/2020/04/PR\\_20200421\\_MI-SOS-Revises-Signature-Match-Process-As-a-Result-of-Federal-Lawsuit.pdf](https://thedemocracydocket.perkinscoieblogs.com/wp-content/uploads/sites/41/2020/04/PR_20200421_MI-SOS-Revises-Signature-Match-Process-As-a-Result-of-Federal-Lawsuit.pdf) (plaintiffs dropped a lawsuit in Michigan after the Secretary of State agreed to enact statewide standards for signature matching); Mark Niesse, *Lawsuit settled, giving Georgia voters time to fix rejected ballots*, ATLANTA J. CONST. (Mar. 7, 2020), <https://www.ajc.com/news/state—regional-govt—politics/lawsuit-settled-giving-georgia-voters-time-fix-rejected-ballots/oJcZ4eCXf8J197AEdGfsSM/> (the Secretary of State in Georgia settled a lawsuit with the state Democratic Party after agreeing to enact a notification policy for rejected ballots); Frederick v. Lawson, 481 F. Supp. 3d 774, 799 (S.D. Ind. 2020) (an Indiana district court issued a permanent injunction preventing state election officials from rejecting mail ballots for signature mismatches where there was no notice or opportunity to cure); ME. SEC’Y OF STATE, INSTRUCTIONS TO MUNICIPAL ELECTION OFFICIALS PROVIDING AN OPPORTUNITY TO CURE DEFECTS ON ABSENTEE BALLOT ENVELOPES BEFORE REJECTION (2020), <https://www.maine.gov/sos/cec/elec/upcoming/pdf/curingabs.pdf> (just two weeks before the 2020 general election, Maine’s Secretary of State issued statewide notice and cure guidelines); Press Release, League of Women Voters, Agreement in New Jersey Lawsuit Will Establish Fair Ballot Signature Match Process for July 7 Primary (June 17, 2020), <https://www.lwv.org/newsroom/press-releases/agreement-new-jersey-lawsuit-will-establish-fair-ballot-signature-match> (parties to a lawsuit challenging New Jersey’s signature matching scheme stipulated to an agreement mandating notice and cure policies).

9. See KATHERINE M. KOPPENHAVER, FORENSIC DOCUMENT EXAMINATION 27–28 (2007) (summarizing factors that may cause changes in handwriting). Cf. Claudio De Stefano et al., *Handwriting analysis to support neurodegenerative diseases diagnosis: A review*, 121 PATTERN RECOGNITION LETTERS 37 (2019) (assessing uses of handwriting analysis in diagnosing neurodegenerative diseases).

10. See 27 AM. JUR. PROOF OF FACTS 3d *Forensic Identification of Handwriting* § 489 (2021).

tion or, at minimum, that voters have reasonable opportunity to cure defects.<sup>11</sup>

During the 2020 election, the basic struggle to balance ballot access and election integrity played out in a more public fashion than at any time in recent memory.<sup>12</sup> This begs several important questions. First, how did the American election system get to this point? The legal standards governing election law have long been debated and that uncertainty unleashed a flood of litigation in 2020.<sup>13</sup> Second, why use signature matching—a practice which is methodologically unsound and steadily falling out of use—at all?<sup>14</sup> The use of handwritten signatures to verify identity rather than to evidence attestation is on the decline in other areas of the law.<sup>15</sup> Third, how should the voting system

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11. U.S. CONST. art. I, § 4, cl. 1; see *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 15 (2013) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)) (“States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law.’”); *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)) (“[T]he second clause of article 1, § 4, which provides that ‘the Congress may at any time by law make or alter such regulations,’ with the single exception stated. The phrase ‘such regulations’ plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own . . . It ‘has a general supervisory power over the whole subject.’”).

12. See Lane Corrigan et al., *Mail Voting Litigation in 2020, Part III: Challenges Seeking to Expand Delivery Options*, LAWFARE (Oct. 28, 2020, 12:45 PM), <https://www.lawfareblog.com/mail-voting-litigation-2020-part-iii-challenges-seeking-expand-delivery-options>.

13. *Voting Rights Litigation 2020*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020> (last visited Jan. 30, 2021).

14. See David A. Graham, *Signed, Sealed, Delivered—Then Discarded*, THE ATLANTIC (Oct. 21, 2020, 5:47 PM), <https://www.theatlantic.com/ideas/archive/2020/10/signature-matching-is-the-phrenology-of-elections/616790/>. Cf. Richard F. Shordt, *Not Registered to Vote? Sign this, Mail it, and Go Hire a Lawyer*, 78 GEO. WASH. L. REV. 438, 471–72 (2010) (“The Internet has become a catalyst for signatures to enter into a new phase, away from handwritten signatures and back towards symbolic acts, which makes handwritten signatures only a brief phase in the evolution of signature technology.” The argument that handwritten signatures are critical to validate contracts has long been dismissed. Electronic signatures can be employed in a safe and secure method with little cost to states. Business transactions in the global economy rely overwhelmingly on electronic records and courts now accept electronically submitted documents. The very essence of voting has evolved from paper ballots, to manual-lever machines, to electronic-voting devices. Moreover, there is simply no empirical evidence to suggest that registration fraud translates into voter fraud at the voting booth.”).

15. See Sacha Pfeiffer, *The History Of Signatures And Their Present Relevance*, NPR (Nov. 25, 2018, 7:55 AM), <https://www.npr.org/2018/11/25/670631106/the-history-of-signatures-and-their-present-relevance>; William E. Wyrough, Jr. & Ron Klein, *The Electronic Signature Act of 1996: Breaking Down Barriers to Widespread Electronic Commerce in Florida*, 24 FLA. ST. U. L. REV. 407 (1997) (reviewing the adoption of electronic signatures in electronic commerce); Lance C. Ching, *Electronic Signatures: A Comparison Of American*

grapple with the problem of bad faith? The bad faith legal challenges following the 2020 election revealed the enduring artifice of voter fraud claims for what they were: a transparent attempt at voter suppression.<sup>16</sup> Lastly, where does the law go from here?

## I. BACKGROUND

Americans have been voting by mail since the dawn of the Republic, but mail voting first became popular during the Civil War.<sup>17</sup> Throughout the nation's history, ever greater numbers of Americans—some entire states, in fact—have embraced the convenience and accessibility of mail voting.<sup>18</sup> The 2020 presidential election saw higher turnout than any election in the last century.<sup>19</sup> Amidst a worldwide viral pandemic, more Americans had the opportunity to vote by mail

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*And European Legislation*, 25 HASTINGS INT'L & COMP. L. REV. 199 (2002); Anthony M. Balloon, *From Wax Seals To Hypertext: Electronic Signatures, Contract Formation, And A New Model For Consumer Protection In Internet Transactions*, 50 EMORY L.J. 905 (2001) (tracking the effects of electronic signature usage on contracts); Steven Harras, *'Electronic signatures' on more mortgage documents OK'd*, CQ ROLL CALL (Jan. 31, 2014), [https://www.westlaw.com/Document/I9aa1537f8aba11e38578f7ccc38dcbee/View/FullText.html?transitionType=default&contextData=\(sc.Default\)&VR=3.0&RS=cb1.0](https://www.westlaw.com/Document/I9aa1537f8aba11e38578f7ccc38dcbee/View/FullText.html?transitionType=default&contextData=(sc.Default)&VR=3.0&RS=cb1.0) (reporting on the decision by the Federal Housing Administration and the Department of Housing and Urban Development to accept electronic signatures on some mortgage documents).

16. See Aaron Rugar, *Trump's desperate "STOP THE COUNT!" tweet, briefly explained*, VOX (Nov. 5, 2020, 10:25 AM), <https://www.vox.com/2020/11/5/21550880/trump-tweet-stop-the-count-votes-presidential-election>; James DeHaven & Ed Komenda, *UP-DATE: Hours later, Trump campaign files suit to stop Clark County vote count*, RENO GAZETTE J. (Nov. 5, 2020, 7:22 AM), <https://www.rgj.com/story/news/2020/11/05/nevada-trump-campaign-announcement-las-vegas-thursday-8-30/6172659002/>.

17. See David A. Collins, *Absentee Soldier Voting in Civil War Law and Politics* (Jan. 1, 2014) (Ph.D. dissertation, Wayne State University); Olivia B. Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, TIME (Sept. 28, 2020, 8:17 PM), <https://time.com/5892357/voting-by-mail-history/>; Melian Solly, *The Debate Over Mail-In Voting Dates Back to the Civil War*, SMITHSONIAN MAG. (Oct. 20, 2020), <https://www.smithsonianmag.com/smart-news/debate-over-mail-voting-dates-back-civil-war-180976091/>; Nina Storchlic, *How mail-in voting began on Civil War battlefields*, NAT'L GEOGRAPHIC (Aug. 14, 2020), <https://www.nationalgeographic.com/history/article/how-mail-in-voting-began-on-civil-war-battlefields>.

18. Storchlic, *supra* note 17. Colorado, Hawai'i, Oregon, Washington, and Utah instituted all-mail voting prior to the outbreak of COVID-19. See *VOPP: Table 18: States With All-Mail Elections*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx>.

19. Kevin Schaul et al., *2020 turnout is the highest in over a century*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>; Nicholas Riccardi, *Referendum on Trump shatters turnout records*, ASSOCIATED PRESS (Nov. 9, 2020), <https://apnews.com/article/referendum-on-trump-shatter-voter-record-c5c61a8d280123a1d340a3f633077800>.

than at any time in American history.<sup>20</sup> Exploding access, however, shined a spotlight on ballot rejection trends and revealed some troubling patterns.<sup>21</sup>

There are three primary grounds employed to justify most ballot rejections: the ballot arrived after a state's statutory receipt deadline; the ballot was missing the voter's signature; or the signature on the ballot or ballot envelope did not match the signature on file with election officials.<sup>22</sup> In this decentralized election system, each state generally dictates its own systems and processes for matching signatures resulting in a range of practices which have not generally received widespread scrutiny.<sup>23</sup> State signature matching policies are often poorly communicated to the public and inconsistently enforced.<sup>24</sup> Basic logistical questions are difficult to answer.<sup>25</sup> These factors necessitate an effort to examine state signature matching practices, and the potential for legislative solutions.

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20. Brittany Renee Mayes & Kate Rabinowitz, *The U.S. hit 73% of 2016 voting before Election Day*, WASH. POST (Oct. 20, 2020), <https://www.washingtonpost.com/graphics/2020/elections/early-voting-numbers-so-far/>.

21. Mark Nichols et al., *750,000 mail-in ballots were rejected in 2016 and 2018. Here's why that matters*, ABC (Oct. 19, 2020, 6:03 AM), <https://abcnews.go.com/Politics/750000-mail-ballots-rejected-2016-2018-matters/story?id=73645323>; see Jane C. Timm, *A white person and a Black person vote by mail in the same state. Whose ballot is more likely to be rejected?*, NBC (Aug. 9, 2020, 5:36 AM), <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126>; Matt Stiles et al., *Mail-in ballots flagged for rejection hit 21,000; Black, Latino voters rejected at higher rate*, L.A. TIMES (Nov. 3, 2020, 12:33 PM), <https://www.latimes.com/california/story/2020-11-03/more-than-21000-mail-in-ballots-flagged-for-rejection-in-battleground-states>.

22. Miles Parks, *Why Some Mail-In Ballots Are Rejected As Invalid*, NPR (Oct. 2, 2020, 4:48 PM), <https://www.npr.org/2020/10/04/920175418/why-some-mail-in-ballots-are-rejected-as-invalid>.

23. See William Janover & Tom Westphal, *Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity—A Case Study of California's Every Vote Counts Act*, 19 ELECTION L.J. 321, 321 (2020).

24. See Elise Viebeck, *More than 500,000 mail ballots were rejected in the primaries. That could make the difference in battleground states this fall*, WASH. POST (Aug. 23, 2020, 9:15 PM), [https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397f92db3d-11ea-809e-b8be57ba616e\\_story.html](https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397f92db3d-11ea-809e-b8be57ba616e_story.html); Larry Buchanan & Alicia Parlapiano, *Two of These Mail Ballot Signatures Are by the Same Person. Which Ones?*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/interactive/2020/10/07/upshot/mail-voting-ballots-signature-matching.html>.

25. What signature will my ballot signature be matched with? The signature on my years-old voter registration? The signature on my driver's license? What if I registered with an electronic signature that doesn't match my handwritten signature? These questions represent merely the tip of the iceberg. See Graham, *supra* note 14.

## II. ELECTION LITIGATION

Over the course of the 2020 election cycle, legal challenges to signature match practices fell into two primary categories. In the first, plaintiffs challenged state election laws that failed to provide voters notice of and an opportunity to cure ballot defects.<sup>26</sup> In the second, plaintiffs challenged various aspects of signature matching practices themselves.<sup>27</sup>

Plaintiffs in both categories have forwarded a variety of arguments, but a common unifying thread is a discussion of the *Anderson-Burdick* framework.<sup>28</sup> In *Anderson v. Celebrezze*, an independent candidate challenged a statutory filing deadline applicable only to independent candidates attempting to appear on the Ohio ballot in the 1980 presidential election.<sup>29</sup> In essence, the court in *Anderson* constructed “an analytical process that parallels its work in ordinary litigation.”<sup>30</sup> First, a court should “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.”<sup>31</sup> Second, a court “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by [the law].”<sup>32</sup> Lastly, a court “must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>33</sup> *Burdick v. Takushi* followed several

26. See Zahavah Levine & Thea Raymond-Sidel, *Mail Voting Litigation in 2020, Part IV: Verifying Mail Ballots*, LAWFARE (Oct. 29, 2020, 1:38 PM), <https://www.lawfareblog.com/mail-voting-litigation-2020-part-iv-verifying-mail-ballots>.

27. See *id.*

28. See *Arizona Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1087–88, 1092–93 (D. Ariz. 2020); *All. for Retired Am. v. Dunlap*, 240 A.3d 45, 51, 53 (Me. 2020); *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744, 792–98 (W.D. Tex. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F. Supp. 3d 959, 980–1001 (M.D. Tenn. 2020); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 798–99 (S.D. Ind. 2020); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 731, 736–40 (S.D. Ohio 2020); *People First of Ala. V. Merrill*, 467 F. Supp. 3d 1179, 1206–09 (N.D. Ala. 2020); *Clark v. Edwards*, 468 F. Supp. 3d 725, 733 (M.D. La. 2020); *DCCC v. Ziriox*, 487 F. Supp. 3d 1207, 1229, 1232–36 (N.D. Okla. 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at \*17–21 (D.S.C. May 25, 2020); *League of Women Voters Va. v. Va. State Bd. of Elections*, 458 F. Supp. 3d 442, 452 (W.D. Va. 2020).

29. Abigail A. Howell, *An Examination of Crawford v. Marion County Election Board: Photo Identification Requirements Make the Fundamental Right to Vote Far From “Picture Perfect,”* 55 S.D. L. REV. 325, 340–41 (2010) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

30. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

31. *Id.*

32. *Id.*

33. *Id.*



years later wherein a voter challenged Hawaii's lack of a write-in ballot option.<sup>34</sup> *Burdick* established that a state's election law will be assessed "in the context of the total ballot access scheme."<sup>35</sup> *Burdick* further established that "where [voters'] rights are severely restricted, strict scrutiny applies. Where restrictions impose less than severe restrictions, courts should apply the *Anderson* balance."<sup>36</sup>

In its most notable application, in *Crawford v. Marion County Election Board*, the Supreme Court was unable to reach a majority with regard to the proper characterization of "severe."<sup>37</sup> In the lead opinion upholding a voter identification law in Indiana, Justice Stevens "concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."<sup>38</sup> In a concurring opinion, Justice Scalia called "for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote."<sup>39</sup> "[S]trict scrutiny is appropriate only if the burden is severe." Thus, the first step is to decide whether a challenged law severely burdens the right to vote.<sup>40</sup> The determinative issue, then, turns on what is considered a "severe" burden. In the absence of a clear precedent, lower courts have been left to make this determination with little guidance resulting in an "avalanche of litigation."<sup>41</sup> The courts hearing these cases were left to address these challenges as they arose on a largely *ad hoc* basis,<sup>42</sup> and

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34. Howell, *supra* note 29, at 341–43.

35. See *Burdick v. Takushi*, 504 U.S. 428, 441 (1992); Jacqueline Riccianni, *Burdick v. Takushi: The Anderson Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949, 1002 (1994); Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 SEVENTH CIR. REV. 465, 471 (2015).

36. Pikor, *supra* note 35, at 471–72.

37. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

38. *Id.* at 190.

39. *Id.* at 204 (Scalia, J., concurring) (quoting *Burdick*, 504 U.S. at 433–34).

40. *Id.* at 205 (Scalia, J., concurring) (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005)).

41. See *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/cases> (last visited Jan. 29, 2020).

42. See Adam Liptak, *Supreme Court Allows Longer Deadlines for Absentee Ballots in Pennsylvania and North Carolina*, N.Y. TIMES (Oct. 28, 2020, 9:10 AM), <https://www.nytimes.com/2020/10/28/us/supreme-court-pennsylvania-north-carolina-absentee-ballots.html>; *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> (last visited Mar. 11, 2022); Levine & Raymond-Sidel, *supra* note 26.

cases in several states ended in consent decrees or voluntary dismissals where election officials agreed to strengthen training and standards.<sup>43</sup> In an apparent effort to referee, the Supreme Court issued a series of election law decisions, often unsigned, some within just weeks of the 2020 election.<sup>44</sup> In the aftermath, a hard look at the shortcomings of this approach is critical.

### III. A NEW ANALYTICAL FRAMEWORK

Two fundamental problems undergirding much of the recent litigation are the failure to closely examine the basic premise of signature matching itself or to properly contextualize it within broader legal trends. These twin inquiries, in a basic sense, mirror those animating the rules of evidence. Here they might be reframed as: (1) Is signature matching reliable? and (2) Is signature matching relevant?

#### A. Signature Matching as An Evidentiary Problem

In the spirit of *Anderson's* search for “an analytical process that parallels [a court’s] work in ordinary litigation,”<sup>45</sup> critics of the practice might assail the reliability of signature matching by comparison to courts’ treatment of handwriting analysis by an expert under the rules of evidence. The admissibility of expert handwriting analysis in federal courts is generally determined by application of the Federal Rule of Evidence 702 and its incorporation of the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>46</sup> Rule 702 governs the admissibility of testimony by an expert witness, requiring that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on suffi-

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43. See *Priorities USA v. Benson*, 448 F. Supp. 3d 755 (E.D. Mich. 2020) (challenging Michigan’s signature matching scheme for lack of uniform standards); Complaint, *League of Women Voters of Pa. v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020) (challenging Pennsylvania’s signature matching scheme for lack of training and guidance for election officials); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020) (dismissing a challenge to the Pennsylvania Secretary of State’s new signature matching guidance).

44. Adam Liptak, *Missing From Supreme Court’s Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html>.

45. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

46. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

cient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>47</sup>

In *Daubert*, the Supreme Court set out a series of nonexclusive factors by which a court may assess the reliability of a particular scientific methodology proffered by an expert witness. The Court has since expanded the reach of *Daubert* to non-scientific testimony.<sup>48</sup> The *Daubert* factors, as recounted in the advisory committee notes to the Federal Rules of Evidence, include: (1) whether the theory or technique can be tested—“that is, whether the [ ] theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the theory or technique has been tested by peer review, (3) the error rate, (4) the “existence and maintenance of standards and controls,” and (5) “whether the technique or theory has been generally accepted in the scientific community.”<sup>49</sup>

Application of the *Daubert* factors to handwriting analysis reveals several issues of value here.<sup>50</sup> In some cases, courts limit admission of handwriting analysis testimony to “the identification of similarities between the defendant’s handwriting and handwritings in question, but have barred testimony as to the ultimate issue of who authored a particular signature.”<sup>51</sup> In other cases, courts deem handwriting analysis inadmissible where its reliability is not established.<sup>52</sup> In assessing the qualifications of witnesses testifying on the subject of handwriting analysis, courts often disqualify purported experts who do “not possess experience or training.”<sup>53</sup>

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47. FED. R. EVID. 702.

48. *Kumho v. Carmichael*, 526 U.S. 137, 141 (1999) (“This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*’s general holding—setting forth the trial judge’s general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”).

49. The *Daubert* factors are concisely articulated in the notes of the advisory committee on the Federal Rules of Evidence. See Fed. R. Evid. 702 advisory committee’s note to 2000 amendment.

50. See Michael J. Saks, *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069, 1097 (1998) (“After standing unquestioned for most of this century, a re-evaluation of handwriting identification expertise has resulted from the Supreme Court’s decision in *Daubert*.”).

51. Eric C. Surette, *Admissibility of Handwriting Expert’s Testimony in Federal Criminal Case*, 183 A.L.R. Fed. 333 Art. § 2 (2021); see *United States v. Brown*, 152 F. App’x 59, 62 (2d Cir. 2005); *United States v. Paul*, 175 F.3d 906, 909–11 (11th Cir. 1999); *United States v. Hines*, 55 F. Supp. 2d 62, 67–72 (D. Mass. 1999).

52. See Surette, *supra* note 51.

53. *Id.*

In sum, courts have often found “that handwriting analysis testimony on unique identification lacks validity and reliability” because “there are no meaningful and accepted validity studies in the field of handwriting analysis, there is no data on document examiner’s error rates, and there is no academic field known as handwriting analysis.”<sup>54</sup> As a result, handwriting analysis testimony is often limited to simply pointing out similarities and differences.<sup>55</sup>

Signature matching is essentially an exercise in handwriting analysis. Evaluated by a quasi-evidentiary standard, this is problematic for several reasons. First, as noted by a federal court in Indiana, the kinds of arguments marshalled to counter expert testimony on handwriting analysis precisely echo the substantive critiques of signature matching.<sup>56</sup> In *Frederick v. Lawson*, the court pointedly remarked that, in defending Indiana’s signature matching policy, the Secretary of State objected to expert testimony offered by the plaintiffs “on grounds that Plaintiffs have not demonstrated the reliability of the method underlying handwriting analysis.”<sup>57</sup>

Second, concerted efforts at peer review and publication on the subject are complicated by the fragmented nature of American election systems.<sup>58</sup> While the U.S. Election Assistance Commission acts as a clearinghouse for data on election administration, efforts to evaluate the reliability of signature matching have been necessarily siloed by state (and sometimes by county).<sup>59</sup> In this state-based system of elec-

54. *Almeciga v. Center for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 419–23 (S.D.N.Y. 2016); *United States v. Rutherford*, 104 F. Supp. 2d 1190, 1192–93 (2000).

55. See, e.g., *Saks*, *supra* note 50, at 1088.

56. See *Frederick v. Lawson*, 481 F. Supp. 3d 774, 799 n.11 (S.D. Ind. 2020) (“We note the irony in the Secretary’s argument regarding the unreliability of handwriting analysis, which is precisely the judgment required of untrained poll workers by existing law. The Secretary’s own position in this regard highlights the importance of and need for providing due process protections before disenfranchising voters based on a signature comparison.”).

57. *Id.* at 795 (noting the irony of the state’s argument on this issue and ultimately enjoining the state from rejecting ballots solely based on signature mismatches).

58. Bloomgarden et al., *supra* note 6, at 19–25 (survey of ballot rejection data in several swing states).

59. See U.S. ELECTION ASSISTANCE COMM’N, SURVEYS AND DATA (2021) (“The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA). EAC is an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration. EAC also accredits testing laboratories and certifies voting systems, as well as audits the use of HAVA funds.”); Graham, *supra* note 14 (noting variations across different counties and states); Janover & Westphal, *supra* note 23, at 23, 34 (detailing variations between counties within a single state); Drew Desilver, *Most mail and provisional ballots got counted in past U.S. elections – but many did not*, PEW RSCH. CTR. (Nov. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many->

tion administration, each state has its own signature matching scheme with its own corresponding error rate.<sup>60</sup> States exert varying levels of control over individual counties and, in some states, each county is permitted to enact its own procedures.<sup>61</sup>

In 2020, at the urging of former President Donald Trump and his campaign, the state of Georgia undertook a limited audit providing some data reflecting on its signature matching scheme's error rate.<sup>62</sup> Under Georgia law at the time, the signature on a returned absentee ballot envelope was compared with the signature on the voter's absentee ballot application.<sup>63</sup> If the signature was twice judged a mismatch, the voter was to be informed within a set period of time to provide an opportunity for the voter to verify their identity and have their vote counted.<sup>64</sup> If the voter failed to provide the requested verification, their ballot was rejected, and their vote went uncounted.<sup>65</sup> If the signature was judged a match, the ballot was removed from the envelope for counting.<sup>66</sup> At this point, the ballot and the envelope were separated in order to preserve secrecy and cannot be retroactively matched back to-

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did-not/; Lila Carpenter, *Signature Match Laws Disproportionately Impact Voters Already on the Margins*, ACLU (2018), <https://www.aclu.org/blog/voting-rights/signature-match-laws-disproportionately-impact-voters-already-margins> (noting the disproportionate rates of ballot rejection on different voter demographics); Charles Stewart, *Reconsidering Lost Votes by Mail* 4 (MIT Dep't Pol. Sci. 2020), <https://ssrn.com/abstract=3660625> (attempting to quantify the number of "lost votes" nationwide); CLEAR BALLOT GROUP, RESPONSE TO: STATE OF GEORGIA 18-22 (2018); Nathaniel Rakich, *Why Rejected Ballots Could Be A Big Problem In 2020*, FIVETHIRTYEIGHT (Oct. 13, 2020, 7:00 AM), <https://fivethirtyeight.com/features/why-rejected-ballots-could-be-a-big-problem-in-2020/>; David Cottrell et al., *Vote-by-mail ballot rejection and experience with mail-in voting* 5-6 (2020); Kyle Wiggers, *Automatic signature verification software threatens to disenfranchise U.S. voters*, VENTURE BEAT (Oct. 25, 2020, 10:25 AM), <https://venturebeat.com/2020/10/25/automatic-signature-verification-software-threatens-to-disenfranchise-u-s-voters/>; Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU FLORIDA (2018).

60. See Bloomgarden et al., *supra* note 6, at 19.

61. See *id.* at 8–15 (surveying the varying practices of several swing states during the 2020 election cycle).

62. Alexa Corse, *Georgia to Review Mail-in Ballot Signatures to Boost Confidence in Elections*, WSJ (Dec. 15, 2020), <https://www.wsj.com/articles/georgia-to-review-mail-in-ballot-signatures-to-boost-confidence-in-elections-11608058670>.

63. See *VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx>.

64. See *id.*

65. See *id.*

66. Nick Wooten, *GA Republicans want 'signature audit' of absentee ballots. Why it likely won't happen*, COLUMBUS LEDGER ENQUIRER (Nov. 23, 2020, 5:47 PM), <https://www.ledger-enquirer.com/news/politics-government/election/article247371684.html>.

gether.<sup>67</sup> Typically, the Georgia Secretary of State's office "only investigates specific complaints about fraud or irregularities in the process."<sup>68</sup> Following the 2020 general election, however, former President Trump succeeded in browbeating the Secretary of State into ordering an audit of Cobb County.<sup>69</sup> According to data released by the state, approximately 0.13% of ballots cast were rejected for missing or mismatched signatures.<sup>70</sup> The audit, conducted by randomly sampling 15,000 out of the 150,000 ballots returned by Cobb County voters, found zero fraudulent votes and only two improperly accepted ballots.<sup>71</sup> While the percentage of rejected ballots may initially seem small at 2,011 votes, when it is considered alongside the fact that the winner prevailed with fewer than 12,000 votes, the significance of the rejection rate comes into sharper focus.<sup>72</sup> In the 2016 presidential election, the outcome in the Electoral College turned on just 80,000 votes spread across three states.<sup>73</sup> In 2020, the prayers of elections officials across swing states were answered when the winner's margin of victory was wide enough to prevent widespread recounts.<sup>74</sup>

Evidentiary challenges also arise where maintenance of standards and controls are concerned. First, there are few nationwide

67. Mark Niese & David Wickert, *Georgia voter signature audit will validate ballots — or find fraud*, ATLANTA J. CONST. (Dec. 27, 2020), <https://www.ajc.com/politics/georgia-official-orders-ballot-signature-audit-in-cobb-county/MHLOCDS6AJFORG4FWLNJQQUIPM/>.

68. Susan McCord, *Georgia Gov. Kemp again calls for signature audit of election results, cites disputed video*, AUGUSTA CHRONICLE (Dec. 4, 2020, 2:35 PM), <https://www.augustachronicle.com/story/news/2020/12/04/kemp-signature-audit-cites-fulton-video/3827380001/>.

69. Niese & Wickert, *supra* note 67.

70. Mark Niese, *No fraud: Georgia audit confirms authenticity of absentee ballots*, ATLANTA J. CONST. (Dec. 29, 2020), <https://www.ajc.com/politics/no-fraud-georgia-audit-confirms-authenticity-of-absentee-ballots/QF2PTOGLNDLNDJEWBU56WEQHM/>.

71. *Id.* ("In one case, a voter's wife signed her husband's ballot envelope. Another voter signed the front of the envelope instead of the back. Eight voters had mismatched signatures, but the voters told investigators the signatures were legitimate.")

72. See Michael Andre et al., *Georgia Election Results*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-georgia.html>, E-mail from Jordan M. Fuchs, Deputy Secretary of State, to Mark Meadows, White House Chief of Staff (Dec. 23, 2020, 9:42 AM), <https://www.politico.com/f/?id=0000017e-3697-d8d6-a3feb7b77ed30000>.

73. See Philip Bump, *Donald Trump will be president thanks to 80,000 people in three states*, WASH. POST (Dec. 1, 2016, 3:38 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/donald-trump-will-be-president-thanks-to-80000-people-in-three-states/>.

74. See Locy, *supra* note 1; Dante Chinni, *Did Biden win by a little or a lot? The answer is . . . yes*, NBC (Dec. 20, 2020, 9:08 AM), <https://www.nbcnews.com/politics/meet-the-press/did-biden-win-little-or-lot-answer-yes-n1251845>.

standards and procedures for signature matching.<sup>75</sup> Second, some states allow each county to dictate their own standards and procedures.<sup>76</sup> A recurrent issue is the source and number of control signatures used.<sup>77</sup> Some states attempt to match ballot signatures against a single signature on file, while others provide multiple control signatures for comparison.<sup>78</sup> Some states use the signatures found on voter registration forms, while others use the signatures found on absentee ballot applications.<sup>79</sup> Some states accept registrations on paper and some online or by touchpad creating problems in comparing a handwritten signature to one signed on a touchpad.<sup>80</sup>

Additionally, states vary as to who exactly is doing the matching.<sup>81</sup> Some states use computer programs to match signatures, some states rely on the judgment of staff or volunteers, and others use a combination of both.<sup>82</sup> Software can be calibrated to allow for more or less stringent matching criteria.<sup>83</sup> In states where humans are used to evaluate signatures, some states mandate training and provide materials, while others leave training up to the discretion of local officials.<sup>84</sup> Some states mandate that more than one person evaluate each signature before it can be rejected.<sup>85</sup>

Lastly, the theory underlying signature matching is often methodologically flawed. In many cases, signature matching involves a single, isolated one-to-one comparison.<sup>86</sup> The scientific community

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75. See *Voting and Election Laws: Voting Rights Laws and Constitutional Amendments*, OFFICIAL GUIDE TO GOV'T INFO. & SERVS. USA.GOV, [HTTPS://WWW.USA.GOV/VOTING-LAWS#ITEM-212489](https://www.usa.gov/voting-laws#item-212489) (LAST VISITED JAN. 27, 2022) (AT THE FEDERAL LEVEL, ELECTION LAW HAS GENERALLY HEWED TO SETTING MINIMUM STANDARDS SINCE THE ERA OF THE CIVIL RIGHTS ACTS OF THE 1950S AND 1960S).

76. See Janover & Westphal, *supra* note 23; see also Bloomgarden et al., *supra* note 6, at 8–15 (California, for example).

77. See John Harris, *How Much Do People Write Alike—A Study of Signatures*, 48 J. CRIM. L. & CRIMINOLOGY 647 (1958) (noting the need for larger sample sizes in order to make more accurate matches).

78. See Bloomgarden et al., *supra* note 6, at 10.

79. See *id.*

80. See *id.* at 13.

81. See Graham, *supra* note 14.

82. See Bloomgarden et al., *supra* note 6, at 10.

83. See Sabri Ben-Achour, *Robots will be verifying some of our ballots. Can we trust them?*, MARKETPLACE (Oct. 30, 2020), <https://www.marketplace.org/shows/marketplace-tech/vote-by-mail-ballots-mismatched-signatures-verification-software-disenfranchisement/>.

84. See Bloomgarden et al., *supra* note 6, at 13–14.

85. See *id.* at 13.

86. See Graham, *supra* note 14; Lau & Nelson, *supra* note 5; CO. SEC'Y OF STATE, SIGNATURE VERIFICATION GUIDE (2018), <https://www.sos.state.co.us/pubs/elections/docs/SignatureVerificationGuide.pdf>. Cf. *4th Grade Science Fair Handbook*, CORNELIUS ELEMENTARY SCHOOL, <https://www.houstonisd.org/cms/lib2/tx01001591/centricity/domain/608/sci>

often rejects one-to-one comparisons of this kind as definitive proof of anything.<sup>87</sup> As with handwriting analysis, a one-to-one comparison may allow for the observation of similarities or differences, but it is far less useful as a means of identifying the signer.<sup>88</sup> The legal field has struggled for decades—if not centuries—to abide by the scientific method, and signature matching fits squarely in that tradition.<sup>89</sup>

### B. Signature Matching Within Broader Legal Trends

In assessing the relevance of signature matching, it is notable that handwritten signatures themselves—as well as their use as a means of identification as opposed to authentication—is on the decline in other areas of the law.<sup>90</sup> Technological advances and the rapid uptake of digital communications have radically altered the ways modern Americans transact.<sup>91</sup> These changes, in turn, have made their way into the law, where signatures have generally been treated as a means of attestation or authentication and not necessarily a means of identifi-

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encefair%20packet\_12.pdf (last visited Nov. 12, 2020) (noting that a sample size of one cannot withstand the scrutiny demanded by the rules of a grade school science fair).

87. See Zascha Blanco Abbott, PRAC. GUIDE DEF. EPL CLAIMS § 6.VII, A.B.A. § A (2018) (“The techniques of statistical inference used in social science depend upon sample sizes sufficiently large for reasonably accurate conclusions to be drawn . . . If a sample size is too small or otherwise incomplete, the sample size will be considered to have little predictive value and must be disregarded. This is because if the sample is too small, a slight change in data would drastically alter the result.”); *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1087, 1090–92, 1102 (D. Kan. 2018).

88. For a discussion of the “individualization fallacy,” see generally Michael J. Saks, *The Individualization Fallacy In Forensic Science Evidence*, 61 VAND. L. REV. 199 (2008).

89. See Jules Epstein, *Preferring The “Wise Man” To Science: The Failure Of Courts And Non-Litigation Mechanisms To Demand Validity In Forensic Matching Testimony*, 20 WIDENER L. REV. 81 (2014); John S. Ehrett, *Antifragile Policymaking: A Strategy For Institutional Response To The Social Science Reproducibility Crisis*, 49 U. MEM. L. REV. 447 (2018); John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center’s New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183, 1184 (1996); M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science’s Overdue Evolution From Magic To Law*, 4 VA. J. CRIM. L. 1 (2016); Kayla Marie Mannucci, *Framed By Forensics: Fulfilling Daubert’s Gatekeeping Function By Segregating Science From The Adversarial Model*, 39 CARDOZO L. REV. 1947 (2018).

90. See Edward D. Kania, *The ABA’s Digital Signature Guidelines: An Imperfect Solution to Digital Signatures On The Internet*, 7 COMM.LAW CONSPECTUS 297, 297–302 (1999).

91. See Wyrrough & Klein, *supra* note 18, at 418–432.



cation.<sup>92</sup> The intent of the signer, rather than the form of the signature, was to be the legitimating factor.<sup>93</sup>

Electronic signatures, signature stamps, and other forms of typed signatures are now generally sufficient to satisfy the statute of frauds if a party intends for the signature to be an authentication.<sup>94</sup> An “X” mark can constitute a signature on a will if the testator intends it to be a signature.<sup>95</sup> The typed name of the sender in the signature block of an email can sometimes suffice as a signature sufficient to create a binding contract.<sup>96</sup>

The first rights that the Framers intended to protect were arguably property rights.<sup>97</sup> Protections for property rights were considered so sacrosanct that they predate most protections for voting rights.<sup>98</sup> If an “X” mark may suffice as attestation to dispose of all one’s worldly property, why is it insufficient to attest to one’s vote?<sup>99</sup>

#### IV. HOW SEVERE IS TOO SEVERE?

Each of these inquiries—reliability and relevance—bear on the fundamental soundness of the practice itself and its impact on the severity analysis set forth in *Anderson-Burdick*. As the Supreme Court reaffirmed in *Crawford v. Marion County Election Board*, courts examining constitutional challenges to election regulations are required to “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”<sup>100</sup> In the case of a purported signature mismatch, the burden falls on individual voters to “cure” their valid, properly cast

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92. See Victor Woerner, *Printed, stamped, or typewritten name as satisfying requirement of statute of frauds as regards signature*, 171 A.L.R. 334 §II–III (2021); Julia Felsenthal, *Give Me Your John Hancock*, SLATE (Mar. 18, 2011, 5:39 PM), <https://slate.com/news-and-politics/2011/03/when-did-we-start-signing-our-names-to-authenticate-documents.html>.

93. See Wyrrough & Klein, *supra* note 15, at 420.

94. See *id.*

95. Signatures serve an attestation function; witnesses serve an identification function. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES*, 145, 154–56 (Wolters Kluwer, 10th ed. 2017).

96. See George L. Blum, *Use of E-mails to Establish Enforceable Contracts*, 32 A.L.R.7th Art. 6 (2021); *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (2005).

97. See ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW* 613–14 (5th ed. 2005) (citing CHARLES A. BEAR, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913)).

98. *Id.* at 613–14, 1107–08.

99. See SITKOFF & DUKEMINIER, *supra* note 95, at 145, 154–56.

100. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

ballot or suffer summary disenfranchisement.<sup>101</sup> Though some states now mandate that voters be notified if their ballot is rejected and afforded a limited opportunity to cure it, there is no guarantee that officials will succeed in contacting each affected voter.<sup>102</sup> There is similarly no guarantee that each affected voter is willing or able to comply with cure procedures.

If the oft-cited justifications for restrictive voter identification laws advanced by states are fraud prevention and voter confidence, signature matching serves neither.<sup>103</sup> First, the data available simply does not support the states' posture. By the available measures, the ballot rejection rate likely exceeds the rate of documented voter fraud.<sup>104</sup> Furthermore, signature matching is not generally a part of any broader fraud prevention system;<sup>105</sup> where a signature is judged a

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101. See Table 15: *States With Signature Cure Processes*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 18, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx> (states with statutory processes vary widely as to how election officials are to make such notifications).

102. See Pam Fessler & Elena Moore, *More Than 550,000 Primary Absentee Ballots Rejected In 2020, Far Outpacing 2016*, NPR (Aug. 22, 2020, 5:00 AM), <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016>. Compare HAW. REV. STAT. § 11-106 (2021) ("the clerk shall make an attempt to notify the voter by first class mail, telephone, or electronic mail to inform the voter of the procedure to correct the deficiency"), and MINN. STAT. § 203B.121 (2021) ("If an envelope has been rejected at least five days before the election . . . the official . . . shall provide the voter with a replacement absentee ballot . . . If an envelope is rejected within five days of the election . . . the official . . . must attempt to contact the voter by telephone or e-mail to notify the voter that the voter's ballot has been rejected. The official must document the attempts made to contact the voter."), with GA. CODE ANN. § 21-1-386 (West 2021) ("The board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection . . ."), and OR. REV. STAT. ANN. § 254.431 (West 2022) ("If a ballot is challenged . . . the county clerk shall mail to the elector a notice . . .").

103. See *Crawford*, 553 U.S. at 191.

104. Compare Michael Wines, *November Surprise: Fewer Ballots Rejected by Election Officials*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/11/02/us/election-ballots-rejections.html>; and Pam Fessler, *A 2020 Surprise: Fewer Absentee Ballot Rejections Than Expected*, NPR (Dec. 31, 2020), <https://www.npr.org/2020/12/31/951249068/a-2020-surprise-fewer-absentee-ballots-rejections-than-expected>, and Fessler & Moore, *supra* note 102; with BRENNAN CNT. FOR JUST., *DEBUNKING THE VOTER FRAUD MYTH* (last visited Jan. 30, 2021); Jenna Goff & Joan Greve, *By the Numbers: Voter Fraud*, PBS (Oct. 18, 2016), <https://www.pbs.org/weta/washingtonweek/blog-post/numbers-voter-fraud>, and Elise Viebeck, *Minuscule number of potentially fraudulent ballots in states with universal mail voting undercuts Trump claims about election risks*, WASH. POST (June 8, 2020, 2:54 PM), [https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html).

105. Michael Wines, *Republicans Want New Tool in Elusive Search for Voter Fraud: Election Police*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/us/voting-rights-election-police.html> ("[Florida Governor Ron] DeSantis took a tough line . . . when he unveiled his [election police] proposal, saying that the new unit would chase crimes that

mismatch and a voter does not act to cure, the ballot is simply discarded. In 2020 in particular, voter confidence was deliberately undermined as an electoral strategy.<sup>106</sup> Advocates for more restrictive voting laws seek to have it both ways, enacting a self-fulfilling prophecy in which they purposefully undermine voter confidence with specious fraud claims and then proceed to cite low voter confidence as a justification for more burdensome policies.<sup>107</sup> Where states have failed to proffer sufficiently legitimate justifications, the burden should not fall on the voters.

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local election official shrug at. ‘There’ll be people, if you see someone ballot harvesting, you know, what do you do? If you call into the election office, a lot of times they don’t do anything,’ he said at an appearance . . . ”); Lori Rozzsa & Beth Reinhard, *Florida governor proposes special police agency to monitor elections*, WASH. POST (Jan. 18, 2022, 6:30 AM), <https://www.washingtonpost.com/nation/2022/01/18/florida-governor-proposes-special-police-agency-monitor-elections/> (“A plan by Florida Gov. Ron DeSantis would establish a special police force to oversee state elections — the first of its kind in the nation — and while his fellow Republicans have reacted tepidly, voting rights advocates fear that it will become law and be used to intimidate voters.”).

106. In a report published in 2018, a committee convened by the National Academy of Sciences to recommend technological solutions for election administrators found instead that the most significant threat to American elections were the deliberate efforts to undermine the credibility of results. See NAT’L ACAD. OF SCIS., ENG’R, AND MED. 2018, SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY xi (2018). See also Maya Yang, *More than 40% in US do not believe Biden legitimately won election – poll*, GUARDIAN (Jan. 5, 2022, 1:16 PM), <https://www.theguardian.com/us-news/2022/jan/05/america-biden-election-2020-poll-victory> (“More than 40% of Americans still do not believe that Joe Biden legitimately won the 2020 presidential election despite no evidence of widespread voter fraud, according to a new Axios-Momentive poll . . . Despite Biden’s inauguration, the attack on the Capitol and the multiple investigations that have debunked the lies pushed by the former president that the election was stolen, the poll suggests that the same level of doubt persists.”); Amy Gardner et al., *Inside the nonstop pressure campaign by Trump allies to get election officials to revisit the 2020 vote*, WASH. POST (Dec. 22, 2021, 5:38 PM), [https://www.washingtonpost.com/politics/trump-election-officials-pressure-campaign/2021/12/22/8a0b0788-5d26-11ec-ae5b-5002292337c7\\_story.html](https://www.washingtonpost.com/politics/trump-election-officials-pressure-campaign/2021/12/22/8a0b0788-5d26-11ec-ae5b-5002292337c7_story.html) (“More than a year after Donald Trump lost the presidency, election officials across the country are facing a growing barrage of claims that the vote was not secure and demands to investigate or decertify the outcome, efforts that are eating up hundreds of hours of government time and spreading distrust in elections. The ongoing attack on the vote is being driven in part by well-funded Trump associates, who have gained audiences with top state officials and are pushing to inspect protected machines and urging them to conduct audits or sign on to a lawsuit seeking to overturn the 2020 results.”).

107. See Stephen Fowler, *Georgia Republicans Pledge To Crack Down On Voting Laws*, NPR (Dec. 17, 2020, 4:05 PM), <https://www.npr.org/2020/12/17/947693825/georgia-republicans-pledge-to-crack-down-on-voting-laws>; Jane C. Trimm, *19 states enacted voting restrictions in 2021. What’s next?*, NBC (Dec. 21, 2021, 7:02 AM), <https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342>.

## CONCLUSION

It would be an act of willful blindness to conclude this note without an acknowledgment of the extraordinary times in which it was written. By Election Day in 2020, the COVID-19 daily death toll in the U.S. stood at 1,130 and rising.<sup>108</sup> For perspective, 1,130 deaths in a single day roughly equals the death toll if seven passenger planes fell out of the sky killing everyone on board.<sup>109</sup> At the height of the pandemic, the daily death toll exceeded 4,000, or a passenger plane crashing every hour for a full day.<sup>110</sup> This was the context in which the former president and his allies demanded more stringent voting restrictions, all the while furthering voter fraud conspiracy theories that ultimately culminated in an attack on the U.S. Capitol aimed at halting the certification of the election results.<sup>111</sup>

The 117th Congress has the opportunity and the duty to enact legislative safeguards aimed at preventing a replay of the chaos of 2020.<sup>112</sup> Former President Trump's transparent attempts to tamper

108. See Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, [https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?name=styl-coronavirus&region=TOP\\_BANNER&block=storyline\\_menu\\_recirc&action=click&pg\\_type=Article&impression\\_id=4f7bab90-633a-11eb-881b-f19a99a1b5c8&variant=1\\_Show](https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?name=styl-coronavirus&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pg_type=Article&impression_id=4f7bab90-633a-11eb-881b-f19a99a1b5c8&variant=1_Show) (last visited Jan. 30, 2021).

109. See David Slotnick, *Boeing's 737 officially lost the title of world's most popular airplane. Airbus' competitor just passed it in sales*, BUS. INSIDER (Nov. 18, 2019), <https://www.businessinsider.com/airbus-beats-worlds-most-popular-plane-a320-737-2019-11; A320 ceo, AIRBUS, https://www.airbus.com/aircraft/passenger-aircraft/a320-family/a320ceo.html> (last visited Jan. 30, 2021).

110. See CDC, COVID DATA TRACKER: TRENDS IN NUMBER OF COVID-19 CASES AND DEATHS IN THE US REPORTED TO CDC, BY STATE/TERRITORY (2022), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailydeaths](https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths).

111. In 2021, President Donald Trump exhorted a mob to storm the U.S. Capitol Building as Congress was in the middle of certifying the Electoral College results of the 2020 election. See Brian Stelter, *Now it's sinking in: Wednesday's Capitol Hill riot was even more violent than it first appeared*, CNN (Jan. 9, 2021, 3:51 PM), <https://www.cnn.com/2021/01/09/media/reliable-sources-january-8/index.html>. As the Capitol siege unfolded, President Trump was misdialing U.S. Senators in a continuing attempt to overturn the results of the election rather than mobilizing a response. See *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894246, at \*1-9 (C.D. Cal. Mar. 28, 2022); Sunlen Serfaty et al., *As riot raged at Capitol, Trump tried to call senators to overturn election*, CNN (Jan. 8, 2021, 9:30 PM), <https://www.cnn.com/2021/01/08/politics/mike-lee-tommy-tuberville-trump-misdialed-capitol-riot/index.html>; *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-take-aways.html>.

112. Cf. Miles Parks, *With Control Of Congress, Democrats Aim To Address Voting Rights*, NPR (Jan. 24, 2021, 7:58 AM), <https://www.npr.org/2021/01/24/960060852/with-control-of-congress-democrats-aim-to-address-voting-rights>; Jill Filipovic, *Opinion, Republicans are going all-out to limit voting rights. We know why*, GUARDIAN (Jan. 30, 2021, 6:21 AM), <https://www.theguardian.com/commentisfree/2021/jan/30/republicans-restrict>

with the democratic process have demonstrated that American election systems, while resilient, are not foolproof.<sup>113</sup> Congress ought to rise to the occasion and ought not delegate to the courts what is properly a legislative prerogative.<sup>114</sup>

The basic framework of the Freedom to Vote Act—a compromise proposal arising out of the For the People Act—provides an optimal legislative vehicle to promptly address this issue within a comprehensive election security regime.<sup>115</sup> The Freedom to Vote Act provides that a ballot cannot be rejected for a purported signature mismatch unless such a determination is made by at least two election officials who have received training in signature matching policies, and requires that those officials represent different political parties or are unaffiliated.<sup>116</sup> The bill’s due process provisions mandate certain minimum standards for affording voters notice and an opportunity to cure by requiring that election officials “as soon as practical, but no later than the next business day after such [signature mismatch] determination is made, make a good faith effort to notify the [voter] by mail, telephone, and (if available) text message and electronic mail” and extending the time to “cure such discrepancy and count the ballot if, prior to the expiration of the third day following the State’s deadline for receiving mail-in ballots or absentee ballots, the [voter] provides the official with information to cure such discrepancy, either in person, by telephone, or by electronic methods.”<sup>117</sup> The bill additionally imposes

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voting-access-bills; Nicholas Wu & Zach Montellaro, *Voting rights push reinvigorates as House Dems tee up new bill next week*, POLITICO (July 30, 2021, 12:52 PM), <https://www.politico.com/news/2021/07/30/new-voting-rights-bill-501772>.

113. See Ezra Klein, *Trump is attempting a coup in plain sight*, Vox (Nov. 7, 2020, 3:50 PM), <https://www.vox.com/2020-presidential-election/2020/11/7/21554114/trump-election-2020-voter-fraud-challenge-recount-biden>; Michael Shear, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>; Sara Murray et al., *DA for Atlanta area requests special grand jury to probe Trump’s election interference*, CNN (Jan. 20, 2022, 5:28 PM), <https://www.cnn.com/2022/01/20/politics/georgia-trump-grand-jury/index.html>; Jan Wolfe, *‘Profound abuse’: Judge disciplines pro-Trump lawyers over election lawsuit*, REUTERS (Aug. 26, 2021, 2:28 PM), <https://www.reuters.com/world/us/judge-sanctions-sidney-powell-other-pro-trump-lawyers-who-claimed-voter-fraud-2021-08-25/>; Marshall Cohen et al., *Trump campaign officials, led by Rudy Giuliani, oversaw fake electors plot in 7 states*, CNN (Jan. 20, 2022, 9:58 PM), <https://www.cnn.com/2022/01/20/politics/trump-campaign-officials-rudy-giuliani-fake-electors/index.html>; Betsy Woodruff Swan, *Read the never-issued Trump order that would have seized voting machines*, POLITICO (Jan. 21, 2022, 3:24 PM), <https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572>.

114. U.S. CONST. art. I, § 4, cl. 1.

115. See Freedom to Vote Act, S. 2747, 117th Cong. (2021).

116. *Id.* § 1301(b)(2)(C)(i)-(ii).

117. *Id.* § 1301(b)(2)(A).

reporting requirements including how many ballots were rejected for signature mismatches, documentation as to the efforts made to contact voters to offer an opportunity to cure, and a description of the state's cure process.<sup>118</sup> If the practice of signature matching is to remain a part of the administration of federal elections, it is essential that Congress codify these basic nationwide standards in order to strike the proper balance between ballot access and election integrity and to protect against bad faith efforts to restrict the franchise. After all, the right to vote is "preservative of all rights."<sup>119</sup> What is absolutely clear is that the need for reform should prevail over continued inaction grounded in nothing more compelling than inertia.<sup>120</sup>

Having observed which tactics were successful and which were not during the 2020 election, bad faith actors will continue their pretextual attempts to restrict voting rights.<sup>121</sup> How confident should American voters be in the strength of democratic norms in the face of a more competent<sup>122</sup> and strategic attempt to circumvent their will?<sup>123</sup> In the words of Senator Raphael Warnock, "A vote is a kind of prayer for the world we want to live in."<sup>124</sup> In the aftermath of the 2020 election, who still believes one solitary prayer or one single vote can be spared?

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118. *Id.* § 1301(b)(3)(A).

119. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

120. Even American astronauts are afforded the opportunity to vote from space. Surely there is a solution that protects Earth-bound citizens. *See Astronauts to Vote in Space*, NASA (Sept. 29, 2020), <https://www.nasa.gov/feature/astronauts-to-vote-in-space>.

121. As of this writing, at least 440 bills have been introduced in forty-nine states attempting to restrict ballot access in myriad ways. *See Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> (last visited Jan. 22, 2022); Janie Boschma et al., *Lawmakers in 47 states have introduced bills that would make it harder to vote. See them all here*, CNN (Apr. 3, 2021, 10:05 AM), <https://www.cnn.com/2021/04/03/politics/state-legislation-voter-suppression/index.html>; Alex Samuels et al., *The States Where Efforts To Restrict Voting Are Escalating*, FIVETHIRTYEIGHT (Mar. 29, 2021), <https://fivethirtyeight.com/features/the-states-where-efforts-to-restrict-voting-are-escalating/>.

122. *See* Aaron Blake, *Trump lawyers suffer embarrassing rebukes from judges over voter fraud claims*, WASH. POST (Nov. 11, 2020, 11:53 AM), <https://www.washingtonpost.com/politics/2020/11/11/trump-lawyers-suffer-embarrassing-rebukes-judges-over-voter-fraud-claims/>. *Cf.* Zeynep Tufekci, *America's Next Authoritarian Will Be Much More Competent*, THE ATLANTIC (Nov. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/trump-proved-authoritarians-can-get-elected-america/617023/>.

123. *See* Tufekci, *supra* note 122.

124. @B52Malm, TWITTER (Nov. 14, 2020, 8:09 PM), <https://twitter.com/b52malm/status/1327780835743981569>.