

The purpose of this memorandum is to detail the procedure implemented in Mobile County during elections to ensure lawful voting and the law that supports the implementation of this procedure.

### **General Voting Procedure in Mobile County**

Currently, voters approach the registration table manned by election workers with the voters list. Each voter furnishes a Photo ID, and the registration clerk reviews the Photo ID and confirms that the voter's Photo ID name is listed on the active voter list. Then, the registration clerk checks that voter's name on the voters list and provides a "voter ID slip" to the voter to take to the ballot table. At the ballot table, the voter signs the poll list and a ballot table clerk provides the voter with the ballot. The voter then proceeds to a table with privacy partitions, where the voter fills out the ballot. Upon completion, the voter takes his completed ballot to the ballot counter where he inserts his ballot and leaves the polling place.

The Chief Clerk is the designated provisional ballot officer. He also supervises issues related to voters' Photo IDs at the registration table. Clerks at the registration table are told to refer such issues to the Chief Clerk to expedite processing other voters and minimize the lines.

### **The Process of Reviewing the Photo ID and the Voter List Data**

In Mobile County, the Probate Judge has worked with elections officials and staff to set out a number of guidelines to fulfill the overall objectives of the Photo ID Law and to ensure compliance with all election laws. Below are the relevant instructions provided by the Mobile County Probate Judge (hereinafter referred to as the "Mobile County Procedure"):

1. As background, Alabama's Photo ID Law, enacted in 2011 and made effective in 2014, requires voters to present a valid Photo ID to vote. Ala. Code §17-9-30(a). The Photo ID Law further provides that the voter can present a number of different types of Photo ID. Ala. Code §17-9-30(a)(1)-(7).
2. Although most voters present their driver's license as the Photo ID, each Photo ID set out in the statute is acceptable, and each election worker is trained to accept each listed form of ID as a valid Photo ID for the voter.
3. Election officials are further instructed that voters must vote in the precinct of their residence in order to cast lawful votes.
4. The various Photo IDs set out by the statute contain different types of information, including, in some cases, the voter's address. Election workers are instructed that an address on Photo ID is not necessary for the Photo ID to be acceptable. More specifically, the registration clerks are instructed that if the Photo ID does not contain an address, they are not to make any inquiry regarding the voter's address.
5. However, from time to time, the voter presents a valid Photo ID with an address, in which the address on the Photo ID conflicts with the address listed on the list of registered voters

(hereinafter “Voter List”). If the addresses do not match, the registration clerk is trained to immediately refer the voter to the Chief Clerk.

6. Chief Clerks are instructed that the address on the Photo ID is not determinative of the address of the voter. When the voter is referred to the Chief Clerk because of a conflict between the address on the Photo ID and the Voter List, the Chief Clerk asks the voter to verify his current residence address, and the voter’s response is assumed to be truthful.

A. If the voter responds that the residence address set out on the Voter List is correct, the voter is brought back to the registration table where the registration clerk is instructed to register the voter to vote a regular ballot with no further action or inquiry taken.

B. If the voter states that the address on the Voter List is not his current residence address, then the Chief Clerk takes steps to confirm for the voter which polling place serves his current residence address. There are several tools available to the Chief Clerk to assist with the process. Each Chief Clerk is provided an Electronic Poll Book (“EPB”) that contains applications to locate by residence address the correct polling location and print out that information for the voter. Each polling place has a large precinct wall map, which can help the voter locate his address if it is within the precinct where they have presented to vote. The voter and the Chief Clerk work together to ascertain where the voter lives and which polling place serves their current residence address.

i. If the current residence of the voter is within the precinct of the polling place where they have presented to vote but different from what appears on the Voter List, then the Chief Clerk should determine if an update form needs to be completed. After that is completed, the voter is processed as a “regular” voter and permitted to vote in the usual manner in his polling place.

ii. If the current residence of the voter is not within the polling place, the Chief Clerk will print the correct poll information from the EPB and also fill out a “transfer” form (pink in color). After the Chief Clerk completes the pink transfer form, the Chief Clerk then gives the form and the printout from the EPB to the voter and instructs the voter to go to that specific polling place to vote. The Chief Clerk also informs the voter that when the voter arrives at the second (correct) polling place, the voter should not wait in line at his new polling place, as he has already been through that process. Instead, the voter should immediately seek out the Chief Clerk of the polling place and hand the Chief Clerk the pink transfer form. Because the voter’s name will necessarily not appear on the Voter List at the correct polling place, the voter will be required to vote a provisional ballot. In addition, the Chief Clerk then explains to the voter that by voting at the polling place where he lives, his vote is legal and his vote will count. Further, the Board of Registrars will update the Voter List with the correct address.

iii. However, if the voter insists on voting at the incorrect polling place where the voter has declared he does not reside, the voter can vote a provisional ballot. State law requires the Inspector to challenge this voter’s improper decision to vote at a polling place in which he does not live. Presumably, such vote will be deemed illegal and never be counted.

The Judge of Probate of Mobile County uses the Mobile County Procedure in order to ensure the legality of the election process, to comply with the election laws, and to ensure (to the extent possible) that each voter casts a legal vote that will be counted. The Mobile County Procedure is designed with the voter in mind. A voter wants his vote to count. This process takes an obvious inconsistency in addresses and presents the voter with the ability to cure what may have been simple neglect or mistake in updating a voter's address after a change in residence. When a voter changes his residence and does not update his driver's license address or his voter registration address, the voter risks voting an illegal ballot if he has changed voting precincts. The Mobile County Procedure assists a voter in complying with the law and voting legally. An inadvertent error in not updating one's address is cured, with the help of election workers, using a simple procedure that takes a voter at his word in determining a voter's correct address.

### **Probate Judge's Duty to Ensure the Legality of the Election Process**

As the Judge of Probate for Mobile County, Judge Davis is "the chief elections official of the county." Ala. Code §17-1-3A(b). The United States Supreme Court has held:

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

*Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). As the county's chief elections officer, the Judge of Probate of Mobile County has an obligation to ensure the integrity of the election process. The Mobile County Procedure is designed with the goal that each vote cast is a legal vote.

### **The Procedure Complies with the Law**

Ala. Code §17-6-5 sets forth the Judge of Probate's duties to prepare the voter lists for the election officials, and also reads, "[a] vote cast at a place other than the voting place at which the voter is entitled to vote shall be illegal." In *Davis v. Bennett*, 154 So. 3d 114 (Ala. 2014), the Alabama Supreme Court made clear that Alabama law requires a voter to vote only in the polling place where he currently lives, or his vote is illegal, which includes the casting of a provisional vote. Under the Mobile County Procedure, if the voter has moved but still lives within that same polling place designated for his current residence, the voter can still vote in that same polling place and cast a "regular" ballot. However, if the voter's current address is now outside the area for his old polling place, a vote cast in the old polling place is illegal. In fact, if the voter does vote at his old polling place, which is not the polling place for his current residence, his vote is illegal and his vote should not be counted, as a matter of law.

After the Alabama Supreme Court decided *Davis v. Bennett*, the Secretary of State enacted, pursuant to its regulatory authority, Ala. Admin. §820-2-2-.13 (the “Regulation”). The relevant portions of the Regulation state:

(1) A voter who has changed his or her domicile from an address in the area covered by one precinct or polling place to an address covered by a second precinct or polling place within the same Board of Registrars’ jurisdiction and who has failed to notify the Board of Registrars of the change of address prior to the date of an election shall not be allowed to cast a ballot at the former polling place. In such cases the poll workers shall obtain the voter’s new precinct or polling place information from either the Board of Registrars or the Judge of Probate and instruct the voter to go to the new precinct or polling place to vote.

(a) Because in such instances the voter’s name will not appear on the poll list at the new precinct or polling place, an inspector at the new polling place shall notify the voter that he or she may cast a provisional ballot in the election.

(b) If the inspector has knowledge and belief that a voter has changed his or her domicile but the voter refutes the inspector’s allegation and asserts that he or she is eligible to vote at the polling place where he or she has presented himself or herself to vote, the inspector shall require the voter to cast a provisional ballot based on the inspector’s knowledge that the voter is not qualified to vote in the precinct in which he or she is seeking to vote. The inspector shall complete a challenge statement setting forth the facts which the inspector believes to support his or her contention that the voter is not qualified to vote in the precinct in which he or she is seeking to vote.

(c) Any provisional ballot issued pursuant to this rule shall be governed by the procedures set forth in Section 17-10-2, Code of Ala. 1975, and Chapter 820-2-6, Alabama Administrative Code.

The Mobile County Procedure mirrors this Regulation in that both are designed to send voters who are at the incorrect polling place to their correct polling place in order to cast a legal vote. Moreover, a conflict between the address on a Photo ID and the address on the voter list raises the question of whether the voter has changed his place of domicile and whether he is voting in the correct polling place. The Inspector’s question to the voter regarding his correct address gives the Inspector the knowledge necessary either to allow the voter to cast a lawful vote in that polling place (where the voter lives in that precinct), or to expedite the voter’s lawful voting at his correct polling place (if he lives in another precinct). As the Alabama Supreme Court set out succinctly in *Davis v. Bennett*, “Alabama statutory law continues to require, as it long has, that voters who have moved cast ballots at the polling place designated for their new address.” *Id.* at 131.

The Alabama Supreme Court has determined that the address on the driver's license of the voter is relevant evidence of the voter's current address. In *Horwitz v. Kirby*, 197 So. 3d 943 (Ala. 2015), a case challenging the legality of certain votes, the Alabama Supreme Court considered the address on driver's licenses of voters as relevant evidence of the place of domicile in determining the place that a voter should have voted.

In the vote challenge case of *Waltman v. Rowell*, 913 So. 2d 1083 (Ala. 2005), the Alabama Supreme Court was faced with conflicting evidence between the voter's address as set forth in his affidavit, which is not within the proper polling place, and the voter's "requisite averment, 'I have actually resided 30 days in this ward next preceding this day,' § 11-46-41(c)(4)." *Id.* at 1092. These two conflicting descriptions of the address of the voter create an internal inconsistency within the affidavit. In Justice Lyons' concurring opinion, he wrote, "I must conclude that the proof at trial of an internally inconsistent affidavit is prima facie evidence of an illegal vote." When a voter presents a state driver's license to an election official, which presents an "obvious inconsistency" with the address on the voter list, the Inspector at the polling place should at least question the voter of on this inconsistency and, under *Waltman*, the inconsistency may even be prima facie evidence of illegality.

Other laws also place substantial weight on the voter's driver's license address in determining where to register the voter to vote. For example, the National Voter Registration Act requires that "[e]ach State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." 52 U.S.C. § 20504(a)(1). Furthermore, the Act requires that "[a]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes." 52 U.S.C. § 20504(d). This automatic updating of the voter list indicates that driver's licenses are reliable sources of data regarding the voter's address. Moreover, the reliance on the change of address to a driver's license under this legal provision further indicates the high degree of reliability of the driver's license address in registering voters. Therefore, where the voter list and the driver's license addresses do not match, the simple step of inquiring about the true address of the voter is done with great regard for the quality of the evidence (the driver's license address) causing a discrepancy.

In *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), where the Court addressed the Indiana state voter ID law, the United States Supreme Court stated:

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be

debatable, the propriety of doing so is perfectly clear. Crawford, 553 U.S. at 196.

The Mobile County Procedure is supported by the interests set forth by the United States Supreme Court in Crawford. The Mobile County Procedure recognizes and addresses the “importance of the State’s interest in counting only the votes of eligible voters.” Moreover, the Mobile County Procedure is a process that improves “orderly administration and accurate record keeping.” The Supreme Court found that these legitimate, important state interests provide “sufficient justification for carefully identifying all voters participating in the election process.” The Mobile County Procedure advances all of these state interests, including the updating of the voter’s list, which also advances the state interest of “accurate record keeping” while it ensures that the voter’s vote is legal and is counted.

In balancing these interests, the courts routinely weigh the interest of the state in counting only legal votes with the burdens placed on the voter. In *Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299, 1320 (11th Cir. 2021) in examining the burdens of Alabama's Photo ID Law, the Eleventh Circuit held:

Alabama's interests in passing the voter ID law are not substantively different from the neutral, nondiscriminatory reasons espoused by Indiana and upheld by the Supreme Court in Crawford. Just as "Congress believes that photo identification is one effective method of establishing a voter's qualification to vote," *Id.* at 193, 128 S.Ct. 1610, so too did the Alabama legislature. It follows that the burden of presenting a photo ID in order to vote is "justified by relevant and legitimate state interests 'sufficiently weighty to justify'" the burden on Alabama voters. *Id.* at 191, 128 S.Ct. 1610 ....

Ultimately, the requirement that Alabama voters present photo ID "is amply justified by the [state's] valid interest in protecting 'the integrity and reliability of the electoral process.'" Crawford, 553 U.S. at 204, 128 S.Ct. 1610. . . Greater Birmingham Ministries at 1326.

In sum, when we weigh the burden on a voter to obtain and present a photo ID against Alabama's interests underlying the voter ID law, we find the law to be a neutral, nondiscriminatory regulation of voting procedure. *Id.* at 1328.

Likewise, answering a simple question regarding one’s residence in order to determine if a voter is casting a ballot in the correct location does not burden the voter. Regardless of the voter’s response, the voter will be provided the opportunity to cast a legal ballot at the precinct where the voter currently resides. The voter must present a valid Photo ID regardless, and where the Photo ID produced evidences a conflict in address, the Mobile County Procedure resolves that conflict without seeking an additional Photo ID or otherwise burdening the voter beyond

seeking a response to the question of where he lives. In *Greater Birmingham Ministries*, the Court found that the burden to obtain a Photo ID was far outweighed by the interest of protecting the integrity of the election. Here, the burden of answering a question is far outweighed by the interest in ensuring lawful votes are cast. This is particularly true where the Mobile County Procedure always results in the voter being instructed on where to cast his vote lawfully. “[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*. 460 U.S., at 788, n. 9, 103 S. Ct. 1564.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189–90 (2008).

Before July 2021, the United States Supreme Court had never addressed the legality of our voting laws which require citizens to vote in precincts in which they reside, and if the vote was not cast in the voter’s lawful precinct, then this unlawful vote would not be counted. In the case of *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, 2021 WL 2690267, at 5–39 (U.S. July 1, 2021), the Supreme Court of the United States for the first time “considered how § 2 (of the Voting Rights Act) applies to generally applicable time, place, or manner voting rules.” (Parenthesis added) Specifically, the Supreme Court considered and affirmed the Arizona voting regulations which are the same as the Alabama voting regulations which require a voter to vote in the precinct of his residence or his vote will not count:

The regulations at issue in this suit govern precinct-based election-day voting and early mail-in voting. Voters who choose to vote in person on election day in a county that uses the precinct system must vote in their assigned precincts. See § 16–122 (2015); see also § 16–135. If a voter goes to the wrong polling place, poll workers are trained to direct the voter to the right location. (Citations omitted) If a voter finds that his or her name does not appear on the register at what the voter believes is the right precinct, the voter ordinarily may cast a provisional ballot. *Ariz. Rev. Stat. Ann.* § 16–584 (Cum. Supp. 2020). That ballot is later counted if the voter’s address is determined to be within the precinct. See *ibid.* But if it turns out that the voter cast a ballot at the wrong precinct, that vote is not counted. See § 16–584(E); App. 37–41 (election procedures manual); *Ariz. Rev. Stat. Ann.* § 16–452(C) (misdemeanor to violate rules in election procedures manual). *Brnovich* at 8

The Supreme Court considered in this § 2 Voting Rights Act case the burden that precinct voting imposed on the voter:

First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of “open[ness]” and “opportunity” connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. After all, every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is “equally open” and that furnishes an equal “opportunity” to cast a ballot must tolerate the “usual burdens of voting.” *Crawford v.*

Marion County Election Bd., 553 U.S. 181, 198, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (opinion of STEVENS, J.). Mere inconvenience cannot be enough to demonstrate a violation of § 2. Brnovich at 12

The Supreme Court then considered the state interest of precinct voting:

“One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.” Id. At 13

Next, the Supreme Court considered the regulation requiring voters to vote at the precinct of residence if their vote is to count:

Not counting out-of-precinct votes induces compliance with the requirement that Arizonans who choose to vote in-person on election day do so at their assigned polling places. And . . . precinct-based voting furthers important state interests. It helps to distribute voters more evenly among polling places and thus reduces wait times. It can put polling places closer to voter residences than would a more centralized voting-center model. In addition, precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections. (Citations omitted) And the policy of not counting out-of-precinct ballots is widespread. See 948 F.3d at 1072–1088 (collecting and categorizing state laws).  
Brnovich at 18

After a thorough review of the Arizona regulations that required voters to vote in the precinct of their residence or their vote would not count, the Supreme Court ruled “Arizona's out-of-precinct policy and HB 2023 do not violate § 2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose.” Brnovich at 2.

The Mobile County Procedure is supported by the law and is a reasonable method of ensuring that all voters are given a chance to cast a legal vote.

### **The Mobile County Procedure Protects the Voter**

Legal voting is an important concern of the population as a whole to ensure confidence in the democratic process. In addition, it is important to each individual voter’s right to cast a lawful vote. A voter who casts an illegal ballot suffers legal consequences when an election contest is filed as the voter must respond first to the allegation that he cast an illegal ballot. Then, if the court rules that the vote was illegal, the voter must then testify to the court and name the candidate for whom he voted. Finally, the voter must submit to cross-examination on the issue. In *Horwitz v. Kirby*, supra the Court held that voters who cast illegal ballots could be subpoenaed to testify at trial about the allegations that they voted illegally. Those that were found to have voted illegally could be required to testify regarding for whom they voted. The

serious consequence of being forced to divulge one's vote in circumstances when the illegal vote could have been avoided by the Mobile County Procedure, further emphasizes the desirability of the Mobile County Procedure.

The Mobile County Procedure is simple, uniformly applied and does not infringe on the right of any voter to vote. Its goal is to help ensure that voters are casting legal votes and that the integrity of elections - the foundation of our democratic principles - is maintained. The process is a benefit to voters who have inadvertently or otherwise failed to correct their address on the voter list. A voter can, with assistance of election workers, determine their correct voting precinct and vote a legal ballot. That result is one of the goals of the Judge of Probate in administering the Mobile County Procedure described in this letter.

