

October 24, 2020

**By First Class Mail and Email to:**

Donna Maskus  
Ellis County Election Office  
718 Main St.  
P.O. Box 720  
Hays, KS 67601  
dclerk@elliscounty.net



AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

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**Re: Concerns Regarding Mislabeled Ballots**

Dear Ms. Maskus,

We are writing to request that you provide Ellis County residents with a public plan to ensure that the nearly 4,000 incorrectly labeled ballots your office mailed out do not confuse or disenfranchise the voters who received them. You have stated that these ballots can and will be counted. While it is encouraging to hear that voters will not have their ballots rejected because of the error, it remains unclear what actions the county is taking on behalf of voters who may have been deterred from casting a ballot as a result of the confusion. We urge you to develop a plan to make certain that every voter who was sent an improperly labeled ballot has their vote for every candidate count. If such a plan exists, it is incumbent on you to share it immediately.

Your office mailed advance ballots to 3,881 Ellis County voters on Wednesday, October 14, 2020.<sup>1</sup> Two days later you discovered that the ballots incorrectly labeled the Kansas Senate 40th District Race as a United States Senate race.<sup>2</sup> Accordingly, voters saw two separate United States Senate races on their ballot, and no Kansas state senate race. While some voters may have been able to decipher the typo and determine that one of the U.S. Senate races was indeed the state senate race, others were likely confused. Voters may have seen the second "U.S. Senate" heading and skipped it thinking they had already voted for the office. They may have also been unsure about which U.S. Senate race had the right candidates and chose not to vote for a candidate in either race. Additionally, even voters that realized that the state race had been mislabeled may have chosen to not return the ballot at all because they are unsure how the ballot will be treated or whether an accurate replacement ballot would be mailed to them. These voters will now be forced to vote in person, at risk to their health, and will only be permitted to vote via a provisional ballot.

In response to media inquiries about this incident, you have stated that you will count incorrectly labeled ballots returned by voters. However, it is unclear whether you are proactively sharing this information with voters. Your

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<sup>1</sup> Jonathan Zwegardt, *Ellis County Clerk preps voters on options for upcoming election*, Hays Post, Oct. 17, 2020 <https://hayspost.com/posts/0b1f608a-6046-4a00-b739-a52ab4948b76>

<sup>2</sup> Matthew Kelly, *Early voting on hold in western Kansas county after ballots improperly labeled*, THE KANSAS CITY STAR (Oct. 21, 2020), <https://www.kansascity.com/article246610653.html>.



commitment to count the mislabeled ballots has not been shared on your office’s website.<sup>3</sup> We are also unaware of any effort to contact voters by phone or mail to ensure them that their vote will count. To date, voters must dig through news reports to learn that incorrectly labeled ballots will be counted. And, even then, you have not yet described a process that will ensure these ballots are tabulated independently and fairly.

Voters who are unaware that their mislabeled ballot will count are at risk of being disenfranchised. First, the voter may be waiting to receive an accurate ballot from your office and miss the return deadline.<sup>4</sup> Additionally, a voter may believe that they need to vote in-person and will be required to cast a provisional ballot.<sup>5</sup> It is important that you take immediate action to notify voters that they will not be receiving a new ballot and that they do not need to vote in-person. This should include, at a minimum, clearly identifying the error on your office’s website, explaining what voters should do despite the error, and describing how the votes will be counted, as well as contacting the voters who received such ballots but have not yet returned them. We request that you describe your notification plan in your response.

You also need a plan for contacting the voters who have already returned their ballots but who skipped voting in one or both races out of confusion. While voters can of course choose to not vote for any candidate in a race, it is essential that you confirm the decision to opt out of the state senate and/or United States senate race was because the voter did not wish to vote for either candidate. We request that you describe your plan to contact any mail ballot voter who did not vote in the inaccurately labeled races.

Finally, your office closed down in-person early voting for three days in order to address the misprinted ballot errors. You are unaware of how many voters who planned to cast their ballots during this period must now find a new time to vote and have acknowledged the burden that the decision to close early voting imposed. The First and Fourteenth Amendment of the United States Constitution safeguard the right to vote from unnecessary restrictions.<sup>6</sup> Restrictions on early voting have frequently been found to violate the constitution.<sup>7</sup> Accordingly, we

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<sup>3</sup> <https://www.ellisco.net/425/Election>; <https://www.ellisco.net/CivicAlerts.aspx?AID=961>

<sup>4</sup> Advance mail ballots must be postmarked on Election Day and received by the county elections office on the third day following the election. Kan. Stat. Ann. 25-1132. With delays in the mail, voters may need to mail their ballots far in advance of November 3<sup>rd</sup> in order for them to be received by November 6, 2020.

<sup>5</sup> Kan. Stat. Ann. § 25-2908(f).

<sup>6</sup> *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S.428 (1992), *Common Cause/Georgia*, 554 F.3d 1340, 1352 (11th Cir. 2009)(“However slight the burden [imposed on voters] may appear, it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.”).

<sup>7</sup> See, e.g., *Common Cause Indiana v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 956, 969 (S.D. Ind. 2018) (shutting down 4 out of 5 early voting locations imposes more “severe” burdens on “voters who lack the financial means or flexible schedules (i.e., those with little power over their own conditions of work, study, or travel) to surmount the obstacles of time and expense” imposed by the shutdowns, and were unjustified); *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 932 (W.D. Wis. 2016) (shut down of all but one early voting location and limiting early voting hours imposed a “moderate” burden due to impact on “populations of voters who disproportionately lack the resources, transportation, or flexible work schedules,” and was unjustified); *Ohio NAACP*, 768 F.3d at 539-42 (upholding district court finding that burdens imposed by eliminating early



request that you expand in-person early voting hours in order to compensate for the time voters lost as a result of your office's mistake. At a minimum, you should expand voting on Saturday, October 31st to a full 8- hour day, and/or add additional weekday evening hours for early voting.

In sum, we request that you:

- provide proactive public notice that misprinted ballots will be accepted;
- directly notify voters who received misprinted ballots that there ballots will be accepted;
- contact any voter who returned a misprinted ballot without voting in the U.S. or state senate race to confirm they intended to opt out;
- expand early voting to compensate for the time voters lost during the three days your office was closed.

We also request, pursuant to the Kansas Open Records Act (KORA), K.S.A. §45-215, et seq., that your office produce the following records:

- A comprehensive list showing the name, address, and phone number of every voter who received an advance ballot with the error, with social security numbers redacted.

In accordance with KORA, we look forward to receiving a response to this request within three (3) business days. If the request is denied, please provide a written statement for the basis of the denial within three (3) business days of this request, citing the specific provision of law under which access is denied.

Please do not hesitate to contact us at (913) 490-4114 if you would like to discuss this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lauren Bonds".

Lauren Bonds  
Legal Director, ACLU of Kansas

A handwritten signature in black ink, appearing to read "Sharon Brett".

Sharon Brett  
Senior Staff Attorney, ACLU of Kansas  
*Accepted to Practice in Kansas, Pending  
Bar Number*

cc: Kansas Secretary of State's Office

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voting days was "significant" given impact on "lower income and homeless individuals," and was unjustified).