

Fingerprint Technology Does Not Belong In Voting: Voicing Opposition to HB 1239/SB 1162

March 23, 2021



ABOUT THE ORGANIZATIONS

*The **Tennessee State Conference of the NAACP** is a non-profit organization established with the objective of insuring the political, educational, social and economic equality of minority groups. Its mission is to foster excellence and equity in legislation through advocacy leadership. Tennessee NAACP achieves that mission by representing the units perspective before state government agencies and partnering with other organizations that believe in education, health care, economics, and labor; and by providing vital information and services to individual units throughout the State.*

***Free Hearts**, founded in 2016, is a non-profit Tennessee state-wide organization led by formerly incarcerated women that provides support, education, advocacy, and organizes families impacted by incarceration, with the ultimate goals of reuniting families and strengthening families. The organization's primary goals are to build up the leadership of incarcerated and formerly incarcerated women and girls, reunite families torn apart by incarceration, and keep families together by fighting to end mass incarceration through support, education, advocacy, and grassroots organizing.*

***Democracy Nashville-Democratic Communities** is a bridge-building organization, founded in 2015, that aligns its activities with ongoing coalitions and transformative movements, and in solidarity with social justice, racial justice, and economic justice activists. The organization advocates for voting rights, labor rights, and policing reform, among its many activities.*

*The **Lawyers' Committee for Civil Rights Under Law**, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all, particularly in the areas of voting rights, criminal justice, fair housing and community development, economic justice, educational opportunities, and hate crimes.*

This year, multiple state legislatures, including the Tennessee General Assembly, have introduced a slew of legislation aimed at making it more difficult to vote. But Tennessee stands out as the only state in the 2021 legislative cycle to sponsor legislation that would allow state officials to use fingerprinting to verify a voter's identity in the voting process. No other state contemplates such a process and, to date, no state has ever used fingerprinting to determine a voter's identity.

If passed, HB 1239/SB 1162 would allow for state and county election officials to use "fingerprint technology to identify voters for purposes of conducting elections" in the State.¹ What exactly this means, or what it looks like in practice, remains troublingly unclear because the text of this legislation provides scant detail. What *is* clear is that in a state where Black people are disproportionately policed, arrested, and imprisoned, and thus disproportionately fingerprinted, this facially-neutral form of voter identification is in fact an attack on Black voter participation. By incorporating a symbol of the criminal system into the voting process, this policy would almost certainly suppress and intimidate Black voters and voters of color, especially if Tennessee's arrest and jail databases are used to identify voters' fingerprints.

Fingerprinting has no place in our elections. It sends the message that voters cannot be trusted. If passed, the Bill will have multiple deleterious and discriminatory effects that are gravely concerning:

- *First*, fingerprinting, especially in Black and minority communities that have experienced over-policing, is often associated with law enforcement or immigration authorities. If fingerprinting becomes a prerequisite to voting, then many in these communities will not vote at all for fear of surveillance or harassment by law enforcement. Moreover, collecting fingerprints at the polls raises Fourth Amendment concerns because generally, authorities are required to show probable cause, as in a lawful arrest, to collect an individual's fingerprints. Not only would this legislation exclude Black and minority populations from the franchise by chilling their vote, it would run into Fourth Amendment protections around when and for what purpose a person can be fingerprinted.
- *Second*, we are unaware of the existence of any comprehensive federal or state databases of fingerprints, so the implementation of the Bill, if passed, would likely involve reliance on arrest and jail records—the largest repository of fingerprints in the State—or even perhaps federal FBI records. Black Tennesseans are overrepresented in these databases based on the State's long history of over-policing people of color.
- *Third*, the Bill's language is vague and overbroad, making it impossible to know what kind of "technology" it involves and how such technology would be used. This vague language gives election officials unfettered discretion to implement the law without guidance, which could lead to a lack of uniformity in application and implicit bias in decisions around who to fingerprint in the first place.

- *Fourth*, the State already has mechanisms to verify the identity of voters (including voter ID) and deterrents to voter fraud (namely, criminal convictions), thus making this Bill unnecessary to further a legitimate governmental purpose and needlessly burdensome on voters, especially Black voters.

Below we expand on the points above – outlining in more detail the reasons we oppose this and any future legislation that contemplates the use of biometrics such as fingerprints or even facial recognition technology to verify a voter’s identity.

We urge legislators to oppose this harmful Bill because it does not further a legitimate governmental purpose and because it imposes a significant burden on Tennessee’s voters, especially Black voters. We hope that readers find our analysis of HB 1239/SB 1162 useful as we work towards a common goal of ensuring fair and inclusive elections in our State.

I. As a matter of policy, the Bill does not encourage inclusive and accessible voting in the State.

A. Overbroad language

The legislative text of the Bill is as follows:

SECTION 1. Tennessee Code Annotated, Title 2, Chapter 1, is amended by adding the following new section:

(a) The state election commission and each county election commission may utilize technology to identify the fingerprints of voters for purposes of conducting elections in this state in accordance with this title.

(b) Each state agency, including the Tennessee bureau of investigation, with a fingerprint database, shall collaborate with the secretary of state for the purpose of facilitating the intent of this section.

SECTION 2. This act takes effect upon becoming a law, the public welfare requiring it.

With such vague language authorizing state and county election officials to “utilize technology to identify the fingerprints of voters for purposes of conducting elections in this state,” the Bill raises more questions than it answers, opening the door to uneven and biased application.

The Bill fails to define the term “technology”—which could mean anything from technology used to fingerprint voters at the polls to state repositories or databases for storing fingerprints collected from residents for other purposes to technology developed to aid election officials in matching fingerprints. For example, would a voter expect to be

fingerprinted when appearing to vote in person? Would an absentee voter expect to be fingerprinted before requesting an absentee ballot? Many of our constituents and members associate the collection of fingerprints with the criminal system—usually those who come into contact with the system are fingerprinted at multiple junctures, including during booking and arrest. Requiring fingerprinting as a prerequisite to voting would substantially burden our community members by dissuading them from appearing to vote for fear of fingerprint collection.² Our communities have also taken advantage of expanded absentee voting during a pandemic that has claimed thousands of lives in the State, and has had a disproportionate impact on Black Americans. As the pandemic continues and rollout of the vaccine remains slow, an additional fingerprinting requirement would prevent many in our community from requesting and voting by absentee ballot for the same reasons as those related to voting in person.

The term “technology” also implicates the potential use of databases election officials might rely on to match voters’ fingerprints collected at the polls. As discussed later in more detail, this practice is problematic because of the potential for implicit bias behind the decision of who is fingerprinted. The largest repository of fingerprints in Tennessee is based on jail and arrest records in which, unsurprisingly, people of color are overrepresented. This opens up the possibility for certain individuals to be fingerprinted more than others simply because their fingerprints are available in databases. Further complicating the matter is the fact that the Bill is silent on uniformity, leaving significant latitude on the part of county election officials to use fingerprint matching for some voters but not others.

The use of fingerprint technology also raises concerns around training, including whether and how county officials would be trained in fingerprint matching, a complex practice that often requires forensic expertise. The use of various matching techniques introduces the potential for error, but the Bill provides no information as to what kinds of curing procedures the State might offer to voters who have had ballots rejected because of mismatched fingerprints. Tennessee currently conducts signature-matching on absentee ballots to verify the identity of voters,³ but to our knowledge no such matching exists for those voting in person. For in-person voting, voter ID verification is the most common method for determining the identity of voters. Fingerprinting would add another form of verification to the mix—one that may not be possible without forensic expertise or digital technology and, even then, may disproportionately burden some voters more than others.⁴

B. Implicit bias in implementation

The use of databases creates the possibility for implicit bias⁵ and racial profiling in implementation in two primary ways: a reliance on databases that disproportionately overrepresent Black and minority populations and broad discretion on the part of election officials as to who is fingerprinted. First, the unfettered use of fingerprinting in the voting process could easily lead to racial profiling in who is asked to be fingerprinted in a polling

place. In Tennessee, where implicit bias has long plagued the State's policing and judicial systems,⁶ these same patterns could be replicated at polling places. A Black voter might be more likely to be fingerprinted because of unconscious implicit bias, especially if there is no required uniformity in the law's implementation. This technology could easily be applied to disproportionately harm voters of color in the United States, as we have seen with the use of other biometric data, such as facial recognition technology.

Second, because the criminal system disproportionately incarcerates Black individuals, that same Black voter may be more likely to appear in a fingerprint database created from arrest records, thereby enabling an election official to conduct fingerprint matching and expose the voter to potential error and disenfranchisement if a mismatch is identified.

Importantly, fingerprinting databases are not neutral tools – they carry the biases of those who create, update, and use the database. Tennessee's primary fingerprint database is the Automated Fingerprint Identification System ("AFIS"),⁷ maintained by the Tennessee Bureau of Investigation. AFIS is comprised of fingerprints derived from arrest records on file with and submitted by local law enforcement agencies. Black individuals are overrepresented in Tennessee's prisons and jails and by extension in these databases—Black people make up 40 percent of the State's prison population, even though they account for only 17 percent of the State's total population.⁸ Black individuals are also more likely than any other demographic to be searched and arrested even if they are ultimately not convicted—and even minor encounters with law enforcement can result in the addition of their fingerprints to the database. Unsurprisingly, the database overrepresents Black Tennesseans. Therefore, its use in carrying out elections would mean that these same individuals are subject to fingerprint matching in the first place, and then subject to error and possible rejection of their ballots as a result.

Comparing the experience of a Black voter to a white voter is instructive here. A white voter may be less likely to get fingerprinted in the first instance. And even if the voter is fingerprinted, this voter's fingerprints are less likely to be included a fingerprint database made from arrest and jail records given Tennessee's history of unequal policing of Black Tennesseans as compared to white Tennesseans, and thus, making the possibility for matching, error, and rejection less likely for the white voter, too. Election officials in the case of the white voter might then rely on voter ID or other forms of verification, which would result in an inherently biased two-tier system that disenfranchises Black voters more than any other demographic.

C. Chilling effect

Incorporating fingerprinting into the voting process would likely also dissuade many voters, especially Black and minority voters, from even showing up at the polls to cast a ballot at all. While some voters may not be dissuaded by a fingerprint requirement, those who have interacted with the criminal system and associate fingerprinting with negative

experiences that involve the police would be understandably reluctant. In Tennessee, where Black people are incarcerated at nearly four times the rate of their white peers,⁹ fingerprinting carries particularly negative connotations in Black communities. Black and minority voters would be less likely to vote because of possible embarrassment, degradation, or stigmatic harm based on their past interactions with the criminal system. Thus, the effect of this law would be to chill the participation of Black and minority communities in the electoral process altogether.

D. State justifications

The sponsors of HB 1239/SB 1162 have made clear that they view the legislation as a “first step” in the State’s purported efforts to prevent voter fraud, despite the fact that there is no evidence of such fraud in the State.¹⁰ Representative Lynn has even suggested that future legislation could require that all voter registration include fingerprinting.¹¹ But there is no evidence of widespread voter fraud in Tennessee or any fraud, for that matter, in the 2020 election cycle.¹² And the State already has mechanisms in place for deterring against fraudulent voting behavior should it ever occur—Tennessee Code § 2-19-107 makes it a Class D Felony (punishable by two to twelve years’ imprisonment and/or a fine of \$5000) for anyone who “intentionally and knowing that such person is not entitled to, registers or votes in any manner or attempts to register or vote in any manner where or when such person is not entitled to under this title, including voting more than once in the same election” or votes in primary elections of “more than one political party in the same day.”

In addition, the State already has safeguards in place to verify a voter’s identity. Voters must present a government-issued photo identification from a list of six acceptable IDs to vote at the polls.¹³ For those voting absentee, Tennessee law only allows certain categories of voters¹⁴ to request absentee ballots and those individuals must provide their social security numbers, date of birth, signatures, and additional information to request absentee ballots.¹⁵

II. As a matter of law, the Bill raises a number of constitutional and statutory concerns.

The language of the Bill is vague and overbroad, raising First and Fourteenth Amendment concerns. The meaning of “technology” and what it means to “utilize” technology to “identify the fingerprints of voters” is unclear. Its application could range from using technology to fingerprint voters at the polls, to relying on certain databases against which to match fingerprints collected at the polls,¹⁶ to technology that automatically matches fingerprints, or any number of other possibilities.¹⁷ This lack of clarity means that voters cannot know what practices they might be subjected to at the polls.¹⁸ The fear and stigma around fingerprinting constitutes a substantial burden on voters, especially on Black and minority voters, and would chill their participation in constitutionally protected activity—exercising the right to vote.

The legislation also raises concerns around the right to vote itself—a fundamental right protected by the First and Fourteenth Amendments to the Constitution. The Supreme Court has long held that the right to vote is preservative of all other rights, and therefore must be protected from undue burdens.¹⁹ Therefore, in assessing any restriction on the right to vote, courts use a balancing test to weigh the asserted injury to voting against the precise interests of the state in maintaining the restriction.²⁰ Incorporating fingerprinting into the voting process would place significant burdens on Black and minority voters who associate fingerprinting with intimidation and may not vote at all because of fears around harassment, embarrassment, and stigmatization, particularly if they have had interactions with the criminal system before. The State’s interest in voter fraud, especially given that the State has not been able to identify a single instance of fraud in the 2020 election, does not outweigh the significant burdens placed on Black and minority voters’ right to cast a ballot.

That the Bill may open up the possibility of fingerprinting at the polls raises Fourth Amendment concerns. Barring the collection of fingerprints for national security and immigration purposes, the Fourth Amendment generally requires an individual to be properly and reasonably seized, as in a lawful arrest, before being fingerprinted.²¹ Even in circumstances where there is no probable cause of arrest, the United States Supreme Court has concluded that the requirements of the Fourth Amendment can be met through “narrowly circumscribed procedures for obtaining” fingerprints *during the course of a criminal investigation*.²² Voting is a far cry from any kind of criminal arrest or investigation – voting does not give probable cause to arrest, it is not a part of a criminal investigation, it does not implicate national security or immigration concerns. Voting is a democratic process open to all citizens and fingerprinting has no place in the franchise.

The Bill’s potential to disproportionately suppress, intimidate, and burden Black voters also may not withstand scrutiny under Section 2 of the Voting Rights Act of 1965. Section 2 prohibits states from using any voting standard, practice, or procedure that results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.²³ Importantly, Section 2 claims require courts to examine how a certain electoral practice interacts with social and historical conditions to cause unequal opportunities to register, to vote, or to have one’s vote counted. If passed, the Bill would appear to have significant discriminatory effects along racial lines. Coupled with Tennessee’s long history of voting discrimination and over-policing of Black communities, the Bill may be susceptible to both intent and results claims under Section 2. This legislation would disproportionately suppress, intimidate, and burden Black voters because they are unlikely to vote if fingerprinting becomes a prerequisite and because they are overrepresented in the State’s arrest and jail record databases which represent the largest repository of fingerprints in the State. The Bill’s effect, coupled with the ongoing effects of Tennessee’s over-criminalization and mass incarceration of Black people, would deny Black voters an equal opportunity to participation in the electoral process.

III. Conclusion

Fingerprinting does not belong in the voting process. It is associated with the criminal system and sends the message that voters cannot be trusted. For those individuals who have had interactions with the criminal system, fingerprint voting may mean that they do not vote at all.

As community-oriented groups that work to engage Black and minority voters across the State, we voice our opposition to HB 1239/SB 1162 because of its potential for chilling electoral participation and harming voters in our communities. We urge legislators, state officials, and policymakers to vote against passage of this Bill, which would impermissibly and disproportionately disenfranchise communities of color in this State.

¹ HB 1239/ SB 1162, bill sponsors Representative Lynn and Senator Niceley. Earlier this session, legislators introduced an alarming bill, SB 1510, that would have abolished early voting, prohibited the use of voting machines, and required voters to hand-mark watermarked paper ballots in elections. That bill was withdrawn in late February. Senate Bill 1510, <https://www.capitol.tn.gov/Bills/112/Bill/SB1510.pdf> (sponsored by Senator Bowling).

² It also raises Fourth Amendment concerns discussed later in this Report.

³ *See* Tenn. Ann. Code § 2-6-202(b).

⁴ Scholars have conducted much research on facial recognition technology widely used in law enforcement and even in the legal profession, including the bar exam. These studies have exposed divergent error rates among demographic groups, in particular on Black Americans, because standard data sets are predominantly white and male and cameras are not optimized to recognize darker skin tones, making it more difficult to identify individuals. *See* Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard Graduate School Blog on Science Policy and Social Justice (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>.

⁵ Implicit biases refer to biases that a person may not know or believe he or she possesses. Certain technologies or algorithms, by the way they are created, may contain inherent implicit biases.

⁶ Samantha Max, *Tennessee Supreme Court Commits to Racial Equity Amid Protests Against Racial Disparities in Law Enforcement*, Nashville Pub. Radio (June 25, 2020),

<https://wpln.org/post/tennessee-supreme-court-commits-to-racial-equity-amid-protests-against-racial-disparities-in-law-enforcement/>.

⁷ Tenn Ann. Code § 8-4-115 (standardize procedures for booking arrestees); *see also* Tenn. Bureau of Investigation, *Fingerprint Information and Resources*, <https://www.tn.gov/tbi/law-enforcement-resources/law-enforcement-resources0/fingerprint-information-resources.html> (last visited Mar. 23, 2021).

⁸ Mandy Pellegrin, *Incarceration in Tennessee: Who, Where, Why, and How Long?*, The Sycamore Inst. (Feb. 14, 2019), <https://www.sycamoreinstitutetn.org/incarceration-tn-prisoner-trends/>.

⁹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹⁰ Vivian Jones, *Bill Would Allow Election Officials to Use Fingerprints to Verify Voter ID*, Main Street Nashville, Feb. 23, 2020, https://www.mainstreet-nashville.com/news/bill-would-allow-election-officials-to-use-fingerprints-to-verify-voter-id/article_b923276c-7537-11eb-b393-b7b04ca252cd.html; Nicholas Reimann, *Tennessee Republicans Propose Using Fingerprints for Voter ID*, Forbes (Feb. 23, 2021, at 5:07 PM), <https://www.forbes.com/sites/nicholasreimann/2021/02/23/tennessee-republicans-propose-using-fingerprints-for-voter-id/?sh=3ede62bb7361>.

¹¹ Jones, *supra* note 11.

¹² Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times, Nov. 10, 2020, <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>.

¹³ Tenn. Sec’y of State, *What ID is Required When Voting?*, <https://sos.tn.gov/products/elections/what-id-required-when-voting> (last visited Mar. 23, 2021).

¹⁴ For the 2020 election cycle, the Tennessee Supreme Court expanded the list of excuses to include: (1) voters who have underlying medical conditions that make them more susceptible to contracting COVID-19 and (2) caretakers of medically vulnerable individuals at higher risk of contracting the virus.

¹⁵ Tenn. Sec’y of State, *Absentee By-Mail Ballot Information*, <https://sos.tn.gov/products/elections/absentee-voting> (Mar. 23, 2021).

¹⁶ See *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 82 (D.D.C. 2001) (“amorphous” regulation not narrowly tailored because it “provides no articulable standard to guide either government officials or employees who must enforce the regulation, or the public who must conform its conduct to the barring regulation's vague requirements”); see also *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005).

¹⁷ Depending on implementation, application of this legislation could also raise significant privacy concerns for voters.

¹⁸ See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (requiring explicit standards so that policy matters are not left to “policemen, judges, and juries for resolution on an ad hoc and subjective basis”); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁰ *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

²¹ See *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

²² *Id.* at 728; see also *Hayes v. Florida*, 470 U.S. 811 (1985).

²³ 52 U.S.C. § 10301(a).