



**STATEMENT OF KRISTEN CLARKE  
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**U.S. HOUSE OF REPRESENTATIVES  
SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS**

**HEARING ON**

**“Ensuring a Free, Fair and Safe Election  
During the Coronavirus Pandemic”**

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## **I. Introduction**

Chairman Clyburn, Ranking Member Scalise, and Members of the House Select Subcommittee on the Coronavirus Crisis, my name is Kristen Clarke and I serve as the President and Executive Director of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on how we can ensure a free, fair and safe General Election during the Coronavirus pandemic.

Throughout my career, I have focused on strengthening our democracy by combating discrimination faced by African Americans and other marginalized communities. The organization that I lead, the Lawyers' Committee, is a national civil rights organization created in 1963 at the request of President John F. Kennedy, to mobilize the private bar to confront issues of racial discrimination. Voting rights has been a core organizational priority since the inception of the organization, and we continue to be at the forefront of policy and legal action aimed at protecting the right to vote. I formerly served as the head of the Civil Rights Bureau for the New York State Attorney General's Office, where I led broad civil rights enforcement across the state. Prior to that, I spent several years at the NAACP Legal Defense Fund, where I helped lead the organization's work in voting across the country, in particular defending the constitutionality of the Voting Rights Act. I began my career as a trial attorney in the Honors Program of the Voting Section of the Department of Justice.

The Lawyers' Committee also leads the nation's largest and longest-running, nonpartisan voter protection effort, the Election Protection program, which includes administering a voter hotline (1-866-OUR-VOTE). Through Election Protection, we work with close to 300 national, state, and community partners to provide Americans from coast to coast with comprehensive voting information and resources. In 2020, our Election Protection program has been focused extensively on the barriers that voters face in the wake of the pandemic.

I am also a member of the National Task Force on Election Crises, a cross-partisan group of civil rights and voting rights leaders and academics, which is dedicated to ensuring a fair election in 2020.

## **II. Summary**

This country is enduring a public health crisis unlike anything we have confronted in over a century. Ensuring people's health and saving their lives must be among our nation's highest priorities. Unfortunately, but not surprisingly, the effects of the crisis have fallen predominantly on those living in poverty, who are disproportionately African American, Latino, and Native American.

If we do nothing, this public health crisis could imperil our democracy as well. Our freedoms are built on one of the most fundamental rights: the right to vote.<sup>1</sup> This pandemic is forcing our citizens to choose between protecting their health and participating in our democracy.

Voting should not be a choice between our fundamental rights and our life or health. The American people should not be placed in circumstances where they are afraid to vote because of fear of contracting a highly contagious and potentially deadly virus. Rather, states must adapt election administration planning in order to facilitate the safe and accessible exercise of voting rights, free of fear.

There are ways to ensure that voters have an array of safe options to vote. Indeed, the more options that are provided to voters, the safer voting will be, not only for voters, but also for those who administer elections. As with many other important areas of our national life, significant new reforms and expenditures are necessary in addition to what existed for elections before the pandemic. The health crisis has added new burdens on states and localities requiring them to cope with emergency circumstances. It has also exposed shortcomings and aggravated flaws that already existed.

To enable voting for the millions of Americans who are used to voting in person on Election Day, but who now wish to vote by mail or vote early to reduce the risk of exposure to COVID-19, states and localities will need to expand these voting methods. For the many people who still prefer to vote in person, new measures will be needed to ensure social distancing and hygiene at polling stations, as well as different approaches to recruiting poll workers and other staff.

There are costs to achieve these objectives. But the costs to this nation of imperiling the right to vote far outweigh the monetary expense of ensuring that all eligible voters are freely and safely able to vote.

### **III. Background on COVID-19**

February 2020 marked the first known death in the United States caused by the novel coronavirus or COVID-19.<sup>2</sup> To date, COVID-19 has claimed more than 186,173 lives in the United States. The United States has at least 6.1 million

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<sup>1</sup> The right to vote is a “fundamental political right” that is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>2</sup> Derrick Bryson Taylor, *How the Coronavirus Pandemic Unfolded: a Timeline*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

confirmed COVID-19 cases.<sup>3</sup> As states began opening over the past several months, coronavirus cases, and in turn, deaths, have increased.<sup>4</sup>

COVID-19 is disproportionately killing African Americans. The Centers for Disease Control and Prevention (“CDC”) has released limited race and ethnic demographic data concerning COVID-19 mortalities—but even these data tell the same story about racial disparities. Even though African Americans make up only 13.4% of the United States population,<sup>5</sup> they account for approximately 21% of COVID-19 deaths. Forty-nine of fifty-six states and territories are currently reporting race and ethnicity data for COVID-19 mortalities, and many states reflect even more stark racial disparities than the national average.<sup>6</sup> For example, in Alabama, African Americans comprise 27% of the population, but account for nearly 42% of COVID-19 deaths.<sup>7</sup> In Michigan, African Americans comprise about 14% of the population, but account for 40% of deaths.<sup>8</sup> In Illinois, they account for 27% of deaths and only 14% of the population.<sup>9</sup> This picture is enhanced when examining data from cities. In Chicago, African Americans account for 56% of deaths, but make up only 30% of the population.<sup>10</sup> The alarming rates at which COVID-19 is killing African Americans can be attributed to decades of discrimination in housing, employment, and health care. Today, ongoing discrimination in testing and treatment continues to fuel significant disparities in COVID-19 cases and outcomes.<sup>11</sup>

The virus that causes COVID-19 is extremely contagious and spreads in various ways, including aerosols and respiratory droplets and contact between individuals. The virus can spread through asymptomatic transmission—meaning that an infected individual who does not show any symptoms can pass on the virus through direct contact with others.<sup>12</sup> Medical experts have called this the “Achilles’

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<sup>3</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019: Cases in the US*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited September 5, 2020).

<sup>4</sup> Alexis Madrigal, *A Second Coronavirus Death Surge is Coming*, *Atlantic* (July 15, 2020), <https://www.theatlantic.com/health/archive/2020/07/second-coronavirus-death-surge/614122/>.

<sup>5</sup> U.S. CENSUS BUREAU, *Quick Facts: Population Estimates July 2019*, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited July 18, 2020).

<sup>6</sup> The COVID Tracking Project has compiled the latest race and ethnicity data from every state that reports it—to give us a better picture of the racial disparity in COVID-19 deaths. <https://covidtracking.com/race> (last visited September 5, 2020).

<sup>7</sup> THE COVID TRACKING PROJECT, *Racial Data Dashboard*, <https://covidtracking.com/race/dashboard> (last visited September 5, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Elizabeth Hlvaninka, *COVID-19 Killing African Americans at Shocking Rates*, *MEDPAGE TODAY* (May 1, 2020), <https://www.medpagetoday.com/infectiousdisease/covid19/86266>.

<sup>11</sup> See John Eligon & Audra D. S. Burch, *Questions of Bias in Covid-19 Treatment Add to the Mourning for Black Families*, *N.Y. TIMES* (May 20, 2020), <https://www.nytimes.com/2020/05/10/us/coronavirus-african-americans-bias.html>.

<sup>12</sup> Nathan W. Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory*

heel” for public health strategies to control the pandemic.<sup>13</sup> The virus enters the body through the nose, mouth, or eyes. Some studies suggest that the virus can spread from contact with surfaces—when a person who coughs and sneezes leaves respiratory droplets on surfaces. In very severe cases, an infected person’s immune system can overreact to the virus’s presence and cause a build-up of fluid in the lungs, making it extremely difficult for the person to breathe. For those who have underlying conditions and comorbidities like diabetes or hypertension, this may very well result in death. There is no cure. A future vaccine could help protect humans against COVID-19, but that vaccine does not yet exist.<sup>14</sup> In planning for elections this year, election officials should assume that COVID-19 will be a continuing danger.

According to the CDC, COVID-19 presents a serious risk of death to people who: are over the age of 60, have underlying health conditions (such as heart disease, diabetes, and lung disease), have weakened immune systems, and are pregnant.<sup>15</sup> On the recommendations of public health experts, government officials at every level have taken drastic actions to reduce transmission and flatten the curve. Federal, state, and local governments have implemented social distancing guidelines and encouraged social distancing.

#### **IV. Election Reforms During COVID-19**

The rapid spread of COVID-19 in the United States during a presidential election year has forced states, local elections officials, voters, and voting rights advocates to grapple with new election-related realities—in particular, how to hold safe and accessible elections.

Several 2020 primary elections demonstrated that states were not prepared to hold elections during a pandemic. In many states, voters had to choose between exercising their right to vote and guarding against the risk of disease, because while states either postponed election dates or moved to predominantly vote by mail elections, many voters had no choice but to make use of in-person vote options that were inadequate—and at times put them at risk of contracting the COVID-19 virus.

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*Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 EMERGING INFECTIOUS DISEASES JOURNAL, no. 7 (last updated May 4, 2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article).

<sup>13</sup> Monica Gandhi et al., *Asymptomatic Transmission, the Achilles’ Heel of Current Strategies to Control COVID-19*, 382 NEW ENG. J. OF MED. 2158 (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMe2009758>.

<sup>14</sup> Tanya Lewis, *How Coronavirus Spreads through the Air: What We Know So Far*, SCI. AM. (May 12, 2020), <https://www.scientificamerican.com/article/how-coronavirus-spreads-through-the-air-what-we-know-so-far1/>.

<sup>15</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019: Groups at Higher Risk for Severe Illness* (Apr. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

The inability to meet the demand to vote by mail or to safely vote in person was caused by insufficient funding and a failure to provide options to enable voting in the difficult circumstances of the pandemic.

Congress provided \$400 million for election assistance to the states in March in the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. This was a welcome step, but only a stopgap. State officials from both political parties have identified additional needs and the experience of the primary elections demonstrates the need is real and substantial.

During primary elections in a number of states voters encountered poll closures, poll worker shortages, poll workers with inadequate training, malfunctioning machines, and long lines. Additionally, there was an increased demand for mail ballots, but many voters, as in Wisconsin, did not receive applications or ballots within sufficient time needed to return their ballots by deadlines. Having received ballots and mailed them on time, many voters found that their ballots did not count or were rejected because they were not received by election officials<sup>16</sup> or were received after the deadline, often through no fault of the voter. Other ballots were rejected because of signature mismatches or failure to sign the ballot. Voters, however, should be given an opportunity to cure supposed defects, as in New York where 14% of ballots were rejected in 2018.<sup>17</sup>

All of this left many voters, particularly voters of color, unable to safely exercise their right to vote. Having not received their ballot, frustrated voters faced the choice of staying home to avoid the risk of COVID-19 exposure or taking their chances in conditions ill prepared for social distancing, often standing in line for hours, exposed to contagion. This is an unacceptable choice and completely unnecessary with adequate resources and reasonable preparation.

Many of the problems in this year’s primaries, such as polling place closures, machine malfunctions, long lines, and flawed vote-by-mail procedures occurred before the COVID-19 pandemic. However, these barriers to the vote were aggravated and increased by the pandemic and demonstrate beyond any doubt the need for resources to take action, which is recognized by many state and local officials.

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<sup>16</sup> Nick Corasan, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. TIMES (Apr. 9, 2020) <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

<sup>17</sup> Pam Fessler and Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-in Ballots Rejected for Tardiness*, NPR (July 13, 2020), <https://www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness>. An NPR analysis of 17 states “found that in the primary elections held so far this year, at least 65,000 absentee or mail-in ballots have been rejected because they arrived past the deadline, often through no fault of the voter.” *Id.*

During the April 7 Wisconsin primary, thousands of voters did not receive their absentee ballot on time or never received them.<sup>18</sup> Local officials acknowledged these mistakes and that they were unable to cope with a surge in absentee ballots. In Milwaukee, polling places were reduced from 180 to five. Not surprisingly, this required many voters in that city, with high concentrations of people of color, to stand in line for hours. In the smaller city of Madison, there were sixty-six polling sites.<sup>19</sup>

During the June 9<sup>th</sup> Georgia primary, the record suggests that everything that could go wrong did go wrong—voters not receiving absentee ballots on time, insufficient numbers of and malfunctioning machines, inadequate training of poll workers, and long lines.<sup>20</sup>

During the Pennsylvania June 2<sup>nd</sup> primary, Black and Latino voters encountered long lines and confusion at the polls because of last minute polling place closures, and a militarized police presence at some polling places in Philadelphia and Pittsburgh. As in other states, thousands of absentee ballots did not reach voters in time, forcing them to vote in person.<sup>21</sup>

These barriers to the vote were replicated in other states. Congress and the States must act to ensure that the problems voters encountered during the primaries do not contribute to a nationwide nightmare during the November general election. In the following, I provide an in depth look at four states which helps provide an understanding of the multiple issues that must be addressed to ensure free, fair, and safe elections in November. The testimony then proceeds through an examination of the overall landscape of the states and finally proceed to an analysis of needed reform issue-by-issue.

## Georgia

Georgia's combined presidential preference primary, state and local primaries, and nonpartisan general elections, which were postponed to June 9<sup>th</sup> due to the raging COVID-19 pandemic across the state, were by any measure catastrophic. A perfect storm of election administration failures came together to

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<sup>18</sup> Corasan, *supra* note 16.

<sup>19</sup> Alison Dirr & Mary Spicuzza, *What We Know So Far About Why Milwaukee Only Had 5 Voting Sites For Tuesday's Election While Madison Had 66*, MILWAUKEE J. SENTINEL (Apr. 9, 2020) <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee-had-5-voting-sites-while-madison-had-66/2970587001/>.

<sup>20</sup> Richard Fausset and Reid Epstein, *Georgia's Election Mess: Many Problems, Plenty of Blame, Few Solutions for November*, N.Y. TIMES (June 10, 2020). <https://www.nytimes.com/2020/06/10/us/politics/georgia-primary-election-voting.html>.

<sup>21</sup> Ivey DeJesus, *In Communities Of Color, Pa. Primary Was Marred By Irregularities, Including Voter Intimidation, Advocates Say*, PA. REAL-TIME NEWS (June 2, 2020) <https://www.pennlive.com/news/2020/06/in-communities-of-color-the-primary-was-marred-by-a-slew-of-irregularities-including-voter-intimidation-say-pa-voting-advocates.html>.



disenfranchise voters who unsuccessfully attempted to vote by absentee ballots and forced voters who had no choice but to vote in-person to experience oppressive long lines and delays.

### *In-Person Voting in Georgia Was Marked by Long Lines, Delays and Problems*

Extreme and oppressively long lines and delays at Georgia polling locations on June 9 were depicted in many press accounts on and after Election Day.<sup>22</sup> In Atlanta, one polling location did not close until well after midnight, with many voters having to wait over five hours to vote in a line that twisted far down the street.<sup>23</sup>

According to a review of June 9 election data by the *Atlanta Journal Constitution* (AJC), about 11% of Georgia's polling sites closed more than an hour late and more than three-quarters of the voting sites in Fulton County closed after 8:00 p.m. "Black voters bore the brunt of long lines and late closings in overcrowded, understaffed and poorly equipped polling places. Only 61% of majority Black precincts closed on time compared with 80% of mostly white precincts," according to the AJC's analysis.<sup>24</sup> According to the AJC's report, many of the problems faced by Georgia voters in the June 9<sup>th</sup> primaries were the product of the COVID-19 pandemic combined with polling place closures, insufficient polling staff, poor planning, insufficient numbers of voting machines or inoperable equipment, insufficient supplies of emergency paper ballots, and other election administration problems.<sup>25</sup>

Problems for voters casting ballots in-person did not end with the June 9<sup>th</sup> election. During the August 11<sup>th</sup> runoff elections, voters continued to experience long lines, delays and problems at the polls—despite much lower voter turnout and fewer jurisdictions conducting runoff ballots.<sup>26</sup> For example, polling places in Floyd County were ordered to remain open until 9:00 p.m. when poll workers were unable to boot up ballot marking devices when the polls opened. Poll hours were also extended at two polls in Macon-Bibb County due to poll pad (electronic poll books) issues that delayed voting after the polls opened.<sup>27</sup>

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<sup>22</sup> Fausset & Epstein, *supra* note 20; Kevin Collier, Cyrus Farivar, Dareh Gregorian & Ben Popken, *Georgia Election 'Catastrophe' in Largely Minority Areas Sparks Investigation*, NBC (June 9, 2020), <https://www.nbcnews.com/politics/2020-election/georgia-secretary-state-launches-investigation-after-unacceptable-voting-problems-n1228541>.

<sup>23</sup> Mark Niesse & Nic Thieme, *Extreme Voting Lines Expose Where Georgia Primary Failed*, ATLANTA J. CONST. (July 28, 2020), <https://www.ajc.com/politics/extreme-voting-lines-expose-where-georgia-primary-failed/YQUMSTEBVFAY7CR7UQOQEHSVLI/>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Stephen Fowler, *Few Problems, Fewer Voters in Georgia Runoff Election*, GPB (Aug. 11, 2020), <https://www.gpb.org/news/2020/08/11/few-problems-fewer-voters-in-georgia-runoff-election>.

<sup>27</sup> *Id.*



## *Absentee Ballot Issues in Georgia*

While Georgia does have no-excuse absentee voting, and the Secretary of State mailed absentee ballot applications to 6.9 million active Georgia voters, as well as heavily promoted absentee voting as a safer alternative to voting in person due to the COVID-19 pandemic, the absentee ballot process he implemented was flawed at best, and a disaster at worst.

For example, the Secretary of State had to mail out 323,000 replacement absentee ballot applications to voters after a vendor sent the applications to incorrect street addresses when the voters provided a mailing address for election related mail.<sup>28</sup> Some 60,000 Georgia voters also received absentee ballot applications mailed by the same vendor which had the wrong return address printed on them.<sup>29</sup> All of the absentee ballots mailed to Georgia voters by the same vendor erroneously instructed voters to place their voted ballots in a privacy envelope (as had been the practice in prior election cycles) even though the vendor chose to substitute a folded piece of paper (privacy sleeve) for the privacy envelope referred to in the instructions, causing many voters to be confused about how to return their ballots.<sup>30</sup>

In May 2020, the AJC reported that absentee ballot requests from an unknown number of Fulton County voters were missing, apparently lost in the election office's swamped email system.<sup>31</sup> Later, more than 250 Fulton County voters complained to the State Election Board that the county failed to send them absentee ballots, despite having submitted applications for the ballots. Of those, at least 107 did not cast a vote in the primaries, and it is likely that many more voters were affected but did not report the problem to the State Election Board.<sup>32</sup> Fulton County also stopped accepting absentee ballot applications via email even though

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<sup>28</sup> Sarah Kallis, *Georgia to Mail Out 323,000 New Absentee Ballot Request Forms*, ATLANTA J. CONST. (Apr. 30, 2020),

<https://www.ajc.com/news/state--regional-govt--politics/georgia-mail-out-323-000-new-absentee-ballot-request-forms/bWgargMOEMBLLYNwxOdbML/>.

<sup>29</sup> Mark Niesse, *Some Georgia Absentee Ballot Request Forms List Wrong Return Address*, ATLANTA J. CONST. (Apr. 9, 2020), <https://www.ajc.com/news/state--regional-govt--politics/some-georgia-absentee-ballot-request-forms-list-wrong-return-address/YH11y0tXOVsbPEWZhLZ0XI/>.

<sup>30</sup> Jenna Eason, *The Instructions on Some Georgia Absentee Ballots are Wrong. Here's What You Need to Know*, TELEGRAPH (May 1, 2020), <https://www.macon.com/news/politics-government/election/article242431106.html>.

<sup>31</sup> Mark Niesse & Ben Brasch, *Absentee Ballot Requests Go Missing in Fulton Ahead of Georgia Primary*, ATLANTA J. CONST. (May 29, 2020), <https://www.ajc.com/news/state--regional-govt--politics/absentee-ballot-requests-missing-fulton-ahead-georgia-primary/kkXUUbXL0wug5niqAvKTqM/>.

<sup>32</sup> Mark Niesse, *Investigation Concludes Fulton Failed to Send Many Absentee Ballots*, ATLANTA J. CONST. (Aug. 27, 2020), <https://www.ajc.com/politics/investigation-concludes-fulton-failed-to-send-many-absentee-ballots/KS5XW5BP5RCHVHGSSWP7TWM26I/>.

state law permits voters to submit applications electronically. The county later changed its position in the wake of complaints.<sup>33</sup>

Many voters never received the notification mandated by the State Election Board from their county registrars' offices informing them of the need to correct problems with the ballots in order for their votes to be counted. Following a lawsuit brought by the Georgia Democratic Party, the state agreed to extend the period for voters to cure problems with the ballots due to the lack of sufficient notice.<sup>34</sup> In the wake of the rejection of some 8,000 absentee ballots cast by Georgia voters in the June 9th primary because the ballots were received by election officials after the 7:00 p.m. Election Day deadline, a federal court recently granted a motion for a preliminary injunction in a lawsuit brought by the New Georgia Project and individual voters extending the deadline for receipt of absentee ballots to three days following the election if the ballots are postmarked by Election Day.<sup>35</sup>

An investigation by the *New York Times* ("NYT") also revealed troubling issues with absentee ballots submitted by voters in Georgia's June 9th elections.<sup>36</sup> The NYT reported that following the June 9th election, it was discovered that votes cast by voters on absentee ballots were not counted by the state's new voting system scanners because voters used check marks or an "X" to mark their ballots instead of filling in a bubble on the ballot.<sup>37</sup> The *Times* also reported Georgia election officials gave inconsistent information about the standard used by the scanners to count a voter's mark as a vote, including claiming it was the same standard certified by the Election Assistance Commission ("EAC")—even though the EAC has not certified such a standard.<sup>38</sup>

Absentee ballot problems did not end with the June 9th election, suggesting the likelihood that absentee ballot problems will likely continue in the November 3rd general election unless immediate remedial action is taken. For example, approximately 700 Fulton County voters received nonpartisan ballots instead of the

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<sup>33</sup> Mark Niesse and Ben Brasch, *Fulton Reverses Course and Accepts Emailed Absentee Ballot Requests*, ATLANTA J. CONST. (July 15, 2020), <https://www.ajc.com/news/state--regional-govt--politics/fulton-rejects-emailed-absentee-ballot-requests-after-primary-problems/p0LYsStYeF7NdlNhwgsyUK/>.

<sup>34</sup> Kelly Mena, *Georgia will give voters more time to correct rejected absentee ballots*, CNN (June 16, 2020), <https://www.cnn.com/2020/06/16/politics/georgia-primary-rejected-absentee-ballots/index.html>.

<sup>35</sup> Stephen Fowler, *Judge Extends Georgia's Absentee Ballot Deadline For November Election*, GPB (Aug. 31, 2020), <https://www.gpb.org/news/2020/08/31/judge-extends-georgias-absentee-ballot-deadline-for-november-election>.

<sup>36</sup> Danny Hakim, Reid J. Epstein and Stephanie Saul, *Anatomy of an Election 'Meltdown' in Georgia*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/politics/georgia-election-voting-problems.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Democratic primary runoff ballots they requested for primary runoff elections on August 11<sup>th</sup>.<sup>39</sup>

Despite the fact that an unprecedented number of Georgians (over 1 million) chose to vote by absentee ballot in the June 9 election in response to the COVID-19 pandemic, the Secretary of State decided not to send absentee ballot applications to Georgia's active voters again for the November 3rd general election.<sup>40</sup> Claiming it would be too impractical and costly to mail absentee ballot applications again, the Secretary of State implemented an online portal which allows only some, but not all, of Georgia's voters to apply online.<sup>41</sup> In order to use the portal, the voter must have a Georgia driver's license or state ID card.<sup>42</sup> Voters who do not have access to the internet or do not have one of these forms of ID will be required to submit an absentee ballot application form to their county registrars' offices in person, by mail or other electronic means in order to obtain an absentee ballot for the November 3rd general election, again risking that they will not receive their absentee ballots in time to return them by the deadline for receipt of the ballots.

It is clear from the June 9th and August 11th elections that Georgia voters are likely to continue to experience problems with both in-person and absentee voting unless remedial action is taken to ensure the problems experienced by Georgia voters in the primary and primary runoffs do not continue in the November 3rd general election. Voters should not be forced to have to file lawsuits in order to obtain piecemeal reforms necessary to protect and preserve their fundamental right to vote—particularly in the face of this deadly pandemic.

## Florida

The impact of the COVID-19 pandemic on the March 17th Florida presidential preference primary may not have produced the long lines and delays seen in other states, such as in Georgia and Wisconsin. This was due in large part to lower in-person voter turnout, surging numbers of voters casting ballots early or by mail due to concerns about COVID-19, and the absence of a contested GOP presidential preference primary.<sup>43</sup>

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<sup>39</sup> Mark Niesse, *Wrong Absentee Ballots Mailed to Over 700 Georgia Voters*, ATLANTA J. CONST. (July 19, 2020), <https://www.ajc.com/politics/wrong-absentee-ballots-mailed-to-over-700-georgia-voters/QX6UOJ24LJBB3ND4BFD4H577UA/>.

<sup>40</sup> Mark Niesse, *Absentee Voting Program Embraced by Georgia Voters, Then Abandoned*, ATLANTA J. CONST. (June 29, 2020), <https://www.ajc.com/news/state--regional-govt--politics/absentee-voting-program-embraced-georgia-voters-then-abandoned/hkNttNsgXlaYZXjUatnvjK/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Secretary of State Brad Raffensperger Unveils New Online Absentee Ballot Request Portal*, [https://sos.ga.gov/index.php/elections/secretary\\_of\\_state\\_brad\\_raffensperger\\_unveils\\_new\\_online\\_absentee\\_ballot\\_request\\_portal](https://sos.ga.gov/index.php/elections/secretary_of_state_brad_raffensperger_unveils_new_online_absentee_ballot_request_portal).

<sup>43</sup> Alex Daugherty & David Smiley, *More Democrats Voted in Florida's 2020 Primary Than in 2016*, MIAMI HERALD (Mar. 17, 2020), <https://www.miamiherald.com/news/politics-government/article241276281.html>.

However, the August 18th Florida statewide primary saw the highest turnout for a statewide primary election in eighteen years, with many of the state's voters casting vote by mail ballots as well as choosing to vote in-person, signaling that the state may very well see record turnout numbers in the November 3rd general election.<sup>44</sup>

While neither of these Florida elections produced the long lines and delays seen in other states during the COVID-19 pandemic, partly due to many voters taking advantage of the state's no-excuse vote by mail process, voting by mail poses significantly higher risks that the vote by mail ballots of voters of color, younger voters and UOCAVA voters will not be counted.<sup>45</sup> As a result, the state must not assume that voting by mail is a cure-all for voting in the face of the COVID-19 pandemic for all voters and needs to provide the resources necessary for fair, equitable and safe in-person voting for voters of color and other voters who choose to vote in person in the general election.

Thus, it is very concerning that the Florida Governor, Ron DeSantis, refused to heed calls by the state's sixty-seven County Supervisors of Election to provide them with more flexibility in administering the November 3rd general election and delayed funding they need in order to adequately prepare for the potentially record turnout—particularly given the likelihood the state will still be plagued by the COVID-19 pandemic throughout the fall and on Election Day.

In May, the Florida State Association of Supervisors of Elections sent an urgent appeal to Governor DeSantis pleading with him to apply for the emergency HAVA funds under the CARES Act that would help them pay for COVID-19 related supplies and provide resources for administering elections in the face of the COVID-19 pandemic.<sup>46</sup> Despite the fact Florida was eligible for up to \$20,253,853 in emergency HAVA funding through the CARES Act, the Governor delayed finalizing a request for these funds from the Election Assistance Commission (EAC) and many

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<sup>44</sup> John Kennedy, *Despite Pandemic, Florida Sees Impressive Voter Turnout For Primary*, TALLAHASSEE DEMOCRAT (Aug. 19 2020), <https://www.tallahassee.com/story/news/2020/08/19/florida-voter-turnout-primary-election-still-high-despite-covid-19-coronavirus-concerns/5609092002/>; John Kennedy, *Florida Primary Turnout Highest in 18 Years*, PALM BEACH POST (Aug. 19 2020), <https://www.palmbeachpost.com/story/news/politics/2020/08/19/florida-primary-turnout-highest-in-18-years/113359226/>.

<sup>45</sup> Anna Baringer, Michael C. Herron, & Daniel A. Smith, *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, ELECTION L. J. (forthcoming), [https://electionscience.clas.ufl.edu/files/2020/04/Baringer\\_Herron\\_Smith\\_VBM\\_FL.pdf](https://electionscience.clas.ufl.edu/files/2020/04/Baringer_Herron_Smith_VBM_FL.pdf); 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), <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126>.

<sup>46</sup> Alex Daugherty & David Smiley, *Florida Supervisors Urge Desantis to 'Act Immediately' to Accept Federal Election Funds*, MIAMI HERALD (May 13, 2020), <https://www.miamiherald.com/news/politics-government/article242699171.html>.

of the state's sixty-seven Supervisors of Election had still not received the CARES Act funding by mid-August.<sup>47</sup>

Governor DeSantis also rejected calls by Supervisors to grant them flexibility to extend early voting days and create vote centers to serve voters who could face long lines and delays at neighborhood polling sites if there is a large surge of in-person voting. Instead, Governor DeSantis merely encouraged schools to close on Election Day in order to serve as polling sites and signed an executive order making it easier for state employees to serve as poll workers and allowing Supervisors to process vote by mail ballots early.<sup>48</sup> However, the executive order does nothing to ensure counties will have adequate resources to ensure voters can vote safely and securely in-person or by mail in the general election.

Therefore, Congress must take action to ensure that Florida's voters will be able to vote safely and securely, whether in-person or by mail, given the likelihood the COVID-19 pandemic will continue to impact voters in the November 3rd general election.

## Wisconsin

Wisconsin's April 7th presidential primary represented a crash course in how not to run an election during a pandemic. Inflexibility in the legislature regarding moving back the election date created chaos both on the ground and in the courts.<sup>49</sup> Restrictive absentee ballot rules disenfranchised untold numbers of voters and those who went to vote in-person experienced unprecedented lines in the face of massive polling place closures.<sup>50</sup> For example, the City of Milwaukee only had five in-person polling places available for nearly 300,000 registered voters, resulting in reduced turnout by nearly nine percentage points and disproportionately affecting Black voters, according to one study.<sup>51</sup> Moreover, voting by absentee ballot was

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<sup>47</sup> Jeffrey Schweers, *Federal COVID-19 Funds for Florida Election Supervisors Delayed Over A Month, Expected This Week*, TALLAHASSEE DEMOCRAT (Aug. 11, 2020), <https://www.tallahassee.com/story/news/local/state/2020/08/11/florida-election-supervisors-waiting-federal-covid-19-funds/3335483001/>.

<sup>48</sup> Gary Fineout, *Desantis Offers Election Day Help as Republicans Say They'll Cast Ballots in Person*, POLITICO (June 17, 2020), <https://www.politico.com/states/florida/story/2020/06/17/florida-gov-wants-schools-and-state-workers-to-help-with-running-election-1293573>.

<sup>49</sup> Nick Corasaniti, Reid J. Epstein & Lisa Lerer, *Wisconsin Is Set to Vote on Tuesday After Court Overrules Governor's Postponement*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-election-postponed-coronavirus.html>.

<sup>50</sup> Elise Viebeck, Amy Gardner, Dan Simmons & Jan M. Larson, *Long Lines, Anger and Fear of Infection: Wisconsin Proceeds with Elections Under Court Order*, WASH. POST (Apr. 7, 2020), [https://www.washingtonpost.com/politics/long-lines-form-in-milwaukee-as-wisconsin-proceeds-with-elections-under-court-order/2020/04/07/93727b34-78c7-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/politics/long-lines-form-in-milwaukee-as-wisconsin-proceeds-with-elections-under-court-order/2020/04/07/93727b34-78c7-11ea-b6ff-597f170df8f8_story.html).

<sup>51</sup> Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, BRENNAN CTR. (June 24, 2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling->



marred by technical glitches and slow mail delivery, which resulted in thousands of completed ballots that were never delivered to election officials.<sup>52</sup>

While Wisconsin had another primary on August 11th which went much more smoothly with many more in-person polling locations available for a relatively low-turnout election, election officials are anticipating record turnout for the general election in November.<sup>53</sup> Wisconsin must be better prepared to handle the increase in voters wishing to cast both absentee and in-person ballots.

To prepare for the November election, Wisconsin must keep open as many polling places as possible that can follow CDC guidance regarding PPE and social distancing to keep voters and poll workers safe. It is necessary to ensure that officials follow through on these issues. In Milwaukee, officials say there will be at least 170 polling locations on Election Day staffed by approximately 1,400 poll workers as well as at least sixteen absentee drop box and early voting locations, with early voting also available at Fiserv Forum and Miller Park, which will also have curbside voting available.<sup>54</sup> Wisconsin must also eliminate its draconian restrictions on absentee ballots such as the witness requirement that is very difficult for many voters to comply with during a pandemic as well as an option for voters who have not been able to acquire an ID for voting due to limited DMV hours.<sup>55</sup>

Another concern is the need to remedy the postal problems that marred the primaries. In the April 7th primary, there were hundreds of undelivered absentee ballots and thousands of absentee ballots discarded for completion errors. Officials say they have acted to improve absentee ballot instructions and revised address labels and added bar codes to facilitate delivery and tracking. However, a major concern remains the turmoil at the U.S. Postal Service and delivery delays due to new management. According to the *Wisconsin State-Journal*, state officials, including U.S. Senator Tammy Baldwin and Madison Mayor Satya Rhodes-Conway,

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[places-milwaukee-depress-turnout](#); see also Alison Durr & Mary Spicuzza, *supra* note 19.

<sup>52</sup> Patrick Marley, *Thousands of Absentee Ballots in Wisconsin Weren't Counted Because of Mailing Problems and Tech Glitches*, MILWAUKEE J. SENTINEL (May 19, 2020), <https://www.jsonline.com/story/news/politics/2020/05/19/glitches-mailing-problems-mar-absentee-voting-wisconsin/5219371002/>.

<sup>53</sup> *Low-Turnout Partisan Primary Gives Election Officials Practice for November*, WIS. ELECTIONS COMM'N (Aug. 14, 2020), <https://elections.wi.gov/node/7026>.

<sup>54</sup> Marti Mikkelsen, *Milwaukee Election Officials Promise More Polling Places, Workers in Tuesday's Election*, WUWM (Aug. 10, 2020), <https://www.wuwm.com/post/milwaukee-election-officials-promise-more-polling-places-workers-tuesdays-election#stream/0>; Bridgit Bowden, *Fiserv Forum and Miller Park to be Used for Early Voting, Milwaukee Officials Say*, WIS. PUBLIC RADIO (Aug. 31, 2020), <https://www.wpr.org/fiserv-forum-and-miller-park-be-used-early-voting-milwaukee-officials-say>.

<sup>55</sup> See Mem. in Supp. of *Gear v. Bostelmann*, 20-CV-278, Pls.' Mot. for Prelim. Inj., 51-58, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-00249 (W.D. Wis. filed July 8, 2020), ECF No. 421; Br. of the *Edwards* Pls. in Supp. of Mot. for Prelim. Inj., 46-51, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-00249 (W.D. Wis. filed July 8, 2020), ECF No. 397.

are demanding assurances that the U.S. Postal Service will fix delays, restore mailboxes and ensure that all absentee ballots will get to voters and back to election officials by 8 p.m. on Election Day. Wisconsin Attorney General Josh Kaul filed a lawsuit against the Trump administration, charging that changes made to mail service are unlawful and noting not only an impact on elections but on seniors and veterans who rely on medications. Senator Baldwin wrote to the Postmaster General saying U.S. Postal Service employees told her staff that mail sorting machines were being removed or disconnected in Milwaukee, Madison, Green Bay, and Rothschild processing and distribution centers. She disagreed with the Postmaster General's statements that the mail sorting machines are not needed.<sup>56</sup>

## Texas

This discussion focuses on the state's response to COVID-19 following the Texas' primary election took place on March 3rd Super Tuesday, prior to the height of the pandemic in the United States. Since that primary, Texas Secretary of State Ruth Hughs has received a letter from the U.S. Postal Service stating that "under our reading of Texas' election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," which "creates a risk that [mail-in] ballots requested near the deadline under state law will not be returned by mail in time to be counted." The Postal Service "strongly recommends" that "voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum," and that "domestic voters should generally mail their completed ballots at least one week before the state's due date" (those deadlines being November 3 for ballots without a postmark and November 4 for ballots with a postmark).<sup>57</sup>

Governor Abbott previously issued proclamations moving the date of the 2020 Primary Runoff Election from May 26 to July 14. Governor Abbott also added five days to early voting for the primary runoff election and he added six days to early voting for the November 2020 general election. Governor Abbott also granted voters the ability to deliver a mail-in ballot in person to the early voting clerk's office prior to Election Day.

However, neither the Governor nor anyone else has taken action to (1) extend the mail-in ballot return deadline; (2) eliminate the requirement that, for applications for mail-in ballots submitted by fax or email, that the hard copy must also be mailed and received by the early voting clerk no later than four business

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<sup>56</sup> *Wisconsin Officials Press USPS for Assurances on Election-Related Mail*, A.P. (Aug. 31, 2020), [https://madison.com/wsj/news/local/govt-and-politics/wisconsin-officials-press-usps-for-assurances-on-election-related-mail/article\\_990d728f-1e86-55cb-bb9f-1cf01cf05310.html](https://madison.com/wsj/news/local/govt-and-politics/wisconsin-officials-press-usps-for-assurances-on-election-related-mail/article_990d728f-1e86-55cb-bb9f-1cf01cf05310.html).

<sup>57</sup> Cassandra Pollock, *USPS Warns Texas That Some Mail-in Ballots May Be Delayed in November*, The Texas Tribune (August 14, 2020), <https://www.texastribune.org/2020/08/14/texas-mail-in-ballots-usps/>.



days later; or (3) to allow voters to deliver completed mail ballots in person to secure, county-controlled boxes located at early voting sites or early voting clerk offices. The failure to take these actions mean that Texas voters continue to be at risk of disenfranchisement, particularly those who are concerned about voting in person due to COVID-19.

Separately, the Fifth Circuit stayed a district court order granting a preliminary injunction pending appeal saying that all voters could request an absentee ballot during the pendency of pandemic circumstances.<sup>58</sup> The Fifth Circuit decision is distressing and the clock will probably run out and a final decision is unlikely before the election.

### **The United States Postal Service**

Before taking a wide-angle lens view of other states, I will discuss the U.S. Postal Service turmoil and delays affecting vote by mail nationwide, and highlighted in my discussion of Wisconsin.

In the midst of an historic pandemic that has already created serious challenges for voters and election administrators, including an unprecedented surge in voting by mail, Postmaster General DeJoy has chosen to implement and refused to rollback sweeping changes to Postal Service policies and practices.<sup>59</sup> These changes, including the reversal of long-standing policy to leave no mail behind at the end of each day and the decommissioning of hundreds of high-volume mail sorting machines across the country, could not have come at a worse time, given the crucial role the Postal Service must play in facilitating elections during this pandemic. Far from increasing efficiency, as Postmaster General DeJoy has publicly insisted is his intent, these changes have already resulted in significant disruptions and delays in mail delivery—and appear designed to make it *more difficult* for states to administer voting by mail and to ensure that every eligible voter is able to cast a ballot that will be counted.

Indeed, the President has admitted this is precisely his goal in denying additional funding to the Postal Service—to undermine the ability of states to successfully conduct voting by mail, as is their constitutional prerogative and as has been necessitated in 2020 by the ongoing pandemic—and the recent changes enacted by the Postal Service seem to have this same goal as well.

In response to this unprecedented assault on the Postal Service and on free and fair elections, the Lawyers' Committee filed suit against Postmaster General

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<sup>58</sup> Texas Democratic Party v. Abbott, No. 20-50407 (5th Cir. 2020).

<sup>59</sup> Bogage et. al., *DeJoy Pushes Back on Criticism of Changes to Postal Service, Says He Won't Restore Sorting Machines*, WASH. POST (Aug. 24, 2020), <https://www.washingtonpost.com/politics/2020/08/24/dejoy-testimony-usps-house/>.

DeJoy and the Postal Service—on behalf of the National Urban League, Common Cause, and the League of Women voters, and their members—as did almost half of all states, as well as other civic organizations and individuals. Our lawsuit and others insist that Postmaster General DeJoy comply with federal law in clearing these sweeping changes in national postal policy with the Postal Regulatory Commission, including holding a public hearing, *prior* to their implementation—which he did not do. Our lawsuit also makes clear that sabotaging the Postal Service in order to undermine Americans’ ability to vote safely and securely by mail violates the Constitution, and that these changes must be reversed and the status quo restored immediately.<sup>60</sup>

There are many steps states and local election administrators can take on their own to ensure that all eligible voters who cast their ballots by mail have their votes counted, and to minimize the risk of disenfranchisement due to disruptions and delays in mail delivery. States which currently require mail ballots to be received by Election Day should instead count all ballots postmarked by Election Day and received a reasonable time afterwards—a practice that was affirmed by the Supreme Court in Wisconsin’s April 7 primary election.<sup>61</sup> States must also allow voters to drop their mail ballots off in person, at election offices, polling places, and secure drop boxes—all practices with proven track records for safety and security in numerous states. States must provide voters with notice and the opportunity to cure any defects prior to rejecting their ballot—as is required by the Constitution.

Local election officials should make use of ballot tracking technology provided by the Postal Service, and must coordinate with local postal officials more closely than ever before to ensure that no ballot is left behind, by conducting in-person sweeps of mail facilities on Election Night and before ballot receipt deadlines—thousands of voters were disenfranchised in 2020 primary elections due to a failure to practice this simple administrative safeguard in local jurisdictions across the nation.

## Overview of the States

In the 2020 primaries, officials in several states responded to the public health crisis by taking emergency action to increase access to mail balloting for voters. Yet, many problems remain to be addressed, with little time to do so. Examples of action taken<sup>62</sup> by several states—including Maryland, New Jersey, and Nevada—are

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<sup>60</sup> National Urban League, et al. v. Louis DeJoy, et al., D. MD, no. 1:20-cv-02391, filed Aug. 18, 2020 (Right-to-vote, 1<sup>st</sup> Amendment, and statutory challenge to U.S. Postal Service changes in practices that may affect mail voting.)

<sup>61</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206–07 (2020).

<sup>62</sup> For a state by state tabulation, see *Voting procedure changes in response to the coronavirus pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Changes\\_to\\_election\\_dates,\\_procedures,\\_and\\_administration\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic.\\_2020#Absentee.2Fmail-in\\_voting\\_procedure\\_changes](https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic._2020#Absentee.2Fmail-in_voting_procedure_changes). Note

operating “no-excuse” mail ballot processes that sought to forgo the application process and send ballots directly to voters. In other states, officials sent mail ballot applications to every voter as a means of encouraging mail voting. Georgia’s Secretary of State issued a directive to send absentee ballot request forms to all of Georgia’s 6.9 million registered voters during the June primary. West Virginia’s Secretary of State issued a similar directive to county elections commissions to send postage pre-paid absentee ballot requests to all registered voters in the upcoming primary election on June 9th.

Perhaps the most significant steps were taken by states that changed their excuse-required mail ballot process to a no-excuse process. In Alabama, the Secretary of State issued a new emergency rule allowing any qualified voter who determines that it is impossible or unreasonable to vote at their polling place for the upcoming primary election to vote absentee under the “physical illness” excuse provision so long as voters include proper identification with their absentee applications. Similarly, New Hampshire’s Secretary of State issued guidance that for all upcoming elections in 2020, all voters “have a reasonable ground to conclude that a “physical disability” exists, and therefore, all voters can request an absentee ballot on that basis. Delaware’s Governor similarly issued an executive order expanding the excuses under state law so voters who are in self-isolation or quarantine related to COVID-19 can vote by mail. Indeed, of the sixteen states with excuse-required processes, nearly all took action to make mail voting more accessible.

Despite state legislative changes already made, many problems remain. The matters at issue are illustrated by the recent rise in elections litigation across the country. One source summarizes by saying the cases fall into categories: all-mail elections, absentee ballot eligibility and applications, witness requirements, and how ballots can be returned.<sup>63</sup>

The six states that have not expanded requirements for absentee ballots have been sued for reasons such as not allowing voters to use COVID-19 concerns to request a ballot. These include Indiana, Louisiana, Mississippi, South Carolina, Tennessee, and Texas.<sup>64</sup>

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that, as the table shows, some states, such as Maryland took different approaches to the primary election and the general election.

<sup>63</sup> “The Canvass: September, 2020,” <https://www.ncsl.org/research/elections-and-campaigns/the-canvass-september-2020.aspx>.

<sup>64</sup> Indiana: *Tully v. Okeson*, No. 1:20-cv-01271-JPH-DLP, 2020 WL 4926439 (S.D. Ind. 2020); Louisiana: Complaint, *Harding v. Edwards*, No. 3:20-cv-00495-JWD-SDJ (M.D. La. Aug. 3, 2020); Mississippi: Complaint, *Oppenheim v. Watson*, No. 25CH1:20-cv-00961 (Miss. Ch. filed Aug. 11, 2020); South Carolina: *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 4915566 (D.S.C. Aug. 21, 2020); Tennessee: *Fisher v. Hargett*, No. M2020-00831-SC-RDM-CV, 2020 WL 4515279 (Tenn. Aug. 5, 2020); Texas: *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020).

Another issue is the burden during a pandemic of requiring witnesses and notarization for absentee ballots during a pandemic, which has been challenged in several states. Minnesota agreed under a consent decree not to enforce witness requirements in 2020.<sup>65</sup> Rhode Island agreed to suspend witness or notary requirements<sup>66</sup> and the United States Supreme Court denied the RNC's motion to overturn the consent decree.<sup>67</sup> Other witness litigation involves Alabama, North Carolina, Oklahoma, South Carolina, Virginia (partially settled), and Wisconsin.<sup>68</sup>

Other litigation involves whether ballots received after election day must be counted. Examples include challenges to hard Election Day receipt deadlines in Georgia, Minnesota, Montana, New Hampshire and South Carolina.<sup>69</sup> However, some litigants have questioned later deadlines that allow ballots after Election Day in Illinois and Nevada.<sup>70</sup>

Two cases in Ohio involve important issues. One challenges the directive of the Secretary of State limiting each Ohio county to a single secure drop box for absentee applications and ballots.<sup>71</sup> The other is a challenge to the Secretary regarding rejection of absentee ballots for signature mismatches without opportunity for voters to cure alleged defects.<sup>72</sup>

The Lawyers' Committee has been involved in over twenty cases this year, many with a relationship to the pandemic. Examples include cases relating to:

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<sup>65</sup> *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. June 16, 2020).

<sup>66</sup> *Common Cause RI v. Gorbea*, No. 1:20-cv-00318-MSM-LDA, 2020 WL 4460914 (D.R.I. July 30, 2020).

<sup>67</sup> *Republican Nat. Comm. v. Common Cause RI*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

<sup>68</sup> Alabama: *Merrill v. People First of Alabama*, No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020); North Carolina: *Democracy N. Carolina v. N. Carolina St. Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020); Oklahoma: *Complaint, DCCC v. Ziriak*, 4:20-cv-211-JED-JFJ (N.D. Okla. June 11, 2020); South Carolina: *Middleton*, No. 3:20-cv-01730-JMC, 2020 WL 4915566 (D.S.C. Aug. 21, 2020); Virginia: Second Amended Complaint for Injunctive and Declaratory Relief, *League of Women Voters of Va. v. Va. St. Bd. of Elections*, No. 6:20-CV-00024-NKM-RSB (W.D. Va. Jul. 17, 2020); Wisconsin: *Democratic National Committee v. Bostelmann*, No. 3:20-cv-249-wmc, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020).

<sup>69</sup> Georgia: *The New Georgia Project v. Raffensperger*, No. 1:20-CV-01986-ELR, 2020 WL 5200930 (N.D. Ga. Aug. 31, 2020); Minnesota: *LaRose*, No. 62-CV-20-3149 (Minn. Dist. Ct. June 16, 2020); Montana: Complaint for Declaratory and Injunctive Relief, *Driscoll v. Stapleton*, No. DA 20-0295 (Mont. Dist. Ct. Mar. 13, 2020); New Hampshire: Amended Complaint for Declaratory and Injunctive Relief, *American Federation of Teachers v. Gardner*, No. 216-2020-CV-00570 (N.H. Super. Ct. Aug. 11, 2020); South Carolina: *Middleton*, No. 3:20-cv-01730-JMC, 2020 WL 4915566 (D.S.C. Aug. 21, 2020).

<sup>70</sup> Illinois: Complaint, *Cook County Republican Party v. Pritzker*, NO. 1:20-cv-04676 (N.D. Ill. Aug. 10, 2020); Nevada: Complaint, *Donald J. Trump for President v. Cegavske*, No. 2:20-cv-01445 (D. Nev. Aug. 4, 2020).

<sup>71</sup> Compl., *A Philip Randolph Inst. Of Ohio v. LaRose*, 1:20-cv-01908-DAP (N.D. Ohio filed Aug. 26, 2020).

<sup>72</sup> *Id.*

- Challenge to purge. Georgia State Conference of NAACP v. DeKalb County BOER, ND GA 1:20-cv-00879-ELR, filed Feb. 26, 2020; in settlement discussions.
- Sections 4(e) and 203 relating to language requirements challenge to distribution of absentee ballot applications. GALEO v. Gwinnett County BOER, ND GA 1:20-cv-01587-WMR, filed April 14, 2020 Motion to dismiss amended complaint being briefed.
- Amended complaint filed as to criminalization of distribution of applications for absentee ballots and preliminary motion filed. Memphis A. Philip Randolph Inst. V. Hargett, MD Tenn. 3:20-mc-0999, filed May 1, 2020
- Challenge to absentee ballot procedures and implementation of voter ID law during pandemic. Motion for preliminary injunction pending. Voluntarily dismissed after State announced procedures that provided all relief we asked for. Collins v. Adams, WD KY, filed May 27, 2020
- Extension of voting hours. Favorable TRO decision. Georgia State Conf. of NAACP v. Gwinnett County BOER, filed June 9, 2020
- Challenge to absentee ballot deadline. Motion for preliminary injunction pending. Common Cause Indiana and Indiana NAACP v. Connie Lawson, S.D. Ind. no. 1:20-cv-20007-SEB-TAB, filed July 30. 2020
- Challenge to lack of notice and opportunity to cure absentee ballots rejected for signature *mismatch*. Motion for preliminary injunction pending. League of Women Voters of Ohio *and* A. Philip Randolph of Ohio v. Frank La Rose, S.D. Ohio, no. 2:20-cv-03843, filed July 31, 2020
- Motion to intervene as plaintiffs on behalf of Common Cause PA, LWV, PA; Black Political Empowerment Project; Make the Road, PA in suit dealing with procedures re drop boxes, absentee ballots, and poll watching for Nov. election. Pennsylvania Democratic Party v. Kathy Boockvar, Commonwealth Court of Pennsylvania, no. 407 MD 2020, August 10, 2020
- Right-to-vote, First Amendment, and statutory challenge to U.S. Postal Service changes in practices that may affect mail voting; also representing Common Cause, LWV. National Urban League, et al. v. Louis DeJoy, et al., D. MD, no. 1:20-cv-02391, filed Aug. 18, 2020
- Challenge to SOS directive prohibiting more than one drop box in each county. A. Phillip Randolph Institute of Ohio, et al. v. Frank LaRose, N.D.

Ohio, no. 2;20-cv-03843-MHW-KAJ, filed August 26, 2020, also representing LWV of Ohio and Ohio NAACP.

- Challenge to limited eligibility and notarization requirements for absentee voting during pandemic; failure to provide notice and opportunity to cure rejections for signature mismatch. Cynthia Parham, et al. v. Michael D. Watson, Jr., et al., S.D. Miss., no. 3:20-cv-00572 -DPJ-FLB, filed August 27, 2020, also representing LWV of Miss and Miss. NAACP.
- Challenge to statute criminalizing distribution of absentee ballot applications. Jeffrey Lichtenstein, et al. v. Tre Hargett, MD. Tenn. No. 20-cv-374, filed August 31, 2020, also representing Memphis & West Tenn AFL-CIO Central Labor Council, Equity Alliance, Tenn NAACP, Memphis APRI, and Free Hearts

## V. Need for Reforms—Issue by Issue Analysis

Turning from examples of recent state measures and litigation challenges, the following is an issue by issue analysis of needed reforms, including, among other needed options, online and same-day voter registration, no excuse absentee vote-by-mail with postage paid by the government, safe in-person voting, and early in-person voting.<sup>73</sup> Adequate funding and election reforms can provide solutions to the chaos and dysfunction that plagued primaries. For example, adequate funding can help ensure sufficient numbers of trained poll workers. Early voting and widely available vote-by-mail can relieve pressure on in-person voting. Together, these can remedy the disgraceful performance in primaries earlier this year that resulted in thousands of people standing for hours in long lines to vote during the pandemic, often in inclement weather.

### 1. Voter Registration

A critical and sometimes overlooked component of expanding vote-by-mail options is the first step in the voting process: voter registration. The pandemic has seriously impacted the opportunity for new voters or those who have moved to a

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<sup>73</sup> The Health and Economic Recovery Omnibus Emergency Solutions Act (“HEROES”) Act, H.R. 6800, 116th Cong. 2d Sess. (as passed by House of Representatives, May 15, 2020), includes provisions addressing in whole or in part many of the points made in this testimony, including, for Federal elections, online registration and same day registration, no excuse absentee ballots, prohibiting witness and notary requirements for mail ballots, in emergency situations sending mail ballots to all registered voters, requiring an option for online requests for mail ballots, due process and opportunity to cure for signature matching, accessibility of early voting polling places, options for return of mail ballots including drop-off locations and designating another person to return the ballot. *See also* “Considerations for Election Polling Locations and Voters,” CDC (June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

new voting district since the last election to register to vote. Because of the pandemic, motor vehicle facilities,<sup>74</sup> a prime location for voter registration under the “motor voter law,”<sup>75</sup> have been closed in many jurisdictions, making it difficult for new drivers—predominately younger people—to register to vote.<sup>76</sup> Many jurisdictions have also closed public assistance agencies, disability offices, and other government agencies that register voters.<sup>77</sup> The impact has been particularly felt in communities of color, where voter registration drives by non-profit organizations rely on church gatherings, picnics, and local street fairs, in addition to door-to-door canvassing, for their success.<sup>78</sup> Student voter registration drives often take place on college campuses, many of which are closed for the indefinite future.<sup>79</sup>

In order to ameliorate the impact on voter registration caused by the pandemic, steps must be taken to facilitate voter registration. Two approaches are online voter registration and same-day voter registration.<sup>80</sup> Online voter registration enables potential voters to register from their homes through their home computers or smartphones, mitigating any potential concern about exposure to the virus and enabling them to register during evenings and weekends. Same-day voter registration is another invaluable tool to ensure that all potential voters can participate, because it enables people to both register and cast a ballot on Election Day or during early voting. Research has shown that states with same-day voter registration consistently have some of the highest voter turnout and participation rates.<sup>81</sup>

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<sup>74</sup> See, e.g., *Compl., Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020).

<sup>75</sup> National Voter Registration Act (“NVRA”), 52 U.S.C. § 20501 et seq. (1993).

<sup>76</sup> See, e.g., Ida Domingo, *DMV Remains Closed in Virginia, Once Open Appointments Will Be Required*, ABC (May 11, 2020), <https://wset.com/news/coronavirus/dmv-remains-closed-until-further-notice-in-virginia-due-to-pandemic>.

<sup>77</sup> See, e.g., Mark Miller, *Coronavirus Is Closing Social Security Offices. Here’s How to Get Benefit Help*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/business/retirement/coronavirus-social-security.html>.

<sup>78</sup> See *Tenn. State Conf. of NAACP v. Hargett*, 420 F. Supp. 3d 683 (M.D. Tenn. 2019). On behalf of civic engagement organizations, the Lawyers’ Committee and its partners challenged a restrictive Tennessee law that placed draconian civil and criminal penalties on these organizations’ ability to conduct large scale voter registration drives. The court noted that the law impinged on “central elements of expression and advocacy” further recognizing that “these drives historically have involved both encouraging and facilitating registration, including, at least in many cases, by physically transporting applications.” *Id.* at 699.

<sup>79</sup> See, e.g., Nicole Taylor, *Student Voter Engagement Handbook* at 5, FAIR ELECTIONS CTR. & CAMPUS VOTE PROJECT (Sept. 2018), [https://15fedd24-5236-4bea-bc35-4ea36b399531.filesusr.com/ugd/85cfb4\\_eafda5a391884b92beb70c0f7fb672c3.pdf](https://15fedd24-5236-4bea-bc35-4ea36b399531.filesusr.com/ugd/85cfb4_eafda5a391884b92beb70c0f7fb672c3.pdf) (highlighting the importance of voter registration events non campus as a part of student engagement and advocacy at colleges).

<sup>80</sup> At least nineteen states and the District of Columbia have same-day voter registration, including California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, Utah, Vermont, Washington, Wisconsin, and Wyoming. NAT’L CONF. OF STATE LEGISLATURES, *Voter Registration Deadlines* (Nov. 1, 2019), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>.

<sup>81</sup> George Pillsbury & Caroline Mak, *America Goes to the Polls 2018: Voter Turnout and Election*



## 2. Expanding Vote-by-Mail Options

Options must be expanded for requesting, receiving, and returning mail-in ballots. Some voters prefer to vote by mail during the pandemic, fearing that they will be exposed to COVID-19 if they vote in person.<sup>82</sup> Many of these voters prefer to vote by mail because they have comorbidities or care for immunocompromised or otherwise vulnerable loved ones, who face a higher risk of contracting COVID-19. These are legitimate justifications to expand vote-by-mail processes—and they ensure that restrictions on mail-in voting does not disenfranchise significant numbers of voters during the pandemic.

### *a. Background on Voting by Mail*

All fifty states have a process by which at least some voters can cast a ballot by mail. Five states—Colorado, Hawaii, Oregon, and Washington, and Utah—conduct elections by mail,<sup>83</sup> meaning that officials send a ballot in the mail and the voter can return the ballot through the mail or in-person at established vote centers or voting booths for a period before and on Election Day.<sup>84</sup>

At least sixteen states authorize local governments to opt into a predominantly vote-by-mail system;<sup>85</sup> allow all-mail absentee voting in local or special elections;<sup>86</sup> or permit certain jurisdictions to conduct elections by mail based

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*Policy in the 50 States* at 8, NONPROFIT VOTE & THE U.S. ELECTIONS PROJECT (Mar. 2019), <https://www.nonprofitvote.org/documents/2019/03/america-goes-polls-2018.pdf>.

<sup>82</sup> *Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19*, PEW RESEARCH CTR. (Apr. 28, 2020), <https://www.people-press.org/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/>.

<sup>83</sup> COLO. REV. STAT. § 1-7.5-104 (all counties “shall” conduct general, primary, odd-year, coordinated, recall, and congressional vacancy elections by mail ballot); HAW. REV. STAT. § 11-101 (all elections “shall be conducted by mail” beginning with the 2020 primary election); OR. REV. STAT. § 254.465 (“[c]ounty clerks shall conduct all elections in this state by mail”); WASH. REV. CODE § 29A.40.010 (in every general, special, or primary election, each active registered voter “shall receive a ballot by mail” unless county officials remove the voter from the rolls); UTAH CODE ANN. § 20A-3-302 (authorizing election officers to mail a ballot to each active voter in the precinct. In 2020, all of Utah’s twenty-one counties opted into the mail-ballot only).

<sup>84</sup> COLO. REV. STAT. § 1-7.5-102(2) (“mail ballot elections conducted by the county clerk and recorder must include voter service and polling centers so voters can register to vote, update voter registration information, and vote in person.”); HAW. REV. STAT. § 11-92.1 (election officials must establish voter service centers across the state); OR. REV. STAT. § 254.474 (county clerks at each primary and general election must maintain “voting booths” in the county); WASH. REV. CODE § 29A.40.160(1) (“[t]he voting center shall be open during business hours during the voting period, which begins eighteen days before, and ends at 8:00 p.m. on the day of, the primary, special election, or general election.”).

<sup>85</sup> See, e.g., CAL. ELEC. CODE § 4005 (authorizing all-mailed ballot elections, including mailing each registered voter a ballot); N.D. CENT. CODE § 16.1-11.1-01 (authorizing mailed ballots).

<sup>86</sup> See, e.g., ALASKA STAT. § 15.20.800 (director may conduct any election other than a general, party primary, or municipal election by mail and “shall” send a ballot to every registered voter); ARIZ. REV. STAT. ANN. §§ 16-409, 16-558.01 (a city, town, or school district may conduct a mail ballot election

on population size.<sup>87</sup> In the local counties that have opted in to vote by mail in these sixteen states, boards of elections automatically mail ballots to registered voters without requiring voters to apply for absentee ballots, and voters can return the ballots by mail or in person. In the local jurisdictions that do not employ automatic vote by mail in these sixteen states, any registered voter can request to vote by mail without having to provide an excuse.<sup>88</sup>

In roughly thirty-four states (including the five vote-by-mail only states) and Washington D.C., any registered voter can request a vote-by-mail ballot without providing an excuse as to why he or she cannot appear to vote in person on Election Day.<sup>89</sup> The remaining roughly sixteen states require a qualified voter to provide a statutorily authorized reason for requesting an absentee ballot.<sup>90</sup>

### ***b. Actions States Have Taken to Facilitate Voting by Mail***

The pandemic presents unprecedented circumstances for many voters who have reasonable fears of voting in person and prefer to vote by mail. Since the spread of COVID-19, several states which had excuse-only absentee voting have taken legislative or executive action to create mostly vote-by-mail systems and make it easier for their citizens to request absentee ballots. For example, Alabama's Secretary of State issued a new emergency rule allowing any qualified voter who determines that it is impossible or unreasonable to vote at their polling place for the upcoming primary election to vote absentee under the "physical illness" excuse provision, so long as voters include proper identification with their absentee applications.<sup>91</sup> Georgia's Secretary of State issued a directive to send absentee ballot request forms to all of Georgia's 6.9 million registered voters in the upcoming primary election on May 19.<sup>92</sup> West Virginia's Secretary of State issued a similar

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and "shall send by nonforwardable mail all official ballots" to each qualified voter); FLA. STAT. § 101.6102 (same); KAN. STAT. ANN. § 25-432 (vote-by-mail only in certain elections); MD. CODE ANN. § 9-501 (same); MO. REV. STAT. § 115.652 (same); MONT. CODE ANN. § 3-19-104 (same); WYO. STAT. ANN. § 22-29-115 (same).

<sup>87</sup> See, e.g., NEB. REV. STAT. § 32-960 (certain counties can apply to conduct all-mailed ballot elections and upon approval, must mail ballots to registered voters); IDAHO CODE § 34-308 (state may designate precincts with fewer than a certain number of voters as vote-by-mail only); NEV. REV. STAT. § 293.213 (same); N.M. STAT. ANN. § 1-6-22.1 (same); MINN. STAT. § 204B.45 (state may designate municipalities with fewer than a certain number of voters may as vote-by-mail only jurisdictions); N.J. STAT. ANN. § 19:62-1 (same).

<sup>88</sup> See, e.g., NAT'L STATE CONF. OF LEGISLATURES, *States With No-Excuse Absentee Voting* (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> ALA. SEC'Y OF STATE, *Absentee Voting During State of Emergency* (Mar. 18, 2020), <https://www.sos.alabama.gov/sites/default/files/SOS%20Emergency%20Rule%20820-2-3-06-01ER.pdf>.

<sup>92</sup> GA. SEC'Y OF STATE, *Raffensperger Takes Unprecedented Steps to Protect Safety and Voter Integrity*

directive to county elections commissions to send postage pre-paid absentee ballot requests to all registered voters in the upcoming primary election on June 9.<sup>93</sup> Similarly, New Hampshire’s Secretary of State issued guidance that for all upcoming elections in 2020, all voters “have a reasonable ground to conclude that a “physical disability” exists, and therefore, all voters can request an absentee ballot on that basis.<sup>94</sup>

Virginia’s Governor clarified that to protect the health of voters during the COVID-19 outbreak, voters may choose the “disability or illness” excuse to vote absentee for the June primary election—this was the subject of a court challenge.<sup>95</sup> Earlier on April 11, 2020, Virginia’s General Assembly passed a bill permitting any registered voter to vote absentee without an excuse, beginning July 1st.<sup>96</sup> Delaware’s Governor similarly issued an executive order expanding the excuses under state law so voters who are in self-isolation or quarantine related to COVID-19 can vote by mail.<sup>97</sup>

Missouri, Tennessee, and Kentucky are the subject of lawsuits by national civil rights groups, including the Lawyers’ Committee.<sup>98</sup> These lawsuits seek expansions of the states’ excuse-only absentee voting laws during the COVID-19 crisis.<sup>99</sup> These lawsuits request the respective courts to order relief expanding the

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*in Georgia* (Apr. 20, 2020),

[https://sos.ga.gov/index.php/elections/raffensperger\\_takes\\_unprecedented\\_steps\\_to\\_protect\\_safety\\_and\\_voter\\_integrity\\_in\\_georgia](https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia).

<sup>93</sup> W. VA. SEC’Y OF STATE, *Eligibility for Absentee Voting in West Virginia* (Apr. 1, 2020),

<https://sos.wv.gov/FormSearch/Elections/Informational/Absentee%20Voting%20Eligibility%20Summary.pdf>.

<sup>94</sup> N.H. SEC’Y OF STATE, *Memorandum Re Elections Operations During the State of Emergency* (Apr. 10, 2020), [https://www.nhpr.org/sites/nhpr/files/202004/covid-19\\_elections\\_guidance.pdf](https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf).

<sup>95</sup> VA. OFF. OF GOVERNOR, *Executive Order 59* (Apr. 24, 2020),

[https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-59-Postponing-May-5-2020-General-and-Special-Elections-to-May-19-2020-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-59-Postponing-May-5-2020-General-and-Special-Elections-to-May-19-2020-Due-to-Novel-Coronavirus-(COVID-19).pdf).

Governor Northam’s Executive Order survived a court challenge brought by plaintiffs who argued, among other things, that expanding vote by mail “usurped the role of the legislature.” *Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-00546-RDA-IDDT, at \*6 (E.D. Va. May 29, 2020). The court denied the case on laches grounds, and Virginia will have no-excuse absentee voting beginning July 1. *Id.* at 9–10.

<sup>96</sup> See *Va. Legislative Information System, 2020 Session*, Va. Acts § 24.2-700.

<sup>97</sup> DEL. OFF. OF GOVERNOR, *Sixth Modification to State of Emergency* (Mar. 24, 2020),

<https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>.

<sup>98</sup> *Mo. State Conf. of the NAACP v. State*, No. 20AC-CC00169 (Mo. 19th Cir. Ct. May 19, 2020), *appeal docketed*, No. SC98536 (Mo. May 20, 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. filed May 1, 2020); *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020); see also *Lewis v. Hughs*, No. 20-0394 (Tex. Sup. Ct. May 27, 2020); *Bailey v. Andino*, No. 27975 (S.C. Sup. Ct. May 27, 2020) (dismissing case because legislature passed Act No. 133, § 2A, 2020 S.C. Acts \_\_\_ allowing all eligible voters to cast absentee ballot).

<sup>99</sup> Compl., *State Conf. of NAACP v. Missouri*, (Cole Cty. Cir. Ct. Mo., filed Apr. 17, 2020); Compl., *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. filed May 1, 2020);

states' absentee statutes to all voters in upcoming state, local, and the November general elections, either by construing existing statutory language to cover the pandemic situation or seeking a "no excuse" vote-by-mail option under a constitutional right to vote theory.<sup>100</sup> The Missouri Supreme Court has granted relief.<sup>101</sup> In Tennessee, the Court denied plaintiff's claim regarding signature verification but the case remains pending with regard to the first time voter restriction.<sup>102</sup> In Kentucky, the plaintiffs agreed to the dismissal of the lawsuit after the State agreed to change election procedures to address plaintiff's concerns.<sup>103</sup>

As many experts and advocates have recognized, voting by mail is not a solution for all voters. Not only is it necessary to expand absentee voting, but it also must be done in a fair and equitable manner. I will now discuss additional reforms to create equitable vote-by-mail systems that work for everyone during the pandemic.

### ***c. Complexity of Multi-Step Vote by Mail Process***

In many states, absentee voting is a complex, multi-step process. Voters shoulder the burden of requesting absentee ballots (most states require that voters make the request in writing), procuring postage to mail absentee requests, waiting to receive the ballot in the mail, voting the ballot, and mailing it back to boards of elections.

Ohio serves as an example. Even though Ohio has no-excuse vote by mail (*i.e.*, anyone can vote by mail), the multi-step process of voting by mail begins with a written request for an absentee ballot.<sup>104</sup> While the Secretary's website has online absentee ballot applications, the law makes clear that the application has to be in writing, ruling out submissions by email or phone. Unless the voter owns a printer, the only way a voter can obtain an absentee ballot application is to request one from his or her board or visit local libraries or print shops to print out an application. During the primary election, this request process presented challenges to many voters, particularly low-income voters, who lack access to printers, postage, or envelopes.<sup>105</sup> When Ohio cancelled its March 17th primary election and transitioned to vote-by-mail-only and moved the election to April 28th, voters could not navigate

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Compl., *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020).

<sup>100</sup> *See id.*

<sup>101</sup> *State Conf. of NAACP v. Missouri*, No. SC98536 (Mo. 2020).

<sup>102</sup> *Memphis A. Phillip Randolph v. Hargett*, No. 3:20-CV-00374, 2020 WL 5095459 (M.D. Tenn. August 28, 2020).

<sup>103</sup> *Collins v. Adams*, No. 3:20-cv-00375-CRS (W.D. Ky. August 27, 2020); State of Emergency Relating to Kentucky Elections, Ex. Order 2020-688 (Aug. 14, 2020), <https://www.sos.ky.gov/elections/Documents/2020GeneralElection/EO-GeneralElection.pdf>.

<sup>104</sup> OHIO REV. CODE § 3509.03.

<sup>105</sup> *See, e.g., Pls.' Mot. TRO*, 6–8, *League of Women Voters Ohio v. LaRose*, No. 2:20-cv-01638-MHW-EPD (E.D. Ohio Mar. 31, 2020), ECF No. 4.

the complex multi-step absentee voting process in time to get their voted ballots back to their election boards.<sup>106</sup> The turnout statistics comparing the 2016 primary and the 2020 primaries are telling. While the number of registered voters went up by 2.8% from 2016 to 2020, voter turnout decreased from 43.7% in 2016 to 23.6% in 2020.<sup>107</sup>

Absentee ballot procedures must be eased to permit election officials to mail absentee ballots to all registered voters, not just those on permanent absentee lists. While states should ideally send out ballots to all registered voters, if they do require applications or requests, voters should be offered more options for requesting absentee ballots. This includes requesting absentee ballots online, by email, or by phone, if the state requires voters to request a ballot. States must provide pre-paid postage for all election-related mailings including absentee ballot requests.

#### ***d. Burdensome Notary and Witness Requirements***

Too many states require absentee voters to notarize their voted ballots or sign their ballots in the presence of one or two witnesses above eighteen years.<sup>108</sup> During the pandemic, notaries' offices have been closed, making it difficult for voters in those states to vote by mail. In addition, given social distancing guidelines, many voters could not find witnesses without risking their health or the health of loved ones.

In response to the pandemic, civil rights groups have challenged notary and witness requirements in Missouri, Virginia, South Carolina, Louisiana, and Alabama, among other states.<sup>109</sup> These lawsuits seek orders that require the

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<sup>106</sup> *Id.* at 15–18.

<sup>107</sup> OHIO SEC'Y OF STATE, *Voter Turnout in Primary Elections (Even)*, <https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-primary-elections-even/> (last visited June 1, 2020); OHIO SEC'Y OF STATE, *2016 Primary Elections Results: Voter Turnout by County*, <https://www.ohiosos.gov/elections/election-results-and-data/2016-official-elections-results/> (last visited June 1, 2020). OHIO SEC'Y OF STATE, *2020 Elections Results: Voter Turnout by County*, <https://www.sos.state.oh.us/elections/election-results-and-data/2020/> (last visited June 1, 2020).

<sup>108</sup> See, e.g., ALA. CODE § 17-9-30(b) (ballot signed by two witnesses or notarized); ALASKA STAT. § 15.20.203 (ballot signed by witness); MISS. CODE ANN. § 23-15-641 (application and ballot notarized); MO. REV. STAT. § 115.279 (ballot notarized); MINN. STAT. § 203B.121 (ballot certification notarized or signed by witness who is Minnesota registered voter); N.C. GEN. STAT. § 163A-1310 (ballot signed by two witnesses or notarized); OKLA. STAT. ANN. TIT. 26, § 14-107 (ballot notarized); R.I. GEN. LAWS § 17-20-23 (ballot signed by two witnesses or notarized); S.D. CODIFIED LAWS § 12-19-10 (application oath notarized, public officer, or voter ID); S.C. CODE § 7-15-220 (ballot signed by witness). Note, this list is not exhaustive.

<sup>109</sup> See, e.g., *Compl., O'Neill v. Hosemann*, No. 3:18-cv-00815 (S.D. Miss. Filed Nov. 21, 2018); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020); *Compl., Power Coal. v. Edwards*, No. 3:20-cv-00283-BAJ-EWD (M.D. La. May 7, 2020); *Compl.*,



respective states to lift notary and witness restrictions for reasons above. Virginia has entered into a partial settlement agreeing to lift the restriction.<sup>110</sup> A federal judge in South Carolina ruled the witness requirement a burden on voters' fundamental right to vote in the primary election.<sup>111</sup> The other cases are pending.

During the pandemic, witness and notary requirements must be lifted so absentee voters are not disenfranchised.

### ***e. Discrepancies in Signature Matching***

Signature matching is another method that states use to verify the identities of absentee voters. Signature matching, however, is fraught with errors.<sup>112</sup> These procedures give elections officials unfettered discretion to reject ballots with signature discrepancies. Experts agree that signature matching is far from scientific. Factors such as age, physical and mental condition, disability, stress, accidental occurrences, inherent variances in neuromuscular coordination, and stance when the voter signs account for differences in signature.<sup>113</sup> Signature matching laws also disproportionately impact voters of color.<sup>114</sup>

During the 2018 primary election, one Georgia county (Gwinnett County) was responsible for 40% of the statewide rejections. Gwinnett County officials rejected 713 absentee ballot applications: 185 because of signature mismatch; 437 because required information was missing; 7 because the elector was found to be disqualified; and 84 because the elector chose to vote in person during early voting.<sup>115</sup> This became the basis for the Lawyers' Committee's successful legal challenge in *Martin v. Kemp*. In that case, a federal court ordered that county officials could not reject ballots because of perceived signature mismatches without providing voters pre-rejection notice and an opportunity to cure.<sup>116</sup>

Most states do not provide guidance, uniform standards, or training to election officials on how to go about matching signatures. The process, therefore, is ad hoc and discretionary, up to each individual county election official's judgment.

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*People First of Ala. v. Merrill*, No. 2:2020cv00619 (N.D. Ala. May 1, 2020).

<sup>110</sup> Consent Decree, 1–2, *League of Women Voters of Va.*, 2020 WL 2158249 (W.D. Va. May 5, 2020), ECF No. 35.

<sup>111</sup> *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020).

<sup>112</sup> *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 212 (D.N.H. 2018).

<sup>113</sup> *Saucedo*, 335 F. Supp. 3d at 217–18; *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at \*7 (N.D. Fla. Oct. 16, 2016); *La Follette v. Padilla*, 2018 WL 3953766, at \*1 (Cal. Super. Ct. Mar. 5, 2018).

<sup>114</sup> Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU FLA., 3, 22 (Sept. 19, 2018), [https://www.aclufl.org/sites/default/files/aclufl\\_-\\_vote\\_by\\_mail\\_-\\_report.pdf](https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf).

<sup>115</sup> Order Pls.' Prelim. Inj. Mot., 32 –33, *Martin v. Kemp*, No. 1:18-cv-04789-LMM (N.D. Ga. Oct. 24, 2018), ECF No. 28.

<sup>116</sup> *Id.*

Many states have adequate safeguards in place to verify a voter's identity including by requesting that the voter submit identification at the application and ballot stages, making signature matching redundant in some instances. More reliable verification procedures than signature matching should be used in this process; at a minimum, use of signature matching should be subject to uniform standards.<sup>117</sup>

#### ***f. Postal Service Performance***

A well-funded, efficient, and functioning postal service is a key ingredient for vote by mail. The U.S. Postal Service is currently underfunded and under-resourced, particularly given the additional challenges posed by delivering mail and packages during a pandemic.<sup>118</sup> This presents a major problem for absentee voters who may not be able to rely on the postal service. Voters of color, rural voters, senior citizens, and people with disabilities shoulder the burdens of a postal service that could have fiscal challenges maintaining existing routes through November, absent additional support from Congress.<sup>119</sup> This is why it is critical for Congress to provide the full \$89 billion in support requested by the Postal Service leadership, to ensure that this vital government service continues in its present form past the end of September.<sup>120</sup>

#### ***g. Lack of Access to Language Assistance***

Language access and literacy issues can compound these problems since a ballot mailed to a voter in a language he or she cannot speak or read is effectively useless. Jurisdictions that are required to provide language assistance under

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<sup>117</sup> Michigan's Secretary of State issued guidance on uniform standards for signature matching procedures for absentee applications and ballots as a result of a legal challenge—states can use this guidance as a blueprint for creating uniform standards. *See Priorities USA v. Benson*, 2020 WL 1433852 (E.D. Mich. Mar. 24, 2020). Secretary Benson instructs clerks to presume that the signature is valid, and a voter's signature is only considered questionable "if it differs in multiple, significant and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter whenever possible." *See* Bill Theobald, *Democrats Win Another Voting Victory in a Swing State*, THE FULCRUM (Apr. 22, 2020), <https://thefulcrum.us/voting/democrats-win-another-voting-victory-in-a-swing-state>.

<sup>118</sup> Tonya Mosley & Samantha Raphelson, *U.S. Postal Service Stands to Suffer Huge Losses From Coronavirus Pandemic*, WBUR (Apr. 21, 2020), <https://www.wbur.org/hereandnow/2020/04/21/us-postal-service-losing-money>; Allison Pecorin, *Postal Service Says It's Going Broke Due To Pandemic, Trump Flatly Opposes Emergency Aid*, ABC (Apr. 13, 2020), <https://abcnews.go.com/Politics/postal-service-broke-due-pandemic-trump-flatly-opposes/story?id=70119153>.

<sup>119</sup> Nicholas Fandos & Jom Tankersley, *Coronavirus is Threatening One of Government's Steadiest Services: The Mail*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html?action=click&module=RelatedLinks&pgtype=Article>.

<sup>120</sup> LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS, *Congress Must Provide Robust Funding for the United States Postal Service* (May 6, 2020), [https://civilrights.org/resource/congress-must-provide-robust-funding-for-the-united-states-postal-service/#\\_ftn13](https://civilrights.org/resource/congress-must-provide-robust-funding-for-the-united-states-postal-service/#_ftn13).



Section 203 of the Voting Rights Act must ensure that any vote-by-mail system provides effective language assistance at every stage of the voting process.<sup>121</sup> Voters with limited English proficiency may think English-only election materials that are mailed to them are junk mail and discard them, or it could take additional time to receive translation assistance from family members.<sup>122</sup> These voters may not be familiar with voting by mail and not know how to obtain absentee ballot applications. Voters may not be able to navigate the Internet or may not have computers or Internet connections to download applications.<sup>123</sup>

For Georgia’s June 9th primary election, Gwinnett County, Georgia did not mail applications in Spanish, despite the county being covered by Section 203 of the Voting Rights Act. An analysis of absentee ballot requests conducted with data current through May 4, 2020 revealed that Hispanic voters accounted for only 3% of active registrants who successfully requested a mail ballot, despite making up 9% of registered voters.<sup>124</sup> By comparison, white voters accounted for 65.7% of active registrants who successfully requested a mail ballot, despite making up 40.5% of active registered voters.<sup>125</sup> Moreover, the return rate of those ballots for Hispanic voters was only 3.2%, whereas for white voters the rate was 15.2%, nearly five times greater.<sup>126</sup> This is not a problem limited to a small subset of voters. There are 10,933,043 U.S. citizens (comprising 4.8% of all U.S. citizens) who speak English less than “very well.”<sup>127</sup>

Jurisdictions should not be permitted to ignore or circumvent Section 203 of the Voting Rights Act; they must ensure that counties properly translate vote-by-mail ballots so language minorities can fill out ballots in their native languages.

### ***h. Difficulties Returning Ballots***

Many states require that voters return their absentee ballots either by mail or in person to boards of elections—and a handful allow voters to drop off their ballots at drop boxes.<sup>128</sup> Delays in postal service delivery due to inadequate funding

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<sup>121</sup> 52 U.S.C. § 10503; 28 C.F.R. § 55.2(b).

<sup>122</sup> Pl.’s Mot. for Prelim. Inj., 6–7, *Ga. Ass’n of Latino Elected Officials v. Gwinnett Cty. Bd. of Registration and Elections*, No. 1:20-cv-01587 (N.D. Ga. filed Apr. 20, 2020), ECF No. 17-1.

<sup>123</sup> *Id.* at 7–8.

<sup>124</sup> Decl. Michael McDonald, 4, *Ga. Ass’n of Latino Elected Officials v. Gwinnett Cty. Bd. of Registration and Elections*, No. 1:20-cv-01587 (N.D. Ga. filed May 4, 2020), ECF No. 30-1.

<sup>125</sup> *Id.* at 4–5.

<sup>126</sup> *Id.* at 5.

<sup>127</sup> U.S. CENSUS BUREAU, *Table S1601. Language Spoken at Home.*” Data Set: 2018 ACS 5-Year Estimates. Available at:

<https://data.census.gov/cedsci/table?t=Language%20Spoken%20at%20Home&tid=ACSSST5Y2018.S1601&hidePreview=false> (accessed June 1, 2010).

<sup>128</sup> NAT’L CONF. OF STATE LEGISLATURES, “Returning a Voted Absentee Ballot” in *Voting Outside the Polling Place: Absentee All Mail and Other Voting at Home Options* (May 19, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#permit>.

can lead to delays in delivering absentee ballots. The in-person option is also limited if voters have to travel to their boards of election to drop off completed ballots. For Native American voters who live on reservations, they often cannot rely on the postal service or live too far from their county commissions to return absentee ballots in person.<sup>129</sup>

More options must be provided: secure ballot drop boxes or repositories in rural areas and on reservations. Voters can drop off their ballots in these boxes before the deadline to receive voted ballots. This would, to some extent, alleviate transportation-related issues.

Additionally, some states impose unnecessary limitations on who can collect and deliver a ballot for a person, and on how many ballots a person can collect and deliver.<sup>130</sup> Georgia's law is narrow. It permits a family member or a person who resides in the same household as a disabled voter to personally return the voter's ballot to the county elections board.<sup>131</sup> Alabama does not allow anyone other than the voter to return his or her own absentee ballot by mail or in-person delivery at their respective boards of elections.<sup>132</sup>

In the pandemic, there are many people who are house-bound and may not have a family member readily available to undertake the task of collecting and delivering the voter's ballot. Or a household may have several family members who rely on a single friend or relative to undertake such tasks. Limitations on the collecting and delivering of ballots should be reasonable, such as not restricting the task to family members, and not limiting the number of ballots that can be collected and delivered too restrictively.

### ***i. Criminal Penalties Associated with Vote by Mail Education***

Some states place criminal penalties on voter engagement activities. Tennessee makes it a Class A misdemeanor for anyone other than members of election commissions to distribute unsolicited absentee ballot requests to voters.<sup>133</sup> As part of voter education campaigns among communities that have never before voted by mail, civic organizations would pass out absentee applications, share the link to the online application form on their websites, or help community members write their own requests.

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<sup>129</sup> NATIVE AM. RIGHTS FUND, *Vote by Mail in Native American Communities*, <https://www.narf.org/vote-by-mail/> (last visited June 2, 2020).

<sup>130</sup> NAT'L CONF. OF STATE LEGISLATURES, *Who Can Collect and Return an Absentee Ballot Other than the Voter* (Apr. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-10-who-can-collect-and-return-an-absentee-ballot-other-than-the-voter.aspx>.

<sup>131</sup> GA. CODE ANN. § 21-2-385.

<sup>132</sup> ALA. CODE § 17-11-9.

<sup>133</sup> TENN. CODE ANN. § 2-6-204(c)(4).

Tennessee's provision violates the First Amendment right to free speech and expression. The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits an abridgment of the freedom of speech. This statute restricts core political speech and expressive conduct by criminalizing the simple act of providing to a voter an unsolicited absentee ballot request. The Lawyers' Committee and its partners have challenged this provision, among others, in federal court. The lawsuit is pending.<sup>134</sup>

States should not be permitted to criminalize voter education and engagement around absentee ballots, especially during a pandemic when more voters will vote by mail.

### **3. Safe In-Person Voting Options**

Most Americans vote in-person. Indeed, for some communities, voting by mail is not a viable option.

For example, vote by mail presents hurdles for Native American voters living on tribal lands, where they do not have mail delivery or pick-up at their homes. Because of the lack of traditional addresses, reservation residents may not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail. The Navajo Nation, the largest reservation in the United States does not have an addressing program, and most people live in remote communities.<sup>135</sup> Thus, it is essential to provide not only the broadest possible vote-by-mail options during the pandemic, but also an expansion of safe, in-person options.

State and local officials must make any necessary modifications to polling place site locations and administration to ensure that open polling places have adequate sanitary supplies to prevent transmitting the virus. During the cancelled March 17th Ohio primaries, there were numerous problems getting poll workers gloves, masks, sanitizer, and wipes due to supply shortages.<sup>136</sup> This failure to

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<sup>134</sup> *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. filed May 1, 2020).

<sup>135</sup> See generally, THE NATIVE AM. VOTING RIGHTS COAL., *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* (Jan. 2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf> (discussing the barriers to voting including lack of access to mail service, lower trust in voting by mail, and non-traditional addresses).

<sup>136</sup> Rick Rouan, *Is It Enough? Gloves, Wipes, Finger Sleeves Issued to Franklin County Poll Workers*, COLUMBUS DISPATCH (Mar. 16, 2020), <https://www.dispatch.com/news/20200316/is-it-enough-gloves-wipes-finger-sleeves-issued-to-franklin-county-poll-workers>; Scott Wartman, *Ohio Gov. Mike DeWine: 75 Polling Places to Move Due to Coronavirus*, CINCINNATI ENQUIRER (Mar. 9, 2020), <https://www.cincinnati.com/story/news/politics/2020/03/09/election-workers-responding-coronavirus-concerns/5000924002/>; Seth A. Richardson, *County Boards of Elections Sending Hand Sanitizer*,

provide appropriate protective supplies and cleaning products increased the risk of transmission for both voters and poll workers.

States should follow guidance issued by the CDC, which advises sick poll workers to stay home, regular cleaning of high touch surfaces, disinfecting potentially contaminated surfaces, such as voting machines and other equipment, and frequent hand washing and sanitizing.<sup>137</sup> States should reconfigure polling places to adhere to “social distancing” protocols, creating more space between voting booths, poll workers, and voters standing in line.

### ***a. Polling Place Adjustments and Impacts on People of Color***

Last-minute polling place consolidations and closures disproportionately impact African American and other voters of color, especially during the pandemic. Wisconsin serves as a prime example. April 7th marked the height of the public health crisis in Wisconsin—African Americans made up almost 50% of Milwaukee County’s COVID-19 cases, and 81% of COVID-19 deaths.<sup>138</sup>

Days before the April 7th Wisconsin primary election, the Milwaukee Election Commission decreased the number of polling locations from 180 to five, citing public health concerns.<sup>139</sup> In contrast, Madison had sixty-six polling locations open. Sixty-one percent of Milwaukee’s voters are African American and 30% are Hispanic.<sup>140</sup> The poll closures in Milwaukee, thus, impacted mostly African American and Hispanic voters. These voters had no choice but to risk their lives by voting in person or not voting at all. Officials did not provide any other viable alternatives for voting. Voters who went to the polls to vote on Election Day experienced long lines, delays, and high risk of exposure to the virus.

On April 2nd, a federal district judge extended the deadline to receive absentee ballots to six days after Election Day (4 p.m. on April 13), extended the deadline for boards to receive absentee ballot requests until April 3, and lifted the requirement that voters provide a witness affirmation or statement.<sup>141</sup> The Seventh

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*Disinfectant Wipes to Polling Locations as Coronavirus Precaution*, CLEVELAND PLAIN DEALER (Mar. 5, 2020), <https://www.cleveland.com/open/2020/03/county-boards-of-elections-sending-hand-sanitizer-disinfectant-wipes-to-polling-locations-as-coronavirus-precaution.html>.

<sup>137</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *Recommendations for Election Polling Locations*, (Mar. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

<sup>138</sup> Shruti Banerjee & Dr. Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, DEMOS (May 14, 2020), <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>.

<sup>139</sup> Mary Spicuzza & Alison Derr, *Why Did Wisconsin Have Just 5 Polling Places? Alderman Wants Answers*, MILWAUKEE J. SENTINEL (Apr. 10, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/10/coronavirus-milwaukee-aldermen-want-answers-polling-places-primary-election/5127577002/>.

<sup>140</sup> Banerjee & Gall, *supra* note 138.

<sup>141</sup> Mot. Prelim. Inj., 4, *Democratic Nat’l Comm. v. Bostelmann.*, No. 3:20-cv-00249-wmc, (W.D. Wis.

Circuit Court of Appeals granted a partial stay reversing the lower court’s decision to overturn the witness verification on absentee ballots.<sup>142</sup> The United States Supreme Court, in a 5-4 decision, overruled the district court’s ruling, holding that last-minute changes to Wisconsin’s election administration would be disruptive and instead instituted an Election Day (April 7th) postmark deadline for absentee ballots, while retaining the lower court’s receipt deadline of April 13th.<sup>143</sup> The dissent pointed out that the majority’s decision stood to disenfranchise thousands of voters who could not vote in person on Election Day because of reasonable health risks. Justice Ginsburg wrote, “Either they will have to brave the polls, endangering their own and others’ safety. . . . Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin’s citizens, the integrity of the state’s election process, and in this most extraordinary time, the health of the nation.”<sup>144</sup>

Wisconsin’s primary election fiasco illustrated how unprepared election officials were to conduct an inclusive election during the pandemic.<sup>145</sup> Polling place consolidations caused long lines, the entire city of Milwaukee only operated five polling locations, and many voters did not receive absentee ballots before the Election Day deadline.<sup>146</sup> Wisconsin health officials have *directly traced* at least seventy-one confirmed cases of COVID-19 to in-person voting that occurred during the April 7, 2020 election and a University of Wisconsin and Ball State University study found a “statistically and economically significant association” between in-person voting the spread of COVID-19 after the election.<sup>147</sup> The poll consolidations disproportionately impacted voters of color, with a study finding average voter turnout in African American and Hispanic wards in Milwaukee at only 18% compared to white wards, which had an average voter turnout of 49%.<sup>148</sup> Overall turnout in Wisconsin’s 2020 presidential primary, dropped significantly from 2016, falling from 47% to 34%, though it was up from 26% in 2012 and about the same in

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Apr. 2, 2020).

<sup>142</sup> Stay Pending Appeal, 4, *Democratic Nat’l Comm. v. Wis. State Legis.*, No. 20-1539, (7th Cir. Apr. 3, 2020).

<sup>143</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206–07 (2020).

<sup>144</sup> *Id.* at 1211 (Ginsburg, J., dissenting).

<sup>145</sup> Outside of the litigation, on April 6, Governor Evers issued an executive order moving the election to June 9. Republicans in the state legislature characterized the order as “constitutional overreach” and challenged it in state court. They also asked the Supreme Court to block the District Court order extending the deadline for absentee ballots. The legislators asserted that the extension fundamentally altered the nature of the election.

<sup>146</sup> *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>.

<sup>147</sup> Chad D. Cotti et al., *The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on Evidence from the Wisconsin Primary*, NAT’L BUREAU OF ECONOMIC RESEARCH (May 2020), <https://www.nber.org/papers/w27187.pdf>.

<sup>148</sup> Shruti Banerjee & Dr. Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, DÉMOS (May 14, 2020), <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>.



2008 at 35%.<sup>149</sup> However, unlike past years, interest in this election was likely buoyed by a competitive Wisconsin Supreme Court election and a huge spike in absentee ballot voting, up to 71% from 14% in April 2019.<sup>150</sup>

### **b. Early In-Person Voting**

One of the most sensible steps to take to reconcile the tension between ensuring voters' health and allowing them to exercise their right to vote is to expand the days and hours of early in-person voting. In essence, expanding early voting opportunities serves to "flatten the curve," by spreading out the number of voters over a longer period of time, thus reducing the need for poll workers at any given time, reducing the number of people that poll workers and voters will have contact with, facilitating social distancing, and ultimately reducing the number of in-person voters on Election Day.

In addition, more African Americans tend to take advantage of early in-person voting opportunities as compared to white voters.<sup>151</sup> In the North Carolina 2016 primary election, 33.8% African American voters voted early in-person as compared to 27.7% white voters. That trend continued in the 2018 primary election with 33.1% African American voters and 28.2% white voters voting early in-person. In the 2020 primaries, 35.7% African American voters voted early in-person as compared to 35.2% white voters.<sup>152</sup> Because of the COVID-19 pandemic, more voters, regardless of race, voted early in-person in the 2020 primary election as compared to the 2016 primary election.<sup>153</sup>

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<sup>149</sup> Miles Parks, *In The End, The Voters Responded': Surprising Takeaways from Wisconsin's Election*, NAT'L PUB. RADIO (Apr. 15, 2020), <https://www.npr.org/2020/04/15/834037566/in-the-end-the-voters-responded-surprising-takeaways-from-wisconsin-s-election>.

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., Russell Weaver & Sonia Gill, *Early Voting Patterns by Race in Cuyahoga County, Ohio: A Statistical Analysis of the 2008 General Election*, Voting Rights Research Br., LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, 2, 6 (Oct. 2012), [http://www.acluohio.org/wp-content/uploads/2014/08/NAACP.V.Husted-MPIEx8-2014\\_0630.pdf](http://www.acluohio.org/wp-content/uploads/2014/08/NAACP.V.Husted-MPIEx8-2014_0630.pdf) (data showed census tracts with heavier African American populations voted early in-person. Report concluded that cutting early in-person voting would disproportionately impact African American voters); Paul Gronke Am. Decl., pp. 3–6, ¶¶ 6–11; pp. 9–11 ¶¶ 18–26 in *Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011) (concluding Florida's omnibus election administration changes truncating early voting period, among other things, violated Section 5 of the Voting Rights Act with discriminatory effect on minority voters); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–37 (4th Cir. 2016) (noting new election administration provisions reducing the number of early voting would disproportionately impact African American voters, increase traffic on Election Day, and increase long lines on Election Day).

<sup>152</sup> These figures were compiled from North Carolina's publicly available statewide voter history file ([https://s3.amazonaws.com/dl.ncsbe.gov/data/ncvhis\\_Statewide.zip](https://s3.amazonaws.com/dl.ncsbe.gov/data/ncvhis_Statewide.zip)) and statewide voter file ([https://s3.amazonaws.com/dl.ncsbe.gov/data/ncvoter\\_Statewide.zip](https://s3.amazonaws.com/dl.ncsbe.gov/data/ncvoter_Statewide.zip)).

<sup>153</sup> AP Staff, *Early In-Person Voting in NC Exceeds Primary 4 Years Ago*, A.P. (Mar. 2, 2020), <https://apnews.com/10b3399d722456ad12848849b76a0157>.

Congress should mandate that all states provide at least two full weeks of early in-person voting in federal elections during the pandemic, until a vaccine is widely available and accessible to all people in the country.<sup>154</sup>

## **VI. Cost of Necessary Elections Measures**

During this uniquely challenging time, states simply lack sufficient resources to run elections without additional federal support. State and county budgets are hemorrhaging due to the many unexpected expenses of addressing the economic and health care crises presented by the pandemic, and they are in dire need of federal assistance to supplement their own spending efforts. When Congress appropriated the \$400 million to states in March in the CARES Act, all fifty states applied for grants, demonstrating the tremendous need for the federal government to help states help themselves. A recent report from the Alliance for Securing Democracy, the Brennan Center for Justice, R Street Institute, and the University of Pittsburgh Institute for Cyber Law, Policy, and Security found that federal funding covers just ten to twenty percent of what is needed to provide vital election safeguards during the pandemic.<sup>155</sup>

The 2020 primary elections and upcoming general election present states and local election administrators with significant tasks. Officials must simultaneously build the infrastructure and staffing levels to expand safe, in-person voting and also expand vote-by-mail systems. They are faced with surging turnout and surging requests for absentee ballots. Budgets are stretched thin. CARES Act funding was minimal and is now depleted. In order to properly prepare for the November elections, Congress must allocate at least an additional \$3.6 billion needed to supplement the \$400 million in funding previously allocated in the CARES Act.<sup>156</sup>

This funding should be allocated without the requirement that states provide a percentage match. Such a requirement would prevent many states that are most affected by COVID-19 from accessing federal support, because they simply do not have the money in their budgets during a recession, with record unemployment rates, rapidly falling state revenues, and increased strain on public and government services and resources.

The Brennan Center for Justice (“Brennan Center”) has estimated that enhancements to vote-by-mail systems alone will require up to \$1.4 billion to meet

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<sup>154</sup> LEADERSHIP CONF. CIVIL AND HUMAN RIGHTS, *Letter to Congress Urging Additional Funding for Elections Assistance in Response to COVID-19* (Apr. 13, 2020), <https://civilrights.org/resource/letter-to-congress-urging-additional-funding-for-election-assistance-in-response-to-covid-19-2/>.

<sup>155</sup> C. Deluzio *et al.*, *Ensuring Safe Elections* (April 30, 2020) at 1.

<sup>156</sup> See LEADERSHIP CONF. CIVIL AND HUMAN RIGHTS, *Letter to Congress Urging Additional Funding for Elections Assistance in Response to COVID-19* (Apr. 13, 2020), <https://civilrights.org/resource/letter-to-congress-urging-additional-funding-for-election-assistance-in-response-to-covid-19-2/>.



the costs in the general election. The costs estimated are for ballot printing, postage, drop boxes, electronic absentee ballot requests, ballot tracking, staffing for processing more mailed-in ballots, enhanced technology for signature verification, high-volume mail processing, and high-speed ballot scanners.<sup>157</sup>

The Brennan Center has also estimated costs for in-person voting measures in the general election. These measures—safe polling places per public health guidance, adequate polling place staffing, and voting wait-time tools (to ensure social distancing and avoid clustering during an early-voting period)—will amount to \$271.4 million. The Brennan Center estimates that \$252.1 million is needed in the general election for voter education, and \$85.9 million is needed to develop and bolster online voter registration for the general election.<sup>158</sup> However, these solely reflect costs for the general election. The Voting Rights Task Force of the Leadership Conference on Civil and Human Rights, co-chaired by the Lawyers’ Committee, estimates that state and local governments need at least twice this amount in funding to administer remaining primaries and begin preparations for the general election—\$3.6 billion, in addition to the \$400 million already allocated.

There is strong bipartisan support from state and local officials for additional federal funds to be used in preparation for coming elections. This is illustrated by a recent hearing of the U.S. Election Assistance Commission, as well as in submitted letters and statements. A key consensus point in the statements by election officials is that they have used the majority of CARES Act funding—and additional funds are needed for this year’s remaining elections.<sup>159</sup> Election officials also stress the spike in use of mail ballots, the anticipated record high turnouts, and the additional pandemic related expenditures, such as for PPE, and for public education.<sup>160</sup>

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<sup>157</sup> Lawrence Norden et al., *Estimated Costs of COVID-19 Election Resiliency Measures*, BRENNAN CTR. (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>.

<sup>158</sup> *Id.*

<sup>159</sup> Election Assistance Commission, *Public Hearing: U.S. Election Assistance Commission: Lessons Learned From The 2020 Primary Elections*, (Jul. 8, 2020), <https://www.eac.gov/events/2020/07/08/public-hearing-us-election-assistance-commission-lessons-learned-2020-primary>. It should also be noted that many election offices make payments to vendors at the end of the year, so what they have on hand now may not be conclusive.

<sup>160</sup> Paul Pate (R-IA), Iowa Secretary of State (Jul. 8, 2020), <https://www.eac.gov/events/2020/07/08/public-hearing-us-election-assistance-commission-lessons-learned-2020-primary> (1:16:49-1:17:54); Jared Dearing (D), Executive Director, Kentucky State Board of Elections (Jul. 8, 2020), <https://www.eac.gov/events/2020/07/08/public-hearing-us-election-assistance-commission-lessons-learned-2020-primary> (1:17:54-1:19:15); Lynn Bailey, Executive Director, Board of Elections in Richmond County, Georgia (Jul. 8, 2020), <https://www.eac.gov/events/2020/07/08/public-hearing-us-election-assistance-commission-lessons-learned-2020-primary> (1:19:24-1: 21:24); Dianna Moorman, Director of Elections, James City County, Virginia Voter Registration and Elections (Jul. 8, 2020); <https://www.eac.gov/events/2020/07/08/public-hearing-us-election-assistance-commission-lessons-learned-2020-primary> (1:23:50-1:27:00); Georgia Association of Voter Registrar’s and Election

## VII. Conclusion

As a nation, we are facing one of the greatest challenges to our democracy in the midst of a global pandemic and recession that is disproportionately impacting African Americans and other people of color. There are few moments in our history where our democracy has been in more peril, and when the stakes for participation for people have been as high. Congress should provide \$3.6 billion in additional funding for state and local elections this year, which is a lifeline for our democracy and vital to protecting public health as COVID-19 continues to ravage communities across the nation. Protecting our democracy also requires certain minimal standards for voters, including at least two weeks of early voting and modernized, no excuse absentee voting by mail as described throughout this testimony, as well as restoration of the postal service. This is absolutely critical to ensure equal access to the ballot for African Americans and other people of color, as well as to ensure the safe and efficient administration of state, local, and the General Election in November. Thank you for your leadership in safeguarding our most fundamental right—the right to vote.

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Officials (Jul. 2, 2020), [https://www.brennancenter.org/sites/default/files/2020-07/Letter from the Georgia Association of Voter Registrars and Election Officials.pdf](https://www.brennancenter.org/sites/default/files/2020-07/Letter%20from%20the%20Georgia%20Association%20of%20Voter%20Registrars%20and%20Election%20Officials.pdf); Bryan K. Barnett (R-MI), Mayor, Rochester Hills, Michigan & President, United States Conference of Mayors (Jun. 15, 2020); Bryan K. Barnett, *Congress: Don't let safe elections fall victim to COVID-19*, HILL (Jun. 15, 2020), <https://thehill.com/opinion/campaign/502735-congress-dont-let-safe-elections-fall-victim-to-covid-19>; Bipartisan Election Officials Funding Letter (Mar. 31, 2020; Last updated May 13, 2020), [https://docs.google.com/document/d/1pRLWoFqj5NXz05PqJjbXSnn3rmPPWPvtHqdW1KZ3\\_ck/mobilbasic?urp=gmail\\_link](https://docs.google.com/document/d/1pRLWoFqj5NXz05PqJjbXSnn3rmPPWPvtHqdW1KZ3_ck/mobilbasic?urp=gmail_link).