



**STATEMENT OF KRISTEN CLARKE
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**SENATE COMMITTEE ON RULES AND ADMINISTRATION
HEARING ON
"2020 GENERAL ELECTION PREPARATIONS"**

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I. Introduction

Chairman Blunt, Ranking Member Klobuchar, and Members of the Senate Committee on Rules and Administration, 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 2020 General Election Preparations to ensure that states hold safe and fair elections during the COVID-19 pandemic. This hearing is particularly timely as our nation mourns and honors the life and legacy of Congressman John Lewis who dedicated his life to protecting the rights of all voters.

Throughout my career, I have focused on strengthening our democracy by combating discrimination faced by African Americans and other marginalized communities. 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 a voter hotline (1-866-OUR-VOTE). Through Election Protection, we work with close to three-hundred 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.¹ 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 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 expenditures are necessary in addition to what was allocated 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 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

¹ 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).

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-19.² To date, COVID-19 has claimed more than 130,000 lives in the United States. The United States has at least 3.6 million confirmed COVID-19 cases.³ As states began opening over the past several weeks, coronavirus cases, and in turn, deaths, have increased.⁴

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,⁵ they account for nearly 23% of COVID-19 deaths. Forty-eight 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.⁶ For example, in Alabama, African Americans comprise 27% of the population, but account for nearly 45% of COVID-19 deaths.⁷ In Michigan, African Americans comprise about 14% of the population, but account for 41% of deaths.⁸ In Illinois, they account for 28% of deaths and only 14% of the population.⁹ 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.¹⁰ 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.¹¹

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

³ 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 July 18, 2020).

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

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

⁶ 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 July 18, 2020).

⁷ THE COVID TRACKING PROJECT, *Racial Data Dashboard*, <https://covidtracking.com/race/dashboard> (last visited July 18, 2020).

⁸ *Id.*

⁹ *Id.*

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

¹¹ 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>.

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.¹² Medical experts have called this the “Achilles’ heel” for public health strategies to control the pandemic.¹³ 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.¹⁴ In planning for elections this year, election officials have to 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.¹⁵ 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.

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

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

¹⁴ 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/>.

¹⁵ 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>.

So far, the 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. Failures such as the inability to meet the demand to vote or safely vote in person were caused by insufficient funding and failure to ensure options and procedures 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 officials¹⁶ 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 they are arguing in New York where 14% of ballots were rejected in 2018.¹⁷

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.

¹⁶ Nick Corasan, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, New York Times (April 9, 2020) <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>

¹⁷ 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.”

As a result, many of the problems in the recent 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.

During the April 7 Wisconsin primary, thousands of voters did not receive their absentee ballot on time or never received them.¹⁸ Local officials acknowledged these mistakes and being 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.¹⁹

During the June 9 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.²⁰

During the Pennsylvania June 2 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.²¹

These barriers to the vote were replicated in other states. Congress must act now to ensure that the problems voters encountered during the primaries do not contribute to a nationwide nightmare during the November general election. State and local election officials are now forewarned, but they are not yet forearmed with the resources and processes needed to confront the problems.

¹⁸ Nick Corasan, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, New York Times (April 9, 2020) <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>

¹⁹ Alison Dirr and Mary Spicuzza, *What we know so far about why Milwaukee only had 5 voting sites for Tuesday's election while Madison had 66*. (April 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/>

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

²¹ Ivey DeJesus, *In communities of color, Pa. primary was marred by irregularities, including voter intimidation, advocates say*, Pennsylvania 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>

A. 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 50 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 10 to 20 percent of what is needed to provide vital election safeguards during the pandemic.²²

Based on the reports to the Election Protection 866-OUR-VOTE hotline administered by Lawyers' Committee during the 2020 primary elections and an assessment of the future, I will discuss the funding and voting rights reforms that Congress must approve to ensure that all voters can exercise their fundamental right to vote while protecting their health. With November around the corner and experts predicting continuation of the pandemic in its current or resurgent form during the next several months, we must urgently prepare so that democracy will continue without disruption during this time of trial.

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.²³

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.

²² C. Deluzio *et al.* *Ensuring Safe Elections* (April 30, 2020) at 1.

²³ 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 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 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.²⁴

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.²⁵ 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—coming to a total of \$3.6 billion, counting the \$400 million already allocated.

1. Uses of the Funding

The Niskanen Center analyzed the requests for funding under the CARES Act and concluded that states need additional funding for the coming elections. Summarizing their findings regarding the most requested items, the Center said that “election officials across the country from both parties” sought to procure PPE to make in-person voting safe. States sought assistance in paying for more poll workers and facilities. They also wanted mailing, ballot and postage supplies, reflecting the bipartisan support in many states for absentee voting. States sought funds for “advertising and educational materials so that voters are informed of how they can vote while remaining safe.” The requests also sought aid to purchase voting machines and ballot scanners and tabulators.²⁶

Though a brief summary is only indicative of all that is required for smooth elections, it is worth adding that ballot supplies have to include such related items

²⁴ Lawrence Norden et al., *Estimated Costs of COVID-19 Election Resiliency Measures*, THE BRENNAN CTR. (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>.

²⁵ *Id.*

²⁶ Matthew La Corte, 47 States and Territories Requested PPE From the Federal Government to Protect Their Elections, Niskanen Center, June 4, 2020.

as printing equipment and online tools to request ballots. Tools are needed for online registration. Funds are also needed for secure ballot drop boxes and to arrange for drop off locations and polling places, including rentals.

2. Bipartisan Support for Funding from State and Local Officials

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 sample 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.²⁷ 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.²⁸

3. States Still Have Time to Put Funding to Good Use

Previous funding in the CARES Act only covers a fraction of what is needed. The priority items requested were needed months ago, but they are still necessary and funds can and will be put to use now and in the coming weeks. Ensuring sufficient numbers of poll workers, preparing for the expected surge in absentee

²⁷ <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.

²⁸ 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 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)

<https://thehill.com/opinion/campaign/502735-congress-dont-let-safe-elections-fall-victim-to-covid-19> 138 bipartisan election officials letter from 25 states (Mar. 31, 2020; Last updated May 13, 2020)

https://docs.google.com/document/d/1pRLWoFqj5NXz05PqJjbXSnn3rmPPWPvtHqdW1KZ3_ck/mobilbasic?urp=gmail_link

voting, and robust public education and other steps will be required and can be deployed virtually up to Election Day. Though, the sooner Congress acts, the better.

Taking a nationwide perspective, the National Association of State Election Directors, though it did not take a formal organizational position, commented that anecdotally “NASED has heard from states that they have already exhausted their CARES Act funding with their primary expenditures.” Many states are already experiencing budget cuts due to falling state revenues and “elections are chronically under resourced.”²⁹

The pandemic is impacting states and communities across the nation, and examples of their needs are readily available. In most instances, officials are planning expenditures for both vote-by-mail and in-person voting.

With respect to mail voting, additional funding will be used to cover costs associated with a spike in mail ballots: supplies, equipment, printing, postage, and staffing, including to verify, process and count ballots. Funding will also be used to provide safe in-person voting locations: to hire poll workers, to replace at-risk staff, and to invest in personal protective equipment, cleaning supplies, and resources for social distancing.³⁰ Officials also plan voter education campaigns to inform voters about their voting options.³¹

B. Need for Reforms

Turning to election reforms, we here address, 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.**³² Adequate funding and election reforms can provide solutions to

²⁹https://www.nass.org/sites/default/files/NASS%20Letters/7.8.20%20Joint%20NASS_NASED_Resp%20to%20Chair%20Thompson.pdf

³⁰ Michigan Association of Municipal Clerks (May 21, 2020)

<https://www.brennancenter.org/sites/default/files/2020-05/Michigan%20Federal%20Funding%20Letter.pdf>

Iowa State Association of County Auditors (May 11, 2020)

<https://www.brennancenter.org/sites/default/files/2020-05/Iowa%20Federal%20Funding%20for%20Elections%20Letter.pdf>

Missouri Association of County Clerks & Election Authorities (May 27, 2020)

<https://www.brennancenter.org/sites/default/files/2020-06/MACCEA%20Funding%20Support%20Letter.pdf>

Georgia Association of Voter Registrar’s and Election 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)

³¹ Iowa State Association of County Auditors (May 11, 2020)

<https://www.brennancenter.org/sites/default/files/202005/Iowa%20Federal%20Funding%20for%20Elections%20Letter.pdf>

³² HR 6800, 116th Cong. 2d Sess., the Heroes Act (passed the House May 15, 2020) includes

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 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 new voting district since the last election to register to vote. Because of the pandemic, motor vehicle facilities,³³ a prime location for voter registration under the “motor voter law,”³⁴ have been closed in many jurisdictions, making it difficult for new drivers—predominately younger people—to register to vote.³⁵ Many jurisdictions have also closed public assistance agencies, disability offices, and other government agencies that register voters.³⁶ 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.³⁷ Student voter registration drives often take place on college campuses, many of which are closed for the indefinite future.³⁸

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.

³³ See, e.g., Compl., *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020).

³⁴ National Voter Registration Act (“NVRA”), 52 U.S.C. § 20501 et seq. (1993).

³⁵ See, e.g., Ida Domingo, *DMV Remains Closed in Virginia, Once Open Appointments Will Be Required*, ABC 13 NEWS (May 11, 2020), <https://wset.com/news/coronavirus/dmv-remains-closed-until-further-notice-in-virginia-due-to-pandemic>.

³⁶ 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>.

³⁷ 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.

³⁸ See, e.g., Nicole Taylor, *Student Voter Engagement Handbook, Fair Elections Ctr. & Campus Vote Project*, 5 (Sept. 2018), 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

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.³⁹ 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.⁴⁰

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.⁴¹ 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 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,⁴² meaning that officials send a ballot in the mail and the

colleges).

³⁹ 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, 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>.

⁴⁰ George Pillsbury & Caroline Mak, *America Goes to the Polls 2018: Voter Turnout and Election Policy in the 50 States*, NONPROFIT VOTE & THE U.S. ELECTIONS PROJECT, 8 (Mar. 2019), <https://www.nonprofitvote.org/documents/2019/03/america-goes-polls-2018.pdf>.

⁴¹ *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/>.

⁴² 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

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.⁴³

At least sixteen states authorize local governments to opt into a predominantly vote-by-mail system;⁴⁴ allow all-mail absentee voting in local or special elections;⁴⁵ or permit certain jurisdictions to conduct elections by mail based on population size.⁴⁶ 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 in all except Missouri.⁴⁷

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.⁴⁸ The remaining roughly sixteen states require a qualified voter to provide a

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).

⁴³ 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.”).

⁴⁴ 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).

⁴⁵ 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 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. § 13-19-104 (same); WYO. STAT. ANN. § 22-29-115 (same).

⁴⁶ 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).

⁴⁷ 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>.

⁴⁸ *Id.*

statutorily authorized reason for requesting an absentee ballot.⁴⁹

Both Republican-led and Democratic-led states use mail voting to significant degrees. For example, in Montana, which has a Democratic Governor and Republican-led House and Senate, more than 73% votes cast in the November 2018 election were by absentee ballot. In Arizona, which has a Republican Governor and a Republican-led State Senate and House, approximately 80% of voters receive their ballots by mail. In California, which has a Democratic Governor and a Democratic-led State House and Senate, more than 70% of voters voted by mail in the March 2020 election.

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.⁵⁰ 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 19.⁵¹ 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 9.⁵² 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.⁵³

⁴⁹ *Id.*

⁵⁰ 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>.

⁵¹ GA. SEC'Y OF STATE, *Raffensperger Takes Unprecedented Steps to Protect Safety and Voter Integrity in Georgia* (Apr. 20, 2020), https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia.

⁵² 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>.

⁵³ 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.

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.⁵⁴ Earlier on April 11, 2020, Virginia’s General Assembly passed a bill permitting any registered voter to vote absentee without an excuse—beginning July 1, Virginia will have no excuse absentee voting.⁵⁵ 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.⁵⁶

Missouri, Tennessee, and Kentucky are the subject of lawsuits by national civil rights groups, including the Lawyers’ Committee.⁵⁷ These lawsuits seek expansions of the states’ excuse-only absentee voting laws during the COVID-19 crisis.⁵⁸ These lawsuits request the respective courts to order relief expanding the 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.⁵⁹

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 discuss additional reforms to create equitable vote-by-mail systems that work for everyone during the pandemic.

⁵⁴ 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.

⁵⁵ See *Va. Legislative Information System, 2020 Session*, Va. Acts § 24.2-700.

⁵⁶ 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>.

⁵⁷ *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).

⁵⁸ 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); Compl., *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020).

⁵⁹ See *id.*

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.⁶⁰ 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.⁶¹ When Ohio cancelled its March 17 primary election and transitioned to vote-by-mail-only and moved the election to April 28, voters could not navigate the complex multi-step absentee voting process in time to get their voted ballots back to their election boards.⁶² 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 2020.⁶³

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.

⁶⁰ Ohio Rev. Code § 3509.03.

⁶¹ *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.

⁶² *Id.* at 15–18.

⁶³ 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).

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.⁶⁴ 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.⁶⁵ These lawsuits seek orders that require the respective states to lift notary and witness restrictions for reasons above. Virginia has entered into a partial settlement agreeing to lift the restriction.⁶⁶ A federal judge in South Carolina ruled the witness requirement a burden on voters' fundamental right to vote in the primary election.⁶⁷ 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.⁶⁸ 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

⁶⁴ 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.

⁶⁵ 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., *People First of Ala. v. Merrill*, No. 2:2020cv00619 (N.D. Ala. May 1, 2020).

⁶⁶ Consent Decree, 1–2, *League of Women Voters of Va.* 2020 WL 2158249 (W.D. Va. May 5, 2020), ECF No. 35.

⁶⁷ *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020).

⁶⁸ *Saucedo v. Gardner*, 335 F. Supp. 3d 202,212 (D.N.H. 2018).

stance when the voter signs account for differences in signature.⁶⁹ Signature matching laws also disproportionately impact voters of color.⁷⁰

During the 2018 primary election, one Georgia county (Gwinnett County, Georgia) 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.⁷¹ This became the basis for the Lawyers' Committee's successful legal challenge in *Martin v. Kemp*, which resulted in a federal court order that county officials could not reject ballots because of perceived signature mismatches without providing voters pre-rejection notice and an opportunity to cure.⁷²

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. 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.⁷³

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

⁶⁹ *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)..

⁷⁰ 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.

⁷¹ 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.

⁷² *Id.*

⁷³ 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>.

packages during a pandemic.⁷⁴ 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.⁷⁵ 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.⁷⁶

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 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.⁷⁷ 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.⁷⁸ 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.⁷⁹

For Georgia's June 9, 2020 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

⁷⁴ 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 NEWS (Apr. 13, 2020), <https://abcnews.go.com/Politics/postal-service-broke-due-pandemic-trump-flatly-opposes/story?id=70119153>.

⁷⁵ Nicholas Fandos and Jom Tankersley, *Coronavirus Is Threatening One of Government's Steadiest Services: The Mail*, NY 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>.

⁷⁶ 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.

⁷⁷ 52 U.S.C. § 10503; 28 C.F.R. § 55.2(b).

⁷⁸ 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.

⁷⁹ *Id.* at 7–8.

registered voters.⁸⁰ 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.⁸¹ 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.⁸² 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.”⁸³

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.⁸⁴ Delays in postal service delivery due to inadequate funding 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.⁸⁵

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.⁸⁶ Georgia’s law is narrow. It permits a family member or a person who

⁸⁰ 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.

⁸¹ *Id.* at 4–5.

⁸² *Id.* at 5.

⁸³ “*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=ACST5Y2018.S1601&hidePreview=false>; Accessed June 1, 2010.

⁸⁴ 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>.

⁸⁵ NATIVE AM. RIGHTS FUND, *Vote by Mail in Native American Communities*, <https://www.narf.org/vote-by-mail/> (last visited June 2, 2020).

⁸⁶ 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>

resides in the same household as a disabled voter to personally return the voter's ballot to the county elections board.⁸⁷ 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.⁸⁸

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.⁸⁹ 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.

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.⁹⁰

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.

[can-collect-and-return-an-absentee-ballot-other-than-the-voter.aspx](#).

⁸⁷ Ga. Code Ann. § 21-2-385.

⁸⁸ Ala. Code § 17-11-9.

⁸⁹ Tenn. Code Ann. § 2-6-204(c)(4).

⁹⁰ *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. filed May 1, 2020).

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.⁹¹ 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 17 Ohio primaries, there were numerous problems getting poll workers gloves, masks, sanitizer, and wipes due to supply shortages.⁹² This failure to 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 Centers for Disease Control (“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.⁹³ States should reconfigure polling places to adhere to “social distancing” protocols, creating more space between voting booths, poll workers, and voters standing in line.

⁹¹ 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).

⁹² 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, 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>.

⁹³ 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>.

a. Polling Place Adjustments and Impacts on Racial Minorities

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 7 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.⁹⁴

Days before the April 7 Wisconsin primary election, the board of elders in Milwaukee decreased the number of polling locations from 180 to 5, citing public health concerns.⁹⁵ In contrast, Madison had 66 polling locations open. Sixty-one percent of Milwaukee’s voters are African American and 30% are Hispanic.⁹⁶ 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 2, 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.⁹⁷ The Seventh Circuit Court of Appeals granted a partial stay reversing the lower court’s decision to overturn the witness verification on absentee ballots.⁹⁸ 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 7) postmark deadline for absentee ballots, while retaining the lower court’s receipt deadline of April 13.⁹⁹ 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

⁹⁴ 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>.

⁹⁵ Mary Spicuzza & Alison Derr, *Why Did Wisconsin Have Just 5 Polling Places? Alderman Wants Answers*, MILWAUKEE J. SENTINEL (Apr. 10, 2020, 5:49 PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/10/coronavirus-milwaukee-aldermen-want-answers-polling-places-primary-election/5127577002/>.

⁹⁶ Banerjee & Gall, *supra* note 27.

⁹⁷ Mot. Prelim. Inj., 4, *Democratic Nat’l Comm. v. Bostelmann.*, No. 3:20-cv-00249-wmc, (W.D. Wis. Apr. 2, 2020).

⁹⁸ Stay Pending Appeal, 4, *Democratic Nat’l Comm. v. Wis. State Legis.*, No. 20-1539, (7th Cir. Apr. 3, 2020).

⁹⁹ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, slip op. at 4 (Apr. 6, 2020) (per curiam).

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.”¹⁰⁰

Wisconsin’s primary election fiasco illustrated how unprepared election officials were to conduct an inclusive election during the pandemic.¹⁰¹ 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.¹⁰² As of May 15, 2020, Wisconsin health officials have *directly traced* 71 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.¹⁰³ 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%.¹⁰⁴ 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 2008 at 35%.¹⁰⁵ 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 2019.¹⁰⁶

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

¹⁰⁰ *Id.* at 6 (Ginsburg, J., dissenting).

¹⁰¹ 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.

¹⁰² *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>.

¹⁰³ 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>.

¹⁰⁴ Shruti Banerjee & Dr. Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, DĒMOS (May 14, 2020), <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>.

¹⁰⁵ 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>.

¹⁰⁶ *Id.*

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

V. 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 communities of color. There are few moments in our

¹⁰⁷ 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 (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).

¹⁰⁸ 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) and statewide voter file (https://s3.amazonaws.com/dl.ncsbe.gov/data/ncvoter_Statewide.zip).

¹⁰⁹ AP Staff, *Early In-Person Voting in NC Exceeds Primary 4 Years Ago*, AP (Mar. 2, 2020), <https://apnews.com/10b3399d722456ad12848849b76a0157>.

¹¹⁰ 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/>.

history where our democracy has been in more peril, and when the stakes for participation for people have been as high. We ask this Committee and the Congress to provide the \$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 Congress to create certain minimal standards for voters, including at least two weeks of early voting and no excuse absentee voting by mail. 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.