



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

**STATEMENT OF KRISTEN CLARKE
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**U.S. HOUSE COMMITTEE ON ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
HEARING ON
"THE IMPACT OF COVID-19 ON VOTING RIGHTS AND ELECTION
ADMINISTRATION: ENSURING SAFE AND FAIR ELECTIONS"**

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I. Introduction

Chairwoman Fudge, Ranking Member Davis, and Members of the Subcommittee on Elections of the U.S House of Representatives Committee on House 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 how we can ensure that states hold safe and fair elections during the COVID-19 pandemic.

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 one of the country's most important national civil rights organizations in pursuit of equal justice for all, in fair housing and community development, economic justice, voting rights, equal educational opportunity, criminal justice, and judicial diversity. 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 on matters including criminal justice issues, education, housing discrimination, fair lending, barriers to reentry, voting rights, immigrants' rights, gender inequality, disability rights, reproductive access, and LGBTQ issues. Before my tenure at the New York State Attorney General's Office, I spent several years at the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), where I helped lead the organization's work in voting rights and election law 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 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. The Lawyers' Committee also leads the nation's largest nonpartisan voter protection effort, the Election Protection Program, which includes a voter hotline (1-866-OUR-VOTE). The Election Protection Program works with over one-hundred national, state, and community partners to provide Americans from coast to coast with comprehensive voting information and resources.

II. Summary

This country is enduring a public health crisis unlike any it has confronted in over a century. Ensuring people's health and saving their lives are our most vital concerns. 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.

This public health crisis has imperiled an equally vital concern: the survival of our democracy. Our freedoms are built on one of the most fundamental rights: the right to vote.¹ And the COVID-19 pandemic has forced 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 adjust election administration planning in order to facilitate the exercise of our most cherished right, free of fear or danger.

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 poll workers and election officials.

Are there costs involved? Absolutely. 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-19.² To date, COVID-19 has claimed more than 100,000 lives in the United States.³ The United States has at least 1.7 million confirmed COVID-19 cases.⁴ Medical experts predict that coronavirus cases, and in turn, deaths, will continue to rise as states begin reopening.⁵

COVID-19 is disproportionately killing African Americans. The Centers for Disease Control and Prevention (“CDC”) has released limited race and ethnic

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).

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 Carla K. Johnson et al., *US Death Toll from Coronavirus Surges Past 100,000 People*, AP NEWS, May 27, 2020, <https://apnews.com/72fae695d7df85acdb1bf449568a8a1f>.

⁴ 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 May 28, 2020).

⁵ Leila Fadel, *Public Health Experts Say Many States Are Opening Too Soon to Do So Safely*, NAT’L PUB. RADIO (May 9, 2020, 7 AM), <https://www.npr.org/2020/05/09/853052174/public-health-experts-say-many-states-are-opening-too-soon-to-do-so-safely>.

demographic data concerning COVID-19 mortalities—but even this data tell the same story about racial disparities. Even though African Americans make up only 13.4% of the United States population,⁶ they account for nearly 23% of COVID-19 deaths. Forty-one states are currently reporting race and ethnicity data for COVID-19 mortalities, and many states reflect even more stark racial disparities than the national average.⁷ For example, in Louisiana, African Americans comprise 32% of the population, but account for nearly 55% of COVID-19 deaths.⁸ In Michigan, African Americans comprise about 14% of the population, but account for nearly 42% of deaths.⁹ In Illinois, they account for nearly 30% of deaths and only 14% of the population.¹⁰ 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.¹¹ 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.¹²

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.¹³ Medical experts have called this the “Achilles’ heel” for public health strategies to control the pandemic.¹⁴ 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

⁶ U.S. CENSUS BUREAU, *Quick Facts: Population Estimates July 2019*, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited June 1, 2020).

⁷ 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.

⁸ THE COVID TRACKING PROJECT, *Racial Data Dashboard*, <https://covidtracking.com/race/dashboard> (last visited June 1, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Elizabeth Hlvankina, *COVID-19 Killing African Americans at Shocking Rates*, MEDPAGE TODAY (May 1, 2020), <https://www.medpagetoday.com/infectiousdisease/covid19/86266>.

¹² 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>.

¹³ 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.

¹⁴ 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>.

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.¹⁵ In planning for elections this year, election officials have to assume that COVID-19 will be a continuing danger because they have no assurance that it will not be.

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.¹⁶ 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.

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 these states provided little to no accommodations for voters to avoid exposure to the illness.

Based on the Lawyers' Committee's experience in the 2020 primary elections and an assessment of the future, I will discuss the voting rights reforms that Congress should adopt to ensure that all voters can exercise their fundamental right to vote while protecting their health, should—as many experts predict—the pandemic in its current or a resurgent form continues to threaten the public during the November general election.

A. 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

¹⁵ 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/>.

¹⁶ 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>.

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,¹⁷ a prime location for voter registration under the “motor voter law,”¹⁸ have been closed in many jurisdictions, making it difficult for new drivers—predominately younger people—to register to vote¹⁹. Many jurisdictions have also closed public assistance agencies, disability offices, and other government agencies that register voters.²⁰ 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.²¹ Student voter registration drives often take place on college campuses, many of which are closed for the indefinite future.²²

In order to ameliorate the impact on voter registration caused by the pandemic, steps must be taken to facilitate voter registration. Two primary approaches are online voter registration and same-day voter registration.²³ 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

¹⁷ See, e.g., Compl., *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020).

¹⁸ National Voter Registration Act (“NVRA”), 52 U.S.C. § 20501 et seq. (1993).

¹⁹ 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>.

²⁰ 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>.

²¹ 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.

²² 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 colleges).

²³ 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>.

participation rates.²⁴

B. 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.²⁵ 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.

1. 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,²⁶ 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.²⁷

At least sixteen states authorize local governments to opt into a predominantly vote-by-mail system;²⁸ allow all-mail absentee voting in local or

²⁴ 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>.

²⁵ *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/>.

²⁶ 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).

²⁷ 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.”).

²⁸ 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).

special elections;²⁹ or permit certain jurisdictions to conduct elections by mail based on population size.³⁰ 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, in all except Missouri, any registered voter can request to vote by mail without having to provide an excuse.³¹

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.³² The remaining roughly sixteen states require a qualified voter to provide a statutorily authorized reason for requesting an absentee ballot.³³

2. 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.³⁴ Georgia’s Secretary of State issued a directive to send absentee ballot

²⁹ 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).

³⁰ 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).

³¹ 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>.

³² *Id.*

³³ *Id.*

³⁴ 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>.

request forms to all of Georgia’s 6.9 million registered voters in the upcoming primary election on May 19.³⁵ 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 9.³⁶ 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.³⁷

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.³⁸ 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.³⁹ 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.⁴⁰

Missouri, Tennessee, and Kentucky are the subject of lawsuits by national civil rights groups, including the Lawyers’ Committee.⁴¹ These lawsuits seek expansions of the states’ excuse-only absentee voting laws during the COVID-19

³⁵ 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.

³⁶ 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>.

³⁷ 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.

³⁸ 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.

³⁹ See *Va. Legislative Information System, 2020 Session*, Va. Acts § 24.2-700.

⁴⁰ 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>.

⁴¹ *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).

crisis.⁴² 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.⁴³

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.

a. Complex Multi-Step 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 receiving 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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 2020.⁴⁷

⁴² 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).

⁴³ *See id.*

⁴⁴ Ohio Rev. Code § 3509.03.

⁴⁵ *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.

⁴⁶ *Id.* at 15–18.

⁴⁷ 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*

Absentee ballot procedures must be eased so as 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.

b. 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ A federal judge in South Carolina ruled the witness requirement a burden on voters' fundamental right to vote in the primary election.⁵¹ The other cases are pending.

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).

⁴⁸ 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.

⁴⁹ 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).

⁵⁰ Consent Decree, 1–2, *League of Women Voters of Va.* 2020 WL 2158249 (W.D. Va. May 5, 2020), ECF No. 35.

⁵¹ *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020).

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

c. Signature Discrepancies

Signature matching is another method that states use to verify the identities of absentee voters. Signature matching, however, is fraught with errors.⁵² 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.⁵³ Signature matching laws also disproportionately impact minority voters.⁵⁴

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.⁵⁵ 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.⁵⁶

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.⁵⁷

⁵² *Saucedo v. Gardner*, 335 F. Supp. 3d 202,212 (D.N.H. 2018).

⁵³ *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)..

⁵⁴ Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU FLA., 3, 22 (Sept. 19, 2018), https://www.acluf.org/sites/default/files/acluf1_-_vote_by_mail_-_report.pdf.

⁵⁵ 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.

⁵⁶ *Id.*

⁵⁷ 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

d. Postal Service

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.⁵⁸ This presents a major problem for absentee voters who may not be able to rely on the postal service. Minority voters, 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.⁵⁹ 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.⁶⁰

e. Language Access

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.⁶¹ 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.⁶² These voters may not be familiar with voting by mail and not know how to obtain absentee ballot

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>.

⁵⁸ 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>.

⁵⁹ 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>.

⁶⁰ 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.

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

⁶² 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.

applications. Voters may not be able to navigate the Internet or may not have computers or Internet connections to download applications.⁶³

For Georgia’s June 9, 2020 primary election, Gwinnett County, Georgia did not mail applications in Spanish, despite 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.”⁶⁷

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.

f. 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.⁶⁸ Delays in postal service delivery due to inadequate funding can lead to delays in delivering absentee ballots. And, 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 cannot rely on the postal service or live too far from their county commissions to return absentee ballots in person.⁶⁹

More options must be provided: secure ballot drop boxes or repositories in

⁶³ *Id.* at 7–8.

⁶⁴ 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.

⁶⁵ *Id.* at 4–5.

⁶⁶ *Id.* at 5.

⁶⁷ “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.

⁶⁸ 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>.

⁶⁹ NATIVE AM. RIGHTS FUND, *Vote by Mail in Native American Communities*, <https://www.narf.org/vote-by-mail/> (last visited June 2, 2020).

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.⁷⁰ 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.⁷¹ 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.⁷²

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.

g. Criminal Penalties Associated with Voter 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.⁷³ 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.⁷⁴

⁷⁰ 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>.

⁷¹ Ga. Code Ann. § 21-2-385.

⁷² Ala. Code § 17-11-9.

⁷³ Tenn. Code Ann. § 2-6-204(c)(4).

⁷⁴ *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. filed May 1, 2020).

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.

C. 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.⁷⁵ 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.⁷⁶ 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, regularly cleaning of high

⁷⁵ 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).

⁷⁶ 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>.

touch surfaces, disinfecting potentially contaminated surfaces, such as voting machines and other equipment, and frequent hand washing and sanitizing.⁷⁷ States should reconfigure polling places to adhere to “social distancing” protocols, creating more space between voting booths, poll workers, and voters standing in line.

1. Polling Place Adjustments and Impacts on Racial Minorities

Last-minute polling place consolidations and closures disproportionately impact African American and minority voters, 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.⁷⁸

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.⁷⁹ In contrast, Madison had 66 polling locations open. Sixty-one percent of Milwaukee’s voters are African American and 30% are Hispanic.⁸⁰ 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. And 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.⁸¹ The Seventh Circuit Court of Appeals granted a partial stay reversing the lower court’s decision to overturn the witness verification on absentee ballots.⁸² 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

⁷⁷ 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>.

⁷⁸ 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>.

⁷⁹ 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/>.

⁸⁰ Banerjee & Gall, *supra* note 27.

⁸¹ Mot. Prelim. Inj., 4, *Democratic Nat’l Comm. v. Bostelmann.*, No. 3:20-cv-00249-wmc, (W.D. Wis. Apr. 2, 2020).

⁸² Stay Pending Appeal, 4, *Democratic Nat’l Comm. v. Wis. State Legis.*, No. 20-1539, (7th Cir. Apr. 3, 2020).

retaining the lower court’s receipt deadline of April 13.⁸³ 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.”⁸⁴

Wisconsin’s primary election fiasco illustrated how unprepared election officials were to conduct an inclusive election during the pandemic.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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%.⁸⁸ 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%.⁸⁹ 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 2019.⁹⁰ States must be better prepared for the general election.

⁸³ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, slip op. at 4 (Apr. 6, 2020) (per curiam).

⁸⁴ *Id.* at 6 (Ginsburg, J., dissenting).

⁸⁵ 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.

⁸⁶ *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>.

⁸⁷ 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>.

⁸⁸ 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>.

⁸⁹ 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>.

⁹⁰ *Id.*

2. *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.⁹¹ 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.⁹² 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.⁹³

Congress should mandate that all states provide at least two full weeks of early in-person voting in federal elections during the pandemic, and until a vaccine is widely available and accessible to all people in the country.⁹⁴

⁹¹ 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).

⁹² 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).

⁹³ AP Staff, *Early In-Person Voting in NC Exceeds Primary 4 Years Ago*, AP (Mar. 2, 2020), <https://apnews.com/10b3399d722456ad12848849b76a0157>.

⁹⁴ 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/>.

D. Cost of Necessary Elections Measures

The 2020 primary elections and upcoming general election pose significant challenges to states and local election administrators. Officials must simultaneously build the infrastructure and staffing levels to expand safe, in-person voting and also expand vote-by-mail systems. This will require at least \$3.6 billion in support from Congress to supplement the \$400 million in funding allocated in the CARES Act.⁹⁵ The federal government must provide this funding without the requirement that states match the amount. 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.⁹⁶

The Brennan Center for Justice 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.⁹⁷

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.⁹⁸ 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’

⁹⁵ *See id.*

⁹⁶ On May 15, 2020, the House of Representatives passed HR 6800 which addresses many of the COVID-19 related reforms addressed in this report which would also require increased funding. HR 6800, 116th Cong. 2d Sess., the Heroes Act (passed the House 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.

⁹⁷ 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>.

⁹⁸ *Id.*

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.

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. As people have taken to the streets to protest the killing of George Floyd, Breonna Taylor, and Ahmaud Aubrey, the latest victims of racial violence and white supremacy, President Trump is threatening to send the military into our communities over the wishes of state governors and local mayors. There are few moments in our history where our democracy has been in more peril, and when it is absolutely critical for Congress to step in to protect our most fundamental right—the right to vote. Thank you for your leadership in safeguarding our democracy and ensuring equal access to the ballot for African Americans and other people of color.