



WRITTEN STATEMENT OF
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AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

Protecting the Right to Vote During the COVID-19 Pandemic

House Judiciary Committee

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on June 3, 2020

Submitted on June 1, 2020

Introduction

With approximately 3 million members, activists, and supporters, the ACLU is a nationwide organization that advances its mission of defending the principles of liberty and equality embodied in our Constitution and civil rights laws. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the Constitution and laws of the United States. The ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of our country's voting laws and Constitution, including the Voting Rights Act of 1965 (VRA) and the National Voter Registration Act of 1993 (NVRA).

In my capacity as Director of the ACLU's Voting Rights Project, I supervise the ACLU's voting rights litigation, which focuses on ensuring that all Americans have access to the franchise, and that everyone is represented equally in our political processes. In that capacity, I recently argued before the Supreme Court in *Department of Commerce v. State of New York*,¹ a case in which we successfully challenged the Administration's effort to add a citizenship question to the 2020 Census questionnaire, a move that would have had devastating consequences for the representation of communities of color across the United States. In addition to my work at the ACLU, I serve as an adjunct clinical professor at NYU School of Law, and am widely published on voting rights issues, including in the *Yale Law Journal Forum* and the *Harvard Civil Rights-Civil Liberties Law Review*.

It is no exaggeration to say that, due to the COVID-19 pandemic, the 2020 election may be the most challenging environment for voting rights and elections administration since the 1864 presidential election was conducted during the Civil War. No American should have to choose between protecting their health and exercising their right to vote. We can take decisive action now to save as many of us as possible from having to make such a choice.

The ACLU has been actively advocating in more than 30 states, and we have brought 10 lawsuits in the past 11 weeks to ensure that all Americans can vote safely.² My testimony today will provide a brief overview of our recent work, in the hopes that it might shed light on possible solutions to our current national emergency.

I. Eligibility to Vote by Mail

As Chief Justice Roberts noted in an opinion last week, "COVID-19 ... has killed ... more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect

¹ 139 S. Ct. 2551 (2019).

² A full list of the ACLU's COVID-19-related voting rights cases is attached to my testimony in Appendix A.

others.”³ To ensure that every American can safely exercise the most fundamental right we have, and to prevent our existing public health emergency from degenerating further, it is imperative that we not only surge resources to states to rapidly implement enhanced public health measures at polling places, but that we also take aggressive action to reduce crowding and long lines at polling places on Election Day, by facilitating efforts to expand early and absentee voting.

But to give you a sense of the magnitude of the challenge we face, more than 80 million Americans voted in-person on Election Day in 2016.⁴ Under normal circumstances, we would similarly expect tens of millions of voters to seek to vote in-person on Election Day this November. But many of them will be unable or reluctant to do so. Our task at hand, therefore, is to help as many of them as would like to, to shift to voting early or absentee, and to help states prepare—in particular, for what we can expect will be unprecedented surge in voting by mail.

A. Challenges for In-Person Voting During the COVID-19 Pandemic

Already this primary season, we have seen significant disruptions to the traditional model of in-person voting. At least two basic interrelated problems have emerged.

First, many polling locations will be unavailable in November. Polling places are often located in locations that will be reluctant to open up their facilities to a higher risk of transmission—such as schools, churches, and, in particular, senior centers and assisted living facilities, which obviously cannot be opened to large crowds congregating in person, given the particular vulnerabilities to COVID-19 that older people face. Ohio, for example, was forced to close 125 polling locations across the state because they were located in retirement living or senior care facilities,⁵ before postponing its primary altogether.⁶

Second, we are also seeing substantial poll worker shortages, which is hardly surprising given the average age of pollworkers. According to the U.S. Election Assistance Commission, in the 2016 election, 56% of poll workers were over the age of 60:

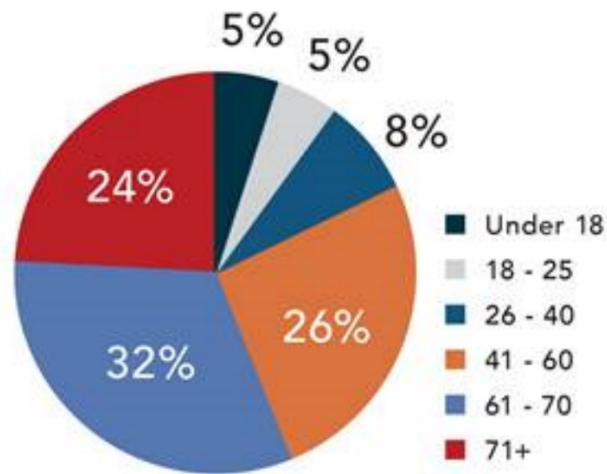
³ *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 590 U.S. ____ (May 29, 2020).

⁴ Approximately 138 million ballots were cast in 2016. See United States Elections Project, 2016 November General Election Turnout Rates, Sept. 5, 2018, <http://www.electproject.org/2016g>. Approximately 59.2% were NOT cast early, by mail, or absentee. See U.S. Elections Assistance Commission, White Paper – EAVS Deep Dive: Early, Absentee, and Mail Voting, May 17, 2017, <https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview>.

⁵ “Primary polling locations moved from nursing homes due to coronavirus concerns,” *Fox19NOW.com*, March 10, 2020, <https://www.fox19.com/2020/03/10/changes-coming-polling-locations-due-coronavirus-concerns/>

⁶ Nick Corasaniti and Stephanie Saul, “Ohio’s Governor Postpones Primary as Health Emergency Is Declared Over Virus,” *N.Y. Times*, March 16, 2020, <https://www.nytimes.com/2020/03/16/us/politics/virus-primary-2020-ohio.html>.

EAVS 2016: Age of Poll Workers



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In all, 16 states have postponed their primaries due to the logistical difficulties of conducting an election during the pandemic.⁸ Because of polling place siting difficulties and poll worker shortages, the general election is likely to feature more voters assigned per polling location than in any election in American history—all while we are still facing a once-in-a-century global pandemic and public health officials are urging Americans to refrain from congregating in large crowds, and to practice social distancing.

The primaries have already provided multiple examples of the public health risks that we face. Multiple Florida poll workers tested positive for COVID-19 in the aftermath of the in-person primary election.⁹ In Chicago, a poll worker for the city's March 17 election died of

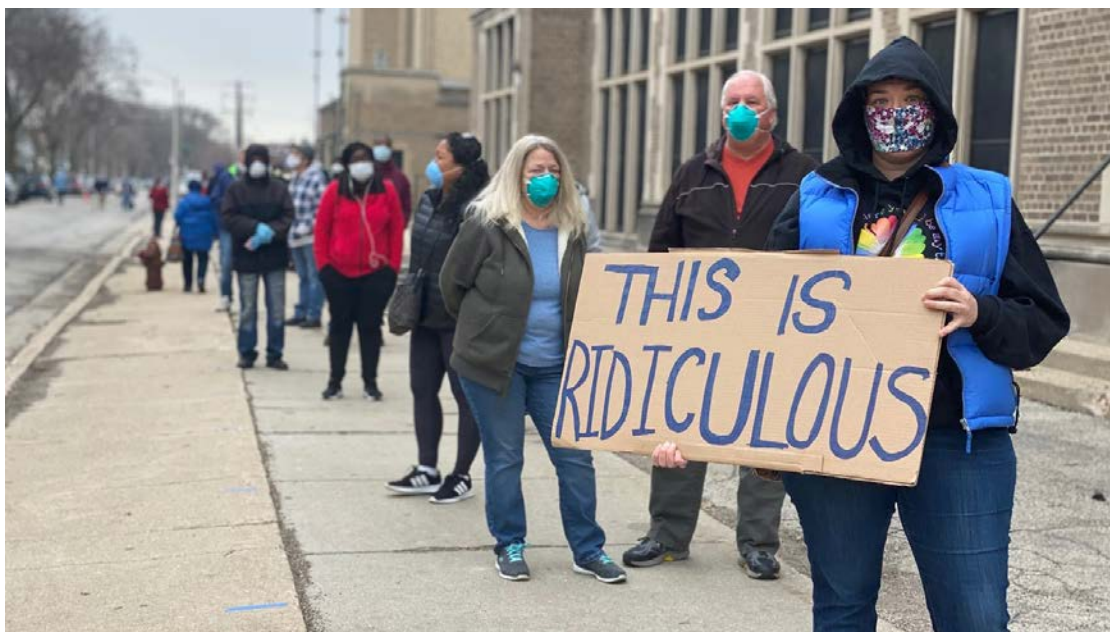
⁷ U.S. Election Assistance Commission, *White Paper: EAVS Deep Dive: Poll Workers and Polling Places* (Nov. 15, 2017), <https://www.eac.gov/documents/2017/11/15/eavs-deep-dive-poll-workers-and-polling-places>.

⁸ Nick Corasaniti and Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List*, N.Y. Times, May 27, 2020 <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>.

⁹ Kent Justice & Steve Patrick, *Duval County Poll Worker Tests Positive for Coronavirus*, News 4 Jax (Mar. 30, 2020), <https://www.news4jax.com/news/local/2020/03/30/duval-county-poll-worker-tests-positive-for-coronavirus/>; David Smiley & Bianca Padró Ocasio, *Florida Held Its Primary Despite Coronavirus. Two Broward Poll Workers Tested Positive*, Miami Herald (Mar. 27, 2020), <https://www.miamiherald.com/news/politics-government/article241539451.html>.

COVID-19, prompting City officials to send letters notifying voters and poll workers who were present at the same polling site.¹⁰

Wisconsin's primary provides perhaps the starkest example.¹¹ Cities in Wisconsin were forced to close polling locations, and these closures impacted voters unequally. The city of Madison had over 60 open polling sites, while in Milwaukee—a city more than twice Madison's size, with a population of roughly 600,000—only 18,803 voters cast their ballots in person, largely because all but five of the city's 180 polling locations had closed.¹² In Milwaukee, voters faced large crowds, long lines, and excessive wait times—all of which made social distancing impossible in the middle of a global pandemic:



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¹⁰ Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, 5 Chicago (Apr. 13, 2020), <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>.

¹¹ Astead W. Herndon and Jim Rutenberg, *Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting*, N.Y. Times (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html>.

¹² Jason Calvi, *'2 Different Cities:' Milwaukee Had 5 Polling Sites During COVID-19 Election; Madison Had 60+*, Fox 6 (Apr. 8, 2020), <https://fox6now.com/2020/04/08/2-different-cities-milwaukee-had-5-polling-sites-during-covid-19-election-madison-had-60/>.

¹³ David D. Haynes, *Wisconsin's election may have been 'ridiculous' but those who braved coronavirus to vote were anything but*, Milwaukee Journal Sentinel, Apr 8, 2020, <https://www.jsonline.com/story/news/solutions/2020/04/08/wisconsin-election-ridiculous-voters-who-braved-coronavirus-lines-inspiring-vote-primary/2966298001/>

Milwaukee was far from alone. For example, “[t]here were also long lines in Green Bay, where the usual 31 polling sites were consolidated to just two.”¹⁴ Some Green Bay voters waited in line for four hours, and some were unable to cast a vote until after midnight.¹⁵ Ultimately, a contact-tracing analysis conducted by the Wisconsin Department of Health found that 52 persons who voted under these conditions tested positive for COVID-19, and economists have found a “statistically and economically significant association between in-person voting and the spread of COVID-19 two to three weeks after the election.”¹⁶

These challenges will likely persist in the fall. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Disease, recently stated that he “can’t guarantee” that in-person voting will be safe in November 2020.¹⁷ He has described the presence of COVID-19 in the fall as “inevitable,”¹⁸ stating: “We will have coronavirus in the fall. . . . I am convinced of that because of the degree of transmissibility that it has, the global nature. What happens with that will depend on how we’re able to contain it when it occurs.”¹⁹ Similarly, CDC Director Dr. Robert Redfield, has warned of a second surge of COVID-19 in the fall, possibly even more difficult to manage with increased risks to vulnerable populations.²⁰

¹⁴ Jason Calvi, ‘2 Different Cities:’ Milwaukee Had 5 Polling Sites During COVID-19 Election; Madison Had 60+, Fox 6 (Apr. 8, 2020), <https://fox6now.com/2020/04/08/2-different-cities-milwaukee-had-5-polling-sites-during-covid-19-election-madison-had-60/>.

¹⁵ *Id.*

¹⁶ Chad D. Cotti et al., *The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on COVID-19: Evidence from the Wisconsin Primary* at 1–2, National Bureau of Economic Research (May 2020), <https://www.nber.org/papers/w27187>.

¹⁷ Jason Silverstein, *Fauci Says He “Can’t Guarantee” In-Person Voting in November Will Be Safe*, CBS NEWS (Apr. 13, 2020), <https://www.cbsnews.com/news/coronavirus-fauci-says-he-cant-guarantee-in-person-voting-in-november-will-be-safe/>.

¹⁸ Christina Maxouris, *US Could Be in for ‘a Bad Fall and a Bad Winter’ If It’s Unprepared for a Second Wave of Coronavirus, Fauci Warns*, CNN (Apr. 29, 2020), <https://www.cnn.com/2020/04/29/health/us-coronavirus-wednesday/index.html>.

¹⁹ Savannah Behrmann, ‘Convinced’: Fauci Says There Will Be Coronavirus in the Fall After Trump Says ‘It May Not Come Back’, USA Today (Apr. 23, 2020), <https://www.usatoday.com/story/news/politics/2020/04/22/coronavirus-dr-anthony-fauci-says-i-am-convinced-second-wave/3009131001/>.

²⁰ Denise Grady, *The Fear of Coronavirus and Flu Colliding in the Fall*, N.Y. Times (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/health/coronavirus-flu-season-deaths.html>; Olga Khazan, *The Scariest Pandemic Timeline*, The Atlantic (Apr. 24, 2020), <https://www.theatlantic.com/health/archive/2020/04/could-there-be-another-coronavirus-quarantine/610630/>; Lena H. Sun, *CDC Director Warns Second Wave of Coronavirus is Likely to be Even More Devastating*, Wash. Post (Apr. 21, 2020), <https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/>.

The CDC therefore instructs that we should encourage as many voters as possible “to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations,” such as mail-in methods of voting.²¹ The health risks of voting by mail are minimal. There is no evidence that COVID-19 can be spread through voting by mail, and the U.S. Postal Service has implemented safeguards to protect against the pandemic by “eliminat[ing] the requirement that customers sign [its] Mobile Delivery Devices for delivery” and requiring the customer “to step back a safe distance or close the screen door” when accepting delivery.²²

Accordingly, more than 800 public health experts have called “on our leaders to prepare for a Presidential election by mail, in which ballots are sent to all registered voters, to allow them to vote from home and ensure their health and safety” in November 2020—because “Americans should never again be asked to choose between performing one of the most hallowed obligations and privileges of citizenship—voting for our representatives at the local, state and federal levels—and our health.”²³

B. Current Laws on Eligibility to Vote by Mail

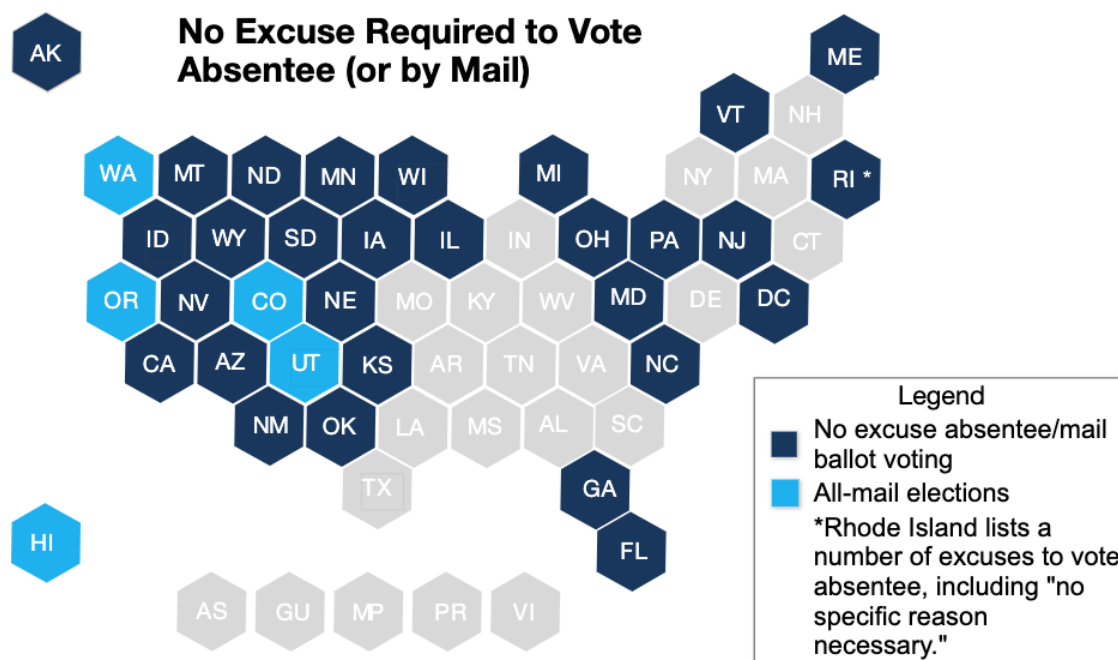
No-excuse absentee voting makes sense in ordinary circumstances, but it’s a no-brainer during the COVID-19 pandemic. Every American should be eligible to vote safely by mail during the pandemic.

²¹ Ctrs. for Disease Control & Prevention, *Recommendations for Election Polling Locations*, March 27, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

²² U.S. Postal Service, *USPS Statement on Coronavirus* (Apr. 2, 2020), <https://about.usps.com/newsroom/statements/usps-statement-on-coronavirus.htm> (citing guidance from World Health Organization, CDC, and Surgeon General).

²³ Sam Hananel, *RELEASE: More Than 800 Public Health Experts Urge Congress To Fund Vote by Mail in November*, The Hill (May 5, 2020), <https://www.americanprogress.org/press/release/2020/05/05/484590/release-800-public-health-experts-urge-congress-fund-vote-mail-november/>.

Fortunately the majority of states—33 states and the District of Columbia—currently offer all eligible voters the option of casting a ballot by mail without requiring a particular excuse:



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These 33 states are a broad and diverse group, including many of the states represented on this Subcommittee, such as Ohio, Pennsylvania, North Dakota, Maryland and California (Virginia will become the 34th state to offer no-excuse absentee voting in November²⁵).

These states are already seeing unprecedented levels of requests to vote absentee—for example, Representative Dean’s home state of Pennsylvania is seeing an *18-fold increase* in absentee ballot requests in Pennsylvania as compared to 2016.²⁶ States will need substantial federal support to surge additional resources for printing, mailing, and processing millions more mail-in ballots than they have received in any previous election.

²⁴ Nat’l Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Qualifying for an Absentee Ballot*, May 19, 2020, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

²⁵ VA LEGIS 1149 (2020), 2020 Virginia Laws Ch. 1149 (H.B. 1).

²⁶ Tierney Sneed, “Four Charts That Show How Absentee Voting Is Skyrocketing In The Pandemic,” *Talking Points Memo*, May 27, 2020 (describing similar surges in other states), <https://talkingpointsmemo.com/news/absentee-voting-data-pennsylvania-new-mexico-indiana-dc>.

That leaves 17 states that, under normal circumstances, would require an excuse to vote by mail. Collectively, these states are home to more than 116 million people, hold 154 seats in the House of Representatives, and wield 188 votes in the Electoral College.²⁷

But there's some good news: of these 17 states, 12 have either waived their normal "excuse" requirement for absentee voting, or have interpreted their disability or illness basis for absentee voting broadly during their primaries to essentially cover everyone while the pandemic is ongoing. These states are a diverse group, and have chief elections officials from across the political spectrum. They include Alabama,²⁸ Arkansas,²⁹ Delaware,³⁰ Kentucky,³¹ New Hampshire,³² and Virginia³³—all of which have interpreted their absentee voting laws to permit all eligible voters to vote absentee under an "illness" or "disability"-related excuses.³⁴

The flexibility that these 12 states have shown in expanding eligibility to vote by mail during the primaries shows that it's not too late—where there is political will, states can make the adjustments necessary to protect every American's right to vote safely during the pandemic.

I note briefly that we at the ACLU have tried our best to do our part, playing a role in bringing about these changes. ACLU state affiliates have been advocating for these changes in a number of these states. One of the states to waive its excuse requirement for the primary, South Carolina, did so³⁵ only after being subject to several lawsuits, including one filed by the ACLU in conjunction with the NAACP Legal Defense Fund.³⁶ And, as I explain below, Missouri appears poised to join this group, having recently passed a bill that, if signed into law, will permit all eligible voters to vote by mail in 2020.

²⁷ See Appendix C.

²⁸ Ala. Leg. Servs. Agency, *Absentee Voting During State of Emergency*, 17-11-3(e) (Mar. 18, 2020), <https://bit.ly/3cUhOqN>.

²⁹ Ark. Exec. Order No. 20-08 (Mar. 20, 2020), <https://bit.ly/2TheWwc>.

³⁰ Governor of Del., Exec. Dep't, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://bit.ly/3bKVfTM>.

³¹ Letter of Michael G. Adams, Sec'y of State, to Andy Beshear, Governor (Apr. 23, 2020), <https://bit.ly/3bFxi6D>.

³² Memorandum from the Sec'y of State and Att'y Gen. to New Hampshire Election Officials re: Elections Operations During the State of Emergency, 2 (Apr. 10, 2020), <https://bit.ly/2ZdZ8xV>.

³³ Va. Dep't of Elections, *Absentee Voting*, <https://bit.ly/3dU4YbW>.

³⁴ A complete list of these states is attached to the end of my testimony as Appendix B.

³⁵ Morgan Newell, *S.C.'s Absentee Ballot Expansion Bill Means Changes to Voting this Primary Season*, WBTV (May 13, 2020), <https://bit.ly/2yxuYe8>.

³⁶ See *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, ECF No. 7-11 (D.S.C. April 28, 2020).

Not all of these 12 states have committed to making the same change for November; but we are hopeful that, having acknowledged that protecting public health and the right to vote required this change for the primary season, these states will make a similarly wise decision for the general election.

That leaves us with just 5 states that are currently refusing to let all voters cast their ballots by mail: **Louisiana, Mississippi, Missouri, Tennessee, and Texas.**

We are currently litigating in three of these states: Missouri, Tennessee, and Texas:

- The Missouri legislature, citing our lawsuit, has passed a bill that would permit all voters to vote by mail in 2020; it is awaiting the Governor’s signature.³⁷
- In Tennessee, my colleagues will be in Chancery Court in Davidson County during this hearing on June 3, arguing that Tennessee’s constitution protects the right to vote safely, which during the pandemic entails a right to vote by mail; or, in the alternative, that voters with preexisting conditions like asthma and diabetes—which wouldn’t normally prevent them from traveling in person to a polling place, but which render them at risk of severe health complications due to COVID-19—must be given the option of voting by mail.³⁸
- The Texas Supreme Court has ruled that lack of immunity to COVID-19 does not constitute a basis for voting by mail in Texas, but has left open the question as to precisely what preexisting conditions might, under the circumstances of the pandemic, count as an illness that would qualify a voter to vote by mail.³⁹

There is no reason that voters in these states—including the constituents of Chairman Cohen, Ranking Member Johnson, and Representatives Gohmert, Garcia, Escobar, and Jackson Lee—should not have the same right to vote safely by mail during the pandemic currently enjoyed by everyone else in this country. Put another way, the constituents of Representatives Raskin, Jordan, Reschenthaler, Cline, Armstrong, Swalwell, Scanlon, and Dean will all have the right to vote safely by mail this November—and the constituents of the other members of this Committee should that right, too.

In any event, that fact that 45 state are permitting all eligible voters to vote by mail in elections this spring and summer tells you that this is not a partisan issue. Some people—including the President and the Attorney General—have recently made false or baseless remarks about the purported election integrity risks of voting by mail, which appear designed to

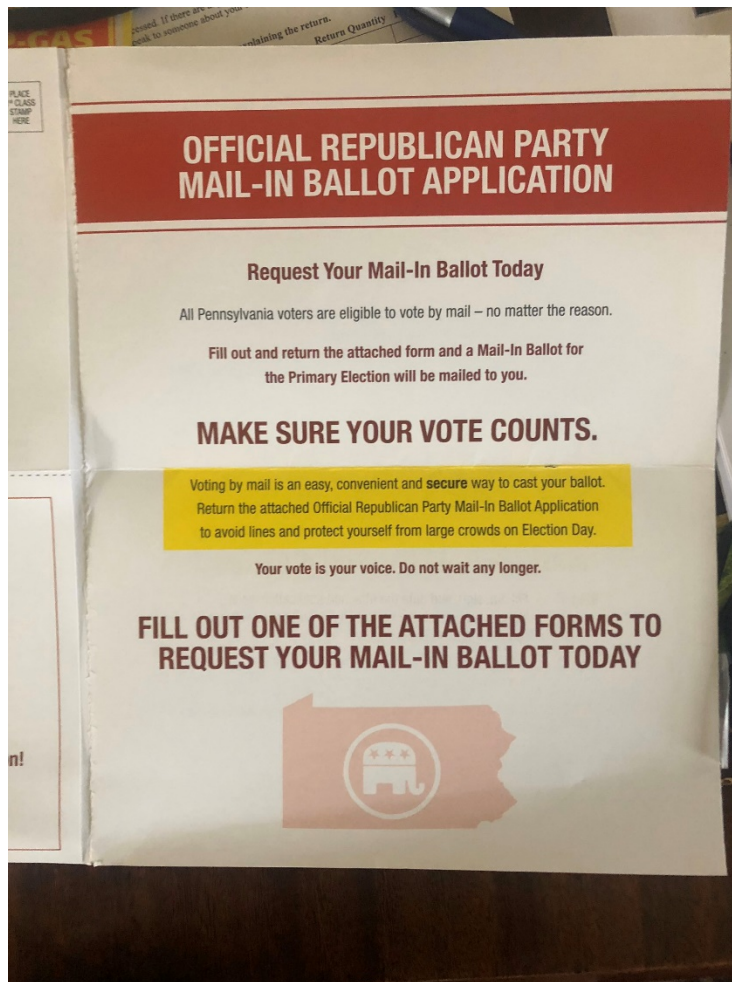
³⁷ Kurt Erickson & Tynan, *On Final Day, Missouri lawmakers approve new vote-by-mail options*, ST. LOUIS POST-DISPATCH (May 15, 2020), <https://bit.ly/2ZE62Na>.

³⁸ *Lay v. Goins*, Docket No. 20-453-IV(III) (Tenn. Chancery Court, Twentieth Judicial District, Davidson County).

³⁹ *In re State of Texas*, No. 20-0394 (Tex. Sup. Ct. May 27, 2020).

undermine confidence in American elections. I will not repeat them here. And I know that several of my co-panelists will be addressing the many security measures that states use to ensure the integrity of absentee ballots, so I will not discuss them in detail here.

But I will note that many states and elections officials across the political spectrum have, for decades, expressed broad support for widespread access to voting by mail. There is perhaps no better way to address concerns about cybersecurity and foreign interference, because you can't hack a paper ballot. We therefore agree with the Republican National Committee, which recently sent a mailer to its Pennsylvania members celebrating the fact that “[a]ll Pennsylvania voters are eligible to vote by mail,” encouraging its members to do so, and stating that “[v]oting by mail is an easy, convenient, and secure way to cast your ballot”:



⁴⁰ Peter Hamby, @PeterHamby, Twitter, April 10, 2020, <https://twitter.com/PeterHamby/status/1248743044678971392>.

It is the height of hypocrisy and bad faith that a President who votes by mail,⁴¹ and is the nominee of a party that describes voting by mail as “convenient” and “secure,” would seek to undermine the American public’s confidence in no-excuse absentee balloting, which a majority of states use today.

In sum, absentee voting first became widespread as a necessary solution to ensure that Americans deployed during the Civil War could still vote during the presidential election of 1864. It is perhaps fitting, as we face our biggest elections administration challenge since that election, that the solution to our current crisis is ultimately same: permitting Americans who are unable to travel in-person to the polls due to a national emergency, to vote by mail.

II. Witness Signature / Notary Requirements

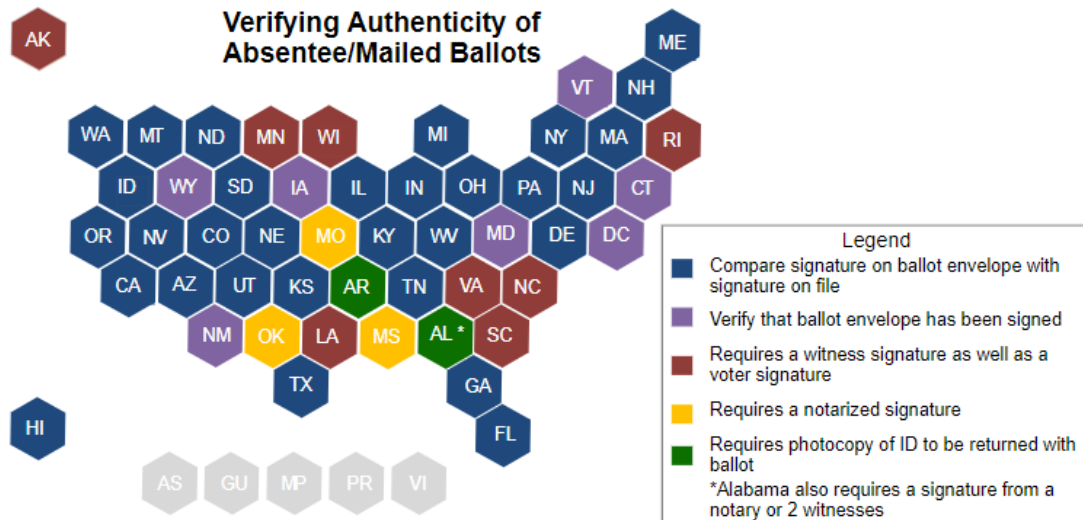
A significant portion of the ACLU’s voting rights work during the COVID-19 pandemic has gone beyond just expanding eligibility to vote by mail; it has also entailed removing unnecessary barriers that unduly burden Americans seeking to vote by mail during the pandemic. These barriers include pre-Election Day deadlines for returning absentee ballots; bans on assistance with the conveyance of absentee ballots; the failure to provide voters with prepaid postage for their ballots; and, in particular, the requirement that absentee voters obtain a witness signature on, or notarization of, their ballots. My testimony below concentrates on this latter type of barrier

A. Current laws on Witness Signature Requirements

States use a variety of methods for verifying absentee or mailed ballots, including scannable bar codes on absentee ballots or envelopes; requiring personal identifying information like Social Security numbers; signature matching; and signatures by a witness or notary.

Ensuring the security of ballots cast by mail is critical. But some methods used by states are less useful—and more burdensome—than others. In particular, witness signature or notarization requirements are quite rare. Only 11 states require that an absentee/mailed ballot envelope be signed by witnesses or notarized:

⁴¹ Anthony Mann, “President Donald Trump voted for the first time in Palm Beach County (presumably for himself),” *South Florida Sun Sentinel*, April 1, 2020, “<https://www.sun-sentinel.com/news/politics/fl-ne-donald-trump-palm-beach-county-voter-20200401-zpl3jignmzflvfguteeahbjtbn-story.html>”



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While such witness signature requirements might be only modestly burdensome during ordinary times, they are quite problematic during the COVID-19 pandemic, as Dr. Arthur Reingold, a medical doctor and a public health expert in the area of infectious diseases and epidemiology who spent eight years at the CDC, and who is now the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health, testified in one of our cases. More than 34 million Americans—including more than 13 million people over 65 years and older—live alone.⁴³ As Dr. Reingold explained, for “individuals without another person able to witness in their household, the requirement that they have someone witness their absentee ballot,” a witness signature requirement “place[s] them at increased risk of exposure to and/or transmission of COVID-19.”⁴⁴ This is because another person coming “in close enough proximity to witness their ballot would place them at increased risk of infection,” and “would be particularly risky for those who are at a greater risk of complications and death from COVID-19.” And for public health purposes, “to prevent increasing the scope of the outbreak of COVID-19, we must assume that anyone could be infected and could infect another person.”

⁴² Nat’l Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Processing, Verifying and Counting Absentee Ballots, How do officials verify voted absentee ballots?*, May 19, 2020, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials>.

⁴³ U.S. Census Bureau, 2010-2018 American Community Survey 1-Year Estimates: ACS Demographic and Housing Estimates: South Carolina (2018), https://data.census.gov/cedsci/table?q=single%20person%20households&g=0100000US&hidePreview=true&tid=ACSDP1Y2018.DP02&vintage=2018&layer=VT_2018_040_00_PY_D1&cid=DP02_0001E.

⁴⁴ Declaration of Arthur Reingold, ¶ 17. See *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, ECF No. 7-11 (D.S.C. April 28, 2020).

The risks to public health posed by such requirements during the pandemic are wholly unjustified. Thirty-nine states—including several represented on this Subcommittee, such as Ohio, North Dakota, Texas, California, and Pennsylvania—maintain election integrity without witness requirements, and rely instead on comparing the voter’s signature on their ballot envelope with their registration signature on file with the state.

Even in the states that do have such a requirement, it amounts to little more than a bureaucratic hoop. In Virginia, for example, “the witness need not print their name or the date below their signature—in fact, the Commonwealth does not require that the witness be identified in any way whatsoever. What is more, the illegibility of the witness signature is not grounds for rejecting the ballot.”⁴⁵ The same is true in South Carolina, where the Executive Director of the State Election Commission recently explained in a letter to South Carolina Governor McMaster that “the witness signature offers no benefit to election officials as they have no ability to verify the witness signature.”⁴⁶ As one federal court put it, it is difficult to see how requiring “an illegible scrawl on an envelope” does anything to combat fraud.⁴⁷

B. ACLU Cases Challenging Witness Signature Requirements

The ACLU has brought litigation in 3 states challenging witness signature or notarization requirements: Virginia, South Carolina, and Missouri. Our work has already produced tangible results for voters and for public health:

- In Virginia, a federal district court approved a consent decree blocking the witness signature requirement for Virginia’s June 23 primary. The court found that the requirement “would only increase th[e] risk” of COVID-19 transmission, and was therefore “likely unconstitutional” during the pandemic.⁴⁸
- In South Carolina, we obtained a preliminary injunction blocking the state’s witness signature requirement for South Carolina’s June 9 primary. The Court ruled that we were “likely to prevail on [our] constitutional challenge to the Witness Requirement,” because it forced our clients and the voting public “to place their health at risk during the COVID-19 pandemic.”⁴⁹

⁴⁵ *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *9 (W.D. Va. May 5, 2020)

⁴⁶ Letter from Marci Andino to Governor McMaster, dated March 30, 2020. *See Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, ECF No. 7-4 (D.S.C. April 28, 2020).

⁴⁷ *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *9 (W.D. Va. May 5, 2020).

⁴⁸ *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *10 (W.D. Va. May 5, 2020).

⁴⁹ *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. April 28, 2020).

- In Missouri, in response to our case, the legislature passed a bill eliminating Missouri’s notary requirement for high-risk individuals for the 2020 elections cycle, but leaving the requirement in place for all other voters.⁵⁰ The Governor has yet to sign the bill. In the meantime, our litigation continues with a hearing in the Missouri Supreme Court set for June 15.

In addition to our cases, at least one other federal court has blocked a witness signature requirement—in Wisconsin for its April primary⁵¹—but that ruling was stayed by the U.S. Court of Appeals for the Seventh Circuit.⁵² That order had unfortunate consequences, as inadequate certification of ballots—which I understand to refer to absence of a witness signature—was the number one reason for absentee ballot rejection in Wisconsin’s April primary, accounting for more than 14,000 lost votes.⁵³

III. The VoteSafe Act, H.R. 6807

Separate and apart from our litigation, the ACLU has voiced our support for legislative efforts that would protect the right of every American to vote safely in November, and provide critical resources to states facing the most difficult elections administration challenge in over a century.

In particular, we have endorsed the VoteSafe Act, H.R. 6807, introduced by Congressman Clyburn and Senator Harris. Specifically, the bill:

- Authorizes a total of \$5 billion to expand vote-by-mail and early voting and to improve the safety of in-person voting during the COVID-19 pandemic.
- Requires states to permit no-excuse mail-in absentee voting.
- Requires states to maintain an early voting period of at least 20 days.
- Provide grants for states to improve the safety, efficiency, and reliability of polling places.

⁵⁰ Kurt Erickson & Tynan, *On Final Day, Missouri lawmakers approve new vote-by-mail options*, ST. LOUIS POST-DISPATCH (May 15, 2020), <https://bit.ly/2ZE62Na>.

⁵¹ *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *20 (W.D. Wis. Apr. 2, 2020).

⁵² *Democratic Nat’l Comm. v. Bostelmann*, Case: 20-1538 (7th Cir., April 5, 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/7th%20Circuit%20Order%20on%20Stay%20-%207pm.pdf>.

⁵³ Wisconsin Elections Commission, *April 7, 2020 Absentee Voting Report at 30*, (May 15, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%202020%2C%202020.Final_.pdf.

- Permitted uses of funding include:
 - Funding to ensure that elections are accessible to individuals with disabilities.
 - Funding to ensure adequate protections for language minority voters.
 - Funding to ensure voting access for American Indian, Alaska Native, and rural voters.
 - Implementing and promoting curbside voting.
 - Implementing and meeting a maximum wait time standard or publishing current wait times for voters.
 - Allowing voters to make advance reservations at their polling places.
 - Providing for the training and recruitment of poll workers.
 - Improving access to voter registration.

As we explained in our letter urging co-sponsorship of the bill,⁵⁴ it is critical that Congress provide the electoral framework and funding necessary for state officials to address the unprecedented challenges facing voters, poll workers, and election administrators during the COVID-19 pandemic. The VoteSafe Act would ensure that Americans can participate in our democracy on a full and equal basis at the ballot box, without having to choose between casting their ballots and protecting their health.

The bill presents a reasonable, balanced approach that—in addition to providing minimum uniform federal standards for early in-person and absentee voting for the 2020 election, to ensure that people can vote safely during the pandemic—also gives states the flexibility to address the particular needs of their respective voting population by providing substantial federal funding.

Congress has rightfully authorized trillions of dollars in new spending to respond to the COVID-19 crisis. In this context, \$5 billion dollars to enable states to cope with a once-in-a-century challenge to elections administration amounts to little more than a rounding error. It is a small—but absolutely critical—price to pay to safeguard our democracy.

Conclusion

The COVID-19 pandemic presents us with an unprecedented threat to voting rights. But there are obvious and simple solutions that we can take now, to protect every American’s right to vote while safeguarding public health.

⁵⁴ ACLU Letter to the House of Representatives Urging Cosponsorship of the VoteSafe Act, H.R. 6807, May 14, 2020, <https://www.aclu.org/letter/aclu-letter-house-representatives-urging-cosponsorship-votesafe-act-hr-6807>.

I thank you again for the opportunity to testify before you, and look forward to answering any questions that you have.

Appendix A - ACLU COVID-19-Related Voting Rights Litigation

The ACLU has filed or intervened in ten lawsuits to protect voting rights and absentee ballot access in response to the impact of COVID-19 on the voting process.

Eligibility to Vote By Mail

1. [Thomas v. Andino](#) – South Carolina (Absentee Voting and Witness Requirement)

Summary: The ACLU filed a federal lawsuit on April 22 challenging South Carolina’s requirements that (1) all absentee ballots have a third-party witness signature on the ballot envelope and (2) voters must have a valid excuse as defined by state law for voting by mail. State election officials rejected the view that self-isolation due to the COVID-19 pandemic qualifies as a valid excuse “because of injury or illness” under state law. The lawsuit seeks to block the state from enforcing the requirements, and to have the court issue guidance instructing local officials to count all otherwise valid absentee ballots that are missing a witness signature for the state’s upcoming elections.

Status: In response to our litigation, on May 13, the Governor [signed legislation](#) ensuring all eligible voters could vote by mail in the June primary due to the COVID-19 pandemic. On May 25, the federal district court granted the ACLU’s request for a preliminary injunction and [blocked](#) the witness signature requirement for ballots cast in the June primary in response to the ACLU’s lawsuit.

2. [Missouri NAACP v. Missouri](#) – Missouri (Absentee Voting and Notary Requirement)

Summary: On April 17, the ACLU [filed a lawsuit on behalf](#) of the Missouri NAACP to ensure all eligible voters have access to absentee mail-in voting in Missouri. Due to the COVID-19 pandemic, many voters may choose to self-isolate. Missouri requires an excuse for voters to access mail-in absentee ballots. The lawsuit seeks a ruling from the court that voters confining themselves to avoid contracting COVID-19 are eligible to vote under the state’s “confinement due to illness” excuse. The lawsuit charges that refusing no-excuse mail-in absentee voting, or alternatively, refusing absentee ballots to those self-confining to avoid exposure to COVID-19, is a violation of the right to vote under the Missouri Constitution.

Status: In response to our litigation, on May 15, the Missouri legislature [passed a bill](#) permitting all Missouri voters to vote by mail during the 2020 elections, and eliminating the notary requirement for certain voters at high risk of severe COVID-19 health complications, but leaving the notary requirement in place for other voters. The bill is awaiting the Governor’s signature. On May 18, the trial court dismissed this case. *See Missouri State Conference of the NAACP v. Missouri*, No. 20AC-CC00169, Order (Cole County Circuit Court, May 18, 2020). The case is now pending in the Missouri Supreme Court.

3. [Texas Democratic Party v. Debeauvoir](#) – Texas (Absentee Voting)

Summary: On April 1 the ACLU joined a lawsuit seeking to declare that due to the COVID-19 crisis, all registered voters are eligible to receive a mail-in ballot. The lawsuit argues that all registered voters should be eligible to vote-by-mail on the basis of “disability” in the Texas Election Code’s vote-by-mail provision. The suit also charges that the court should order the state to accept and tabulate all mail-in ballots received by eligible voters under this category.

Status: On April 15, a Texas judge granted a preliminary injunction effectively permitting all registered voters to vote by mail-in ballot as a result of the COVID-19 public health crisis. On May 14, an appeals court ruled that the lower court order must remain in effect while appeals proceed. But on May 15, the Texas Supreme Court stayed that order. On May 27, the Texas Supreme Court ruled in related litigation that lack of immunity to COVID-19 does not constitute a basis for voting by mail in Texas. The ruling leaves unclear what, if any preexisting conditions, might qualify a voter to vote by mail during the pandemic.

4. [Lay v. Goins](#) – Tennessee (Absentee Voting)

Summary: On May 15, the ACLU filed a lawsuit in state court seeking to declare that Tennessee’s constitution guarantees a right to vote safely by mail during the COVID-19 crisis; or alternatively, that voters with preexisting medical conditions rendering them at risk of severe health complications from COVID-19 are entitled to vote by mail under the state’s existing illness excuse for absentee voting.

Status: A hearing on the plaintiffs’ motion for a temporary injunction is scheduled for June 3.

Witness Signature Requirements

5. [League of Women Voters of Virginia v. Virginia State Board of Elections](#)⁵⁵ – Virginia Witness Requirement

Summary: On April 17, 2020, the ACLU filed a federal lawsuit challenging the state’s witness requirement for mail-in absentee voting. Under Virginia law, any voter submitting an absentee ballot must open the envelope in front of another person, fill out the ballot, then have the third-person sign the outside of the ballot envelope before mailing it back. The lawsuit asks the court to block the witness requirement during the COVID-19 crisis and issue guidance instructing election officials to count otherwise valid ballots missing a witness signature. Proceedings will continue for the November general election.

⁵⁵ *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *10 (W.D. Va. May 5, 2020).

Status: On May 5, the court [approved a consent decree](#), pursuant to which the State agreed to remove the witness requirement for voters during the June primary. Proceedings will continue with respect to the November general election.

Other Barriers to Voting By Mail

6. [League of Women Voters of Michigan v. Benson](#) – Michigan Absentee Deadline

Summary: The ACLU filed a lawsuit in Michigan appeals court to challenge the state's deadline for receipt of absentee mail-in ballots. The state requires all absentee ballots to be received by Election Day in order to be counted. The lawsuit charges that this requirement violates the Michigan constitution and seeks a court declaration that election officials should accept and tabulate all otherwise valid ballots postmarked by Election Day.

Status: The ACLU filed a complaint for mandamus in the Michigan Court of Appeals on May 22, 2020.

7. [Collins v. Adams](#) – Kentucky Voter ID

Summary: On May 27 the ACLU filed a federal lawsuit challenging Kentucky's photo ID law during the pandemic for voters unable to obtain photo ID because DMV offices are closed or inaccessible, and who lack means to submit required photocopies of their IDs with their absentee ballots. The case also seeks to extend Kentucky's current no-excuse absentee voting rules from its primary to the general election.

Status: The complaint was filed on May 27 in the U.S. District Court for the Western District of Kentucky.

8. [Western Native Voice v. Stapleton](#) – Montana Prohibition on Ballot Collection

Summary: On March 12, 2020, the ACLU and NARF brought suit in Montana state court on behalf of Western Native Voice (WNV) challenging a Montana statute restricting Native Americans' access to the ballot. A majority of Montana's citizens vote by mail, and the state's rural tribal communities rely on get-out-the-vote (GOTV) organizers like WNV who collect and transport ballots. Montana's Ballot Interference Prevention Act (BIPA) imposed severe restrictions on GOTV organizers which would deny ballot access to many Native American voters.

Status: On May 20, the Montana District Court [issued a temporary restraining order](#) blocking the law pending the outcome of a hearing scheduled for May 29. The primary is on June 2.

9. [Black Votes Matter v. Raffensperger](#) – Georgia Failure to Provide Postage

Summary: On April 8, the ACLU [filed a complaint](#) on behalf of Black Votes Matter in federal district court challenging the constitutionality of a Georgia law requiring citizens to buy postage stamps when submitting mail-in absentee ballots and absentee applications. The COVID-19 pandemic makes voting unrealistic for voters, meaning most will have to submit mail-in absentee ballots if they wish to vote. Forcing citizens to pay for postage to mail in their ballots means they must pay to participate in the democratic process. The lawsuit charges that this is equivalent to a poll tax and is thus unconstitutional. The lawsuit is seeking a preliminary injunction to force Georgia to send all voters prepaid returnable envelopes for mail-in absentee ballots and absentee ballot applications.

Status: On April 30, the court denied Plaintiffs' motion for a preliminary injunction regarding the June primary election. *Black Voters Matter Fund et al v. Raffensperger*, 20-cv-01489-AT, Doc. No. 83 (N.D. Ga. April 30, 2020). The case remains ongoing.

Ballot Initiatives

10. [Thompson v. DeWine](#) – Ohio Ballot Initiative Signature Requirements

Summary: On April 30 the ACLU filed for emergency approval to intervene in Ohio federal district court to ensure access to the ballot in November. The ACLU is representing the Ohioans for Secure and Fair Elections (OSFE) who seek to amend the Ohio Constitution. Due to the COVID-19 pandemic, OSFE seeks to extend the deadlines and ease restrictions applicable to petitions for proposed amendments to the Ohio Constitution.

Status: On May 21 the district court ordered the Ohio Secretary of State to accept electronic signatures and extend the deadline. On May 26, the United States Court of Appeals for the Sixth Circuit [stayed the district court order](#).

**Appendix B – States that Have Altered Eligibility Rules for Voting By Mail
Due to the COVID-19 Pandemic**

Twelve states have made the switch to no-excuse mail-in voting in light of the pandemic:

<u>State</u>	<u>Description</u>
Alabama	Alabama has allowed “any qualified voter who determines it is impossible or unreasonable to vote at their voting place” as a result of COVID-19 to vote by mail in primary runoff elections being held in July by reason that “a physical illness or infirmity [] prevents [the voter’s] attendance at the polls.” ⁵⁶
Arkansas	Arkansas has determined that Ark. Code Ann. §§ 7-5-402, which only allows absentee voting for people who are “absent or unable to attend an election due to illness or physical disability,” should be read “so that all eligible qualified electors currently entitled to vote in the March 31, 2020 election may request the appropriate absentee ballots from their county of residence.”
Connecticut	The Governor of Connecticut has issued an executive order modifying Conn. Gen. Stat. Ann. § 9-135 to allow any eligible voter to vote by absentee ballot in the August 11, 2020 primary if “he or she is unable to appear at his or her polling place . . . because of the sickness of COVID-19.” ⁵⁷

⁵⁶ Governor of Arkansas, Exec. Order No. 20-08, (Mar. 20, 2020), <https://bit.ly/2TheWwc>.

⁵⁷ Conn. Exec. Order No. 7QQ (May 20, 2020) <https://bit.ly/2LWF0Zq>.

Delaware	A Delaware executive order provides that for upcoming primary and special elections, “the qualification of ‘sick or physically disabled’ [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19 . . . and who herself or himself freely chooses to use such qualification to vote by absentee ballot.” ⁵⁸
Indiana	The Indiana Election Commission issued an order stating that “[a]ll registered and qualified voters are afforded the opportunity to vote no-excuse absentee by mail.” ⁵⁹
Kentucky	The Governor of Kentucky issued an executive order stating that “[a]ll Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary if they are able to do so.” ⁶⁰
Massachusetts	Massachusetts law clarifying that “any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person,” which is one of the reasons set forth in the state constitution that permits a Massachusetts voter to vote by mail. ⁶¹

⁵⁸ Governor of Delaware, Exec. Dep’t, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://bit.ly/3bKVfTM>.

⁵⁹ Ind. Elec. Comm’n. Order No. 2020-37, *Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election*, March 25, 2020, <https://bit.ly/2yznaJ1>; Chris Sikich, *Indiana Election Officials have message for Hoosiers: Please, Please, Please Vote by Mail*, INDYSTAR, (May 15, 2020 7:44 P.M.) <https://bit.ly/2Abpbv8>.

⁶⁰ Ky. Exec. Order 296, (April 24, 2020), <https://bit.ly/3d3jfDj>.

⁶¹ An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19, ch. 45 (2020), <https://bit.ly/2LFSZTc>.

<p style="text-align: center;">New Hampshire</p>	<p>New Hampshire has interpreted its “physical disability” provision to “appl[y] equally to voters who are experiencing symptoms of COVID-19 . . . and those who are self-quarantining as a preventative measure.”⁶²</p>
<p style="text-align: center;">New York</p>	<p>The Governor of New York has issued an executive order stating that every eligible voter will receive an application for an absentee ballot with postage paid to return the application.⁶³</p>
<p style="text-align: center;">South Carolina</p>	<p>The South Carolina General Assembly passed a bill, which was signed by the Governor and which allows any voter to cite the state of emergency resulting from the COVID-19 pandemic as a recognized reason to request an absentee ballot.⁶⁴</p>
<p style="text-align: center;">Virginia</p>	<p>The Virginia Department of Elections issued a statement clarifying that “[v]oters may choose reason ‘2A My disability or illness’” to vote absentee in upcoming elections due to COVID-19.⁶⁵</p>

⁶² Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), <https://bit.ly/2ZdZ8xV>.

⁶³ N.Y. Exec. Order No. 202-23 (April 24, 2020) <https://on.ny.gov/3ekb0mj>.

⁶⁴ Morgan Newell, *S.C.’s Absentee Ballot Expansion Bill Means Changes to Voting this Primary Season*, WBTV (May 13, 2020), <https://bit.ly/2yxuYe8>.

⁶⁵ Va. Dep’t of Elections, <https://bit.ly/3dU4YbW> (last visited May 18, 2020). In addition to this administrative clarification that was triggered by the ongoing pandemic, the Virginia General Assembly amended Virginia’s election laws to permanently allow for no-excuse absentee voting starting with the November 2020 general election. VA LEGIS 1149 (2020), 2020 Virginia Laws Ch. 1149 (H.B. 1).

West Virginia	<p>West Virginia now permits all registered voters to vote absentee in forthcoming elections due to “[i]llness, injury or other medical reason which keeps [the voter] confined,” defining “other medical reason” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.”⁶⁶</p> <p>West Virginia construes “confined” as being “restricted to a specific location for reasons beyond that person’s control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.”⁶⁷</p>
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Additionally, the Missouri legislature has recently approved a new vote-by-mail option, pending the Governor’s signature.⁶⁸

⁶⁶ W. Va. Code R. §§ 153-53-2–153-53-3.

⁶⁷ W. Va. Code R. § 153-53-2.

⁶⁸ Kurt Erickson & Tynan, *On Final Day, Missouri lawmakers approve new vote-by-mail options*, ST. LOUIS POST-DISPATCH (May 15, 2020), <https://bit.ly/2ZE62Na>.

Appendix C – Population Size of 17 States that Do Not Have Statutes Currently Permitting All Eligible Voters to Vote By Mail

State	Population¹	Number of Representatives	Electoral Votes
Alabama	4,903,185	7	9
Arkansas	3,017,825	4	6
Connecticut	3,565,287	5	7
Delaware	973,764	1	3
Indiana	6,732,219	9	11
Kentucky	4,467,673	6	8
Louisiana	4,648,794	6	8
Massachusetts	6,949,503	9	11
Mississippi	2,976,149	4	6
Missouri	6,137,428	8	10
New Hampshire	1,359,711	2	4
New York	19,453,561	27	29
South Carolina	5,148,714	7	9
Tennessee	6,833,174	9	11
Texas	28,995,881	36	38
Virginia	8,535,519	11	13
West Virginia	1,792,147	3	5
TOTAL	116,490,534	154	188