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## Election Emergencies: Voting in Times of Pandemic

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# Election Emergencies: Voting in Times of Pandemic

Michael T. Morley\*

## *Abstract*

*Over the past century, two global pandemics have struck during American elections—the Spanish Flu of 1918 and COVID-19 in 2020. The legal system’s responses to those pandemics, occurring against distinct constitutional backdrops concerning voting rights, differed dramatically from each other. These pandemics highlight the need for states to address the impact of election emergencies, including public health crises, on the electoral process. States should adopt election emergency laws that both empower election officials to modify an election’s rules as necessary to respond to such disasters and set forth “redlines” to identify certain policies that, even in a disaster, are too risky and problematic to adopt. Courts, for their part, must*

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\* Sheila M. McDevitt Professor, Florida State University College of Law. I am grateful for the feedback I received on this piece at the faculty workshop at the Florida State University College of Law, as well as invaluable suggestions from Professors Edward B. Foley, Rebecca Green, and Bertrall Ross. I would also like to acknowledge the invaluable help of my research assistant, Cara Campbell, as well as the detailed and professional editing by Andrew Nissensohn, Alicia Ochsner Utt, and the staff of the *Washington & Lee Law Review*.

In preparing this article, I relied heavily upon several useful and comprehensive compilations of legal authorities relating to the 2020 election cycle, including the Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, <https://perma.cc/L93Y-5UCD>; Ballotpedia, *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, <https://perma.cc/3B53-BPVV>; and the National Conference of State Legislatures, *NCSL Election Resources*, NAT'L CONFERENCE OF STATE LEGISLATURES, <https://perma.cc/BBM3-XJCR> (last updated Jan. 5, 2022).

*recognize the unique challenges that election emergency litigation poses and adapt their jurisdictional, procedural, and equitable requirements to be able to effectively adjudicate challenges arising from pandemics and other disasters that threaten the electoral process.*

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## INTRODUCTION

States often must conduct elections in the midst of natural disasters such as hurricanes,<sup>1</sup> wildfires,<sup>2</sup> floods,<sup>3</sup> and blizzards.<sup>4</sup> Our nation has also periodically conducted elections in the face of violence, including the Civil War,<sup>5</sup> antiblack terrorism in Southern states during and after Reconstruction,<sup>6</sup> and the terrorist attacks of 9/11, which occurred on the day of New York's 2001 Democratic primaries.<sup>7</sup>

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1. See, e.g., Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 547 (2018) [hereinafter Morley, *Election Emergencies*] (recounting how Hurricanes Katrina, Sandy, and Matthew disrupted elections); DAVID K. TWIGG, *THE POLITICS OF DISASTER* 23–24 (2012) (discussing Hurricane Andrew's impact on the 1992 general election in Florida).

2. See, e.g., Sanya Mansoor, "They Have Lost So Much But They Will Not Lose Their Right to Vote." *Advocates Fight to Enfranchise Americans Displaced by Wildfires*, TIME (Sept. 25, 2020, 2:32 PM), <https://perma.cc/8426-J8DK>; Linda Poon, *What Happens to Voting When There's a Natural Disaster*, BLOOMBERG: CITYLAB (Oct. 30, 2020, 9:53 PM), <https://perma.cc/2RN9-MFZX> (last updated Nov. 2, 2020, 1:13 PM) (discussing the difficulties faced by voters in western states who evacuated their homes due to wildfires in 2020).

3. See, e.g., *In re Gen. Election—1985*, 531 A.2d 836, 840 (Pa. Commw. Ct. 1987) (holding that the trial court had authority to delay voting for two weeks in certain precincts due to heavy flooding on election day).

4. See, e.g., *State v. Marcotte*, 89 A.2d 308, 309–12 (Me. 1952) (holding that an election rescheduled due to a severe blizzard on election day was valid).

5. See 1 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES*, §§ 362–385, at 290–335 (1907), <https://perma.cc/T8PG-D22S> (PDF) (discussing disputes arising from congressional elections held in Confederate states and areas under martial law).

6. See Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L. REV. 633, 651 (2019) ("Beginning in the 1870s, white violence and intimidation targeted black voters and other supporters of the Republican Party with the goal of deterring them from voting and giving the Democratic Party an advantage in elections."); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 164–67 (2019).

7. See Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 525–26 (2005) (describing how a New York trial judge and the Governor issued orders suspending ongoing primaries in the wake of the 9/11 terrorist attacks); see also Morley, *Election Emergencies*, *supra* note 1, at 553–59.

National public health crises such as pandemics pose distinct challenges for the electoral process. Whereas the effects of natural disasters and even many violent conflicts tend to be geographically limited, pandemics impact the entire nation. Moreover, many of the challenges posed by natural disasters and violence can be somewhat mitigated by relocating polling locations.<sup>8</sup> With a pandemic, in contrast, there often is not a “safe” spot to which polling places and election officials may be moved, and bringing the disease under control can take months or years.<sup>9</sup> Additionally, the risk and consequences of infection in a pandemic may vary based on individual factors such as age or preexisting medical conditions to a much greater extent than the dangers posed by natural disasters or violence within the geographic areas they impact.<sup>10</sup>

This Article proposes that a sound election system rests on three fundamental principles. First, all eligible voters must have a reasonable opportunity to cast their ballots safely and have them counted. Second, the system must minimize the possibility of mistake, irregularity, illegality, accident, confusion, or fraud. Third, the system must be designed in a way that bolsters public confidence in the accuracy and integrity of the election’s results.<sup>11</sup> Sometimes, these principles may be in tension with each other. Signature match requirements for absentee ballots, for example, help ensure that the person who

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8. See Morley, *Election Emergencies*, *supra* note 1, at 611–12.

9. See Nicky Phillips, *The Coronavirus Will Become Endemic*, 590 NATURE 382, 382–83 (2021) (“Almost 90% of [immunologists surveyed] think that the coronavirus will become endemic—meaning that it will continue to circulate in pockets of the global population for years to come . . .”).

10. See Amanda Morris & Maggie Astor, *Vulnerable to the Virus, High-Risk Americans Feel Pain as the U.S. Moves On*, N.Y. TIMES (Feb. 17, 2022), <https://perma.cc/B3A6-M6Y5> (last updated Feb. 24, 2022) (“Millions of Americans with weakened immune systems, disabilities or illnesses [are] especially vulnerable to the coronavirus.”).

11. In the context of campaign finance law, the U.S. Supreme Court has recognized that the government has equally compelling interests in preventing both actual quid pro quo corruption of governmental officials (that is, bribery) as well as the *appearance* of such corruption. See *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”); see also Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1568 (2012).

completed and returned a ballot is the intended voter and can bolster public confidence in the integrity of the electoral process.<sup>12</sup> Yet such rules may result in eligible voters' ballots being erroneously rejected.<sup>13</sup> When it comes to addressing election emergencies, however, there are many steps that states can take to promote all of these principles simultaneously.

To implement these principles, an election system must be robust enough to withstand a wide range of possible emergencies. When a crisis arises, a state should allow as broad a range of different voting methods as reasonably possible to minimize the impact on voters.<sup>14</sup> For some types of emergencies, like a last-minute natural disaster, relocating polling places or transitioning to regional voting centers might be the most effective responses.<sup>15</sup> For other threats, such as a pandemic where in-person voting carries a risk of contagion, absentee voting may be a more effective alternative.<sup>16</sup> But disasters such as terrorist transmission of anthrax in the mails, a national postal strike, or destruction of a central mail sorting facility may render mail-based voting unsafe or ineffective.<sup>17</sup> And, perhaps most frighteningly, multiple emergencies can occur at the same time; one nightmare scenario for the 2020 election was having a hurricane strike major population centers on Election Day in the

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12. See, e.g., *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 382 (6th Cir. 2020) (“Since the identity of a person who voted by mail cannot be verified as easily as someone who voted in person—in-person voters must present photo identification—the legislature has established procedures and conditions for absentee voting with which it demands ‘strict compliance.’” (citation omitted)).

13. See *id.* at 395 (Moore, J., dissenting) (discussing evidence that “the most recent reported rejection rate for absentee ballots due to perceived signature invalidity is 0.09% and . . . many of those rejections are highly likely to be erroneous due to the inadequate training that election officials receive”).

14. See Morley, *Election Emergencies*, *supra* note 1, at 615–16.

15. See *id.* at 611–12, 617 n.436.

16. See *infra* Part III.

17. In 2001, for example, anthrax sent through the postal system resulted in a nationwide panic that would have seriously affected any election held by mail at the time. See Scott Shane, *F.B.I., Laying Out Evidence, Closes Anthrax Case*, N.Y. TIMES (Feb. 19, 2010), <https://perma.cc/G5PH-ZFJQ>; David Johnston & William J. Broad, *Anthrax in Mail Was Newly Made, Investigators Say*, N.Y. TIMES (June 23, 2002), <https://perma.cc/T6RL-3RPE>.

midst of the COVID-19 pandemic.<sup>18</sup> Because of the unpredictable breadth of potential catastrophes, creative alternatives—such as authorizing election officials to travel to hospitals or assisted-living facilities where voters may be confined,<sup>19</sup> or conducting curbside<sup>20</sup> or potentially even drive-through voting<sup>21</sup> in a carefully planned, secure manner for medically vulnerable voters—should also be considered.

This Article explores protection of the constitutional right to vote in the midst of public health crises, distilling lessons learned from conducting the 2020 presidential election in the midst of the COVID-19 pandemic. Building on my previous work, this Article contends that, to conduct elections safely and fairly during emergencies such as pandemics, states must enact election emergency statutes to empower the appropriate officials to make necessary adjustments to the electoral process. In addition to specifying the steps that officials *may* take, such statutes should also impose “election emergency redlines,” identifying changes to the rules governing the electoral process that officials are prohibited from adopting, even in emergencies. While every state’s election code contains at least a few narrow provisions allowing officials to address particular kinds of problems,<sup>22</sup> the majority of states presently lack comprehensive election emergency laws, and very few contain election

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18. See Maria Clark, “One, Two, Three Punch”: *Back-to-Back Hurricanes and COVID-19 Complicate Voting in Lake Charles*, THE TENNESSEAN (Oct. 28, 2020, 7:00 AM), <https://perma.cc/2Q5B-NPH5> (last updated Oct. 28, 2020, 7:38 AM) (stating that election officials consolidated polling locations into “mega-sites” in response to the combined impact of COVID-19 and Hurricanes Laura and Delta hitting the Lake Charles area of Louisiana in quick succession).

19. See, e.g., CONN. GEN. STAT. §§ 9-159q(b), (g), 9-159r(a), (c) (2022); FLA. STAT. § 101.655(1) (2022); IOWA CODE § 53.22(2)(a)(1) (2022); MINN. STAT. § 203B.11(1) (2022); S.D. CODIFIED LAWS § 12-19-9.1 (2023); WIS. STAT. § 6.875(2)(a) (2022).

20. See, e.g., 10 ILL. COMP. STAT. 5/17-13.5 (2022); MISS. CODE ANN. § 23-15-541(2) (2022); N.C. GEN. STAT. § 163-166.9(a) (2022); TEX. ELEC. CODE § 64.009(a) (2022).

21. See, e.g., *S.A.F.E. Initiatives*, HARRIS CNTY. ELECTIONS DIV., <https://perma.cc/443G-C92W>.

22. See Morley, *Election Emergencies*, *supra* note 1, at 606 n.407, 611 n.436 (compiling state laws allowing election officials to use paper ballots or relocate polling places if unexpected problems arise).

emergency redlines.<sup>23</sup> Moreover, most current election emergency statutes seem to assume that the crisis at issue will be a natural disaster like a hurricane or earthquake; few are sufficiently broad to address the unique circumstances that pandemics implicate.

Courts, for their part, must be attentive to the special considerations inherent in litigation arising from election emergencies. They must recognize that political parties, candidates, and potentially even voters have standing to bring challenges regarding the impact of emergencies on the elections in which they participate.<sup>24</sup> Courts should likewise acknowledge that a state's Secretary of State or other statutorily-designated chief election officer<sup>25</sup> is generally a proper defendant, rather than requiring plaintiffs to sue potentially dozens of county election officials in typically harried, expedited proceedings. Moreover, courts generally should not decline to order necessary adjustments to an election's rules in response to unexpected last-minute emergencies under the *Purcell* principle.<sup>26</sup>

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23. See, e.g., N.C. GEN. STAT. § 163-27.1(a), (d) (2022) (specifying that, when the Executive Director of the State Board of Elections exercises emergency authority to “conduct an election,” he or she may, “[u]nder no circumstances” either send absentee ballots to voters who failed to submit valid request forms or require the election to be conducted “using all mail-in ballots”); VA. CODE ANN. § 24.2-713 (2022) (empowering the Commissioner of Elections to “designate alternative methods and procedures” for requesting and returning absentee ballots during a declared emergency, but prohibiting the Commissioner from “authoriz[ing] the counting of any absentee ballot returned after the polls have closed”); see also IOWA CODE § 47.1(2) (2022) (specifying that, even in a countywide emergency, the number of polling places in the county may not be reduced by more than 35 percent); IDAHO CODE § 34-1006(2) (2023) (specifying that, even in a declared emergency, every voter must have “the opportunity to vote in person”); cf. 26 OKLA. STAT. §§ 22-104(1), 22-105 (2022) (allowing the Secretary of the State Election Board to prescribe emergency procedures for “the counting and recounting of votes,” but specifying that such manual counts must involve, if possible, people of different political parties).

24. See *infra* Part IV.A.

25. See 52 U.S.C. § 20509.

26. See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (holding that federal courts should generally avoid granting relief in election cases shortly before an election's voting period begins due to “considerations specific to election cases”); see also Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 441–42 (2016) (arguing that the *Purcell* principle should be one factor that courts consider in deciding whether to grant injunctive relief



In crafting relief, courts should be sensitive to the remedial hierarchy established by the U.S. Supreme Court by modifying the rules governing electoral procedures where possible, rather than extending the period for voting.<sup>27</sup> Finally, once voters have cast ballots in reliance on emergency orders, regulations, or injunctions, courts should vigorously apply the doctrine of laches to preclude after-the-fact attempts to retroactively contest the validity of—and nullify—those votes.<sup>28</sup>

Part I lays a foundation by discussing the last major election cycle that occurred in the midst of a global pandemic: the 1918 elections held while the nation was being ravaged by the Spanish Flu. This Part unearths an election contest for state legislature arising from the Spanish Flu that has apparently never before been discussed in the literature.<sup>29</sup> Part II explores the impact of COVID-19 on the 2020 presidential election, discussing many of the emergency measures that states implemented, the specific legal channels through which those measures were adopted, and litigation stemming from states' actions or, in some cases, failure to act.

Part III turns to controversies concerning a specific set of emergency measures that many states adopted in response to COVID-19: alternatives for voting outside the polling place. As recently as the 2016 election, approximately seventeen states had limited, excuse-based absentee voting systems.<sup>30</sup> In over half the states in the nation, fewer than 10 percent of the ballots

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shortly before an election period commences, rather than a dispositive prohibition on such relief).

27. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207–08 (2020) (per curiam) (reversing a district court order “[e]xtending the date by which ballots may be cast by voters” because it “fundamentally alter[ed] the nature of the election”); see also Morley, *Election Emergencies*, *supra* note 1, at 615–16.

28. See *Costello v. United States*, 365 U.S. 265, 282 (1961) (“Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”).

29. Cf. Jason Marisam, *Judging the 1918 Election*, 9 ELECTION L.J. 141, 141 n.2 (2010) (stating that “[b]road searches on Lexis and Westlaw for all cases that might relate to both the flu or influenza and voting or elections” during the 1918 election cycle resulted in only one Idaho Supreme Court case).

30. See Drew DeSilver & A.W. Geiger, *For Many Americans, Election Day Is Already Here*, PEW RSCH. CTR. (Oct. 21, 2016), <https://perma.cc/9CB6-XZAQ>.

cast in the 2016 election were absentee or mail-based.<sup>31</sup> Due to COVID-19, many states had to depart from their ordinary election processes—whether through statutory amendment, gubernatorial declaration, emergency regulation, or court order—and dramatically expand their administrative capacity to prepare for the expected deluge of absentee ballots.<sup>32</sup>

Part IV explores the jurisdictional, procedural, and remedial difficulties courts faced in attempting to adjudicate the flood of election cases stemming from COVID-19 and recommends solutions. Part V presents broader remedial principles, explaining how states can alleviate the need for such emergency litigation by adopting election emergency statutes to prepare for the next pandemic or other disaster that threatens the electoral process. This Part emphasizes that states must not only empower election officials to address such crises, but adopt election emergency redlines, specifying certain steps that officials are prohibited from taking even in the midst of an emergency. The Article concludes by reiterating the need for legislators, election officials, and courts to focus on all three principles of sound elections—broad access for eligible voters, security, and legitimacy—when public health crises strike.

### I. VOTING DURING THE SPANISH FLU

Before COVID-19, the Spanish Flu of 1918 was the most significant pandemic that impacted our nation's elections.<sup>33</sup>

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31. U.S. ELECTION ASSISTANCE COMM'N, THE ELECTION ADMINISTRATION AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT: A REPORT TO THE 115TH CONGRESS 23–25 (2017), <https://perma.cc/W95G-N5RW> (PDF).

32. See Nicholas Riccardi & Angeliki Kastanis, *Record Avalanche of Early Votes Transforms the 2020 Election*, ASSOCIATED PRESS (Oct. 16, 2020), <https://perma.cc/9QMB-4CVA>; *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 3, 2020), <https://perma.cc/EGT2-P6BW>; see also Jesse Yoder et al., *How Did Absentee Voting Affect the 2020 U.S. Election?* 1–5 (Stanford Inst. for Econ. Pol'y Rsch., Working Paper No. 21-011, 2021) (finding that vote-by-mail did not significantly increase voter turnout or propel the Democratic party's performance during the 2020 election).

33. See Bo Erickson, *Voting During a Pandemic? Here's What Happened in 1918*, CBS NEWS (Apr. 6, 2020, 3:58 PM), <https://perma.cc/FXJ9-67E3> (last updated Apr. 7, 2020, 11:58 AM); Dionne Searcey, *The Lessons of the Elections of 1918*, N.Y. TIMES (Mar. 21, 2020), <https://perma.cc/9MLV-RKHQ>. See generally Marisam, *supra* note 29.

That strain of influenza was highly contagious. It weakened its victims' lungs, frequently leading to pneumonia that was often fatal for children, the elderly, and young adults in their twenties.<sup>34</sup> Altogether, it is estimated that approximately 675,000 Americans—and at least twenty-one million people worldwide—died from the Spanish Flu or resulting pneumonia.<sup>35</sup>

In Spring 1918, the disease swept through American military bases, infecting and killing thousands of troops.<sup>36</sup> The best available evidence suggests that the Allied Expeditionary Force brought it to Europe, infecting both Allied and enemy forces and dramatically increasing the war's already grim casualty count.<sup>37</sup> That summer, as the disease swept through Europe, cases in the United States seemed to abate.<sup>38</sup>

A second wave started in Boston in August of 1918.<sup>39</sup> Within two weeks of the flu's re-appearance, two thousand American naval personnel contracted it.<sup>40</sup> The disease struck with "stunning rapidity"; healthy people became incapacitated, developing temperatures as high as 105 degrees as well as "[g]eneral weakness and severe aches in their muscles, joints, backs and heads" in as little as two hours.<sup>41</sup> Although most people recovered after a few days, between five and ten percent of victims proceeded to catch pneumonia.<sup>42</sup>

By the end of September 1918, the contagion had spread to military bases throughout the United States: the Army had over 50,000 cases of the Spanish Flu with 1,100 deaths, while the Navy had 31,000 ill sailors and another 1,100 dead.<sup>43</sup> The situation was so dire that, despite the Allies' massive planned offensive against Germany, the Army cancelled its October draft

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34. ALFRED W. CROSBY, *AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918*, at 5, 21 (2d ed. 2003).

35. *Id.* at 206–07.

36. *Id.* at 11.

37. *Id.* at 25–27.

38. *See id.* at 30, 32.

39. *See id.* at 39 (explaining that the Navy's "grossly overcrowded" living quarters in Boston contributed to the disease's spread in the city).

40. *Id.*

41. *Id.*

42. *Id.* at 39–40.

43. *Id.* at 48.

call for 142,000 additional men.<sup>44</sup> The Army's death toll peaked in mid-October with over 6,000 deaths in a single week.<sup>45</sup> New York City, by comparison, suffered as many as 5,200 deaths in a week.<sup>46</sup>

That fall, the flu spread quickly in Philadelphia<sup>47</sup> and swept through the West Coast.<sup>48</sup> The U.S. Surgeon General issued a public health advisory urging cities to shut down their schools, churches, saloons, and theaters,<sup>49</sup> and many complied.<sup>50</sup> Nevertheless, so many people died in Pennsylvania that bodies were often left in their homes for several days until they could be collected and buried.<sup>51</sup> One city morgue stacked hundreds of un-embalmed corpses on top of each other with no ice because coffins were in short supply.<sup>52</sup>

Both the Speaker of the U.S. House of Representatives and the House Majority Leader contracted the Spanish Flu.<sup>53</sup> The House and the Senate closed their public galleries and a few

44. *Id.* at 49.

45. *Id.* at 59.

46. *Id.* at 60.

47. *Id.* at 73.

48. *Id.* at 94.

49. *See id.* at 74 (“I hope that those having the proper authority will close all public gathering places if the community is threatened with the epidemic. This will do much toward checking the spread of the disease.” (quoting Nat'l Archives, R.G. 90, File 1622, Blue, Rupert, *Epidemic Influenza and the United States Public Health Service*)).

50. *See id.* at 74, 87, 95; *see also, e.g., Close N.J. Schools to Check Influenza*, PHILA. EVENING BULL. (Sept. 30, 1918), <https://perma.cc/2SV3-UQ5H>; *Pastors Protest Church Closing*, PHILA. INQUIRER (Oct. 18, 1918), <https://perma.cc/WH3S-ZTPF>; *State Board Here to Discuss Quarantine*, LOUISVILLE TIMES (Oct. 18, 1918), <https://perma.cc/Q8MP-KPWJ>. Digital copies of many of the historic newspaper articles cited here have been made available through the *Influenza Encyclopedia* digital archive maintained by the University of Michigan Medical School's Center for the History of Medicine. *See 1918 Influenza Digital Archive*, UNIV. OF MICH. CTR. FOR THE HIST. OF MED., <https://perma.cc/V6ME-RNRQ>. Links to pieces dealing specifically with the 1918 elections are available at *1918 Influenza Pandemic (Spanish Flu) and the 1918 Midterm Election Cycle*, BALLOTPEdia, <https://perma.cc/35D8-FR5Y> (last updated Nov. 24, 2020).

51. CROSBY, *supra* note 34, at 76–77.

52. *Id.* at 77.

53. *See Vote a Million to Fight “Flu”*, WALL ST. J. (Sept. 29, 1918), <https://perma.cc/7CKH-TM5F>.

days later the entire Capitol was closed to the public.<sup>54</sup> The House held only brief pro forma sessions which lacked the constitutionally required quorum.<sup>55</sup>

On October 15, 1918, the House considered a joint resolution that the Senate had already adopted to create a physician reserve corps for the Public Health Service to help alleviate the physician shortage that many cities were facing.<sup>56</sup> Many doctors had joined the military to aid the war effort and were stationed away from home, preventing them from assisting with the domestic emergency.<sup>57</sup> The House still lacked a quorum. Due to the exigency of the pandemic, however, members from both parties agreed to a *modus vivendi* to consider the legislation without a quorum call.<sup>58</sup> Following some amendments in the committee of the whole, the House approved the resolution by voice vote.<sup>59</sup>

Throughout most of what would have been the fall campaign season, political parties and candidates across the nation cancelled rallies, speeches, and other campaign events, mostly due to public health orders prohibiting public gatherings.<sup>60</sup> In Seattle, the Republican state party chair planned to have county chairs “organize automobile parties of county candidates to canvass their counties and see as many party leaders and other voters as possible.”<sup>61</sup> One Milwaukee newspaper labeled 1918 the “first silent campaign,” explaining, “A few personal appeals have gone through the mails and the billboard features have gone on as usual, but the crowded hall, the speech, the applause, and the cigar smoke, have all been

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54. See 56 CONG. REC. 11,164 (1918) (statement of Rep. Rainey).

55. See *Sick Days*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES (Dec. 17, 2018), <https://perma.cc/N2HF-DBTL>.

56. *Id.*

57. See 56 CONG. REC. 11,268 (1918) (statement of Rep. Foster); *id.* at 11,272 (statement of Rep. Vare).

58. See *id.* at 11,267 (statement of the Speaker).

59. *Id.* at 11,288.

60. See, e.g., *Flu Snag for Politicians*, COURIER-J., LOUISVILLE (Oct. 7, 1918), <https://perma.cc/B8VB-Q5VJ>; *Politics Faces Real Shutdown by Influenza*, CHI. TRIB. (Oct. 16, 1918), <https://perma.cc/Z8BK-4Y3T>; *Fall Campaign Still Hindered*, INDIANAPOLIS STAR (Oct. 17, 1918), <https://perma.cc/5MG5-8NE9>.

61. *Influenza Damper Stifles Politics*, SEATTLE DAILY TIMES (Oct. 20, 1918), <https://perma.cc/X6WN-WPUM>.

missing.”<sup>62</sup> In Iowa, despite the ongoing nationwide war effort, “political interest seemed at the lowest possible ebb. Voters joked each other on the street corner over inability to name candidates for some of the most important offices.”<sup>63</sup>

The flu also impeded suffragettes’ efforts to generate public support for several state constitutional amendments on the ballot in the November elections.<sup>64</sup> One activist lamented, “Everything conspires against women suffrage. Now it is the influenza which is trying to prevent a spread of the suffrage doctrine.”<sup>65</sup> Another organizer in South Dakota explained, “Just when we had plans developed for a renewed and revised campaign, along comes the influenza and cuts off all possibility of public speaking and even meetings in open air. . . . [W]e have not been able to work with the individual voter.”<sup>66</sup>

By the end of October, mortality rates began to decline on the East Coast and throughout much of the Midwest. Emergency hospitals began closing, while churches and schools in many areas reopened.<sup>67</sup> With bans on public meetings lifted, last-minute political events in some jurisdictions also got into swing.<sup>68</sup> The threat of the flu still hung over the election, however, particularly on the West Coast.<sup>69</sup> Because the flu had spread there later, deaths in the western states did not begin to peak until early November.<sup>70</sup>

In Oakland, California, a quarter of local election board members resigned just a few days before the election due to the

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62. *Flu Ban Curbs Spellbinders*, MILWAUKEE J. (Nov. 3, 1918), <https://perma.cc/3FRT-BTGE>.

63. *Campaign Closes with Little Noise*, DES MOINES REG. (Nov. 3, 1918), <https://perma.cc/6H9F-2TTM>.

64. *Influenza Mars Suffrage Plans*, INDIANAPOLIS STAR (Oct. 10, 1918), <https://perma.cc/ER8J-ZAQR>.

65. *Id.*

66. Ellen Carol Dubois, *A Pandemic Nearly Derailed the Women’s Suffrage Movement*, NAT’L GEOGRAPHIC (Apr. 20, 2020), <https://perma.cc/B94C-MMB3>.

67. See CROSBY, *supra* note 34, at 85, 99; *Schools in State to Reopen Monday*, BIRMINGHAM NEWS (Oct. 30, 1918), <https://perma.cc/K747-G9JN>.

68. See *Political Drives Will Open Today Despite Epidemic*, ALBANY KNICKERBOCKER PRESS (Oct. 20, 1918), <https://perma.cc/AEE4-7TJK>.

69. See Marisam, *supra* note 29, at 143.

70. See CROSBY, *supra* note 34, at 60.

risks posed by the flu.<sup>71</sup> Oakland election officials planned to appoint people showing up to vote as replacements on the spot.<sup>72</sup> In Deseret, Utah, county officials urged that polling places be relocated to outdoor tents because “ventilation is often poor in the polling places,” large crowds posed a risk of contagion, and voters “might be kept away from the polls by fear of contracting the disease.”<sup>73</sup> On the East Coast, Philadelphia faced serious challenges in conducting the election; the week before election day, over 300 out of 1,349 polling place officials had to be replaced.<sup>74</sup> Many of those vacancies arose because the flu had killed the officials.<sup>75</sup>

Voter turnout was generally expected to be low.<sup>76</sup> Election workers<sup>77</sup> and voters<sup>78</sup> were required to wear masks at many polling places. Health officials in some locales advised limiting the number of voters permitted in each polling place.<sup>79</sup> Many jurisdictions reported heavily depressed vote tallies.<sup>80</sup> In some

71. See *Election Board Members Quit over Flu Scare*, OAKLAND TRIB. (Oct. 31, 1918), <https://perma.cc/B8T6-BM9X>.

72. See *id.*

73. *Social Gatherings Forbidden for Present*, DESERET EVENING NEWS (Oct. 18, 1918), <https://perma.cc/34MM-BD9G>.

74. *Draft and “Flu” Hit Election Systems*, PHILA. EVENING BULL. (Nov. 1, 1918), <https://perma.cc/Q24H-3LTR>.

75. See *id.* (“[T]he ravages made by the ‘flu’ [were] plain by the written notice ‘deceased’ on the large envelopes sent out by the Commissioners.”).

76. See, e.g., *Stephens, Bell, Both Confident; Influenza May Hold Down Vote*, L.A. EVENING HERALD (Nov. 4, 1918), <https://perma.cc/4N5X-AXHB>.

77. See, e.g., *Influenza Affects Vote*, ST. PAUL PIONEER PRESS (Nov. 6, 1918), <https://perma.cc/H3XS-WCE9>; *Masked Men to Front Voters*, L.A. TIMES (Nov. 5, 1918), <https://perma.cc/2UB4-EKZY>; *Precautions at Polls Ordered to Prevent Spread of Plague*, ROCKY MOUNTAIN NEWS (Nov. 3, 1918), <https://perma.cc/SB3C-5X4C>.

78. See *Even Influenza Avails Not to Dampen Ardor of Voters*, S.F. CHRON. (Nov. 6, 1918), <https://perma.cc/3HXH-GKBJ>; *Mask Violators Argue; Are Fined*, OAKLAND TRIB. (Nov. 7, 1918), <https://perma.cc/MA7S-YF7J>; *Voting is Safe if You Wear a Mask*, OAKLAND TRIB. (Nov. 2, 1918), <https://perma.cc/74FF-L2L6>.

79. See, e.g., *Health Warning Is Given to Voters*, SPOKESMAN-REV. (Nov. 5, 1918), <https://perma.cc/GCM2-38SU>.

80. See, e.g., *Less than 1,000 Votes Cast Here*, CHARLESTON EVENING POST (Nov. 6, 1918), <https://perma.cc/67VB-BYY8>; *Early Vote Is Light; Officials Lacking*, OAKLAND TRIB. (Nov. 5, 1918), <https://perma.cc/J934-UR4C> (“The influenza epidemic scared Berkeley voters away from the polls, despite a rigid enforcement of the mask ordinance, and an unusually light vote was recorded

neighborhoods in southern Minnesota, for example, nearly all the inhabitants were infected with the flu and few people voted.<sup>81</sup> Likewise, in Alameda County, California, a substantial number of poll workers were too ill to staff their assigned polling locations.<sup>82</sup> Some polling places were unable to open at all, leaving voters in those precincts with no way to vote.<sup>83</sup> Many municipalities prohibited people from congregating to hear election results or holding election night parties.<sup>84</sup>

Overall, voter turnout was approximately 10% less than in the 1914 congressional elections; up to three million people refrained from voting due to the Spanish Flu pandemic.<sup>85</sup> Although the Spanish Flu caused major impediments to the electoral process, it appears to have resulted in very few challenges to the election's outcomes.<sup>86</sup> One such controversy concerned an election for county probate judge in Idaho.<sup>87</sup> County commissioners had designated the courthouse as the polling place for the precinct containing the city of Albion.<sup>88</sup> That precinct included the Albion State Normal School, a small two-year teachers' college that had some residential students.<sup>89</sup>

In early November, faculty and students living at the school were quarantined and confined to its campus.<sup>90</sup> The day before the election, they petitioned the county to establish a polling

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at noon today.”). San Francisco, in contrast, experienced high turnout. See *Even Influenza Avails Not to Dampen Ardor of Voters*, *supra* note 78.

81. See *Influenza Affects Vote*, *supra* note 77.

82. See *Early Vote Is Light; Officials Lacking*, *supra* note 80.

83. See *Was the “Flu” to Blame?*, OAKLAND TRIB. (Nov. 18, 1918), <https://perma.cc/S45C-43Z2> (“Because of the prevalence of the influenza the polls of Ingot precinct in Shasta county remained closed on election day. In that precinct 95 voters are registered.”); Erickson, *supra* note 33 (“Some poll sites were unable to open due to ‘too much influenza,’ according [to] *The Sacramento Bee*, declaring ‘there were not enough citizens who were well enough.’”).

84. See *Health Warning Is Given to Voters*, *supra* note 79; *Flu Prevents Night Parties*, CLEVELAND PLAIN DEALER (Nov. 6, 1918), <https://perma.cc/S2CX-CRKC> (PDF); *Health Before Politics*, CINCINNATI COM. TRIB. (Nov. 6, 1918), <https://perma.cc/6ZS7-3JEN>.

85. See Marisam, *supra* note 29, at 145–46.

86. See *id.* at 146.

87. See *Harper v. Dotson*, 187 P. 270, 270 (Idaho 1920).

88. *Id.*

89. See Marisam, *supra* note 29, at 147.

90. *Harper*, 187 P. at 270.



place at the school.<sup>91</sup> The commissioners agreed and appointed additional election judges to accept and tally votes there.<sup>92</sup> Fifteen votes were cast at the school for the Democratic candidate and four votes for the Republican.<sup>93</sup> After the Democrat won the countywide election by an eleven-vote margin, the Republican contested the election results in state court.<sup>94</sup>

State law specified that county commissioners could not relocate a polling place after July 31 in an election year.<sup>95</sup> When it “become[s] impossible or inconvenient to hold an election” at a designated polling place, however, the election judges—“after having assembled as near as practicable to such place”—could instead move the polls to “the nearest convenient place.”<sup>96</sup> This provision was narrow. It allowed a polling location to be changed after the statutory deadline only if the election judges first gathered there, and even then the polling location had to be moved as close as possible.<sup>97</sup> This statute was crafted to deal with unexpected physical impediments at a particular location, such as a flood or building collapse, rather than a broader threat such as a pandemic. Moreover, this provision did not allow for the establishment of additional emergency polling places if the originally designated location remained open.<sup>98</sup>

At the time, the Idaho Supreme Court was comprised of two justices appointed by Democrats and one appointed by a Republican.<sup>99</sup> Applying a plain meaning approach, it unanimously held that “the act of the commissioners in designating a second voting place in Albion precinct, after their July meeting, was void and rendered the election held at said place void.”<sup>100</sup> The court added that “[t]he only reasonable construction” of the statute governing polling locations “is that

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91. *Id.*

92. *Id.* at 270–71.

93. *Id.* at 271.

94. *Id.* at 270.

95. *Id.* at 271 (quoting IDAHO C.S. § 510).

96. *Id.* (quoting IDAHO C.S. § 584).

97. *Id.* (citing IDAHO C.S. §§ 510, 584).

98. *See id.* (citing IDAHO C.S. §§ 510, 584).

99. Marisam, *supra* note 29, at 148.

100. *Harper v. Dotson*, 187 P. 270, 271 (Idaho 1920).

an election held in violation of its express prohibitory terms is invalid.”<sup>101</sup>

The court was also concerned about the lack of transparency regarding the new polling location. State law required county officials to give public notice of all polling locations, but there was no evidence that the county had informed the public in any way about the voting site established at the school.<sup>102</sup> It was not even clear from the record, the court declared, whether all of the voters quarantined at the school knew they could vote there.<sup>103</sup> More broadly,

[t]he quarantine in effect at the school made the pretended election a private one. The canvass of the votes could not be public as required by law, and there could be no opportunity to exercise the right of challenge. . . . The whole affair seems to have been a special dispensation granted certain individuals in violation of the statutes.<sup>104</sup>

The court concluded that the votes cast at “the pretended election held at the school . . . should not have been counted.”<sup>105</sup> After deducting the votes cast there, as well as other votes that were deemed illegal for unrelated reasons, the court concluded that the Republican had prevailed.<sup>106</sup> It did not address the fact that voters had cast their ballots in reliance on the county commissioners’ actions. Nor did it discuss whether the school’s residents would have been permitted to vote in person at the courthouse, despite the quarantine.<sup>107</sup> Rather, the court’s main focus seems to have been prohibiting government officials from unilaterally approving substantial deviations from state law and effectively forcing the court to accept otherwise invalid votes as a *fait accompli*.

In Oklahoma, one county held an election on an initiative to dissolve a consolidated school district.<sup>108</sup> The results were 140

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 272.

107. *See id.* at 271.

108. *See Rasure v. Sparks*, 183 P. 495, 495 (Okla. 1919).

votes in favor of dissolution and 82 against.<sup>109</sup> The county superintendent refused to recognize the election results and appointed officers for the consolidated district's school board.<sup>110</sup> Several taxpayers sought a writ of mandamus against the superintendent to compel him to issue a proclamation that the district was dissolved.<sup>111</sup>

The superintendent argued, among other things, that the election's results were invalid because "the day on which such purported election was held was a very rainy, stormy and muddy day, and . . . the epidemic known as the 'Flu' was quite prevalent in said district, all of which prevented a full vote on the question of dissolution."<sup>112</sup> The Supreme Court of Oklahoma held that anyone who wished to challenge the election's results could have filed an election contest.<sup>113</sup> Since no one had done so, the superintendent was bound by those results and had a ministerial duty to dissolve the consolidated district.<sup>114</sup> That ruling turned primarily on procedure, however. The court did not address whether, in a direct election contest, the impediments posed by the flu might have been sufficient to nullify the election's results.

Another election challenge arising from the Spanish Flu has apparently gone unnoticed in the literature; it is eerily similar to the type of post-election disputes that the United States experienced, writ large, following the 2020 election. The challenge arose from allegedly illegal changes to election procedures in response to the flu, accusations of ballot mishandling, the exclusion of election observers from the ballot count, and even vote-buying.<sup>115</sup> Democratic candidates T.F. Murtha, a prominent attorney, and Fred Roquette, a businessman and state legislator, had been declared the winners of their races to represent Stark County in the North Dakota House of Representatives.<sup>116</sup> The nonpartisan

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 496.

113. *See id.* at 496–97.

114. *See id.* at 497.

115. *Will Deny Charges Brought About by Beaten Leaguers*, GRAND FORKS HERALD (Dec. 4, 1918), <https://perma.cc/LX3M-3QB8>.

116. *Id.*

candidates they defeated, Anthony Reilly and Valentine Kuhn, filed an election contest with the North Dakota House,<sup>117</sup> which was the final arbiter of election contests for that chamber.<sup>118</sup>

The challengers alleged that election officials had illegally accepted absentee ballots from six voters in the city of Belfield who had been bedridden with the Spanish Flu on election day. “[B]eing anxious to vote,” those voters asked the election board to “send the judges of election to their several homes to take their vote.”<sup>119</sup> Election officials fulfilled the voters’ requests, returning the voters’ completed ballots to their polling place and depositing them in the ballot box.<sup>120</sup> If the House rejected those votes, the nonpartisan candidates would win.<sup>121</sup> The challengers also alleged that Murtha and Roquette had bought “several barrels of whiskey” which they “ladled out to the thirsty voters of Stark county” to illegally influence their votes.<sup>122</sup>

Peculiarly, the challengers’ attorneys argued to the House committee overseeing the election contest that

[t]he only reason for making the contest was to teach the people of [Stark] county and of the state that irregularities in elections should cease. “It is better,” [one of the attorneys] said, “that the committee should decide that Stark county should have no representation in the house than that they should countenance such election irregularities.”<sup>123</sup>

Their attorneys also claimed that Murtha, who had been chair of the Stark County Democratic Committee, had entered into a corrupt “conspiracy” with the chair of the Republican county committee against the nonpartisan candidates.<sup>124</sup>

Murtha and Roquette responded that election officials had also allowed eighteen housebound flu patients in the Hungary

117. *Id.*

118. N.D. CONST. OF 1889, art. II, § 47.

119. *Two Defeated Candidates to Try Once More*, GRAND FORKS HERALD (Jan. 7, 1919), <https://perma.cc/69BD-KC5F>.

120. *Id.*

121. *Id.*

122. *Contestants Fail to Offer New Evidence*, GRAND FORKS HERALD (Jan. 24, 1919), <https://perma.cc/F7LK-PEYZ>.

123. *Would Unseat Men to Teach People Lesson*, GRAND FORKS HERALD (Jan. 23, 1919), <https://perma.cc/K6JD-DFMN>.

124. *Contestants Fail to Offer New Evidence*, *supra* note 122.

precinct to vote from home.<sup>125</sup> All but two of those ballots had been cast for the challengers.<sup>126</sup> If votes from housebound voters were invalid, then both the Belfield and the Hungary votes must be discarded, and Murtha and Roquette would remain ahead.<sup>127</sup> A witness for Murtha and Roquette also testified that election officials in Rader Township, who were “members of the Nonpartisan league, took ballots from the voting place to the home of W.J. Mosely, nearly a mile away and there counted the ballots after they had first eaten supper.”<sup>128</sup> Another witness claimed that while ballots were being counted in Fertile Valley, a health officer ordered election officials “to lock doors and exclude the public because of influenza epidemic.”<sup>129</sup> Murtha further argued that the contestants’ allegations “had not been proven and that no evidence of any kind had been submitted indicating fraud.”<sup>130</sup>

The House Elections Committee issued a report finding that numerous irregularities had occurred in the election and all affected votes should be rejected.<sup>131</sup> It concluded that the ballots in Belfield and Hungary which had been cast from voters’ homes were invalid.<sup>132</sup> The votes in Rader that had been taken to the Mosely farmhouse to be counted, as well as the votes in Fertile Valley which health officials had required be counted in private, were likewise rejected.<sup>133</sup> The committee explained that state law required ballots to be tallied in public, and “[t]o allow any other practice to obtain would expose those under political excitement to temptations which, yielded to, might [be] subversive of the great objects and ends of free suffrage to exercise at popular elections.”<sup>134</sup> The committee also invalidated

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125. “Flu” Votes Are Cause of Much Anxiety, GRAND FORKS HERALD (Jan. 8, 1919), <https://perma.cc/WQ6G-CNNQ>.

126. *Id.*

127. *Id.*

128. *Irregularity in Elections Again Charged*, GRAND FORKS HERALD (Jan. 20, 1919), <https://perma.cc/CD4J-JKXH>.

129. *Id.*

130. *Contestants Fail to Offer New Evidence*, *supra* note 122.

131. *See Stark County Violations in Election Many*, BISMARCK TRIB. (Jan. 27, 1919), <https://perma.cc/VQT7-QTKL>.

132. *Id.*

133. *Id.*

134. *Id.*

votes from Lehigh precinct because Jacob Roquette, candidate Fred Roquette's brother, had tallied them.<sup>135</sup> After making the necessary adjustments, the committee concluded that Murtha and Roquette had received the most votes and recommended that they be seated.<sup>136</sup> The North Dakota House adopted the committee's report, rejecting the contest and affirming the election results.<sup>137</sup>

Thus, as in Idaho, the North Dakota House was not sympathetic to the argument that the uniquely dangerous circumstances of the Spanish Flu warranted departures from the plain meaning of the election code. Election officials had allowed sick voters to cast their ballots at home to avoid exacerbating their conditions and spreading their contagion to others; they likewise permitted ballots to be tallied in private as a means of limiting the flu's spread.<sup>138</sup> The legislature, however, concluded that it was inappropriate and dangerous for election officials to take it upon themselves to deviate from the election code's clear requirements, even in response to a global contagion.<sup>139</sup> In Idaho and North Dakota, ballots that voters had cast in reliance on election officials' actions were discarded.<sup>140</sup> In Oklahoma, election results were accepted despite the threat posed by the Spanish Flu and the apparent lack of substantial ameliorating measures.<sup>141</sup> Of course, all of these contests occurred before the Supreme Court bolstered constitutional protections for voting rights over the course of the twentieth century,<sup>142</sup> and federal courts at the time would not provide equitable relief in most kinds of election cases.<sup>143</sup> Still, the

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*; *see also* Harper v. Dotson, 187 P. 270, 271 (Idaho 1920).

141. *See generally* Rasure v. Sparks, 183 P. 495 (Okla. 1919).

142. *See* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2094–2108 (2018) (describing the evolution of the Court's voting rights jurisprudence over the twentieth century); *see also* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31–34 (2003).

143. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 551–56 (1946) (holding that the political question doctrine bars courts from exercising subject-matter

Spanish Flu left the nation with inauspiciously strict precedents as we entered an election besieged by a global COVID-19 epidemic.

## II. ELECTIONS IN THE COVID-19 ERA

In the decades since the Spanish Flu abated, the United States has experienced several other epidemics. The H2N2 flu of 1957 to 1958 killed approximately 116,000 people in the United States and 1.1 million people worldwide.<sup>144</sup> The so-called Hong Kong H3N2 flu of 1968 killed over 100,000 people in the United States and one million people worldwide.<sup>145</sup> The H1N1 swine flu pandemic of 2009, in contrast, killed far fewer people both domestically and abroad.<sup>146</sup> Despite their death tolls, these pandemics did not substantially impact day-to-day life in the United States<sup>147</sup> and there is little evidence that they directly affected the electoral process.<sup>148</sup>

The COVID-19 pandemic has been of a completely different order of magnitude than these previous incidents. Globally, there have been nearly 570 million confirmed cases and more

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jurisdiction over constitutional challenges to redistricting plans), *overruled by* Baker v. Carr, 369 U.S. 186 (1962); Giles v. Harris, 189 U.S. 475, 486–88 (1903) (holding that federal courts typically cannot grant equitable relief in election challenges); Taylor v. Beckham, 178 U.S. 548, 578–81 (1900) (holding that the Due Process Clause does not empower federal courts to review challenges to the results of state and local elections). Moreover, the federal Declaratory Judgment Act would not be adopted until nearly two decades later. Declaratory Judgment Act, Pub. L. No. 73-343, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C §§ 2201–2202).

144. *1957–1958 Pandemic (H2N2 Virus)*, CDC, <https://perma.cc/WLQ7-TZEA> (last updated Jan. 2, 2019).

145. *1968 Pandemic (H3N2 Virus)*, CDC, <https://perma.cc/GBC8-XWAB> (last updated Jan. 2, 2019).

146. *See H1N1 Pandemic: A New Flu Virus Emerges*, CDC, <https://perma.cc/4ES2-HXW4> (last updated June 11, 2019). The severe acute respiratory syndrome (“SARS”) outbreak of 2003 resulted in approximately 8,100 cases worldwide and 811 deaths; of those, the United States experienced twenty-seven cases and no deaths. *See Severe Acute Respiratory Syndrome (SARS)*, CDC, <https://perma.cc/CG3N-F55S> (last updated Dec. 6, 2017).

147. *See, e.g.,* Eric Spitznagel, *Why American Life Went on as Normal During the Killer Pandemic of 1969*, N.Y. POST, <https://perma.cc/G5ZM-P294> (last updated May 18, 2020, 9:57 AM).

148. *See id.*

than six million deaths.<sup>149</sup> The United States has had over ninety million reported cases with more than one million deaths.<sup>150</sup> COVID-19 triggered not only a national state of emergency,<sup>151</sup> but also emergency declarations within each state which lasted throughout much of 2020 and, in many places, continued well into 2021.<sup>152</sup> In Spring 2020, most governors issued shutdown and stay-at-home orders.<sup>153</sup> Many of the nation's most iconic tourist destinations—Broadway, the Las Vegas Strip, Walt Disney World—went dark.<sup>154</sup> Schools, theaters, restaurants, arenas, and other areas of public congregation were required to close.<sup>155</sup> Several religious institutions challenged these restrictions; some of those cases ended up in the Supreme Court.<sup>156</sup> Unemployment skyrocketed

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149. See *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://perma.cc/SB5U-PTJL>; *COVID-19 Dashboard*, JOHNS HOPKINS UNIV. & MED. CTR. FOR SYS. SCI. & ENG'G, <https://perma.cc/PF8N-9YPU>.

150. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://perma.cc/ER7L-B6WT>.

151. See Proclamation No. 9994, 8 Fed. Reg. 15,337 (Mar. 13, 2020).

152. See *States' COVID-19 Public Health Emergency Declarations and Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://perma.cc/AQA8-D6AQ>; *State Emergency Health Orders During the Coronavirus (COVID-19) Pandemic, 2021–2022*, BALLOTPEdia, <https://perma.cc/JQQ3-X4RH>; see also Christopher E. Ondeck et al., *Hard to Say Goodbye: States Are Slowly Lifting States of Emergency*, NAT'L L. REV. (June 28, 2021), <https://perma.cc/ZZT9-5QRA>.

153. *States' COVID-19 Public Health Emergency Declarations and Mask Requirements*, *supra* note 152.

154. See, e.g., Jamie Biesiada, *Big Covid-19 Closings: Broadway and Disney Parks*, TRAVEL WEEKLY (Mar. 12, 2020), <https://perma.cc/MZ9G-5T82>; Spitznagel, *supra* note 147.

155. See Julie Bosman, *How the Shutdown Reordered American Life*, N.Y. TIMES (Jan. 26, 2019), <https://perma.cc/9BRH-ESCL>; Opinion, *The Restaurant Lockdown Massacre*, WALL. ST. J. (Dec. 11, 2020, 6:43 PM), <https://perma.cc/6M9G-26RJ>.

156. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (granting injunction pending appeal against California's COVID restrictions because they "treat[] some comparable secular activities more favorably than at-home religious exercise"); *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 66 (per curiam) (2020) (granting injunction pending appeal against enforcement of New York Governor Andrew M. Cuomo's prohibition of religious gatherings because it "single[s] out houses of worship for especially harsh treatment"); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (granting injunction barring enforcement of prohibition on indoor worship services pending the Court's ruling on the underlying certiorari petition); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.) (granting



as businesses across the nation temporarily shuttered their establishments or went bankrupt.<sup>157</sup> Weddings, funerals, graduations, and other milestone events were cancelled. Many students were forced to switch to online learning in Spring 2020, which continued in numerous places throughout the following academic year.<sup>158</sup>

For several weeks, broadcast television programs were regularly preempted by competing live briefings from the White House and the Governor of New York.<sup>159</sup> Face masks became a ubiquitous sight and were mandatory in most public places.<sup>160</sup> To combat COVID-19, the federal government launched Operation Warp Speed, an unprecedented \$10 billion public-private interagency program to subsidize research into fourteen different vaccine technologies simultaneously.<sup>161</sup> The program was structured to ultimately fund the testing, manufacture, purchase, and distribution of up to five different vaccines.<sup>162</sup>

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injunction pending appeal because “[t]his outcome is clearly dictated by this Court’s decision in *South Bay*”); see also *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (mem.) (granting certiorari before judgment, vacating lower court ruling, and remanding for reconsideration in light of *Roman Catholic Diocese*); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.) (granting certiorari before judgment, vacating lower court order, and remanding for reconsideration in light of *South Bay*).

157. See Ella Koeze, *6 Months After Coronavirus Shutdowns, the Shape(s) of the Economic Crisis*, N.Y. TIMES (Oct. 5, 2020), <https://perma.cc/ZC2U-FW53>.

158. See Amelia Nierenberg & Kate Taylor, *The State of Schools as the Pandemic Wanes*, N.Y. TIMES (June 9, 2021), <https://perma.cc/CNH7-UR7G> (last updated Aug. 5, 2021); Ginia Bellafante, *Are We Losing a Generation of Children to Remote Learning?*, N.Y. TIMES (Nov. 6, 2020), <https://perma.cc/GHM9-WM2J> (last updated Nov. 9, 2020).

159. See Ella Torres, *A Timeline of Cuomo’s and Trump’s Responses to Coronavirus Outbreak*, ABC NEWS (Apr. 3, 2020, 5:08 AM), <https://perma.cc/GYM6-4CE5>.

160. See Press Release, CDC Newsroom, CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread (July 14, 2020), <https://perma.cc/267Q-KHGQ>.

161. Press Release, DOD, Trump Administration Announces Framework and Leadership for ‘Operation Warp Speed’ (May 15, 2020), <https://perma.cc/GR6K-2LFE>.

162. See *id.*; see also Jon Cohen, *Unveiling ‘Warp Speed,’ the White House’s America-First Push for a Coronavirus Vaccine*, SCIENCE (May 12, 2020), <https://perma.cc/T29V-5723>.

As the nation grappled with these public health, economic, and educational threats, it also faced a racial justice reckoning triggered by Minneapolis police officer Derek Chauvin's appalling murder of George Floyd in the course of arresting him for a nonviolent alleged offense.<sup>163</sup> Floyd's death cast a stark spotlight on racial disparities in the criminal justice system, particularly statistics showing that a disproportionately high number of African-American men have been killed by police.<sup>164</sup> As public support for this new racial justice movement grew, civil rights protests swept the nation, leading to public health debates due to the size of the gatherings and close proximity of the participants.<sup>165</sup> At the same time, President Donald Trump also convened large political rallies in support of his reelection campaign that appear to have contributed to the spread of COVID-19.<sup>166</sup>

This was the backdrop against which states held elections in 2020. The attendant challenges were vast. Most basically, some voters—particularly members of vulnerable populations like senior citizens and immunocompromised people—were

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163. See Tim Arango et al., *Derek Chauvin Is Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021, 5:07 PM), <https://perma.cc/QLG2-Q8T2>.

164. See, e.g., Lynne Peebles, *What the Data Say About Police Brutality and Racial Bias—and Which Reforms Might Work*, NATURE (June 19, 2020), <https://perma.cc/6FHA-GDUR> (last updated May 26, 2021); Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. OF SCIS. 16793, 16793 (2019); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2107–09 (2017); Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1079–80 (2020).

165. Compare Tara Haelle, *Risking Their Lives to Save Their Lives: Why Public Health Experts Support Black Lives Matter Protests*, FORBES (June 19, 2020, 6:22 PM), <https://perma.cc/J6G3-2QFR>, with Michael Powell, *Are Protests Dangerous? What Experts Say May Depend on Who's Protesting What*, N.Y. TIMES (July 6, 2020), <https://perma.cc/7586-QYKQ> (last updated Oct. 11, 2020); cf. Randall Valentine et al., *Relationship of George Floyd Protests to Increases in COVID-19 Cases Using Event Study Methodology*, 42 J. PUB. HEALTH 696, 697 (2020) (studying eight cities where protests concerning George Floyd occurred and finding all had a “positive abnormal” growth in COVID-19 infection rates).

166. See Berkeley Lovelace, Jr., *Trump Campaign Rallies Led to More Than 30,000 Coronavirus Cases, Stanford Researchers Say*, CNBC (Oct. 31, 2020, 11:41 AM), <https://perma.cc/EJ2G-T9K9> (last updated Nov. 2, 2020).

reluctant to vote in person.<sup>167</sup> A substantial number of poll workers, many of whom were senior citizens, declined to serve, forcing election officials to scramble to find replacements.<sup>168</sup> Many privately owned locations that had served as polling places in previous elections were reluctant to open themselves to the public or were too cramped to allow for adequate social distancing.<sup>169</sup> Consequently, election officials in many jurisdictions substantially reduced the number of polling places in the primary and general elections.<sup>170</sup>

States prepared to conduct the 2020 elections in the midst of COVID-19 through five different types of measures. First, the law of many states allowed governors to suspend state statutes, statutory deadlines, and administrative regulations during declared emergencies.<sup>171</sup> Other states gave governors somewhat narrower authority during emergencies, allowing them to suspend regulations but not laws.<sup>172</sup> Second, most states permitted executive agencies, including the Department of State or state board of elections, to promulgate emergency regulations which they used to reinterpret state statutes in a manner more responsive to the exigencies of a global pandemic.

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167. See Nick Corasaniti & Michael Wines, *In Year of Voting by Mail, a Scramble to Beef Up In-Person Voting, Too*, N.Y. TIMES (Sept. 7, 2020), <https://perma.cc/CJ3A-8C36> (last updated Sept. 15, 2020).

168. See ADAM SMITH ET AL., HEALTHYELECTIONS.ORG, POLL WORKER RECRUITMENT 4 (2020), <https://perma.cc/R4EM-WKHF> (PDF); see also Lissandra Villa, *The Pandemic Is Causing a Shortage of Poll Workers. Can States Recruit Enough by Election Day?*, TIME (Aug. 5, 2020, 5:03 PM), <https://perma.cc/JN3N-CV8E>.

169. See ELECTION INFRASTRUCTURE GOV'T COORDINATING COUNCIL & SUBSECTOR COORDINATING COUNCIL JOINT COVID WORKING GROUP, U.S. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, FINDING POLLING LOCATIONS AND POLL WORKERS 1–2 (2020), <https://perma.cc/F2RA-2698> (PDF). Facebook and other private companies helped to recruit replacement poll workers, particularly younger people who generally faced reduced risks from COVID-19. Alison Durkee, *Facebook Says It Helped Recruit 100,000 Poll Workers*, FORBES (Sept. 29, 2020, 12:23 PM), <https://perma.cc/WT6R-E4Z2>.

170. See, e.g., Danielle Gehr, *24 Rural Iowa Counties Opt for Single Polling Site Amid COVID-19 Concerns*, DES MOINES REG. (June 4, 2020, 3:28 PM), <https://perma.cc/8PTS-SH9U>; *Philadelphia Looks to Slash Polling Places in June 2 Primary*, ASSOCIATED PRESS (May 13, 2020), <https://perma.cc/NRL6-LRL5>; Corasaniti & Wines, *supra* note 167.

171. See Morley, *Election Emergencies*, *supra* note 1, at 609 n.424.

172. See *id.* at 609 n.423.

Third, in some states, election emergency statutes delegated authority to particular election officials to modify or suspend certain rules of the electoral process. Through such laws, the legislature may identify and pre-authorize—well in advance of an election—the range of potential responses that would be appropriate when crises arise. Legislatures in several states that lacked general election emergency laws passed special measures amending the election code specifically for the 2020 election.

Fourth, when courts concluded that states had failed to adequately modify their electoral rules in response to the pandemic, they entered injunctions compelling officials to take certain actions, or prohibiting them from doing so, to enforce the federal (or state<sup>173</sup>) constitutional right to vote. In some cases, government officials entered into consent decrees with interest groups to modify certain rules of the electoral process.<sup>174</sup> Finally, where a public sector remedy was not forthcoming, many jurisdictions turned to private donations to subsidize get-out-the-vote efforts as well as various measures to make it easier and safer to vote.<sup>175</sup>

This Part explores some of the ways in which states used these tools to conduct a presidential election despite the pervasive and potentially fatal risks of COVID-19. It focuses in particular on states' modifications to ballot access rules, extensions of the period for voting, and resolutions of disputes concerning election transparency. Because absentee voting and vote-by-mail were such major parts of the response to COVID-19, the wide range of election modifications states adopted to expand opportunities to vote outside of polling places are addressed separately in Part III.

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173. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2019).

174. See, e.g., Consent Decree Judgment and Decree, Common Cause R.I. v. Gorbea, No. 20-CV-00318 (D.R.I. July 30, 2020), <https://perma.cc/9T7Q-KX9P> (PDF); Consent Decree, Powell v. Benson, No. 20-CV-11023 (E.D. Mich. May 19, 2020), <https://perma.cc/DYT8-3MTK> (PDF); cf. Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014).

175. See, e.g., *COVID-19 Response Grants*, CTR. FOR TECH & CIVIC LIFE, <https://perma.cc/945T-2XSV>.

### A. *Ballot Access*

States generally require candidates wishing to run in primary elections to submit petitions signed by a specified number of voters within the jurisdiction. The Supreme Court has upheld such measures as a way of limiting ballot access to candidates who are able to demonstrate “a modicum of voter support.”<sup>176</sup> As discussed earlier, many states issued shutdown orders in the early weeks of COVID-19 to prevent people from congregating in public. Even after those orders were lifted, social distancing requirements and the risk of infection made it difficult and risky to canvass for signatures. As a result, several putative candidates and their supporters asked courts to enjoin election officials from enforcing their states’ ballot access laws as written.

Some challenges were brought as a matter of statutory interpretation, claiming that the signature requirement should be read as containing an implicit exception for unexpected emergencies. In *Griswold v. Warren*,<sup>177</sup> for example, a plaintiff seeking to run in Colorado’s Democratic primary for U.S. Senate argued that she was entitled to appear on the ballot because she had “substantially complied” with the state’s ballot access rules by submitting 5,383 out of a required 10,500 signatures.<sup>178</sup> On the one hand, the state election code contained a general provision stating that “[s]ubstantial compliance with the provisions or intent of this code shall be all that is required.”<sup>179</sup> On the other hand, Colorado’s candidate petition law specified that “no petition is legal that does not contain the requisite number of names of eligible electors.”<sup>180</sup>

The Colorado Secretary of State agreed that the plain meaning of the state’s ballot access law could not be enforced

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176. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986); *see* *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (holding that states have an “undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot”); *see also* *Am. Party of Tex. v. White*, 415 U.S. 767, 782 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

177. 462 P.3d 1081 (Colo. 2020) (per curiam).

178. *Id.* at 1083.

179. COLO. REV. STAT. § 1-1-103(3) (2020).

180. *Id.* § 1-4-902(1).

under the circumstances.<sup>181</sup> The Secretary argued, however, that the required number of signatures should be proportionately reduced based on the number of days within the statutory signature-gathering period—which was fifty-seven days long—in which COVID-19 impeded putative candidates' efforts within the state.<sup>182</sup> The plaintiff fell short of the number of signatures required under that alternative approach.<sup>183</sup>

The Colorado Supreme Court rejected both positions. It held that the state's ballot access law was "mandatory" and required "strict compliance."<sup>184</sup> The court acknowledged that the "unprecedented" risks posed by COVID-19 "made signature collection more difficult," but concluded that only the state legislature could remedy the problem.<sup>185</sup> The court declared, "[W]e do not have the authority to rewrite the Election Code in response to the COVID-19 virus."<sup>186</sup> It further noted that the legislature had passed a law allowing the Secretary to extend the deadline for filing petitions if she could not accept them as a result of "closures or restrictions due to public health concerns."<sup>187</sup> But that provision neither "alter[ed] the minimum signature requirements" nor "suggest[ed] that they could be altered by the Secretary or a court."<sup>188</sup>

Approximately twenty states took steps to modify their candidate filing requirements.<sup>189</sup> A few did so through statutory amendments. Alabama, for example, passed a law extending the filing deadline for independent presidential candidates.<sup>190</sup> Vermont simply eliminated its signature requirement for the 2020 primaries, allowing candidates to self-declare without any

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181. *Griswold*, 462 P.3d at 1083.

182. *Id.* at 1082–83.

183. *Id.*

184. *Id.* at 1085–86.

185. *Id.* at 1086.

186. *Id.*

187. *Id.* (quoting COLO. REV. STAT. § 1-4-801 (2022)).

188. *Id.*

189. See *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEdia, <https://perma.cc/4VZF-YKB2>.

190. See H.B. 272, § 1(e) (Ala. 2020).

supporting petitions.<sup>191</sup> The governors of other states issued executive orders pursuant to their general state-of-emergency authority to reduce the number of signatures required on nominating petitions and extend their submission deadlines.<sup>192</sup> Connecticut Governor Ned Lamont, for example, reduced the state's signature requirement by 30 percent, extended the filing deadline by two days, and authorized candidates to collect electronic signatures.<sup>193</sup> Florida Secretary of State Laurel Lee issued emergency regulations allowing all materials to be submitted electronically.<sup>194</sup>

Putative candidates also filed a range of constitutional challenges to ballot access requirements.<sup>195</sup> Plaintiffs generally prevailed in states where stay-at-home orders were in place through the filing deadline and executive officials had failed to adjust the ballot access rules.<sup>196</sup> A few other courts ordered

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191. See Act of Mar. 30, 2020, No. 92, § 2(a), 2020 Vt. Acts & Resolves 89, 89 (“[A] person shall not be required to collect voter signatures in order to have the person’s name placed on any ballot in the year 2020, including on any local election ballot.”).

192. See, e.g., N.Y. Exec. Order No. 202.2 (Mar. 14, 2020), <https://perma.cc/NUG3-K4UT> (PDF).

193. See Conn. Exec. Order No. 7LL, §§ 1–2 (May 11, 2020), <https://perma.cc/7KKU-YTZ7> (PDF).

194. See Designation of Division of Elections as Filing Office for Department of State; Requirements for Candidate Qualifying Papers; Withdrawal of Candidacy, §§ 1–3, 46 Fla. Admin. Reg. 1413–14 (Apr. 3, 2020) (current version at FLA. ADMIN CODE ANN. R. 1S-2.0001(1)–(3)); Candidate Petition Process, 46 Fla. Admin. Reg. 1415 (Apr. 3, 2020); see also Andrew Pantazi, *Coronavirus: Florida Allows Political Candidates to Gather Electronic Petitions*, FLA. TIMES-UNION (Mar. 16, 2020, 9:04 PM), <https://perma.cc/4HGD-V4TA>.

195. See, e.g., Meg Cunningham & Kendall Karson, *As Coronavirus Upends Elections, Ballot Access Becomes Next Point of Concern*, ABC NEWS (Apr. 22, 2020, 2:54 PM), <https://perma.cc/7BLT-ZRRC>.

196. See, e.g., *Esshaki v. Whitmer*, 813 F. App’x 170, 171–72 (6th Cir. 2020) (“[T]he combination of the State’s strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs’ ballot access . . . [and] is unconstitutional as applied here.”); *Order, Alberto v. City of Roanoke*, at 4, No. CL20-997 (Va. Cir. Ct. June 4, 2020); (“[T]he ballot access criteria for the qualification requirements and deadlines for the November 2020 Roanoke City Council Member Election are not the least restrictive means of vindicating [the state’s] interests in light of the unprecedented social and economic disruption resulting from the COVID-19 pandemic.”); *Goldstein v. Sec’y of the Commonwealth*, 142 N.E.3d 560, 571, 574–75 (Mass. 2020).

greater COVID-19-related accommodations than state officials had been willing to provide. For example, even after Georgia officials had extended the deadline for filing candidate petitions, a federal district court recognized that “[b]ecause of the ongoing pandemic and the subsequent restrictions on social interactions, [potential candidates] could not . . . gather signatures in the same safe and reasonable manner as they could during more typical times.”<sup>197</sup> Rather than completely waiving the signature requirement, however, the court reduced it by 30 percent.<sup>198</sup> The court explained that this remedy took into account both the “challenges Plaintiffs have faced in their signature collection efforts amid the COVID-19 pandemic,” as well as “the State’s legitimate interest in ensuring that only candidates with a measurable modicum of public support will gain access to the 2020 general election ballot.”<sup>199</sup> Courts in other jurisdictions proportionally reduced their states’ signature requirements based on the number of days in the petitioning period for which stay-at-home orders had been in effect.<sup>200</sup>

For the most part, however, courts were generally reluctant to second-guess officials who had taken emergency steps to adjust their states’ signature requirements.<sup>201</sup> The U.S. District Court for the District of Connecticut explained, “The Constitution leaves these questions for elected officials. . . . While the plaintiffs, or this court, might have made a different decision, it is the Governor’s to make, so long as he does so in a manner consistent with the Constitution.”<sup>202</sup> Some plaintiffs were denied relief even when state officials had failed

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197. *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1292 (N.D. Ga. 2020), *permanent injunction entered*, No. 20-CV-013120, 2020 U.S. Dist. LEXIS 212969 (N.D. Ga. Sept. 14, 2020).

198. *Id.* at 1295.

199. *Id.* at 1296.

200. *See, e.g., Garbett v. Herbert*, 458 F. Supp. 3d 1328, 1352 (D. Utah 2020).

201. *See Dhillon v. Wobensmith*, 475 F. Supp. 3d 456, 458–59 (D. Md. 2020) (“The present signature-gathering requirements, which are the product of the Maryland General Assembly’s lawmaking, the State Board of Elections’ policy modifications, and a Consent Judgment . . . , strike a delicate balance between the interests of unaffiliated candidates in accessing the ballot and Defendants’ interest in conducting an orderly General Election.”); *see, e.g., Libertarian Party of Conn. v. Merrill*, 470 F. Supp. 3d 169, 188–89 (D. Conn. 2020).

202. *Merrill*, 470 F. Supp. 3d at 188–89.



to take ameliorative action. Several courts rejected constitutional challenges where a substantial amount of time to gather signatures had passed before COVID-19 struck and, even after the pandemic had hit the state, the applicable stay-at-home orders still allowed limited opportunities to collect signatures.<sup>203</sup> Conversely, in other jurisdictions, relief was denied because a substantial amount of time still remained for candidates to gather signatures after the stay-at-home orders were lifted and public places began to reopen.<sup>204</sup>

The Sixth Circuit, adopting an unusually demanding interpretation of the state-action doctrine, was quite parsimonious in modifying ballot-access requirements.<sup>205</sup> For example, in Ohio, the Governor's shutdown order expressly exempted First Amendment activities such as signature-gathering.<sup>206</sup> The Sixth Circuit held that, due to this "express exemption," the Ohio government had not "changed the status quo" concerning the range of ways in which potential candidates could seek signatures for their petitions.<sup>207</sup>

The court acknowledged that Ohio's stay-at-home orders and social-distancing requirements, as well as the general public fear of COVID-19, made signature gathering more difficult.<sup>208</sup> Rejecting such considerations, however, the court declared that "just because procuring signatures is now harder

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203. See *Whitfield v. Thurston*, 468 F. Supp. 3d 1064, 1097 (E.D. Ark. 2020). Several ballot access cases were brought *pro se* and dismissed due to various procedural deficiencies. See, e.g., *Walker v. Barnett*, No. 20-CV-04059, 2020 U.S. Dist. LEXIS 173091, at \*12–13, 15 (D.S.C. Sept. 22, 2020); *di Genova-Chang v. Ducey*, No. CV-20-00141, 2021 U.S. Dist. LEXIS 70544 (D. Ariz. Apr. 12, 2021); Order at 1, *Wright v. Ziriaux*, No. CIV-20-00287 (W.D. Okla. Aug. 21, 2020) (denying interim relief due to failure to serve), *dismissed due to sovereign immunity*, 499 F. Supp. 3d 1080 (W.D. Okla. 2020).

204. *Libertarian Party of Pa. v. Wolf*, No. 20-2299, 2020 U.S. Dist. LEXIS 124200, at \*35 (E.D. Pa. July 14, 2020) (rejecting "the plaintiffs' claims that . . . it would be impossible as a practical matter for them to collect the required signatures in time" since the stay-at-home orders had expired in all Pennsylvania counties eight-and-a-half weeks before the signature collection deadline), *aff'd*, 813 F. App'x 834 (3d Cir. 2020).

205. See *Thompson v. DeWine*, 959 F.3d 804, 810, 813 (6th Cir. 2020).

206. See *id.* at 810; OHIO DEP'T OF HEALTH, ORDER TO LIMIT AND/OR PROHIBIT MASS GATHERINGS IN THE STATE OF OHIO ¶ 1 (Mar. 12, 2020), <https://perma.cc/4Y7P-N8H6> (PDF).

207. *Thompson*, 959 F.3d at 810.

208. See *id.*

(largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot.”<sup>209</sup> It went on to emphasize that any burdens that putative candidates faced did not stem from the state's ballot access requirements, but rather from COVID-19 and people's reactions to it: “[W]e cannot hold private citizens' decisions to stay home for their own safety against the State.”<sup>210</sup> Courts were also quick to reject claims where the plaintiffs had not even attempted to collect signatures due to COVID-19<sup>211</sup> or waited too long after the deadline to bring their challenges.<sup>212</sup>

Thus, many state officials with statutory authority to modify ballot access requirements exercised their discretion reasonably. In most other jurisdictions, courts recognized that requiring putative candidates to gather signatures face-to-face in a global pandemic was unreasonably burdensome and warranted targeted relief, particularly while stay-at-home orders were in force.<sup>213</sup> The Sixth Circuit's focus on whether the state itself had created the burdens faced by potential candidates was misguided. The gravamen of an as-applied challenge is that particular requirements which generally are

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209. *Id.*

210. *Id.*; see also *Duncan v. LaRose*, No. 20-CV-2295, 2020 U.S. Dist. LEXIS 152715, at \*5–6 (S.D. Ohio Aug. 24, 2020) (upholding the deadline for independent candidates for President to submit signed petitions under *Thompson's* rationale).

211. See, e.g., *Kishore v. Whitmer*, 972 F.3d 745, 750 (6th Cir. 2020) (denying relief where plaintiffs “made the conscious choice” not to collect signatures after the Governor lifted his stay-at-home order because, while “their decision was quite understandable, ‘we cannot hold private citizens’ decisions to stay home for their own safety against the State” (quoting *Thompson*, 959 F.3d at 810)); *Blankenship v. Newsom*, 477 F. Supp. 3d 1098, 1104 (N.D. Cal. 2020) (explaining that the plaintiff “has done, quite literally, *nothing* to secure a place on the California Ballot” but instead pointed to the “uncertain scope of the Stay-at-Home Order and a fear of COVID-19 transmission in justification for his idleness” (emphasis in original)); *Order from Chambers, Alaska Libertarian Party v. Fenumiai*, No. 20-CV-00127 (D. Alaska July 10, 2020).

212. See, e.g., *Eason v. Whitmer*, 485 F. Supp. 3d 876, 880, 885 (E.D. Mich. 2020).

213. See, e.g., *Goldstein v. Sec'y of the Commonwealth*, 142 N.E. 3d 560, 574 (Mass. 2020) (“[I]t is the *in-person* aspect of the signature requirement that renders it unduly burdensome in light of the current pandemic and quarantine, as this requirement presents public safety risks for both the campaign and individual signatories.” (emphasis in original)).

constitutionally permissible may, under certain circumstances, become unconstitutionally burdensome regardless of whether the state itself is responsible for those circumstances.<sup>214</sup> The relevant state action in these cases was the state's enforcement of a ballot access requirement. The main issue was whether such enforcement was reasonable in the context of a global pandemic. Most courts properly recognized the need for flexibility concerning those signature requirements.

### B. *The Voting Period*

Election officials were faced with very different considerations when considering the timing of the primary elections, as compared with the general elections. They generally had some degree of flexibility to postpone primaries, at least for a few weeks. Such postponements were a useful response because COVID-19 became a major public health crisis in the United States in the midst of primary season. Delaying elections by a few extra weeks gave voters additional time to request and cast absentee ballots while also allowing election officials to restructure in-person voting to make it as safe as possible.

The federal constitutional and statutory constraints on presidential elections, in contrast, made postponing the general election a virtual impossibility.<sup>215</sup> Moreover, because officials had over six months to prepare for the general election, delaying it by a few additional weeks would not have yielded substantial benefits.

#### 1. Postponing Primaries

COVID-19 was recognized as a major risk to the United States in early 2020, just as the presidential preference primaries were getting into full swing. The U.S. Department of

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214. See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360 (1998) ("Litigants in the federal courts can attack the constitutionality of legislative enactments [by bringing] an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.").

215. See Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 193–98 (2020) [hereinafter Morley, *Postponing Federal Elections*].

Health and Human Services declared a public health emergency on January 31, 2020.<sup>216</sup> More than a month later, on March 11, the World Health Organization declared that a global COVID-19 pandemic existed.<sup>217</sup> A few days after that announcement, the U.S. Centers for Disease Control issued interim guidance recommending the postponement or cancellation of in-person events with fifty or more people.<sup>218</sup>

States with primaries in mid- to late March were faced with the most significant challenge because they had extremely limited time to adjust, and substantial controversy existed over the best response. Democrats tended to support extending the period for absentee voting and postponing in-person voting; Republicans generally believed the primaries should proceed as regularly scheduled, with appropriate steps taken at polling places to make in-person voting as safe as possible.<sup>219</sup> Both governmental and private organizations published guidance concerning the conduct of voting to attempt to mitigate COVID-related risks at polling places, though many of these guides were not available until somewhat later in the primary season.<sup>220</sup>

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216. *Determination that a Public Health Emergency Exists*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://perma.cc/8GLD-9LWC>.

217. Tedros Adhanom Ghebreyesus, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19*, WHO (Mar. 11, 2020), <https://perma.cc/K6C3-ZYDF>.

218. See CDC, CORONAVIRUS DISEASE (COVID-19): GET YOUR MASS GATHERINGS OR LARGE COMMUNITY EVENTS READY 1 (2020), <https://perma.cc/23SB-QVQJ> (PDF).

219. See John Whitesides & Julia Harte, *Explainer: Why Vote by Mail Triggered a Partisan Battle Ahead of November's Election*, REUTERS (Apr. 14, 2020, 6:10 PM), <https://perma.cc/S42B-VL2F>; see also Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic*, N.Y. TIMES (Aug. 10, 2020), <https://perma.cc/GDX5-8P56>.

220. See, e.g., NAT'L TASK FORCE ON ELECTION CRISES, COVID-19 ELECTION GUIDE 6–8 (2020), <https://perma.cc/ZLA2-D2RX> (PDF); ELECTION INFRASTRUCTURE GOV'T COORDINATING COUNCIL & SUBSECTOR COORDINATING COUNCIL, JOINT COVID WORKING GROUP, HEALTH AND SAFETY AT THE POLLING PLACE 9 (2020), <https://perma.cc/N3TU-MUBW> (PDF); *Polling Locations and Voters: Interim Guidance to Prevent Spread of Coronavirus Disease 2019 (COVID-19)*, CDC (last updated Oct. 29, 2020), <https://perma.cc/MFJ5-Q67R>; see also AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC'S

The challenges posed by COVID-19 were exacerbated in Ohio due to the limited extent of the Governor's emergency powers. By the time of the primary, the state had fifty confirmed COVID-19 cases and Governor Mike DeWine had declared a state of emergency.<sup>221</sup> The day before the primary, which was scheduled for March 17, DeWine held a press conference to announce that he believed the election should be postponed but that he lacked the authority to do so himself.<sup>222</sup> He was therefore supporting a lawsuit that voters were filing imminently to seek a court order postponing the election.<sup>223</sup> The state Attorney General, Dave Yost, had invited two elderly women, including the former Director of the Ohio Department of Aging, to sue the Secretary of State to postpone the election.<sup>224</sup> Secretary of State Frank LaRose, in turn, asked Yost not to contest the lawsuit.<sup>225</sup>

Accordingly, that evening—about twelve hours before voting was to commence—the voters sued in state court, seeking a restraining order to have the primary postponed until June 2.<sup>226</sup> Secretary of State Frank LaRose, the only defendant, declared that he did not oppose the requested relief.<sup>227</sup> Two candidates appeared at the hearing to contest the motion,<sup>228</sup>

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CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS 6 (2020), <https://perma.cc/T9FQ-6PFA> (PDF).

221. See Griff Witte & Katie Zezima, *Ohio Gov. Mike DeWine's Coronavirus Response Has Become a National Guide to the Crisis*, WASH. POST (Mar. 16, 2020), <https://perma.cc/Q5XF-QUXK>.

222. Nick Corasaniti & Stephanie Saul, *Ohio's Governor Postpones Primary as Health Emergency Is Declared Over Virus*, N.Y. TIMES (Mar. 16, 2020), <https://perma.cc/XNK6-8VHX>.

223. See *id.*; Gabe Rosenberg, *Judge Denies Request to Delay Primary Election Until June 2*, WOUB (Mar. 16, 2020), <https://perma.cc/V8EU-JKHY> (last updated Mar. 17, 2020).

224. See Sharon Coolidge & Dan Horn, *Ohio Election Lawsuit: Meet the 81-Year-Old Woman Who Sued to Stop Ohio's Primary*, CINCINNATI ENQUIRER (Mar. 16, 2020, 8:29 PM), <https://perma.cc/S6XF-4MWK> (last updated Mar. 17, 2020).

225. Rosenberg, *supra* note 223.

226. See Journal Entry, *Reardon v. LaRose*, No. 20CV-2105, at 1 (Franklin Cty. Ct. Com. Pleas Mar. 17, 2020), *appeal dismissed*, No. 20AP-160 (Ohio Ct. App. Mar. 31, 2020).

227. *Id.*

228. *Id.* at 1–2; J.P. Burleigh, *Ohio Executive Authority to Postpone Elections*, U. CIN. L. REV.: BLOG (May 1, 2020), <https://perma.cc/NU35-3NXG>

however, and the court denied the motion on the spot.<sup>229</sup> In response, shortly after 10:00 PM, the Director of the Ohio Department of Public Health ordered “the polling locations in the State of Ohio *closed* on March 17, 2020” to “avoid the imminent threat . . . of widespread exposure to COVID-19.”<sup>230</sup> Rather than relying on an election emergency law or even general state-of-emergency powers, she invoked her authority under Ohio’s public health statute to “make special orders . . . for preventing the spread of contagious or infectious diseases.”<sup>231</sup>

That same evening, almost immediately afterwards, a Republican candidate for county judge challenged the Director’s cancellation of in-person voting by seeking a writ of mandamus from the Ohio Supreme Court.<sup>232</sup> The court ordered the state to file a response by 1:30 AM and specified that it would not extend that deadline.<sup>233</sup> The following morning, the day of the now-cancelled primary, the court denied the candidate’s petition without opinion, allowing the Director’s order to stand.<sup>234</sup>

Because in-person voting on Election Day was cancelled, Secretary of State LaRose issued a directive extending the period for absentee voting until June 1 and rescheduling

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(citing Chris Wetterich, *Court Will Not Stop Ohio’s Elections on Thursday*, CIN. BUS. COURIER (Mar. 16, 2020, 8:44 PM), <https://perma.cc/Z9N7-AU68>).

229. *Reardon*, No. 20CV-2105, at 2.

230. Dr. Amy Acton, Ohio Dep’t of Health, In Re: Closure of the Polling Locations in the State of Ohio on Tuesday March 17, 2020, at 3 (Mar. 16, 2020), <https://perma.cc/EQ53-XAEN> (PDF) (emphasis in original).

231. *Id.* (quoting OHIO REV. CODE § 3701.13 (2020)).

232. See Verified Complaint for Writ of Mandamus ¶¶ 1, 16, State *ex rel.* Speweik v. Wood Cty. Bd. of Elections, 141 N.E.3d 253 (Ohio 2020) (No. 2020-0382).

233. See Order re: Respondent’s Answer at 1, *Speweik*, 141 N.E.3d 253 (Ohio 2020) (No. 2020-0382).

234. See Order Denying Writ of Mandamus at 1, *Speweik*, 141 N.E.3d 253 (Ohio 2020) (No. 2020-0382). A voter subsequently sought a writ of mandamus from the Ohio Supreme Court against each of the justices of that court to compel them to provide a written opinion explaining the reasoning for their dismissal in *Speweik*. See Verified Complaint for Writ of Mandamus at 2–4, State *ex rel.* Brinkman v. O’Connor, 150 N.E.3d 972 (Ohio 2020) (No. 2020-0389). The court dismissed that suit—also without a written opinion. See *Brinkman*, 150 N.E.3d 972 (Ohio 2020).

in-person voting for June 2.<sup>235</sup> The directive specified that no new voter registrations could be processed for the election.<sup>236</sup> Boards of elections were required to accept absentee ballot requests through May 26.<sup>237</sup> The order also established a new canvassing schedule, with election results to be certified by July 3.<sup>238</sup> The Ohio Democratic Party immediately challenged the order's legality, claiming that the Secretary lacked any statutory basis to issue it.<sup>239</sup> The legislature effectively mooted the case, however,<sup>240</sup> by enacting a statute extending the absentee voting period for the primary until late April and allowing in-person voting on April 28 for disabled and homeless voters.<sup>241</sup>

DeWine's handling of the 2020 primary provides insight into the mistakes state officials can make when attempting to confront an election emergency. By early March, the risks that COVID-19 would pose for Ohio's impending primaries were readily discernable. DeWine nevertheless failed to convene the legislature to enact an election emergency law either rescheduling the election or empowering him or the Secretary of State to make any necessary adjustments. Rather, he waited until the day before the election to take remedial action. While certain unexpected crises may require such a quick response, there was no reason for such eleventh-hour measures regarding COVID-19. DeWine also sent mixed messages to the public. He initially claimed that he lacked legal authority to suspend the election, so he endorsed an essentially collusive lawsuit to invite a court to do so for him. When a government official encourages plaintiffs to sue, and then fails to oppose their claims in the hope that the court will order results that the official lacks authority

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235. Ohio Sec'y of State Directive 2020-06, Order from Director Dr. Amy Acton Closing Polls for the March 17, 2020 Presidential Primary Election, at 1–2 (Mar. 16, 2020), <https://perma.cc/WL2U-BY6A> (PDF).

236. *Id.* at 1 (“The February 18, 2020 voter registration deadline remains the voter registration deadline.”).

237. *Id.*

238. *Id.* at 3.

239. Complaint ¶ 16, State *ex rel.* Ohio Democratic Party v. LaRose, 150 N.E.3d 99 (Ohio 2020) (No. 2020-0388).

240. See *LaRose*, 150 N.E.3d at 101.

241. See Amended Substitute H.B. No. 197, 133rd Gen. Assemb., Reg. Sess., § 32(C)(3), (D)(1) (Ohio 2020).

to adopt, the official is effectively circumventing statutory limits on their power.<sup>242</sup>

When the trial court rejected the Governor's strategy, he reversed course. The evening before the election, he allowed the Director of the Ohio Department of Health to issue an order barring people from polling places.<sup>243</sup> A state official intentionally using their general statutory authority to shut down an election—particularly given a lack of statutory power to unilaterally cancel or postpone elections—raises serious democratic concerns. Doing so mere hours before voting was to commence created unnecessary uncertainty and confusion for both poll workers and the public.

The Secretary of State exacerbated the problems by adopting a framework for the rest of the election without statutory authority.<sup>244</sup> Acting *ultra vires* in this manner runs the risk of inducing people to unwittingly cast votes at illegal times or places, or in an illegal manner, that could wind up being discarded. Though COVID-19 required election officials to re-think the primary election, the last-minute chaos stemmed from the state's lack of an election emergency statute, as well as its delay in addressing the problem. Furthermore, the Governor presented other state officials with the *fait accompli* of a failed election, effectively compelling them to allow additional voting opportunities. Even if a court concluded that the Director's order prohibiting in-person voting was illegal or unwarranted, it would have had no choice but to allow further voting. Executive officials should be permitted to assert such unilateral and irreversible authority over elections, if at all, only in the narrowest, most extreme circumstances. And they should not be

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242. Cf. Morley, *supra* note 174, at 677–83 (explaining how governmental defendants sometimes exploit collusive litigation to obtain desired results they cannot achieve through the ordinary legislative or regulatory process).

243. See Acton, *supra* note 230.

244. But see Ned Foley, *Ohio: Deciding How Best to Preserve a Fair Election, with Equal Voting Rights, While Saving Lives—in the Context of a Fast-Changing Emergency, and Without Adequate Statutory Provisions*, ELECTION L. BLOG (Mar. 17, 2020, 3:39 PM), <https://perma.cc/NCA8-WFAM> (“As the state’s chief elections officer, Secretary LaRose needed to issue a directive that in his best good-faith judgment would remedy the federal constitutional problem caused by Dr. Acton’s legitimate and appropriate health-based order.”).



permitted to manufacture such circumstances in part through their own delays.

Florida's presidential preference primary was also scheduled for March 17.<sup>245</sup> The night before, several progressive groups sued in federal district court for a temporary restraining order barring in-person voting the next day due to the risk posed by COVID-19.<sup>246</sup> The court rejected the motion the following morning, declaring that allowing the election to proceed was in the public interest.<sup>247</sup> The court acknowledged that in-person voting could cause COVID-19 to spread among poll workers and voters, "increasing the already-substantial risk that the nation's healthcare capacity will eventually be overrun."<sup>248</sup> It likewise noted that, while election officials could reduce the likelihood of transmission, they could not eliminate it.<sup>249</sup> The court nevertheless declared, "The national healthcare emergency is not a basis to cancel an election."<sup>250</sup> The day after the primary, the plaintiffs sought a second restraining order, this time to prevent election officials from "processing the [election's] results."<sup>251</sup> The court again held that such relief would be against the public interest.<sup>252</sup>

States with later primaries had more time to make necessary adjustments.<sup>253</sup> Several attempted to facilitate absentee voting by automatically sending a form to request an absentee ballot to each name recorded in their voter registration databases.<sup>254</sup> A few states, such as New Jersey, went even

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245. See *Williams v. DeSantis*, No. 1:20CV67, 2020 U.S. Dist. LEXIS 212950, at \*12 (N.D. Fla. Mar. 17, 2020).

246. See *id.*

247. *Id.* at \*13.

248. *Id.* at \*12.

249. *Id.*

250. *Id.* at \*13.

251. See *Williams v. DeSantis*, No. 1:20CV67, 2020 U.S. Dist. LEXIS 212952, at \*12 (N.D. Fla. Mar. 18, 2020).

252. *Id.*

253. See *Corasaniti & Saul*, *supra* note 219.

254. See Elise Viebeck, *The Pandemic Has Already Altered How Tens of Millions of Americans Can Cast Their Ballots this Year*, WASH. POST (May 23, 2020, 2:52 PM), <https://perma.cc/9ZPC-WPN7> ("[Twelve] states and the District of Columbia are proactively sending absentee ballot applications or request forms to voters specifically because of the coronavirus. Roughly 34.7 million people will receive the forms, according to state figures on registered

further by requiring state officials to mail an actual absentee ballot to each active primary voter in its database and conduct a primarily mail-based election.<sup>255</sup> Numerous jurisdictions postponed their primaries until the summer when it was thought that infection rates would decrease.<sup>256</sup> Most postponements occurred through emergency executive order or proclamation,<sup>257</sup> although Pennsylvania<sup>258</sup> passed a law to move the date and Georgia's Secretary of State exercised his authority under an election emergency statute to declare a delay.<sup>259</sup> Some jurisdictions that typically were limited to excuse-based absentee voting allowed additional groups of voters, up to the electorate as a whole, to cast their primary ballots by mail.<sup>260</sup>

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and active voters.”); *see, e.g.*, Act of June 16, 2020, Pub. Act 101-0642, § 10, 2020 Ill. Laws 1991, 1993–94 (codified at 10 ILL. COMP. STAT. 5/2B-15(a) (2020)) (repealed 2021); *West Virginia Launches Plan to Send Absentee Ballot Applications to All Voters*, WHSV (Mar. 26, 2020, 1:16 PM EDT), <https://perma.cc/PZC7-KMFJ>.

255. *See, e.g.*, N.J. Exec. Order No. 144, ¶ 1 (May 15, 2020), <https://perma.cc/EX5T-XHEX> (PDF); Act of April 22, 2020, ch. 5, § 1, 2020 Utah Laws 3815, 3816 (codified at UTAH CODE ANN. § 20A-1-309(6)(a), (e)) (requiring the “2020 regular primary election” to “be conducted by mail” with certain limited exceptions and directing election officials to mail ballots “to each active voter who is eligible to vote in the primary”); *see also* Act of Apr. 8, 2020, ch. 10, § 9(a), 2020 Alaska Sess. Laws ch. 10, § 9(a) (authorizing the lieutenant governor to require any election to be held by mail for the duration of the COVID-19 emergency); Viebeck, *supra* note 254 (“[F]our states—Maryland, Montana, Nevada and New Jersey—are proactively sending absentee ballots for the primaries to approximately 11.3 million voters in the coming months.”).

256. *See* Corasaniti & Saul, *supra* note 219.

257. *See, e.g.*, La. Exec. Dep’t Proc. No. JBE 2020-27, § 4 (Mar. 13, 2020), <https://perma.cc/4GWB-VTEH> (PDF); Ky. Exec. Order No. 2020-236, § 1 (Mar. 16, 2020), <https://perma.cc/9YDM-DUAZ> (PDF); Md. Proclamation, Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency—COVID-19, § 1 (Mar. 17, 2020), <https://perma.cc/3TFR-NW6G> (PDF); Ala. Proclamation § 1(A) (Mar. 18, 2020), <https://perma.cc/H3U7-6W2E>; Mo. Exec. Order No. 20-03, § I (Mar. 18, 2020), <https://perma.cc/UEM9-2ZRG>.

258. *See* Act of Mar. 27, 2020, No. 2020-12, § 16, 2020 Pa. Laws 41, 60.

259. *See* Press Release, Brad Raffensperger, Georgia Sec’y of State, Raffensperger Announces Postponement of Primary Election Until June 9 (Apr. 9, 2020), <https://perma.cc/79X7-ESEJ>; *see also* Press Release, Brad Raffensperger, Georgia Sec’y of State, Secretary of State Raffensperger Postpones the Presidential Preference Primary (Mar. 14, 2020), <https://perma.cc/2NJ6-QWVE>.

260. *See, e.g.*, Act of July 1, 2020, ch. 245, § 3, 82 Del. Laws 1, 2–10 (2020) (codified at DEL. CODE ANN. tit. 15, §§ 5601–02 (2020)) (allowing any voter to

States also adjusted various voting rules, such as witness requirements for absentee ballots.<sup>261</sup>

COVID-19 was a national and global tragedy. Due to the timing of its onset in the United States, the pandemic's impact on the electoral process was containable. Most states were able to adjust their primaries in various ways to mitigate the disease's risks. Moreover, the primaries provided something of a low-stakes "dry run" for the general election. By April, both major parties' presidential nominees had been effectively ascertained, even if neither had yet gathered enough delegates to secure the nomination at their respective national party conventions.<sup>262</sup> Jurisdictions that typically handled small numbers of absentee ballots got experience managing larger quantities—in some cases going to the extreme of operating all-mail elections.<sup>263</sup> And perhaps because the primaries were not partisan contests, many state governors, secretaries of state, and legislatures adopted measures to ensure broad participation without jeopardizing public health.<sup>264</sup>

## 2. Early Voting in the General Election

Allowing early voting or extending existing early voting periods were other natural responses to the threat of COVID-19.

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vote by mail "in the 2020 primary election, general election, [or] special election"); Act of June 4, 2020, S.B. 631, § A, 2020 Mo. Laws 818, 823 (codified at MO. REV. STAT. § 115.277.1(7) (2020)) (authorizing mail voting in any 2020 elections for any voter who has "contracted or is in an at-risk category for contracting or transmitting [COVID-19]"); Act of May 12, 2020, No. 133, § 2.A, 2020 S.C. Acts 1273, 1278 (allowing any voters residing in an area subject to an emergency declaration to vote absentee); *see also* Ky. Exec. Order No. 2020-236, *supra* note 257, § 1 ("All Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary election if they are able to do so").

261. *See* Act of June 11, 2020, No. 2020-17, § 1.(a), 2020 N.C. Sess. Laws 104, 104 (reducing the number of required witnesses from two to one for any elections held in 2020).

262. *See* Melissa Gomez, *Who Is Running for President in 2020?*, L.A. TIMES (Mar. 18, 2020), <https://perma.cc/42L2-TWTU> (last updated Apr. 8, 2020).

263. *See supra* note 260 and accompanying text.

264. *See* Eric Feltham & Nicholas A. Christakis, *Voting in the 2020 Primaries Didn't Worsen the COVID-19 Pandemic*, FIFTYEIGHT (Oct. 15, 2020, 7:00 AM), <https://perma.cc/N728-6WXC>; *see, e.g.*, David Wahlberg, *71 People Who Went to the Polls on April 7 Got COVID-19; Tie to Election Uncertain*, WIS. STATE J. (May 16, 2020), <https://perma.cc/82YV-8ZXT>.

By providing people more opportunities to vote, expanded early voting reduced the likelihood of large congregations at polling places on Election Day. Early voting often occurs in countywide voting centers at which any county resident may vote. Accordingly, far fewer locations are typically needed for early voting than for voting on Election Day. And it was often easier to maintain social distancing in the larger spaces where early voting occurred.

States modified their early voting rules in different ways. Some did so through executive orders issued under general state-of-emergency statutes.<sup>265</sup> In Texas, for example, the Governor issued an emergency order under the Texas Disaster Act of 1975.<sup>266</sup> The order extended the early voting period by suspending the state law that specified October 19 as the start of early voting<sup>267</sup> and declaring that it would begin on October 13 instead.<sup>268</sup> Two months later, in late September, the state Republican Party challenged the order's legality, but the Texas Supreme Court rejected the Party's claim because it had waited too long to sue.<sup>269</sup> Other jurisdictions instead relied on emergency regulations promulgated by state election officials.<sup>270</sup>

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265. See, e.g., Cal. Exec. Order N-67-20, §§ 3(a), 4 (June 3, 2020).

266. TEX. GOV'T CODE §§ 418.001–418.261.

267. See TEX. ELEC. CODE § 85.001(a).

268. See Proclamation No. 41-3752, 45 Tex. Reg. 5456, 5456–57 (July 27, 2020).

269. See *In re Hotze*, 627 S.W.3d 642, 645 (Tex. Oct. 7, 2020) (“To disrupt the long-planned election procedures as relators would have us do would threaten voter confusion.”).

270. See, e.g., Procedures for November 3, 2020 Elections, 31 KY. ADMIN. REGS. 4:192E, § 3 (2020) (“County Clerks shall make in-person voting available to any registered voter of the county on the three Saturdays before the November 3, 2020 election for a span of at least four (4) hours each Saturday.”); Public Notice, Md. State Bd. of Elections, Dates and Times for the Opening of the Early Voting Centers in the 2020 Presidential General Election (Aug. 14, 2020), <https://perma.cc/G7JC-2SCV> (PDF); N.C. State Bd. of Elections Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency, §§ 1–4 (July 17, 2020), <https://perma.cc/T94E-SBP3> (PDF); see also Md. Exec. Order No. 20-06-19-01, § III(a) (June 19, 2020), <https://perma.cc/6J7M-5W6M> (PDF) (allowing heads of state agencies to suspend statutory deadlines).

Utah<sup>271</sup> and South Carolina<sup>272</sup> established early voting periods for the 2020 election via statute. Because the majority of states already allowed for a reasonably long period of early voting as part of their permanent election codes,<sup>273</sup> emergency changes to early voting rules were a limited part of the pandemic response. Election systems that offer a variety of voting opportunities have resiliency built into them, making them better capable of operating in the face of emergencies like pandemics.

### 3. Postponing the General Election

One major controversy that arose in public discussions over the risks that COVID-19 posed to the electoral process was the possibility of postponing the general election.<sup>274</sup> In late July 2020, President Donald J. Trump tweeted,

With Universal Mail-In Voting (not Absentee Voting, which is good), 2020 will be the most INACCURATE & FRAUDULENT Election in history. It will be a great embarrassment to the USA. Delay the Election until people can properly, securely and safely vote???<sup>275</sup>

As commentators were quick to point out, a President lacks authority to directly cancel or postpone an election.<sup>276</sup>

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271. See Act of Aug. 20, 2020, ch. 17, § 1, 2021 Utah Laws 65, 66 (codified at UTAH CODE § 20A-1-310(8)(a)(ii)(A)–(B) (2020)).

272. See Act of Sept. 16, 2020, No. 143, § 5, 2020 S.C. Acts 1318, 1320 (“Beginning on October 5, 2020, each county board of elections and voter registration must provide for in-office absentee voting for the November 3, 2020, General Election.”).

273. See *Early Voting Laws*, NAT’L CONF. OF STATE LEGISLATURES, <https://perma.cc/NP8E-8Q7P>.

274. See Rebecca Shabad, *Trump Floats Delaying the Election, But He Can’t Do That*, NBC NEWS (July 30, 2020, 9:09 AM) <https://perma.cc/LV36-46DY> (last updated July 30, 2020, 7:27 PM).

275. Kevin Liptak & Betsy Klein, *Trump Floats Delaying Election Despite Lack of Authority to Do So*, CNN (July 30, 2020, 6:43 PM), <https://perma.cc/4Q2P-XPUCH>.

276. One concern was that the President might be able to invoke other claimed powers, such as authority to exclude people from quarantine zones or disperse riots, to interfere with the conduct of voting on Election Day, similarly to how the Governor of Ohio relied on an order from the state health department to prevent in-person voting during the scheduled primaries. See *supra* notes 230–231 and accompanying text.

The Constitution grants state legislatures plenary authority to determine the “Manner” in which their states appoint presidential electors,<sup>277</sup> but allows Congress to “determine the Time of [choosing] the Electors.”<sup>278</sup> Pursuant to this authority, Congress enacted the Presidential Election Day Act,<sup>279</sup> requiring states to appoint their electors “on the Tuesday next after the first Monday in November” of presidential election years—Election Day.<sup>280</sup> Congress had initially adopted this law in the 1840s in part to help combat voter fraud by preventing people from voting multiple times in states that held their presidential elections on different days.<sup>281</sup>

In theory, Congress could have amended this provision to provide an exception for the 2020 general election for President, as many states had done for their primaries,<sup>282</sup> but neither major party expressed any interest in doing so. Moreover, as discussed below, the Constitution imposes severe timing constraints on presidential elections that would make any such delay logistically difficult. In any event, there was no reason to believe that delaying the election by a few weeks would mitigate the risks presented by COVID-19 or materially aid election officials’ preparation efforts.

The Presidential Election Day Act contains an exception: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day” in whatever manner the legislature directs.<sup>283</sup> This provision allows a state legislature to either reschedule a presidential election or directly appoint electors itself if an unexpected disaster impedes a substantial amount of voting on Election Day.<sup>284</sup> Even then, it is the state legislature—not the

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277. See U.S. CONST. art. II, § 1, cl. 2; see also *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

278. See U.S. CONST. art. II, § 1, cl. 4.

279. Act of Jan. 23, 1845, Pub. L. No. 28-2, 5 Stat. 721 (codified as amended at 3 U.S.C. § 1).

280. *Id.*

281. See Morley, *Postponing Federal Elections*, *supra* note 215, at 186.

282. See *supra* Part II.B.1.

283. 3 U.S.C. § 2.

284. See Morley, *Postponing Federal Elections*, *supra* note 215, at 187–90.

President—that would be responsible for making the decision.<sup>285</sup> But 3 U.S.C. § 2 was inapplicable to COVID-19 since states had months to prepare for in-person voting on Election Day and numerous alternative mechanisms for voting were widely available for people who were unable to vote in person due to the risks posed by the pandemic.

Both Congress and states would have faced substantial constraints in any potential attempt to postpone the 2020 presidential election. In most states, there is a delay of several weeks between Election Day and final certification of the election’s results to allow time for canvassing, recounts, election contests, and other post-election litigation.<sup>286</sup> Under the Electoral Count Act of 1876,<sup>287</sup> December 8 was the “safe harbor” deadline for the 2020 election cycle; states had to certify their results by then to protect their slates of electors from being challenged on the floor of Congress.<sup>288</sup> That deadline, however, is optional; each state’s legislature may decide whether to take advantage of it.<sup>289</sup>

The Constitution provides that all electors must cast their electoral votes on the same day, which it allows Congress to set.<sup>290</sup> The Electoral Count Act required electors to cast their votes on December 14 for the 2020 election cycle.<sup>291</sup> If a state’s

285. See Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1066–68 (2021).

286. See *Canvass, Certification and Contested Election Deadlines and Voter Intent Laws*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 28, 2020), <https://perma.cc/WQ83-G5RQ>.

287. Act of Feb. 3, 1887, Pub. L. No. 49-90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 3–18).

288. See 3 U.S.C. § 5; see also *Bush v. Gore*, 531 U.S. 98, 110-11 (2000) (per curiam) (discontinuing Florida’s recount of votes in the 2000 presidential election based on the Court’s conclusion that the Florida legislature had prioritized taking advantage of the safe harbor over completing a recount).

289. Derek Muller, *Restraining Judicial Application of the “Safe Harbor” Provision in the Electoral Count Act*, 81 OHIO ST. L.J. ONLINE 221, 221 (2020). Muller points out elsewhere that, while the safe harbor prevents Congress from rejecting a state’s slate of presidential electors, it still allows Congress to decide for itself whether those electors’ votes were “regularly given.” Derek Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1551–52 (2021).

290. U.S. CONST. art. II, § 1, cl. 4 (“The Congress may determine . . . the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”).

291. See 3 U.S.C. § 7.

electors cast their votes after that date, “statutory and constitutional questions as to the validity of those votes would arise.”<sup>292</sup>

Federal law also mandates that Congress meet in joint session on January 6 to count electoral votes.<sup>293</sup> And, of course, an incumbent President’s term expires on January 20, regardless of whether a successor has been elected.<sup>294</sup> In the event Congress has not yet named a new President or Vice President, those offices are deemed vacant and the Speaker of the House serves as Acting President until the issue is resolved.<sup>295</sup> Thus, federal constitutional and statutory provisions tightly constrain the ability of either Congress or a state legislature to delay or extend a presidential election. Notwithstanding President Trump’s tweet, which commentators immediately repudiated, no jurisdictions attempted to postpone Election Day in response to COVID-19.

### C. Election Transparency

Several post-election lawsuits did not challenge the election’s outcome directly. Instead, the plaintiffs claimed that election officials improperly prevented observers from monitoring the conduct of voting or processing of absentee ballots.<sup>296</sup> Election officials in some jurisdictions limited the number of observers even though absentee ballots were being processed at numerous tables simultaneously,<sup>297</sup> making it

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292. See Morley, *Postponing Federal Elections*, *supra* note 215, at 195.

293. 3 U.S.C. § 15; see U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

294. See U.S. CONST. amend. XX, § 1.

295. See 3 U.S.C. § 19(a)(1); see also U.S. CONST. amend. XX, § 3.

296. Absentee ballot processing typically includes multiple steps such as comparing voters’ signatures on envelopes to election records, confirming that the person who submitted the absentee ballot has not already voted, and accurately duplicating damaged ballots on fresh sheets to be run through automatic tabulation machines.

297. See, e.g., Opinion & Order at 8, *Constantino v. City of Detroit*, No. 20-014780-AW (Mich. Cir. Ct. Nov. 13, 2020) (rejecting challenge to the exclusion of a Republican election observer from the counting area for absentee ballots due to overcrowding concerns), *leave to appeal denied*, No. 355443, 2020 Mich. App. LEXIS 7618 (Mich. Ct. App. Nov. 16, 2020), *leave to appeal denied*, 950 N.W.2d 707 (Mich. 2020); Opinion and Order at 1, *Donald J. Trump for President, Inc. v. Benson*, No. 20-225-MZ (Mich. Ct. Claims Nov. 6, 2020) (rejecting a claim concerning an election challenger who was “excluded from



impossible for observers to meaningfully monitor everything that was occurring. In other jurisdictions, election officials required observers to remain in a small area far from where absentee ballots were being processed, preventing them from seeing what was written on any of the envelopes or election records.<sup>298</sup> Observers in Pennsylvania were directed to stay “up to thirty-five yards away” from “ballot-canvassing operations.”<sup>299</sup>

Election officials argued that these policies were necessary to maintain social distancing and prevent the spread of COVID-19.<sup>300</sup> In other cases, they simply declared that state law only allowed observers to be in the room and did not guarantee them the rights to be close to election officials or to be able to read the paperwork being processed.<sup>301</sup>

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the counting board during the absent voter ballot review process”), *leave to appeal denied*, Nos. 355378 & 355397, 2020 Mich. App. LEXIS 8099 (Mich. App. Dec. 3, 2020), *leave to appeal denied*, 951 N.W.2d 353 (Mich. 2020); *see also* Opinion & Order at 1–2, *Polasek-Savage v. Benson*, No. 20-000217-MM (Mich. Ct. Claims Nov. 3, 2020) (upholding a county policy that allegedly allowed only a single challenger from each eligible organization to be present at a “combined absent voter counting board”).

298. *See, e.g., In re Canvassing Observation*, 241 A.3d 339, 342–43 (Pa. Nov. 17, 2020) (“[W]hile he could see the Board employees . . . examining the back of the ballot return envelopes, from his position, he could not read the actual declarations on the ballot envelopes.”); *see also Kraus v. Cegavske*, No. 82018, 2020 Nev. LEXIS 1043, at \*1 (Nev. Nov. 3, 2020) (requesting that the court prohibit a county from duplicating mail ballots “unless observers are granted an opportunity to meaningfully observe the process”).

299. *In re Canvassing Observation*, 241 A.3d at 351 (Saylor, C.J., dissenting).

300. *See* Opinion & Order, *Constantino*, No. 20-014780-AW, at 8 (“Given the COVID-19 concerns, no additional individuals could be allowed into the counting area.”); *In re Canvassing Observation*, 241 A.3d at 350 (discussing the argument of the county board of elections that “it fashioned these rules based on its careful consideration of how it could best . . . safeguard its employees and others who would be present during a pandemic for the pre-canvassing and canvassing process . . .”).

301. *See In re Canvassing Operation*, 241 A.3d at 350 (“[W]e deem the absence of proximity parameters to reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections . . .”).

Election transparency is key, particularly in emergency circumstances.<sup>302</sup> Mistakes and irregularities are bound to occur, especially when election officials are required to implement unfamiliar processes on a widespread scale or must otherwise make adjustments to deal with a crisis. Observers provide an additional check to minimize the risk that problems will remain undetected. They can also bolster public confidence in the election's outcome by dispelling concerns about fraud, mishandling, irregularity, or illegality.

Rather than viewing election observers as unwelcome interlopers to be grudgingly tolerated to the absolute minimum extent legally required, election officials should regard them as useful partners. Officials should ensure observers' ability to meaningfully monitor each step of the process to the greatest degree possible consistent with public health concerns, election security, and preserving the privacy of people's votes. This might mean, for example, using audio-visual equipment such as large screens and projectors or requiring the use of personal protective equipment. At least some of the litigation and controversy concerning the 2020 election may have been prevented if election officials in certain jurisdictions had placed greater emphasis on transparency.

### III. ABSENTEE VOTING IN THE COVID-19 ERA

Due to the risk of contagion at polling places, absentee voting was a major component of our election system's response to COVID-19. In the 2020 election, an estimated 46% of voters, or 72,856,000 people, cast absentee ballots,<sup>303</sup> up from 23.54%, or 32,982,211 absentee ballots, in the 2016 presidential election.<sup>304</sup> Going into the 2020 election, the majority of states already had no-excuse absentee voting in which any eligible

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302. See Rebecca Green, *Election Observation Post-2020*, 90 *FORDHAM L. REV.* 467, 492 (2021) (“[S]tates should plan election observation contingencies should disruptions—like pandemic or weather-related disturbances—arise.”).

303. See PEW RSCH. CTR., *SHARP DIVISIONS ON VOTE COUNTS, AS BIDEN GETS HIGH MARKS FOR HIS POST-ELECTION CONDUCT* 19 (2020), <https://perma.cc/9RXF-SP9X>; FED. ELECTION COMM'N, *OFFICIAL 2020 PRESIDENTIAL GEN. ELECTION RESULTS* 8 (2021), <https://perma.cc/MRF2-BUNA>.

304. See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 31, at 24–25 tbl.2.

voter could choose to cast an absentee ballot.<sup>305</sup> Most states with excuse-based systems similarly allowed the entire electorate to vote absentee in the 2020 election, if they wished, as a response to COVID-19. Over a half-dozen states amended their laws specifically to allow universal absentee voting in the 2020 election.<sup>306</sup> In others, the Governor issued an executive order<sup>307</sup> or the Secretary of State issued emergency regulations<sup>308</sup> clarifying that COVID-19 counted as a legally sufficient excuse to allow any voter to cast an absentee ballot under the state's for-cause absentee voting statute.

A few states, including Indiana,<sup>309</sup> Louisiana,<sup>310</sup> Tennessee,<sup>311</sup> and Texas,<sup>312</sup> declined to allow their entire electorates to participate in absentee voting during the 2020 election. Plaintiffs brought constitutional challenges in those jurisdictions, with mixed results. In Indiana, the U.S. Court of Appeals for the Seventh Circuit reasoned that, since the Supreme Court had held that the constitutional right to vote

305. See *Absentee and Mail Voting Policies in Effect for the 2020 Election*, *supra* note 32.

306. See Act of July 31, 2020, No. 20-3, § 1, 2020 Conn. Acts 197, 197–98 (July Spec. Sess.) (codified at CONN. GEN. STAT. § 9-135 (a) (2020)); Act of July 1, 2020, ch. 245, § 3, 82 Del. Laws 1, 2–10 (2020) (codified at DEL. CODE ANN. tit. 15, §§ 5601–02 (2020)); Act of July 6, 2020, ch. 115, § 14, 2020 Mass. Acts 207, 216; Act of July 8, 2020, ch. 472, § 6, 2020 Miss. Laws 1410, 1415–16 (codified at MISS. CODE ANN. § 23-15-713 (d), (e)) (2020); Act of June 4, 2020, S.B. 631, § A, 2020 Mo. Laws 818, 823 (codified at MO. REV. STAT. § 115.277.1(7) (2020)); Act of July 17, 2020, ch. 14, § 14:1, 2020 N.H. Laws 50, 50; Act of Aug. 20, 2020, ch. 139, § 1, 2020 N.Y. Laws 830, 830 (codified at N.Y. ELEC. LAW § 8-400(1)(b) (2020)); Act of Sept. 16, 2020, No. 143, § 3, 2020 S.C. Acts 1318, 1319.

307. See, e.g., Ky. Exec. Order 2020-688, § 1 (Aug. 14, 2020), <https://perma.cc/9TK5-6EEV>.

308. See, e.g., ALA. ADMIN. CODE r. 820-2-3-.06-.04ER (2020) (temporary emergency rule); Ark. State Bd. of Elections, Res. No. 4 of 2020, In the Matter of: Absentee Voting Procedures, at 2 (July 22, 2020); Press Release, Andrew “Mac” Warner, W. Va. Sec’y of State, Secretary of State Mac Warner Announces Voting Options for Voters to Continue Making Safe Decisions in 2020 General Election (July 27, 2020), <https://perma.cc/L7GF-ZHLY>.

309. See IND. CODE § 3-11-10-24(a) (2020).

310. See LA. REV. STAT. § 18:1303(B)-(L) (2020).

311. See TENN. CODE ANN. § 2-6-201 (2020).

312. See TEX. ELEC. CODE ANN. §§ 82.001–82.004, 82.008 (West 2020).

does not include the right to cast an absentee ballot,<sup>313</sup> restrictions on absentee voting are subject only to rational basis scrutiny.<sup>314</sup> The court pointed out that Indiana’s decision to selectively allow certain voters such as the elderly to vote absentee did not “make it harder for anyone [else] to cast a ballot.”<sup>315</sup>

It further noted that Indiana’s restrictions would also withstand scrutiny under the *Anderson-Burdick* balancing test<sup>316</sup> because the state offered an extensive early voting period and advanced important reasons for restricting absentee voting: “discouraging fraud, ensuring that the maximum number of ballots are deemed valid, managing administrative capacity to process ballots, and permitting voters to receive timely information about candidates up to election day.”<sup>317</sup> The court concluded by emphasizing the need to defer to state officials’ policy decisions regarding the most effective way to restructure the state’s electoral system to respond to COVID-19.<sup>318</sup>

The Tennessee Supreme Court reached a similar conclusion.<sup>319</sup> It held that, despite the risks of COVID-19, voting in person did not substantially burden the rights of voters who neither had “special vulnerability to COVID-19” nor were caretakers for such people.<sup>320</sup> It explained:

The State’s Plan for in-person voting includes detailed measures for [voters’] protection and the protection of the poll workers, including social distancing, screening questions for poll workers before entry into the polling

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313. See *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969) (“It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.”); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) (“In *McDonald* . . . [a]t issue was not a claimed right to vote but a claimed right to an absentee ballot.”).

314. *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020).

315. *Id.*

316. See *infra* note 429.

317. *Tully*, 977 F.3d at 617.

318. See *id.* at 618 (“[I]n the midst of a pandemic ‘when [l]ocal officials are working tirelessly to shap[e] their response to changing facts on the ground . . . the appropriate response is subject to reasonable disagreement.’” (quoting *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 393–94 (5th Cir. 2020) (internal quotations omitted))).

319. See *Fisher v. Hargett*, 604 S.W.3d 381, 403 (Tenn. 2020).

320. *Id.*

places, plexiglass shields for check-in procedures, mandatory masks and gloves for poll workers and recommended masks for voters, single use pens for voters to use to sign poll books, single use styluses for voters to use to ensure touchless voting, and frequent and regular sanitation of surfaces.<sup>321</sup>

The Texas Supreme Court took an especially hard line on the issue of absentee voting.<sup>322</sup> State law allowed a person to vote absentee if they had “a sickness or physical condition that prevent[ed] [them] from appearing at the polling place on election day without . . . injuring [their] health.”<sup>323</sup> Plaintiffs argued that the general public’s lack of COVID-19 immunity at the time constituted a “physical condition” that exposed them to health risks if they voted in person.<sup>324</sup> The Texas Supreme Court surprisingly rejected this facially reasonable interpretation. It held that the legislature had intended the state’s absentee voting law to be applied only “in specific, defined categories.”<sup>325</sup> The plaintiffs’ proposed interpretation of the statute swept too broadly, encompassing virtually everyone rather than only people with “an abnormal or at least distinguishing state of being.”<sup>326</sup> The court concluded, “A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition” and thus does not render a person “eligible to vote by mail” under state law.<sup>327</sup>

The Texas Democratic Party (TDP) then turned to the federal courts, challenging Texas’ absentee voting restrictions under the Twenty-Sixth Amendment.<sup>328</sup> It had no better luck.<sup>329</sup> The TDP argued that the state’s absentee voting law impermissibly abridged younger voters’ right to vote on account

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321. *Id.* at 402–03.

322. *See In re State*, 602 S.W.3d 549, 561 (Tex. 2020).

323. TEX. ELEC. CODE ANN. § 82.002(a) (West 2021).

324. *See State*, 602 S.W.3d at 557.

325. *Id.* at 559.

326. *Id.* at 559–60.

327. *Id.* at 560.

328. *See* U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

329. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

of age by allowing senior citizens to cast absentee ballots.<sup>330</sup> The Fifth Circuit rejected this claim. Echoing the Tennessee Supreme Court's interpretation of the Equal Protection Clause, the Fifth Circuit declared that an election law "abridges a person's right to vote for purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced."<sup>331</sup> The court added that a law that "makes it *easier* for others to vote does not abridge any person's right to vote for purposes of the Twenty-Sixth Amendment."<sup>332</sup> Thus, Texas' absentee voting law was valid under the Twenty-Sixth Amendment.

In Louisiana, the Secretary of State had issued an emergency plan for the 2020 presidential preference primary that allowed a person to cast an absentee ballot if they were at particular risk of severe illness from COVID-19, had been advised or required to quarantine due to COVID-19 (or were caring for such a person), or were experiencing COVID-19 symptoms.<sup>333</sup> A federal district court ordered the state to apply that plan to the general election, as well.<sup>334</sup> The court found that, "although state officials have attempted to implement precautions to make voting in person safer, even these well-intentioned efforts cannot ameliorate the risk."<sup>335</sup> Such risks were particularly substantial for "voters with comorbidities" and "voters who care for the frail and the infirm."<sup>336</sup> These burdens were not justified by the state's claimed interests in preventing voter fraud, limiting strains on election officials, avoiding voter confusion, or bolstering public confidence in the

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330. *See id.* at 183.

331. *Id.* at 190–91 (emphasis in original).

332. *Id.* at 191 (emphasis in original).

333. *See* La. Sec'y of State R. Kyle Ardoin, Secretary of State Emergency Election Plan for the July 11, 2020 Presidential Preference Primary and August 15, 2020 Municipal General Elections in the State of Louisiana, at 8 (Apr. 20, 2020), <https://perma.cc/BA3Z-38WJ>.

334. *See* *Harding v. Edwards*, 487 F. Supp. 3d 498, 528 (M.D. La. 2020), *appeal dismissed as moot sub nom.* *Harding v. Ardoin*, No. 20-30632, 2021 U.S. App. LEXIS 31662 (5th Cir. May 17, 2021).

335. *Id.* at 515.

336. *Id.*

electoral process.<sup>337</sup> Thus, the court ordered the state to expand absentee voting to vulnerable groups of voters in the general election, as it had done in the presidential primary.<sup>338</sup>

Despite these counterexamples, most voters throughout the nation were eligible to cast absentee ballots in the 2020 presidential election. This posed a substantial challenge for election officials because absentee voting historically played only a limited role in most states. In over half the country, no more than ten percent of votes were typically cast through absentee ballots.<sup>339</sup> Election officials had to ramp up their absentee ballot processing systems to potentially accommodate ten to fifteen times as many ballots as usual while in the midst of a global pandemic. To prepare for this historic deluge, election officials had to order substantially more absentee ballots, hire more personnel, purchase more tabulation equipment, and find the physical space to safely secure and process absentee ballot applications and the completed ballots themselves.<sup>340</sup> Congress enacted the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act,<sup>341</sup> appropriating an additional \$400 million to help subsidize the cost of responding to COVID-19 in the 2020 elections,<sup>342</sup> but that was only a fraction of the necessary funding.<sup>343</sup>

Whereas almost every state recognized the need to facilitate absentee voting due to COVID-19, more substantial disagreements arose over the logistics of helping voters take advantage of that opportunity. Several jurisdictions

337. *Id.* at 515-23.

338. *Id.* at 528.

339. See *EAVS Deep Dive: Early, Absentee and Mail Voting*, U.S. ELECTION ASSISTANCE COMM’N (Oct. 17, 2017), <https://perma.cc/V5LM-3LA4>; see also Lee Drutman, *There Is No Evidence That Voting by Mail Gives One Party an Advantage*, FIFTYTHREE (May 12, 2020, 6:00 AM), <https://perma.cc/VUA2-RW6E>.

340. See Richard Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://perma.cc/D95W-WS7A>; see also Michael Wines, *Voting by Mail Could Be What States Need. But Can They Pull It Off?*, N.Y. TIMES (Apr. 11, 2020), <https://perma.cc/8MSZ-HYB8>.

341. Pub. L. No. 116-136, 134 Stat. 281 (2020).

342. *Id.*

343. See Bridget Bowman, *Coronavirus Response Includes \$400 Million in Election Assistance. Will It Be Enough?*, ROLL CALL (Mar. 25, 2020, 10:11 AM), <https://perma.cc/D5HK-CN34>.

commendably decided to proactively distribute blank absentee ballot request forms based on the records in their voter registration databases.<sup>344</sup> A few groups sued election officials in other states to force them to similarly distribute such applications, but courts generally held that COVID-19 did not make it unduly burdensome for voters to contact election offices to affirmatively request the forms for themselves.<sup>345</sup>

In Iowa, the Secretary of State ordered county election officials to send voters blank absentee ballot application forms to complete and return.<sup>346</sup> The directive emphasized, “To ensure uniformity and to provide voters with consistent guidance on the absentee ballot application process, County Auditors shall distribute only the blank Official State of Iowa Absentee Ballot Request Form.”<sup>347</sup> Three county auditors instead sent a form to each voter in their counties pre-populated with that voter’s personal information from the registration database.<sup>348</sup> Because all of the identifying information on the forms had been drawn from the database, those auditors could not use that information to confirm that a person requesting a ballot was the intended voter.<sup>349</sup> Moreover, only residents of those counties had the advantage of receiving pre-populated forms, protecting them from the possibility of having their application rejected due to

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344. See, e.g., Press Release, Md. State Bd. of Elections, Applications for General Election Mail-In Ballots on the Way to Eligible Maryland Voters (Aug. 31, 2020), <https://perma.cc/PL8W-VVGR> (PDF); see also Press Release, Jocelyn Benson, Mich. Sec’y of State, Benson to Mail Postcards Encouraging Voters to Apply Online to Vote from Home (Aug. 13, 2020), <https://perma.cc/E76B-QQ8E>; N.M. STAT. ANN. § 1-12-72(D) (2020) (authorizing New Mexico county clerks to distribute absentee ballot applications for the 2020 election).

345. See, e.g., Memorandum Opinion at 12, NAACP Penn. State Conf. v. Boockvar, No. 364 M.D. 2020 (Pa. Commw. Ct. Sept. 11, 2020) (noting the lack of evidence “that voters will be, or are likely to be, disenfranchised in the upcoming General Election absent the requested mandatory injunctive relief”); see also Coal. for Good Governance v. Raffensperger, No. 20-CV-1677, 2020 U.S. Dist. LEXIS 86996, at \*10 n.3 (N.D. Ga. May 14, 2020).

346. See Paul D. Pate, Iowa Sec’y of State, Emergency Election Directive, Statewide Absentee Ballot Request Form Mailing, at 2 (July 17, 2020), <https://perma.cc/2EB9-4LLB> (PDF).

347. *Id.*

348. See *infra* note 351 and accompanying text.

349. See Order re: Motion for Temporary Injunction at \*17, Republican Nat’l Comm. v. Gill, No. EQCV193154, 2020 Iowa Dist. LEXIS 10 (Iowa Dist. Ct. Aug. 28, 2020).



information mismatch.<sup>350</sup> State judges in each of those counties enjoined the auditors from distributing pre-populated forms, directed them to send blank forms instead, and ordered them to warn anyone who had submitted a pre-completed form that their request for an absentee ballot was invalid.<sup>351</sup>

The Iowa Supreme Court rejected a separate suit by the Democratic Senatorial Campaign Committee challenging the Secretary's requirement that county auditors distribute only blank forms.<sup>352</sup> It declared, "[W]e are not persuaded that the obligation [for voters] to provide a few items of personal information on an absentee ballot application is unconstitutional."<sup>353</sup>

Some states' election officials went even further by automatically mailing an absentee ballot to each voter without receiving a specific request from them. At the time, five states typically conducted their elections by mail in this manner.<sup>354</sup> Three other states have since amended their election codes to require automatic distribution of vote-by-mail ballots, as well—though they have also retained opportunities for in-person voting.<sup>355</sup>

The law of other jurisdictions, however, prohibited election officials from automatically distributing absentee ballots to

350. *Id.*

351. *See id.* at 21 (granting a temporary injunction preventing Woodbury County from distributing pre-populated ballot request forms); Order for Temporary Injunction at \*9, *Republican Nat'l Comm. v. Miller*, No. EQCV095986, 2020 Iowa Dist. LEXIS 8 (Iowa Dist. Ct. Aug. 27, 2020) (same for Linn County); Order for Temporary Injunctive Relief at \*15, *Republican Nat'l Comm. v. Weipert*, No. CVCV081957, 2020 Iowa Dist. LEXIS 11 (Iowa Dist. Ct. Sept. 12, 2020) (same for Johnson County).

352. *See Democratic Senatorial Campaign Comm. v. Iowa Sec'y of State*, 950 N.W.2d 1, 3 (Iowa 2020).

353. *Id.* at 7.

354. *See* COLO. REV. STAT. § 1-5-401 (2022); HAW. REV. STAT. § 11-101 (2022); OR. REV. STAT. § 254.465 (2020); UTAH CODE ANN. § 20a-3a-202 (LexisNexis 2020) (amended 2022); WASH. REV. CODE § 29a.40.010 (2022).

355. *See* Act of Sept. 27, 2021, ch. 312, § 1, 2021 Cal. Stat. 5473, 5474 (codified at CAL. ELEC. CODE § 3000.5(a), (c) (2022)) (requiring "distribution of vote by mail ballots" to active registered voters); Act of June 2, 2021, ch. 248, § 3, 2021 Nev. Stat. 1213, 1216 (codified at NEV. REV. STAT. § 293.269911 (2021)) ("[T]he county clerk shall prepare and distribute . . . a mail ballot for every election."); Act of June 7, 2021, No. 60, § 7, 2021 Vt. Acts & Resolves 511, 515 (codified at VT. STAT. ANN. tit. 17, § 2537a (2021)) ("The Secretary of State's office shall mail a general election ballot to all active voters.").

recipients who had not requested them. In Arizona, for example, the Attorney General obtained an *ex parte* temporary restraining order to prevent the Maricopa County Recorder from automatically distributing an absentee ballot for the presidential preference primary based on each Maricopa record in the statewide database.<sup>356</sup> Arizona law allowed absentee ballots to be mailed only to people who made “a verbal or signed request to the county recorder” by the statutory deadline.<sup>357</sup> The court ruled that the Recorder’s actions “will create voter confusion on the eve of an election and could result in voters attempting to vote ballots that are not lawfully authorized.”<sup>358</sup> In Alaska, a plaintiff group sued to force election officials to automatically distribute absentee ballots without receiving requests, but it was unsuccessful.<sup>359</sup> The court reasoned that requiring voters to submit a brief request form served legitimate government purposes and was not a burdensome requirement, notwithstanding the prevalence of COVID-19.<sup>360</sup>

Several disputes concerned whether states could continue to enforce other security requirements protecting the absentee ballot process. For example, an Alabama district court enjoined a state law requiring that absentee ballots be witnessed because social distancing requirements arising from COVID-19 made such interpersonal interactions difficult and potentially dangerous.<sup>361</sup> The Eleventh Circuit, however, stayed that injunction without written order.<sup>362</sup> The First Circuit, in contrast, affirmed a consent decree enjoining Rhode Island’s

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356. See Temporary Restraining Order at 3, State *ex rel.* Brnovich v. Fontes, No. CV2020-3477 (Ariz. Super. Ct. Mar. 13, 2020).

357. ARIZ. REV. STAT. § 16-542(a), (e) (LexisNexis 2022).

358. Temporary Restraining Order, *supra* note 356, at 3.

359. Disability L. Ctr. of Alaska v. Meyer, 484 F. Supp. 3d 693, 697 (D. Alaska 2020).

360. *Id.* at 708.

361. See People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1149 (N.D. Ala. 2020) (“[S]ome voters at risk of severe complications from COVID-19 who do not regularly encounter at least two adults simultaneously will be dissuaded from voting due to the health risks associated with complying with the witness requirement . . .”), *injunction stayed in relevant part*, No. 20-13695-B, 2020 U.S. App. LEXIS 33371 (11th Cir. Oct. 13, 2020), *injunction stayed*, 141 S. Ct. 25 (2020).

362. See People First of Ala. v. Merrill, No. 20-13695-B, 2020 U.S. App. LEXIS 33371 (11th Cir. Oct. 13, 2020), *injunction stayed*, 141 S. Ct. 25 (2020).

witness requirement, stressing that “no Rhode Island official has stepped forward in these proceedings, even as amicus, to tout the need for the rule.”<sup>363</sup> A Minnesota state court approved similar decrees for the primary and general elections.<sup>364</sup> Minnesota’s federal district court had refused to approve such an agreement for the primaries without a fairness hearing, but the hearing did not occur due to the state-court settlement.<sup>365</sup>

Courts reached similarly disparate results over whether to enjoin laws prohibiting third-party ballot collection during the pandemic.<sup>366</sup> In contrast, lawsuits to force counties to offer more drop box locations generally failed.<sup>367</sup> One plaintiff group argued unsuccessfully that, due to the risks of COVID-19, requiring voters to pay for stamps to return absentee ballots by mail was an unconstitutional poll tax under the Twenty-Fourth

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363. Common Cause R.I. v. Gorbea, 970 F.3d 11, 15 (1st Cir. 2020), *stay denied sub nom.* Republican Nat’l Comm. v. Common Cause R.I., 141 S. Ct. 206 (2020).

364. See *LaRose v. Simon*, No. 62-CV-20-3149, 2020 Minn. Dist. LEXIS 455, at \*29 (Minn. Dist. Ct. Aug. 3, 2020) (holding that it was “reasonable” for the Secretary to conclude that the plaintiffs’ challenge to the witness requirement would be successful).

365. Order at 1–2, *League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-CV-1205 (D. Minn. June 16, 2020).

366. Compare Judgment at 4, *Am. Women v. State*, No. 20AC-CC00333 (Mo. Cir. Ct. Oct. 22, 2020) (“Plaintiffs’ free-speech challenge to the ‘Ballot Collection Ban’ fails because the law clearly regulates conduct, not speech, and Plaintiffs have not identified any speech that the law prohibits.”), with *Driscoll v. Stapleton*, 473 P.3d 386, 390, 393 (Mont. 2020) (affirming preliminary injunction against prohibition on third-party ballot harvesting because third-party organizations “do ballot-collection work on reservations” and Native Americans disproportionately prefer to “pool their ballots together” to have them delivered to election officials).

367. See *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 144–45 (5th Cir. 2020) (affirming the constitutionality of the Texas Governor’s proclamation allowing each county to establish a single drop box due to the risks of COVID-19, even though it barred counties from establishing additional drop boxes, because the order provided an additional voting opportunity rather than burdening voting rights); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241, 1254, 1256–57 (Ohio Ct. App. 2020) (rejecting the argument that the Ohio Secretary of State’s order allowing county boards of elections to establish absentee ballot drop boxes at their central offices violated state law by barring counties from establishing drop boxes at other locations); *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 920–23 (Tex. 2020) (holding that the Texas Governor’s proclamation authorizing a single drop box within each county was consistent with the federal and state constitutions, as well as state law).

Amendment.<sup>368</sup> The court rejected that claim, pointing out that “[p]ostage charged by the United States Postal Service—like the fee charged by any other courier or the bus fare for getting to the polls to vote in person—is not a tax.”<sup>369</sup>

Another of the most hotly contested COVID-related adjustments was deadline extensions for returning completed absentee ballots in the general election. In many states, the election code specifies that election officials must receive an absentee ballot by the close of polls on Election Day for the ballot to be valid.<sup>370</sup> Some governors exercised their emergency authority to suspend this statutory deadline. Their orders typically directed election officials to accept absentee ballots received within a certain number of days (usually between three and ten) after Election Day, so long as either the ballot’s envelope was postmarked by Election Day or the envelope lacked a postmark.<sup>371</sup> Plaintiffs in several other states sued, alleging that enforcing the deadline in the midst of COVID-19 would be unconstitutional; despite some plaintiff successes, courts were often skeptical of such claims.<sup>372</sup>

The U.S. Supreme Court’s April 2020 ruling in *Republican National Committee v. Democratic National Committee*,<sup>373</sup> during the primaries, made such cases much more difficult to bring—at least in federal court. At the time, COVID-19 had been a declared pandemic in the United States for only a few weeks. Wisconsin’s presidential preference primary was scheduled for

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368. See *Nielsen v. DeSantis*, No. 20-CV-00236, 2020 U.S. Dist. LEXIS 171773, at \*26–27 (N.D. Fla. June 24, 2020).

369. *Id.* at \*27.

370. See *Table 11: Receipt and Postmark Deadline for Absentee/Mail Ballots*, NAT’L CONFERENCE OF ST. LEGISLATURES (last updated July 12, 2022), <https://perma.cc/XY4U-K4YW>.

371. See, e.g., Pa. Exec. Order No. 2020-02 (Jun. 1, 2020), <https://perma.cc/D7XT-NJ4B>.

372. Compare *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 353 (Pa. 2020) (granting deadline extension), with *Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020) (“[L]aws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic . . .”), and *League of Women Voters of Del., Inc. v. State Dep’t of Elections*, 250 A.3d 922, 928, 938 (Del. Ch. 2020) (rejecting challenge to deadline); see also *infra* note 380 and accompanying text.

373. 140 S. Ct. 1205 (2020) (per curiam).

April 7.<sup>374</sup> To accommodate the anticipated flood of last-minute absentee ballot requests due to COVID-19, the state extended the deadline by which election officials had to receive completed absentee ballots from April 7 to April 13.<sup>375</sup> The Democratic National Committee nevertheless sued, claiming the state had not gone far enough in expanding voting opportunities due to the pandemic.<sup>376</sup>

The district court ordered election officials to accept any ballots that were postmarked after the day of the primary, so long as they were received by the April 13.<sup>377</sup> As discussed in greater depth below, the U.S. Supreme Court held that this ruling violated not only the *Purcell* Principle, which counsels against changing the rules of an election shortly before it begins (much less after voting has commenced),<sup>378</sup> but also the remedial hierarchy in election emergency cases. Under that hierarchy, courts may apply the powerful remedy of postponing an election or extending the period of voting only when no lesser alternatives would alleviate a constitutional violation.<sup>379</sup>

Relying in part on *Republican National Committee*, other courts rejected challenges to absentee ballot deadlines for the general election—particularly those filed months ahead of time.<sup>380</sup> The Seventh Circuit, for example, declared that

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374. See WIS. ELECTION COMM'N, *2020 Spring Election and Presidential Preference Primary Results* (April 7, 2020), <https://perma.cc/366N-YXBS>.

375. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

376. See *id.* at 1209 (Ginsburg, J., dissenting).

377. See *id.* at 1207 (majority op.) (explaining that the “district court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13”).

378. See *id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

379. See *id.* (“Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election.”).

380. See, e.g., *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) (rejecting a challenge to the deadline because, even if the post office delayed in delivering an absentee ballot to a voter, numerous other avenues for voting remained available, and the voter could have requested their ballot “as early as 49 days before the election”); *Nielsen v. DeSantis*, No. 20-CV-00236, 2020 U.S. Dist. LEXIS 171773, at \*27–28 (N.D. Fla. June 24, 2020); see also *Driscoll v. Stapleton*, 473 P.3d 386, 394–95 (Mont. 2020)

“reading the Constitution to extend deadlines near the election is difficult to justify when the voters have had a long time to cast ballots while preserving social distancing . . . . Deciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government.”<sup>381</sup> Similarly, a Florida district court explained that an Election Day deadline

eliminates the problem of missing, unclear, or even altered postmarks, eliminates delay that can have adverse consequences, and eliminates the remote possibility that in an extremely close election—Florida has had some—a person who did not vote on or before election day can fill out and submit a ballot later.<sup>382</sup>

Even if votes are not completely tallied by the time the polls close, having an unknown—and potentially substantial—number of valid votes still outstanding, yet to be received by election officials, may undermine public confidence in the electoral process.<sup>383</sup> Requiring that election officials receive completed absentee ballots by Election Day may also help to reduce opportunities for potential fraud.<sup>384</sup> In addition, such a deadline reduces the likelihood that an election’s apparent winner will change between the time that initial unofficial results are announced on election night and final results are certified.<sup>385</sup> As Professor Rick Pildes powerfully explains:

[L]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the

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(refusing to enjoin a law requiring election officials to receive absentee ballots by the close of polls on Election Day).

381. *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 643 (7th Cir. 2020), *application to vacate stay denied sub nom.* *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020).

382. *Nielsen*, 2020 U.S. Dist. LEXIS 171773, at \*28.

383. Many states create an exception to the deadline for military and overseas ballots, but those are always a small percentage of the returns. See U.S. ELECTION ASSISTANCE COMM’N, *supra* note 31, at 130.

384. Cf. EDWARD B. FOLEY, *BALLOT BATTLES* 218–20 (2016) (recounting the evidence that President John F. Kennedy, with the help of his Vice-Presidential candidate “Landslide” Lyndon Johnson, won the state of Texas by a few hundred fraudulent votes in the 1960 presidential election).

385. See Pildes, *supra* note 142, at 46.

apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode.<sup>386</sup>

The burden on voters of a deadline established well in advance of an election will generally remain constant, regardless of whether that deadline is Election Day itself, or some other day over the following week or two. Moreover, any such burden may generally be avoided through a voter's own reasonable efforts. As discussed earlier, by the time of the 2020 general election, the COVID-19 pandemic had been afflicting the United States for months, giving voters ample opportunity to request an absentee ballot. Viewed *ex ante* from a pre-election perspective, requiring voters to ensure that election officials received their absentee ballots by Election Day did not become unduly burdensome due to the onset of COVID-19.

Although absentee voting was among the most obvious and effective responses to COVID-19, some states implemented other alternatives as well, such as curbside voting and even drive-thru voting in Harris County, Texas.<sup>387</sup> For other types of disasters, however, such as mail-based anthrax attacks or a national postal strike, absentee voting may be far less effective. Our experience with pandemics demonstrates the importance of having a wide range of accessible, secure mechanisms for voting.

The COVID-19 pandemic also underscored the difficult institutional choice questions that arise in responding to election emergencies. A sound election system rests on three fundamental principles—(i) all eligible voters must have a reasonable opportunity to safely cast a vote and have it counted; (ii) election procedures must minimize the risks of mistake, irregularity, accident, confusion, and fraud; and (iii) the system must have the appearance of legitimacy, bolstering public confidence in the electoral process. Many ways of responding to election emergencies promote all three values simultaneously. Other alternatives, in contrast, involve tradeoffs among those values, and the Constitution does not require states to strike a particular, objectively identifiable balance among them. One of

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386. *Id.*

387. See Michael Hardy, *Drive-Through Voting. 24-Hour Polling Places. Finger Condoms. Welcome to Elections 2020 in Harris County*, TEX. MONTHLY (Sept. 24, 2020), <https://perma.cc/6DS5-G6GF>.

the biggest challenges courts faced in resolving election-related litigation in the midst of the COVID-19 pandemic was determining the proper degree of deference to afford to legislatures and election officials in balancing those three principles. The ad hoc *Anderson-Burdick* balancing test appeared to invite courts to weigh the various considerations for themselves.<sup>388</sup> One consistent message from the Supreme Court seems to have been that, when applying such standards, courts must grant substantial deference to the political branches' decisions concerning the rules governing the electoral process.<sup>389</sup>

#### IV. ADJUDICATING ELECTION EMERGENCY CASES

Due in large part to COVID-19, the 2020 presidential election cycle involved an unprecedented deluge of hundreds of lawsuits challenging the rules governing the election. As the previous Parts suggest, these cases collectively concerned virtually every aspect of the electoral process, often in minute detail. Beyond the merits, courts were confronted with a variety

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388. Cf. *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983) (noting that challenges to a state's election laws "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions"); see also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that "a more flexible standard" applies to First and Fourteenth Amendment challenges to state election laws on the grounds they are unduly burdensome).

389. See *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 32–33 (2020) (Roberts, J., concurring in denial of stay) ("Assessing the complicated tradeoffs involved in changing or retaining election deadlines, or other election rules, in light of public health conditions in a particular State is primarily the responsibility of state legislatures and falls outside the competence of federal courts."); *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting) (emphasizing "the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators" and the need to avoid "damag[ing] . . . the authority of legislatures"); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay) ("[A] State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily 'should not be subject to second-guessing by an unelected federal judiciary . . .'" (internal quotation marks omitted) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunction pending appeal)); cf. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (emphasizing the breadth of legislatures' authority over the appointment of presidential electors, including the power to impose conditions on such appointments); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (explaining that legislatures, rather than federal courts, are responsible for congressional redistricting).



of recurring jurisdictional, procedural, and remedial issues that future election emergency cases are also likely to involve. Courts have generally applied a variety of different approaches in resolving these issues, often overlooking the unique aspects of election emergency cases that should affect their analysis.

### A. *Recognize Broad Standing*

Most basically, courts should recognize that political parties, candidates, and voters have standing to ensure that the elections in which they participate are conducted according to the law.<sup>390</sup> Indeed, political party committees are ideal plaintiffs in election litigation because they have organizational standing to represent their own interests,<sup>391</sup> as well as associational standing to represent the interests of both their candidates and members (i.e., voters).<sup>392</sup> Candidates and voters participating in

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390. See *Shays v. FEC*, 414 F.3d 76, 87, 90, 92 (D.C. Cir. 2005) (holding that because candidates have a right to have their elections be “conducted in accordance with” the law, they have standing to challenge “illegally structure[d] . . . competitive environments,” “illegally granted opportunities” for competitors, and agency actions that “permit [statutorily]-banned practices”); cf. Dan Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Law*, 44 IND. L. REV. 113, 115 (2010) (“[T]he Court’s stringent approach to private rights of action is ill-suited to election disputes, given that they involved quintessentially public rights for which a judicial forum is essential.”).

391. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (recognizing organizational standing); see, e.g., *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 n.4 (5th Cir. 2006) (holding that a political party has standing to challenge decisions regarding the inclusion of competing candidates on ballots which may reduce its own candidates’ chances for success, because “[p]olitical victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party’s interests”); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that a plaintiff political party had standing to challenge “the improper placing of an additional party on the state-wide ballot” because it could “siphon votes” from the plaintiff party’s candidates “and therefore adversely affect [the plaintiff party’s] interests”); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990).

392. See *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000) (explaining associational standing); see, e.g., *Benkiser*, 459 F.3d at 587 (holding that a state party “has associational standing on behalf of its candidate” to challenge state action that “threatens [the candidate’s] candidates’ election prospects”); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004); cf. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (“The Democratic Party also

an election should generally have standing to sue when necessary to ensure enforcement of the procedures and other rules governing it.<sup>393</sup>

Courts must be careful about using the “generalized grievance” doctrine to decline jurisdiction over claims relating to election emergencies.<sup>394</sup> It appears some courts may have applied the doctrine aggressively as a way to quickly dispose of unsubstantiated or otherwise meritless challenges to the 2020 presidential election.<sup>395</sup> The right to vote, however, is “individual and personal in nature.”<sup>396</sup> The fact that it is shared by a broad swath of the public does not preclude each right holder who has exercised that right in an election from seeking to ensure the process is conducted properly.<sup>397</sup> Indeed, the Court has expressly recognized that Article III standing exists even where “large numbers of voters suffer interference with voting rights.”<sup>398</sup> Unnecessarily aggressive application of standing doctrines makes it harder for courts to grant relief when election officials do not go far enough to address election emergencies. Likewise, broad application of the generalized grievance doctrine also disables courts from serving as a check to ensure both the validity of election officials’ acts and equitable treatment for all members of the electorate.

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has standing to assert the rights of those of its members who will be prevented from voting by the new law.”), *aff’d*, 553 U.S. 181 (2008).

393. See *Carson v. Simon*, 978 F.3d 1051, 1058–59 (8th Cir. 2020) (per curiam); see also *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 924–25 (7th Cir. 2020).

394. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”).

395. See, e.g., *Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020) (holding that plaintiffs lacked standing to challenge allegedly unconstitutional disparate treatment between in-person and absentee voters because the claimed harm suffered by in-person voters was shared by a large group of people); *Feehan v. Wis. Elections Comm’n*, No. 20-CV-1771, 2020 U.S. Dist. LEXIS 231603, at \*19–35 (E.D. Wis. Dec. 9, 2020).

396. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2019) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

397. *FEC v. Akins*, 524 U.S. 11, 24 (1998) (“[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.”).

398. *Id.*

*B. Permit Suits Against the Chief Election Official*

Some courts have made it difficult to identify the proper defendant in election-related litigation.<sup>399</sup> Such rulings can make election emergency lawsuits impracticable. In *Jacobson v. Florida Secretary of State*,<sup>400</sup> for example, the plaintiffs sued the Florida Secretary of State to challenge the Florida law specifying the order in which candidates' names must be listed on ballots.<sup>401</sup> The court held that the plaintiffs lacked standing because an order against the Secretary was incapable of redressing their alleged injuries.<sup>402</sup> The court explained, "The problem for the [plaintiffs] is that Florida law tasks the [county] Supervisors [of Elections], independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute."<sup>403</sup> The court added, "[T]he Supervisors are independent officials under Florida law who are not subject to the Secretary's control."<sup>404</sup>

The court acknowledged that the Secretary possessed extensive statutory authority over the electoral process.<sup>405</sup> For example, as "chief election officer of the state," the Secretary was charged with "general supervision and administration of the election laws."<sup>406</sup> Moreover, the Secretary had power to "prescribe rules about ballot layout and to provide written direction to the Supervisors."<sup>407</sup> State law even allowed the Secretary to sue county supervisors to compel them to perform their duties.<sup>408</sup> The court could have granted redress by prohibiting the Secretary, as chief election officer, from allowing

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399. See, e.g., *Ga. Republican Party, Inc. v. Raffensperger*, No. 20-14741, 2020 U.S. App. LEXIS 39969, at \*6-7 (11th Cir. Dec. 20, 2020) (holding that plaintiffs lacked standing to sue the Secretary of State to challenge implementation of Georgia's signature-matching statute for absentee ballots, since state law imposed responsibility for signature matching on county officials).

400. 974 F.3d 1236 (11th Cir. 2020).

401. *Id.* at 1242.

402. *Id.* at 1241.

403. *Id.* at 1253.

404. *Id.*

405. *Id.* at 1254.

406. *Id.*

407. *Id.* at 1256 (citing FLA. STAT. §§ 97.012(16), 101.151(9)(a)).

408. See *id.* at 1253 (citing FLA. STAT. § 97.012(14)).

ballots with the allegedly improper layout to be printed and used.

The court also rejected the argument that county supervisors could be bound under Federal Rule of Civil Procedure 65(d), which specifies that injunctions apply to nonparties “who are in active concert” with a named defendant.<sup>409</sup> The Secretary of State and county supervisors of elections, however, are statutorily required to work in concert with each other to conduct elections.<sup>410</sup> Particularly in an election emergency, suing a state’s chief election officer is much more feasible than the Eleventh Circuit’s proposed alternative of suing dozens of county election officials.<sup>411</sup> Even obtaining service of process on so many officials in the context of emergency proceedings would be impracticable. Moreover, the chief election officer is typically better situated than officials in small counties to adequately brief the issues involved in emergency litigation in short order. At least where injunctive relief is required across multiple counties, plaintiffs should generally be permitted to bring election emergency litigation against a state’s chief election officer.<sup>412</sup> Injunctive relief against that officer could run against county and local election officials, as well, under Rule 65(d).

### C. Apply the Purcell Principle Correctly

One of the biggest potential obstacles to obtaining effective relief in pre-election lawsuits is the so-called *Purcell* Principle.<sup>413</sup> The principle, derived from the U.S. Supreme Court’s ruling in *Purcell v. Gonzalez*,<sup>414</sup> generally counsels federal courts to avoid ordering changes to the rules governing an election in the weeks before the election begins.<sup>415</sup> *Purcell*

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409. See *id.* at 1255 (quoting FED. R. CIV. P. 65(d)(2)(C)).

410. See *id.* at 1253 (citing FLA. STAT. § 99.121).

411. See *id.* at 1258 (“To satisfy traceability and redressability, the voters and organizations should have sued the Supervisors of Elections instead of the Secretary of State.”).

412. See, e.g., *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1267 (N.D. Fla. 2020).

413. See *Hasen*, *supra* note 26, at 441.

414. 549 U.S. 1 (2006).

415. *Id.* at 5–6.

directs courts to assess “considerations specific to election cases” before granting injunctive relief close to an election. The *Purcell* Court explained, “Court orders affecting elections, especially conflicting orders, can . . . result in voter confusion” and depress voter turnout.<sup>416</sup> Even small last-minute changes to an election’s rules “can interfere with administration of an election and cause unanticipated consequences.”<sup>417</sup>

Importantly, however, the *Purcell* principle restricts only a federal court’s initial grant of injunctive relief against an election-related legal provision. Thus, if a lower court has enjoined a statute or regulation, the *Purcell* Principle does not impede higher courts from staying or reversing that ruling—thereby reinstating the challenged legal provision—even when such an order would effectively change an election’s rules close to that election’s voting period.<sup>418</sup>

Invoking *Purcell*, the Court repeatedly stayed injunctions that lower courts had entered against state election laws and procedures to alleviate potentially substantial burdens on voting rights due to COVID-19.<sup>419</sup> Its most significant ruling on

416. *Id.* at 4–5.

417. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

418. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (“[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.”); *Democratic Nat’l Comm.*, 141 S. Ct. at 31–32 (Kavanaugh, J., concurring in denial of application to vacate stay) (“Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule. That obviously is not the law.”).

419. *See, e.g., Andino v. Middleton*, 141 S. Ct. 9, 9 (2020) (Kavanaugh, J., concurring in stay pending appeal) (staying preliminary injunction against the state’s witness requirement for absentee ballots because “federal courts ordinarily should not alter state election rules in the period close to an election”); *Republican Nat’l Comm.*, 140 S. Ct. at 1207–08 (staying preliminary injunction entered on April 2 that allowed voters to postmark their absentee ballots for the state’s primaries after they were held on April 7); *see also Merrill v. People First*, 141 S. Ct. 25, 25 (2020) (staying permanent injunction against Alabama Secretary of State’s ban on curbside voting); *Democratic Nat’l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay) (upholding stay of district court injunction suspending enforcement of state laws governing absentee ballots in the general election,

the issue came during the 2020 primaries, in *Republican National Committee v. Democratic National Committee*<sup>420</sup> (“*RNC v. DNC*”). There, the Court stayed the lower courts’ injunction which had extended the deadline for absentee ballots in Wisconsin’s primary.<sup>421</sup> The district court had entered its order on April 2; the primary, which was the statutory deadline for absentee ballots, was five days later.<sup>422</sup> The Supreme Court declared that, by extending the absentee ballot deadline “so close to the election date . . . the District Court contravened this Court’s precedents.”<sup>423</sup> Citing *Purcell*, the Court noted that “lower federal courts should ordinarily not alter the election rules on the eve of an election.”<sup>424</sup>

Critically, this holding is a much stronger variation of *Purcell* itself, which had merely counseled courts to consider the circumstances “specific to election cases” when deciding whether to issue equitable relief close to an election.<sup>425</sup> *RNC v. DNC* elevates *Purcell* to a presumptive categorical bar. Following the Supreme Court’s lead, lower courts vigorously applied the *Purcell* Principle in the 2020 election cycle,<sup>426</sup> particularly in post-election challenges.<sup>427</sup>

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because “the district court changed Wisconsin’s rules too close to the election . . .”).

420. 140 S. Ct. 1205 (2020).

421. See *id.* at 1207.

422. See generally *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), *as clarified*, No. 20-CV-00249, 2020 U.S. Dist. LEXIS 62054 (W.D. Wis. Apr. 3, 2020), *as amended*, No. 20-CV-00249, 2020 U.S. Dist. LEXIS 62053 (W.D. Wis. Apr. 3, 2020), *stayed in part*, No. 20-1538, 2020 U.S. App. LEXIS 25831 (7th Cir. Apr. 3, 2020), *stay granted sub nom.*, *RNC v. DNC*, 140 S. Ct. 1205 (2020).

423. *RNC*, 140 S. Ct. at 1207.

424. *Id.* (citing *Purcell*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U.S. 951 (2014)).

425. *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006); see *Hasen*, *supra* note 26, at 429 (“[T]he *Purcell* principle should properly be understood not as a stand-alone rule but instead as relevant to one of the factors (the public interest) the Court usually considers.”).

426. See, e.g., *Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020); *Mi Familia Vota v. Abbott*, 834 F. App’x 860, 865 (5th Cir. 2020); *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020).

427. See, e.g., *Bogney v. Boockvar*, 980 F.3d 336 (3d Cir. 2020), *vacated sub nom.* *Bogney v. DeGraffenreid*, No. 20-740, 2021 U.S. LEXIS 1952 (U.S. Apr. 19, 2021); *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 925 (7th Cir. 2020).

The Court erred in extending the *Purcell* Principle to election emergency litigation.<sup>428</sup> When unexpected crises such as pandemics arise, the circumstances of an election already materially change. Legislatures or election officials will often attempt to make adjustments to remediate the emergency's impact. Accordingly, the underlying premises of the *Purcell* Principle—ensuring stability and avoiding confusion—no longer apply. When a state's response to an election emergency is inadequate to preserve the constitutional right to vote, the *Purcell* Principle should not prohibit courts from ordering additional last-minute changes to respond to eleventh-hour threats.

#### D. Enforce the Remedial Hierarchy

When election officials fall short in responding to election emergencies, courts must step in to protect voting rights.<sup>429</sup> Courts granting relief in election emergency cases generally have three main types of options: election modifications, election postponements, and election cancellation.<sup>430</sup> An *election modification* is a change to one or more rules of the electoral process while leaving the timing of the election—in particular, the deadline for voting—in place.<sup>431</sup> Examples of election modifications include automatically distributing absentee ballot application forms, suspending for-cause requirements for absentee voting, or allowing additional forms of voter identification.<sup>432</sup>

An *election postponement* extends the period for voting in some way.<sup>433</sup> This may occur either by rescheduling in-person

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428. See Rick Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 274 (2020).

429. The Court generally applies an ad hoc balancing test to determine whether enforcing certain election requirements would violate the constitutional right to vote. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); see also Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 283.

430. See Morley, *Election Emergencies*, *supra* note 1, at 616.

431. See *id.* at 615.

432. See *id.*

433. See *id.* at 615–16.

voting until a later date or pushing back the deadline for the postmark or receipt of absentee ballots.<sup>434</sup> Finally, an *election cancellation*, as its name implies, completely terminates an election on the grounds it would be impossible to conduct in the near future.<sup>435</sup> The expectation is that a new election, with new candidates, will be held once the area has sufficiently recovered from the disaster.<sup>436</sup> Hurricane Katrina's widespread devastation, for example, caused cancellation of several New Orleans elections in its aftermath.<sup>437</sup>

In one of the earliest COVID-related cases arising from the 2020 election, *Republican National Committee v. Democratic National Committee*, the Supreme Court established a remedial hierarchy for election emergency cases.<sup>438</sup> The Court's ruling establishes that when an unexpected disaster will create unconstitutional burdens on voting rights, the presumptively proper remedy is an election modification.<sup>439</sup> In contrast, election postponements, which extend the period for voting, are an "unusual" and "extraordinary" remedy that "fundamentally alter[] the nature of the election."<sup>440</sup> *RNC v. DNC* prohibits a federal court from ordering an election postponement as a constitutional remedy unless it determines that no combination of election modifications would be sufficient to redress the constitutional violations.<sup>441</sup> After staying the postponement that the lower court had ordered, the Court in *RNC v. DNC* expressly emphasized that it was not "expressing an opinion" on whether "other reforms or modifications in election procedures in light of COVID-19 are appropriate,"<sup>442</sup> thereby leaving the door open to them.

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434. See *id.* at 549–50. The phrase "election postponement" is used because Election Day is typically the deadline for the postmark or receipt of absentee ballots. See *id.* at 550. Extending the period for the return of absentee ballots in any way effectively postpones that aspect of Election Day.

435. See *id.* at 550.

436. See *id.*

437. See Morley, *Election Emergencies*, *supra* note 1, at 559–63.

438. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020) (per curiam).

439. See *id.*

440. *Id.* at 1207–08.

441. *Id.* at 1207.

442. *Id.* at 1208.



Thus, in the *RNC v. DNC* Court's remedial hierarchy, modifications are the presumptive and strongly preferred remedy.<sup>443</sup> By extension, completely cancelling an election to be rescheduled at some point in the future—an alternative the *RNC v. DNC* Court did not even discuss—would be even more extreme than a postponement. Such relief would be potentially appropriate, if at all, only in extremely rare cases when catastrophic circumstances made any lesser alternative impossible.

### *E. Use Laches to Protect Emergency Orders*

Laches is an affirmative defense that bars plaintiffs from seeking equitable relief when their delay in suing would prejudice the defendants.<sup>444</sup> Although the federal judiciary and each state may apply slightly different variations of the doctrine,<sup>445</sup> it is fundamentally the same across jurisdictions. Laches is a major consideration in election emergency cases. When election officials, courts, or other actors adopt emergency measures to respond to unexpected disasters, any challenges to their legality or constitutionality must be brought immediately. Once voters cast their ballots in reliance on emergency modifications to the election code, laches should generally preclude post-election attempts to have those votes invalidated.<sup>446</sup> Indeed, retroactively invalidating the votes of people who followed the rules of an election as they existed at the time those votes were cast would raise serious due process concerns.<sup>447</sup>

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443. *Id.*

444. *See supra* note 28.

445. *See* Michael T. Morley, *Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 486–90 (2019) (explaining that, even when federal and state courts use identical terminology to discuss equitable concepts, each jurisdiction will have a different body of binding caselaw which may construe and apply those concepts in somewhat differing ways).

446. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 998 (2005) (explaining how applying laches in challenges to election-related rules can promote “public confidence in the election process”).

447. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 582 (11th Cir. 1995).

Following the 2020 presidential election, many courts vigorously applied laches to dismiss challenges to various remedial measures that election officials had adopted in response to COVID-19 weeks, and in some cases even months, earlier.<sup>448</sup> In *Trump v. Wisconsin Election Commission*,<sup>449</sup> for example, President Donald J. Trump challenged Wisconsin's certification of the Democratic slate of presidential electors.<sup>450</sup> He argued that the Wisconsin Election Commission's adjustments to the rules governing absentee voting and the use of drop boxes a few weeks before the election in response to COVID-19 violated the Presidential Electors Clause.<sup>451</sup> The Clause makes the state legislature responsible for setting the rules governing presidential elections.<sup>452</sup>

The Seventh Circuit held that laches barred Trump's claims.<sup>453</sup> It explained that both the Commission and the State's voters would suffer "unquestionable harm" from allowing the President to challenge the election's rules "at this late date," after "the State's voters . . . cast ballots in reliance on the guidance, procedures, and practices that the President challenges here" and the state "ha[d] tallied the votes and certified the election outcome."<sup>454</sup> This is exactly the correct approach. Once voters have cast their ballots in reliance on publicized election emergency measures that election officials have adopted or courts have ordered, losing candidates generally should not be permitted to retroactively challenge the election results based on those votes. The time to challenge a publicized election emergency modification is before the election occurs, not after voting is complete.

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448. See, e.g., *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925–26 (7th Cir. 2020); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1323–25 (N.D. Ga. 2020); *King v. Whitmer*, No. 20-13134, slip op. at 16–19 (E.D. Mich. Dec. 7, 2020); *Trump v. Biden*, 951 N.W.2d 568, 572–77 (Wis. 2020); *Kistner v. Simon*, No. A20-1486, slip op. at 3 (Dec. 4, 2020); see also *Boland v. Raffensperger*, No. 2020-CV-343018, slip op. at 4 (Ga. Super. Ct. Dec. 8, 2020).

449. 983 F.3d 919 (7th Cir. 2020).

450. *Id.* at 922.

451. *Id.* at 923 (citing U.S. CONST. art. II, § 1, cl. 2).

452. *Id.*

453. *Id.* at 927.

454. *Id.* at 926.

## V. ELECTION EMERGENCY STATUTES AND REDLINES

One of the most effective ways a state may prepare for the next pandemic or other crisis that threatens the electoral system—and to remediate the continued effects of COVID-19 on elections—is to enact a general, permanent election emergency law.<sup>455</sup> Such statutes delegate authority to election officials to address unexpected disasters before they occur. They alleviate the need for a legislature to reconvene under emergency circumstances to craft a resolution in the midst of an impending or ongoing election.<sup>456</sup> This approach allows the legislature to specify in advance the range of potentially appropriate responses and eliminates unnecessary questions as to the scope of election officials' authority in a crisis.<sup>457</sup> These laws also reduce the need for governors to decide which provisions of the election code or statutory deadlines to suspend in an unguided exercise of unilateral discretion.

Elections are fundamentally bureaucratic endeavors. Up to 214 million voters of varying ages, who speak different languages, with different degrees of physical and mental ability, literacy, understanding of the electoral process, and voting experience have the opportunity to cast ballots over a period of a few weeks.<sup>458</sup> Largely part-time or even volunteer personnel with limited training and expertise staffing thousands of temporary polling locations collectively determine tens of millions of voters' eligibility; provide them with the correct ballots; and then collect, store, and often transport those ballots or resulting electronic records for tabulation. Opportunities for mistake, misunderstanding, or accidents abound. Substantial unanticipated changes to the rules and procedures governing the process—particularly last-minute changes—only magnify the likelihood such problems will arise.<sup>459</sup>

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455. See, e.g., Morley, *Election Emergencies*, *supra* note 1, at 609 n.424.

456. See *id.* at 610–12.

457. See *id.*

458. See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 31, at 21.

459. See Hasen, *supra* note 26, at 441 (“When the rules for elections change, voters may not only be confused; they can be disenfranchised. . . . It is tough to restrain . . . workers on new rules or procedures close to the election and to produce appropriate new written instructions the period just before the election.”).

Comprehensive election emergency laws both structure and guide this process. They identify the range of appropriate responses to pandemics and other crises before they occur and, more importantly, before the political beneficiaries of a particular approach are known. These laws allow decision-making to occur under a Rawlsian veil of ignorance, based on sound constitutional and policy considerations.<sup>460</sup> Such statutes can also alleviate the need for election emergency litigation in which partisans make rushed presentations to judges unfamiliar with the intricacies of the electoral process, who in turn are then forced to craft remedies on the fly, ostensibly as a matter of constitutional law. A systemic response is superior to selective judicial suspension of various components of the electoral system.

Election emergency laws should balance the three fundamental principles underlying fair elections: ensuring that all eligible voters have a reasonable opportunity to safely vote; minimizing the risk of mistake, irregularity, accident, confusion, and fraud; and conveying the appearance of legitimacy to the public to make it as easy as possible for people to accept an election's results as fair and legitimate, no matter the partisan outcome.<sup>461</sup> To promote these goals, election emergency statutes should be consistent with the remedial hierarchy that the Supreme Court imposed for federal courts in *Republican National Committee v. Democratic National Committee*. That hierarchy dictates that, whenever possible, election officials should be required to respond to unexpected crises through election modifications: changes to particular rules governing the electoral process that do not extend the period for voting past the election's scheduled conclusion. These modifications might include automatically distributing absentee ballot application forms based on all records in the statewide voter registration

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460. See JOHN RAWLS, A THEORY OF JUSTICE 118 (Harvard Univ. Press rev. ed. 1999) (1971) (introducing the veil of ignorance concept to "evaluate principles solely on the basis of general considerations").

461. Due to the spread of misinformation and politically motivated lies about the 2020 election, this last factor has become even more critically important. See Jim Rutenberg, et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (last updated Oct. 11, 2021), <https://perma.cc/8HKN-B97D>; see, e.g. MICH. S. OVERSIGHT COMM., REPORT ON THE NOVEMBER 2020 ELECTION IN MICHIGAN, S. 101, 58TH Sess., at 3 (2020).

database, allowing voters to confirm their identities on the relevant forms in different ways, or relocating polling places to larger, better ventilated, or otherwise safer areas. Election officials must also be empowered to authorize alternate secure means of voting as needed to respond to a range of possible exigencies. Depending on the nature of the crisis, this might mean allowing all voters to cast absentee ballots, establishing additional days of early voting before Election Day, expanding curbside or drive-thru voting, or permitting bipartisan teams of election officials to gather votes from hospitals or assisted-living facilities.

Election postponements in which the period for voting is extended—such as by changing the deadline for returning absentee ballots or delaying in-person voting—should be used only when election modifications would be insufficient to mitigate the risks posed by a crisis. In general, when an emergency like a pandemic strikes well in advance of Election Day, both voters and election officials are reasonably able to make the necessary adjustments ahead of time. Changing the deadline for election-related acts that voters have a substantial amount of time to perform, like registering to vote or requesting an absentee ballot, is seldom a necessary response to a crisis. Moreover, extending the period for voting or delaying an election changes the election’s fundamental nature to a much greater degree than mere modifications.<sup>462</sup> And, as discussed earlier, postponements of presidential elections within a state face additional hurdles under the U.S. Constitution and federal law.<sup>463</sup>

Finally, in extreme cases such as Hurricane Katrina, there may be no alternative to election cancellation. Outright cancellation must be an extraordinarily rare last resort, subject to strict constraints, because it may result in vacancies. Establishing this remedial hierarchy of election modification, election postponement, and election cancellation allows officials to respond effectively to pandemics and other crises while

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462. See *Republican Nat’l Comm. v Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020) (“[A]llow[ing] voters to mail their ballots after election day . . . is extraordinary relief and would fundamentally alter the nature of the election . . .”).

463. See *supra* Part II.B.3.

minimizing the disruption to the process and potential for partisan manipulation.

In addition to specifying the election modifications that officials may adopt, election emergency laws should also identify the measures that they are forbidden from implementing, even in the context of an emergency.<sup>464</sup> For example, automatically distributing an absentee ballot application form to each record in the statewide voter registration database can encourage and facilitate absentee voting as a response to a pandemic. By completing and returning the form, voters can confirm their identity, continued eligibility to vote in the jurisdiction, and desire to participate in the election. The form also allows each voter to specify the address to which they wish their absentee ballot to be sent.

A legislature may reasonably conclude that going a step further by automatically sending actual absentee ballots to each record in the database raises unnecessary risks to the integrity of the electoral system. Many states' voter registration databases are outdated or inaccurate.<sup>465</sup> A 2012 study from the Pew Center on the States concluded that approximately 24 million records—one out of every eight—contained inaccurate or outdated information.<sup>466</sup> A 2010 study from the Caltech/MIT Voting Technology Project similarly estimated that nearly 9% of voter registration records were invalid.<sup>467</sup> Although many states have taken steps to improve their systems over the past decade, problems with the validity of voter registration records continue to be identified.<sup>468</sup>

Several jurisdictions with automatic voter registration systems have inadvertently registered ineligible non-citizens to vote.<sup>469</sup> And some voter registration records have proven to be

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464. See *supra* note 23 and accompanying text.

465. See PEW CTR. FOR THE STATES, *INACCURATE, COSTLY, AND INEFFICIENT 1* (2012), <https://perma.cc/KHN5-E2JJ> (PDF).

466. See *id.*

467. See STEPHEN ANSOLABEHERE & EITAN HERSH, *THE QUALITY OF VOTER REGISTRATION RECORDS: A STATE-BY-STATE ANALYSIS 1* (2010), <https://perma.cc/7U7S-PMVA> (PDF) (estimating that, out of more than 185 million voter registration records, over 16 million were invalid).

468. See Pam Fessler, *Some Noncitizens Do Wind Up Registered to Vote, but Usually Not on Purpose*, NPR (Feb. 26, 2019, 10:58 AM), <https://perma.cc/XQY7-7Z89>.

469. See *id.*

completely fraudulent—often as the result of third-party voter registration drives where workers are directly or indirectly paid based on the number of applications they submit.<sup>470</sup> Both progressive<sup>471</sup> and conservative<sup>472</sup> groups have been caught engaging in fraudulent registration schemes, including improperly submitting registrations on behalf of celebrities, sports figures, or completely fabricated people. Attempts to update or correct voter registration rolls are often challenged in court as partisan attempts to “purge” voters.<sup>473</sup> Federal law prohibits states from systematically correcting their voter registration rolls within three months of federal primary or general elections, which effectively limits such efforts to odd-numbered years.<sup>474</sup>

For these reasons, a legislature might reasonably conclude that there may be too many inaccurate, outdated, or fraudulent voter registration records for election officials to rely on the state’s voter registration database as the basis for automatically mailing out absentee ballots (as opposed to request forms for such ballots). The United States has over 213 million registered voters.<sup>475</sup> If even 10 percent of voter registration records are problematic, that means over 21 million absentee ballots in a presidential election could be sent to outdated addresses, erroneous addresses, non-existent people, or other improper destinations. Having tens of millions of absentee ballots available outside of both election officials’ control and the hands of the voters who are supposed to be casting them raises a serious threat to both the actual and perceived integrity of the electoral system.

Even when voter registration records are accurate, voters may not be living at their addresses of record. They may be away from home for school or work, for example. Similarly, during a

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470. See Steve Friess, *Acorn Charged in Voter Registration Fraud Cases in Nevada*, N.Y. TIMES (May 5, 2009), <https://perma.cc/Q8AJ-UCDP>.

471. See *id.*

472. See Patrik Jonsson, *Potential Voter Registration Fraud in Florida: GOP’s Own “ACORN” Scandal?*, CHRISTIAN SCI. MON. (Sept. 29, 2012), <https://perma.cc/5JYM-5NVU>.

473. See Pam Fessler, *Are States Purging or Cleaning Voter Registration Rolls?*, NPR (Dec. 20, 2019), <https://perma.cc/XY46-F3BV>.

474. See 52 U.S.C. § 20507(c)(2).

475. See U.S. ELECTION ASSISTANCE COMM’N, *supra* note 31, at 21.

lockdown in a pandemic, voters may choose to stay with family or friends. Particularly given the major economic and social dislocations to which COVID-19 has given rise, there may be an even greater need than usual to send voters' absentee ballots to alternate addresses. Unilaterally mailing absentee ballots to voters' addresses of record will likely result in millions, if not tens of millions, of ballots being systematically sent to the wrong places.

Moreover, many voters who are away from home will request that replacement ballots be mailed to them at the addresses where they are staying. Consequently, multiple ballots will be issued to millions of voters, leading to substantial numbers of unaccounted-for ballots, facilitating ballot theft, and contributing to inadvertent or intentional double voting. Legislatures can avoid these types of problems by specifying that, while election officials might choose to send absentee ballot application forms to all voters, the unilateral distribution of unrequested absentee ballots is prohibited even in the context of an emergency. Automatically sending an absentee ballot request form, rather than an actual absentee ballot without request, to each potential voter helps ensure that ballots are sent only to actual people, the information in their registration records is correct (or updated based on the information they submit), and the correct ballots are sent to the correct places.<sup>476</sup>

Some legislatures also might choose to establish third-party ballot collection, which opponents sometimes refer to as "harvesting," as a prohibited "redline." Ballot collection or harvesting is when a person other than a voter or a member of their household—such as a political activist, campaign worker, or paid contractor—collects, and often solicits, absentee ballots to return to election officials. This practice is especially controversial when third parties who may not even be known to the voter are permitted to gather unlimited numbers of ballots,

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<sup>476</sup> See, e.g., N.C. GEN. STAT. § 162-27.1(a), (d) (2023) (specifying that, when the Executive Director of the State Board of Elections exercises emergency authority to "conduct an election," the Director may "[u]nder no circumstances" send absentee ballots to voters who failed to submit valid request forms).



frequently without having to meaningfully identify themselves to election officials.<sup>477</sup>

The Carter-Baker Commission on Federal Election Reform,<sup>478</sup> the Bauer-Ginsberg Presidential Commission on Election Administration,<sup>479</sup> and even progressive groups such as the Brennan Center for Justice have warned that, when election fraud occurs, it usually arises from absentee ballots.<sup>480</sup> The Carter-Baker Commission expressly advocated that “[s]tates and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials.”<sup>481</sup> It continued, “The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.”<sup>482</sup>

Several scandals involving both Democratic<sup>483</sup> and Republican<sup>484</sup> operatives and supporters have involved ballot harvesting. Ballot collectors may pressure, deceive, or pay voters to give them blank ballots or cast their votes a certain way.<sup>485</sup> Allowing third-party ballot collection unnecessarily

477. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2347 (2021) (“Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence.”).

478. See COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 46 (2005), <https://perma.cc/VF22-AVHG> (PDF).

479. See PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 56 (2014), <https://perma.cc/US3U-RPRP> (PDF).

480. See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 34 n.16 (2007), <https://perma.cc/S6GB-WVZA> (PDF) (calling absentee voting “far more of a threat” to election integrity than in-person voting).

481. COMM’N ON FED. ELECTION REFORM, *supra* note 478, at 47.

482. *Id.*

483. See Jason Allen, *4 Women Accused in Paid Voter Fraud Ring*, 21 CBS DALL.-FORT WORTH (Oct. 12, 2018), <https://perma.cc/G5GL-8UY6>.

484. See Alan Blinder, *Election Fraud in North Carolina Leads to New Charges for Republican Operative*, N.Y. TIMES (July 30, 2019), <https://perma.cc/QU9L-8BNS>.

485. See Allen, *supra* note 483 (stating that the women involved in the fraud, which “targeted elderly voters,” would “either ‘assist’ the voter with filling out the ballot, or fill it in themselves, and use deception to get the voter to sign the envelope”); Bob Christie, *Records Show Coordinated Arizona Ballot*

exacerbates the risks of absentee voting and may undermine public confidence in the electoral system.

Such ballot collection can be particularly dangerous during pandemics. Asymptomatic people can carry and transmit viruses such as COVID-19.<sup>486</sup> Allowing people to travel door-to-door to collect absentee ballots, particularly from medically vulnerable senior citizens or infirm voters, creates an unnecessary risk of spreading disease. Especially early in the pandemic, a primary method of slowing the spread of COVID-19 had been the promotion of social distancing;<sup>487</sup> allowing candidates, activists, and third-party groups to go door-to-door to collect absentee ballots can undermine such containment efforts.

Another tempting response during pandemics and other emergencies is for election officials to allow voters to transmit ballots through the internet. Some local election officials in New Jersey purported to authorize this submission method in the wake of Superstorm Sandy;<sup>488</sup> a county supervisor of elections in Florida did so after Hurricane Michael.<sup>489</sup> Both decisions raised serious legal, technological, and administrative questions. Although federal law authorized a pilot program to explore internet voting for military and overseas voters,<sup>490</sup> current

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*Collection Scheme*, ASSOCIATED PRESS (June 2, 2022), <https://perma.cc/SD9K-XQSK> (discussing evidence that a ballot harvesting defendant “canvassed San Luis neighborhoods and collected ballots, in some cases paying for them”).

486. Michael A. Johansson et al., *SARS-CoV-2 Transmission from People Without COVID-19 Symptoms*, 4 JAMA NETWORK OPEN, no. 1, Jan. 2021, at 1, 2.

487. See, e.g., Xutong Wang et al., *Impact of Social Distancing Measures on Coronavirus Disease Healthcare Demand, Central Texas, USA*, 26 EMERGING INFECTION DISEASES 2361, 2361 (2020), <https://perma.cc/LX6Q-QPHA> (PDF) (“Beginning in March 2020, states and cities implemented extensive social distancing measures to contain the spread of SARS-CoV-2 . . . .”); cf. Emily Anthes, *C.D.C. Eases Covid Guidelines, Noting Virus Is “Here to Stay”*, N.Y. TIMES (Aug. 11, 2022), <https://perma.cc/83S3-N327> (PDF).

488. See CONSTITUTIONAL RIGHTS CLINIC, RUTGERS LAW SCHOOL-NEWARK, *THE PERFECT STORM: VOTING IN NEW JERSEY IN THE WAKE OF SUPERSTORM SANDY* 83 (2014).

489. See *Florida Elections: Andrew Gillum Upset Over 150 People Displaced by Hurricane Michael Voting by Email*, ASSOCIATED PRESS (Nov. 12, 2018), <https://perma.cc/YMR7-8SFA>.

490. See 52 U.S.C. § 20311(b)(1), (c).

technology is far too insecure to permit domestic voters to transmit ballots over the internet, particularly in the context of presidential elections that are subject to a substantial risk of foreign interference.<sup>491</sup> The National Academies of Sciences, Engineering, and Medicine concluded in 2018 that “the risks currently associated with internet voting are more significant than the benefits. Secure internet voting will likely not be feasible in the near future.”<sup>492</sup> It elaborated, “Internet voting should not be used in the future until and unless very robust guarantees of security and verifiability are developed and in place, as no known technology guarantees the secrecy, security, and verifiability of a marked ballot transmitted over the Internet.”<sup>493</sup>

The Association for Computing Machinery similarly cautioned about the “insoluble security problems that are inherent to casting ballots online, including server penetration attacks, client-device malware, attacks to emailed and faxed ballots in transit, denial-of-service attacks, disruption attacks, ransomware, and the challenge to reliably authenticate voters.”<sup>494</sup> Other groups such as the National Institute of Standards and Technology<sup>495</sup> and Verified Voting Foundation<sup>496</sup> have echoed these concerns. Most of these experts’ skepticism generally focuses on transmitting completed ballots over the internet. With the serious threat of hacking by foreign militaries

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491. See Philip Ewing, *What You Need to Know About Foreign Interference and the 2020 Election*, NPR (Sept. 1, 2019), <https://perma.cc/MX5Q-K82C>; see, e.g., S. SELECT COMM. ON INTELLIGENCE, REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, S. REP. NO. 116-290, at 3 (Nov. 10, 2020).

492. See NAT’L ACADS. OF SCI., ENG’G & MED., SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY 102 (2018), <https://perma.cc/45Y8-EGSL> (PDF).

493. *Id.* at 106.

494. See SUSAN GREENHALGH ET AL., EMAIL AND INTERNET VOTING: THE OVERLOOKED THREAT TO ELECTION SECURITY 5 (2018), <https://perma.cc/7PJZ-2GBW> (PDF).

495. See NELSON HASTINGS ET AL., NAT’L INST. OF STANDARDS & TECH., SECURITY CONSIDERATIONS FOR REMOTE ELECTRONIC UOCAVA VOTING 59 (2011), <https://perma.cc/P2AT-AMZ6> (PDF).

496. See *Internet Voting News*, VERIFIED VOTING, <https://perma.cc/BPK3-PHAE>.

or intelligence services,<sup>497</sup> however, allowing blank absentee ballots to be downloaded or transmitted over the internet raises similarly serious concerns, as well. States should not create unnecessary vulnerability by allowing the transmission of either blank or completed ballots over the internet—particularly as a hastily implemented emergency measure in the midst of a crisis.

As these examples demonstrate, election emergency laws can play an important role not only in empowering election officials to respond to unexpected crises, but in preserving both the security and perceived legitimacy of the election by identifying certain steps that, even in emergencies, remain prohibited.

### CONCLUSION

A fair election system must balance three fundamental values. First, most basically, all eligible voters must have a reasonable opportunity to vote safely and have their vote counted. Second, the system must include adequate safeguards to minimize the risk of mistake, irregularity, accident, confusion, or fraud. Finally, the system must have the appearance of legitimacy, bolstering public confidence in the electoral process and assuring voters that election results reflect the legally accurate outcome. Election systems face a range of potential threats, from global pandemics to natural disasters and terrorist attacks. To be sufficiently robust to achieve these goals despite such challenges, an electoral system must be flexible, allowing election officials to authorize a diverse range of reasonable, secure mechanisms for voting. During the 2020 election cycle, adjustments to the mechanics of in-person voting on Election Day, early voting, absentee voting, curbside voting, care-facility voting, and even drive-thru voting were essential components of the response, collectively allowing over 150 million Americans to vote.

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497. See NAT'L COUNTERINTELLIGENCE & SEC. CTR., FOREIGN THREATS TO U.S. ELECTIONS: ELECTION SECURITY INFORMATION NEEDS, <https://perma.cc/E8TR-YALE> (PDF); Tim Lau, *U.S. Elections Are Still Vulnerable to Foreign Hacking*, BRENNAN CTR. FOR JUSTICE (July 18, 2019), <https://perma.cc/P8A7-FHJU>; see also S. SELECT COMM. ON INTELLIGENCE, *supra* note 491, at 40–45.

States should enact election emergency laws to establish a framework for addressing crises that may threaten the electoral process. These laws should identify not only the scope of officials' authority to modify or suspend the election code and the circumstances under which such authority should be exercised, but the "redlines" that officials may not cross—potential remedial measures that the state may not adopt—even when responding to an emergency. The barrage of hundreds of pre-election lawsuits triggered by COVID-19 demonstrates the benefit of having legislatures work these issues out in advance, determining the range of permissible responses to potential crises without the time and political constraints that arise once disaster strikes. Courts, for their part, must be attuned to the special demands of cases arising from election emergencies when grappling with technical issues such as standing, the proper parties to such lawsuits, and doctrines governing equitable remedies. In the century between the Spanish Flu of 1918 and COVID-19, both constitutional and statutory protections of the right to vote in the face of pandemics have dramatically evolved. Armed with the lessons learned from COVID-19, we can hopefully be even better prepared for the next crisis before it arises.