



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

**TESTIMONY OF MARCIA JOHNSON-BLANCO
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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
HEARING ON
“VOTING IN AMERICA: ENSURING FREE AND FAIR ACCESS TO THE BALLOT”
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I. Introduction

Chairman Butterfield, Ranking Member Steil, and Members of the Subcommittee on Elections of the U.S. House of Representatives Committee on House Administration, my name is Marcia Johnson-Blanco and I am the Co-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on the challenges that far too many voters face when voting in America.

For the past 17 years, I have worked to provide assistance and resources to voters through Election Protection, the nation's largest nonpartisan voter protection coalition convened by the Lawyers' Committee. The Lawyers' Committee is one of the country's most preeminent civil rights organizations, in the pursuit of equal justice for all. Created in 1963 at the request of President John F. Kennedy to mobilize the private bar to address issues of racial discrimination, from its inception the Lawyers Committee has been at the forefront of fighting against voter discrimination using litigation, advocacy and programs, such as Election Protection, which works year-round to ensure that all voters have an equal opportunity to vote and have that vote count. Since 2001, Election Protection volunteers—made up of nearly 300 local, state and national partners—have provided voters throughout the country with comprehensive information and assistance at all stages of voting through a suite of voter protection hotlines, field programs and engagement with election officials. From its inception, Election Protection has documented the challenges to the vote. These challenges were exacerbated during the 2020 general election cycle, when we had the first presidential election during a global health pandemic.

If Congress does not act, history may well look back on the 2020 election and its aftermath as an inflection point, where the nation was led down a path to two very different systems: one, of those states where voters are given an array of sensible and secure methods of voter registration and voting leading to increasingly greater voter turnout; and the other, of those states, where stringent restrictions on voting continue to arbitrarily and discriminatorily stanch participation in the political process. The support for this proposition is easily found: in the data behind the 2020 voter turnout, in the herculean efforts of mobilization and litigation needed to secure that turnout and to ensure that all votes were counted, and in the legislation – both protective of the right to vote and suppressive of the right to vote - adopted and under consideration by numerous states since the election.

The 2020 election cycle saw robust participation with over 100 million people voting before Election Day,¹ and it was declared the most secure election in history.² This record turnout was not only the result of high interest in the election, but also of an unprecedented number of voting options provided by states. Election data show that the states with the highest

¹ Joey Garrison, *Voter Turnout 2020: Early Voting Tops 100 Million Ballots Cast*, USA Today (Nov. 3, 2020) (online at www.usatoday.com/story/news/politics/elections/2020/11/03/voter-turnout-2020-early-voting-tops-100-million/6133004002/).

² Stefan Becket et al., *2020 Election "Most Secure In History," Security Officials Say*, CBS News (Nov. 13, 2020) (online at www.cbsnews.com/live-updates/2020-election-most-secure-history-dhs/).

turnout in 2020 were those which had same-day registration or sent ballots to all voters.³ The states with the greatest increase in voter turnout were those states that adopted reforms to expand access to the ballot. Some, but not all of these reforms, were adopted in reaction to the coronavirus pandemic, resulting in many states expanding voting by mail to nearly all voters and employing devices such as drop boxes and expanding early voting hours. The bottom line, however, is that making it easier for voters to cast their ballots not surprisingly led to dramatic increases in voter turnout. For example, the three states that the highest percentage point increase in turnout between the November 2016 election and the November 2020 election -- Hawaii, California, and Utah – mailed ballots to every registration voter in the state in 2020 but did not do so in 2016.⁴ By contrast, those states with the most restrictive laws tended to be among the states with the lowest turnout in the election. Significantly, no state reported more than a handful of instances of voter fraud despite facilitating the ability to cast a ballot.

Some of these reforms were not easily won. Even before the nation was thrust into the middle of a global healthcare crisis, far too many voters confronted significant barriers to the vote including: 1) restrictive voter ID laws; 2) cutbacks to early voting; 3) consolidations or elimination of polling places without notice or consultation with the affected community; 4) restrictions on community-based voter registration groups; 5) purging of voter rolls in violation of the National Voter Registration Act; and 6) rejection of absentee ballots through misuse of signature matching procedures. These barriers were exacerbated during the COVID-19 pandemic. During the 2020 election cycle, the Lawyers' Committee itself participated in 50 lawsuits. This included an unprecedented number of lawsuits to rid state election systems of unnecessary and arbitrary restrictions, and after the election participating in the defense of an extraordinary number of lawsuits brought by the losing presidential candidate and his allies, aimed at throwing out legitimately cast votes – most often those cast by persons of color - in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin.

Unfortunately, the fight is not over. State legislatures across the country have introduced legislation to make it harder to vote, ranging from reverting to “no excuse” absentee ballots, to unnecessary and arbitrary burdens on voting by mail, to the extraordinary measure recently adopted by Georgia, prohibiting the simple act of providing water to those waiting in line to vote - knowing that it is persons of color who are most apt to confront long waiting lines to exercise their franchise. On the other hand, there are states that are considering legislation that will sensibly facilitate voting, such as increasing the opportunities to register, mandating drop boxes, and expanding early voting.

³ United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g).

⁴ United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g); Eric Escalante, *California's New Election Laws: Here's What's Changing In 2020*, ABC 10 (Dec. 24, 2019) (online at <https://www.abc10.com/article/news/local/california/ca-new-election-laws/103-024e8e34-ed5e-4574-8f9c-7a21d82b5524>).

This prospective nationwide dichotomy – between the “have” voters, i.e., those for whom voting is made easier, and the “have not” voters, those for whom voting is made harder – is what Congress must address. It is critical for Congress to pass federal legislation to level the playing field and ensure that all voters have convenient access to voting in future elections.

II. A Two-Tiered System of Voting

The 2020 election exposed major differences in the voting experience for citizens depending upon the state they resided in. Based on statistics from the United States Election Project, the five states with the highest turnout of eligible voters (all about 75%) Minnesota, Wisconsin, Colorado, Maine, and Washington.⁵ all have same-day registration.⁶ Two two of these states – Colorado and Washington – mailed ballots to every eligible voter.⁷ In fact, the top twelve states by turnout, each with turnout above 73%,⁸ all employed either same-day registration or universal mail-in voting for the 2020 election.⁹ These states, by adopting best practices, were able to achieve record participation by their residents in the 2020 election.

By contrast, most of the states with the lowest turnout, including Oklahoma, Arkansas and West Virginia, did not adopt the reforms of same-day registration and universal mail-in voting.¹⁰ Of the bottom eleven states by turnout, with turnout of 63.4% or less,¹¹ only one (Hawaii) adopted same-day registration and only two (Hawaii and New Mexico) mailed ballots to every eligible voter for the 2020 election.¹² Instead of adopting pro-voter reforms, many of these states (Indiana, Tennessee, Louisiana, Mississippi and Texas) with low turnout required voters to provide an excuse in order to vote by mail in the 2020 election.¹³ Even in the midst of a

⁵ See Appendix; United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g).

⁶ National Council of State Legislatures, *Same Day Voter Registration* (Oct. 6, 2020) (online at <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>).

⁷ National Council of State Legislatures, *Absentee and Mail Voting Policies in Effect for the 2020 Election* (Nov. 3, 2020) (online at www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx).

⁸ See Appendix; United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g).

⁹ National Council of State Legislatures, *Absentee and Mail Voting Policies in Effect for the 2020 Election* (Nov. 3, 2020) (online at www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx); National Council of State Legislatures, *Same Day Voter Registration* (Oct. 6, 2020) (online at <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>).

¹⁰ See Appendix; United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g).

¹¹ *Id.*

¹² National Council of State Legislatures, *Absentee and Mail Voting Policies in Effect for the 2020 Election* (Nov. 3, 2020) (online at www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx); National Council of State Legislatures, *Same Day Voter Registration* (Oct. 6, 2020) (online at <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>).

¹³ Clifford Colby, *How Vote By Mail Works in All 50 States For The 2020 Election*, CNet (Oct. 21, 2020) (online at <https://www.cnet.com/how-to/how-vote-by-mail-works-in-all-50-states-for-the-2020-election-hint-you-can-do-it-now/>).

pandemic, these states were unwilling to lift the excuse requirement and allow voters to avoid the potential hazards of voting in person. Instead, voters were forced to show up to the polls and many chose to stay home rather than risk their health and safety.

In 2020, the difference between the highest turnout state and the lowest turnout state was 25 percentage points.¹⁴ This staggering number illustrates the potential for pro-voter policies to dramatically increase the number of voters who participate in federal elections. Simple reforms, such as same-day voter registration, are associated with significant increases in turnout. Combined with other reforms such as universal mail-in voting, they can transform the electorate and grow the voter base. Our current election system has far too many barriers to vote; it is time for legislation to simplify and modernize our election system.

III. Barriers to Vote Addressed By Election Protection

Through its suite of hotlines: 866-OUR-VOTE (866-687-8683) administered by the Lawyers' Committee; 888-VE-Y-VOTA (888-839-8682) administered by NALEO Educational Fund; 888-API-VOTE (888-273-8683) administered by APIAVote and Asian Americans Advancing Justice-AAJC; and 844-YALLA-US (844- 925-5287) administered by the Arab American Institute and field programs, the Election Protection coalition worked throughout 2020 to ensure access to the ballot. Over the course of 2020, the program had 40,000 volunteers participating in field programs in 41 states, and the 866-OUR-VOTE hotline supported voters through over 46,000 shifts filled by legal volunteers. The 866-OUR-VOTE hotline received over 219,000 calls during the year, with over 29,000 on Election Day alone. The 866-OUR-VOTE hotline created over 190,000 tickets in the Our Vote Live database during 2020. The majority of calls throughout the year were questions from voters on a wide range of issues about how to navigate our voting infrastructure.

During the 2020 General Election cycle, top issues included questions and concerns about mail-in and absentee ballots, as well as voter ID and registration. These issues remained concerns on Election Day as well. However, Election Day also brought calls of polling place accessibility issues, and concerning calls complaining of voter intimidation and electioneering. The barriers we saw voters struggle to overcome early on in the pandemic and the primaries only persisted, as did the voters eager to cast their ballots. During Election Protection, we received reports about late poll openings because of a lack of needed number of poll workers, ballot shortages or equipment failure. This often resulted in long lines, some hours long which required voters to make difficult decisions about whether they could remain in line to vote. These delayed openings, ballot shortages, and equipment failures negatively affected voters with work, school, childcare, eldercare, or other responsibilities who were not always able to endure long wait times and as a result were unable to cast a ballot. Examples of these potentially-disenfranchising conditions occur all too frequently, in particular at polling places serving communities of color.

¹⁴ See Appendix; United States Election Project, *2020 November General Election Turnout Rates* (online at www.electproject.org/2020g).

A. The Impact of COVID-19 on the 2020 Primaries

Several 2020 primary elections demonstrated that states were not prepared to hold elections during a pandemic. In many states, voters had to choose between exercising their right to vote and guarding against the risk of disease because while some states either postponed election dates or moved to predominantly vote by mail elections, many voters had no choice but to make use of in-person vote options that were inadequate—and at times put them at risk of contracting the COVID-19 virus. Failures such as the inability to meet the demand to vote or safely vote in person were caused by insufficient funding and inadequate infrastructure to ensure options and procedures to enable voting in the difficult circumstances of the pandemic.

During primary elections in a number of states, voters encountered poll closures, poll worker shortages, poll workers with inadequate training, malfunctioning machines, and long lines. Additionally, there was an increased demand for mail ballots, but many voters, as in Wisconsin, did not receive applications or ballots with sufficient time to return their ballots by deadlines. Having received ballots and mailed them on time, many voters found that their ballots did not count or were rejected because they were not received by election officials¹⁵ or were received after the deadline, often through no fault of the voter. Other ballots were rejected because of signature mismatches or failure to sign the ballot.

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

The public health crisis caused by the coronavirus pandemic not only overturned the 2020 primary election schedule and long-established modes of voting, it forced voters to choose between protecting their health and participating in our democracy. States had to make changes to election administration in a very short period of time, and for many voters exercising the right to vote posed an extreme risk. During the pandemic, many states postponed elections and many switched to vote by mail relying on existing absentee ballot laws to conduct elections. This resulted in the nation having to confront the challenges to the vote by mail system, including that many voters were unaware of how to vote by mail and others did not have access to vote by mail opportunities.

1. Voter Registration

The first step to accessing the ballot is voter registration. Because of the pandemic, motor vehicle facilities, a prime location for voter registration under the “motor voter law,”¹⁶ have been closed in many jurisdictions, making it difficult for new drivers—predominately younger

¹⁵ Nick Corasan, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. TIMES (Apr. 9, 2020) <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>

¹⁶ National Voter Registration Act (“NVRA”), 52 U.S.C. § 20501 et seq. (1993).

people—to register to vote.¹⁷ Many jurisdictions closed public assistance agencies, disability offices, and other government agencies that register voters.¹⁸ The impact has been particularly felt in communities of color, where voter registration drives by non-profit organizations rely on church gatherings, picnics, and local street fairs, in addition to door-to-door canvassing, for their success.¹⁹ Student voter registration drives often take place on college campuses, many of which are closed or have highly restrictive public gathering policies for the indefinite future.²⁰

2. Absentee Voting and Vote By Mail

Although all 50 states have a process by which some voters can cast a ballot by mail, the level of access voters have to mail balloting varies, and in some states the process can be cumbersome and difficult. In 34 states and Washington D.C., any registered voter can request a vote-by-mail ballot without providing an excuse as to why he or she cannot appear to vote in person on Election Day.²¹ Five of those states—Colorado, Hawaii, Oregon, Washington, and Utah—conduct elections by mail, meaning that officials send a ballot in the mail and the voter can return the ballot through the mail or in person at established vote centers or voting booths for a period before and on Election Day.²² The remaining 16 states require a qualified voter to provide a statutorily-authorized reason for requesting an absentee ballot, which is a barrier to voting, especially in 2020 due to the pandemic.²³

¹⁷ See, e.g., Ida Domingo, *DMV Remains Closed in Virginia, Once Open Appointments Will Be Required*, ABC 13 NEWS (May 11, 2020), <https://wset.com/news/coronavirus/dmv-remains-closed-until-further-notice-in-virginia-due-to-pandemic>.

¹⁸ See, e.g., Mark Miller, *Coronavirus Is Closing Social Security Offices. Here's How to Get Benefit Help*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/business/retirement/coronavirus-social-security.html>.

¹⁹ See *Tenn. State Conference of the NAACP v. Hargett*, 420 F. Supp. 3d 683 (M.D. Tenn. 2019). On behalf of civic engagement organizations, the Lawyers' Committee and its partners challenged a restrictive Tennessee law that placed draconian civil and criminal penalties on these organizations' ability to conduct large scale voter registration drives. The court noted that the law impinged on "central elements of expression and advocacy" further recognizing that "those drives historically have involved both encouraging and facilitating registration, including, at least in many cases, by physically transporting applications." *Id.* at 699.

²⁰ See, e.g., Nicole Taylor, *Student Voter Engagement Handbook*, FAIR ELECTIONS CTR. & CAMPUS VOTE PROJECT, 5 (2018), https://15fedd24-5236-4bea-bc35-4ea36b399531.filesusr.com/ugd/85cfb4_eafda5a391884b92beb70c0f7fb672c3.pdf (highlighting the importance of voter registration events on campus as a part of student engagement and advocacy at colleges).

²¹ See, e.g., National Conference of State Legislatures, *States With No-Excuse Absentee Voting* (May 1, 2020) (online at www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx).

²² COLO. REV. STAT. § 1-7.5-104 (all counties "shall" conduct general, primary, odd-year, coordinated, recall, and congressional vacancy elections by mail ballot); HAW. REV. STAT. § 11-101 (all elections "shall be conducted by mail" beginning with the 2020 primary election); OR. REV. STAT. § 254.465 ("[c]ounty clerks shall conduct all elections in this state by mail"); WASH. REV. CODE § 29A.40.010 (in every general, special, or primary election, each active registered voter "shall receive a ballot by mail" unless county officials remove the voter from the rolls); UTAH CODE ANN. § 20A-3-302 (authorizing election officers to mail a ballot to each active voter in the precinct. In 2020, all of Utah's twenty-one counties opted into the mail-ballot only).

²³ See, e.g., National Conference of State Legislatures, *States With No-Excuse Absentee Voting* (May 1, 2020) (online at www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx).

During the primaries, officials in several states responded to the public health crisis by taking emergency action to increase access to mail balloting for voters. Some states that had excuse-only absentee voting took legislative or executive action to ease voting for their citizens, but others simply refused to take action to expand access to mail voting during the pandemic.²⁴ For instance, several states operating “no-excuse” mail ballot processes, including Maryland, New Jersey, and Nevada, eliminated the application process and sent ballots directly to voters. In other states, officials sent mail ballot applications to every voter as a means of encouraging mail voting. In some states, officials sent mail ballot applications to every voter as a means of encouraging mail voting. Georgia’s Secretary of State issued a directive to send absentee ballot request forms to all of Georgia’s 6.9 million registered voters during the June primary.²⁵ West Virginia’s Secretary of State issued a similar directive to county elections commissions to send postage pre-paid absentee ballot requests to all registered voters in the upcoming primary election on June 9.²⁶ Similarly, New Hampshire’s Secretary of State issued guidance that for all upcoming elections in 2020, all voters “have a reasonable ground to conclude that a “physical disability” exists, and therefore, all voters can request an absentee ballot on that basis.²⁷ Virginia’s General Assembly passed a bill permitting any registered voter to vote an absentee ballot.

Despite the expanded access to vote by mail, most voters shouldered the burden of requesting absentee ballots (most states require that voters make the request in writing), procuring postage to mail absentee requests and return postage, waiting to receiving the ballot in the mail, voting the ballot, securing the signature of a notary or two witnesses, and mailing it back to boards of elections. The process of voting by mail presents challenges to many voters, particularly low-income voters, who lack access to printers, postage, or envelopes. Additionally, Election Day receipt deadlines posed another significant barrier to effective mail voting during the pandemic. Many states require that voters return their absentee ballots either by mail or in person to boards of elections—and a handful allow voters to drop off their ballots at drop boxes – by the close of polls on Election Day or earlier. Voters have little control over delays in mail delivery by the U.S. Postal Service or administrative delays by local election officials attempting to process an unprecedented surge in applications for mail-in ballots.

Additionally, some states required a notary or witness in order to cast an absentee ballot. It is challenging to meet this requirement without a pandemic. It is exponentially more difficult

²⁴ Bill Theobald, *All New York Voters May Now Vote by Mail This Year*, THE FULCRUM (Aug. 20, 2020), <https://thefulcrum.us/new-york-vote-by-mail-2647040221>.

²⁵ GA. SEC’Y OF STATE, *Raffensperger Takes Unprecedented Steps to Protect Safety and Voter Integrity in Georgia* (Apr. 20, 2020), https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia.

²⁶ W. VA. SEC’Y OF STATE, *Eligibility for Absentee Voting in West Virginia* (Apr. 1, 2020), <https://sos.wv.gov/FormSearch/Elections/Informational/Absentee%20Voting%20Eligibility%20Summary.pdf>.

²⁷ N.H. SEC’Y OF STATE, *Memorandum Re Elections Operations During the State of Emergency* (Apr. 10, 2020), https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf.

during a healthcare crisis when most public services are not readily available, and particularly during the primary season when most cities had stringent shut downs. Citing the pandemic, civil rights groups challenged notary and witness requirements in Alabama, Louisiana, Missouri, South Carolina, and Virginia, among other states.²⁸ Lawsuits brought by the Lawyers' Committee are discussed below.

Some states impose unnecessary limitations on who can collect and deliver a ballot for a person, and on how many ballots a person can collect and deliver.²⁹ Alabama does not allow anyone other than the voter to return his or her own absentee ballot by mail or in-person delivery at their respective boards of elections.³⁰ In the pandemic, there are many people who are house-bound and may not have a family member readily available to undertake the task of collecting and delivering the voter's ballot. Or a household may have several family members who rely on a single friend or relative to undertake such tasks. For some voters, dropping off ballots in person at the Board of Elections is not a viable option. For Native American voters who live on reservations, they often cannot rely on the Postal Service or live too far from their county commissions to return absentee ballots in person.³¹

Despite efforts to increase access to absentee ballots, during the primary elections, many voters did not get their requested ballots. For example, many voters in states such as Georgia were unable to successfully get access to absentee ballots, resulting in voters having to endure extremely long lines and delays at polling places. The Georgia Secretary of State mailed 323,000 replacement absentee ballot applications to voters after a vendor sent the applications to incorrect street addresses when the voters provided a mailing address for election related mail.³² Some 60,000 Georgia voters also received absentee ballot applications mailed by the same vendor which had the wrong return address printed on them.³³ All of the absentee ballots mailed to Georgia voters by the same vendor erroneously instructed voters to place their voted ballots in a privacy envelope (as had been the practice in prior election cycles) even though the vendor

²⁸ See, e.g., Compl., O'Neil v. Hosemann, No. 3:18-cv-00815 (S.D. Miss. filed Nov. 21, 2018); League of Women Voters of Va. v. Va. State Bd. of Elections, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020); Thomas v. Andino, No. 3:20-CV-01552, 2020 WL 2617329 (D.S.C. May 25, 2020); Compl., Power Coal. for Equity & Justice v. Edwards, No. 3:20-cv-00283 (M.D. La. filed May 7, 2020); Compl., People First of Ala. v. Merrill, No. 2:20-cv-00619 (N.D. Ala. filed May 1, 2020).

²⁹ National Conference of State Legislatures, *Who Can Collect and Return an Absentee Ballot Other than the Voter* (Aug. 28, 2020) (online at www.ncsl.org/research/elections-and-campaigns/vopp-table-10-who-can-collect-and-return-an-absentee-ballot-other-than-the-voter.aspx).

³⁰ ALA. CODE § 17-11-9.

³¹ Native American Rights Fund, *Vote By Mail in Native American Communities* (online at www.narf.org/vote-by-mail/).

³² Sarah Kallis, *Georgia to Mail Out 323,000 New Absentee Ballot Request Forms*, ATLANTA J. CONST. (Apr. 30, 2020) (online at www.ajc.com/news/state--regional-govt--politics/georgia-mail-out-323-000-new-absentee-ballot-request-forms/bWgargMOEMBLLYNwxOdbML/).

³³ Mark Niese, *Some Georgia Absentee Ballot Request Forms List Wrong Return Address*, ATLANTA J. CONST. (Apr. 9, 2020) (online at www.ajc.com/news/state--regional-govt--politics/some-georgia-absentee-ballot-request-forms-list-wrong-return-address/YH11y0tXOVsbPEWZhLZ0XI/).

chose to substitute a folded piece of paper (privacy sleeve) for the privacy envelope referred to in the instructions, causing many voters to be confused about how to return their ballots.³⁴ Furthermore, over 8,500 voters were disenfranchised in Georgia because election officials did not receive their ballots by Election Day.³⁵ Despite these challenges, an unprecedented number of Georgia voters (over 1 million) chose to vote by absentee ballot in the June 9th election in response to the COVID-19 pandemic.

Wisconsin is an example of the challenges voters faced during the primaries where trouble receiving and being able to timely return absentee ballots was exacerbated by a reduction in polling locations. The Wisconsin primary was held on April 7, 2020, during the height of the public health crisis when African Americans made up almost 50% of Milwaukee County's COVID-19 cases, and 81% of COVID-19 deaths.³⁶ Days before the April 7 Wisconsin primary election, the board of elders in Milwaukee decreased the number of polling locations from 180 to 5, citing public health concerns.³⁷ In contrast, Madison had 66 polling locations open. Sixty-one percent of Milwaukee's voters are African American and 30% are Hispanic. The poll closures in Milwaukee, thus, impacted mostly African American and Hispanic voters. These voters had no choice but to risk their lives by voting in person or not voting at all. Officials did not provide any other viable alternatives for voting. Voters who went to the polls to vote on Election Day experienced long lines, delays, and high risk of exposure to the virus.

On April 2, a federal district judge extended the deadline to receive absentee ballots to six days after Election Day (4 p.m. on April 13), extended the deadline for boards to receive absentee ballot requests until April 3, and lifted the requirement that voters provide a witness affirmation or statement.³⁸ The Seventh Circuit Court of Appeals granted a partial stay reversing the lower court's decision to overturn the witness verification requirement for absentee ballots.³⁹ The U.S. Supreme Court, in a 5–4 decision, overruled the district court's ruling, holding that last-minute changes to Wisconsin's election administration would be disruptive and instead instituted an Election Day (April 7) postmark deadline for absentee ballots, while retaining the lower

³⁴ Jenna Eason, *The Instructions on Some Georgia Absentee Ballots are Wrong. Here's What You Need to Know*, TELEGRAPH (May 1, 2020) (online at www.macon.com/news/politics-government/election/article242431106.html).

³⁵ Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-in Ballots Rejected for Tardiness*, NAT'L PUB. RADIO (July 13, 2020, 5:00 AM) (online at www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness).

³⁶ Shruti Banerjee & Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, DEMOS (May 14, 2020), (online at www.demos.org/blog/covid-19-silenced-voters-color-wisconsin).

³⁷ Mary Spicuzza & Alison Dirr, *Why Did Milwaukee Have Just 5 Polling Places? Aldermen Want Answers*, MILWAUKEE J. SENTINEL (Apr. 10, 2020, 5:34 PM), (online at www.jsonline.com/story/news/politics/elections/2020/04/10/coronavirus-milwaukee-aldermen-want-answers-polling-places-primary-election/5127577002/).

³⁸ Mot. Prelim. Inj., 4, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-00249, (W.D. Wis. Apr. 2, 2020).

³⁹ Stay Pending Appeal, 4, Democratic Nat'l Comm. v. Wis. State Legislature, No. 20-1539, (7th Cir. Apr. 3, 2020).

court's receipt deadline of April 13.⁴⁰ The dissent pointed out that the majority's decision stood to disenfranchise thousands of voters who could not vote in person on Election Day because of reasonable health risks. Justice Ginsburg wrote, "Either they will have to brave the polls, endangering their own and others' safety. . . . Or they will lose their right to vote, through no fault of their own."⁴¹

Overall, during the 2020 primaries, while many voters were able to successfully vote by mail, over 543,000 ballots were rejected by election officials.⁴² Most of the ballots were rejected for minor correctable failures, such as a missing signature, missing envelope flaps, and failure to seal envelopes.⁴³

3. Early Voting

Thirty-eight states and the District of Columbia currently provide for in-person early voting but the number of days vary across the nation. Some states have responded by extending the time available for access to early voting.⁴⁴ For its June primary election, Kentucky provided additional opportunities for early voting.⁴⁵ In July, Texas extended early voting by six days to 19 days for in-person early voting for the November general election.⁴⁶ North Carolina added two more weekends before the election for in-person early voting and extended the hours the polls would be open those days.⁴⁷

Expanded early voting opportunities also have the benefit of helping protect the right to vote in communities of color. More African Americans tend to take advantage of early in-person voting opportunities as compared to White voters.⁴⁸ Because of the COVID-19 pandemic, more

⁴⁰ Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020) (per curiam).

⁴¹ *Id.* at 1211 (Ginsburg, J., dissenting).

⁴² Elise Viebeck, *More Than 500,000 Mail Ballots Were Rejected in the Primaries. That Could Make the Difference in Battleground States This Fall.*, WASH. POST (Aug. 23, 2020, 9:15 PM) (online at www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397f92db-3d11-ea80-e-b8be57ba616e_story.html).

⁴³ *Id.*

⁴⁴ National Council of State Legislatures, *State Laws Governing Early Voting* (online at www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx).

⁴⁵ Office of the Governor Andy Beshear, Executive Order 2020-296 (April 24, 2020), https://governor.ky.gov/attachments/20200424_Executive-Order_2020-296_SOE-Relating-to-Elections.pdf.

⁴⁶ The Fulcrum, *The 24 states That Have Already Made Voting In November Easier* (July 30, 2020) (online at <https://thefulcrum.us/voting/state-election-changes-coronavirus-2646841303>).

⁴⁷ *Id.*

⁴⁸ See, e.g., Russell Weaver & Sonia Gill, *Early Voting Patterns by Race in Cuyahoga County, Ohio: A Statistical Analysis of the 2008 General Election*, Voting Rights Research Br., LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, 2, 6 (Oct. 2012), http://www.acluohio.org/wp-content/uploads/2014/08/NAACP.V.Husted-MPIEx8-2014_0630.pdf (data showed census tracts with heavier African American populations voted early in-person. Report concluded that cutting early in-person voting would disproportionately impact African American voters); Paul Gronke Am. Decl., pp. 3–6, ¶¶ 6–11; pp. 9–11 ¶¶ 18–26 in *Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011) (concluding Florida's omnibus election administration changes truncating early voting period, among other

voters, regardless of race, voted early in person in the 2020 primary election as compared to the 2016 primary election.⁴⁹

4. Voter Education and Engagement

Some states place criminal penalties on voter engagement activities. Tennessee makes it a Class A misdemeanor for anyone other than members of election commissions to distribute unsolicited absentee ballot requests to voters. As part of voter education campaigns among communities that have never before voted by mail, civic organizations would pass out absentee applications, share the link to the online application form on their websites, or help community members write their own requests. Tennessee's provision violates the First Amendment right to free speech and expression. The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits an abridgment of the freedom of speech. This statute restricted core political speech and expressive conduct by criminalizing the simple act of providing to a voter an unsolicited absentee ballot request. Discussion of the Lawyers' Committee's challenge to this provision is discussed below.

Early Voting and Election Day 2020

The 2020 General Election had unprecedented voter turnout despite the struggles voters faced in the primaries with over 101 million voters voting before Election Day.⁵⁰ However, voters still encountered significant problems voting and the top questions and issues reported to Election Protection were about 1) voting in person including problems at polling places; 2) the challenges of voting by mail including uncertainty about receiving absentee ballots in time; and 3) the unprecedented turnout during early voting. These reports were similar to those voters encountered during the primaries and those seen in previous elections. Overall, despite the rise in participation in vote by mail opportunities with 28% of callers to the 866-OUR-VOTE reporting they planned to vote by mail, 35% of callers reported planned to vote in person. Mainly throughout the election cycle, voters struggled to find a safe means to cast their ballot.

Election Protection received the largest number of calls from Pennsylvania, Georgia, Texas, Michigan and California.

things, violated Section 5 of the Voting Rights Act with discriminatory effect on minority voters); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–37 (4th Cir. 2016) (noting new election administration provisions reducing the number of early voting would disproportionately impact African American voters, increase traffic on Election Day, and increase long lines on Election Day).

⁴⁹ AP Staff, *Early In-Person Voting in NC Exceeds Primary 4 Years Ago*, AP (Mar. 2, 2020) (online at <https://apnews.com/10b3399d722456ad12848849b76a0157>).

⁵⁰ Joey Garrison, *Voter Turnout 2020: Early Voting Tops 100 Million Ballots Cast*, USA Today (Nov. 3, 2020) (online at www.usatoday.com/story/news/politics/elections/2020/11/03/voter-turnout-2020-early-voting-tops-100-million/6133004002/).

Pennsylvania

The Pennsylvania Department of State reported over 6.8 million votes cast in the 2020 General Election. 38.5% of counted ballots were cast by mail or absentee and 61.52% were cast in person.⁵¹ Voter turnout in the state was 76.5%, beating 2016 turnout which was 61.1 million votes casted or about 70% of registered voters voting.

The top three issues reported to Election Protection from Pennsylvania on Election Day were 1) long lines, particularly in communities of color; 2) late polling place openings; and 3) confusion about the vote by mail process. Some precincts reported mechanical problems or ran out of supplies. Voters reported lack of or insufficient language assistance in Berks and York counties. The most egregious instance occurred in York County, where election officials rather than provide needed language assistance (1) spoke slowly and used hand gestures and mimicry as a prerequisite to allowing voters to utilize an interpreter, (2) impeded interpreters' conversations with voters by hovering over conversations and interrupting interactions telling voters that they could not use the interpreter and (3) prevented voters from using their assistance of choice with casting their ballot.

Georgia

The Georgia Secretary of State reported that 4.9 million voters voted in the 2020 election; 2.6 million voted early, 1.3 million voted by mail, and 975,000 voted on Election Day.⁵² Throughout this time period, voters in Georgia were concerned about whether they would receive ballots on time. Many voters who mailed their ballots back or used absentee ballot drop boxes expressed concerns that they could not verify that the ballots were received. The state's My Voter Page was not up to date. Election Protection provided assistance by calling or advising voters to call their county election office to verify that ballots had been received. While it was likely not convenient for Election Officials to receive such calls as they prepared for Election Day, it was understandable given the problems that voters encountered during the primary elections that voters would need assurance that their ballots were received in time to be counted.

Further, Georgia voters who voted in person encountered problems with equipment failure. Precincts that experienced these equipment failures quickly ran out of paper ballots. This contributed to the very long lines experienced by voters. Equipment failure continued during the January 5 runoff election with Election Protection receiving reports of poll pad failures in several counties including DeKalb, Gilmer, Forsythe, Floyd, Columbia and Chatham counties.

⁵¹ The Pennsylvania Department of State reported that 2.6 million voters voted by mail and 4.2 million voted in person. [https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx#:~:text=126%2C573%20%2D%20Provisional%20Ballots%20Cast%20for,\)%20and%20rejected%20\(21%2C117\)](https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx#:~:text=126%2C573%20%2D%20Provisional%20Ballots%20Cast%20for,)%20and%20rejected%20(21%2C117))

⁵² Georgia Secretary of State, *November 3, 2020 Official Results* (online at <https://results.enr.clarityelections.com/GA/105369/web.264614/#/detail/5000>).

Texas

In order to meet expected turnout, Texas, to its credit, provided an additional week of early voting prior to November 3rd Election Day, a change welcomed by voters. Additionally, Texas adopted other innovations including drive through voting in Harris County, a popular initiative that was the subject of lawsuits before Election day and is now being directly attacked in the state legislature.

Election Protection received 1) inquiries about the voting process; 2) questions about voter ID and voter registration; and 3) questions about absentee ballots and vote by mail. Particularly, during early voting, voters encountered long lines that overwhelmed polling locations, reports of voters complaining of voter intimidation and inadequate access to curbside voting, particularly in Bexar county. Problems with Bexar County continued on Election Day as well.

On Election Day, there were many reports of voter intimidation caused by excessive electioneering with reports of partisan actors breaching electioneering barriers. Additionally, there were delayed polling place openings in Tarrant, Dallas, Bexar, and Hiladgo County and reports of system breakdowns in other counties such as Grimes, Nueces and Upshur County.

Michigan

According to Michigan's Secretary of State's office, a reported 5.5 million Michigan voters cast their ballots during the presidential election. This was an historic turnout for Michigan voters since the 2008 presidential election cycle, in which 4.3 million voters turned out.

The 866-OUR-VOTE hotline primarily assisted callers with 1) general questions regarding same day registration and finding their polling places; 2) reports of intimidation and electioneering and 3) concerns about polling place accessibility. Calls included reports of late openings at polling locations, shortage of poll workers at precincts; and voters who did not receive absentee ballots on time.

The State of Michigan is a great example of strengthening voter access through both practice and policy. For example, voters are able to register *and* vote on Election Day, making this option feasible for new voters. Additionally, voters are able to participate in absentee voting, an option made possible by a 2018 constitutional amendment. In 2020, the number of absentee ballots surged to nearly 3.5 million.⁵³

⁵³ Eric Lloyd, *3.5 Million Absentee Ballots Requested by Michigan Voters, 3.1 Million Already Returned*, 9 & 10 News (online at www.9and10news.com/2020/11/03/3-5-million-absentee-ballots-requested-by-michigan-voters-3-1-million-already-returned/).

California

The California Secretary of State reported that 15,423,301 or approximately 87% of Californian voters voted by mail in the general election whereas 2,361,850, or approximately 13% voted in person.⁵⁴ During the early voting period, the 866-OUR-VOTE hotline received calls related to fake ballot drop boxes and printing errors on ballots. Main issues reported related to 1) equipment failures; 2) long lines and 3) intimidation and electioneering.

During early voting, fake ballot collection boxes were placed in Los Angeles, Orange and Fresno counties. The then Secretary of State, Alex Padilla and the State's Attorney General, Xavier Becerra sent a cease and desist order to the State's GOP party which admitted to placing the unofficial ballots in those counties. The 866-OUR-VOTE hotline received calls from voters concerned about the presence of these fake drop boxes and expressed discomfort about using drop boxes.

A Note about Voter Intimidation and Electioneering

Election Protection received many reports from voters who felt intimidated by excessive electioneering. This included partisan supporters who breached electioneering barriers and forcefully engaged voters to vote for their preferred candidate. Additionally, we received reports of concern about law enforcement at polling places. For example, the Election Protection hotline received calls from Pennsylvania voters in Cumberland, Dauphin and Lehigh counties reporting being intimidated by the presence of constables wearing bulletproof vests with weapons in view. Additionally, during early voting in Fairfax County, Virginia, voters had to go around a group of very supporters for President Trump waving flags and loudly supporting his re-election. Election officials had to open a larger portion of the early voting site to allow voters who felt intimidated to wait inside of the building. While there are disputed reports about whether these supporters breached the electioneering barrier, this incident represents a much publicized example of the types of reports received by the Election Protection hotline about excessive electioneering.

II. 2020 Election Litigation

As part of its work on Election Protection work, the Lawyers' Committee also engages in litigation to protect the right to vote. During the 2020 election cycle, we participated in over 50 cases, an unprecedented number of lawsuits on behalf of voters to strike down laws and policies imposing a burden on voting. In several cases, the Lawyers' Committee secured relief at the trial court level, only to be overturned by appellate courts. The failure of the courts to provide relief is further evidence of the need for legislative action to safeguard voting rights. Below are examples of litigation during the 2020 election cycle regarding access to the ballot.

⁵⁴ Cal. Sec'y of State, *2020 General Voter Participation by Stats by County*, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/03-voter-participation-stats-by-county.pdf> (last visited Mar. 29, 2021).

Alaska

The Lawyers' Committee's involvement in Alaska is an example of where state courts construing state constitutions provided broader protections for voting rights than did federal circuit courts construing the United States Constitution.

The case involved a challenge, under the Alaska State Constitution, to Alaska's absentee ballot witness requirement that requires absentee ballots to be notarized or signed and certified by a witness over the age of eighteen ("witness requirement").⁵⁵ The Lawyers' Committee and co-counsel at the Native American Rights Fund and the ACLU of Alaska represented the Arctic Village Council, a tribe of more than 100 Alaska Natives, the League of Women Voters of Alaska, and several individual voters. The evidentiary record highlighted the rate at which Alaska Natives and elderly voters were dying of the pandemic and the severe burdens on these classes of voters, in particular on Alaska Natives, of having to collect witness signatures. The lawsuit framed the choice as an unacceptable and avoidable Catch-22—an example of the state putting voters in a difficult position of having to choose between voting or breaking quarantine to risk their health and well-being just to acquire witness signatures.⁵⁶

Detailed affidavits from the tribe showed that at the height of the pandemic, the tribe had put in place strict lockdown orders prohibiting members from leaving their residences or interacting with anyone outside of their households—these were precautionary measures taken to curb the spread of the coronavirus in the community and in light of the rampant deaths among Natives. The tribe had also closed polling places during Alaska's August primary election and anticipated closing them in November because of the pandemic. At least fifty members of the tribe lived alone and did not have access to witnesses, and they would have been disenfranchised completely in the November election. These anecdotes highlighted the severe burdens that Alaskan voters faced in order to cast their ballots during the pandemic.

Based on the evidence in the record, the state court judge declared the witness requirement an unconstitutional burden on the right to vote as applied during the pandemic and granted the plaintiffs preliminary injunction motion ordering the State to eliminate the witness requirement for the November general election. The Supreme Court of Alaska unanimously affirmed the district court's decision and it remains in place for the duration of the pandemic.⁵⁷ The result in this case stands in stark contrast to the Supreme Court's stay of an order enjoining South Carolina's witness requirement for absentee ballots.⁵⁸

⁵⁵ Alaska Stat. tit. 15 § 15.20.203.

⁵⁶ *Arctic Village Council et al. v. Meyer*, No. 3AN-20-07858 CI (3rd Judicial Dist. Of Anchorage, Compl. and Mot. for Prelim. Injunction, filed Sept. 8, 2020), aff'd sub nom. *Alaska v. Arctic Village Council*, No. S-17902 (Alaska Oct. 12, 2020).

⁵⁷ *See id.*

⁵⁸ *Marci Andino, et al. v. Kylon Middleton, et al.*, Supreme Court of the United States, no. 20A55, Oct. 5, 2020.

Missouri

Missouri normally restricts access to voting by mail to only a few categories of voters, but following its June 2, 2020 municipal elections, Missouri expanded mail voting eligibility for the remaining 2020 elections to all voters. However, in doing so, the state placed unnecessary, arbitrary, and burdensome restrictions on the new “no-excuse” category of mail-in ballot.

First, voters casting a no-excuse mail-in ballot could submit their application only by mail or in person—and even if they applied in person at their local election office, election officials were required to mail the voter their ballot rather than simply hand it to them. Second, voters could return their ballot only by mailing it through the United States Postal Service. In contrast, voters who qualified to vote absentee under one of its seven excuse categories (expanded from the usual six for 2020 elections) could submit their applications by email, fax, in person, or by mail, and could return their ballots in person, via curbside drop-off or delivery by a close relative, or by mail, including via FedEx or UPS in addition to the US Postal Service. Finally, Missouri required voters casting a no-excuse mail-in ballot to have their ballot notarized, defeating the purpose of voting remotely for voters concerned about exposing themselves to the coronavirus. And again, even voters who got their no-excuse mail-in ballot notarized at their local election office were prohibited from simply handing their completed ballot to the election official, and were instead required to then mail their ballot to that same official via the US Postal Service.

The burdensome effects of these arbitrary restrictions were fully apparent during Missouri’s August 4, 2020, primary elections, when thousands of voters were disenfranchised by the combination of these restrictions and significant delays in mail delivery by the US Postal Service. As a result, many voters who submitted their applications weeks in advance did not receive their mail-in ballot until Election Day or a few days prior, if at all, too late to return it by US mail such that it would be received by election officials by the close of polls on Election Day as—itself a significant and unjustified burden which Missouri did not relax in light of the pandemic and mail delays. Unable to return their ballot in person, or even by overnight mail through a private mail carrier, these voters were faced with the choice of exposing themselves to hundreds or thousands of other voters by voting in person on Election Day, or not voting at all.

Missouri’s August 4 election also revealed other unlawful practices, including the rejection of mail ballots because of minor errors or omissions—even where the ballot envelope already contained that information, such as the voter’s address—in violation of the Materiality Provision of the Civil Rights Act of 1964, and the failure to notify voters and give them an opportunity to correct these errors before their ballots were rejected, in violation of the Due Process Clause of the United States Constitution.

The Lawyers’ Committee, together with Demos, ACLU of Missouri, and the Missouri Voter Protection Coalition, filed suit in federal district court in the Western District of Missouri on behalf of the Organization for Black Struggle, the St. Louis and Kansas City chapters of the A. Philip Randolph Institute, National Council of Jewish Women St. Louis Section, and Missouri Faith Voices. The lawsuit requested the court to order that no-excuse mail-in voters be able to use

the same request and return process available to excuse-only absentee voters, and that Missouri stop rejecting ballots for immaterial errors and without adequate notice and opportunity to cure.

The District Court granted in part our request for preliminary injunction, requiring that Missouri allow all voters to return their ballot in person, either themselves or through a close relative, during the November 3, 2020, general election.⁵⁹ The court found that providing a more restrictive voting process for no-excuse mail-in and excuse-only absentee voters was arbitrary and that the state presented “no reasonable justification” for this distinction⁶⁰—let alone one significant enough to justify the significant “risk [of] disenfranchisement even if the voter does everything right.”⁶¹ The court further found that, because this remedy would only require the state to apply existing processes to additional voters, rather than adopt new processes, it would not place significant additional burden on election officials—and that there was “no merit” to the state’s argument that this two-track process accomplished its asserted objectives, such as reducing strain on election officials.⁶²

Despite these clear findings of fact, and the very limited nature of the relief ordered by the District Court, the order was stayed by a divided three-judge panel of the United States Court of Appeals for the Eighth Circuit.⁶³ The majority all but ignored the District Court’s findings of fact, instead accepting the state’s assertions at face value, and failed to apply the *Anderson-Burdick* framework for evaluating voting restrictions⁶⁴ that has been established over decades and hundreds of rulings. Paradoxically, the majority based its decision in part on the need to avoid confusing voters—despite evidence that the District Court’s order would *reduce* voter confusion created by the state’s two-track process—and the close proximity to the election—despite waiting fourteen days after the District Court’s issued its order to issue its own order granting the stay.⁶⁵

Ohio

Last year, Ohio saw numerous pandemic-related election administration changes that precipitated the need to bring litigation aimed at removing barriers to voting. The first dramatic change occurred during the state’s primary election, originally scheduled for March 17, 2020. That time marked the height of the pandemic—coronavirus cases and deaths were surging, little was known about the virus, including how it spread. Just a few days before Ohio’s primary election was to take place, Ohio Governor Mike DeWine issued Executive Order 2020-01D declaring a state of emergency in Ohio “to protect the well-being of the citizens of Ohio from the dangerous

⁵⁹ *Org. for Black Struggle v. Ashcroft*, No. 2:20-CV-04184-BCW, 2020 WL 6325722 (W.D. Mo. Oct. 9, 2020).

⁶⁰ *Id.* at *7.

⁶¹ *Id.*

⁶² *Id.* at *5.

⁶³ *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020).

⁶⁴ *See id.* at 608 (“[a]s long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.” (quoting *Common Cause Indiana v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020))).

⁶⁵ *Id.* at 609.

effects of COVID-19.”⁶⁶ Only days later, then President Trump had declared a national state of emergency.⁶⁷

Conducting elections during this early period of the pandemic was unprecedented. This led executive officials in the state to take action in response, including moving more than 150 polling locations.⁶⁸ Hundreds of poll workers had quit just days before the primary election.⁶⁹ The Secretary of State Frank LaRose ultimately cancelled the March 17 primary election⁷⁰ and just a week later, the Ohio General Assembly codified a new date, April 28, for an all-absentee ballot primary election⁷¹.

Around March 17 and the days that followed the legislature’s passage of the coronavirus omnibus bill that pushed the primary date back, the Lawyers’ Committee was closely working with local partners that were directly connecting with voters who had not received their absentee ballots, or did not have postage or a printer to be able to print absentee ballot applications and mail to the local boards. Local partners were convinced that April 28 would not provide enough time for most of the voters in the state to successfully request and vote by absentee ballots. An increased number of voters were in need of absentee ballots on very short notice. However, short staffing at county boards of election, slow postal delivery times, and the number of steps needed for a voter to request an absentee ballot (mailing an absentee request either in person or by mail, receiving the ballot by mail, and having to mail back the ballot) made it all but impossible for a voter to receive and return an absentee ballot in a timely manner. Our partners on-the-ground were also fielding calls from voters who had missed the registration deadline and wanted to know whether the boards could process their voter registration applications given that a new election day had been set.

⁶⁶ The Office of Governor Mike DeWine, *Executive Order 2020 OID* (Mar. 9, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/03/09/file_attachments/1396418/Executive%202020-01D.pdf.

⁶⁷ Adam Edelman et al., *Trump Declares National Emergency to Combat Coronavirus, Authorizes Waiving of Laws and Regulations*, NBC News (Mar. 13, 2020, 1:54 PM) (online at www.nbcnews.com/politics/donald-trump/trump-hold-friday-afternoon-press-conference-coronavirus-n1157981).

⁶⁸ Rick Rouan, *Ohio Primaries Still Set Tuesday Despite Coronavirus Concerns that Shut Down Louisiana’s*, Columbus Dispatch (Mar. 13 2020, 2:17 p.m.), <https://www.dispatch.com/news/20200313/ohio-primary-still-set-tuesday-despite-coronavirus-concerns-that-shut-down-louisianarsquos>. There are 978 nursing home facilities and 774 assisted living facilities in the State of Ohio. Ohio Health Care Ass’n, *Quick Facts About Ohio’s Long-Term Care System*, https://www.ohca.org/quick_facts_1 (last visited Mar. 15, 2020).

⁶⁹ Rick Rouan et al., *Ohio Election Boards Frantically Seeking Poll Workers Due to Coronavirus Outbreak*, Cincinnati Enquirer (Mar. 12, 2020, 5:57 PM) (online at www.cincinnati.com/story/news/politics/2020/03/12/ohio-elections-boards-frantically-seeking-poll-workers-due-coronavirus-outbreak/5033374002/).

⁷⁰ Grace Panetta, *The Ohio Supreme Court Issued a Last-Minute Ruling Allowing the State to Postpone Its March 17 Primary*, Business Insider (Mar. 16, 2020, 7:34 PM), (online at www.businessinsider.com/ohio-postpones-march-17-primary-until-june-cancels-in-person-voting-2020-3).

⁷¹ Andrew J. Tobias, *Ohio Lawmakers Sets All-Mail Primary Election Through April 28; Legal Challenge Still Possible*, Cleveland.com (Mar. 25, 2020) (online at www.cleveland.com/open/2020/03/ohio-senate-sets-all-mail-primary-election-through-april-28-legal-challenge-still-possible.html).

Against this backdrop, the Lawyers' Committee, Demos and the ACLU of Ohio filed suit in the United States District Court for the Southern District of Ohio on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute, and individual Ohio voters alleging that (1) the timeline and process adopted by the Ohio legislature would deprive Ohio voters of their fundamental right to vote, and (2) the failure to move the registration deadline back violated Section 8 of the National Voter Registration Act, which mandates the voter registration deadline for a federal election be no earlier than 30 days prior to the election.⁷² Through first-hand stories, the plaintiffs illustrated how voters were being burdened by the truncated timeline. The State of Ohio, the Ohio Republican Party, and the Ohio Democratic Party all intervened as defendants in the case, and the Ohio Libertarian Party intervened as plaintiffs.

Briefing concluded on April 3, 2020, and on that same day the district court issued a decision allowing Ohio's 2020 primary election to proceed as planned on April 28 and declining to extend the voter registration deadline.⁷³

The experience in the primary election, and in particular, the fact that most of Ohio's voters voted by mail foreshadowed the record numbers of voters who would cast absentee ballots in the general election on November 3, 2020. With no end in sight as to the pandemic, shortly after the primary election, local partners began working to educate voters on the complicated, multi-step absentee ballot process. This work, including data collection through public records requests to the counties, highlighted Ohio's flawed use of signature-matching for absentee ballot requests and absentee ballots. The data showed that the state's inconsistent signature match process often resulted in eligible Ohio voters incorrectly having their absentee applications or ballots rejected. Without clear notification or an efficient way to address questions about their signatures, Ohio voters were likely to be disenfranchised. With more Ohioans than ever expecting to cast absentee ballots in the general election, the Lawyers' Committee and co-counsel, the ACLU, the ACLU of Ohio, and Covington & Burling LLP, filed suit in the Southern District of Ohio on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and individual voters, asking the district court to declare the current signature-matching policies unconstitutional and issue an order to Secretary of State Frank LaRose to cease all signature matching of absentee ballot applications and ballots until a uniform and constitutional standard across county board of elections is implemented.⁷⁴ Though the court denied plaintiffs relief for the general election,⁷⁵ the case is still pending.

Local partners were not the only organizations attempting to make it easier for voters to vote by absentee ballots either through massive public education on the process or through lawsuits challenging lack of uniformity in the processing and counting of absentee ballots. During the summer of 2020, several local county boards realized the need to make it easier for voters to return their absentee ballots in the context of the ongoing pandemic, the trickle-down effects of federal

⁷² *League of Women Voters of Ohio et al. v. LaRose*, No. 2:20-cv-01638, Dkt. 1 (S.D. Ohio, Compl. filed Mar. 30, 2020).

⁷³ *Id.* Dkt. 57 (S.D. Ohio, Denying motion for temporary restraining, Order issued Apr. 30, 2020).

⁷⁴ *League of Women Voters of Ohio et al. v. LaRose*, No. 2:20-cv-03843, 2020 WL 5757453 (S.D. Ohio, Compl. filed July 31, 2020).

⁷⁵ *See id.* (denying preliminary injunction, Order issued Sept. 27, 2020).

policies around postal service mail delivery (e.g., mail delays, removal of sorting machines, removal of mailboxes from certain neighborhoods), the public perception and distrust in the postal service and by extension uncertainty around whether their absentee ballots would count, and hardships faced by voters who did not have cars or could not travel to boards of elections to return their absentee ballots in person. The confluence of these factors led many boards, especially in urban parts of the state including Cleveland and Cincinnati, to seek permission from Secretary LaRose to install multiple ballot drop boxes across their respective counties and in different neighborhoods.⁷⁶ The response from Secretary LaRose was negative: in August 2020, Secretary LaRose issued a directive banning counties from installing drop boxes at more than one location in each county and mandating the location be the board of elections office.⁷⁷

This decision resulted in the Lawyers' Committee and co-counsel⁷⁸ filing a lawsuit on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, the Ohio State Conference of the NAACP, and individual voters, challenging the directive as a constitutional violation of the fundamental right to vote under the First and Fourteenth Amendments and the Equal Protection Clause.⁷⁹ At trial, the plaintiffs introduced expert and lay witness testimony that illustrated the hardships on voters in urban counties, such as the lower percentage of car ownership, longer travel times, and higher ratios of persons to drop boxes (900,000 voters in Cuyahoga County where Cleveland is located had access to one drop box whereas 8000 voters in rural Stark County had access to one drop box).

Recognizing these burdens, the court ordered Secretary LaRose to work with local county officials in Cuyahoga County who were planning to install multiple drop-off sites across the county at public libraries and at a parking lot near the board of elections office.⁸⁰ Through those negotiations, Secretary LaRose agreed on September 28 to allow the Cuyahoga Board of Elections to set up an additional drop box across the street from its building off of Board property, but rejected the Board's plan to also collect ballots at six public libraries throughout the county.⁸¹ In response, the court ordered an extremely narrow remedy that required the State to allow Cuyahoga

⁷⁶ Julie Carr Smyth, *What You Need to Know About Ohio Drop Box Restrictions*, AP News (Oct. 13, 2020) (online at <https://apnews.com/article/election-2020-virus-outbreak-cleveland-voting-rights-elections-8218c863638d6f13ae453e4a2ccc7494>).

⁷⁷ Ohio Sec'y of State, *Directive 2020-16*, Aug. 12, 2020; Jo Ingles, *Ohio Secretary Of State's Decision Leaves Ballot Drop Boxes Hard To Get To*, Radio WOSU (Aug. 18, 2020), <https://radio.wosu.org/post/ohio-secretary-states-decision-leaves-ballot-drop-boxes-hard-get#stream/0>.

⁷⁸ The ACLU of Ohio, the Chandra Law Firm, James Schuster, and pro bono counsel at Dechert LLP.

⁷⁹ *Ohio A. Philip Randolph Institute et al. v. LaRose*, No. 1:20-CV-01908, 2020 WL 5909804 (N.D. Ohio 2020, Compl. filed Aug. 26, 2020).

⁸⁰ *See id.* Dkt. 88, dismissing case without prejudice, Order issued Oct. 6, 2020.

⁸¹ Initially, the court dismissed the lawsuit believing that the violation had been remedied. But the plaintiffs filed a reconsideration motion drawing attention to the fact that Secretary LaRose had wrongly prohibited the county from installing drop-off sites at public libraries given that he had allowed voters to drop off their ballots at a location "outside" the board of elections office (parking lot). *Id.* Dkt. 88. The court granted the plaintiffs' motion for reconsideration ordering Secretary LaRose to allow the county to install its drop-off sites. *Id.* Dkt. 91, granting motion for reconsideration, Order issued Oct. 8, 2020.

County to install multiple drop-off sites at the county’s public libraries.⁸² Despite the district court’s detailed fact-finding in the case, a Sixth Circuit panel issued a stay of the district court’s order on the grounds that it was too late to make any changes before Election Day.⁸³

The case highlighted an increasing trend in 2020 of federal circuit courts overturning lower court rulings that expanded the franchise.

Tennessee

Tennessee was another state in which the pandemic severely highlighted the need for state officials to accommodate more impacted voters through broadening access to absentee voting. Several state statutes operated as barriers to voters seeking to cast absentee ballots. *First*, the state’s absentee ballot statute limits voters who can apply for absentee ballots to thirteen narrow categories including above the age of 65, religious reasons, and physical disability.⁸⁴ *Second*, the state does not provide a timely notice and opportunity to cure absentee ballots rejected for signature mismatch—in fact, the state statute allows election officials to reject an absentee ballot *prior* to sending any kind of notice to a voter (“signature-matching claim”).⁸⁵ *Third*, the state prohibits voters who registered to vote by mail and never before voted in an election in Tennessee from voting by absentee ballot the first time they vote—in other words, the statute requires that these voters vote in person for the first time (“first-time voter claim”).⁸⁶ *Fourth*, the state makes it a felony for anyone other than a member of an election commission to distribute absentee ballot applications to voters (“absentee ballot application ban”).⁸⁷ These barriers, coupled with the extraordinary circumstances of the pandemic, precipitated the need to bring litigation.

The Lawyers’ Committee and co-counsel⁸⁸ represented multiple organizations including the Memphis A. Philip Randolph Institute and the Tennessee State Conference of the NAACP and individuals in a challenge to these provisions under the fundamental right to vote of the First and Fourteenth Amendments and the Due Process Clause, among others.⁸⁹ The record showed the significant burdens on plaintiffs and their members who tended to skew above fifty, had comorbidities that exacerbated the risk of contracting the coronavirus, or identified as Black American, a group that has been disproportionately impacted by the virus in Tennessee and has experienced higher cases and deaths against the backdrop of a lack of access to healthcare and

⁸² *Id.* Dkt. 91, granting motion for reconsideration, Order issued Oct. 8, 2020.

⁸³ *Ohio A. Philip Randolph Institute et al. v. LaRose*, 831 Fed. App’x 188 (6th Cir. 2020).

⁸⁴ Tenn. Code Ann. § 2-6-102.

⁸⁵ *Id.* § 2-6-204(b) (“If upon receipt of any absentee ballot the registrar determines that the ballot is not entitled to be cast under this title, the registrar shall mark the absentee ballot envelope Rejected, write the reason for the rejection on the envelope, and sign it. The absentee ballot envelope, unopened, shall be placed in a container of rejected absentee ballots for the election. Notice of the rejection shall immediately be given in writing to the voter.”).

⁸⁶ *Id.* § 2-2-115(b)(7).

⁸⁷ *Id.* § 2-6-202(c)(3).

⁸⁸ The Campaign Legal Center and Tennessee-based law firm Sherrard, Roe, Voigt, Harbison LLP.

⁸⁹ See *Memphis A. Philip Randolph Institute v. Hargett*, No. 3:20-cv-00374 (M.D. Tenn. 2020, Compl. filed May 1, 2020); *Lichtenstein v. Hargett*, No. 3:20-cv-00736 (M.D. Tenn. 2020, Compl. filed Aug. 28, 2020).

insurance because of pervasive and systemic discrimination. The plaintiffs also showed that, with the increased need for voting absentee in the state, there was a greater likelihood that counties would reject more absentee ballots because of the absence of notice and cure, lack of uniform standards, and potential erroneous signature-matching by county officials. The plaintiffs further illustrated the burdens on first-time voters and introduced evidence of an impacted voter who could not vote in the August primary election because he had registered by mail, never before voted, and did not want to risk contracting the virus by voting in person. The plaintiffs showed how, even before the pandemic, the restriction burdened recent high school graduates who had registered to vote but had to move away from their home counties for college and could not travel home to vote in person. The plaintiffs also introduced evidence on the ways that the absentee ballot application ban prevented them from giving absentee applications to constituents and members who did not know that they had to submit requests, thereby chilling the organizations' right to engage in core First Amendment speech in connection with voting.

After the Tennessee Supreme Court, in a companion state case brought by other plaintiffs, expanded absentee ballot eligibility to a broader class of voters to include those unable to vote in person because of medical vulnerabilities or because they were caretakers of individuals with underlying comorbidities,⁹⁰ the federal plaintiffs stipulated to dismissing that claim.

As for the remaining claims, the district court denied relief to the plaintiffs on their signature-matching claims and a Sixth Circuit panel affirmed.⁹¹ The district court granted relief on the plaintiffs' first-time voter claim and the Sixth Circuit affirmed, making way for this class of voters to request absentee ballots in the general election.⁹² Finally, the district court denied relief on the absentee ballot application distribution ban on the grounds that this activity did not involve speech protected under the First Amendment.⁹³ These claims are still pending.

The Lawyers' Committee's experience in Tennessee illustrates the precariousness of litigating to expand the franchise in federal court and looking for other avenues to combat restrictive laws and policies that keep people from accessing the ballot.

III. 2021 Suppressive Election Legislation

Backlash to the massive voter turnout of the 2020 election season – and, in particular, to the large turnout of voters of color and their use of mail voting and early voting opportunities - has been swift. State legislatures across the country have introduced legislation to limit access to the ballot by any means necessary, many of which will disproportionately impact voters of color. According to one recent estimate, more than 250 bills with provisions restricting voting access are

⁹⁰ *Lay v. Goins*, No. 20-435-IV (Tenn. Aug. 5, 2020).

⁹¹ *Memphis A. Philip Randolph Institute v. Hargett*, 482 F. Supp. 3d 673 (M.D. Tenn. 2020) (signature-matching), *aff'd* 978 F.3d 378 (6th Cir. 2020).

⁹² *Memphis A. Philip Randolph Institute v. Hargett*, 485 F. Supp. 3d 959 (M.D. Tenn. 2020) (first-time voter), *aff'd* 977 F.3d 566 (6th Cir. 2020).

⁹³ *Lichtenstein v. Hargett*, No. 3:20-cv-00736, 2020 WL 5658732 (M.D. Tenn. Sept. 20, 2020) (ban on absentee ballot application distribution).

moving ahead in 43 states.⁹⁴ Georgia and Tennessee provide examples of states enacting or considering new laws that would attack voting access in unprecedented ways.

Georgia Omnibus Voter Suppression Bill (SB 202)

In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, this bill slashes early voting hours and weekend early voting; requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; punishes out-of-precinct voters in arbitrary ways; significantly shortens the period in which voters can apply for and cast absentee ballots; prohibits non-poll workers from providing food or water to people standing in line; and creates a mechanism that would effectively allow the white-predominated state legislature to control county boards of election predominated by voters of color. Any one of these provisions would significantly burden voting in Georgia; together they constitute a major barrier to the administration of free and fair elections in the State.

This bill's new restrictions on early voting, for example, eliminate the guarantee of early voting on weekends, permitting county officials to eliminate Sunday early voting completely even though Sunday voting is disproportionately used by Black voters during "Souls to the Polls" events.⁹⁵ The legislation provides no standards for how county officials should make their determinations to cut early voting hours, allowing for uneven and discriminatory application. This is particularly vexing since the purported rationale for limiting early voting is to ensure that early voting is "uniform" across the state. In actuality, this provision would likely suppress Black turnout.

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or return a voted absentee ballot is another new hurdle voters will now face in Georgia under this omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver's license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia's driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts. Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

⁹⁴ The Brennan Center for Justice, *State Voting Bills Tracker 2021* (Feb. 24, 2021) (online at www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021).

⁹⁵ Kevin Morris, *Georgia's Proposed Voting Restrictions Will Harm Black Voters Most*, The Brennan Center for Justice (Mar. 6, 2021) (online at www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most).

This bill also imposes significant limitations on absentee ballot drop boxes that were used by millions of Georgia voters during the November 2020 election. In addition to limiting the number of drop boxes overall, this bill restricts the placement of drop boxes to the office of the board of registrars and to locations inside early voting polling places and bans drop boxes from being available outside of regular business hours. These restrictions will substantially burden those voters who work multiple jobs and/or irregular hours and therefore cannot access early voting hours. These provisions are also concerning because they obviate work done by county election boards to set up 2020 drop boxes, which were generally outside, installed into concrete, monitored 24/7 by video surveillance, and highly effective in providing voters with an additional means of submitting their ballots outside working hours.

This legislation also severely limits out-of-precinct voting. Under current law, Georgia voters who vote a provisional ballot in the wrong precinct in the county where they are registered to vote can still have their votes counted for the candidates who also appear on the ballot in their correct precinct.⁹⁶ Moving forward, voters who appear to vote before 5pm in the wrong precinct will be required to sign a sworn affidavit attesting that they are unable to go to their correct precinct before 7pm. The bill requires the State Election Board to review these sworn statements, but provides no guidance about what, if anything, the State Election Board is required to do following this review. This leaves open the possibility of punitive action against voters who execute these affidavits, without any notice of what that punitive action may include or why such punitive action is necessary. In the past, Georgia voters have voted out-of-precinct for many reasons, including lack of adequate notice of polling place closures that are a regular feature of Georgia elections. In many instances, these closures and consolidations have weighed more heavily on Black and Brown communities in Georgia than upon white communities, and these new out-of-precinct voting requirements will likely do the same.

The law's new limits on absentee voting will also present a major barrier to many voters. Previously a voter could request an absentee ballot anywhere from 180 days before the election until four days before the election. Now, a voter must request an absentee ballot between 78 days before an election and 11 days before the election. This limitation means that if a voter learns just 10 days before the election that they have to leave the state for an emergency, they will not be able to request and vote an absentee ballot. This provision will serve to seriously reduce access to the ballot for all Georgians. Additionally, the only exception to this rule applies to disabled voters and voters over the age of 65. Among absentee voters over the age of 65, white voters are overrepresented; and among absentee voters under the age of 65, Black voters are overrepresented. As a result, this change in the deadline to apply for absentee ballots will also likely disproportionately and negatively impact nondisabled voters under 65 years of age, a group in which Black voters are overrepresented.

Astoundingly, this legislation also prohibits anyone from providing food or water to voters standing in line within 150 feet of the outer edge of the building for a polling place, or within 25 feet of any voter standing in line to vote at any polling place. It's not clear what sort of governmental interest this provision serves. What is clear is that it would have a significant impact

⁹⁶ SB 202, LC 28 0334S, Section 34.

on polling places with longer lines, which are disproportionately polling places with high minority populations,⁹⁷ and would make it more burdensome for those individuals to stand in line and vote.

Finally, the law significantly curtails the powers of the popularly-elected Secretary of State and county election officials. It eliminates the Secretary's voting power on the five-person State Board of Elections, replacing the Secretary with a Chair appointed by the Georgia legislature, giving the legislature control of the appointments of the majority of the Board. Further, the law gives the State Board authority to suspend county election superintendents and appoint temporary replacements. Taken together, these changes have the potential to allow the legislature's hand-picked majority on the State Board to target and effectively take over the boards of specific counties – including, as is justifiably feared, those with substantial Black and other person of color representation.

On March 25, 2021, Georgia's Governor Brian Kemp signed this legislation into law. On March 28, the Lawyers' Committee filed litigation on behalf of civil rights organizations challenging the law.

Tennessee Fingerprinting Bill (HB 1239/SB 1162)

Tennessee stands out as the only state⁹⁸ in the 2021 legislative cycle to sponsor legislation that would allow state officials to use fingerprinting to verify a voter's identity in the voting process. No other state contemplates such a process and, to date, no state has ever used fingerprinting to determine a voter's identity. If passed, this legislation would allow for state and county election officials to use "fingerprint technology to identify voters for purposes of conducting elections" in the State.⁹⁹ What exactly this means, or what it looks like in practice, remains troublingly unclear – the text of the bill is just four sentences. But given that Tennessee's primary fingerprint database is derived from arrest records submitted by local law enforcement agencies that disproportionately police, arrest, and fingerprint Black Tennesseans, this facially-neutral form of voter identification is likely to disproportionately harm voters of color.

This legislation raises a number of election administration issues. First and foremost, fingerprinting is often associated with law enforcement or immigration authorities, especially in Black and minority communities that have experienced over-policing. If fingerprinting becomes a prerequisite to voting, then many in these communities will not vote at all for fear of surveillance

⁹⁷ Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, NPR (Oct. 17, 2020) (online at www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl).

⁹⁸ Though Tennessee is the only state to introduce this sort of fingerprinting legislation this session, other states have already signaled that they may pursue the use of fingerprinting as a tool of voter identification moving forward. *See, e.g.,* Dave Elias, *Some Florida lawmakers discuss fingerprint voting to ensure safer elections*, NBC 2 (Feb. 18, 2021) (online at nbc-2.com/news/politics/2021/02/17/some-florida-lawmakers-discuss-fingerprint-voting-to-ensure-safer-elections/).

⁹⁹ HB 1239/ SB 1162, bill sponsors Representative Lynn and Senator Niceley. Earlier this session, legislators introduced an alarming bill, SB 1510, that would have abolished early voting, prohibited the use of voting machines, and required voters to hand mark watermarked paper ballots in elections. That bill was withdrawn in late February. Senate Bill 1510, <https://www.capitol.tn.gov/Bills/112/Bill/SB1510.pdf> (sponsored by Senator Bowling).

or harassment by law enforcement. By incorporating a symbol of the criminal system into the voting process, this policy would almost certainly suppress, intimidate, and burden Black voters and voters of color. Moreover, collecting fingerprints at the polls raises Fourth Amendment concerns because, generally, authorities are required to show probable cause, as in a lawful arrest, to collect an individual's fingerprints.

We are unaware of the existence of any comprehensive federal or state databases of fingerprints, so the implementation of the bill, if passed, would likely involve reliance on arrest and jail records—the largest repository of fingerprints in the State—or even perhaps federal FBI records. Black Tennesseans are overrepresented in these databases based on the State's long history of over-policing people of color, so they are more likely to be subject to error and possible rejection of their ballots as a result.

Additionally, the bill's language is vague and overbroad, making it impossible to know what kind of "technology" it involves and how such technology would be used. This technology could easily be applied to disproportionately harm voters of color in the United States, as we have seen with the use of other biometric data, such as facial recognition technology. The bill also appears to give election officials unfettered discretion to implement the law without guidance, which could lead to a lack of uniformity in application and implicit bias in decisions around who to fingerprint in the first place. The use of fingerprint technology also raises concerns around training, including whether and how county officials would be trained in fingerprint matching, a complex practice that often requires forensic expertise. The use of various matching techniques introduces the potential for error, but the bill provides no information as to what kinds of curing procedures the State might offer to voters who have had ballots rejected because of mismatched fingerprints.

Finally, the State already has mechanisms to verify the identity of voters (including voter ID) and deterrents to voter fraud (namely, criminal convictions),¹⁰⁰ thus making this bill unnecessary to further a legitimate governmental purpose and needlessly burdensome on voters.

Arizona Legislation

In Arizona, state legislators have introduced over fifty bills aimed at eliminating voter-friendly programs and erecting new barriers throughout the voting process, many of which would have a disproportionate impact on voters in tribal communities and other voters of color, low-wealth voters, and voters in other marginalized communities. They have done so under an unprecedented veil of secrecy, announcing hearings on the bills with as little as a day's notice,

¹⁰⁰ Under Tennessee Code § 2-19-107, it is a Class D Felony (punishable by two to twelve years' imprisonment and/or a fine of \$5000) for anyone who "intentionally and knowing that such person is not entitled to, registers or votes in any manner or attempts to register or vote in any manner where or when such person is not entitled to under this title, including voting more than once in the same election" or votes in primary elections of "more than one political party in the same day." And in order to vote, voters must present a government-issued photo identification from a list of six acceptable IDs to vote at the polls. For those voting absentee, Tennessee law only allows certain categories of voters to request absentee ballots and those individuals must provide their social security numbers, dates of birth, signatures, and additional information to request absentee ballots.

and limiting or blocking scheduled testimony both by fellow legislators and by community groups and voting rights advocates.

Several of these bills target the state's popular and widely-used Permanent Early Voter List (PEVL), through which over 80% of Arizona voters receive their ballot automatically by mail in each election for which they are eligible, and which they can then return by mail or in person. Currently, voters need only apply once for the program, and remain in it as long as they remain eligible and their registration status remains active, or until they request to be removed or an official mailing sent by the County Recorder is returned as undeliverable. SB 1485 would change that, requiring County Recorders to remove voters from the PEVL if they fail to cast a PEVL ballot in both the primary and general election in two consecutive federal elections—even if they voted in person or cast a PEVL ballot in a non-federal election during that span. This bill is designed to make it harder for Arizona voters to participate in elections, is redundant to the state's existing voter roll list maintenance process, and increases administrative burdens on local election officials, without advancing any legitimate state interest. Other bills would shorten the early voting window (SB 1593) and require that the voter write their voter registration number or driver's license number on their PEVL ballot envelope (SB 1713), among other provisions.

And these attacks on voters are not limited to the PEVL. HB 2373 would require any person or organization submitting twenty-five or more voter registration applications in a year to obtain and include a county-issued unique identifying number on each form they submit or distribute, regardless of where the form was obtained. This bill targets voters of color and tribal communities in particular, which rely on voter registration drives to help register voters living in rural areas far from County Recorder offices and without access to the internet or at-home mail delivery. And, by requiring a unique identifier on each form, the bill would compel voters to associate with whoever is assisting them in registering—and any actual or perceived views attributed to the assisting entity—creating a chilling effect on political participation and raising First Amendment concerns.

Also, SB 1106 would create felony penalties for anyone who registers to vote in Arizona “without the requisite intent to remain,” an unnecessary and superfluous provision—Arizona already defines residency and provides felony penalties for registering at a false address—clearly designed to intimidate student voters and low-wealth voters who move more frequently. HB 2717 would provide that the legislature and governor must approve any consent decrees requiring changes to statutes or rules that a court has found unlawful—an obvious power-grab aimed at preventing judicial oversight of elections and other state laws and processes, and a clear violation of separation of powers principles.

Florida Legislation

In Florida, opponents of free and equal access to democracy have taken the approach of packing much of their voter suppression agenda into a single omnibus bill – SB 90 and its counterpart HB 7041. And, like in Arizona, Florida legislators have gone out of their way to limit public scrutiny and testimony on this and other bills. While limiting public access, the Heritage Foundation has been working with legislators behind the scenes in providing many of

the ideas behind the bills, if not the language itself, as has been acknowledged by at least one Florida legislator. It is outrageous that a group like the Heritage Foundation, which has made limiting access to democracy a top priority, has been given a backroom seat at the table in Florida—and other states¹⁰¹—while the citizens who will be subject to these restrictive provisions have been shut out.

While the Senate and House versions have yet to be reconciled, both bills limit the use of Vote By Mail (VBM) drop boxes, and SB 90 eliminates them entirely. Both bills would require voters to make a new request to vote by VBM ballot each year, instead of every two years under current law, needlessly causing additional burdens for voters and local election officials. Other provisions currently contained in one or the other version of the bill would make it illegal to give a voter any item while they are in line, including food or water; limit who can assist a homebound voter in picking up and dropping off their VBM ballot, creating additional burdens for disabled and elderly voters, limited-English-proficient voters, and voters confined due to illness; prohibit local election officials from accepting private grants to help fund election infrastructure, a crucial lifeline necessitated by the Florida legislature’s chronic failure to provide adequate funding for elections; require that election officials compare the signature on a voter’s VBM ballot to only the most recent version of their signature on file, rather than multiple versions of their signature, making signature match verification even less reliable than it already is; and allow political party and campaign operatives to themselves view and compare the signature on a voter’s VBM ballot with the signature on file, making it easier to bring mass voter qualification challenges often aimed at throwing out large numbers of ballots in marginalized communities, and particularly communities of color.

IV. Federal Legislation to Protect the Vote

The For the People Act would establish national standards for free and fair elections and nullify the effects of a wave of restrictive voting bills at the state level. The For the People Act modernizes voter registration, requiring online voter registration, automatic voter registration, and same-day registration. It increases voting options by requiring fourteen days of early voting, no-excuse voting by mail and drop boxes. And it removes unnecessary requirements for voting, such as notarization and witness requirements for mail ballots and restrictive ballot receipt deadlines.¹⁰²

A. Litigation and State Legislation Show the Need for HR 1.

As described above, the Lawyers’ Committee and its partners have engaged in litigation across numerous states to challenge state laws infringing voting rights and undermining free and fair access to the ballot. The current legislative session has brought a new surge of legislation to

¹⁰¹ See Nick Corasaniti and Reid J. Epstein, “G.O.P. and Allies Draft ‘Best Practices’ for Restricting Voting,” *New York Times* (March 23, 2021, updated March 25, 2021), *available at* <https://www.nytimes.com/2021/03/23/us/politics/republican-voter-laws.html>.

¹⁰²The Voting Rights Advancement Act, legislation to restore the preclearance provisions of the Voting Rights Act, is also critical and will be considered separately.

suppress the vote.¹⁰³ Below, we provide examples that illustrate the importance of HR 1 in overcoming voter suppression efforts.

1. Modernizing Registration

Registration has long been an obstacle course for citizens seeking to exercise their right to vote. Some states have moved to modernize the registration process through online registration, same-day registration, and automatic voter registration. But these efforts have been uneven, with some states moving to make registration more, rather than less, difficult. State legislatures are introducing bills that would require proof of citizenship to register and would preclude automatic voter registration and same-day registration. The For the People Act would preempt this restrictive state legislation and make modernized registration part of a new nationwide baseline for voting.

Even after voters are registered, they may face removal from the rolls, often through arbitrary and unjustified procedures. The state of Georgia, for example, has a troubling history of purges.¹⁰⁴ Recently, in *Ga. State Conf. of the NAACP v. DeKalb Cty. Bd. of Registration and Elections*, the Lawyers' Committee and partners challenged the board of elections' purges of DeKalb County voters, including the removal of homeless voters.¹⁰⁵ The case is ongoing.

The For the People Act would protect voters from these improper voter purges. Section 2502 of the For the People Act establishes objective conditions for removal of a voter's name from the voter roll. Under this section, states would be prohibited from removing a voter's name from the roll because of a voter's failure to vote in a previous election. States would also be required to provide notice within 48 hours to a voter who is removed from the voter roll.

2. Providing voting options

During the pandemic, many states expanded opportunities for early voting and voting by mail. Now that the 2020 election cycle is over, some states have moved to curtail early voting and reinstate antiquated requirements for voting by mail. Bills in several states would limit or preclude early voting, and a flurry of bills would limit or create new requirements for voting by mail. State legislators have also introduced bills that would restrict where and how ballots can be returned.

The Lawyers' Committee has litigated to expand the options for voters in states that refused to provide no-excuse voting by mail during the pandemic. In *Collins, et al. v. Adams, et al.*, the Lawyers' Committee and partners sought no-excuse absentee voting and removal of

¹⁰³Reid Epstein et al., *G.O.P. and Allies Draft 'Best Practices' for Restricting Voting*, New York Times (March 23, 2021) (online at www.nytimes.com/2021/03/23/us/politics/republican-voter-laws.html).

¹⁰⁴ Brennan Center for Justice, *Purges: A Growing Threat to the Right to Vote* (2018) (online at www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

¹⁰⁵ 2020 WL 5239127 (N.D. Ga. Sept. 2, 2020).

various burdens on voting in Kentucky.¹⁰⁶ The state ultimately announced that it was implementing most of the adjustments that plaintiffs were seeking. The Lawyers' Committee and partners have gone to court against parties resisting easy distribution of ballot applications.¹⁰⁷ We also litigated over state requirements establishing limits on drop box availability so severe as to negate the whole purpose of the boxes.¹⁰⁸

The For the People Act would eliminate the need for litigation to ensure that voters in all states have the option to vote early or vote by mail. Section 1611 of the For the People Act requires two weeks of early voting. Section 1621 makes no-excuse voting by mail available to all voters and requires mailing of ballot applications to all registered voters. Section 1907 requires states to provide drop boxes and provides reasonable requirements regarding location and number.

3. Eliminating burdens on voting

Although the civil rights measures of the 1960s did away with literacy tests and poll taxes, states are dreaming up new methods of vote denial -- restrictive identification, notarization and witness requirements for mail ballots, arbitrary signature matching procedures, restrictive ballot receipt deadlines and more. The Lawyers' Committee has fought in court to remove these burdens on voting. In *Arctic Vill. Council v. Meyer*, the Lawyers' Committee and partners represented a tribe and several other plaintiffs in a state constitutional challenge to Alaska's enforcement of the witness requirement for absentee ballots during the pandemic.¹⁰⁹ We obtained a preliminary injunction in state court, but the case is still pending. In *League of Women Voters of Ark. v. Andino*, the Lawyers' Committee and co-counsel represent the League of Women Voters of South Carolina, The Family Unit, Inc., and two individual voters in a challenge to a South Carolina statute providing for the rejection of absentee ballots due to missing or allegedly mismatched signatures on the absentee ballot envelope.¹¹⁰ Plaintiffs alleged that South Carolina law failed to provide voters with notice and an opportunity to cure the deficiency. The Defendants have appealed the district court's preliminary injunction to the Fourth Circuit, which remains pending.

The For the People Act would prohibit many of these restrictive requirements adopted by states to suppress the vote. Section 1903 of the For the People Act provides that sworn, written

¹⁰⁶ No. 3:20-00375 CRS (W.D. Ky. 2020).

¹⁰⁷ *Angelic Johnson, et. al., v. Jocelyn Benson, et. al.*, No. 20-cv-01098, 2020 WL 6733809 (W.D. MI. November 15, 2020).

¹⁰⁸ *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020), and *Texas State Conference of the NAACP v. Abbott*, No. 1:20-cv-1024-RP (W.D. Tex.); *Philip Randolph Inst. of Ohio v. LaRose*, No. 1:20-CV-01908, 2020 WL 5909804 (N.D. Ohio Oct. 6, 2020), *stayed*, 831 Fed. App'x 188 (6th Cir. 2020), filed August 26, 2020.

¹⁰⁹ No. 3AN-20-07858CI (AK. Superior Ct. 3rd Judicial Dist. Anchorage Oct. 5, 2020), *aff'd* sub nom. *Alaska v. Arctic Vill. Council*, S-17902 (AK. Supreme Ct. Oct. 12, 2020)

¹¹⁰ 2020 WL 6302998 (D.S.C. Oct. 27, 2020) (granting preliminary injunction in part); voluntarily stayed in part, 2020 WL 6395498 (4th Cir. Oct. 29, 2020).

statements are sufficient for identification, eliminating the requirements of strict voter identification laws. Section 1621 bars witness and notary requirements for mail ballots and requires due process, including notice and opportunity to cure, with respect to signature verification or other ballot defects. Section 1621 also requires ballots to be counted that are sent before the election and received ten days after, notwithstanding state deadlines.

V. Conclusion

The Lawyers' Committee endorses the For the People Act, a bill that would substantially address many of the issues that emerged in litigation during the 2020 election cycle. Litigation requires time and resources, and relief is not guaranteed even when voters face significant burdens on their right to vote. The For the People Act would ensure that there are clear federal standards for voting and that voters in every state have fair access to the ballot. The For the People Act would be a substantial step forward for our democracy and a major victory for voting rights.

Appendix

See Attachment.