

Mail Voting Litigation in the COVID-19 Pandemic

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Abstract:

The COVID-19 pandemic has spawned an avalanche of litigation regarding the appropriate ways to adapt, apply, and administer election rules amid the pandemic. Due to the increased demand for mail voting, plaintiffs in more 43 states across the country have filed more than 200 cases challenging nearly every aspect of the absentee balloting process, asserting claims under a variety of state and federal laws. This report outlines the many legal challenges to absentee and mail voting systems brought against states since March, largely in response to the COVID-19 pandemic. While most cases seek to expand the availability of or loosen restrictions associated with mail voting, some cases challenge the expansion of absentee voting, arguing that mail-in voting leads to fraud and thereby dilutes the influence of genuine voters.

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Introduction

The COVID-19 pandemic has spawned an avalanche of litigation regarding the appropriate ways to adapt, apply, and administer election rules amid the pandemic. Since March, more than 200 COVID-related cases have been filed in federal and state courts across more than 43 states. Richard Hasen, a legal scholar at U.C. Irvine, predicts that 2020 is on track to become the most litigated election season ever.¹ Because the pandemic created a sudden increase in demand for mail voting, much of the litigation relates to mail voting rules.

This report outlines the many legal challenges to absentee and mail voting systems (sometimes referred to as vote by mail) brought against states in response to the COVID-19 pandemic. Since March, plaintiffs have brought challenges to the absentee ballot application process, seeking to expand the availability of absentee voting, or in some cases, seeking to limit it. Plaintiffs have brought challenges against states requiring an “excuse” to vote absentee, either asking for excuses to be waived due to the pandemic or asking that the pandemic itself qualify as an excuse. Plaintiffs have further challenged lack of free postage; ballot receipt deadlines; bans on ballot collection; failure to accommodate voters with disabilities; witness and notary requirements; ID requirements; and the processes by which voters may cure mismatches or mistakes on their absentee ballot, so it may be counted. For each of these rules, plaintiffs have brought a variety of claims—federal and state constitutional violations, violations of the Voting Rights Act and the Americans with Disabilities Act, and state statutory violations.

The report is organized according to the life cycle of an absentee ballot: Section II covers issues related to availability of voting by mail in the first instance, and the process by which a voter can apply for an absentee ballot; section III examines challenges to limits on voters’ eligibility to vote by mail; section IV explores claims related to submitting mail-in ballots; section V surveys issues regarding the verification of mail-in ballots; and section VI reviews issues related to counting the vote. Finally, section VII discusses several cases that challenge recent operational changes made by the U.S. Postal Services. Claims at each phase of the mail voting process are at various stages of litigation, and judicial outcomes to date have varied considerably between states and type of claim.

¹ Richard Hasen, *As November Looms, So Does the Most Litigious Election Ever*, N.Y. Times (July 7, 2020), <https://www.nytimes.com/2020/07/07/us/2020-election-laws.html>.

II. Availability of Absentee Voting

Although most of the litigation surrounding absentee voting seeks to expand its availability, some legal challenges seek to restrict it. Plaintiffs in several states have brought suits alleging that the state’s implementation of universal absentee voting violates either state law or the U.S. Constitution. These claims usually assert that the challenged voting procedures create a high risk of voter fraud, thereby diluting the influence of legitimate voters. Most of these claims have yet to reach a decision on the merits, and in no case has the plaintiff’s requested relief been granted, including requested preliminary injunctions.

A. Claims that Vote by Mail Leads to Fraud

There have been challenges in at least four states—Pennsylvania,² Nevada,³ Virginia,⁴ and New Jersey⁵—to the implementation of expanded vote-by-mail initiatives on the grounds that such changes unduly burden the right to vote by increasing voter fraud, which has the effect of diluting the weight of validly cast ballots. The challenges in Pennsylvania, Nevada and New Jersey remain live, while the Virginia plaintiffs dropped their case after their request for a preliminary injunction was denied because of their delay in filing the case.⁶

In the Pennsylvania lawsuit, the Trump Campaign alleges that mail-in voting “is the single greatest threat to free and fair elections.”⁷ The complaint takes aim at the manner in which Pennsylvania officials have administered the state’s recently passed mail-in voting law, Act 77, which adopted no-excuse mail-in voting for all qualified electors. In support of the claim that expanded vote by mail leads to fraud, the complaint cites a 2005 report from the Commission on Federal Election Reform, authored by former President Jimmy Carter and former Secretary of State James A. Baker, that observed “[a]bsentee ballots remain the largest source of potential voter fraud.”⁸ The complaint

² Verified Complaint for Declaratory and Injunctive Relief, Donald J. Trump for President, Inc. v. Boockvar, No. 2:20-cv-00966 (W.D. Pa. June 29, 2020) [hereinafter “Trump Pennsylvania Complaint”].

³ Complaint for Declaratory and Injunctive Relief, Donald J. Trump for President, Inc. v. Cegavske, No. 2:20-cv-1445 (D. Nev. Aug. 4, 2020) [hereinafter “Trump Nevada Complaint”].

⁴ Verified Complaint for Declaratory and Injunctive Relief, Curtin v. Va. State Bd. of Elections, No. 1:20-cv-546 (E.D. Va. May 13, 2020) [hereinafter “Curtin Complaint”].

⁵ Complaint for Declaratory and Injunctive Relief, Donald J. Trump for President, Inc. v. Murphy, No. 3:20-cv-10753 (D.N.J. Aug. 18, 2020) (hereinafter “Trump New Jersey Complaint”).

⁶ *Curtin*, 2020 WL 2817052 (opinion filed at E.D. Va. No. 1:20-cv-00546 (RDA/IDD)).

⁷ Trump Pennsylvania Complaint, *supra* note 2, at 1.

⁸ Comm’n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (2005).

also cites case law to the same effect⁹ and asserts that Pennsylvania has a history of elections tarnished by fraud and that mail-in voting exacerbates the impact of administrative deficiencies, such as outdated or inaccurate voter registration databases, and promotes the potentially abusive and hard-to-detect practice of ballot harvesting.¹⁰

The Trump Campaign’s central legal argument is that Pennsylvania officials failed to satisfy their duty to establish basic minimum safeguards against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or tampering, thus giving rise to violations of the First and Fourteenth Amendments of the U.S. Constitution.¹¹ As a remedy, the Trump Campaign seeks, inter alia, to enjoin Pennsylvania election officials from setting up unsecured drop boxes in locations other than in the offices of County Election Boards and from preventing poll watchers from being present in all locations where votes are cast.

In Nevada, the Trump campaign, the Republican National Committee and the Nevada Republican Party sued the Nevada secretary of state in federal district court, seeking to enjoin the state’s newly enacted election law, Assembly Bill 4 (“AB4”). Similar to the Trump campaign’s Pennsylvania case, the Nevada complaint alleges that AB4 violates the fundamental right to vote and the equal protection clause by implementing changes to election rules that make “voter fraud and other ineligible voting inevitable,” thereby diluting the Nevadans’ honest vote.¹² The complaint specifically targets the provisions of AB4 that require counties to accept and count ballots received after Election Day (AB4 § 20); that establish the number of in-person polling places based on a county’s population, resulting in fewer in-person voting places for rural voters (AB4 § 11); that authorize county or city clerks to establish non-uniform standards for processing and counting ballots (AB4 §22); that vest standardless discretion in election inspectors to determine whether multiple ballots received in one envelope must be rejected (AB4 §25); and that authorize ballot harvesting (AB4 §21).¹³ At the core of AB4’s constitutional infirmities, according to the complaint, is Nevada’s failure to provide “‘minimal procedural safeguards’ to protect against the ‘unequal evaluation’ of mail ballots.”¹⁴

⁹ See, e.g., Trump Pennsylvania Complaint, supra note 2, at 23–24 (“[M]ail in ballot fraud is a significant threat—so much so that the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting.” (internal quotation marks omitted) (citing *Veasey v. Abbot*, 830 F.3d 216, 239, 256 (5th Cir. 2016)).

¹⁰ *Id.* at 22–28.

¹¹ *Id.* at 49–50, 52–53. In particular, the complaint alleges that the Pennsylvania officials abdicated their constitutional duty by permitting some counties to unilaterally establish unsecured drop boxes for return of mail-in ballots and by arbitrarily restricting poll watcher service only to in-person voting and only by qualified voters of the county of their residence. *Id.*

¹² Trump Nevada Complaint, supra note 3, at 23.

¹³ *Id.*

¹⁴ *Id.* at 21 (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

Most recently in New Jersey, the Trump Campaign, the Republican National Committee, and the New Jersey Republican State Committee sued the New Jersey Governor and Secretary of State, challenging Executive Order 177 (“EO 177”), which suspends a number of New Jersey’s election laws, and provides that mail in ballots will automatically be sent to all registered voters without the need to apply. EO 177 also modifies the ballot-return deadline to November 10 for vote-by-mail ballots that are postmarked on or before election day and establishes that otherwise valid ballots lacking a postmark are to be deemed timely cast if received within 48 hours of the closing of the polls. Those who vote in person on November 3 will vote via provisional ballot. Echoing the claims asserted in the Pennsylvania and Nevada lawsuits, the Trump Campaign argues that EO 177 establishes an “unauthorized voting system [that] facilitates fraud and other illegitimate voting practices, and therefore violates the Fourteenth Amendment to the U.S. Constitution.”¹⁵ In addition to the Supreme Court precedent and Carter-Baker report that the Trump Campaign cited in its Pennsylvania and Nevada Complaints, the New Jersey Complaint also discusses allegations of mail in voting fraud from this past May in a city council election in the City of Paterson.¹⁶ The Complaint also alleges an equal protection violation under the Fourteenth Amendment, related to EO 177’s requirement that all in-person voters cast provisional ballots. As a result of this change, the Complaint contends that “[i]t will be impossible for county officials to properly inventory, transport, and canvass the massively increased volume of provisional ballots by the prescribed statutory process . . . [which] risks New Jersey counties adopting arbitrary and varying procedures without ‘specific rules designed to ensure uniform treatment.’”¹⁷

In Virginia, six voters brought suit in a federal district court challenging the expansion of absentee voting rights on the grounds that such changes lead to voter dilution and disenfranchisement. The plaintiffs cited Supreme Court precedent establishing that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹⁸ Similarly to the Trump Campaign’s lawsuit in Pennsylvania, the plaintiffs in Virginia pointed to the state’s history of mail-in ballot fraud and the myriad operational issues associated with the rapid expansion of vote by mail to support their argument that Virginia’s changes unduly burdened the fundamental right to vote.¹⁹ However, the plaintiffs dropped the case before the court could reach the merits.

¹⁵ Trump New Jersey Complaint, *supra* note 5, at 34.

¹⁶ *See id.* at 20–24 (describing the New Jersey Attorney General’s investigation of voter fraud in the city council election, which involved a campaign worker confessing “to having stolen ballots out of mailboxes, both completed and uncompleted, on behalf of and at the direction of the Mendez campaign.”).

¹⁷ *Id.* at 35–36 (citing *Bush v. Gore*, 531 U.S. 98, 105–06 (2000)).

¹⁸ Curtin Complaint, *supra* note 4, at 17 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

¹⁹ *Id.* at 10–16.

B. Applying to Vote by Mail

Plaintiffs in some states have challenged the process by which voters receive and submit applications to vote by mail. In Iowa, plaintiffs sued challenging a law making the application process more difficult. For decades, election officials had been able to use available voter database information to fill fields in absentee ballot requests that voters had missed, and then send appropriate absentee ballots to those voters. But in June 2020, the Iowa Legislature passed a law that prohibited officials from looking up missing or incorrect information in voter databases, instead requiring them to get in touch with the voters themselves to retrieve the information, often by mail. This change converted a simple and routine process to an arduous and complex one, at the same time as absentee ballot applications from voters unfamiliar with the process are expected to skyrocket. Plaintiffs are challenging the new law seeking declaratory and injunctive relief under various provisions of the Iowa Constitution.²⁰

By contrast, plaintiffs in other states have challenged laws expanding access to vote by mail. However, none of these challenges has succeeded. In Michigan, the Secretary of State mailed out applications to vote by mail to all registered voters in the state.²¹ The plaintiffs, a voter in Michigan and a candidate for the state legislature, challenged this decision, alleging that the Secretary of State had no authority under state law to mail out the applications.²² However, the court refused to grant a preliminary injunction. The court found that neither plaintiff would suffer irreparable harm if an injunction were not issued, because the only effect of the Secretary of State's actions was to make it slightly easier for Michigan voters to choose to exercise their right to vote by mail.²³ The court also found that the plaintiffs were unlikely to succeed on the merits, because the state Constitution created a "self-executed right" to "vote by absentee ballot."²⁴

C. Deadline to Submit Vote-by-Mail Applications

Plaintiffs in some states have sued to extend the deadline by which voters must apply for an absentee ballot. In Idaho, for example, a surge in vote-by-mail applications caused the state's online application portal to crash.²⁵ A district court therefore granted an emergency injunction extending the application deadline by a week.²⁶ Similarly, plaintiffs in Ohio challenged the state's deadline for

²⁰ Complaint, LULAC of Iowa v. Pate, No. _____ (Iowa Dist. Ct. July 14, 2020)

²¹ Cooper-Keel v. Benson, No. 20-000091-MM, slip op. at 2 (Mich. Ct. of Claims June 18, 2020).

²² *Id.*

²³ *Id.* at 4–5.

²⁴ *Id.* at 6 (citing Mich. Const. Art. 2 § 4).

²⁵ Complaint, Moreno v. Idaho Sec'y of State, No. 20-cv-242, at 5 (D. Idaho May 20, 2020).

²⁶ Moreno v. Idaho Sec'y of State, No. 20-cv-242 (D. Idaho May 23, 2020).

applying or an absentee ballot, arguing that it violated their right to vote.²⁷ However, the claim was dismissed as moot after the Ohio state legislature passed a bill changing vote-by-mail procedures in light of COVID-19.²⁸

III. Eligibility to Vote by Mail

Most states, as well as the District of Columbia, allow any eligible voter to vote via an absentee ballot without providing an excuse.²⁹ However, in several states, absentee voting is only available to certain classes of voters. Frequently, absentee voting is available to citizens who are over a certain age, out of the jurisdiction on Election Day, or live with a disability that makes it difficult for them to show up to a polling place in person.³⁰ Plaintiffs in several states have brought lawsuits seeking to expand eligibility to vote by mail. These lawsuits fall into several categories. First, some complaints seek to expand the availability of absentee voting to any eligible voter. Second, plaintiffs have filed claims arguing that a voter's lack of immunity to COVID-19 constitutes a sufficient excuse under state law to allow that voter to vote by mail. And third, several lawsuits challenge states' age limits on absentee voting. These claims have met with mixed results, often dependent on a court's interpretation of the specific state laws at issue.

A. Absentee Balloting Without an Excuse

Although most states allow any qualified voter to vote by mail, some states require that the voter have one of a number of specified excuses. Plaintiffs in several of these states have brought legal challenges seeking to make absentee voting available to everyone.³¹ These claims generally assert that the right to vote, protected by either the state's constitution or the U.S. Constitution, requires that all voters have access to the ability to vote by mail, at least during the pandemic. So far, only a few of these claims have reached decisions on the merits, with mixed results.

²⁷ Reardon v. LaRose, No. 20CV-2105 (Ohio Ct. Common Pleas Mar. 16, 2020).

²⁸ Reardon v. LaRose, No. 20CV-2105 (Ohio Ct. Common Pleas Apr. 22, 2020).

²⁹ Kate Rabinowitz & Brittany Renee Mayes, *At Least 77% of American Voters Can Cast Ballots by Mail in the Fall*, Wash. Post (Aug. 14, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/>.

³⁰ *Id.*

³¹ In addition to the cases discussed below, *see, e.g.*, Complaint, Tulley v. Okeson, No. 20-cv-1271 (S.D. Ind. filed Apr. 29, 2020) (pending judgment on the merits); League of Women Voters v. Merrill, No. CV-2020-900702.00, slip op. at 2 (Ala. Cir. Ct. Aug. 5, 2020) (dismissing a complaint under state law as a nonjusticiable political question).

A recent decision from a state court in Missouri rejected such a challenge.³² The Missouri Constitution states that “[q]ualified electors of the state who are absent . . . may be enabled by general law to vote at all elections by the people.”³³ The court interpreted this language as permitting, but not requiring absentee voting, explaining that “[t]he word ‘may’ denotes discretion, not an obligation.”³⁴ Additionally, the Missouri Supreme Court had previously held that absentee voting was a “special privilege” rather than a right.³⁵ The court also reasoned that “strict compliance with the statutory requirements for absentee voting” was necessary to combat absentee voting’s “unique risks of fraud and abuse.”³⁶ The court therefore found that the Missouri Constitution did not guarantee a “constitutional right to cast an absentee ballot in any election for any reason.”³⁷ This decision, however, has been vacated, and is pending reconsideration after the Missouri state legislature passed an emergency law expanding the availability of absentee balloting.³⁸

By contrast, a Tennessee state court has interpreted the Tennessee Constitution to guarantee a universal right to vote by mail.³⁹ The court explained that voting was a fundamental right under the Tennessee Constitution.⁴⁰ And infringements on the right to vote under the Tennessee Constitution are evaluated under the Anderson-Burdick test, also used to evaluate certain infringements on the right to vote under the U.S. Constitution.⁴¹ Applying this test, the court balanced the potential costs and benefits of voting by mail.⁴² The court made extensive factual findings that COVID-19 posed a serious health risk to poll workers and voters who showed up at polling places.⁴³ The state argued that, these benefits notwithstanding, it could not hire enough election workers to process the increased number of mail-in ballots that universal absentee balloting would produce.⁴⁴ The court, however, dismissed the state’s argument, because it was based on the unsupported assumption that 100% of voters who received mail-in ballots would actually return them.⁴⁵ The court also found that the risk of voter fraud did not justify limiting absentee voting, because there were already adequate safeguards to prevent fraud, and because in-person voting was no less likely to be fraudulent.⁴⁶ Accordingly, the court held

³² NAACP v. Missouri, No. 20AC-CC00169 (Mo. Cir. Ct. May 15, 2020).

³³ Mo. Const. Art. VIII, sec. 7.

³⁴ NAACP v. Missouri, No. 20AC-CC00169, slip op. ¶ 28.

³⁵ *Id.* ¶ 29.

³⁶ *Id.* ¶ 31.

³⁷ *Id.* ¶ 32.

³⁸ NAACP v. Missouri, No. SC98536, slip op. at 9 (Mo. June 23, 2020).

³⁹ Demster v. Hargett, No. 20-435-IV(III) (Tenn. Ch. June 6, 2020).

⁴⁰ *Id.* slip op. at 7–8.

⁴¹ *Id.* at 5 n.2.

⁴² *Id.* at 25 (“Under *Anderson-Burdick*, the burdens are weighed against the State’s justifications for imposing the burden of in-person voting.”).

⁴³ *Id.* at 18–22.

⁴⁴ *Id.* at 9–10.

⁴⁵ *Id.* at 13–16.

⁴⁶ *Id.* at 17–18.

that the state was required to allow all qualified voters to vote by mail.⁴⁷ And because the court reached this result under the Anderson-Burdick test, it did not need to determine whether strict scrutiny applied to the state’s limitations on the availability of voting by mail.⁴⁸

Because the court in Tennessee applied a test taken from federal voting rights law, one might surmise that universal absentee voting would be required under the U.S. Constitution as well. However, the Fifth Circuit has rejected a claim that the 14th Amendment required Texas to implement universal no-excuse absentee balloting.⁴⁹ The Fifth Circuit declined to apply the Anderson-Burdick test, finding that the Supreme Court’s earlier decision in *McDonald v. Board of Election Commissioners* controlled instead.⁵⁰ In *McDonald*, the Supreme Court upheld a state law denying certain incarcerated individuals the ability to vote by mail.⁵¹ The Court held that this law did not implicate the right to vote because it did not “absolutely prohibit[]” the affected individuals from voting, but instead simply denied them access to one particular mechanism designed to make voting easier.⁵² Applying *McDonald*, the Fifth Circuit held that the Constitution does not require universal absentee voting.⁵³ It found that, COVID-19 notwithstanding, the plaintiffs could still vote in person, and that their right to vote had therefore not been abridged.⁵⁴ The court reviewed Texas’ vote-by-mail laws under rational basis review.⁵⁵ And reviewing the law deferentially, the court found that the state had rationally extended absentee voting only to elderly people, a group to whom COVID-19 poses a greater risk.⁵⁶

B. Fear of Contracting COVID-19 as an Excuse

Several states allow citizens to vote by mail only if they have an illness or disability that makes it difficult for them to show up at a polling place in person. For example, the Connecticut Constitution allows absentee voting for any “qualified voters . . . who are unable to appear at the polling place on the day of election . . . because of sickness, or physical disability.”⁵⁷ Similarly, Texas law makes a voter “eligible for early voting by mail if the voter has a sickness or physical condition” that prevents in-person voting.⁵⁸ Groups in various states have filed lawsuits, asking courts to interpret these

⁴⁷ *Id.* at 25–26.

⁴⁸ *Id.* at 24.

⁴⁹ *Texas Democratic Party v. Abbott*, No. 20-50407, slip op. at 16 (5th Cir. June 4, 2020).

⁵⁰ *Id.* at 18 (citing *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 803 (1969)).

⁵¹ *Id.* (citing *McDonald*, 394 U.S. at 807).

⁵² *Id.* (quoting *McDonald*, 394 U.S. at 808 n.7).

⁵³ *Id.* at 18–20.

⁵⁴ *Id.* at 19–20.

⁵⁵ *Id.* at 23.

⁵⁶ *Id.*

⁵⁷ Conn. Const. art. VI § 7.

⁵⁸ Tex. Election Code § 82.002(a).

provisions to allow almost anyone to vote by mail in light of the risk of COVID-19 exposure from in-person voting.⁵⁹ Most of these claims have failed. Most courts have held that these provisions allow absentee voting only when the voter herself actually suffers from an illness; potential vulnerability to the illness is not enough.

This issue has been most extensively litigated in Texas. In March, the Texas Democratic Party (TDP) filed a suit in state court, seeking a declaration that a lack of immunity to COVID-19 constituted a “disability” under the Texas Elections Code—and accordingly, that anyone without immunity to COVID-19 was permitted to vote by mail.⁶⁰ The Texas Elections Code defines a disability as “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.”⁶¹ The TDP argued that lack of immunity to COVID-19 met this definition. It is a “physical condition” that could easily “injur[e] the . . . health” of a voter who contracts COVID-19 by showing up at a polling place. The trial court agreed with the TDP, holding that any qualified voter who lacked immunity to COVID-19 was eligible to vote by mail.⁶² However, the Texas Attorney-General then issued an order directing election officials not to accept absentee ballots from voters whose only excuse for voting by mail is that they lacked immunity to COVID-19.⁶³ The trial court’s order was stayed pending appeal.⁶⁴ The litigants then petitioned the Texas Supreme Court for a writ of mandamus to compel election officials to permit vote by mail in accordance with the trial court’s order.⁶⁵ However, the petition was denied.

The Texas Supreme Court held that voters were not eligible to vote by mail just because they lacked immunity to COVID-19. The majority opinion reasoned that an absence of immunity to disease was not a “physical condition” under the Election Code, because it did not result in a unique “incapacity” relative to the general population.⁶⁶ However, the court also explained that voters applying for an absentee ballot did not need to explain or provide proof of their disability—they simply needed to check a box on the application indicating that they had a disability.⁶⁷ The court therefore found that state election officials had no “duty . . . to look beyond the application” or “investigate each applicant’s disability.”⁶⁸ Justice Boyd’s concurrence construed the statute slightly

⁵⁹ In addition to the cases mentioned below, *see* Complaint, Memphis A. Phillip Randolph Institute v. Hargett, No. 20-cv-374 (M.D. Tenn. May 1, 2020), which is still pending a judgment on the merits.

⁶⁰ *In re State of Texas*, No. 20-0394, slip op. at 4–5 (Tex. May 27, 2020).

⁶¹ Tex. Election Code § 82.002(a) (emphasis added).

⁶² *In re State of Texas*, slip op. at 5.

⁶³ *Id.* at 5–6.

⁶⁴ *Id.*

⁶⁵ *Id.* at 6–7.

⁶⁶ *Id.* at 21.

⁶⁷ *Id.* at 23–24.

⁶⁸ *Id.*

differently, but reached a similar result. Justice Boyd would have held that lack of immunity to COVID-19 was a “physical condition,” but not one with sufficient “likelihood” to “injur[e] . . . the voter’s health.”⁶⁹ He argued that, under the court’s precedents, the term “likelihood” required that it be “probabl[e]”—not merely “possibl[e]”—that the specified event would occur.⁷⁰ Finally, Justice Bland agreed with Justice Boyd that lack of immunity to COVID-19 could be a “physical condition” under the Election Code.⁷¹ However, Justice Bland emphasized that state law leaves it up to each voter, to determine in their individual case, whether COVID-19 was likely to injure their health.⁷²

Courts in other jurisdictions have reached similar results. In Missouri, for example, the state conference of the NAACP asked a state court to declare that Missouri law permits absentee voting for any voter who feared contracting COVID-19 at a polling place.⁷³ Missouri allows a citizen to vote by mail if she “expects to be prevented from going to the polls to vote on election day due to: . . . Incapacity or confinement due to illness or physical disability.”⁷⁴ The plaintiffs argued that voters who refused to go to the polls for fear of contracting COVID-19 were “confine[d] due to illness or physical disability.”⁷⁵ However, the court rejected this reading. The court explained that the plaintiff’s construction of the statute would allow citizens to vote by mail if they feared contracting any illness, not just COVID-19.⁷⁶ And, according to the court, such a reading would have broadened the availability of absentee voting far beyond the Missouri legislature’s expressed intent.⁷⁷ This decision, however, has since been vacated.⁷⁸ The trial court has been instructed to reconsider its decision after Missouri’s legislature passed a law expanding vote-by-mail to voters in specified at-risk groups.⁷⁹ However, because this law expressly enumerates the groups newly able to vote by mail, it is unlikely that the lower court’s decision will change.⁸⁰

Not every state has interpreted its law so narrowly. A Connecticut state court, for example, has construed its Constitution to permit absentee voting for any qualified voter concerned about the pandemic.⁸¹ The Constitution of Connecticut allows the legislature to authorize voting by mail for

⁶⁹ *Id.* at 1 (Boyd, J., concurring).

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 1 (Bland, J., concurring).

⁷² *Id.* at 8 (“[T]he plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a ‘physical condition’ will cause a ‘likelihood’ that voting in person will injure the voters’ health.”).

⁷³ NAACP v. Missouri, No. 20AC-CC00169, slip op. at 1 (Mo. Cir. Ct. May 15, 2020).

⁷⁴ Mo. Rev. Stat. § 115.277.1(2).

⁷⁵ NAACP v. Missouri, slip op. ¶ 7.

⁷⁶ *Id.* ¶ 8.

⁷⁷ *Id.* ¶¶ 9–14.

⁷⁸ NAACP v. Missouri, No. SC98536 (Mo. June 23, 2020).

⁷⁹ *Id.* at 9.

⁸⁰ *See id.*

⁸¹ Fay v. Merrill, No. HHD CV 20-6130532 (Conn. Super. Ct. July 22, 2020).

qualified voters who are “unable to appear at the polling place on the day of the election . . . because of sickness or disability.”⁸² The court found that the words “because of sickness” did not require that the voter herself suffer from the sickness.⁸³ Instead, the “existence of a raging global pandemic” was enough of an excuse.⁸⁴ The court distinguished the ruling of the Texas Supreme Court, arguing that the Texas Elections Code contained distinct language permitting absentee voting only when the voter herself would contract COVID-19.⁸⁵

C. Age Limits

Several states limit absentee voting to any qualified voter over a certain age. Plaintiffs in several states have brought lawsuits challenging these age limits. These claims assert that the age limits violate younger citizens’ right to vote, and that they discriminate on the basis of age in violation of the 26th Amendment. Most of these challenges are still awaiting decisions on the merits, and some have been resolved without any decision squarely addressing the issue of age discrimination. For example, the South Carolina legislature rendered a challenge moot by abolishing its limitations on absentee voting in light of COVID-19, allowing “all qualified voters to vote absentee ballot.”⁸⁶ And in Tennessee, a state court did not rule on a challenge to the state’s age limits in particular because it found that any special limitation on absentee voting during the pandemic violated the right to vote in the state’s constitution.⁸⁷

Only the Fifth Circuit has directly addressed an age discrimination claim on the merits.⁸⁸ In that case, the Texas Democratic Party challenged a Texas state law making absentee voting universally available only to voters over the age of 65.⁸⁹ The plaintiffs argued that the law should be subject to strict scrutiny. They pointed to the 26th Amendment, which states that the right to vote “shall not be denied or abridged . . . on account of age.”⁹⁰ The Fifth Circuit, however, found that only rational basis review applied because limits on absentee voting did not “den[y] or abridge[]’ the right to vote”⁹¹—qualified voters still had the option to show up in person at the polls.⁹² Accordingly, the Fifth Circuit declined to invalidate Texas’ age limit.

⁸² Conn. Const. art. 6, § 7.

⁸³ *Fay*, slip op. at 1–2.

⁸⁴ *Id.* at 1.

⁸⁵ *Id.* at 2.

⁸⁶ *Thomas v. Andino*, No. 3:20-cv-01552, slip op. ¶ 26 (D.S.C. May 25, 2020).

⁸⁷ *Demster v. Hargett*, No. 20-0435-I(III), slip op. at 25–26 (Tenn. Ch. June 4, 2020).

⁸⁸ *Texas Democratic Party v. Abbott*, No. 20-50407 (5th Cir. June 4, 2020).

⁸⁹ *Id.* at 25–26.

⁹⁰ U.S. Const. amend. XXVI.

⁹¹ *Id.* at 27–28.

⁹² *Id.* at 28–29.

D. Mailing Ballots to All Eligible Voters

Plaintiffs in several states have brought suits challenging failure of the state to mail ballots to all eligible voters, under various legal theories. Plaintiffs in Washington D.C., for example, alleged that the District violated the Voting Rights Act by failing to consistently and reliably mail ballots to voters in a predominantly African-American ward.⁹³ Litigants in Wisconsin have brought constitutional claims, arguing that, in light of the pandemic, election officials should be required to automatically send ballots to all eligible voters.⁹⁴ And finally, some litigants have challenged the state government's authority under state law to send out mail-in ballots in the absence of specific authorizing legislation.⁹⁵ The courts have yet to rule on the merits of these claims. Some litigants have voluntarily dismissed their case.⁹⁶ In Wisconsin, a case was dismissed for lack of subject matter jurisdiction because the plaintiffs, municipal organizations, lacked standing to bring an equal protection challenge against their own state government.⁹⁷ And in Georgia,⁹⁸ a federal district court declined to differentiate between the plaintiff's various challenges to the state's election procedures, dismissing them all as presenting a nonjusticiable political question.⁹⁹

IV. Submitting Mail-In Ballots

Where voters are allowed to submit ballots by mail, a host of challenges have been filed regarding the rules for sending them in and having them counted. Not all jurisdictions provide prepaid postage for the return of mail ballots. Plaintiffs have challenged the cost of postage as an unconstitutional poll tax and as an undue burden on the right to vote. States have differing deadlines for when mail-in ballots must be received. Plaintiffs have challenged some deadlines as burdening the right to vote. Some states have banned the collection of other voters' ballots or have failed to provide accommodations to individuals with disabilities who seek to send mail in ballots, policies that have also faced challenges by plaintiffs claiming a burden on the right to vote.

⁹³ Complaint, *Robinson v. Dist. of Columbia Bd. of Elections*, No. 2020-cv-1364 (D.D.C. May 21, 2020); *see also* *Coalition for Good Governance v. Raffensperger*, No. 20-cv-1677, slip op. at 3–4 (N.D. Ga. May 14, 2020) (dismissing a claim seeking to compel state officials to take measures to ensure that eligible voters receive absentee ballots and can use them anonymously).

⁹⁴ *See, e.g., City of Green Bay v. Bostlemann*, No. 20-C-479, slip op. at 2 (E.D. Wis. Mar. 27, 2020).

⁹⁵ Complaint, *Republican Nat'l Comm. v. Newsom*, No. 20-cv-1055 (E.D. Cal., May 24, 2020).

⁹⁶ Minute Order Granting the Plaintiff's Motion to Dismiss With Prejudice, *Robinson*, No. 2020-cv-1364 (June 30, 2020); *Republican Nat'l Comm.*, No. 20-cv-1055 (E.D. Cal. July 9, 2020).

⁹⁷ *City of Green Bay*, No. 20-C-479, slip op. at 5–6.

⁹⁸ *Coalition for Good Governance*, No. 20-cv-1677.

⁹⁹ *Id.* at 7–11.

A. Cost of Postage for Mailing Ballots

There have been numerous challenges¹⁰⁰ in multiple states¹⁰¹ to the failure of state officials to provide prepaid return envelopes for mail-in or absentee ballots or to otherwise waive the cost of postage. Plaintiffs have brought both federal and state law claims, on similar grounds.

Federal claims allege two types of constitutional violations.¹⁰² The first, and more straightforward, is that any requirement that a voter pay for postage to cast their vote or apply for a mail ballot constitutes a poll tax in violation of the 14th and 24th Amendments.¹⁰³ The 24th Amendment explicitly prohibits the implementation of poll taxes in federal elections,¹⁰⁴ and since 1966¹⁰⁵ the United States Supreme Court has interpreted the Equal Protection Clause of the 14th Amendment¹⁰⁶ also to prohibit poll taxes.

¹⁰⁰ *See, e.g.*, Complaint, Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-01489-AT (N.D. Ga. April 8, 2020) [hereinafter “Black Voters Matter Fund Complaint”]; Complaint for Injunctive and Declaratory Relief, New Ga. Project v. Raffensperger, No. 1:20-cv-01986-LMM (N.D. Ga. May 8, 2020) [hereinafter “New Ga. Project Complaint”]; Amended Complaint, League of Women Voters of Ohio v. LaRose, No. 2:20-cv-01638 (S.D. Ohio March 31, 2020); First Amended Complaint for Injunctive and Declaratory Relief, Nielsen v. DeSantis, No. 4:20-cv-00236-RH-MJF (N.D. Fla. May 20, 2020) [hereinafter “Nielsen Complaint”]; Complaint for Mandamus, League of Women Voters of Michigan v. Benson, No. 353654 (Mich. Ct. Appeals May 20, 2020); Complaint for Injunctive and Declaratory Relief, DCCC v. Zirix, No. 20-CV-00211-JED-JFJ (N.D. Okla. May 18, 2020) [hereinafter “DCCC Complaint”]; Complaint for Declaratory and Injunctive Relief, Alliance for Retired Americans v. Dunlap, No. ____ (Me. Super. Ct., Kennebec June 24, 2020) [hereinafter “Alliance for Retired Americans Complaint”]; Complaint for Injunctive and Declaratory Relief, Middleton v. Andino, No. 3:20-cv-1730-MJC (D.S.C. May 01, 2020) [hereinafter “Middleton Complaint”] (claims related to prepaid postage subsequently removed from an amended complaint after stipulated removal (Middleton v. Andino, No. 3:20-cv-01730-JMC, 2020 WL 4251401, n.1 (D.S.C. July 24, 2020))); Amended Complaint, Stringer v. North Carolina, No. 20-CVS-05615 (N.C. Super. Ct. Wake Cnty. July 8, 2020) [hereinafter “Stringer Complaint”]; Petition for Declaratory and Injunctive Relief, Crossey v. Boockvar, No. 319 M.D. 2020 (Penn. Commonw. Ct. Apr. 22, 2020).

¹⁰¹ These states include at least Florida, Georgia, Maine, Michigan, North Carolina, Ohio, Oklahoma, Pennsylvania, and South Carolina. *See id.*

¹⁰² One case, Middleton v. Andino, No. 3:20-cv-01730-JMC, 2020 WL 4251401 (D.S.C. July 24, 2020), also involved a challenge under § 2 of the Voting Rights Act (52 U.S.C. § 10301) to a series of vote by mail requirements including a requirement that voters pay to mail in ballots. The aspects of the case related to prepaid postage were subsequently removed from an amended complaint after stipulated removal. *Id.* at n.1.

¹⁰³ *See, e.g.*, Black Voters Matter Fund Complaint, *supra* note 100, at 17; Alliance for Retired Americans Complaint, *supra* note 100, at 49.

¹⁰⁴ U.S. Const. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.”).

¹⁰⁵ Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

¹⁰⁶ U.S. Const. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”)

Black Voters Matter Fund¹⁰⁷ is paradigmatic. Plaintiffs brought suit against the Georgia Secretary of State and others for, among other claims, failing to provide prepaid postage on return ballot envelopes to voters. Georgia law allows for any voter to vote absentee for any reason¹⁰⁸ after first applying for an absentee ballot via mail, fax, e-mail, or in person.¹⁰⁹ Plaintiffs asserted that the cost of stamps imposed on voters who chose to apply for absentee ballots via mail and/or then sent those ballots via mail constituted a poll tax¹¹⁰ even though there were no “statutes or regulations that require[d] government officials to charge voters postage on absentee ballots.”¹¹¹ Plaintiffs noted that other states provide prepaid postage envelopes for mail in ballots and that Georgia provides prepaid postage envelopes for other purposes.¹¹²

The Northern District of Georgia dismissed Plaintiffs’ poll tax claim in early August.¹¹³ The court granted a motion to dismiss the poll tax claims, holding that because it was possible to vote in person “stamps are not poll taxes under the Twenty-Fourth Amendment prism.”¹¹⁴ At the same time, however, the court did not dismiss claims that postage requirements impermissibly burden the right to vote (as discussed below).¹¹⁵

The holdings in other courts have been mixed. In Nielsen, Plaintiffs claimed that a Florida statute requiring voters to pay postage for mail ballots¹¹⁶ constituted a poll tax.¹¹⁷ The court summarily dismissed this claim, simply stating that “[r]equiring a voter to pay for postage to mail a registration form or ballot to a Supervisor of Elections is not unconstitutional or otherwise unlawful.”¹¹⁸ In

¹⁰⁷ Black Voters Matter Fund Complaint, supra note 100.

¹⁰⁸ O.C.G.A. § 21-2-380(b) (“An elector who votes by absentee ballot shall not be required to provide a reason in order to cast an absentee ballot . . .”).

¹⁰⁹ O.C.G.A. § 21-2-381(a)(1)(A) (“[A]ny absentee elector may make, either by mail, by facsimile transmission, by electronic transmission, or in person in the registrar’s or absentee ballot clerk’s office, an application for an official ballot . . .”).

¹¹⁰ Black Voters Matter Fund Complaint, supra note 100, at 17.

¹¹¹ *Id.* at 11.

¹¹² *Id.*

¹¹³ Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-01489, 2020 WL 4597053 (N.D. Ga. Aug. 11, 2020).

¹¹⁴ *Id.* at *27. The court held open the possibility that this determination could be revisited if “circumstances surrounding methods of voting radically change.” *Id.* at n.24. In the course of its analysis the court looked to another recent case, League of Women Voters of Ohio v. LaRose, No. 2:20-cv-1638 (S.D. Ohio Apr. 3, 2020), which seemed to briefly analyze a poll tax claim under the *Anderson* test. The *Black Voters Matter Fund* court did not find the case persuasive and instead employed the stricter analysis of *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). *Black Voters Matter Fund*, 2020 WL 45977053, at *23.

¹¹⁵ *Black Voters Matter Fund*, 2020 WL 45977053, at *35.

¹¹⁶ Fla. Stat. § 101.65(9) (requiring that instructions be included with vote by mail ballots which include the instruction to “[b]e sure that there is sufficient postage if mailed”)

¹¹⁷ Nielsen Complaint, supra note 100, at 67–68.

¹¹⁸ Order Dismissing the Nielsen and Williams Complaints in Part, at 11, Nielsen v. DeSantis, No. 40:20-cv-00236-RH-MJF (N.D. Fla. Filed June 30, 2020).

contrast, the court in *Lewis v. Hughes*¹¹⁹ declined to dismiss Plaintiff’s claim that a Texas law¹²⁰ that requires voters to pay for postage for mail-in ballots is a poll tax in violation of the 14th and 24th Amendments. The court held that it was sufficient at the motion to dismiss stage for Plaintiffs to have alleged that postage constituted a fee that must be paid if voters wished to avoid risking “harming their health to vote in person” in order to vote.¹²¹ Finally, some cases have simply not yet proceeded to any sort of determination as to the merits or the validity of similar claims.¹²²

The second set of federally based claims challenging requirements that voters pay for stamps in order to vote assert that such a requirement is an impermissible burden under the Anderson-Burdick test.¹²³ Cases in this bucket are also substantially similar. Plaintiffs often include voters at particular risk of harm from COVID-19 who are therefore most reliant on the ability to vote by mail.¹²⁴ The particular burdens alleged are numerous and exacerbated by the public-health and economic difficulties presented by COVID-19. For example, plaintiffs in *Black Voters Matter Fund* alleged that a failure to provide prepaid postage for return ballots imposed burdens on the right to vote by requiring a payment by those least able to afford stamps,¹²⁵ by requiring those who lack internet access or credit cards to risk their safety by going to the post office during a pandemic,¹²⁶ by requiring those who have no means to do so to travel to the post office, and by requiring voters unsure of how much their ballots weigh to use extra postage so that their votes can be counted.¹²⁷ Plaintiffs assert that government interests at issue are insufficient to justify these burdens.

In *DCCC v. Zirioux*, Plaintiffs assert a “heavy” burden falling “more severely on low-income voters” for which the “only plausible [s]tate interest” is “a lack of administrative resources” which

¹¹⁹ *Lewis v. Hughes*, No. 5:20-cv-00577-OLG, 2020 WL 434432 (W.D. Tex. July 28, 2020).

¹²⁰ Tex. Elec. Code § 86.002(e) (“If the clerk determines that the carrier envelope and other balloting materials will weigh more than one ounce when returned by mail to the clerk, the clerk shall include with the balloting materials a notice of the amount of first class postage that will be required for the return by mail of the carrier envelope and enclosed materials.”).

¹²¹ *Lewis*, 2020 WL 434432, at *16.

¹²² *See, e.g.*, *DCCC Complaint*, supra note 100.

¹²³ These claims are often brought together with the previous set. *See, e.g.*, *Black Voters Matter Fund Complaint*, supra note 100; *New Ga. Project Complaint*, supra note 100; *Middleton Complaint*, supra note 100 (claims related to prepaid postage subsequently removed from an amended complaint after stipulated removal (*Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 4251401, n.1 (D.S.C. July 24, 2020))); *Lewis v. Hughes*, No. 5:20-cv-00577-OLG, 2020 WL 434432 (W.D. Tex. July 28, 2020).

¹²⁴ *See, e.g.*, *Alliance for Retired Americans Complaint*, supra note 100, at 5-8.

¹²⁵ *See also* *Alliance for Retired Americans Complaint*, supra note 100, at 25–26; *Complaint for Declaratory and Injunctive Relief* at 25, *Lewis v. Hughes*, No. 5:20-cv-00577 (W. D. Tex. May 11, 2020) [hereinafter “*Lewis Complaint*”]; *New Ga. Project Complaint*, supra note 100, at 30; *DCCC Complaint*, supra note 100, at 22.

¹²⁶ *See also* *Alliance for Retired Americans Complaint*, supra note 100, at 25–26; *Lewis Complaint*, supra note 125, at 25; *New Ga. Project Complaint*, supra note 100, at 30; *DCCC Complaint*, supra note 100, at 22.

¹²⁷ *Black Voters Matter Fund Complaint*, supra note 100, at 12. *See also* *Alliance for Retired Americans Complaint*, supra note 100, at 25–26; *Lewis Complaint*, supra note 125, at 25; *New Ga. Project Complaint*, supra note 100, at 30.

“cannot outweigh” the heavy burden on voters.¹²⁸ Plaintiffs in *Lewis v. Hughes* assert a “severe” burden on the right to vote for which the government “can offer no justification that outweighs the significance of the burden.”¹²⁹ Plaintiffs in *Black Voters Matter Fund* took a different approach, claiming that the stamp requirement is “at least a ‘slight’ burden on all voters (and a severe one for some voters)” but that the government has “no legitimate interest in forcing voters to pay for postage because wealth has nothing to do with a voter’s qualifications.”¹³⁰ Plaintiffs pointed as well to Georgia requirements to provide prepaid postage in other circumstances as evidence that the administrative cost to the state would be “minimal” in doing so for mail-in ballots.¹³¹ Plaintiffs in *The New Georgia Project* point to the ability of other state and county governments, as well as the federal government, to provide prepaid postage on absentee ballots in addition to funding provided by Congress for elections during COVID-19 as further evidence that a budgetary justification is insufficient.¹³² Plaintiffs in several of these cases point to an increase in voter turnout in King County, Washington caused by the provision of prepaid postage on return envelopes to buttress their claims that failing to provide postage burdens the right to vote.¹³³

Results in these cases have thus far been mixed. As previously stated, the court in *Nielsen* dismissed all claims related to payment for postage without much discussion.¹³⁴ Other courts, such as in *Lewis*¹³⁵ and *Black Voters Matter Fund*,¹³⁶ have allowed claims to proceed beyond the motion to dismiss stage. At the same time, the *Black Voters Matter Fund* court denied a preliminary injunction due to plaintiffs’ failure to demonstrate a substantial likelihood of success on the *Anderson-Burdick* balancing test.¹³⁷ Other cases have yet to proceed even this far.¹³⁸

In addition to claims based in federal constitutional law, Plaintiffs in some states have brought claims based in state statutory or constitutional law which have followed largely the same trajectory. For example, plaintiffs in *Stringer v. North Carolina* brought claims based in part on a failure to provide prepaid postage under multiple provisions of the North Carolina Constitution.¹³⁹ The first

¹²⁸ DCCC Complaint, supra note 100, at 31.

¹²⁹ *Lewis* Complaint, supra note 125, at 36.

¹³⁰ *Black Voters Matter Fund* Complaint, supra note 100, at 18.

¹³¹ *Id.* at 19.

¹³² *New Ga. Project* Complaint, supra note 100, at 44–45. *See also* *Nielsen* Complaint, supra note 100, at 53–54.

¹³³ *See, e.g.*, *Lewis* Complaint, supra note 125, at 26–27; *New Ga. Project* Complaint, supra note 100, at 45–46; *Nielsen* Complaint, supra note 100, at 54; DCCC Complaint, supra note 100, at 23.

¹³⁴ Order Dismissing the *Nielsen* and *Williams* Complaints in Part at 11, *Nielsen v. DeSantis*, No. 40:20-cv-00236-RH-MJF (N.D. Fla. June 30, 2020).

¹³⁵ *Lewis v. Hughes*, No. 5:20-cv-00577-OLG, 2020 WL 434432, at *12 (W.D. Tex. July 28, 2020).

¹³⁶ *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489, 2020 WL 4597053, at *35 (N.D. Ga. Aug. 11, 2020).

¹³⁷ *Id.*

¹³⁸ *See, e.g.*, *Alliance for Retired Americans* Complaint, supra note 100; DCCC Complaint, supra note 100.

¹³⁹ *Stringer* Complaint, supra note 100. These provisions included N.C. Const. art. I, §§ 10, 12, 14, & 19.

claim¹⁴⁰ stated that multiple burdens on the right to vote, including a requirement to purchase postage for mail ballots, violate the Free Elections Clause of the North Carolina Constitution which states that “[a]ll elections ought to be free.”¹⁴¹ The second claim¹⁴² also alleged a burden on the right to vote under other North Carolina Constitutional provisions.¹⁴³ Analysis of burdens follows the federal cases in claiming monetary and transactional costs.¹⁴⁴ The case has not progressed significantly.

B. Ballot Receipt Deadlines

Challenges under federal law to mail ballot deadlines¹⁴⁵ have proceeded along four main grounds, three under the U.S. Constitution and one under the Voting Rights Act.¹⁴⁶ Constitutional challenges often appear together in the same case. Two of the more common claims appear in New Georgia Project.¹⁴⁷ In that case, plaintiffs alleged that Georgia’s Election Day receipt deadline (i) fails the Anderson-Burdick test as an undue burden on the right to vote and thus violates the First and Fourteenth Amendment, and (ii) further violates the Fourteenth Amendment through denial of procedural due process.¹⁴⁸

For the undue burden claim under Anderson-Burdick, Plaintiffs argued that the Election Day receipt deadline posed a severe burden on the right to vote by requiring voters to learn of the deadline,

¹⁴⁰ *Id.* at 29–32.

¹⁴¹ N.C. Const. art. I, § 10.

¹⁴² Stringer Complaint, *supra* note 100, at 32–34.

¹⁴³ N.C. Const. art. I, §§ 12, 14, & 19.

¹⁴⁴ Stringer Complaint, *supra* note 100, at 29.

¹⁴⁵ See, e.g., S.C. Code Ann. § 7-17-230 (“No ballot shall be counted...which is received by the board of voter registration and elections or other officials charged with the conduct of the election after time for closing of the polls...”); M.R.S. tit. 21-A, § 755 (“In order to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls are closed.”); Okla. Admin. Code § 230:30-11-5(a) (“Regular mail absentee ballots must be received by the Secretary of the County Election Board no later than 7 p.m. on the day of the election.”); Fla. Stat. § 101.67(2) (“[With some exceptions,] all marked absent elector’s ballots to be counted must be received by the supervisor by 7 p.m. the day of the election.”); O.C.G.A. § 21-2-386(a)(1)(F) (“All absentee ballots returned to the board or absentee ballot clerk after the closing of the polls on the day of the primary or election shall be safely kept unopened by the board or absentee ballot clerk and then transferred to the appropriate clerk for storage for the period of time required for the preservation of ballots used at the primary or election and shall then, without being opened, be destroyed in like manner as the used ballots”); Tex. Elec. Code § 86.007 (“[With some exceptions,] a marked ballot voted by mail must arrive at the address on the carrier envelope: (1) before the time the polls are required to close on election day; or (2) not later than 5 p.m. on the day after election day, if the carrier envelope was placed for delivery by mail or common or contract carrier before election day and bears a cancellation mark of a common or contract carrier or a courier indicating a time not later than 7 p.m. at the location of the election on election day.”).

¹⁴⁶ See, e.g., New Ga. Project Complaint, *supra* note 100; Nielsen Complaint, *supra* note 100; DCCC Complaint, *supra* note 100; Alliance for Retired Americans Complaint, *supra* note 100; Middleton Complaint, *supra* note 100; Lewis Complaint, *supra* note 100.

¹⁴⁷ New Ga. Project Complaint, *supra* note 100.

¹⁴⁸ *Id.* at 48–58.

actually receive their ballot with enough time to mail it in to arrive prior to the deadline, and guess when their ballots needed to be mailed in order to satisfy the deadline.¹⁴⁹ Those who failed to do so would be disenfranchised.¹⁵⁰ Plaintiffs further argued that even those voters who were able to satisfy the deadline suffered a severely burdened right to vote by being deprived of the ability to consider their choice of candidate until the actual election day since they would need to vote early to meet the deadline.¹⁵¹

In addition, Plaintiffs argued that Georgia's absentee voting procedures, including the receipt deadline, violate the Due Process Clause under the Mathews test.¹⁵² The relevant interests at stake are “the right to vote and have that vote count” and to “cast a meaningful and informed vote” which rights are deprived by failure to count ballots received after Election Day and by requiring voters to cast their vote early.¹⁵³ Plaintiffs argued that the receipt deadline was not “reliable [or] fair” because voters might not be sent their ballots with sufficient time to mail them in for receipt by the deadline and because voters would be forced to mail their ballots early and therefore vote with “incomplete information.”¹⁵⁴ Finally, Plaintiffs argued that additional or substitute procedural safeguards were available in the form of counting votes mail in votes postmarked by election day and received within five business days of the election, which would be allowed under Georgia law.¹⁵⁵

The deadline for the receipt of absentee ballots in the Wisconsin state primary election was challenged on similar grounds.¹⁵⁶ Originally, Wisconsin would only count absentee ballots if they were received by the day of the election.¹⁵⁷ During litigation, Wisconsin agreed to count any ballots postmarked by Election Day, and received by the date on which the election results would have to be certified.¹⁵⁸ The district court issued a preliminary injunction that went even further. The increased demand for absentee ballots had created “a backlog of over 21,000 absentee ballot applications.”¹⁵⁹ To ensure that all voters had time to submit their ballots, the district court ordered the state to accept all

¹⁴⁹ *Id.* at 51–52. *See also* Lewis Complaint, *supra* note 105, at 36; Nielsen Complaint, *supra* note 100, at 59–60; Alliance for Retired Americans Complaint, *supra* note 100, at 41.

¹⁵⁰ New Ga. Project Complaint, *supra* note 100, at 52. *See also* DCC Complaint, at 31; Nielsen Complaint at 59–60

¹⁵¹ New Ga. Project Complaint, *supra* note 100, at 52; *See also* Nielsen Complaint, *supra* note 100, at 59–60.

¹⁵² New Ga. Project Complaint, *supra* note 100, at 54–59. *See also* Nielsen Complaint, *supra* note 100, at 62–66; DCCC Complaint, *supra* note 100, at 33–35.

¹⁵³ New Ga. Project Complaint, *supra* note 100, at 56–57. *See also* Nielsen Complaint, *supra* note 100, at 62–66; DCCC Complaint, *supra* note 100, at 33–35.

¹⁵⁴ New Ga. Project Complaint, *supra* note 100, at 57. *See also* Nielsen Complaint, *supra* note 100, at 62–66; DCCC Complaint, *supra* note 100, at 33–35.

¹⁵⁵ New Ga. Project Complaint, *supra* note 100, at 57–59. *See also* Nielsen Complaint, *supra* note 100, at 62–66; DCCC Complaint, *supra* note 100, at 33–35.

¹⁵⁶ *Democrat Nat'l Comm. v. Bostlemann*, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020).

¹⁵⁷ *Id.* at *2.

¹⁵⁸ *Id.* at *16

¹⁵⁹ *Id.* at *17.

ballots postmarked within six days of the election.¹⁶⁰ However, this order was appealed to the Supreme Court.¹⁶¹ The Court held that the district court’s order was issued too close to the election, and was therefore likely to cause confusion among the voters and also that it offered a form of relief which Plaintiffs had not asked for.¹⁶² Accordingly, the Court stayed the order to the extent that it required Wisconsin election officials to accept ballots postmarked after Election Day.¹⁶³

Plaintiffs in other cases have argued that election receipt deadlines violate a third constitutional provision, the Equal Protection Clause of the Fourteenth Amendment. For example, Plaintiffs in Lewis argued that the Texas receipt deadline provided for the disparate treatment of voters because different counties enforce the deadline with differing degrees of strictness.¹⁶⁴

These cases have not yet proceeded very far. The court in New Georgia Project was scheduled to hold a hearing on a preliminary injunction on August 19th.¹⁶⁵ An opinion dealing with a motion for a judgment on the pleadings in Middleton did not address the constitutional issues involved in the receipt deadline but denied Defendants’ motion.¹⁶⁶ Applying the Anderson-Burdick test to both Plaintiff’s undue burden and disparate treatment claims, the court in Lewis allowed both claims to proceed beyond a motion to dismiss.¹⁶⁷

In addition to claims under federal constitutional law, plaintiffs have challenged ballot receipt deadlines under Section 2 of the Voting Rights Act for vote denial. For example, Plaintiffs in Middleton assert that under the totality of the circumstances for Section 2 claims, provision of South Carolina law including a ballot receipt deadline “abridge and in some cases entirely deny the rights of African American voters,” due in part to socioeconomic differences between racial groups in South Carolina which exacerbate the effects of the COVID-19 pandemic.¹⁶⁸ In July, the court allowed this claim to proceed beyond Defendants’ motion to dismiss.¹⁶⁹

Challenges to ballot receipt deadlines often focus on particular events that require a deadline-extension under a given set of circumstances. For example, after actions by Arkansas’

¹⁶⁰ *Id.* at *17–18.

¹⁶¹ Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205 (2020).

¹⁶² *Id.* at 1207–08.

¹⁶³ *Id.* at 1208.

¹⁶⁴ Lewis Complaint, *supra* note 125, at 38–39.

¹⁶⁵ Order Setting Hearing on Motion 57 Motion for Preliminary Injunction, New Ga. Project v. Raffensperger, No. 1:20-cv-01986-LMM (N.D. Ga. May 8, 2020).

¹⁶⁶ Middleton v. Andino, No. 3:20-cv-01730-JMC, 2020 WL 4251401 (D.S.C. July 24, 2020).

¹⁶⁷ Lewis v. Hughes, No. 5:20-cv-00577-OLG, 2020 WL 434432, at *13–15 (W.D. Tex. July 28, 2020)

¹⁶⁸ Middleton Complaint, *supra* note 100, at 37–39. *See also* Complaint, Mays v. Thurston, No. 4:20-cv-341-JM (E.D. Ark. March 26, 2020).

¹⁶⁹ *Middleton*, 2020 WL 4251401, at *6–7.

governor and secretary of state to extend the application deadline for absentee ballots to the day before the primary due to COVID-19, a group of plaintiffs brought a challenge to the failure to extend the receipt deadline as well because voters would not have time to request a ballot on the final day and still get it in on time.¹⁷⁰ They challenged this inaction along the procedural due process and undue burden analyses discussed above, as well as under Section 2 of the Voting Rights Act.¹⁷¹ The case was dismissed for lack of standing after the court found no injury, reasoning that the state's actions had made it easier to vote than usual and that traditional avenues of voting were still available.¹⁷²

In two somewhat different cases, county boards of elections in Pennsylvania petitioned the courts to allow them to extend their own receipt deadlines. In one instance the sheer volume of mail in ballots which had to be sent to voters necessitated sending some ballots sufficiently late such that they would not be able to be returned on time.¹⁷³ In the other, a technology failure resulted in the removal of apartment numbers from hundreds of addresses, preventing mail in ballots from reaching those apartments with sufficient time to be returned by the receipt deadline.¹⁷⁴ The first petition was granted while the second was denied.¹⁷⁵

Finally, some plaintiffs have brought claims under state law challenging ballot receipt deadlines that mirror federal undue burden claims. Plaintiffs in *Stringer*, discussed previously, asserted the election receipt deadline burdened the right to vote in violation of the North Carolina Constitution.¹⁷⁶ Plaintiffs in *Alliance for Retired Americans* challenged Maine's ballot receipt deadline as an undue burden both under the federal constitution and the Maine constitution.¹⁷⁷ Plaintiffs in *League of Women Voters of Michigan* successfully petitioned the Michigan Court of Appeals for a writ of

¹⁷⁰ Complaint, *Mays v. Thurston*, No. 4:20-cv-341-JM (E.D. Ark. March 26, 2020).

¹⁷¹ *Id.* at 14-17.

¹⁷² Order, at 3, *Mays v. Thurston*, No. 4:20-cv-341-JM (E.D. Ark. March 26, 2020).

¹⁷³ Emergency Petition of the Bucks County Board of Elections Requesting an Extension of Time to Accept and Tabulate Absentee and Mail-In Ballots from the Qualified Registered Electors of Bucks County Postmarked and Mailed by June 1, 2020 and Received by the Bucks County Board of Elections by a Deadline to be Set at or Before Tuesday, June 9, 2020 at 5:00 p.m., In re: Extension of Time for Absentee and Mail-In Ballots to be Received and Counted in the 2020 Primary Election, No. 202002322-37 (Penn. Ct. Common Pleas, Bucks Cnty. May 26, 2020).

¹⁷⁴ Emergency Petition of the Montgomery County Board of Elections Requesting an Extension of Time to Accept Voted Absentee and Mail-In Ballots from the Qualified Registered Electors of Montgomery County Received by the Montgomery County Board of Elections Between Tuesday June 2, 2020 After 8:00 p.m. and Tuesday June 9, 2020 at 5:00 p.m., In re: Extension of Time for Absentee and Mail-In Ballots to be Received and Counted in the 2020 Primary Election, No. 2020-06413 (Penn. Ct. Common Pleas, Montgomery Cnty. May 26, 2020).

¹⁷⁵ Order, In re: Extension of Time for Absentee and Mail-In Ballots to be Received and Counted in the 2020 Primary Election, No. 202002322-37 (Penn. Ct. Common Pleas, Bucks Cnty. May 27, 2020); Order, In re: Extension of Time for Absentee and Mail-In Ballots to be Received and Counted in the 2020 Primary Election, No. 2020-06413 (Penn. Ct. Common Pleas, Montgomery Cnty. June 2, 2020).

¹⁷⁶ *Stringer* Complaint, *supra* note 100, at 32-34.

¹⁷⁷ *Alliance for Retired Americans* Complaint, *supra* note 100, at 37-43.

mandamus ordering the secretary of state to accept ballots postmarked by the election date, bringing claims under the Michigan constitution.¹⁷⁸

C. Ban on Absentee Voter Assistance

To varying degrees, several states have laws restricting the ability of third parties to assist voters in returning absentee ballots either via mail or in person to elections officials. Notable features of such laws include, but are not limited to: restricting the universe of individuals from which absentee voters can seek assistance to narrow categories of closely related individuals,¹⁷⁹ criminalizing the acceptance of compensation for helping with the return of an absentee ballot,¹⁸⁰ restricting the number of ballots that an individual eligible to assist absentee voters can collect,¹⁸¹ and narrowing the circumstances in which an absentee voter can seek assistance.¹⁸²

Regardless of the precise content of the absentee assistance limitations, plaintiffs across jurisdictions allege two primary federal constitutional violations. On occasion, plaintiffs have brought a federal statutory claim under § 208 of the Voting Rights Act (“VRA”). Many of these claims remain live and their resolutions appear uncertain.

The first federal constitutional claim asserts that state limits on third-party absentee voting assistance, both individually and when combined with other restrictions on mail voting, constitute an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments of the U.S. Constitution. Teeing up the Anderson-Burdick analysis for assessing such claims, plaintiffs

¹⁷⁸ Complaint for Mandamus, *League of Women Voters of Michigan v. Benson*, No. 353654 (Mich. Ct. App. May 22, 2020); Order, *League of Women Voters of Michigan v. Benson*, No. 353654 (Mich. Ct. App. June 3, 2020). *See also* Verified Complaint for Declaratory and Injunctive Relief, *Michigan Alliance for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Claims June 2, 2020).

¹⁷⁹ *See, e.g.*, Ga. Code Ann. § 21-2-385(a) (2018) (allowing voters to seek assistance only from a limited set of family members, a household member, a caregiver, or detention center employee); Mich. Comp. Laws § 168.932(f) (2019) (allowing only election and postal workers and members of a voter’s household or immediate family to handle or return an absentee ballot on a voter’s behalf); Mont. Code Ann. § 13-35-703(2) (2019) (making it unlawful for a person to collect a voter’s absentee ballot unless the person is an election official, a postal worker, the voter’s family member, household member, or caregiver, or an “acquaintance” of the voter).

¹⁸⁰ *See, e.g.*, Me. Rev. Stat. Ann. tit. 21-A, § 791(2)(A) (2019) (establishing the acceptance of compensation to help voters return absentee ballots a Class D crime punishable by up to a year of imprisonment and a \$2,000 fine).

¹⁸¹ *See, e.g.*, Mont. Code Ann. § 13-35-703(3) (limiting authorized individuals to collect and convey no more than six ballots).

¹⁸² *See, e.g.*, Okla. Admin. Code §§ 230:30-9-6(g), 230:30-11-1.1(a)–(c) (2020) (prohibiting organizations from collecting absentee ballots except in the case of physically incapacitated or emergency incapacitated voters); 25 Pa. Stat. and Cons. Stat. Ann. § 3146.6a (limiting absentee ballot assistance to voters who, due to illness or physical disability, are unable to attend a polling place or operate a voting machine); Tex. Elec. Code § 86.006 (2019) (making it an offense for third parties to assist voters in mailing their mail-in ballots except in narrow circumstances, such as when the third party is closely related to the voter or lives with the voter, or if the voter is disabled).

emphasize the inherent challenges posed to in-person voting during the COVID-19 pandemic and the dramatic spike in absentee voting that is expected to occur in the November general election. Consequently, many voters who intend to vote by mail for the first time will likely require assistance, the denial of which will disproportionately impact and disenfranchise the most vulnerable groups of voters (for example, those with limited access to the postal service, such as the disabled, the elderly, and the poor). Plaintiffs largely dismiss the state’s purported interest in limiting instances of voter fraud and fraudulent ballot harvesting.¹⁸³ Plaintiffs also contend that the limits on absentee assistance are unnecessarily duplicative of other laws that more directly criminalize fraud in the voting process.

The second federal constitutional claim contends that state restrictions on absentee voting assistance infringe on civic and political organizations’ constitutionally protected speech and associational rights, in violation of the First and Fourteenth Amendments. These claims center around the classification of voter outreach and ballot collection activity as “core political speech” and protected expressive conduct that receives First Amendment protection.¹⁸⁴ Restrictions on absentee voter assistance allegedly inhibit civic organizations’ ability to facilitate conversations about the importance of voting and to organize, encourage, and protect the right to vote. Plaintiffs assert that the laws at issue in various states constitute overbroad restrictions on political speech and political organizing that are not sufficiently tailored to advance a compelling state interest.

In addition, some plaintiffs allege that some state restrictions on third-party absentee assistance violate Section 208 of the VRA or conflict with that provision in contravention of the federal Supremacy Clause. Section 208 of the VRA establishes that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.”¹⁸⁵ In Michigan and South Carolina, plaintiffs asserted this claim because the restrictions at issue purportedly prevent voters protected by Section 208 from receiving assistance from the person of their choice, as is required by the VRA.¹⁸⁶

¹⁸³ Notably, in North Carolina, where a 2018 congressional race was marred by a fraudulent scheme involving absentee ballots, Plaintiffs claim that the state’s recently enacted rules that restrict assistance to voters who seek *applications* for absentee ballots are not appropriately tailored to the state’s interest in preventing fraud. Complaint at 11–12, *Advance N.C. v. North Carolina*, No. 20CV-02965 (N.C. Super. Ct. Mar. 4, 2020).

¹⁸⁴ *See, e.g.*, New Ga. Project Complaint, *supra* note 100, at 62 (“Voter turnout efforts, including assisting voters with the submission of absentee ballots . . . is the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” (internal quotation marks omitted) (citing *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)).

¹⁸⁵ 52 U.S.C. § 10508.

¹⁸⁶ *See* Verified Complaint for Declaratory and Injunctive Relief at 36–37, *Mich. Alliance for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Claims June 2, 2020) (alleging that Michigan’s law establishing a state mandated list of permissible assisters consisting only of election workers and members of their immediate family or household conflicts with VRA § 208); Middleton Complaint, *supra* note 100, at 41–44, (claiming that South Carolina’s law, which makes it a crime for any candidate or a member of a candidate’s paid campaign staff to return a voter’s absentee ballot is preempted by § 208 of the VRA).

D. Failure to Provide Accommodations for Voters with Disabilities

Plaintiffs have challenged the accessibility of various states' mail voting procedures, alleging that voters with disabilities face unnecessary obstacles to exercise their right to vote on equal footing with other voters during COVID-19.¹⁸⁷ Generally speaking, plaintiffs in these cases comprise visually or manually impaired individuals, as well as organizations representing such voters, whose physical conditions prevent them from transmitting, marking, and/or returning mail in ballots in accordance with the relevant state's procedures.

In most states, the process of voting by mail entails filling out a paper ballot by hand and subsequently placing the completed ballot in the mail, with procedural particularities varying across states. While existing mail voting processes may allow non-disabled individuals to vote secretly and independently, visually or manually disabled individuals are likely to need assistance to read and mark their paper absentee ballots, thus stripping their ballot of the secrecy that non-disabled voters enjoy. Thus, plaintiffs describe their dilemma as having to make the “unconscionable choice of either leaving their homes in order to receive in-person assistance with voting at the closest polling place—thereby facing the threat of severe illness or death—or staying home and foregoing the right to vote privately and independently (if third-party assistance is available), or the right to vote entirely (if it is not).”¹⁸⁸

In most instances, these claims have been brought in federal court, asserting violations of Title II of the Americans with Disabilities Act (“ADA”)¹⁸⁹ or Section 504 of the Rehabilitation Act.¹⁹⁰ Both claims center on states' failure to provide reasonable accommodations to disabled voters in the provision of public services¹⁹¹ and federally funded programs.¹⁹² Plaintiffs assert the existence of a variety of logistically and financially feasible accommodations that would allow disabled voters to request, receive, fill out, and even return their absentee ballots electronically. For instance, Maryland

¹⁸⁷ See, e.g., First Amended Complaint, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-00457 (M.D.N.C. June 5, 2020); Complaint, *Frye v. Gardner*, No. 1:20-cv-00751 (D.N.H. July 7, 2020); Complaint, *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-04003 (S.D.N.Y. May 22, 2020).

¹⁸⁸ Complaint for Declaratory and Injunctive Relief at 36, *Merrill v. Dunlap*, No. 1:20-cv-00248-JAW (D. Me. July 15, 2020); see also Complaint at 23, *Drenth v. Boockvar*, No. 1:20-cv-00829-JPW (M.D. Pa. May 21, 2020) (describing the issue using identical language); Complaint at 24, *Frye v. Gardner*, No. 1:20-cv-00751 (D.N.H. July 7, 2020) (same).

¹⁸⁹ 42 U.S.C. §§ 12131, et seq.

¹⁹⁰ 29 U.S.C. § 794.

¹⁹¹ Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

¹⁹² Section 504 of the Rehabilitation Act establishes that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .” 29 U.S.C. § 794(a).

has designed, implemented, and made freely available to other states its own ballot marking system that disabled voters in Maryland have used with success in previous elections.¹⁹³ Maryland’s tool allows a disabled voter to receive and complete an online ballot, which the voter must subsequently print out and submit. For blind or deaf-blind voters, electronic ballots permit the use of text-to-speech or braille translation software that obviate the need for assistance. Another frequently suggested possibility involves extending to blind voters electronic ballot delivery systems that have been created in certain states to satisfy obligations under the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).¹⁹⁴ While states implement their UOCAVA responsibilities differently, some states permit voters to deliver completed ballots via email or fax. Michigan, a state confronted with this inaccessible absentee ballot issue, voluntarily entered into a consent decree to make its UOCAVA PDF ballots available to blind voters in Michigan for its May primary election.¹⁹⁵ Although Michigan does not currently permit the electronic transmission of completed ballots, disabled voters nevertheless benefit from the increased technological accessibility of electronic ballots.

V. Verifying Mail-In Ballots

Once voters receive their absentee or mail-in ballots, most states require them to verify that they are who they say they are, and that the intended voter—and no one else—voted using that absentee ballot. States attempt to verify the identity of the absentee voter in three ways: either by imposing a witness or notary requirement, which often requires a third party to watch the voter fill out the ballot and sign the back, affirming that the voter herself did so; imposing an ID requirement, which mandates that the voter return the ballot with a photocopy of a valid photo ID enclosed; or by imposing a signature requirement, which requires that the voter sign the back of ballot envelope as proof that they voted. In lieu of these requirements, many states simply ask voters to list a driver’s license number or the last four digits of their social security number as verification. States argue that these requirements are necessary to ensure against voter fraud when the voters themselves aren’t able to be verified by poll workers. Plaintiffs respond that such requirements do little to deter anyone staunchly committed to voting fraudulently (to the extent such voters exist), and that, especially in light of COVID-19, such policies mandate that voters risk defying stay-at-home orders, or risk

¹⁹³ See Complaint at 13, *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-04003 (S.D.N.Y. May 22, 2020) (describing Maryland’s ballot marking tool).

¹⁹⁴ Under UOCAVA, states are required to send absentee ballots to active members of the military and other categories of designated voters who reside outside of the United States at least 45 days before federal elections. 52 U.S.C. § 20301 et seq. Some states, such as New York, Manie, Michigan, and Pennsylvania have implemented e-mail or electronic ballot delivery systems pursuant to these UOCAVA obligations.

¹⁹⁵ Stipulated and Consent Order Resolving Plaintiffs’ Motion for Temporary Restraining Order, *Powell v. Benson*, Case No. 2:20-Cv-11023-GAD-MJH (E.D. Mich. May 1, 2020).

contracting the virus, in order to cast a ballot. While few of these cases have yet been decided, courts seem split on the issue, and their reasoning often depends on the strength of the state’s argument that these requirements actually deter voter fraud.

A. Witness and Notary Requirements

Only twelve states in the country require an absentee ballot to be witnessed or notarized in order to be counted: Alabama, Alaska, Louisiana, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, Virginia, and Wisconsin.¹⁹⁶ In prior elections before the COVID-19 pandemic, some states required absentee ballots to be signed by a single witness,¹⁹⁷ and others by two witnesses or a notary.¹⁹⁸ Some states have required absentee ballots to be notarized in most instances, but not all.¹⁹⁹ Still others have required a witness or a notary, but the witness must be a registered voter, a difficult requirement to meet when living temporarily in another state.²⁰⁰ There have been recent lawsuits challenging the witness or notary requirements in all but two of these states. Only Alaska and Mississippi have yet to receive a direct challenge to their witness and notary requirements, though both are defending pandemic voting rights lawsuits on other grounds.

A few of these states have voluntarily relaxed or waived witness or notary requirements in the face of legal challenges. In Missouri, where absentee ballots must in ordinary times be notarized, this requirement has been waived for those who choose to vote absentee because they are at a heightened risk of contracting COVID-19.²⁰¹ This relaxed notary requirement comes on the heels of a lawsuit challenging the state’s limiting interpretation of the excuse requirement.²⁰²

Other states have agreed (either on their own volition or upon pressure from voting rights groups) to relax or waive these requirements, only to invite pushback from the Republican party and campaigns. Virginia, for example, has reached an agreement with civil rights plaintiffs to waive its witness requirement through the November election, but the agreement has yet to be approved by a

¹⁹⁶ While these are the only states that have witness or notary requirements for the ballot itself, some states have retained similar requirements for absentee ballot applications, and are facing challenges. *See, e.g.*, Complaint, Collins v. Adams, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020) (challenging a Kentucky requirement for the November election that voters requesting absentee ballots because of a medical emergency must have those ballot applications notarized, even though they waived this requirement for the June primary).

¹⁹⁷ *See* S.C. Code Ann. § 7-15-210.

¹⁹⁸ *See* Ala. Code § 17-11-49.

¹⁹⁹ *See* Mo. Ann. Stat. § 115.283 (exempting those who select “incapacity or confinement due to illness or disability” as an excuse from the notary requirement).

²⁰⁰ *See* Minn. Stat. § 8210.0500.

²⁰¹ *See* Summer Ballentine, New Missouri Law Expands Absentee Voting During the Pandemic, AP News (June 4, 2020), <https://apnews.com/23413271a5178474385d36fd961931f5>.

²⁰² Complaint, Mo. NAACP v. Missouri, No. SC98536 (Mo. Cir. Ct. filed Apr. 17, 2020).

court, and Republicans oppose the deal.²⁰³ In Minnesota, where state officials have filed consent decrees in three different lawsuits, Republicans have sought to intervene in each and argue against the relaxation of the witness requirement, citing voter fraud and alleging collusion between plaintiffs and the Minnesota Secretary of State.²⁰⁴ A state judge has approved the consent decree in two lawsuits, while a federal judge has denied the consent decree in the third.²⁰⁵ The Republican intervenors have appealed the approval of the consent decree in the state court cases, and the Minnesota Supreme Court will hear argument in September.²⁰⁶

Still other states have refused to budge on the requirement, or have relaxed it only partially, and face ongoing litigation seeking to relax or waive a witness or notary requirement. In Alabama, for example, state officials have been unwilling to relax the state's requirement for the signature of two witnesses or a notary, even in the face of extensive litigation before the state's July primary runoff. In *People First of Alabama v. Merrill*, which challenges Alabama's witness requirement, the district court's carefully circumscribed preliminary injunction was stayed by the Supreme Court on July 2, but a bench trial is scheduled for September 7.²⁰⁷ In Oklahoma, the State Supreme Court ruled that the notarization requirement for absentee ballots contravened state law.²⁰⁸ The state legislature responded by reinstating the notarization requirement, or, in the alternative, allowing voters to contravene the requirement by sending a photocopy of photo identification along with their ballot.²⁰⁹ New plaintiffs have challenged this new requirement on constitutional grounds.²¹⁰

Lawsuits have challenged witness and notary requirements and sought declaratory and injunctive relief under the following provisions: the fundamental right to vote (the Anderson-Burdick test) under the First and Fourteenth Amendments;²¹¹ Title II of the ADA (as applied to disabled

²⁰³ See Partial Consent Judgment and Decree, *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-00024-NKM-RSB (W.D. Va. filed Aug. 5, 2020).

²⁰⁴ Andy Monserud, *Republicans Intervene in Minnesota Absentee Ballot Provision*, Courthouse News (June 18, 2020), <https://www.courthousenews.com/republicans-intervene-in-minnesota-absentee-ballot-provision>.

²⁰⁵ See, e.g., Order, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. filed Aug. 3, 2020); but see Andy Monserud, *Federal Judge Won't Sign Off on Relaxed Minnesota Ballot Rules*, Courthouse News (June 23, 2020), <https://www.courthousenews.com/federal-judge-wont-sign-off-on-relaxed-minnesota-absentee-ballot-rules>.

²⁰⁶ Brian Bakst, *Minnesota Supreme Court Will Review Absentee Ballot Case*, MPR News (Aug. 13, 2020), <https://www.mprnews.org/story/2020/08/13/minnesota-supreme-court-will-review-absentee-ballot-case>.

²⁰⁷ *People First of Ala. v. Merrill*, No. 19A1063 (S. Ct. filed July 2, 2020) (granting a stay of the preliminary injunction against enforcing the witness requirement for the July 14 runoff for those who provide a written statement outlining a medical condition placing the voter at a severe risk of contracting COVID-19).

²⁰⁸ *LWV of Okla. v. Ziriak*, No. O-118765 (Okla. S. Ct. May 4, 2020).

²⁰⁹ DCCC Complaint, *supra* note 100, at 14. A voter may also contravene the notarization requirement by getting two witnesses to sign his or her ballot, but this special COVID-19 exemption is subject to significant limitations. *Id.* at 16–17.

²¹⁰ *Id.* at 29.

²¹¹ See, e.g., Complaint, *People First of Ala. v. Merrill*, 2:20-cv-00619-AKK (N.D. Ala. filed May 1, 2020) [hereinafter "People First Complaint"]; Complaint, *Power Coalition for Equity & Justice v. Edwards*, No. 3:20-cv-00283 (M.D. La. filed May 7, 2020) (consolidated with *Clark v. Edwards*); Complaint, *Clark v. Edwards*, No. 3:20-cv-00308 (M.D. La. filed

individuals fearing exposure to COVID-19);²¹² Section 2 of the VRA (vote denial for black communities during COVID-19);²¹³ Sections 3(b) and 201 of the VRA (an impermissible “test or device” under the statute);²¹⁴ and various state constitutional and statutory grounds.²¹⁵

Courts across the country have failed to come to a consensus on the merits of the above claims, due to a variety of internal and external factors: the varying application of justiciability doctrines such as standing²¹⁶ and *Purcell*,²¹⁷ which encourages courts to avoid rulings that would drastically change voting processes too close to an election; the timing of challenges before states had interpreted or altered state statutes or administrative rules in light of COVID-19;²¹⁸ the timing of challenges before

May 19, 2020) (consolidated with *Power Coalition for Equity and Justice v. Edwards*); *LWV Minn. Educ. Fund v. Simon*, No. 0:20-cv-01205 (D. Minn. filed May 19, 2020); Complaint, *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020); DCCC Complaint, *supra* note 100; Complaint, *Thomas v. Andino*, No. 3:20-cv-01552 (D.S.C. filed April 22, 2020).

²¹² See, e.g., *People First Complaint*, *supra* note 211.

²¹³ See, e.g., *id.*; Complaint, *Power Coalition for Equity & Justice v. Edwards*, No. 3:20-cv-00283 (M.D. La. filed May 7, 2020) (consolidated with *Clark v. Edwards*); Complaint, *Clark v. Edwards*, No. 3:20-cv-00308 (M.D. La. filed May 19, 2020) (consolidated with *Power Coalition for Equity and Justice v. Edwards*); Complaint at 4, *Thomas v. Andino*, No. 3:20-cv-01552 (D.S.C. filed April 22, 2020).

²¹⁴ See, e.g., *People First Complaint*, *supra* note 211; Complaint at 3, *Thomas v. Andino*, No. 3:20-cv-01552 (D.S.C. filed April 22, 2020).

²¹⁵ See, e.g., Complaint, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. filed May 13, 2020) (challenging under Article I, Section 2 and Article VII, Section 1 of the Minnesota Constitution, which together safeguard the fundamental right to vote); Complaint, *NAACP Minn. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. filed June 6, 2020) (same); Complaint, *NAACP v. Missouri*, No. SC98536 (Mo. Sup. Ct. filed Apr. 17, 2020) (challenging Missouri notarization requirement for absentee ballot requests under the Missouri Constitution and the state’s voting laws); Complaint, *LWV of Okla. v. Ziriak*, No. O-118765 (Okla. S. Ct. filed Apr. 23, 2020) (arguing that Oklahoma’s requirement that absentee ballots be accompanied by a notarized affidavit does not conform to Oklahoma law, and a signed statement under penalty of perjury may also qualify); Stringer Complaint, *supra* note 100 (arguing that North Carolina’s witness requirement violates its Free Elections Clause, as well as the fundamental right to vote protected in its state constitution); Complaint, *Chambers v. North Carolina*, No. _____ (N.C. Super. Ct. filed July 10, 2020) (same).

²¹⁶ See, e.g., *People First of Ala. v. Merrill*, 2:20-cv-00619-AKK, slip op. at 16 (N.D. Ala. June 15, 2020) (“The requirement that these plaintiffs must find two adult witnesses or a notary public in order to vote absentee is itself an injury sufficient to confer standing.”); *but see Clark v. Edwards*, No. 3:20-cv-00308, slip op. at 13 (M.D. La. June 22, 2020) (holding that a plaintiff had failed to establish an injury-in-fact due to fear of obtaining a witness signature during a pandemic because social distancing and pandemic “best practices” “could be used to ensure her safety during the brief interaction necessary to obtain a witness signature on her ballot”).

²¹⁷ *Clark*, No. 3:20-cv-00308, slip op. at 11 (“The intervention-shy spirit of *Purcell* is echoed in the underpinnings of Article III standing doctrine. . . . Thus, this Court undertakes the standing analysis in this case with particular rigor, knowing that to justify potentially disruptive judicial intervention, the existence of an Article III case or controversy is especially vital.”).

²¹⁸ See, e.g., *NAACP v. Missouri*, No. SC98536, slip op. at 6 & n.1 (Mo. Sup. Ct. filed Apr. 17, 2020) (stating that the relief these plaintiffs seek “must be provided by the Executive or Legislative Branches, not the courts,” while taking judicial notice of the fact that the Missouri Legislature, since the complaint was filed, passed legislation if not settling, at least disambiguating the issue).

states outside of the Northeast had been hit hardest by the pandemic;²¹⁹ and the choice of whether to challenge these burdens under state or federal standards.²²⁰

To the extent that decisions addressed the merits, claims that a witness or notary requirement fails the Anderson-Burdick test (included in nearly all challenges to these requirements) have succeeded to some degree, and courts have not held that they trigger strict scrutiny.²²¹ Whether courts have found state governments' asserted interest in preventing voter fraud to be legitimately protected by a witness requirement tends to heavily influence the outcome of the test.²²² It seems only one court has addressed the issue of whether a witness or notary requirement discriminates against individuals with disabilities under the ADA in the context of COVID-19, and it found that it does not.²²³ Claims that a witness or notary requirement is a “test or device” under the VRA have been ineffective, because courts have construed those requirements as a voucher of the voter’s identity, not as a qualification to vote, in contrast with the tests and devices (for example, literary tests) that Section 201 was enacted to prohibit.²²⁴

B. ID Requirement

²¹⁹ See, e.g., *id.* at 7 (granting a motion to dismiss on an equal protection claim by arguing that the plaintiff had not established that voters “in rural counties with few or no positive cases” and voters “in metropolitan areas with thousands of positive cases” are similarly situated); *but see* Order at 22, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. filed Aug. 3, 2020) (reasoning that the Republican intervenors “can’t have it both ways” by simultaneously arguing that there is no evidence the pandemic will be a threat to voting in November days after the President suggested via Twitter to delay the election until people can safely vote).

²²⁰ See Order at 19, *LaRose*, No. 62-CV-20-3149 (“Unlike the claims advanced in the U.S. District Court case, this case relies both on claims raised under the Minnesota Constitution and the U.S. Constitution. . . . It is undisputed that Minnesota courts can find greater protections of individual rights than the U.S. Constitution.”); *NAACP v. Missouri*, No. SC98536, slip op. at 6 (“[T]he decisions from other States do not support Plaintiffs’ interpretation, for at least three reasons. First, none of these decisions addressed Missouri law . . . so they have no persuasive value on this question of statutory interpretation.”).

²²¹ See, e.g., *People First of Ala. v. Merrill*, 2:20-cv-00619-AKK, slip op. at 36 (N.D. Ala. June 15, 2020); *Thomas v. Andino*, No. 3:20-cv-01552, slip op. at 35–36 (D.S.C. filed April 22, 2020).

²²² See, e.g., *People First*, 2:20-cv-00619-AKK, slip op. at 40 (“All that the witnesses certify is that they watched this person—who may or may not be known to them, and who may or may not be the same person who completed the ballot—sign the affidavit. This is hardly a foolproof fraud prevention measure.”); *see also Thomas v. Andino*, No. 3:20-cv-01552, slip op. at 38–39.

²²³ See *People First*, 2:20-cv-00619-AKK, slip op. at 60 (holding that the plaintiffs did not state a viable claim for discrimination under the ADA because, as the Alabama Supreme Court has held that witness requirement is an essential condition for eligibility to vote under state law, the plaintiffs could not merely state that the requirement is nonessential in order to show a likelihood of success).

²²⁴ See *id.* at 73–74; *Thomas v. Andino*, No. 3:20-cv-01552, slip op. at 53.

Only two states in the nation require voters to send a photocopy of their ID along with their absentee ballot—Alabama and Arkansas.²²⁵ However, most states have some sort of identification requirement when a first-time voter is attempting to vote absentee, and some states require voters—no matter whether they’ve voted absentee before—to send a photocopy of their ID with their absentee ballot application.²²⁶

An ID requirement means voters must have obtained an ID—and plaintiffs argue that the process of obtaining one during COVID-19, depending on the voter’s state, is either arduous or impossible.²²⁷ And, assuming one has obtained an ID, plaintiffs emphasize the need to find a scanner and printer or photocopier—expensive machines that many voters do not own. The Alabama Secretary of State’s advice to visit a Kinko’s or Walmart, plaintiffs argue, was hardly viable when many such stores were closed, and the expense or risks of the trip were prohibitive for many voters.²²⁸

Because few states have these requirements, however, and voter ID laws have been heavily tested by the courts in the past decade, there seem to be few cases challenging them during COVID-19. Where they have been challenged, it is in conjunction with other barriers to the franchise: witness requirements, signature matching, failure to include COVID-19 as an excuse for absentee voting, and other restrictions.²²⁹

The lawsuits that have challenged identification requirements have sought declaratory and injunctive relief under the following provisions: the fundamental right to vote (the Anderson-Burdick test) under the First and Fourteenth Amendments;²³⁰ Title II of the ADA (as applied to disabled individuals fearing exposure to COVID-19);²³¹ and various state constitutions.²³²

²²⁵ Photo Voter ID, Ala. Sec’y of State, <https://www.sos.alabama.gov/alabama-votes/voter/voter-id>; Ark. Code. Ann. § 7-5-412.

²²⁶ See Voter ID for Absentee Ballots, VoteRiders, <https://www.voteriders.org/voter-id-for-absentee-ballots> (for non-first-time voters by mail: Alabama, Kansas, Kentucky, North Dakota, South Dakota, and Wisconsin).

²²⁷ See, e.g., Complaint at 76, *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020) (“As of the date of filing this Complaint, only one driver licensing regional office in the entire Commonwealth had reopened—all of the remaining statewide license issuance locations, including REAL ID offices, are still ‘closed to the public until further notice.’”).

²²⁸ John Merrill, Twitter (Apr. 21, 2020), <https://twitter.com/johnhmerrill/status/1252652987241172992?lang=en> (“When I come to your house and show you how to use your printer I can also teach you how to tie your shoes and to tie your tie. I could also go with you to Walmart or Kinko’s and make sure that you know how to get a copy of your ID made while you’re buying cigarettes or alcohol.”).

²²⁹ See, e.g., People First Complaint, *supra* note 211.

²³⁰ *Id.*; Complaint, *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020); Alliance for Retired Americans Complaint, *supra* note 100; DCCC Complaint, *supra* note 100.

²³¹ People First Complaint, *supra* note 211.

²³² Alliance for Retired Americans Complaint, *supra* note 100 (challenging the requirement that new voters attempting to register by mail must submit a photocopy of an identification document under the Due Process and Qualifications of Electors Clauses of the Maine Constitution).

While very few of these cases have been decided, in at least one case, a judge enjoined Alabama from applying its requirement that voters include a photocopy of their ID solely to qualified voters 65 or older and to voters with a disability who provide a written statement.²³³ Another district court, investigating the constitutional claims rather than ADA claims, declined to enjoin an ID requirement for mail-in voter registration, holding that the weighty interests that informed earlier voter ID cases control here, despite the additional challenges created by COVID-19.²³⁴

VI. Counting the Vote

Once an absentee or mail-in ballot is received, a state official (often a county clerk) will decide if that ballot will count or not. A ballot may not be counted for one of several reasons. The first is a signature defect, where the election official perceives a mismatch between the signature on file with the voter's registration and the signature on the returned ballot or ballot envelope, or where the voter failed to sign the ballot or envelope at all. Second, the voter made another mistake which prevents the ballot from being counted (such as failing to get the ballot witnessed in states where that is required). And third, the ballot was received by the county after the applicable receipt deadline, either because it was postmarked on time but delayed, or sent late. These issues have produced considerable litigation on behalf of voters during the pandemic. In the case of signature matching, plaintiffs have been fairly successful in challenging these requirements, especially in states without a process to notify the voter that their absentee ballot would not count. Courts have treated these cases as procedural due process violations under the Mathews test and mandated that states notify voters and provide a process through which a voter can cure their ballot and allow it to be counted. In the case of counting ballots received after the receipt deadline, courts have found in specific circumstances that these requirements, too, may be unduly burdensome to voters without sufficient evidence of a justification from the states.

A. Signature Matching and Notice to Cure Ballot Mistakes

Absentee ballot signature requirements provide considerable fodder for election-related litigation during the pandemic, as record numbers of voters cast ballots through the mail. In particular,

²³³ *People First of Ala. v. Merrill*, 2:20-cv-00619-AKK, slip op. at 61–67 (N.D. Ala. filed May 1, 2020). While the Eleventh Circuit upheld the injunction, the Supreme Court granted a stay just a week and a half before the Alabama primary. *People First of Ala. v. Merrill*, No. 20-12184 (S. Ct. July 2, 2020).

²³⁴ *DNC v. Bostelmann*, 20-cv-249-wmc, slip op. at 16 (W.D. Wis. Mar. 3, 2020) (“However, the State’s interest with respect to this requirement has been recognized by the United States Supreme Court and the Seventh Circuit Court of Appeals, and appears to be much more significant than any interest in limiting the time period for registering to vote electronically or by mail.”).

controversy often surrounds signature matching, which often involves a somewhat standardless process through which county officials decide whether the voter who signed the absentee ballot or return envelope is the voter whose signature they have on file.²³⁵ Nineteen states require that voters be notified and given an opportunity to correct (or “cure”) their ballots for signature issues before they are rejected, but a majority of states have no process to inform voters when their absentee ballot will not be counted.²³⁶

Where states employ signature matching, plaintiffs have argued that they should either do away with the practice entirely²³⁷—that is, count every ballot they would normally reject because the signatures didn’t match—or else adopt a notice and cure period, in which county officials make every effort to contact the voter (typically through some specified period after the election), and provide a process for voters to verify that they cast the ballot themselves.²³⁸ More generally, plaintiffs have sought a procedure for notice and opportunity to cure if an absentee ballot is rejected for any signature defect, including signature mismatch. Another common signature defect is the voter’s failure to sign the ballot envelope altogether. Many states offer an opportunity to cure absentee ballots rejected due to signature defects, or have put such processes in place due to COVID-19 litigation.²³⁹ States that do not offer notice and an opportunity to cure have proved to be vulnerable to procedural due process challenges.

The lawsuits that have challenged signature matching requirements for lack of notice and opportunity to cure ballot mistakes have sought declaratory and injunctive relief under the following provisions: the fundamental right to vote (the Anderson/Burdick test) under the First and Fourteenth

²³⁵ See generally Stanford Law School Law and Policy Lab, *Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity* (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf (discussing the process by which California verifies signatures on mail-in ballots and attempts to remedy signature mismatches).

²³⁶ See Table 15: States that Permit Voters to Correct Signature Discrepancies, Nat’l Conf. of State Leg. (Aug. 7, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx>.

²³⁷ See, e.g., Alliance for Retired Americans Complaint, *supra* note 100.

²³⁸ See, e.g., Collins v. Adams, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020) (seeking to extend the five-day period to cure a signature mismatch after election day from the June primary to the November general election); Ariz. Democratic Party v. Hobbs, No. 2:20-cv-01143 (D. Ariz. filed June 10, 2020) (seeking to extend the five-day period to cure a signature mismatch to ballots lacking a signature, for whom Arizona law allows only to cure on or before Election Day).

²³⁹ See, e.g., Clark v. Edwards, No. 3:20-cv-00308 (M.D. La. May 19, 2020) (after plaintiffs originally sought a cure process in their complaint, Louisiana passed an emergency rule providing voters the opportunity to cure ballot deficiencies, and plaintiffs withdrew cure-related claims from their motion for a preliminary injunction).

Amendments;²⁴⁰ procedural due process under the Fourteenth Amendment (the Mathews test);²⁴¹ equal protection under the Fourteenth Amendment;²⁴² and various state statutory and constitutional grounds.²⁴³

Courts have been quite receptive to these challenges, particularly those brought under the Mathews procedural due process test. Courts reason that the interest in the right to vote is so fundamental, and the notice requirements so bare and minimal, that a pre-deprivation process is required. This rationale is especially compelling in cases where elections are held entirely by mail, such as in North Dakota, where, for its June primary, each of the state’s counties elected to operate the election entirely by mail.²⁴⁴

It helps, too, that the Purcell question of weighing voter confusion and dissuasion when changing the rules close to an election is not at issue in these cases because questions of signature matching and notice to cure arise only after a vote is submitted and are largely within the ambit of election officials.²⁴⁵

B. Counting Issues and the New York Primary

The state of New York experienced a particularly notable vote counting issue associated with its June 23 primary. In early August, a court in the Southern District of New York granted a preliminary injunction sought by a group of plaintiffs comprised of candidates and absentee voters in New York’s June 23, 2020 primary election. The injunction required the Commissioners of the New York State Board of Elections to direct all local elections boards to count otherwise valid absentee

²⁴⁰ Complaint, *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky. filed May 27, 2020); *Ariz. Democratic Party v. Hobbs*, No. 2:20-cv-01143 (D. Ariz. filed June 10, 2020); Alliance for Retired Americans Complaint, *supra* note 100; Complaint, *Self Advocacy Solutions N.D. v. Jaeger*, No. 3:20-cv-00071 (D.N.D. filed May 1, 2020) [hereinafter “Self Advocacy Complaint”]; Complaint, *League of Women Voters of N.J. v. Way*, No. 3:20-cv-05990 (D.N.J. filed May 18, 2020) [hereinafter “New Jersey LWV Complaint”].

²⁴¹ *See, e.g.*, *Clark v. Edwards*, No. 3:20-cv-00308 (M.D. La. May 19, 2020); Alliance for Retired Americans Complaint, *supra* note 100; Self Advocacy Complaint, *supra* note 240; New Jersey LWV Complaint, *supra* note 216.

²⁴² New Jersey LWV Complaint, *supra* note 240.

²⁴³ *Stringer* Complaint, *supra* note 100 (arguing that North Carolina’s signature matching requirement violates its Free Elections Clause, as well as the fundamental right to vote protected in its state constitution); Alliance for Retired Americans Complaint, *supra* note 100 (challenging Maine’s failure to notify voters of rejection of their absentee ballots for perceived signature mismatch or other technical defect under the Due Process, Qualifications of Electors, and Equal Protection Clauses of the Maine Constitution).

²⁴⁴ *See, e.g.*, *Self Advocacy Solutions N.D. v. Jaeger*, No. 3:20-cv-00071, slip op. at 5, 16 (D.N.D. June 3, 2020) (“Because there is no possibility of meaningful postdeprivation process when a voter’s ballot is rejected (there is no way to vote after an election is over, after all), sufficient predeprivation process is the constitutional imperative.”).

²⁴⁵ *Id.* at 21 (“A voter filling out an absentee ballot will be entirely unaffected by an order enjoining the signature-matching requirement—a requirement that applies only after a ballot is submitted. In other words, there is no potential for voter confusion or dissuasion from voting because the process for submitting an absentee ballot will remain unchanged.”).

ballots which were “(1) received by June 24, 2020 without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.”²⁴⁶

The factual circumstances leading up to the case were caused by COVID-19. Prompted by the pandemic, Governor Andrew Cuomo issued a series of executive orders in late April and early May that modified New York election law (i) to allow for voters to receive absentee ballots based on the potential for contracting COVID-19,²⁴⁷ (ii) to direct the local boards of elections to send absentee ballots applications to all voters,²⁴⁸ and (iii) to require that any ballot sent to a voter for any election held on June 23, 2020 also include a postage paid return envelope.²⁴⁹ At the same time, the New York State Legislature modified existing law to require that “absentee ballots postmarked on or before Election Day be counted.”²⁵⁰ Ballots were to be counted if they arrived before the close of polls on June 23 or were postmarked by June 23 and arrived by June 30.²⁵¹ Ultimately, despite efforts by the post office, “thousands of absentee ballots for the June 23 Primary were not postmarked.”²⁵² Evidence reviewed by the court indicated that a large number of ballots, especially in New York City, were invalidated because they lacked a postmark.²⁵³ Plaintiffs brought suit claiming violations of their First and 14th Amendment rights, as well as corresponding rights under the New York Constitution.²⁵⁴

The court first addressed the issues of standing, sovereign immunity, necessary parties, and abstention in favor of plaintiffs before turning to the merits and the requested preliminary injunction.²⁵⁵ The court found an irreparable injury in the violation of Plaintiffs’ “constitutional rights in connection with election results that will soon be certified as final.”²⁵⁶ The court then held that the plaintiffs “demonstrated a clear and substantial likelihood of success on the merits of their First Amendment and Equal Protection Clause claims,” while noting that it did not need to address the likelihood of success on the merits for Plaintiffs’ separate procedural due process claim.²⁵⁷

²⁴⁶ *Gallagher v. N.Y. State Bd. of Elections*, No. 20 Civ. 5504 (AT), 2020 WL 449849, at *23 (S.D.N.Y. Aug. 3, 2020).

²⁴⁷ N.Y. Exec. Order No. 202.15 (Apr. 9, 2020).

²⁴⁸ N.Y. Exec. Order No. 202.23 (Apr. 24, 2020).

²⁴⁹ N.Y. Exec. Order No. 202.26 (May 1, 2020).

²⁵⁰ *Gallagher*, 2020 WL 449849, at *3.

²⁵¹ *Id.*

²⁵² *Id.* at *5.

²⁵³ *Id.* at *7–8.

²⁵⁴ *Id.* at *1.

²⁵⁵ *Id.* at *8–13.

²⁵⁶ *Id.* at *14.

²⁵⁷ *Id.* at *15 & n.3.

As to the right to vote claim, the court considered whether the state’s actions unduly burdened the plaintiffs’ right to vote in the primary.²⁵⁸ Applying the Anderson-Burdick standard, the court found the burden in the specific circumstances of the case to be “exceptionally severe” because “a large number of ballots will be invalidated . . . based on circumstances entirely out of voters’ control.”²⁵⁹ Having found a severe burden to the plaintiffs’ rights, the court proceeded to apply strict scrutiny, finding that the state’s interest in ensuring ballots were cast before the close of polls on Election Day was valid, but that the postmark requirement was not narrowly tailored to achieve that interest.²⁶⁰ Instead, the court found that the postmark requirement was “grossly overinclusive” covering ballots that “cannot possibly have been put in the mail later than June 23.”²⁶¹ The court also found that less restrictive means of achieving the state’s interest were available and that the postmark requirement would fail even under the more flexible, non-strict-scrutiny balancing test alternatively employed under Anderson-Burdick.²⁶²

For the Equal Protection Clause claim, the court examined whether the postmark requirement, under the circumstances, “created a voting process where the state ‘by later arbitrary and disparate treatment, value[s] one person’s vote over that of another.’”²⁶³ The court found two ways in which votes were valued differently. First, the USPS handled the postmark issue for ballots differently in different areas of the state. Second, because ballots travel at different speeds, ballots mailed at the same time on the same day might, by random chance, be treated differently--one might be counted and the other not counted.²⁶⁴

Having found a substantial likelihood of success on the merits, the court found that the equities tipped in the plaintiffs favor and that there was a strong public interest in granting an injunction.²⁶⁵ The case underscores the significant counting issues that can arise as a result of issues with the USPS and mail ballots.

²⁵⁸ *Id.* at *15.

²⁵⁹ *Id.* at *16.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at *17.

²⁶³ *Id.* at *18 (quoting *Bush v. Gore*, 531 U.S. 91, 104 (2000)).

²⁶⁴ *Id.* at *19–20.

²⁶⁵ *Id.* at *21–22.

VII. Challenges to the U.S. Postal Service’s Operational Changes Impacting Vote by Mail

In response to operational changes at the U.S. Postal Service that have caused nationwide slowdowns in mail delivery and prompted accusations of an intentional effort to undermine mail in voting for the November general election, twenty one state attorneys general have banded together and sued the Trump administration and Postmaster General Louis DeJoy in two separate suits, filed in federal district court in Washington and Pennsylvania.²⁶⁶ Among the service changes the lawsuits seek to enjoin and vacate are the elimination of postal service overtime, the decommissioning of mail sorting machines, the removal of post office collection boxes, and the reclassification of election mail. The groups of states in both lawsuits allege that the Postal Service’s recent actions are procedurally and substantively invalid, as they violate various federal statutory and constitutional provisions. A separate suit brought by civil and voting rights organizations similarly challenges the Postal Service’s recent actions.²⁶⁷

The central statutory claim pertains to the Postal Reorganization Act (“PRA”),²⁶⁸ which created the Postal Service’s Board of Governors²⁶⁹ and the Postal Regulatory Commission.²⁷⁰ Under 39 U.S.C. § 3661(b), “When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.” The complaints allege that the Postal Service, at the direction of Postmaster General DeJoy implemented “transformative” changes in mail service on a nationwide basis without fulfilling its non-discretionary duty to obtain an

²⁶⁶ The attorneys general of Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Wisconsin joined the attorney general of Washington in a suit brought in the Eastern District of Washington. See Complaint for Declaratory Judgment, Mandamus, and Injunctive Relief, *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wa. Aug. 18, 2020) (hereinafter “Washington USPS Complaint”). In a second case in the Eastern District of Pennsylvania, the attorney general of Pennsylvania joined with the attorneys general of California, Delaware, D.C., Maine, Massachusetts, and North Carolina. See Complaint for Declaratory and Injunctive Relief, *Pennsylvania v. DeJoy*, No. 2:20-cv-4096 (E.D. Pa. Aug. 21, 2020) (hereinafter “Pennsylvania USPS Complaint”).

²⁶⁷ See Complaint, *National Urban League v. DeJoy*, No. 1:20-cv-2391 (D.Md. Aug. 18, 2020).

²⁶⁸ See Pub. L. No. 91-375, 84 Stat. 719.

²⁶⁹ See 39 U.S.C. § 202 (creating a Board of Governors, consisting of eleven members, nine of which are appointed by the President with advice and consent of the Senate, one of which is selected by these nine appointees to serve as the Postmaster General, and the last of which is appointed by this group of ten to serve as Deputy Postmaster General).

²⁷⁰ See 39 U.S.C. §§ 501–502 (creating the Postal Regulatory Commission, comprised of five commissioners appointed by the President with advice and consent of the Senate who “shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration.”).

advisory opinion from the Postal Regulatory Commission.²⁷¹ As a remedy for this statutory violation, the states in both suits seek to enjoin the Postal Service from implementing any changes that have a nationwide effect on delivery service without first satisfying the necessary statutory and regulatory procedures.²⁷²

The states also raise constitutional claims, alleging that the Postal Service’s contested changes violate the states’ right to prescribe “the Time, Places and Manner of holding Elections for Senators and Representatives” under Art. I, § 4, as well their right to appoint presidential electors, under Art. II, § 1.²⁷³ The states claim to have invoked their authority under the Elections Clause and the Electors Clause “in reliance on the Postal Service’s history of timely delivering Election Mail and treating Election Mail with the highest priority.”²⁷⁴ The complaints allege that the Postal Service’s actions “on the eve of the 2020 election—well after the [s]tates have established systems for voting using the Postal Service—”²⁷⁵ impermissibly interfere with the states’ constitutional rights to set the “Time, Places, and Manner of holding Elections for Senators and Representatives” and to appoint presidential electors “in such manner” as their Legislatures direct.²⁷⁶ In addition to seeking vacatur and injunctions against the contested actions, the Plaintiffs in the Pennsylvania lawsuit seek the appointment of an independent monitor to oversee the Postal Service’s compliance with the court order.²⁷⁷

Conclusion

The COVID-19 pandemic has put unprecedented stress on the processes by which states handle voting by mail. As a result, plaintiffs across the country have initiated legal challenges to nearly every aspect of the absentee voting process. Plaintiffs have brought claims challenging the processes by which applications to vote by mail are sent out and verified, as well as the deadlines by which those applications must be received. Litigants have sought to expand eligibility to vote absentee in states

²⁷¹ See Washington USPS Complaint, supra note 266, at 103–06; see also Pennsylvania USPS Complaint, supra note 1, at 59–61.

²⁷² See Washington USPS Complaint, supra note 266, at 114; see also Pennsylvania USPS Complaint, supra note 1, at 65. Furthermore, the states in *Washington v. Trump* seek a writ of mandamus to compel the Postal Service to submit a proposal requesting an advisory opinion from the Postal Regulatory Commission prior to the implementation of any such changes. Washington USPS Complaint, supra note 266, at 114.

²⁷³ U.S. Const. art. II, § 1 provides “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”

²⁷⁴ Pennsylvania USPS Complaint, supra note 266, at 63.

²⁷⁵ Washington USPS Complaint, supra note 266, at 107–08.

²⁷⁶ See Washington USPS Complaint, supra note 266, at 106–108; see also Pennsylvania USPS Complaint, supra note 1, at 62–63.

²⁷⁷ Pennsylvania USPS Complaint, supra note 266, at 66.

where not every voter has that right. Litigants have argued that no voter who fears contracting COVID-19 should be forced to go to the polls in order to vote—or that, at least, the ability to vote by mail should not depend on the voter’s age. Plaintiffs have challenged barriers to the mailing of ballot applications and ballots themselves, seeking to eliminate the cost of postage, to extend the deadline by which those ballots can be submitted, and to ensure that voters can receive required assistance or accommodations to send in their ballots. Voters in a number of states have brought challenges to ensure that states count every vote, both by eliminating requirements that voters mail in a photocopy of their ID or procure a witness signature, and by ensuring that voters have an opportunity to remedy any perceived signature mismatch. And even state governments have brought challenges of their own, suing the Postal Service to enjoin operational changes that could prevent it from timely processing all mailed ballots.

However, not all plaintiffs seek to expand the availability of voting by mail. The Trump campaign has filed lawsuits in several states challenging expansions of absentee voting, arguing that mail-in voting leads to fraud and thereby dilutes the influence of genuine voters. And litigants in some states have challenged decisions by state executives to automatically send out absentee ballots or absentee ballot applications to all voters, alleging that they lacked authority to do so under state law. Plaintiffs in states across the country have challenged nearly every part of the absentee balloting process, asserting claims under a variety of state and federal laws. It will be up to courts, state legislatures and voting officials to anticipate and resolve these disputes, so they do not tarnish the actual or perceived integrity of election results in November, and so the country can avoid this kind of legal frenzy in future elections.