



# Mail Voting Litigation During the Coronavirus Pandemic



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**October 29, 2020**

*Abstract:*

With approximately [80 million](#) Americans projected to vote by mail in November, parties have turned to the courts to clarify the appropriate ways to adapt, apply, and administer the rules of mail voting for pandemic elections. Plaintiffs across the country have filed more than 200 cases and appeals 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 since March, largely in response to the COVID-19 pandemic.

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# Introduction

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Approximately [80 million](#) Americans are projected to vote by mail in the 2020 general election—double the number who voted by mail in the 2016 election.

To address the surge in demand for mail voting, election officials across the United States have been scrambling to scale vote-by-mail operations and to work with state legislatures and governors to adapt the rules and procedures for mail voting during the coronavirus pandemic. Many state-level initiatives have sought to accommodate the increased demand, and even encourage it, by relaxing rules that create obstacles to mail voting. Other initiatives have sought to slow the growth of vote-by-mail and limit accommodations, citing potential voter fraud. Sometimes those forces have collided within an individual state as parties within the same state have pursued different approaches, leading to heated political debate, deadlock and litigation.

Disputes over the rules of mail voting are playing out in the courts and have spawned an avalanche of litigation regarding the appropriate ways to adapt, apply and administer the rules for elections during the pandemic. Since March, more than 300 election cases have been filed in federal and state courts in almost every state, marking what is perhaps [the most litigated election season](#) in the past two decades. And most of this litigation relates to the rules associated with mail voting.

To promote public awareness of the stress the pandemic has placed on election and voting laws across the country, a team of us at the [Stanford-MIT Healthy Elections Project](#) has been compiling (with the generous help of Professor Justin Levitt), summarizing and categorizing this season’s election cases that arise from, or have taken on increased importance in light of, the pandemic. We have published the data in a [COVID-Related Election Litigation Tracker](#). It’s designed to help election officials, legislators, scholars and the interested public find, sort and better understand the recent slew of coronavirus-related election cases. Users can search cases in the tracker by [issue](#), state and party name. Each case includes a short summary, key-issue tags and, where possible, links to key court documents.

But some readers may want a broader run-through of the litigation, without skimming on the important details. So, we summarized this season’s election litigation related to mail voting. We are publishing that summary here, in a five-part report called “Mail Voting Litigation During the Coronavirus Pandemic,” starting with this post. We based the report on cases in the [Stanford-MIT COVID-Related Tracker](#), and more information about individual cases discussed can be found on the

tracker. The report outlines the various types of legal challenges to absentee and mail voting practices and procedures brought since March, largely in response to the pandemic. Most of the suits we discuss have been brought against states and counties and their respective officials responsible for the mail voting rules.

Our survey reveals a wide array of legal claims and challenges regarding absentee and mail voting. Most cases seek to expand the availability of, or loosen restrictions associated with, mail voting. But others challenge the expansion of vote-by-mail and defend the associated restrictions, arguing that mail voting leads to fraudulent votes that dilute the weight of genuine votes or that state officials and courts have acted outside of their authority in adopting accommodations. While there is [no evidence of widespread fraud](#) in mail voting, there have been isolated instances.

Plaintiffs have challenged every aspect of mail voting, from the application process to state eligibility requirements, from ballot-receipt deadlines to voter verification practices. Plaintiffs have alleged a variety of violations—federal and state constitutional violations, federal statutory violations of the Voting Rights Act and the Americans with Disabilities Act, and various state statutory violations.

Claims are at different stages of litigation, and judicial outcomes to date have varied considerably among the states and types of claim. While dozens of cases are still pending and new cases are being filed every week, the [Purcell v. Gonzalez](#) doctrine, which discourages courts from issuing rulings that would change voting procedures close to an election date, will become an increasingly important consideration for courts as the election approaches.

This five-part report is organized roughly according to the life cycle of an absentee ballot.

Parts I through IV relate to various efforts to expand mail voting or make it more accessible. Part I covers issues related to the availability of absentee or mail voting. It explores challenges to the processes by which voters apply for and receive absentee ballots, such as cases that seek to require the state to send mail ballot applications or mail ballots to all voters. Part I also examines challenges to eligibility requirements imposed by some states on voters seeking to vote absentee, such as requirements that voters have an “excuse” to vote by mail that is specified in the state’s laws unless they are senior citizens (typically at least 60 or 65 years old).

Part II explores claims related to the rules governing the submission of mail ballots, such as the deadline by which election officials must receive mail ballots. There is a big divide between states that require ballots to be *received* by Election Day and those that require ballots to be *postmarked* by Election Day.

Part II also explores the “[secrecy sleeve](#)” requirement of some states, an issue that garnered attention after a recent Pennsylvania [court ruling](#). The rule rejects any so-called “naked ballots”—ballots that have been returned in the official return envelope but not first placed inside an official “secrecy sleeve” envelope inside the return envelope. Part II also touches on challenges to the requirement to provide postage on a mail-in ballot and claims that mail voting procedures fail to provide accommodations to voters with disabilities.

Part III surveys challenges designed to expand mail ballot drop-off and delivery options. We explore challenges to restrictions on collecting and returning ballots for other voters, sometimes referred to as “ballot harvesting.” We also look at challenges to limits placed by state officials on the number or location of absentee ballot drop-off locations. Finally, Part IV reviews the legal challenges to recent operational changes made by the [U.S. Postal Service \(USPS\)](#) that plaintiffs view as a risk to mail voting. These USPS cases are unique, because they are the only cases seeking to expand or protect mail voting that are not directed at state officials. Rather, they are filed against the federal government and the postmaster general.

Part IV surveys challenges to the most common processes used by election officials to verify that the person who cast the mail ballot is the intended voter. These include signature verification (a practice that entails comparing the signature on a ballot return envelope with an image of the intended voter’s signature on file at the elections office to see if they match) and the requirement that one or more witnesses sign a voter’s mail ballot or return envelope and attest to the voter’s identity. Plaintiffs have also sought to ensure that voters are notified and provided an opportunity to fix or “cure” ballot “defects,” such as a missing signature (when a voter or witness forgets to sign or signs in the wrong place), or a signature that election officials determined does not match the signature on file. Without the ability to cure, election officials do not count ballots with such defects and voters may never know their votes were not counted.

Whereas Parts I through IV focus on legal efforts to expand vote-by-mail and make it more accessible to more voters, Part V focuses on cases that seek the opposite—cases that challenge the expansion of mail voting and the relaxation of the associated restrictions. These cases seek to halt various vote-by-mail accommodations and restrict the use of mail voting. The suits typically challenge policy modifications on one of two grounds: that mail voting increases voter fraud and/or that the officials implementing such policies are not authorized by law to do so. Primarily brought by the Trump campaign and Republican Party operatives, these cases challenge decisions by state officials to send vote-by-mail applications or ballots to all voters in a state, to provide mail ballot drop-off locations that make it more

convenient for voters to return their ballots, to loosen voter verification procedures and to extend ballot-receipt deadlines during the pandemic.

# Part I: Application and Eligibility to Vote By Mail

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Most states, as well as the District of Columbia, [allow any eligible voter](#) to vote via an absentee ballot without providing an excuse. However, in several states, absentee voting is available only to certain classes of voters who might have particular difficulty reaching the polls, such as the elderly or those who expect to be out of town on Election Day. The coronavirus pandemic has made many people who would usually vote in person reluctant or even unable to do so, for fear of contracting COVID-19. Accordingly, litigants in a number of states have brought lawsuits seeking to compel states to give more voters access to the absentee ballot. So far, these suits have been almost universally unsuccessful.

These lawsuits usually assert one of a few distinct claims.

First, litigants have challenged the processes by which voters can apply to vote by mail. In some states, the coronavirus has increased demand for vote-by-mail applications to the point where the application infrastructure has had trouble keeping up, leading voters to file suits to ensure that states preserve sufficient opportunity to apply for a mail-in ballot. Some lawsuits have pushed back on state initiatives that would have made the application process for mail-in voting more difficult. In Iowa, for example, the state's decision to enact a policy that made the application process more difficult resulted in extensive litigation.

Second, some complaints have sought to make absentee voting available to any registered voter, even in states where the law currently restricts voting by mail to certain enumerated groups. These complaints generally argue that limitations on who can vote absentee place an undue burden on the right to vote, at least during the pandemic. Voters who are ineligible to vote absentee under the state's existing rules are required to vote at a polling place. These suits argue that this puts these voters at risk of coronavirus exposure. This argument usually fails in court.

Third, some plaintiffs have filed lawsuits arguing that state laws that allow absentee voting in cases of illness or disability should *also* enable any voter who lacks immunity to the coronavirus to vote by mail. These claims have usually failed also. Courts have been reluctant to extend these statutory provisions to the [vast majority of the electorate](#) that still lacks immunity to the virus.

Finally, several lawsuits challenge state restrictions that limit absentee voting to seniors above a certain age. They argue that such state law restrictions violate the 26th Amendment's prohibition on using age as a basis to deny or abridge a citizen's right to vote. In some state courts, these arguments have succeeded, depending on the court's interpretation of state law. But federal courts have uniformly refused to find that age restrictions violate the U.S. Constitution.

## Applying to Vote by Mail

Before a voter's eligibility to vote by mail is determined, the voter must usually apply for an absentee ballot. Plaintiffs in some states have challenged the process by which voters receive and submit applications to vote by mail.

In [\*LULAC of Iowa v. Pate\*](#), plaintiffs in Iowa challenged a law that made the application process more difficult. For decades, election officials had been able to use available voter database information to complete missing data in voters' applications for absentee ballots and then send absentee ballots to those voters. But in June 2020, the Iowa legislature passed a law that prohibits officials from looking up missing or incorrect information in voter databases and, instead, requires officials to retrieve the missing information by contacting the voters themselves, often by mail. This change converted a simple and routine process into an arduous and time-consuming one, at a time when the number of absentee ballot applications was expected to skyrocket, especially from voters unfamiliar with the process. Nevertheless, the Iowa Supreme Court [rejected](#) the plaintiffs' challenge. The court explained that the law was unlikely to result in significant disenfranchisement and that it was justified by the state's interest in preventing voter fraud.

Enforcement of this law resulted in substantial disruption to absentee voting applications. Pursuant to this law, Iowa's secretary of state issued a directive prohibiting county election officials from sending out forms already populated with voter information. When some county officials did anyway, the Republican National Committee (RNC) and the Trump campaign [sued](#), asking an Iowa state court to enjoin the county election officials from processing these forms. The court granted the requested injunction, thereby [invalidating](#) approximately 64,000 absentee ballot applications. The state's Democratic Party has since filed its [own lawsuit](#), seeking to strike down the secretary of state's directive as inconsistent with Iowa administrative and constitutional law. However, the Iowa Supreme Court recently rejected this challenge, finding the secretary of state's directive authorized by state law.

The vote-by-mail application process was contentious in other states, particularly in states where the coronavirus pandemic struck just before the deadline to apply for absentee ballots. However, many of these states have resolved their issues relatively swiftly. In Idaho, for example, a surge in vote-by-mail applications caused the state’s online application portal to crash. A district court then [granted](#) an emergency injunction, extending the application deadline by a week. Similarly, plaintiffs in Ohio [challenged](#) the state’s deadline for applying for an absentee ballot, arguing that the timing of the deadline violated their right to vote. Their claim was dismissed as moot, after the Ohio state legislature passed a bill changing vote-by-mail procedures in light of the coronavirus.

Finally, plaintiffs in some states have brought lawsuits seeking to require the state to send vote-by-mail applications to *all* eligible voters. However, these challenges have usually failed. In [Alaska](#), plaintiffs brought such a suit after the state had sent mail-in applications only to elderly voters. But the federal district court denied the plaintiffs’ requested injunction, finding that their right to vote had not been abridged. In the court’s reasoning, any registered voter in Alaska could still fill out an online or paper application to vote by mail. A state court in [Pennsylvania](#) also denied a request for a similar injunction, finding that the plaintiffs had not demonstrated that the injunction was necessary to prevent them from suffering irreparable harm.

## Absentee Balloting Without an Excuse

Although most states allow any registered voter to vote by mail, some states require that voters have one of several accepted reasons for requesting the absentee ballot. Plaintiffs in several states with such requirements have brought legal challenges, seeking to make absentee voting available to everyone. 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 be eligible to vote by mail, at least during the pandemic. So far, these claims have been unsuccessful.

In [NAACP v. Missouri](#), a Missouri state court rejected a challenge to the excuse requirement for voting absentee brought under state law. 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.” The court interpreted this language as permitting, but not requiring, absentee voting, explaining that “[t]he word ‘may’ denotes discretion, not an obligation.” Additionally, the Missouri Supreme Court had previously held that absentee voting was a “special privilege,” not a right. The court also reasoned that “strict compliance with the statutory requirements for absentee voting” was necessary to combat what

the state claimed were absentee voting’s “unique risks of fraud and abuse.” The court also found that the Missouri Constitution did not guarantee a “constitutional right to cast an absentee ballot in any election for any reason.” This decision has since been [vacated](#). It is pending reconsideration after the Missouri state legislature passed an [emergency law](#) expanding the availability of absentee balloting.

Some state trial courts have ruled in the other direction. In [Fisher v. Hargett](#), a Tennessee state court initially interpreted the Tennessee Constitution to guarantee a universal right to vote by mail. However, the Tennessee Supreme Court quickly reversed this determination. The trial court in *Fisher* ruled that voting was a fundamental right under the Tennessee Constitution. Infringements of the right to vote under the Tennessee Constitution are evaluated under the *Anderson-Burdick* test. This test comes from the Supreme Court’s decisions in [Anderson v. Celebrezze](#) and [Burdick v. Takushi](#), cases in which candidates for elected positions challenged state laws that prevented them from appearing on the ballot. Since then, however, the test has been applied more generally to a wide variety of laws allegedly infringing on the right to vote under the U.S. Constitution. The *Anderson-Burdick* test requires the court to balance the challenged law’s burden on voting against the law’s benefits to the state.

After extensive factual findings, the court in *Fisher* determined that the state law’s restrictions on absentee voting were not sufficiently justified. The court found that the state could easily process and verify absentee ballots from more voters and that absentee voting did not pose a special risk of voter fraud. But the court found that the state’s restrictions imposed a substantial burden on voters, because requiring voters to show up at polling places during a pandemic could pose a serious health risk.

The Tennessee Supreme Court disagreed with the lower court’s analysis. The state’s supreme court also analyzed Tennessee’s vote-by-mail eligibility criteria under the *Anderson-Burdick* test but found that the plaintiffs’ right to vote was only minimally burdened. The court held that most voters had no unique vulnerability to the coronavirus and could still safely show up at the polls. The state supreme court declined to do its own analysis of the state’s justifications for the restrictions on absentee balloting, deferring instead to the legislature’s stated reasons that the limits furthered the state’s interests in “1) prevention of fraud; 2) fiscal responsibility; and 3) feasibility.”

The most significant *federal* court decision on the issue of eligibility for absentee voting comes out of the U.S. Court of Appeals for the Fifth Circuit. In [Texas Democratic Party v. Abbott](#), the plaintiffs argued that the 14th Amendment requires Texas to implement universal no-excuse absentee balloting. Plaintiffs saw initial success in the federal district court, which invalidated Texas’s restrictions on

absentee voting during the pandemic, condemning these restrictions as a return to the “yesteryear of the Divine Right of Kings.” However, in a more rhetorically measured opinion, the Fifth Circuit reversed.

The appellate court declined to apply the *Anderson-Burdick* test, finding that the U.S. Supreme Court’s earlier decision in [McDonald v. Board of Election Commissioners](#) controlled instead. In *McDonald*, the Supreme Court upheld a state law denying certain incarcerated individuals the ability to vote by mail. 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. Applying *McDonald*, the Fifth Circuit held that the Constitution does not require universal absentee voting. It found that Texans had not been “absolutely prohibited” from voting because, the coronavirus notwithstanding, they could still vote in person. The Fifth Circuit reviewed Texas’s vote-by-mail laws under rational basis review, probing only whether the challenged laws had some “rational” connection to a “legitimate government interest.”

The U.S. Court of Appeals for the Seventh Circuit followed the Fifth Circuit’s approach. In [Tully v. Okeson](#), plaintiffs in Indiana brought a challenge under the 14th Amendment, alleging that Indiana’s system abridged their right to vote. Indiana, like Texas, does not allow no-excuse absentee voting. Voters are eligible to vote by mail only if they fall into one of 13 statutorily enumerated categories. Citing *McDonald*, the Seventh Circuit court found that limitations on absentee voting do not fall within the scope of the right to vote because they do not absolutely prevent the plaintiffs from voting. The court also rejected the plaintiffs’ equal protection claim, holding that Indiana’s scheme satisfied both rational basis review and the *Anderson-Burdick* test. The court found that the denial of absentee balloting was a minimal burden on the plaintiffs’ ability to vote and that this minimal burden was justified by the state’s interest in “ensuring safe and accurate voting procedures.”

## 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. This year the coronavirus changed the usual calculus here. The airborne nature of the virus makes it potentially dangerous for almost anyone to show up at polls, where large collections of people gather and often must wait for long periods of time. Groups in various states filed lawsuits, asking courts, in light of the risk of coronavirus exposure during in-person voting, to interpret the provisions made available for people with illness or disability to allow almost

anyone to vote by mail. Most of these claims have failed. Courts have generally held that these provisions of state law apply only when the voter is suffering from an illness or a disability. Per most courts, fear of contracting an illness, such as COVID-19, is not enough.

This issue was litigated most extensively in [Texas](#). In March, the Texas Democratic Party (TDP) filed a suit in state court, seeking a declaration that a lack of immunity to the coronavirus constitutes a “disability” under the Texas Election Code and, accordingly, that anyone without immunity to the coronavirus should be permitted to vote by mail. The [Texas Election 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.” The TDP argued that lack of immunity to the coronavirus meets this definition. It is a “physical condition,” the TDP argued, 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 lacks immunity to the coronavirus would be eligible to vote by mail. 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 was that they lacked immunity to the coronavirus. The trial court’s order was stayed pending appeal. The litigants then petitioned the Texas Supreme Court for a writ of mandamus to compel election officials to permit mail voting in accordance with the trial court’s order.

The Texas Supreme Court denied the petition to force election officials to obey the trial court’s order. It held that voters are not eligible to vote by mail just because they lack immunity to the coronavirus. 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. But the court did make one important clarification. It explained that voters applying for an absentee ballot do not need to explain or provide proof of their disability; they simply needed to check a box on the application indicating that they have a disability. The court found that state election officials have no “duty ... to look beyond the application” or “investigate each applicant’s disability.”

In a concurring opinion, Justice Jeffrey Boyd construed the statute slightly differently but reached a similar result. Boyd said he would have held that lack of immunity to the coronavirus is a “physical condition” but not one with sufficient “likelihood” to “injur[e] ... the voter’s health.” He argued that, under the court’s precedents, the term “likelihood” requires that it be “probabl[e]”—not merely “possibl[e]”—that the specified event would occur. Justice Jane Bland agreed that lack of immunity to

the coronavirus could be a “physical condition” under the Election Code. But Bland emphasized that state law leaves it up to individual voters to determine whether the coronavirus is likely to injure their health.

Courts in other jurisdictions have reached similar results. In [Missouri v. NAACP](#), for example, the state conference of the NAACP asked a state court to declare that Missouri law permits absentee voting for any voter who fears contracting COVID-19 at a polling place. Missouri allows a citizen to vote by mail if the voter “expects to be prevented from going to the polls to vote on election day due to” a host of factors including “[i]ncapacity or confinement due to illness or physical disability.” The plaintiffs argued that voters who refused to go to the polls for fear of contracting COVID-19 are “confine[d] due to illness or physical disability.”

The state circuit court rejected this reading, explaining that the plaintiffs’ construction of the statute would allow citizens to vote by mail if they fear contracting any illness, not just COVID-19. According to the court, such a reading would broaden the availability of absentee voting far beyond the Missouri legislature’s expressed intent. The Missouri Supreme Court, however, reversed the ruling, instructing the trial court to reconsider its decision after Missouri’s legislature [passed a law](#) expanding vote-by-mail to voters in specified at-risk groups. On remand, the trial court again denied the plaintiffs’ requested injunction, finding that plaintiffs without COVID-19 did not suffer from “incapacity or confinement due to illness” under the updated statute.

Not every state has interpreted its law so narrowly. In [Fay v. Merrill](#), a Connecticut state court considered a challenge to the governor’s order allowing any eligible voter to vote by mail. The Connecticut Constitution allows the legislature to authorize voting by mail only for particular groups of qualified voters, including those “unable to appear at the polling place on the day of the election ... because of sickness or disability.” The court construed this constitutional provision to permit absentee voting for any qualified voter concerned about contracting COVID-19 during the pandemic. The court found that the words “because of sickness” did not require the voter to suffer from the sickness. Instead, the “existence of a raging global pandemic” was justification enough. The court distinguished its ruling from that of the Texas Supreme Court, arguing that the Texas Election Code contained distinct language permitting absentee voting only when the voter has contracted COVID-19.

## Age Limits

Several states limit no-excuse absentee voting to any qualified voter over a certain age—usually 60 or 65. Plaintiffs have brought lawsuits challenging these age limits, seeking to make absentee voting universally available to younger voters as well. 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.

These claims have consistently been rejected by state and federal courts. The U.S. Court of Appeals for the Fifth Circuit rejected such a challenge in [Texas Democratic Party v. Abbott](#). In addition to its claims under state law and under the 14th Amendment, the Texas Democratic Party also challenged Texas’s absentee voting law under the 26th Amendment. It argued that the law unconstitutionally discriminates on the basis of age. The plaintiffs argued that the law should be subject to strict scrutiny, pointing to the text of the 26th Amendment, which states that the right to vote “shall not be denied or abridged ... on account of age.” The circuit court, relying on *McDonald*, reasoned that, if limits on absentee voting do not deny or abridge the right to vote at all, then neither could they deny or abridge the right to vote “on account of age.” The court therefore refused to apply strict scrutiny and applied only rational basis review, which the challenged law easily survived.

However, even courts applying the *Anderson-Burdick* test have upheld age limits on no-excuse absentee voting. The U.S. Court of Appeals for the Seventh Circuit also considered a 26th Amendment challenge in [Tully v. Okeson](#). The court first found that *McDonald* controlled and that the challenged age limits did not implicate the right to vote. But the court also held, in the alternative, that the age limits would survive review under the *Anderson-Burdick* test. The court found that many younger voters would still be eligible to vote by mail because they would meet other vote-by-mail requirements, and that any minimal burden on voters who had to show up at a polling place was justified by the state’s interest in “ensuring safe and accurate voting procedures.”

Similarly, in [Disability Law Center of Alaska v. Meyer](#), the plaintiffs challenged a decision by the Alaska state government to mail absentee voting applications to all registered voters over the age of 65. The federal district court denied the plaintiffs’ request for an injunction requiring the state to send applications to all registered voters. The court found that younger voters’ rights had not been “abridged” within the meaning of the 26th Amendment, because even though they would not be mailed applications proactively, they could still fill out online or paper applications to vote by mail.

## Ensuring Receipt of Mail-In Ballots

Plaintiffs in several states have brought lawsuits to ensure that eligible voters actually receive mail-in ballots. However, few courts have yet to rule on the merits of these claims. One example comes from a suit filed by the city of [Green Bay, Wisconsin](#). The city brought a constitutional claim, arguing that, in light of the pandemic, election officials should be required to automatically send ballots to all eligible voters. But this case was dismissed for lack of subject matter jurisdiction under a doctrine that holds that municipal organizations lack standing to bring an equal protection challenge against their own state government. Additionally, a district court in Georgia [dismissed](#) various challenges to state election procedures and absentee voting procedures, finding that they all presented nonjusticiable political questions.

\* \* \*

Despite a slew of recent litigation over the application process and eligibility requirements for voting by mail, courts have shown reluctance to get involved. Litigants have asserted claims under nearly every relevant source of law—local, state and federal; administrative, statutory and constitutional. But the courts have generally exhibited a common theme in all of these cases: reluctance to wade into the political thicket. Part II of this five-part report, “Mail Voting Litigation During the Coronavirus Pandemic,” explores lawsuits related to the submission of mail ballots, including claims challenging the cost of postage, ballot-receipt deadlines, bans on ballot collection assistance and lack of accommodations for mail voters who have disabilities.

## Part II: Submission of Mail-In Ballots

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As the COVID-19 pandemic has wrought unprecedented change on the U.S. election system in general and mail voting in particular, voters and advocates have challenged nearly every aspect of the vote-by-mail process. This article, the second in a five-part report, surveys litigation brought since March 2020, challenging vote-by-mail ballot submission rules and procedures that voting rights advocates argue burden the right to vote.

Specifically, this article discusses four types of legal battles playing out across the country aimed at removing barriers for voters who cast their ballots by mail. The lawsuits challenge Election Day ballot-receipt deadlines for mail-in ballots, the requirement that ballots be returned in a “secrecy sleeve,” the cost of postage required to mail ballots, and the lack of accommodations for voters with disabilities who seek to send ballots by mail. The claims are largely constitutional, but plaintiffs have also employed statutory arguments. Plaintiffs have had little success on ballot postage and voter assistance claims, as well as in Pennsylvania’s highly-publicized secrecy sleeve litigation, but have seen mixed results in Election-Day receipt deadline and accessibility challenges.

### Ballot Receipt Deadlines

A central category of vote-by-mail litigation concerns ballot receipt deadlines. Some states, such as [Florida](#), [Oklahoma](#), [Georgia](#), [Maine](#), and [Texas](#), mandate that mail ballots be *received* by election officials no later than Election Day in order to be counted. Other states require that mail ballots be *postmarked* on Election Day and received by election officials within some specified number of days after, typically two to seven days. In practice, Election Day ballot receipt deadlines result in tens of thousands of rejected ballots. In the 2020 primaries, more than [50,000 ballots](#) were rejected for arriving late, including more than [20,000](#) in Florida alone. According to data from the [2018](#) and [2016](#) Election Administration and Voting Survey, late receipt is the number one cause of rejected mail ballots.

Plaintiffs have brought four main types of federal law challenges to Election Day mail ballot deadlines, three under the U.S. Constitution and one under the Voting Rights Act. The constitutional claims are that Election Day deadlines constitute an undue burden on the right to vote under the *Anderson-Burdick* test; violate the Fourteenth Amendment by denying procedural due process; and

violate the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs initially saw some success on the constitutional claims, with district courts granting plaintiffs' requests for preliminary injunctions in Georgia and Wisconsin. However, appellate courts subsequently stayed these injunctions. As shown in the discussion of *DNC v. Wisconsin State Legislature* below, the Supreme Court has largely supported these appellate court stays.

The *New Georgia Project* case, filed in May, illustrates the undue burden and procedural due process arguments in operation. For their undue burden claims, plaintiffs relied on what is known as the *Anderson-Burdick* test. Developed out of two separate U.S. Supreme Court rulings, the test calls for balancing the burden imposed on the electorate by a voting regulation against the state's interests in relying on that regulation. Plaintiffs [argued](#) that Georgia's requirement that all mail-in ballots be received on or before Election Day posed a severe burden on the right to vote by requiring voters to learn the deadline, receive their ballots with enough time to complete and return them, and guess how many days it would take their ballots to reach election officials through the mail service. Plaintiffs further argued that even those voters who meet the deadline suffer a burden on their right to vote because they are deprived of the ability to consider their choice of candidate until Election Day due to the requirement their ballot be in the mail soon enough to reach election officials by the Election Day ballot receipt deadline.

In addition, Plaintiffs [argued](#) that Georgia's Election Day ballot receipt deadline violates the Due Process Clause under the *Mathews* test. The *Mathews* test calls for balancing an individual's interest in not being deprived of a right without certain procedural protections against the government's interest. Plaintiffs argued that Georgia's failure to count ballots received after Election Day and its requirement that mail voters cast their votes early deprived the voters of their protected interests "to vote and have that vote count" and to "cast a meaningful and informed vote," since they would have "incomplete information" when they had to mail it. Plaintiffs also argued that additional or substitute procedural safeguards were available by counting mail-in votes *postmarked* by Election Day and received within five business days of the election, which would be allowed under Georgia law.

In other cases, plaintiffs have argued that Election Day receipt deadlines violate a third constitutional provision: the Fourteenth Amendment's Equal Protection Clause. Plaintiffs in *Lewis*, for example, [argued](#) that Texas's Election Day receipt deadline resulted in disparate treatment of voters because different counties enforce the deadline with differing degrees of strictness.

Some federal district courts have been receptive to plaintiffs’ constitutional claims, but federal appellate courts have subsequently stayed district courts’ injunctions. For instance, the court in *New Georgia Project* [granted](#) the relevant part of a preliminary injunction on August 31, effectively extending Georgia’s receipt deadline. But in early October, an Eleventh Circuit U.S. Court of Appeals panel [stayed](#) the injunction. The appeals panel found that the district court “erred on two analytical fronts: first, in finding that Georgia’s Election Day deadline severely burdened the right to vote; and second, in improperly weighing the State’s interests against this burden.” The Eleventh Circuit also criticized the district court for “accepting the plaintiffs’ novel procedural due process argument,” noting that, “even if we could choose to innovate a new approach (which we cannot), we would see no reason to do so.”

Similarly, in *DNC v. Bostelmann*, in response to a challenge to Wisconsin’s Election Day ballot receipt deadline during the state’s primary elections, a federal district court [ordered](#) the state to accept all ballots postmarked within six days of the election. However, the U.S. Supreme Court [stayed](#) this order, reasoning that it was issued too close to the election and was, therefore, likely to cause confusion among voters. Five months later, in late September, the district court [granted](#) a preliminary injunction in four consolidated lawsuits, including *DNC v. Bostelmann*. The injunction extended the absentee ballot receipt deadline until November 9, provided the ballots were postmarked by Election Day, November 3. But the Seventh Circuit [stayed](#) the district court’s injunction in early October, agreeing with the Wisconsin legislature’s contentions that a federal court should not change rules so close to an election and that political, not judicial, officials should decide when a pandemic justifies changes to otherwise valid rules.

On October 26, 2020, the U.S. Supreme Court, in a 5-3 vote, [rejected](#) Democrats’ and voting rights groups’ request to strike down the Seventh Circuit’s stay. The Court did not issue a majority opinion, but in multiple concurrences, Chief Justice Roberts and Justices Gorsuch and Kavanaugh criticized the federal court’s intervention in state election procedures. Chief Justice Roberts leveled criticism not only at the federal district court that ordered an extension of Wisconsin’s receipt deadline, but at district courts more broadly. In describing the court’s deadline extension as “improper,” Roberts noted that “[i]n this case, as in several this Court has recently addressed, a District Court intervened in the thick of election season to enjoin enforcement of a State’s laws.” Justice Gorsuch similarly found the district court’s order inappropriate on the basis of both separation of powers and voter confusion concerns. Under the Constitution, according to Justice Gorsuch, judges cannot “improvise with their own election rules in place of those the people’s representatives have adopted.” He stressed the measures already taken by the Wisconsin legislature to respond to COVID-19 to state that the district court was simply complaining that “the state hasn’t done *enough*,” and voiced concern that there were

no clear rules for a judge to use in determining exactly when a ballot receipt deadline would be acceptable. Additionally, Gorsuch raised the possibility that “[l]ast-minute changes” to election procedures run the risk of “confusion and chaos and eroding public confidence in electoral outcomes.”

Concurring, Justice Kavanaugh articulated three reasons why the district court’s injunction was unwarranted. First, the injunction violated the *Purcell* principle by altering state election laws close to an election. Justice Kavanaugh explained that the *Purcell* principle serves to ensure that the “rules of the road” are clear leading up to the election, reducing voter and election official confusion, promoting efficiency, and giving citizens confidence in the election result. He articulated further that an application of the *Purcell* principle that states that a federal appellate court should not overturn a district court order close to the election would “turn *Purcell* on its head.” Instead he saw such action as the appellate court correcting the violation of *Purcell*. Second, Justice Kavanaugh stated that the district court’s injunction “misapprehended the limited role of the federal courts in COVID-19 cases,” because it is the role of the state legislature to “address the health and safety of the people.” While asserting that federal courts lack the expertise needed to make changes to election laws due to the pandemic, he listed cases in which the Supreme Court has recently stayed federal court injunctions that “second-guessed state legislative judgments about whether to keep or make changes to election rules during the pandemic.

Third and finally, Justice Kavanaugh wrote that “the District Court did not sufficiently appreciate the significance of election deadlines. Under the *Anderson-Burdick* test, he said, a state’s “reasonable deadlines” for election steps do not raise constitutional issues because “a State cannot conduct an election without deadlines.” In particular he claimed that states with election day receipt deadlines “want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flop the result of an election.” He further stated that quick election results help to preserve the stability of elections. Justice Kavanaugh endorsed in a footnote Chief Justice Rehnquist’s view in *Bush v. Gore* that state courts are limited in their ability to “rewrite state election laws for federal elections” because Article II states that rules in Presidential elections are to be established by state legislatures.

Justice Kagan, in dissent, took issue with what she deemed Justice Kavanaugh’s and the Seventh Circuit’s “misunderstanding of *Purcell*’s message.” *Purcell* instructs courts to “consider all relevant factors, not just the calendar.” While an autumn injunction could confuse voters, “there is not a moratorium on the Constitution as the cold weather approaches.” The federal district court was correct in issuing its order, Kagan argued, since a ballot receipt deadline extension would not confuse

voters about how to cast their ballots or discourage Wisconsinites from exercising their right to vote. Kagan also emphasized what she viewed as the detrimental effects of the Court’s decision on Wisconsin voters’ enfranchisement. “Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day,” Kagan wrote. “Without the district court’s order, they must opt between ‘brav[ing] the polls,’ with all the risk that entails, and ‘los[ing] their right to vote.’”

In addition to claims arising under federal constitutional law, plaintiffs have challenged ballot receipt deadlines under Section 2 of the Voting Rights Act. For example, Plaintiffs in [Middleton v. Andino](#) asserted that South Carolina’s ballot receipt deadline “abridge[s] and in some cases entirely den[ies] the rights of African American voters,” due in part to socio-economic differences between racial groups in South Carolina which exacerbate COVID-19’s effects. The district court [denied](#) Plaintiffs’ motion for a preliminary injunction extending the receipt deadline. Plaintiffs in [Yazzie v. Hobbs](#) were also unsuccessful in bringing a challenge under the Voting Rights Act. On appeal, the Ninth Circuit [ruled](#) that Plaintiffs—“six members of the Navajo Nation who reside on the reservation in Apache County, Arizona”—lacked standing because they failed to plead a “concrete and particularized injury.” The Ninth Circuit also found that a favorable decision would not redress Plaintiffs’ alleged injury because it would be infeasible for election officials to identify and separate mailed ballots cast by on-reservation Navajo Nation members from those cast by other voters.

In two somewhat unusual cases from the 2020 primaries, county boards of elections in Pennsylvania petitioned state 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 resulted in some voters receiving their ballots too late to return them by the deadline. In [the other](#), a design flaw for a website to request a mail-in ballot in another Pennsylvania county resulted in apartment numbers being left off of voters’ addresses, preventing mail-in ballots from reaching them in time to be returned by the receipt deadline. A state court [granted](#) the first petition, while another state court [denied](#) the latter.

For the general election, plaintiffs in Pennsylvania have secured a vote-by-mail ballot deadline extension. In [Pennsylvania Democratic Party v. Boockvar](#), the Pennsylvania Supreme Court [extended](#) the state’s receipt deadline and “adopt[ed] the Secretary’s informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement.” In late September, Republican state legislators, as well as the Republican Party of Pennsylvania, [filed](#) applications for a stay of the Pennsylvania Supreme Court’s order at the U.S.

Supreme Court. But in mid-October, the Supreme Court denied Republicans' request, [permitting](#) Pennsylvania officials to count ballots received up to three days after the election. It takes five votes to issue a stay, but the Court was [tied](#) on whether to grant Republicans' request. Neither side of the Court explained its position.

At the U.S. Supreme Court, Republican state legislators had [argued](#) that the receipt deadline extension granted by the Pennsylvania Supreme Court violates federal law that requires holding "all elections for Congress and the Presidency on a single day throughout the Union" and violates the Elections Clause of the U.S. Constitution by "seizing the authority to set the times, places, and manner of federal elections from the state legislature." The legislators argued that the Elections Clause grants direct authority to Pennsylvania's General Assembly to regulate federal elections in Pennsylvania and that only Congress, not the Supreme Court of Pennsylvania, can alter the General Assembly's election regulations. While the legislators' request for review acknowledged the COVID-19 context of the Pennsylvania Supreme Court's decision, it noted that "the Supreme Court of Pennsylvania's own special master found that COVID-19 is not likely to disrupt the November General Election ballot receipt deadline."

In early October, [Secretary Boockvar](#) and [Pennsylvania Democrats](#) filed briefs in response to legislators' and Republicans' requests for review. Boockvar [argued](#) that the legislators' stay request raised concerns of federalism. "This Court should not second-guess the Pennsylvania Supreme Court's straightforward construction of the Commonwealth's constitution," Boockvar stated in her brief. The Secretary urged that "state courts be left free and unfettered by [this Court] in interpreting their state constitutions." In addition to federalism implications, a decision by the U.S. Supreme Court to grant legislators' stay request could have resulted in the rejection of thousands of ballots. Such an outcome could have had an outsize impact on the results of the 2020 presidential election, since at least 3 million votes are expected to be cast by mail alone in Pennsylvania this year and because President Trump won Pennsylvania by a narrow margin of 44,000 votes in 2016.

Following the Supreme Court's 4-4 decision, Pennsylvania Republicans [applied](#) to the Supreme Court for expedited consideration of their challenge. However, on October 28, the Court again [declined](#) to block the Pennsylvania Supreme Court's ordered deadline extension. Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch dissented, stating that "[i]t would be highly desirable to issue a ruling . . . before the election," but "reluctantly conclud[ing] that there is simply not enough time at this late date to decide the question before the election." Newly-confirmed Justice Amy Coney Barrett took no part in the decision. According to the Court's press office, Barrett did not [participate](#) "because of the need

for a prompt resolution” of the question “and because she has not had time to fully review the parties’ filings.”

On October 28, the U.S. Supreme Court also [declined](#) to block an extension of North Carolina’s absentee ballot receipt deadline. In September, North Carolina’s Board of Elections [extended](#) the state’s receipt deadline by six days to allow ballots received through November 12 and postmarked by Election Day, to be counted. The extension was made pursuant to a consent [decree](#) in federal court. Republicans appealed to the Fourth Circuit, but the appeals court, in a 12-3 vote, [denied](#) an emergency stay of the district court’s order. Republicans next appealed the Fourth Circuit’s decision, but the U.S. Supreme Court [allowed](#) North Carolina’s absentee ballot receipt deadline extension to stand. Justices Thomas, Gorsuch, and Alito dissented, saying that they would have blocked the state’s extension.

On October 29, in response to a similar challenge, a three-judge panel of the Eighth Circuit [blocked](#) Minnesota’s absentee ballot receipt deadline extension. As a result of litigation regarding the state’s Election Day deadline earlier this year, Minnesota Secretary of State Steve Simon voluntarily entered into a state court-backed consent [decree](#) directing election officials to count absentee ballots received up to a week after Election Day. But five days before the general election, the Eighth Circuit panel ruled that a Republican state legislator and a GOP activist, who would also [serve](#) as presidential electors, had standing to challenge the consent decree. The court reversed a lower court’s denial of plaintiffs’ motion for a preliminary injunction.

In addition to ruling that the plaintiffs did, in fact, have standing, the court considered the merits of plaintiffs’ claims. It concluded that Minnesota’s extension “likely” violated Article II of the U.S. Constitution “because the Secretary extended the deadline for receipt of ballots without legislative authorization.” Under Article II, Section 1 of the U.S. Constitution, the court reasoned, the secretary cannot “override” the state legislature, stating that “[t]here is no pandemic exception to the Constitution.”

Despite recognizing that the *Purcell* principle instructs that “judges should normally refrain from altering [election rules] close to an election,” the panel determined that its decision—issued less than a week before the election—was supported by *Purcell*. The *Purcell* principle “is a presumption against disturbing the status quo,” the court explained, and here, “the Minnesota Legislature set the status quo, the Secretary upset it, and it is [the court’s] duty, consistent with *Purcell*, to at least preserve the possibility of restoring it.” The court instructed the Secretary of State to “identify, segregate, and otherwise maintain and preserve all absentee ballots” received by mail after 8 pm on Election Day. The

court strongly hinted at the possibility of the rejection of all ballots received after the Election Day deadline, directing the state to separate late ballots “in a manner that would allow for their respective votes . . . to be removed from vote totals.” Following the court’s order, Minnesota Secretary of State Steven Simon [announced](#) that the state would not seek a stay of the Eighth Circuit’s decision at the U.S. Supreme Court, even though the state “disagree[d] with the court’s decision.” The secretary’s statement emphasized “that there is no court ruling yet saying [that ballots received after Election Day] are invalid,” and that “[w]e absolutely reserve the right to make every argument after Election Day that protects voters.”

Plaintiffs have also brought state law claims mirroring federal undue burden claims, and the results have been mixed. For instance, 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. The court, in denying Plaintiffs’ motion for a preliminary injunction, found this argument unavailing, [stating](#) that “even in 2020, [the ballot deadline] imposes only a modest burden on the right to vote.”

Michigan state courts have been all over the place on this issue. Plaintiffs in [League of Women Voters of Michigan v. Benson](#) [unsuccessfully petitioned](#) the Michigan Court of Appeals for a writ of mandamus ordering the secretary of state to accept ballots postmarked by the election date, with claims under the Michigan Constitution. The Michigan Supreme Court [denied](#) Plaintiffs leave to appeal. In [Michigan Alliance for Retired Americans v. Benson](#), Plaintiffs initially saw a better outcome, as a Michigan state court [granted](#) Plaintiffs’ preliminary injunction enjoining enforcement of Michigan’s Election Day ballot receipt deadline. The court held that, “as applied to plaintiffs under the facts and evidence presented in this case, the ballot receipt deadline violates plaintiffs’ constitutional rights” under Article II, Section 4 of the Michigan Constitution. It ruled that an “absent voter ballot that is postmarked by no later than November 2, 2020, and received within 14 days after the election, is eligible to be counted.” However, in mid-October, a state appellate court [reversed](#) that ruling, holding that under [League of Women Voters of Michigan v. Benson](#), it is constitutional to require that ballots be received by the close of polls on Election Day to be counted.

Finally, a notable case arising out of the New York June 23, 2020 primary, [Gallagher v. N.Y. State Board of Elections](#), illustrates the interplay between ballot deadlines and postal service operations. In response to the COVID-19 pandemic, the New York State Legislature [modified](#) existing law to require that “absentee ballots postmarked on or before Election Day be counted.” 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. For some reason, “thousands of absentee ballots for the June 23 Primary were not postmarked,” even

though they were mailed in. Evidence [reviewed](#) by the court indicated that a large number of ballots, especially in New York City, were invalidated because they lacked a postmark. Plaintiffs brought suit in the Southern District of New York, claiming violations of their First and Fourteenth Amendment rights, as well as corresponding rights under the New York Constitution.

Applying *Anderson-Burdick*, the U.S. District Court for the Southern District of New York [found](#) the burden on Plaintiffs' right to vote to be "exceptionally severe" because "a large number of ballots will be invalidated . . . based on circumstances entirely out of voters' control." Having found a severe burden, the court applied strict scrutiny, finding that the state's interest in ensuring ballots were cast before polls closed on Election Day was valid but that the postmark requirement was "grossly overinclusive," covering ballots that "cannot possibly have been put in the mail later than June 23."

In assessing Plaintiffs' Equal Protection Clause claim, the court also examined whether the postmark requirement "created a voting process where the state 'by later arbitrary and disparate treatment, value[s] one person's vote over that of another.'" The court found that votes were valued differently in two ways. First, the U.S. Postal Service handled the postmark issue for ballots differently across the state. Second, because ballots travel through the mail at different speeds, ballots mailed at the same time on the same day might, by chance, be treated differently—one might be counted and the other might not.

Having found a substantial likelihood of success on the merits, as well as a strong public interest in granting an injunction, the court determined that the equities tipped in Plaintiffs' favor. In early August, the court [granted](#) a preliminary injunction [requiring](#) local elections boards to count otherwise valid absentee 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."

## Ballot Secrecy Sleeve Requirements

Another salient category of vote-by-mail litigation concerns ballot "secrecy sleeve" rules, which require voters to place completed ballots in paper envelopes before enclosing those envelopes in outer, or return, envelopes. The purpose of secrecy sleeves is to separate the voter's identifying information from the ballot itself in order to protect the voter's privacy. At least 15 [states](#) have laws requiring election officials to provide absentee voters with secrecy sleeves but, in many of those states, use of the secrecy sleeve is optional, and failure to use it is not grounds to reject the ballot.

In a high profile case in Pennsylvania, *Pennsylvania Democratic Party v. Boockvar*, Plaintiffs argued that failure to use the secrecy sleeve should not result in rejection of the ballot. In fact, most Pennsylvania counties [accepted](#) “naked ballots,” those not placed in secrecy envelopes, during the state’s June 2020 primary. Plaintiffs [argued](#) that the language of Pennsylvania’s secrecy sleeve statute did not require rejection of “naked ballots.” On September 17, 2020, the Pennsylvania Supreme Court [held](#) that naked ballots must be rejected in the November general election. After [determining](#) that the language of the statutory secrecy sleeve requirement is “neither ambiguous nor unreasonable,” the court came to “the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.”

[According](#) to Philadelphia’s City Commissioner Lisa M. Deeley, over 100,000 ballots across the state could be rejected for missing secrecy sleeves. The Pennsylvania Supreme Court’s decision has “[sparked](#) a flurry of voter education efforts from nonprofit organizations and political campaigns to highlight the now-required secrecy envelope.”

## Cost of Postage for Mailing Ballots

Another set of legal challenges targets states’ failure to cover the costs of mailing completed mail-in ballots. While about a [dozen states](#)—including Hawaii, Oregon, and Washington, which [regularly conduct](#) all elections by mail— do provide voters with prepaid ballot return envelopes, most states do not.

Plaintiffs have brought suit in several states, including [Georgia](#), [Florida](#), [Oklahoma](#), [Maine](#), [South Carolina](#), [North Carolina](#), [Texas](#), and [Pennsylvania](#), alleging two constitutional violations. First, plaintiffs argue that requiring voters to pay for postage to cast their votes or apply for ballots constitutes a poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. Second, plaintiffs assert that forcing voters to pay for stamps is an impermissible burden under the *Anderson-Burdick* test. As of mid-October, plaintiffs have had little success in ballot postage litigation. Courts have largely denied plaintiffs’ motions for preliminary injunctions on both their poll tax and *Anderson-Burdick* ballot postage claims, generally finding that paying for postage is not a poll tax and that burdens on voters do not outweigh state interests.

The case of *Black Voters Matter Fund v. Raffensperger* provides an illustrative example of the postage-as-poll-tax argument. Georgia law [allows](#) voters to vote absentee for any reason after [applying](#)

for an absentee ballot. Plaintiffs sued Georgia’s secretary of state because voters must provide postage to apply for absentee ballots via mail and to return completed ballots. Plaintiffs contend the cost of stamps is tantamount to a poll tax, even though there are no “[statutes or regulations that require government officials to charge voters postage on absentee ballot applications](#).” The federal district court [dismissed](#) Plaintiffs’ poll tax claim in early August. Although the court [recognized](#) that in-person voting is “potentially a difficult” option for many voters, “particularly during a pandemic,” the court [held](#) that because in-person voting “theoretically remains an option,” “stamps are not poll taxes under the Twenty-Fourth Amendment prism.” In September, Plaintiffs [appealed](#) the district court’s poll tax ruling to the Eleventh Circuit.

Other plaintiffs challenging postage requirements as poll taxes have seen mixed, but largely negative, results. For instance, in [Nielsen v. DeSantis](#), the court summarily [dismissed](#) Plaintiffs’ claim that a Florida [statute](#) requiring voters to pay postage for mail ballots constituted a poll tax, 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.” In [Alliance for Retired Americans](#), the Supreme Judicial Court of Maine [denied](#) Plaintiffs’ motion for a preliminary injunction in late September, and similarly concluded that requiring postage on a mail-in ballot is not a poll tax. A federal district court in Oklahoma reached the same conclusion in [DCCC v. Ziriak](#). While plaintiffs have seen minimal success on poll tax claims, the U.S. District Court for the Western District of Texas declined in [Lewis v. Hughs](#) to dismiss Plaintiffs’ challenge to a Texas [law](#) requiring voters to pay for ballot postage. 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.” The Fifth Circuit summarily [affirmed](#) the district court’s opinion in early September and then [withdrew](#) its opinion in early October.

Plaintiffs have also brought claims that postage requirements are an impermissible burden under the *Anderson-Burdick* test. Parties allege a variety of burdens, many of which are exacerbated by COVID-19. Plaintiffs in [Black Voters Matter Fund](#), for instance, [alleged](#) that a failure to provide prepaid postage burdened the right to vote by requiring those least able to afford stamps to pay, those who lack internet access or credit cards to risk their safety by going to the post office during a pandemic, and those who have no means to do so to travel to the post office. Plaintiffs in [Lewis](#), [Alliance for Retired Americans](#), and [New Georgia Project](#) made similar arguments, asserting that government interests are insufficient to justify these burdens.

As with poll tax claims, plaintiffs have generally seen negative results for their *Anderson-Burdick* claims. In denying Plaintiffs’ motion for a preliminary injunction in *Black Voters Matter Fund*, the federal district court in Atlanta [noted](#) that Plaintiffs failed to demonstrate “a substantial likelihood of success on their argument that the burden of the postage requirement outweighs the cost to the state of the requested relief.” While Plaintiffs [appealed](#) the court’s poll tax ruling to the Eleventh Circuit, they declined to appeal the court’s *Anderson-Burdick* holding. The federal district court in Oklahoma, ruling in *DCCC v. Ziriak* and denying Plaintiffs’ motion for injunctive relief, [stated](#) that paying for postage is a “light” burden on voters and that the “state’s fiscal interests are sufficient to justify its not allocating funds to prepay for postage for absentee ballots.” Similarly, in [Alliance for Retired Americans](#), a superior court in Maine denied a preliminary injunction [finding](#) that “paying for postage to return an absentee ballot by mail represents, at most, a moderate burden and, more likely, only a slight burden that is outweighed by the State’s interest.”

Finally, in addition to federal constitutional law claims, plaintiffs have brought postage requirement suits grounded in state constitutional law. For example, Plaintiffs in [Stringer v. North Carolina](#) alleged that a postage requirement for mail ballots violates the Free Elections Clause of the North Carolina Constitution, which [states](#) that “[a]ll elections ought to be free.” As of mid-October, the case [has not progressed](#) significantly.

## Failure to Provide Accommodations for Voters with Disabilities

[Plaintiffs](#) in some states [have challenged](#) the lack of accessibility of mail voting procedures, alleging that absentee voters with disabilities face unnecessary obstacles. Generally, these cases are brought by or on behalf of visually- or manually-impaired individuals who are unable to transmit, mark, and/or return mail-in ballots in accordance with state procedures.

Voting by mail typically entails filling out a paper ballot by hand and placing the completed ballot in the mail. While existing mail voting processes may allow non-disabled individuals to vote secretly and independently, voters with visual or manual disabilities are likely to need assistance to read and mark their paper absentee ballots, stripping them of the privacy available to non-disabled voters. 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 [during the pandemic]—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).”

These cases have largely been brought in federal court, asserting violations of Title II of the Americans with Disabilities Act (“ADA”) or Section 504 of the Rehabilitation Act. Both claims center on the failure of states to offer reasonable accommodations to voters with disabilities in the provision of public services and federally-funded programs. Plaintiffs assert the existence of a variety of logistically and financially feasible accommodations that would enable disabled voters to request, receive, complete, and even return their absentee ballots electronically. For instance, [Maryland](#) has designed, implemented, and made freely available to other states its ballot marking system that allows a disabled voter to receive and complete an online ballot. For voters who are blind or deaf, electronic ballots permit the use of text-to-speech or braille translation software that obviates the need for assistance. In August, Pennsylvania implemented an online ballot tool, OmniBallot, which allows for the electronic delivery and marking of ballots via a link sent to eligible voters. Pennsylvania expanded accessibility after a state court [ruled](#) that its mail-in ballot process violated the ADA and Rehabilitation Act. After the ruling, the federal district court in a case challenging Pennsylvania’s accessibility limitations—[Drenth v. Boockvar](#)—[granted](#) Defendants’ motion for summary judgment, agreeing with Defendants’ argument that “because a remote ballot marking system will be in place for the November 2020 general election and all future elections, there is no longer a case or controversy for the court to resolve.” The court further granted Defendants’ motion for summary judgment with respect to any claim arising from the return or submission of mailed ballots because “Plaintiffs’ complaint did not raise such a claim.”

Some plaintiffs have sought a different accommodation for blind voters: an electronic ballot delivery systems that some states have created to comply with Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) obligations. Michigan, for example, voluntarily [entered](#) into a consent decree to make its UOCAVA PDF ballots available to blind voters for the state’s May primary election. Although Michigan does not currently permit the electronic transmission of completed ballots, voters with disabilities benefit from the increased technological accessibility to electronic ballots.

## Part II Conclusion

In recent months, voters have brought a wave of challenges to mail-in ballot submission deadlines and restrictions that they believe infringe on the public’s right to vote. Plaintiffs have, thus far, seen largely negative results. Even where plaintiffs have won preliminary injunctions at the lower court level, the

appellate courts—both in the state and federal context—have typically reversed rulings that would have extended ballot deadlines and relaxed limitations on voter assistance.

It remains to be seen whether additional rulings on vote-by-mail cases will be issued and implemented before November. As the COVID-19 pandemic rages on, vote-by-mail will remain a crucial method of electoral participation, and voters are likely to continue to challenge state rules that they view as burdening their right to vote.

## Part III: Challenges Seeking to Expand Delivery Options

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This election will see [a greater number](#) of mail-in ballots than any general election in U.S. history. What’s more, many voters will be using mail-in ballots for the [first time](#). Millions of voters will thus fill out ballots using an unfamiliar process and then deliver them using infrastructure that, in many cases, was [never designed to handle](#) such a massive increase in volume.

Among the many challenges of coping with this reality, states confront two problems associated with the return of mail ballots. First, they must develop a ballot collection system that can handle the rapid growth in mail-in balloting. Some states have chosen to [expand](#) the infrastructure for the return of completed absentee ballots, citing the importance of meeting a new surge in demand and protecting public health during the pandemic. Other states, however, have [limited](#) ballot drop-off options, arguing that the expansion of vote-by-mail access could lead to election fraud.

Second, states must craft policies that govern how much assistance a voter may receive when filling out and returning a completed absentee ballot. The phrase “absentee voter assistance” often refers to a third party collecting ballots from absentee voters and delivering them to a drop box or elections office. However, it can also refer to ballot *delivery*, where a third party delivers vote-by-mail ballots or applications to prospective voters. Although some states have made it [easier](#) for third parties to assist voters in the vote-by-mail process, others have fought to [preserve](#) bans or limitations on third-party assistance (particularly on ballot collection, which is often pejoratively labeled “ballot harvesting”).

This article—the third in a five-part report from the Stanford-MIT Healthy Elections Project—surveys the major litigation regarding efforts to expand mail-in ballot assistance and mail ballot return delivery issues. It identifies challenges to state laws that prohibit third parties from helping absentee voters complete or deliver their ballots (“absentee voter assistance”). It examines lawsuits around the provision of ballot drop-off locations. And, it discusses ongoing litigation against operational changes at the U.S. Postal Service that may delay ballot delivery in [almost every state](#).

Challenges to laws restricting absentee voter assistance have generally failed. Courts have been reticent to strike down state voting regulations without clear evidence that they place a severe burden on the right to vote. However, litigation over delivery infrastructure (drop boxes and Postal Service changes)

has been more successful for vote-by-mail advocates, who have secured several favorable rulings from state and federal courts.

## Bans on Absentee Voter Assistance

Laws that restrict the ability of third parties to assist absentee voters include laws that [restrict](#) the type of person from whom the voter may seek assistance, [criminalize](#) the acceptance of compensation for helping return an absentee ballot, [limit](#) the number of ballots that a third-party assistant may collect, and [narrow](#) the circumstances in which an absentee voter may seek assistance. Thus far, plaintiffs have had little success challenging these statutes.

Plaintiffs challenging absentee voter assistance restrictions usually allege two federal constitutional violations. The first constitutional claim is that restrictions on third-party absentee voting assistance are an undue burden on the fundamental right to vote. Courts evaluate laws that burden the franchise under the [Anderson-Burdick standard](#), which balances the burdens that a voting regulation imposes on the electorate against the state's interests in the regulation. The *Anderson-Burdick* standard does not fit neatly into traditional tiered review of equal protection claims. Courts generally (but not uniformly) adopt a [sliding scale approach](#): the greater the burden a law places on the franchise, the more robust the state's justification for the law must be.

Thus far, courts have found that these laws do not place a severe burden on the electorate under *Anderson-Burdick*. In [American Federation of Teachers v. Gardner](#), a New Hampshire state court refused to enjoin the state's restrictions on ballot collection and delivery, concluding that it was "not persuaded" that the law "even impose[d] a burden on a voter." In [another](#) case, a federal district court in Tennessee upheld restrictions on ballot collection and delivery, finding that they imposed a "moderate," but not "severe," burden on voters. In *Middleton v. Andino*, a federal district court in South Carolina similarly [declined](#) to find that a "candidate collection ban," which prohibits political candidates or paid campaign staff from collecting and returning completed absentee ballots, posed a severe burden on the right to vote. The court determined that the ban was "rationally related to the government's interest in preserving the integrity of elections and preventing voter fraud" and that "[t]he restriction is therefore likely to be upheld as constitutional."

Courts have taken a skeptical view of challenges to voter assistance bans even without resorting to an *Anderson-Burdick* analysis. For example, the Pennsylvania Supreme Court recently [refused](#) to enjoin

state officials from banning third-party delivery of absentee ballots, although it did not explicitly cite to the *Anderson-Burdick* standard.

The second constitutional claim is that state restrictions on absentee voting assistance infringe on civic and political organizations' First Amendment rights of speech and association. For instance, the plaintiffs in [New Georgia Project v. Raffensperger](#) argued that third-party ballot delivery and collection was protected as expressive conduct under the First Amendment. More specifically, the plaintiffs claimed that Georgia's ban on ballot delivery and collection inhibited civic organizations' ability to express their views on the importance of voting. The District Court also rejected this argument, noting that both the [Fifth](#) and [Ninth](#) Circuits have held that ballot and voter application collection is not expressive conduct. Because the court found Georgia's limitations on ballot collection did not implicate the First Amendment, the law was subject only to rational basis review. Under this lenient standard, the court concluded that Georgia's stated interest in "combating election fraud and verifying the eligibility of voters" was likely sufficient to uphold the law. Plaintiffs in New Hampshire brought a similar claim in a state court, in [American Federation of Teachers](#). That court, too, cited Fifth and Ninth Circuit rulings in arriving at the conclusion that "the practice of collecting and delivering absentee ballots is not expressive conduct implicating the First Amendment."

Plaintiffs have also challenged state restrictions on third-party absentee assistance on the grounds that the restrictions violate federal statutes, such as Section 208 of the Voting Rights Act (VRA). Section 208 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." In cases in Michigan ([Michigan Alliance for Retired Americans v. Benson](#)) and [South Carolina \(Middleton v. Andino\)](#), plaintiffs asserted that absentee assistance restrictions prevented voters with disabilities from receiving assistance from the person of their choice. However, neither court resolved this claim on the merits. In [Middleton](#), the federal district in South Carolina [dodged](#) the VRA question, noting that the plaintiffs had failed to raise it in their motion for a preliminary injunction. In [Michigan Alliance](#), a Michigan state court [enjoined](#) a state law that allowed only immediate family members (or a person residing in the voter's household) to return a voter's absentee ballot; but, the court based its ruling on the Michigan Constitution, not the VRA. And a state appellate court subsequently [reversed](#) the lower court ruling, reinstating Michigan's limitations on third-party absentee ballot delivery.

One of the most high-profile ballot collection cases centers on alleged violations of Section 2 of the Voting Rights Act, which prohibits voting practices and procedures that discriminate on the basis of race, as well as those with a discriminatory impact. In the lawsuit, [Arizona Republican Party v.](#)

[Democratic National Committee](#), the plaintiffs challenged Arizona state law H.B. 2023, which imposes criminal penalties for assisting with ballot collection. A federal district court [upheld](#) the law but, in January, a divided Ninth Circuit, sitting *en banc* in [Democratic National Committee v. Hobbs](#), reversed, ruling that H.B. 2023 was enacted with discriminatory intent, in violation of Section 2 of the Voting Rights Act. The court determined that the law impacted thousands of Native American, Hispanic, and Black voters who had relied on third-party collection. In April, the Arizona Republican Party [filed](#) a petition for certiorari to the U.S. Supreme Court. The Court [granted](#) certiorari in early October for a consolidated group of Arizona voting rights cases.

## Limits on Absentee Ballot Drop-Off Locations

The second category of cases relating to return of mail ballots involves challenges to state limitations on where voters may drop off ballots. The plaintiffs in these cases emphasize how restrictions on drop-off locations can confuse absentee voters, many of whom plan to deposit their ballots at secure drop boxes across their county. Plaintiffs have challenged these types of restrictions in [Texas](#), [Ohio](#) and [Pennsylvania](#).

On October 1, Texas Governor Greg Abbott issued a [proclamation](#) that restricted each county to a single drop-off location for ballots cast before Election Day. He explained the move by saying it was needed to prevent voter fraud. The move prompted swift legal [challenges](#), with plaintiffs arguing that the restrictions would burden people with disabilities, the elderly, and minority voters, especially in the state's largest and most populous [counties](#). They noted the restriction would be especially burdensome in the state's most populous counties, such as Harris County (which had planned to set up 11 drop-off locations for its over four million residents) and Travis County (which had planned to set up four drop-off locations for its over 1.2 million residents).

In a suit brought in the U.S. District Court for the Western District of Texas, the plaintiffs claimed that the governor's order violated the First and Fourteenth Amendments as an impermissible burden on the right to vote. They also challenged the governor's order under Section 2 of the Voting Rights Act, claiming it had a disproportionate impact on Latino voters, who have been disproportionately affected by COVID-19. In an [order](#) enjoining the state from implementing the restrictions on drop-off locations, U.S. District Judge Robert Pitman said it was "perplexing" that the state could "simultaneously assert the [drop off centers] do not present a risk to election integrity on Election Day

but somehow do present such a risk in the weeks leading up to” Election Day. The Fifth Circuit [granted](#) a stay of the lower court’s injunction pending appeal.

Parallel proceedings in state court were also unsuccessful. On October 15, just days after the Fifth Circuit’s stay, a Texas state court temporarily enjoined Governor Abbott’s one-per-county rule on drop off centers. Travis County Judge Tim Sulak [wrote](#) in an order that the governor’s proclamation “would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters’ constitutionally protected rights to vote ...” After a state appellate court upheld Judge Sulak’s order, the Texas Supreme Court [reversed](#). The court held that the drop box restrictions did not “disenfranchise anyone,” because Texas voters could still take advantage of mail-in ballots or expanded in-person early voting.

In Ohio, Secretary of State Frank LaRose issued [Directive 2020-16](#), which authorized a single secured drop box outside each county board of elections office. Plaintiffs filed lawsuits in both [federal](#) and [state](#) courts to compel the state to designate additional locations for drop boxes. In mid-September, Judge Richard Frye of the Franklin County Common Pleas Court [determined](#) that the Secretary of State’s ban on establishing multiple drop boxes at various locations was “arbitrary and unreasonable.” In response to this state court order, the Secretary of State [permitted](#) each of Ohio’s 88 county boards of elections to install more than one drop box, but still required that they be located directly outside of each county’s board of elections offices.

On October 8, Ohio U.S. District Judge Dan Aaron Polster [issued](#) an injunction against enforcement of Directive 2020-16. The injunction halted the directive’s prohibition on drop boxes in locations other than directly outside the board of elections office, thus allowing drop boxes to be placed in other locations. The judge’s order also enjoined a ban on the deployment of county board staff to non-elections office ballot boxes. Judge Polster dismissed the state’s contention that multiple drop boxes posed an unacceptable risk of fraud, saying there was “no evidence in the record that suggests that multiple drop boxes cannot be as secure as the single drop box required at each board of elections.” Furthermore, “[n]o evidence was introduced at the hearing to support the conclusory reference to fraud in the Secretary’s brief.” Shortly after Judge Polster’s decision on October 9, a divided Sixth Circuit panel [stayed](#) the district court’s injunction pending interlocutory appeal.

In Pennsylvania, the Trump campaign also [sought](#) an injunction in federal district court against the state’s use of drop boxes for absentee ballots. The Pennsylvania Supreme Court has [already held](#) that the Pennsylvania Election Code allows counties to establish drop boxes beyond those at their main

county office locations. The federal district court addressed the merits of the Trump campaign’s federal constitutional claims against Pennsylvania’s use of drop boxes. The Trump campaign argued that Pennsylvania’s use of drop boxes violates equal protection because the state permits different counties to use drop boxes to varying extents and with varying degrees of security. In his October 10 order granting summary judgment in favor of the state, Judge Ranjan held that there was no unequal treatment because “the result of . . . uneven implementation [of drop boxes] will not be votes in certain counties being valued less than others . . . [or]. . . voters who vote in person [having] their votes valued less . . . . Instead, if Plaintiffs are right, any unlawful votes will dilute all other lawful votes in the same way.” The Trump campaign plans to appeal the district court’s ruling to the Third Circuit.

Finally, plaintiffs have challenged restrictions on voting options that occupy a middle ground between absentee voting and traditional in-person voting. Most notably, plaintiffs in Alabama recently filed a [lawsuit](#) in federal court, seeking to enjoin that state’s ban on curbside voting. Curbside voting allows disabled or elderly voters to cast a ballot from their vehicle outside a polling place, and therefore minimizes transmission risk for vulnerable voters. The district court [agreed](#) with plaintiffs, concluding that the ban violated the First and Fourteenth Amendments, as well as the Americans with Disabilities Act. The court issued a temporary injunction against the ban, and the Eleventh Circuit [affirmed](#). But on October 21, in a 5 to 3 vote, the U.S. Supreme Court [reversed](#), with Justices Sonia Sotomayor, Elena Kagan, and Stephen Breyer dissenting.

## USPS Operational Changes

The final group of lawsuits target the entity that will deliver millions of ballots during the election season: the U.S. Postal Service. Recent [operational changes](#) at the Postal Service caused nationwide [slowdowns](#) in mail delivery. In response, twenty-four state attorneys general filed federal lawsuits against the Trump administration and U.S. Postmaster General Louis DeJoy in [Washington](#), [Pennsylvania](#), and the [District of Columbia](#). Civil rights organizations and individual petitioners have filed similar lawsuits in the District of Columbia ([three related filings](#)), [Pennsylvania](#), and [Illinois](#). Several members of the New York legislature have also joined individual voters to file a [complaint](#) in U.S. District Court for the Southern District of New York.

Collectively, these lawsuits seek to enjoin the Postal Service from eliminating overtime hours for workers processing the mail, decommissioning mail sorting machines that help speed the processing of mail, removing post office mail collection boxes, and declassifying election mail as first-class mail. The

lawsuits allege that the Postal Service’s recent actions violate various federal statutory and constitutional provisions.

The central statutory claim involves the [Postal Reorganization Act](#) (“PRA”), which created the Postal Service’s [Board of Governors](#) and the [Postal Regulatory Commission](#). Under [39 U.S.C. § 3661\(b\)](#), the Postal Service must request an advisory opinion from the Postal Regulatory Commission before making a “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.” The complaints allege that the Postal Service implemented its “[transformative](#)” changes in mail service on a nationwide basis without obtaining an advisory opinion from the Postal Regulatory Commission. The lawsuits 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.

The lawsuits also raise constitutional claims. The individual and civil rights plaintiffs allege that the Postal Service’s actions—which could potentially delay the delivery of millions of mail-in ballots—are an [unconstitutional infringement](#) on the right to vote. Meanwhile, the state attorneys general [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—impermissibly interfere with the states’ constitutional rights to set the “Time, Places, and Manner of holding Elections for Senators and Representatives” under [Art. I, § 4](#) of the U.S. Constitution and to appoint presidential electors “in such manner” as their legislatures direct under [Art. II, § 1](#).

Thus far, four different federal district courts have sided with the individual and state plaintiffs. On September 17, Judge Stanley Bastian of the Eastern District of Washington [granted](#) a nationwide injunction against the Postal Service’s operational changes. Four days later, Judge Victor Marrero of the Southern District of New York also enjoined the Postal Service from instituting its operational changes. Among other things, Judge Marrero’s detailed [order](#) requires the Postal Service to treat all election mail as First-Class or Priority Express mail; mandates the approval of requested overtime between October 26 and November 6; and requires the Postal Service to draft a “guidance memorandum” for managerial staff on the proper handling of election mail. Six days after Judge Marrero’s ruling, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia [issued an injunction](#). Finally, on September 28, U.S. District Court for the Eastern District of Pennsylvania also enjoined the Postal Service’s operational changes in a ruling that [explicitly adopted](#) Judge Marrero’s order. The Pennsylvania order also forbade future implementation of the proposed

operational changes until the Postal Service receives an advisory opinion from the Postal Regulatory Commission.

### Part III Conclusion

The widespread adoption of vote-by-mail has spurred litigation against efforts to restrict the use of absentee ballots. Although challenges to restrictions on ballot collection and delivery have gained little traction thus far, proponents of vote-by-mail have scored key victories on the issues of ballot drop boxes and the U.S. Postal Service. However, other battles—particularly the Texas litigation on the one-per-county drop box rule—remain unresolved.

Ultimately, vote-by-mail [remains](#) one of the most effective options for running a nationwide election during a crippling pandemic, and states will need to balance the need for election security against the right of individual voters to cast votes without placing their health at risk.

## Part IV:

# Challenges to Mail Ballot Voter Verification Procedures

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The first three parts of this report review litigation over rules for applying to vote by mail, eligibility requirements for vote by mail, the date by which mail ballots must be received, how mail-in ballots must be submitted, and who can help a voter in the process. This part examines litigation over how election officials verify that the person who casts a mail ballot is the intended voter and when officials may reject ballots that do not meet the verification requirements.

Every state has a process for verifying the identity of the voter who casts an absentee ballot. Election officials use these processes to ensure that the person who submitted the ballot is, in fact, the duly registered voter who requested the ballot. The processes are designed to ensure against voter fraud in mail voting, as there is no poll worker to perform an in-person verification of the voter's identity. While there is [no evidence of widespread fraud](#) in mail voting, there have been isolated cases.

Almost all states require the voter to sign the return ballot envelope to affirm that the person casting the vote is the intended voter and that he or she has not already voted in the election. Most states additionally verify the identity of mail voters in one of two ways: by comparing the voter's signature on the ballot return envelope to the voter's signature on file with the election office to see if they match, or by having a witness or a notary public sign the ballot or return envelope to attest that the ballot was completed by the intended voter. Other states, such as Alabama and Arkansas, also require that voters return a photocopy of identification with their absentee or mail ballot or ask voters to write their driver's license number or the last four digits of their Social Security numbers on their return envelope.

In some states, when election officials determine that a ballot fails to meet the verification requirements, they simply do not count the vote, and the voter may never know. In many states that perform signature verification, however, largely in response to litigation, election officials now notify voters of any "defects" in their ballots and provide them an opportunity to fix or "cure" the problem.

With the massive increase in the number of absentee ballots already being cast, and the high number of first-time mail voters, there is likely to be an increase in the number of mail ballots flagged and rejected

for defects, including missing signatures and signatures that election officials determine do not match those on file. And because of the pandemic, witness requirements have raised health concerns for some voters. As a result, signature verification practices and witness requirements have come under renewed scrutiny ahead of the November election.

Voting rights advocates have filed a flood of litigation regarding states' voter verification practices and rules relating to mail ballot "defects." In this article, we survey the litigation challenging states' signature verification practices and witness or notary requirements. The success of such litigation has been mixed, and has depended on a number of factors. For federal law claims, outcomes tend to turn on the court's views of whether voting by mail is a liberty interest, the deprivation of which requires procedural due process, how severe a burden the ballot requirement poses to voters, and the strength of the state's argument that the ballot requirement is appropriate or necessary to deter a legitimate threat of voter fraud.

## Signature Verification Requirements

At least 31 [states](#) require election officials to compare the signature on the ballot's return envelope with the signature of the intended voter on file to see if they match. The Healthy Elections Project has summarized these processes in some detail in a [recent report](#). In the 2018 midterm elections, about [64,000 ballots](#) (about .2% of all mail ballots cast) were rejected because election officials determined the signatures on the ballot did not match the signature(s) on file. Almost [as many ballots](#) were rejected because voters failed to sign their ballot envelopes. Because turnout will be high this year, and so many voters will be using the mail-in option, many of them for the first time, the number of ballots rejected for signature mismatch and missing signatures will likely be higher.

The signature requirements for absentee ballots have proven a frequent subject of litigation in the COVID-19 pandemic. Plaintiffs have generally brought two kinds of challenges. First, plaintiffs challenge the process of signature verification itself and request that it not be used as a basis to reject ballots. Second, and often in the alternative, plaintiffs request the state to adopt so-called "notice and cure" procedures that require local election officials to contact the voter to inform them of the problem and provide them with an opportunity and a process to fix the problem so the ballot can be counted.

## Lack of Uniform Standards and Training

Lawsuits challenging the verification process itself typically allege that the state lacks uniform [standards or criteria](#) for matching ballot signatures to signatures on record. They argue that officials charged with comparing the signatures lack necessary expertise and training to perform such comparisons and are prone to errors. They claim that these weaknesses in the process violate the U.S. Constitution's guarantee to equal protection, as the votes of different voters are subject to disparate treatment.

This election season, several such cases have resulted in courts granting consent decrees or the states agreeing to change their policies. In Michigan, for example, the progressive advocacy organization [Priorities USA](#) [sued](#) the state, alleging that Michigan did not have uniform standards for reviewing signatures. The complaint said this lack of uniform standards allowed election officials throughout the state to employ arbitrary and diverging criteria and that many of these officials did not have sufficient training and skills to compare signatures. The Michigan Secretary of State then released new [signature verification guidance](#), and plaintiffs dropped the [suit](#). The new guidance did not eliminate the practice of signature verification altogether, but it implemented a statewide standard designed to reduce erroneous rejections stating that:

Signature review begins with the presumption that the voter's ... envelope signature is his or her genuine signature. 1. If there are any redeeming qualities in the ... return envelope signature as compared to the signature on file, treat the signature as valid. ... 2. A voter's signature should be considered questionable only if it differs in multiple, significant and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter whenever possible.

The guidance also strengthened the mandate that election officials notify voters of a rejected ballot and provide cure procedures.

Similarly, in Pennsylvania, the League of Women Voters [challenged](#) the state's practice of signature matching in federal court, alleging the state failed to require any handwriting training or provide any standards or guidelines to aid election officials in their signature analysis. Plaintiffs alleged violation of both equal protection and procedural due process, as well as infringement on the fundamental right to vote. Plaintiffs [dropped their lawsuit](#) after the Secretary of State Kathy Boockvar [issued guidance](#) on September 11, 2020, prohibiting all of the state's county boards of elections from rejecting returned absentee or mail ballots "based solely on signature analysis."

The Pennsylvania case did not end there, however. The Trump campaign challenged the Secretary of State's new guidance in federal court. The court [dismissed](#) the lawsuit on October 10, holding that Pennsylvania's "Election Code does not impose a signature-comparison requirement for mail-in and absentee ballots" and that the lack of a signature matching does not violate the due process or equal protection clauses of the U.S. Constitution. Finally, on October 23, in response to a petition filed by the Secretary Boockvar seeking declaratory relief, the Pennsylvania Supreme Court [unanimously held](#) that "county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons." The court explained that the state's election code permits use of signature matching to verify in-person voters and provisional ballots, but not for absentee or mail-in ballots. The court clarified, however, that absentee ballots may be rejected for the voter's failure to sign and date the "declaration envelope" altogether.

In Maine, voter advocacy groups filed a [state court case](#) that alleged that the state failed to provide any training on handwriting analysis or signature comparison and simply instructed election officials to determine whether the signatures "appear to have been made by the same person." Plaintiffs argued that Maine's guidance "forces its election officials to make subjective, arbitrary and standardless determinations as to whether to count a voter's ballot" and that such judgments were error-prone. Moreover, the lawsuit argued, the state undertook signature matching only for [some absentee voters](#)—those who request an absentee ballot by mail, in-person, or by fax, but not those who request an absentee ballot online or over the telephone, where no signature was required as part of the request process. In response to the lawsuit, which alleged a host of state and U.S. constitutional violations, the state's secretary of state instructed the state's election officials to implement robust [notice and cure procedures](#).

### **Lack of Notice and Cure**

Most signature verification lawsuits challenge the failure of election officials to notify voters and afford them an opportunity to cure the signature defect before they toss the ballot. Short of asking for the elimination of signature matching altogether, these claims seek injunctions that prohibit election officials from discarding any mail ballots for signature mismatch without first notifying the voter and giving them an opportunity to fix the error.

Lawsuits seeking to require states to adopt notice and cure argue that the lack of notice and cure violates several legal provisions. The two most common claims are that rejecting ballots without notice and cure creates a severe burden on the fundamental right to vote and fails the *Anderson-Burdick* test, in violation of the First and Fourteenth Amendments (see lawsuits in [Kentucky](#), [Arizona](#), [Maine](#), [North Dakota](#), [New Jersey](#)), and deprives voters of their liberty interest in voting without procedural due process, in violation of the Fourteenth Amendment (see lawsuits in [Louisiana](#), [Maine](#), [North Dakota](#), [New Jersey](#)). Some lawsuits have also alleged various state statutory and constitutional violations. A lawsuit in [North Carolina](#) alleged violation of the state constitution’s Free Elections Clause and fundamental right to vote protections. And a lawsuit in [Maine](#) argued violations of the state constitution’s guarantees of due process and equal protection, as well as state laws governing qualifications of electors.

Many states have voluntarily put notice and cure processes in place following such litigation. In New York, after plaintiffs filed a [lawsuit](#) in federal court, the parties agreed to a [settlement agreement](#) on September 17, 2020, specifying how voters will be contacted if their ballot is rejected and how they can fix the problem. In Louisiana, after plaintiffs [sought](#) a cure process in May, the legislature passed an emergency rule providing voters the opportunity to cure ballot deficiencies, and plaintiffs withdrew cure-related claims. Similarly, after being sued, Mississippi implemented [new rules](#) providing for notice and cure.

Courts have been relatively receptive to these challenges, particularly those alleging violations of procedural due process. That may explain why [more and more states](#) now require voters to be notified and afforded an opportunity to cure signature defects on their ballots. At least [nine states](#)—Arizona, Georgia, Indiana, Maine, North Dakota, Michigan, New Jersey, New York, and North Carolina—have created or enhanced their notice and cure policies in 2020 in response to lawsuits, though some of this litigation is still winding its way through the courts.

Courts reason that the voter’s interest in the right to vote is so fundamental, and the notice requirements so minimal, that a process is required before depriving the voter of their vote. This rationale is especially compelling in cases where elections are held entirely by mail, such as they were for North Dakota’s June primary. A federal district court in North Dakota issued a [preliminary injunction](#) prohibiting the state from rejecting any ballot on the basis of signature mismatch “absent adequate notice and cure procedures.” The court found that “[b]ecause there is no possibility of a meaningful post-deprivation process when a voter’s ballot is rejected (there is no way to vote after an election is

over, after all), sufficient pre-deprivation process is the constitutional imperative.” In August, the court issued a [permanent injunction](#).

Similarly, in a case filed prior to COVID-19 but resolved during the pandemic, a federal district court in Indiana granted a [permanent injunction](#) finding that the state’s rejection of ballots for mismatched signatures with no notice and cure violated two constitutional provisions. The court found, under the *Anderson-Burdick* balancing test, that Indiana’s policy violated the Equal Protection Clause because, although only a narrow class of voters were affected, the magnitude of the burden on those voters was substantial. The court also ruled that the policy violated the Due Process clause of the Fourteenth Amendment because, while the right to vote absentee is not a fundamental right, “having extended the privilege of mail-in absentee voting to certain voters, the State ‘must afford appropriate due process protections to the use of [mail-in] absentee ballots.’”

The case of *League of Women Voters of New Jersey v. Way* serves as another good example of the claims brought in these challenges and how they are resolved. Plaintiff in that federal lawsuit [challenged](#) New Jersey’s signature verification process, which [required](#) the county clerk to reject a ballot if they determined the signature on the envelope did not match one on file. Officials doing the comparisons received no training. Plaintiffs [sought](#) notice and an opportunity for the voter to cure, arguing that the current procedure violated the Due Process and Equal Protection clauses, as well as the First and Fourteenth Amendments.

For their due process claim, Plaintiffs claimed that voters faced a high risk of being erroneously deprived of their right to vote even though implementation of procedures that would mitigate that risk would impose only a minimal burden on the state. For their Equal Protection claim, Plaintiffs argued that the absence of statewide standards or training leads to arbitrary differences in the way votes are counted in different locations and that no state interest is furthered by the current process. Finally, for the *Anderson-Burdick* claim, Plaintiffs argued that the current process imposed a severe burden on the right to vote since ballots could be entirely rejected, that this burden was exacerbated by increased reliance on mail voting during the COVID-19 pandemic, and that no sufficiently weighty interest could be offered by the state to justify this burden. The court [granted](#) plaintiffs’ motion for a preliminary injunction for the July 7 primary only, after [stipulation](#) agreement between the parties. Under the order, the Secretary of State was required to direct those responsible for verifying ballots to issue cure letters to voters whose ballots were rejected, explaining how they could verify their identity and have the ballot counted. Defendant also agreed to conduct a public awareness campaign to inform

voters about the signature requirements and the new cure process and to issue signature analysis guidance to the signature evaluators.

## Timeline to Cure

One permutation of lawsuits seeking the right of voters to notice and cure focuses on the timeline to cure errors. Most states with notice and cure procedures give voters until some specified number of days *after* Election Day to cure the mistake. This [varies](#) from just [two days](#) after Election Day in some states to up to 14 days after Election Day or a couple of days before the state’s certification of its vote in others. But some states that allow cure require that any correction be made by the close of polls on Election Day. Election Day cure deadlines mean some voters, particularly those who submit their ballots within a few days of Election Day, are unlikely to receive notice of a defect in time to cure it. So plaintiffs in some states that already provide a notice and cure procedure filed suits this year, seeking to extend the amount of time a voter has to cure their ballot.

One such example is Arizona. While the state already had a notice and cure procedure in place, plaintiffs won an extension of the deadline for a voter to cure a ballot that was returned unsigned. In [Arizona Democratic Party v. Hobbs](#), a federal district court issued a [permanent injunction](#) that gives voters who failed to sign their ballots five business days after Election Day to fix the missing signature, the same amount of time voters in the state already had to fix mismatched signatures. Before the lawsuit, voters had only until Election Day to cure a missing signature. The court [found](#) that the Election Day cure deadline, in the circumstances, failed the *Anderson-Burdick* test even under “the most deferential level of scrutiny” and also constituted a procedural due process violation under the Mathews test.

But the state [appealed](#) the decision to the U.S. Court of Appeals for the Ninth Circuit, which on October 6 [granted](#) the state’s request to put the district court’s order on hold while the state’s appeal is litigated. The court concluded that the requirement that voters supply a missing signature by Election Day imposes only a “minimal” burden, and that “the public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour.” The court noted that the Supreme Court has repeatedly admonished lower federal courts not to change the rules of an election in the run-up to that election.

## Upholding Ballot Rejection without Notice and Cure

While claims seeking a notice and cure procedure for signature defects have been among the most successful mail voting claims brought by voting rights advocates, they have not succeeded in all states. Courts in Ohio and Texas, for example, have upheld the policy of tossing ballots where election officials determine the signature on the ballot does not match that on file, without any requirement of notifying the voter or providing an opportunity to cure the error.

In *Richardson v. Texas Secretary of State Hughs*, a federal district court in Texas [ordered](#) the state to either implement notice and cure procedures or refrain from comparing signatures altogether. In a 103-page [order](#), the court explained that, because “Texas has created a mail-in ballot regime . . . the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots.” The court held that the state’s lack of any notice and cure process violated procedural due process. On appeal however, the Fifth Circuit U.S. Court of Appeals [stayed](#) the injunction on October 19, 2020, stating that “Texas’s strong interest in safeguarding the integrity of its elections from voter fraud far outweighs any burden the state’s voting procedures place on the right to vote.” Deviating from other courts, the court explained that the state is likely to succeed on its argument that the right to vote does not implicate any state-created liberty interest under the due process clause. So, for November, Texas can reject mail ballots for signatures they determine do not match, without giving voters a chance to fix the error. Under state law, voters must be notified within 10 days *after* the election that their ballot was rejected, but there is no ability to challenge the rejection. The unanimous three-judge decision bucks the overall trend towards requiring notice and cure under procedural due process.

Similarly, a federal district court in Ohio [denied](#) plaintiffs’ motion for a preliminary injunction against the state’s policy of rejecting ballots without giving voters adequate time to cure any ballot signature deficiencies. Applying the *Anderson-Burdick* test, the court reasoned that the state’s interest in preventing fraud outweighs the moderate burden on the right to vote.

In sum, lawsuits seeking a notice and cure procedure for signature defects have been among the most successful mail voting claims brought by voting rights advocates, winning rulings on the merits and favorable settlements, consent decrees, and legislation. But plaintiffs have not won all cases. When it comes to rejecting a ballot for signature defects, Courts have not agreed on the severity of that burden on voter’s right to vote and the weight of the state interest served by not having a notice and cure procedure in place. And notably, there is emerging disagreement within the circuits about whether

absentee voting constitutes a liberty interest subject to procedural due process protections under the *Mathews* test.

## Witness and Notary Requirements

Before the COVID-19 pandemic, [12 states](#) required either a witness or a notary public to sign the back of the ballot or return envelope to affirm the identity of the voter: the battleground states of North Carolina and Wisconsin, as well as Alabama, Alaska, Louisiana, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island, South Carolina, and Virginia.

The specifics of these requirements vary from state to state, but most require the ballot to be signed by a single witness or [a notary](#). Alabama requires [two witnesses or a notary](#). [Missouri](#) requires notarization, but [exempts](#) from its notary requirement voters who identify themselves as having an “incapacity or confinement due to illness or disability.” [Minnesota](#) requires a witness or a notary but stipulates that the witness must be a registered voter -- a requirement that is difficult for a voter who is living temporarily in another state. A few states took legislative action to relax these requirements during the pandemic. North Carolina, for example, [reduced](#) its requirement from two witness signatures to one for the 2020 elections.

Witness requirements can be particularly [confusing to voters](#), as they often include multiple components, requiring the name, signature, and address of the witness, as well as the date of the witness signature, all on specific locations on the back of one of the return envelope (or the separate “secrecy sleeve” envelope that goes inside of the external return envelope) or on a separate affidavit document. In North Carolina, in the 2016 general election, [2,700 absentee ballots](#), or 55% of all rejected absentee ballots, were rejected due to witness errors on the ballot.

Recent lawsuits have challenged witness or notary requirements in every state that has them, most recently [Alaska](#). Plaintiffs have generally asked courts to either suspend the witness and/or notary requirement during the pandemic or at least require a notice and cure procedure to allow voters the opportunity to fix witness or notary-related ballot mistakes.

Plaintiffs have brought claims under several provisions of federal law. The most common claim is that these requirements place an unconstitutional burden on plaintiffs' fundamental right to vote in violation of the First and Fourteenth Amendments to the U.S. Constitution. For these claims

(including lawsuits in [Alabama](#), [Louisiana](#), [Minnesota](#), [Kentucky](#), [Oklahoma](#), [South Carolina](#)), plaintiffs argue that the witness requirements as applied during the COVID-19 pandemic fail the Anderson-Burdick test because they leave voters, particularly immuno-compromised voters, with an untenable choice between protecting their health or exercising their right to vote. Plaintiffs also argue that the requirements have a disproportionately negative impact on African Americans, in violation of Section 2 of the Voting Rights Act (see lawsuits in [Louisiana](#), [South Carolina](#), [Virginia](#)) and the Equal Protection clause of the U.S. Constitution (see lawsuits in [South Carolina](#), [Alabama](#)). They argue the requirements, constitute an impermissible “test or device” in violation of Sections 3(b) and 201 of the Voting Right Act (VRA) (see lawsuits in [Alabama](#), [South Carolina](#)). And they say the requirements violate Title II of the Americans with Disabilities Act (ADA), as applied to people with disabilities fearing exposure to COVID-19 (see lawsuit in [Alabama](#)).

Plaintiffs have also brought claims challenging witness or notary requirements under various state constitutional and statutory grounds, including under the [Minnesota constitution](#), the [Missouri constitution](#), the [North Carolina constitution](#) and [Oklahoma state law](#).

Results of these challenges have varied significantly.

Plaintiffs prevailed in Alaska under state constitutional law. On October 12, the Alaska State Supreme Court upheld a preliminary injunction [waiving](#) the state’s witness requirement for 2020, affirming the lower court’s [conclusion](#) that plaintiffs are likely to succeed on the merits. Applying a state law balancing test similar to *Anderson-Burdick*, the court reasoned that the witness requirement, as applied during the pandemic, impermissibly burdens the right to vote in violation of Article 1, Section 5 of the Alaska Constitution. Having to choose between voting and protecting one’s health, the court said, places a severe burden on the right to vote.

Several states have voluntarily relaxed or waived witness or notary requirements in the face of legal challenges. [Missouri](#), for example, relaxed its notary requirements in response to a [lawsuit](#) challenging the state’s witness requirement. Under the new rules, voters who choose to vote absentee because they are at a heightened risk of complications from COVID-19 are not required to fulfill the ordinary notary requirements.

Several states that relaxed or waived their witness or notary requirements in the face of litigation faced challenges over those changes. In Virginia, Minnesota, and Rhode Island, Republican Party groups sought unsuccessfully to stop these changes. A federal court in Virginia approved a [consent decree](#) to

waive the state's witness requirement through November despite opposition from the Republican Party of Virginia. In Minnesota, the Trump campaign and Republican National Committee (RNC) [sought to intervene](#) in three different lawsuits in which a state official approved consent decrees relaxing the state's witness requirement, citing concern about voter fraud and alleged collusion between plaintiffs and the Minnesota Secretary of State. A state judge [approved a consent decree](#) in two of the suits, while a federal judge [denied the consent decree](#) in the third. Though Republican intervenors appealed the consent decree in the state court cases, they subsequently agreed to [dismiss](#) their appeals and the consent decrees stand. And in Rhode Island, the RNC's attempt to intervene in a case and block a [consent decree](#) that waived the state's witness requirement during the pandemic was successful on appeal to the [First Circuit Court of Appeals](#) but failed at the U.S. [Supreme Court](#), on the grounds that they lacked standing, as no state official objected to the agreement.

In North Carolina, however, Republican opposition to a settlement relaxing the state witness requirement was more successful. After the North Carolina State Board of Elections (NCSBE) [settled](#) a [suit](#) brought by North Carolina Alliance for Retired Americans and issued [new guidance](#) in September to make both witness and signature defects [broadly curable](#) via affidavit, the Trump campaign and North Carolina General Assembly leaders [objected](#) to the settlement and new guidance. After a dizzying array of inter-related lawsuits and, *after early voting had already started and absentee ballots were already being submitted*, a federal court issued an [injunction](#) on October 14 that split the baby. It [requires state officials](#) to reject ballots that lack a witness signature but provide a standard notice and cure process for other ballot errors, such as an incomplete witness address, a witness or voter signature on the wrong line, or a missing voter signature. The decision was appealed (primarily on other issues in the case) but [left in place](#) by an en banc ruling of the US Court of Appeals for the Fourth Circuit, and on Oct. 28, a [decision](#) of the U.S. Supreme Court.

Other states fiercely defended their absentee ballot witness requirements. In Alabama, for example, in the face of extensive litigation before the state's July primary runoff, state officials defended the state's requirement that absentee ballots be submitted with the signature of *two* witnesses or a notary plus a copy of a photo ID. In [People First of Alabama v. Merrill](#), the federal district court entered a preliminary injunction against enforcing the witness requirement in the July 14 runoff but *only* for voters who provided a written statement outlining a medical condition that placed the voter at a severe risk from contracting COVID-19. The state still appealed the court's ruling all the way to the U.S. Supreme Court, which [stayed](#) the preliminary injunction on July 2, reinstating the witness requirement just 12 days before the state's primary. The plaintiffs continued to litigate at the district court, however, and won an injunction. But on October 13, the 11th Circuit [stayed](#) the district court's

injunction, effectively reinstating the witness requirement. Despite all the litigation, the state's requirement of two witnesses or a notary, plus a copy of a photo ID, remains intact.

In Oklahoma, the state supreme court [struck down](#) the notarization requirement for absentee ballots on the grounds that it contravened a state law, but the state legislature amended state law two days later to reinstate the requirement. The amended law did add an option, to be used only during a state-declared emergency, that would allow voters to send in a photocopy of approved identification as an alternative to the notary requirement. Plaintiffs in a new lawsuit challenged this new requirement in federal district court on constitutional grounds, but the court [denied the relief](#). After noting that fraud is an “exceeding rarity in Oklahoma history,” the court nonetheless ruled that the state's interests in preventing voter fraud are “legitimate and weighty.”

In some cases, plaintiffs successfully challenged witness requirements in district court only to be overturned on appeal. In *DNC v. Bostelmann*, for example, a federal district court [suspended](#) Wisconsin's witness requirement during the pandemic. But the Seventh Circuit U.S. Court of Appeals [overturned](#) the decision, concluding that the district court “did not give adequate consideration to the state's interests” and citing precedent that “[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”

A notable and high profile example of the legal whiplash of witness or notary litigation this election season is *Andino v. Middleton* in South Carolina. In May, a federal district court in South Carolina issued a [preliminary injunction](#) suspending the witness requirement for the June primary voting due to COVID-19-related concerns. The litigation continued in two separate lawsuits seeking to extend the injunction to November and, in September, a federal district court [enjoined](#) the witness requirement for the November election as well. On appeal, a Fourth Circuit panel [stayed](#) the injunction (restoring the witness requirement), but the Fourth Circuit [ruling en banc](#) quickly reversed and reinstated the injunction (suspending the requirement). Finally, on October 5, *after absentee voting had already started*, the U.S. Supreme Court [reversed](#) the Fourth Circuit's en banc ruling in a two-paragraph order, reinstating the witness requirement for absentee ballots. The Court exempted ballots already received by the state and any ballots received within two days of the order (as these ballots were presumably submitted in reliance on the lower court ruling that no witness was required). Justice Brett Kavanaugh, in concurrence, offered two reasons for his decision. First, he explained, the state's legislature “should not be subject to second guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” And second,

he said, under the Purcell principle, the district court should not have made procedural changes so close to the election. (The district court’s injunction was entered September 18, 2020.)

While plaintiffs obtained favorable settlements and consent decrees in several states during the pandemic, they have generally not succeeded on the merits of witness or notary cases under federal law. Claims that a witness or notary requirement fails the Anderson-Burdick test (a claim included in nearly all challenges to these requirements) have succeeded to some degree at the district court level but have generally failed on appeal. At least 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. Claims that a witness or notary requirement is a “test or device” under the Voting Rights Act have been ineffective because courts have [construed](#) these requirements as necessary to establish the voter’s identity, not as a qualification to vote, in contrast with the tests and devices (such as literacy tests) that Section 201 was enacted to prohibit. Plaintiffs did win a ruling that a witness requirement in Alaska violates the state’s constitution as applied during the pandemic.

## Part V: Efforts to Halt Vote By Mail Expansion

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The potential disruption of in-person voting because of the COVID-19 pandemic has prompted [varied reactions](#) from state governments. Some states, such as California, Nevada, New Jersey, and Vermont, announced plans to send mail-in ballots to all registered voters. Other states, such as [Connecticut](#), expanded the list of acceptable excuses for using absentee ballots to include fear of COVID-19. But not everyone supports the expansion of vote-by-mail or relaxation of rules concerning the use of absentee ballots. In several states, including potential battleground Texas, state officials have refused to expand vote-by-mail access. And just as litigation has sought to expand opportunities for remote voting, litigation has also sought to restrict it.

This article—the last in a five-part report on vote-by-mail litigation—discusses the legal challenges to the expansion of mail voting. These include challenges to state statutes or regulations that authorize the automatic delivery of ballots or ballot applications to all registered voters, relax regulations governing the collection and delivery of mail ballots by third parties, and eliminate witness and notary requirements.

In lawsuits across the country, litigants are presenting two central arguments against vote-by-mail expansion policies. First, opponents claim that expanded mail-in voting will lead to fraud, thereby diluting the value of legal votes, in violation of the First and Fourteenth Amendments. (There is no evidence that vote-by-mail ballots are particularly susceptible to [fraud](#).) Second, opponents argue that state officials lack the legal authority to change the rules related to voting by mail and that major changes must be left to the legislative branch.

### Fraud and Vote Dilution

Plaintiffs in [Pennsylvania](#), [Nevada](#), [Virginia](#), [New Jersey](#), [Illinois](#), [Montana](#), [Hawaii](#), and [Texas](#) have challenged state and county attempts to expand access to mail ballots, arguing that mail voting will increase the incidence of voter fraud. Six of these eight cases are still pending. The plaintiffs in Virginia [voluntarily](#) withdrew their case before a ruling on the merits, while federal judges in Nevada and Vermont dismissed the lawsuits on [standing grounds](#), finding that the plaintiffs had not alleged a particularized injury, because any potential vote dilution would affect *all* voters, not just the plaintiffs

in the lawsuits. Although the federal case in Nevada was dismissed, a [similar case](#) continues in state court.

The lawsuits challenging mail voting follow a consistent formula. The plaintiffs assert that mail ballots are inherently prone to fraud and that the state has failed to establish basic minimum safeguards to ensure ballot reliability. The complaints often include anecdotal references to instances of voter fraud at the state or local level, using examples from within and outside the state where the suit is filed. The complaints then argue that a spike in fraudulent mail-in ballots will dilute validly cast votes, thereby depriving citizens of their right to vote under the First and Fourteenth Amendments.

The Pennsylvania lawsuit is a prominent example of this pattern of legal argument. There, in federal court, the Trump campaign [alleges](#) that mail-in voting “is the single greatest threat to free and fair elections.” The complaint takes aim at the state’s recently passed mail-in voting law, Act 77, which [adopted](#) no-excuse mail-in voting for all qualified voters. The complaint quotes from a 2005 [report](#) prepared by the Commission on Federal Election Reform, which is co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, as observing that “[a]bsentee ballots remain the largest source of potential voter fraud.” The complaint also alleges that Pennsylvania has a history of fraudulent elections and that mail ballots will create administrative difficulties and encourage hard-to-detect ballot harvesting.

Lawsuits in other states have followed a similar playbook. In federal court in New Jersey, the Trump campaign is [challenging](#) Executive Order 177 (EO 177, codified by the legislature as A4475), which directed the state to [automatically](#) send mail-in ballots to all registered voters. After citing allegations of voter fraud in a New Jersey city council election, the complaint argues that EO 177 established an “unauthorized voting system [that] facilitates fraud and other illegitimate voting practices, and therefore violates the Fourteenth Amendment to the U.S. Constitution.” The Trump campaign has also [filed](#) a federal lawsuit in Montana, where Governor Steve Bullock issued a [directive](#) authorizing “universal vote-by-mail procedures” for federal elections. Citing alleged examples of mail ballot fraud in New Jersey and Nevada, the complaint [concludes](#) that fraud is “guaranteed when hundreds of thousands of ballots are indiscriminately distributed.”

The six pending lawsuits that center on voter fraud claims have struggled in the early stages of litigation. In five of these cases, initial rulings have supported expanded mail-in voting (Pennsylvania, Illinois, Nevada, New Jersey, and Montana). In fact, a federal judge recently [dismissed](#) the New Jersey

case. In the Texas case, the state supreme court invalidated a county's proposed expansion of vote-by-mail, but it did so on grounds unrelated to the plaintiff's claim that vote-by-mail invites fraud.

Federal courts have generally rejected fraud-based challenges to vote-by-mail expansion. In the Pennsylvania case, *Trump v. Boockvar*, U.S. District Judge Nicholas Ranjan [granted](#) summary judgment for Pennsylvania on the grounds that the plaintiffs failed to allege a concrete injury. In a 137-page opinion that touched on multiple aspects of state and federal law, Judge Ranjan held that the Trump campaign's voter fraud claims were speculative and were "at most ... a sequence of uncertain assumptions." The Trump campaign plans to [appeal](#) to the Third Circuit. In earlier decisions, federal judges in Montana, Illinois, and New Jersey took a similarly skeptical view. In Illinois, Judge Robert Dow [held](#) that the plaintiff's allegations of voter fraud relied "primarily on unsupported speculation and secondarily on isolated instances of voter fraud in other states and historical examples from Illinois...." In New Jersey, Judge Michael Shipp [concluded](#) that the Trump campaign had "faile[d] to connect...past instances of voter fraud with the relief that they [sought]." And in Montana, Judge Greg Hertz tersely [described](#) the allegations of widespread voter fraud in Montana as "fiction."

State courts have been equally unreceptive to the argument that expansion of vote-by-mail creates constitutionally impermissible opportunities for voter fraud. In a Nevada district court for Clark County, which includes Las Vegas, the Elections Integrity Project challenged a statute (AB 4) that authorized state officials to send mail ballots to every registered voter in the state and permitted third-party ballot collection. In an [order](#) denying a preliminary injunction, Nevada state court Judge Rob Bare concluded that the plaintiffs' allegations of voter fraud were speculative and lacked "any concrete evidence." On October 7, the Nevada Supreme Court [upheld](#) Judge Bare's decision on the same rationale.

In a well-publicized case, Texas state courts took a similar line to their Nevada counterparts. On August 25, Chris Hollins, the clerk of Harris County, [announced](#) that his office would send mail voting applications to the more than two million registered voters in the county. Texas Attorney General Ken Paxton [filed](#) for an injunction against Hollins in state court on August 31. The attorney general's motion argued that a county clerk "lacks the authority to send vote-by-mail applications to every registered voter in Harris County." Paxton said the practice risked misleading ineligible voters into casting fraudulent mail-in ballots. The district court [declined](#) to issue the injunction, and an intermediate appellate court [affirmed](#) on interlocutory appeal. The appellate opinion noted that any claims of potential fraud were "speculative" and that Texas had not proven that voters would intentionally violate Texas law by fraudulently applying for mail-in ballots. The Texas Supreme Court

eventually [struck down](#) the Harris County decision, saying that the Texas Elections Code did not allow county clerks to send unsolicited applications for mail-in ballots, especially when a voter was ineligible to vote-by-mail in the first place.

## Lack of Legal Authority

Several other challenges to expanded mail-in voting argue that state officials lack the legal authority to expand mail voting for the general election. There is considerable overlap between this category of lawsuits and the lawsuits that focus on alleged voter fraud. Several of the fraud cases discussed above—including the lawsuits in [Montana](#) and [Texas](#)—argue that state officials expanded mail voting without statutory authority. In Montana, for example, the Trump campaign argued that Governor Steve Bullock issued his executive order in “direct usurpation of the legislature’s authority.” And, as mentioned above, the Texas Supreme Court held that a county clerk in that state lacked the statutory authority to dispatch vote-by-mail applications to every registered voter in the county.

But some cases have made executive overreach the centerpiece of their argument. These cases argue that state officials exceeded their authority to expand vote-by-mail under state law. For example, in Michigan, a voter and a candidate for the state legislature challenged the Secretary of State’s decision to send mail ballot applications to all registered voters. The [complaint](#) alleged that the Secretary of State had no authority under state law to mail out the applications. After [denying](#) a preliminary injunction, the trial court [granted summary judgment](#) to the secretary of state. The court concluded that Michigan law gave the secretary “clear and broad authority to provide advice and direction with respect to the conduct of elections and registrations.” This included the authority to mail unsolicited absentee ballot applications. The applications informed voters about their “self-executing right,” under the Michigan constitution, to cast an absentee ballot. A Michigan appellate court later [upheld](#) the ruling.

An ongoing legal dispute in North Carolina also concerns executive action to expand absentee voting. In September, the state Board of Elections [issued](#) new guidance to local election officials, easing rules for curing defective absentee ballots. State Republican leaders sued, and a federal district court temporarily [blocked](#) parts of the new policy, after mail voting had already started for the general election. The court ruled that, despite the guidance from the Board of Elections, state law barred counties from accepting unwitnessed absentee ballots. This prompted a new round of [guidance](#) from the Board of Elections, which was released on October 18. The new policies should allow counties to

work through a backlog of more than 10,000 absentee ballots that were set aside and not processed after the court's ruling, although future litigation is still possible.

The most significant case on the authority of state officials to expand vote-by-mail access has come out of Pennsylvania. Under Pennsylvania law, mail-in ballots [must](#) arrive no later than 8 p.m. on Election Day. But in mid-September, the Pennsylvania Supreme Court [ruled](#) that enforcing the Election Day deadline during the COVID-19 pandemic would violate the Pennsylvania Constitution. The court pointed to the [Free and Equal Elections Clause](#) of the state constitution, which holds that elections must be “free and equal,” and which bars any “civil or military” power from “interfer[ing] to prevent the free exercise of the right of suffrage.” The majority concluded that the pandemic was functionally a “natural disaster” that threatened equal access to the right to vote. As a remedy, the court ordered state officials to count ballots that arrive within three days of Election Day, “unless a preponderance of the evidence demonstrates that [the ballot] was mailed after Election Day.”

On September 28, the Trump campaign filed an [application](#) for an emergency stay with U.S. Supreme Court Justice Samuel Alito. Among other things, the filing argues that the Pennsylvania Supreme Court's decision violates the [Elections Clause](#) of the U.S. Constitution. That clause states that the “Times, Places, and Manner” of elections “shall be prescribed in each State by the Legislature thereof . . .” By extending the deadline, the petitioners argued, the Pennsylvania Supreme Court was supplanting the state legislature's authority to determine the “Times, Places, and Manner” of the election.

On October 19, a deadlocked U.S. Supreme Court [denied](#) the stay application, with Chief Justice John Roberts Jr. joining Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. With the seat vacated by the death of Justice Ruth Bader Ginsburg still empty, the court's 4 to 4 split ruling left the Pennsylvania Supreme Court decision intact, though the U.S. Supreme Court's action has no precedential value. This means that the Pennsylvania petitioners' argument could still be adopted in the future to uphold laws that state officials find inadequate, and state courts find unconstitutional under state constitutions. A literal interpretation of the word “Legislature” in the Elections Clause would arguably invalidate efforts by state governors and courts to expand mail voting options by, for example, extending absentee ballot deadlines or augmenting ballot delivery options. Readers may remember that this precise argument was adopted by three conservative justices as an [alternative](#) means of resolving *Bush v. Gore* in 2000. There, the concurring justices argued that “to attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has

actually departed from the statutory meaning, would be to abdicate [the Court’s] responsibility to enforce the explicit requirements of [the Elections Clause].”

It is worth noting that the U.S. Supreme Court has already endorsed a more capacious reading of the Elections Clause than the one adopted by the Pennsylvania petitioners. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the 5 to 4 majority [concluded](#) that the word “Legislature” in the Election Clause of the U.S. Constitution means the “lawmaking power” of a state. Writing for the majority, Justice Ginsburg argued against a narrow interpretation of the word “Legislature” that encompassed only “the legislative body alone.” Instead, a state’s “legislature” can include the citizen initiative process, executive vetoes, and arguably, state court decisions. (We use the word “arguably” because the *Arizona State Legislature* majority did not explicitly mention state court decisions in its opinion).

The fact that the other four justices would have stayed the Pennsylvania Supreme Court decision suggests that a more conservative Court might, in the future, welcome the petitioners’ argument. With the U.S. Senate expected to confirm nominee Judge Amy Coney Barrett by October 26, the underlying arguments in this case could return in later litigation.

## Part V Conclusion

Overall, litigation challenging the expansion of mail voting in the months before the 2020 election has broadly favored state officials who sought to meet the surge in demand caused by the COVID-19 pandemic. Challenges to state expansions of vote-by-mail have generally failed on the merits, with judges ruling that states acted within their authority and that claims of potential voter fraud were too speculative to warrant relief. However, U.S. Supreme Court’s 4 to 4 split in *Republican Party of Pennsylvania v. Boockvar* raises the prospect of future restrictions on the ability of state executives to respond to public health concerns around election operations.

As the COVID-19 pandemic continues to rage, mail voting will be a critical factor in the upcoming election. Opponents of mail voting will likely continue to challenge expansions of the practice, and several cases await appeal or initial rulings on the merits. As the election draws nearer, it will be up to states to promulgate legally defensible vote-by-mail strategies, and balance their citizens’ health and their right to vote.