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## Ensuring Equal Access to the Mail-In Ballot Box

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### ABSTRACT

Mail voting has emerged as the top policy solution to voting amid the COVID-19 pandemic. But not all mail voting schemes are created equal. Implemented improperly, vote-by-mail can disproportionately disenfranchise many of the same voters at highest risk of contracting and subsequently dying from the virus. From voter identity verification to language access, jurisdictions implementing widespread mail voting must be sensitive to the differential needs of minority communities. This Article emphasizes the need to communicate with residents regarding mail voting procedures, undertake measures to boost voter confidence in mail ballots, and take other steps to ensure that vote-by-mail empowers all voters to cast their ballot. Implemented carefully, vote-by-mail can protect everyone's right to vote as voters grow increasingly wary of the polls.

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## INTRODUCTION

The COVID-19 pandemic is exacerbating existing inequality in the United States. Not only do the indigent and people of color face greater risk of contracting the illness and subsequently dying from it,<sup>1</sup> but already marginalized voters will face greater burdens on their right to vote in the November 2020 general election if officials do not act quickly. As of this writing, states' responses to COVID-19 have been mixed: Fifteen states have delayed their primary elections, some *multiple times*,<sup>2</sup> and others have proceeded as though there were no pandemic or actively blocked efforts to postpone elections. Reasonably, voters are confused, and primary voter turnout has been significantly depressed in some states, such as Illinois, where COVID-19 kept voters at home.<sup>3</sup>

The expansion of vote-by-mail is being championed by medical experts and voting rights advocates as the best tool in our election officials' pandemic-response toolbox.<sup>4</sup> Nevertheless, some experts express concerns over a potential decrease in voter participation, which is traditionally associated with

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1. See generally Reis Thebault, Andrew Ba Tran & Vanessa Williams, *The Coronavirus Is Infecting and Killing Black Americans at an Alarming High Rate*, WASH. POST (Apr. 7, 2020), <https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarming-high-rate-post-analysis-shows/?arc404=true> [<https://perma.cc/HE4U-LS46>]. In Los Angeles County, there is evidence that the poor are three times as likely to die of COVID-19. Alex Wigglesworth, *L.A. County Reports 18 New Coronavirus Deaths, Says Poor People Are Three Times More Likely to Die*, L.A. TIMES (Apr. 26, 2020), <https://www.latimes.com/california/story/2020-04-26/l-a-county-reports-18-new-coronavirus-deaths-says-poor-people-are-three-times-more-likely-to-die> [<https://perma.cc/T977-R6D7>].
  2. Alaska, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Pennsylvania, Rhode Island, West Virginia, Wyoming and Puerto Rico rescheduled their contests. See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Their Primaries Because of Coronavirus. Here's a List.*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> [<https://perma.cc/ZQ9H-4PZU>].
  3. Nick Corasaniti et al., *Illinois Stumbles as States See Light Voter Turnout, With Many Ballots in the Mail*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/politics/primary-voter-turnout-2020.html> [<https://perma.cc/F4A8-6C98>].
  4. See Lily Hay Newman, *Vote by Mail Isn't Perfect. But It's Essential in a Pandemic*, WIRED (Apr. 9, 2020), <https://www.wired.com/story/vote-by-mail-absentee-coronavirus-covid-19-pandemic> [<https://perma.cc/3W28-CWDQ>]; see also Devan Cole & Abby Phillip, *Michelle Obama's Voter Registration Group Throws Support Behind Mail-in Voting Push*, CNN (Apr. 14, 2020), <https://www.cnn.com/2020/04/13/politics/michelle-obama-mail-in-voting-support-coronavirus/index.html> [<https://perma.cc/4YRE-Y5LW>].

vote-by-mail schemes.<sup>5</sup> Others caution against its partisan implications. Vote-by-mail may in fact increase voter turnout,<sup>6</sup> especially among minorities<sup>7</sup> and the differently abled.<sup>8</sup> Additionally, most research has shown that vote-by-mail election processes do not favor a specific political party—including reports by the U.S. Election Assistance Commission, which analyzed the most comprehensive set of federal election data.<sup>9</sup> Vote-by-mail is simply the most effective measure available to ensure that voters can participate even amid the viral outbreak.

Of course, vote-by-mail measures are no cure-all to barriers to voting. Mandatory signature matching,<sup>10</sup> failure to provide voters with alternatives to photo ID to verify their identity, and lack of reasonable opportunity to cure

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5. ELIZABETH BERGMAN ET AL., HOW DOES VOTE BY MAIL AFFECT VOTERS? A NATURAL EXPERIMENT EXAMINING INDIVIDUAL-LEVEL TURNOUT 2 (2020), <https://disabilityorganizing.net/voting/docs/Bergman-Yates.pdf> [<https://perma.cc/DX99-MBYQ>].
  6. See Alan S. Gerber, Gregory A. Huber & Seth J. Hill, *Identifying the Effects of All-Mail Elections on Turnout: Staggered Reform in the Evergreen State*, 1 POL. SCI. RES. & METHODS 91 (2013) (finding that increased mail voting in Washington boosted aggregate participation by 2 to 4 percentage points); GEORGE PILLSBURY, NONPROFIT VOTE, AMERICA GOES TO THE POLLS 2018 (2019), <https://www.voteathome.org/wp-content/uploads/2019/03/america-goes-polls-2018.pdf> [<https://perma.cc/9R29-9DZH>] (providing comprehensive research into the 2018 elections showing the three reforms that had the most positive impact on voter engagement were: Vote at Home, Same Day Registration, and Automatic Voter Registration).
  7. See Priscilla L. Southwell, *A Panacea for Latino and Black voters? Elevated Turnout in Vote by Mail Elections*, 47 SOC. SCI. J. 819 (2010) (analyzing election data from elections in 2004–2007 in Denver, Colorado and finding that Latinx and Black voters participated more often in vote-by-mail elections).
  8. See Arlene Kanter & Rebecca Russo, *The Right of People With Disabilities to Exercise Their Right to Vote Under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852 (2006).
  9. The U.S. Election Assistance Commission conducts the “Election Administration and Voting Survey” following each federal general election and has done so since 2004. See, e.g., U.S. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY: 2018 COMPREHENSIVE REPORT (2019), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf) [<https://perma.cc/BB7E-V7GB>]. A recent study of vote-by-mail programs in California, Utah, and Washington found that “[c]laims that vote-by-mail fundamentally advantages one party over the other appear overblown.” May Wong, *New Research on Voting by Mail Shows Neutral Partisan Effects*, STAN. INST. FOR ECON. POL’Y RES. (Apr. 16, 2020), <https://siepr.stanford.edu/news/new-research-voting-mail-shows-neutral-partisan-effects> [<https://perma.cc/GYW4-SU6W>]. But see Reid J. Epstein, *Vote by Mail in Wisconsin Helped a Liberal Candidate, Upending Old Theories*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/wisconsin-mail-voting.html> [<https://perma.cc/J7TP-JSHC>] (showing that vote-by-mail privileged Democratic voters in Wisconsin’s election).
  10. States often adopt signature verification methods, in which election officials compare signatures on file from a voter’s registration or another government record to the signature on their ballot, rejecting the ballot at their discretion.

ballot defects are each likely to have a disproportionate effect on communities of color.<sup>11</sup> As states continue to expand mail voting, it is essential that officials study these areas for improvement. Vote-by-mail is good policy even in the best of times, and the COVID-19 pandemic presents an opportunity to expand and improve mail voting in the United States to best protect the voting rights of minority citizens. This Article proposes several measures that jurisdictions should implement to ensure that citizens have an equal opportunity to cast their mail ballot.

### I. LARGE SWATHS OF VOTERS FACE BARRIERS TO THE (MAIL-IN) BALLOT BOX

Voting is a fundamental right that cannot be abridged without due process. Yet large swaths of voters face barriers to voting by mail which prevent them from effectively exercising their fundamental right. Granting election officials unchecked discretion in rejecting noncompliant ballots from eligible voters is facially violative of the U.S. Constitution.<sup>12</sup> It can also have dire consequences. For example, during the 2018 midterm elections, Georgia election officials discarded hundreds of absentee ballots.<sup>13</sup> “Of those discarded ballots, more than one-third came from the racially diverse Gwinnett County, where more than half of the rejected ballots belonged to African American or Asian American voters.”<sup>14</sup>

Vote-by-mail will fail to meet its franchising potential if eligible voters have difficulty obtaining mail ballots, and if those ballots ultimately go uncounted. Poorly designed and implemented vote-by-mail schemes could have a disparate impact on communities of color—especially on Native American voters, many of

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11. DANIEL A. SMITH, ANALYSIS OF ABSENTEE (“VOTE-BY-MAIL”) BALLOTS CAST IN FLORIDA (2016), <https://electionsmith.files.wordpress.com/2016/10/smith-coie-jenner-report-dnc-fdp.pdf> [<https://perma.cc/347H-9AWN>]; Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1644–45 (2019).

12. See, e.g., *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1022 (N.D. Fla. 2018) (“The precise issue in this case is whether Florida’s law that allows county election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection—passes constitutional muster. The answer is simple. It does not.”).

13. Danielle Root & Adam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:03 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections> [<https://perma.cc/2UFM-9UF4>].

14. *Id.*

whom lack government-recognized addresses.<sup>15</sup> These issues are only exacerbated by the COVID-19 pandemic; in New Mexico, for instance, four Native American Pueblos closed their doors to nonresidents in an attempt to reduce viral transmission, meaning United States Postal Service could not deliver mail ballots directly to residents' doors.<sup>16</sup> With the potential disenfranchising effect of poorly executed mail voting so dramatic, jurisdictions scaling up vote-by-mail need to remain cognizant of the needs of different voting communities and implement procedures to ensure all citizens have access to a mail ballot.

### A. Signature Variance and Matching Provisions Generally

For the most part, a person may never think twice about variations in their signature. It is only in the context of voting by mail that these variations become profoundly consequential. A study of signature verification in Florida during the 2012, 2016, and 2018 elections found that the procedure disproportionately screened out ballots cast by young and minority voters.<sup>17</sup> Variances between signatures are more prevalent in people who are elderly, disabled, or who speak English as a second language.

At issue is the fact that every voter's signature may vary for a variety of reasons, both intentional and unintentional. Unintentional factors that can affect a person's handwriting include medical or physical factors such as growing old, illness, injury, symptoms from taking certain medicine, change in eyesight, and consuming alcohol or drugs; mechanical factors such as pen type, ink, signing surface, signing position, and paper quality; and psychological factors such as distress, anger, fear, depression, happiness, and nervousness. Moreover, a person's handwriting naturally changes over time.

As a procedure to verify identity, signature comparison can be unreliable, arbitrary, and violative of Fourteenth Amendment equal protection standards, which forbid any electoral procedure lacking "specific standards to ensure its equal application."<sup>18</sup> Election officials tasked with

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15. See *Vote by Mail in Native American Communities*, NATIVE AM. RTS. FUND, <https://www.narf.org/vote-by-mail> [<https://perma.cc/3RMY-LTQH>] (last visited July 6, 2020); *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018); Declaration of Matthew A. Barreto, Ph.D., *Brakebill*, 905 F.3d 553 (No. 18-1725).

16. Gwyneth Doland, *Fewer Polling Places Present Challenges for Native Voters*, N.M. IN DEPTH (May 27, 2020), <http://nmindepth.com/2020/05/27/fewer-polling-places-present-challenges-for-native-voters/> [<https://perma.cc/9HXX-2PCE>].

17. SMITH, *supra* note 11.

18. See, e.g., Complaint at 21–22, *Richardson v. Tex. Sec'y of State*, No. 5:19-cv-00963 (W.D. Tex. Aug. 7, 2019).

verifying signatures are rarely trained in forensic handwriting and often are not provided with any guidelines to assist in determining if two signatures match. Nineteen states perform signature verification in addition to checking information and eligibility against the voter registration record when requesting a mail-in ballot.<sup>19</sup>

Many of those signature comparison procedures that are in place give no guidance on the questions that inevitably arise during signature comparison evaluations, such as what types of stylistic variations suggest that two signatures were made by different individuals, and what number of variations is required to conclude that the signature on the mail-in ballot envelope, ballot application, or prior documents was executed by a person other than the voter. Perhaps unsurprisingly, verification standards may vary even within a single county.

## **B. Signature Matching Provisions Can Harm Younger and Minority Voters**

In his analysis of absentee ballots cast in Florida,<sup>20</sup> Dr. Daniel Smith found “clear evidence that across the state’s 67 counties a higher rate of absentee ballots cast by Democratic electors were rejected than absentee ballots cast by Republican electors” in Florida’s 2012 Election.<sup>21</sup> Because Florida law does not allow voters to cure potential defects, thousands of votes were rejected. Younger and minority ballots were twice as likely to be rejected as those cast by older white voters.<sup>22</sup> Dr. Smith found that Black registered voters are disproportionately more likely to cast an absentee ballot that is rejected by election officials than are their white counterparts. Additionally, he found that as the percentage of mailed absentee ballots from Black voters

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19. Arkansas, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Illinois, Indiana, Kansas, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Tennessee conduct signature verification before issuing an absentee ballot. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT’L CONF. ST. LEGISLATURES (June 9, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/Z27Z-T43M>].

20. About 27 percent of registered Florida voters cast their ballot by mail in the 2012 Election. See SMITH, *supra* note 11, at 2.

21. *Id.* at 14.

22. See DANIEL A. SMITH, ACLU FLA., VOTE-BY-MAIL BALLOTS CAST IN FLORIDA 3 (2018), [https://www.aclufi.org/sites/default/files/aclufi\\_-\\_vote\\_by\\_mail\\_-\\_report.pdf](https://www.aclufi.org/sites/default/files/aclufi_-_vote_by_mail_-_report.pdf) [<https://perma.cc/WEJ7-ELRK>]. This was true in both the 2012 and 2016 Florida General Elections. *Id.*

increased, the percentage of rejected mailed absentee ballots from Black voters also increased.<sup>23</sup>

Similarly, litigation in California in *La Follette v. Padilla* revealed that as many as 45,000 vote-by-mail ballots were rejected by election officials and voters were neither notified that their vote was not counted nor afforded an opportunity to cure their ballot's defect under sections of the California Elections Code—sections that were ultimately amended in response to advocacy efforts and the plaintiffs' success in the trial court proceedings.<sup>24</sup> In the complaint, the ACLU reported that "Latino voters ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 11 of the 29 counties, while Asian-Americans' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 6 counties."<sup>25</sup> The trend in rejection rates being higher for voters of color and younger voters places these voters in a special predicament; either vote by mail with the possibility of your vote not counting or vote in person in conditions that may be unsafe.

### **C. Security Measures Should Not Cost Voters Their Exercise of the Franchise**

Despite the well-documented dangers of signature matching, H.R. 1,<sup>26</sup> a congressional bill overhauling voting, campaign finance, and ethics laws, mandates signature verification to confirm the identity of voters mailing in their ballots. Almost as dangerously, the Securing America's Federal Elections Act of 2019<sup>27</sup> contains no provision that requires states to provide an alternative to signature matching verification. To safeguard absentee voting, this legislation must mandate alternatives to signature verification. Allowing for alternative methods of verification is especially useful because most election officials lack the hands-on experience and training in forensic

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23. See Expert Report of Dr. Daniel A. Smith, Ph.D., *Fair Fight Action v. Raffensperger*, No. 1:18-cv-05391-SCJ (N.D. Ga. Dec. 16, 2019).

24. *La Follette v. Padilla*, No. CPF 17-515931, 2018 WL 4050727 (Cal. Super. Ct. Apr. 9, 2018). Ultimately the ensuing appeal of the trial court's ruling in favor of plaintiffs was dismissed because on September 17, 2018, the Governor of California signed Senate Bill No. 759 (2017–2018 Reg. Sess.), which amended former section 3019(c)(2) to provide voters an opportunity to cure a mismatched signature before the certification of election results. As revised, the statute now provides the remedy sought by plaintiffs in the underlying litigation, including a notice provision and cure procedure. See CAL. ELEC. CODE §§ 3019(d)(1)–(3) (West 2020).

25. Complaint at 13, *La Follette*, 2018 WL 4050727 (No. CPF 17-515931).

26. For the People Act of 2019, H.R. 1, 116th Cong. § 1621(a)(2) (2019).

27. See Securing America's Federal Elections Act of 2019, H.R. 2722, 116th Cong. (2019).



handwriting analysis that those conducting signature analysis would undergo in other contexts. As such, states should adopt statewide standards for signature verification to prevent individual counties from using overly harsh or overly lenient matching algorithms. States should also promulgate strict guidelines for conducting signature verification and implementing signature verification software, as do most large counties in Colorado, for example.<sup>28</sup> Publishing signature verification standards at least two weeks before an election so that voters can make their best efforts to match their signature to past government records may also minimize signature rejection.

States must create a failsafe for signature matching of vote-by-mail ballots. If a signature cannot be verified, election officials should employ the following measures: allow the voter to provide the last four digits of their Social Security Number, a bank statement, a utility bill, driver's license or passport number, or a digital photograph of the voter; allow the voter to affix their fingerprint to their ballot; or allow the voter to provide sworn statements.

These curing provisions should be extended to all ballot discrepancies, not just signature discrepancies. Election officials must allow voters to cure discrepancies with their ballot by telephone, email, through a website or other online portal, and in person. In-person curing should be a last resort, and other methods must provide a meaningful opportunity to cure from the safety of a voter's home. The good-faith efforts by election officials to notify a voter of a discrepancy, as required by H.R. 1, must be documented by the county clerk or registrar's office and reported to the relevant secretary of state's office. The method of notification must also be documented.

Finally, providing a twenty-one-day period after election day for voters to cure their ballots ensures that ballots mailed or submitted on the day of the election can be corrected. A shorter window of time, especially when coupled with delays in mail or vote counting, may preclude voters otherwise entitled under law to correct their ballot from having their vote counted.

## II. ABSENTEE VOTING WILL BE SEVERELY RESTRICTED ABSENT VIGILANT ADVOCACY AND RESISTANCE

As stated above, vote-by-mail does not favor one political party over another in voting outcomes. The Republican Party apparatus, however, has

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28. Brian Naylor, *Sign Here: Why Elections Officials Struggle to Match Voters' Signatures*, NPR (Nov. 17, 2018), <https://www.npr.org/2018/11/17/668381260/sign-here-why-elections-officials-struggle-to-match-voters-signatures> [<https://perma.cc/YG6U-4QWD>].

attacked the use of mail voting. The Republican Party has consistently described mail voting as (1) a scheme to undercut Republican electoral chances and (2) an invitation for mass voter fraud. President Donald Trump is at the forefront of this effort, encouraging Republicans to “fight very hard” against statewide mail-in voting.<sup>29</sup> Less than twelve hours later, he continued on Twitter, “Absentee Ballots are a great way to vote for the many senior citizens, military, and others who can’t get to the polls on Election Day. These ballots are very different from 100% Mail-In Voting, which is ‘RIPE for FRAUD,’ and shouldn’t be allowed!”<sup>30</sup> Less than a week following the President’s tweets, Tucker Carlson criticized Michelle Obama’s efforts to expand vote-by-mail on air, asserting “it would instantly destroy the public’s faith in elections outcomes and hence, our democracy.”<sup>31</sup> The Republican Party chairwoman, Ronna McDaniel, argued in an interview on Fox Business that the Democrats “want to take away the safeguards that ensure the integrity of the election process.”<sup>32</sup> The Republican Party has even brought lawsuits in states like California attempting to restrict mail voting based on the unfounded fraud allegations.<sup>33</sup>

While states largely controlled by the Republican Party have long used vote-by-mail,<sup>34</sup> advocates must prepare for even stronger pushback against vote-by-mail expansion in the leadup to the general election. The following section arms advocates with certain policy recommendations; while not comprehensive of valuable possible reforms to mail voting schemes,<sup>35</sup> these

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29. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2020, 5:20 AM), <https://twitter.com/realdonaldtrump/status/1247861952736526336> [<https://perma.cc/7E85-MGR8>] (“Republicans should fight very hard when it comes to state wide mail-in voting. Democrats are clamoring for it. Tremendous potential for voter fraud, and for whatever reason, doesn’t work out well for Republicans. @foxandfriends”).

30. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2020, 4:34 PM), <https://twitter.com/realdonaldtrump/status/1248031484532928514> [<https://perma.cc/F6ZB-24KW>].

31. FOX News Channel, *Tucker Carlson Tonight 4-14-20*, DAILY MOTION (Apr. 14, 2020), <https://www.dailymotion.com/video/x7tb6df> [<https://perma.cc/HYN4-YBBN>].

32. Jim Rutenberg, Maggie Haberman & Nick Corasaniti, *Why Republicans Are so Afraid of Vote-by-Mail*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/politics/republicans-vote-by-mail.html> [<https://perma.cc/8LA6-35AY>].

33. See, e.g., Complaint for Declaratory & Injunctive Relief, Republican Nat’l Comm. v. Newsom, No. 2:20-cv-01055-MCE-CKD (E.D. Cal. May 24, 2020).

34. Red states like Utah have long embraced vote-by-mail, which was implemented with bipartisan support. See Eric Cortellessa, *How to Save Elections From a Pandemic*, YES! (Mar. 26, 2020), <https://www.yesmagazine.org/democracy/2020/03/26/coronavirus-elections> [<https://perma.cc/BX6P-633Z>]; see also UTAH CODE ANN. § 20A-3-301 (West 2019).

35. For more recommendations, see MATT BARRETO ET AL., PROTECTING DEMOCRACY: IMPLEMENTING EQUAL AND SAFE ACCESS TO THE BALLOT BOX DURING A GLOBAL PANDEMIC

recommendations are tailored to enfranchising minority voters, who are both among the most vulnerable to COVID-19<sup>36</sup> and the most likely to be disenfranchised during a normal election.

### III. POLICY RECOMMENDATIONS TO PREVENT DISENFRANCHISEMENT

#### A. Access to Mail-in Ballots Must Expand in Light of the Pandemic

##### 1. Voter Registration Laws and Absentee Ballot Applications

First-time vote-by-mail voters face additional, and potentially insurmountable, barriers to voting by mail in light of the pandemic. These barriers exist at every stage of the vote-by-mail process.

Social distancing and stay-at-home orders in response to the COVID-19 pandemic have had a significant impact on voter registration efforts.<sup>37</sup> Limited voter registration is most likely to affect young people, minority groups, and naturalized immigrants.<sup>38</sup> Many states and deputized organizations transitioned to online-only systems of registration to adjust; internet access, however, is still a privilege, with disparate rates across the country. According to the Pew Research Center, low-income people, people living in rural areas, and people of color have lower rates of high-speed broadband access and computer or smartphone ownership than white and high-income Americans.<sup>39</sup> States should allow for day-of registration, onsite registration, automatic registration, phone registration, and uniform online registration with accommodation for voters with visual impairments.<sup>40</sup>

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(2020), <https://latino.ucla.edu/wp-content/uploads/2020/03/VRP-VBM-res.pdf> [https://perma.cc/9GYU-64CX].

36. See *COVID-19 in Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [https://perma.cc/F6T4-BCNL].

37. Traditional, community-oriented voter registration efforts have been hampered by the social distancing and stay-at-home orders. See, e.g., Bridget Bowman, ‘A Game-Changer’: Pandemic Forces Shift in Black Voter Outreach, ROLL CALL (May 21, 2020), <https://www.rollcall.com/2020/05/21/a-game-changer-pandemic-forces-shift-in-black-voter-outreach> [https://perma.cc/AT7X-HBPW].

38. See Sam Levine, ‘We Can’t Afford to Wait’: Coronavirus Could Shut Out Drove of New US Voters, GUARDIAN (Apr. 23, 2020), <https://www.theguardian.com/us-news/2020/apr/23/coronavirus-fight-to-vote-us-voters> [https://perma.cc/T3N3-7VCK].

39. Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RES. CTR. (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists> [https://perma.cc/5FAQ-PY2T].

40. Michael Maley, *Electoral Management Under COVID-19*, (Electoral Regulation Research Network/Democratic Audit of Austl. Joint Working Paper Series, Working

Once registered, voters in many states must provide additional documentation with their applications for mail-in ballots, including photo ID.<sup>41</sup> Arkansas and Alabama require the absentee ballot itself to be returned with a photocopy of a voter's photo ID.<sup>42</sup> Continuing to mandate that voters submit printed copies of their identification with their ballot or application—at a time when many public libraries and businesses are closed—means that voters must otherwise have access to computers and printers, or smartphones or digital cameras if election officials require the submission of electronic materials. Lack of access to an internet connection or unfamiliarity with digital devices present further barriers which, as the evidence suggests, fall disparately on minority voters like Native Americans.<sup>43</sup> Some states, such as Alabama, require absentee ballots applications to be notarized or witnessed,<sup>44</sup> presenting another difficult hurdle for voters avoiding contact with those outside their home.

Further, voter registration and the absentee ballot application process must be made available to those who lack a conventional street address or access to consistent mail delivery. Many Native Americans live on reservations and do not have street addresses, and their P.O. boxes may be shared.<sup>45</sup> Other minorities are “less likely to have permanent addresses than nonminority citizens, more apt to live in areas with inconsistent mail delivery,

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- Paper No. 71, 2020), [https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0003/3393066/WP71\\_Maley.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3393066/WP71_Maley.pdf) [https://perma.cc/3E8Z-3NTF].
41. In Alabama, for example, voters hoping to receive an absentee ballot must write or visit their local Absentee Election Manager, request an absentee ballot, and provide documentation including a copy of their photo ID. See *Absentee Voting Information*, ALA. SECRETARY ST., <https://www.sos.alabama.gov/alabama-votes/voter/absentee-voting> [https://perma.cc/98RL-ZTNW] (last visited July 6, 2020); see also Pam Fessler, *Need a Witness For Your Mail-In Ballot? New Pandemic Lawsuits Challenge Old Rules*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/865043618/need-a-witness-for-your-mail-in-ballot-new-pandemic-lawsuits-challenge-old-rules> [https://perma.cc/AM3T-FGE5].
  42. Fessler, *supra* note 41.
  43. NATIVE AM. VOTING RIGHTS COAL., *VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA* 5 (2018), [https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf?fbclid=IwAR2-f63a7LunWsWDJsDPWos\\_zRA\\_Qmm8HSiucjleGAWLm2NPX99ZKKGKIRY](https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf?fbclid=IwAR2-f63a7LunWsWDJsDPWos_zRA_Qmm8HSiucjleGAWLm2NPX99ZKKGKIRY) [https://perma.cc/H55R-UU2D] (“[I]n Arizona, which has had online registration for more than 15 years and where 40% of all registrations were done online in 2016, only 6.7% of [Native American] Arizona respondents registered online. In New Mexico, where the system is relatively new, only 3.3% of the Native American respondents registered online, and in Nevada 5.1% registered online (as opposed to 21% of all registrants).”).
  44. MISS. CODE ANN. § 23-15-715 (West 2019).
  45. *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018); see also Declaration of Dr. Matthew A. Barreto, Ph.D., *supra* note 15.

and more prone not to return mail they receive.”<sup>46</sup> Jurisdictions must remain cognizant of these potential roadblocks and offer workable alternatives. For instance, jurisdictions might allow voters, and especially Native governments, to designate a different address or a P.O. box at which absentee ballots can be collected and dropped off.

## 2. Provide No-Excuse Ballots by Mail

Sixteen states currently require that voters requesting a mail-in ballot provide a qualified excuse—a specific reason for needing to vote by mail, as outlined by a state’s absentee voter law.<sup>47</sup> Many states have expanded these excuses to capture fear of COVID-19 transmission in the last few months,<sup>48</sup> but others have staunchly refused to do so, even despite litigation.<sup>49</sup> It remains unclear which states will extend the COVID-19 absentee ballot excuse to the General Election. Voters must not be forced to choose between risking their own health and the lives of others’ and casting a ballot.

H.R. 1 would strike any such restriction on mail ballots, greatly expanding access to mail-in ballots. The bill would greatly reduce the burden voters face in light of COVID-19. H.R. 1 fails to lift the burden of having to specially request a mail-in ballot. As explained above, the very process of requesting a mail-in ballot can be disproportionately burdensome to minority voters. Measures should be taken to mitigate this burden; for instance, voters must be able to request absentee ballots through a variety of means, including by phone, by mail, by email or online, in person, or via text message. At the very least, states must waive any existing excuse requirements and provide at least one alternative to in-person application for an absentee ballot.

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46. Stephanopoulos, *supra* note 11, at 1644–45.

47. See *Absentee Ballot Rules*, VOTE.ORG, <https://www.vote.org/absentee-voting-rules> [<https://perma.cc/8RYG-YDGM>] (last visited July 6, 2020).

48. For example, Kentucky, which normally requires an excuse to vote by mail, allowed any voter to request an absentee ballot for their Primary Election. Larry Seward, *No Excuse: Kentucky Gets in Line With Mail-In Voting*, WCPO 9 (May 22, 2020), <https://www.wcpo.com/news/local-news/no-excuse-kentucky-gets-in-line-with-mail-in-voting> [<https://perma.cc/M7JV-AFZL>].

49. Texas, for instance, still requires an excuse to vote by mail despite months of litigation on the matter. See Richard L. Hasen, *Texas Voters Face Malicious Prosecutions After COVID-19 Absentee Ballot Ruling*, SLATE (May 27, 2020), <https://slate.com/news-and-politics/2020/05/texas-supreme-court-voters-covid-19-absentee-ballot.html> [<https://perma.cc/7495-2P9P>]; Brent Kendall, *Supreme Court Rejects Bid for Texas Voters Afraid of Coronavirus to Cast Absentee Ballots*, WALL ST. J. (June 26, 2020), <https://www.wsj.com/articles/supreme-court-rejects-bid-for-texas-voters-afraid-of-coronavirus-to-cast-absentee-ballots-11593207543> [<https://perma.cc/4V7R-27NE>].

## **B. Mail-in Ballots Must Be Comprehensible to All Voters, Regardless of a Voter's English Language Proficiency**

Poll workers play an invaluable role in elections, including aiding limited-English-proficient voters. While stuck at home because of the associated risks of the pandemic, many of these voters will lack language assistance when navigating their ballot materials. Vote-by-mail voters must be protected by measures that ensure language accessibility of ballots, in order to minimize the detrimental effects of COVID-19 on their ability to receive assistance in their native language.

Significant analyses of past general elections have shown that mail-in ballots of non-English language voters are disproportionately rejected by election officials. Daniel A. Smith's analysis of multiple Florida general elections' absentee ballots revealed that non-English language voters' ballots were much more likely to be rejected by election officials.<sup>50</sup> In the California 2012 general election, Dr. Mindy Romero, founder and director of the California Civic Engagement Project at the University of Southern California's Sol Price School of Public Policy, found that "non-English-language ballots comprised just over 2.5% of votes cast, but accounted for 3.3% of all rejected ballots. And 25% of rejected non-English-language ballots were rejected due to mismatched signatures."<sup>51</sup>

The Voting Rights Act's protections for language minority groups, known as Section 203, requires that materials generally provided by mail to residents in covered jurisdictions must be offered in the applicable minority language.<sup>52</sup> Although the compliance rates have not been widely studied, one examination suggested that forty percent of section 203-covered jurisdictions fail to provide written and oral language assistance to limited-English-proficient voters.<sup>53</sup> Compliance with Section 203 matters more than ever. Jurisdictions should reevaluate their language access programs, mailing materials in the applicable minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language

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50. See SMITH, *supra* note 1111.

51. Verified Petition for Writ of Mandate & Complaint for Declaratory & Injunctive Relief at 13–14, *La Follette v. Padilla*, No. CPF 17-515931, 2018 WL 4050727 (Cal. Super. Ct. Apr. 9, 2018).

52. 52 U.S.C.A. § 10503 (West 2019).

53. See James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 176, 188 (2007) (stating that only 60.4 percent of 361 polled jurisdictions "reported providing both oral and written language assistance").

materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials. Of course, jurisdictions not covered by Section 203 should nevertheless strive to provide language access to all language minority groups in their boundaries. Compliance with Section 203 and greater attention to language access needs nationwide will help ensure that mail ballots are comprehensible for all voters who will be casting a ballot without the assistance of election officials.

## **C. Voters Must Have Confidence That Their Ballot Was Received and Counted**

### **1. Equitable, Well-Communicated Deadlines**

Even in the best of times, vote-by-mail voters may be confused about the deadline to mail their ballot. At least 9000 eligible voters who requested a mail-in ballot in Wisconsin's botched 2020 primary election did not receive their ballot by election day, and many were unable to vote in person, leaving those voters disenfranchised.<sup>54</sup>

Moving to a federal postmarked-by deadline standard is an important and necessary step toward ensuring that voters know how to make sure their ballots are counted. Unfortunately, H.R. 1 does not provide a provision that would extend the deadline to submit a mailed ballot during times of emergency. Voters who request absentee ballots but do not receive their ballots until after election day must have an opportunity to have their votes counted. As a remedy, states should be required to accept mail-in ballots that are either post marked on election day or are received at least 7 days after election day.

### **2. Confidence in the United States Postal Service**

Some voters, and especially minority voters,<sup>55</sup> lack full confidence in postal services to deliver their ballot via mail, and this attitude has an

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54. Nick Corasaniti & Stephanie Saul, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html> [https://perma.cc/DG5W-TBN2].

55. See, e.g., John Whitesides, *Black Voters Don't Trust Mail Ballots. That's a Problem for Democrats*, REUTERS (May 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-election-insig/black-voters-dont-trust-mail-ballots-thats-a-problem-for-democrats-idUSKBN2351G0> [https://perma.cc/F9L7-AZ9V].

observable effect on their behavior. Political scientists have found that the strongest predictor for how voters return their ballot—by mail or in person—is trust in the United States Postal Service, or confidence that one’s mail ballot will be timely delivered and counted.<sup>56</sup> Recent research finds that the implementation of vote-by-mail for an all-mail election can cause a temporary decrease in voter confidence in the integrity of the voting process that lasts for one election cycle.<sup>57</sup> Although the fear of mail accuracy is likely less of a concern for voters who are comparatively far more fearful of leaving their homes for risk of contracting or spreading the coronavirus, in normal times many voters distrust the mail system.

As with most areas of improvement in mail voting schemes, any reduction in voter confidence can be ameliorated with certain measures. Jurisdictions can cut out one element of the mailing process by providing community dropoff locations which allow for no-contact ballot drop off for citizens. It is also helpful to ensure a clear, robust chain of custody that accounts for ballots from their time of receipt to when they are tallied or recounted. While trust in mail delivery services has undoubtedly increased since the introduction of vote-by-mail, some jurisdictions have also implemented extensive safeguards, tracking procedures, and security measures to ensure all ballots are delivered securely, which helps to increase trust in the system.<sup>58</sup>

### 3. Transparency in the Counting of Mail-in Ballots

Election officials can further spur confidence in the vote-by-mail process if they process all ballots on central count scanning equipment and set up round-the-clock camera surveillance that can be streamed online for the

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56. See Andrew Menger & Robert M. Stein, *Choosing the Less Convenient Way to Vote: An Anomaly in Vote by Mail Elections*, 73 POL. RES. Q. 196 (2019).

57. Jesse Clark, *Lost in the Mail? Vote by Mail and Voter Confidence* 1 (Mass. Inst. of Tech. Dep’t of Political Sci., Research Paper No. 2019-31, 2020).

58. Counties such as Denver and Boulder utilize a program called Ballot TRACE, which enables election officials and voters to track their ballots from the printer to the county’s mail facility to a local postal carrier and back again through the mail to the respective election division. Additionally, voters in counties that use Ballot TRACE can choose to receive messages about their ballot’s status through email or text message. *Life Cycle of a Ballot*, DENVERGOV.ORG, <https://www.denvergov.org/content/denvergov/en/denver-elections-divison/voter-election-information/ballot-life-cycle.html> [<https://perma.cc/8L7Z-EXXL>] (last visited Mar. 22, 2020). Washington state created an online system that enables voters to enter their first and last names and date of birth to track their ballot. See *Register to Vote*, VOTEWA, <https://voter.votewa.gov/WhereToVote.aspx> [<https://perma.cc/5HBS-HY2K>] (last visited Mar. 22, 2020).



duration of the ballot operation. Further, providing a ballot-processing environment that also allows for the safe, secure, and healthy observation of workers by third parties is imperative. Moreover, election officials should speak early and often to warn the public that the count can be expected to take longer than election night announcements of the past. These steps will bolster public confidence and allow officials to later perform a ballot comparison audit.<sup>59</sup>

### CONCLUSION

It is undeniable that voting during the 2020 General Election will be substantially different than any elections in recent memory. The coronavirus has revealed the need for more widespread access to mail voting and rendered more urgent efforts to improve both vote-by-mail policy and procedures and any necessary in-person voting. Advocacy for universal mail elections must be thoughtful and tailored to the suggestions outlined above to ensure that mail-in voting procedures do not further disenfranchise citizens, especially voters of color. Voting by mail is safe, secure, and, executed properly, capable of advancing equal access to the ballot, ameliorating ballot access issues exacerbated by the COVID-19 pandemic.

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59. A post-election audit checks that the equipment and procedures used to count votes during an election worked properly. Ballot comparison audits check machine interpretations of ballots cast, usually by checking a random sample of ballots against computers' "cast vote records" or by running ballots through machines for a second time and checking for differences in vote tallies.