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MAIL-VOTING DURING COVID-19: PROTECTING PUBLIC HEALTH AND EXPANDING VOTING ACCESSIBILITY

Emily Kawahara*

The history of American treatment of civil liberties during national security crises thus teaches several important lessons . . . it teaches that the perceived threats to national security that have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded.¹

INTRODUCTION

As the U.S. faces a true threat to national health and safety from COVID-19,² vote-by-mail fraud has been reoriented into an additional and, in some cases, more dire threat than the growing infection rate and death toll from the pandemic. According to President Donald Trump, the use of mail-in ballots during the 2020 presidential election would be “the scandal of our times!”³ President Trump has used his public platform to continuously and adamantly question the integrity of the democratic process. When asked in an interview that aired on Fox News whether he would accept the election outcome in November, President Trump stated “I have to see” after asserting that the election will be rigged by mail-in voting.⁴ From April to July, President Trump “made five dozen false claims about mail balloting.”⁵ In a July tweet, he warned that mail-voting “will lead to the most CORRUPT ELECTION in our Nation’s History.”⁶ These assertions of baseless claims used to question the integrity of the democratic system and the legitimacy of the upcoming election redirects the public’s focus, distracting from the pandemic. As perfectly summarized by Katie Glueck of the New York Times, “the presidential race is now not simply a fight over character, competence or even vicious personal attacks,” instead the 2020 presidential election “is also about one of the fundamental pillars of American democracy: free and fair elections, and faith in the outcome.”⁷

*Thank you Professor Dov Fox for your comments, advice, and positivity. Thank you Mark Estes, Liz Parker, and the rest of the Legal Research Center librarians at the University of San Diego School of Law for your patience and guidance.

¹ William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 19 (1988).

² See *Coronaviruses*, NAT’L INST. OF ALLERGY & INFECTION DISEASE, <https://www.niaid.nih.gov/diseases-conditions/coronaviruses> (last updated May 19, 2020) (offering an overview of coronaviruses); Michelle A. Jorden et. al., Ctr’s for Disease Control & Prevention, *Evidence for Limited Early Spread of COVID-19 Within the United States, January-February 2020*, 69 MORBIDITY AND MORTALITY WKLY. REP., 680, 680 (2020) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6922e1.htm#suggestedcitation> (explaining the timeline of travel-related and nontravel-related COVID-19 cases); Michelle L. Holshue et al., *First Case of 2019 Novel Corona Virus in the United States*, N. ENGL. J. MED. (Mar. 5, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191> (providing a case report of the first COVID-19 case in the U.S.).

³ @realDonaldTrump, TWITTER (June 22, 2020, 4:16 AM), <https://twitter.com/realDonaldTrump/status/1275024974579982336>.

⁴ Interview by Chris Wallace with Donald Trump, President, United States, in Washington D.C. (July 19, 2020).

⁵ Maggie Haberman et al., *Trump’s False Attacks on Voting by Mail Stir Broad Concern*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/06/24/us/politics/trump-vote-by-mail.html>. (“About a third of the president’s falsehoods were general warnings about widespread fraud in mail-voting. Another 11 were specific claims about held-up mail carriers, stolen and forged ballots and dead people voting.”).

⁶ @realDonaldTrump, TWITTER (July 21, 2020, 4:21 AM), <https://twitter.com/realDonaldTrump/status/1285540318503407622> (including the following hashtag: #RIGGEDELECTION).

⁷ Katie Glueck, *A 2020 Question 100 Days Out: Will the Elections Be Free and Fair?* N.Y. TIMES (July 25, 2020), https://www.nytimes.com/2020/07/25/us/politics/2020-election-voter-fraud-interference.html?campaign_id=9&emc=edit_nn_20200726&instance_id=20633&nl=the-morning®i_id=137714071&segment_id=34399&te=1&user_id=ef2528c8b535602a2f208660aa7648d1.

To be clear, the November 2020 presidential election *will* go on. President Trump called to postpone the election in a July tweet stating: “With Universal Mail-In Voting (not Absentee Voting, which is good), 2020 will be the most INACCURATE & FRAUDULENT Election in history. It will be a great embarrassment to the USA. Delay the Election until people can properly, securely and safely vote???”⁸ However, a president does not have this type of authority. Article II of the U.S. Constitution states that, “[t]he Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.”⁹ In an act approved by the Twenty-Eighth Congress in 1845, the presidential election date was fixed to “the Tuesday next after the first Monday in the month of November.”¹⁰ Even if Congress passed bipartisan legislation to change the date of the election, the Constitution clearly instructs that the President and Vice President terms “end at noon on the 20th day of January” and terms for Senators and Representatives end “at noon on the 3d day of January,”¹¹ leaving little time between a changed election date and the end of term. Therefore, delaying the election is, if not impossible, extremely difficult.¹² The election will be held as planned and voting during the public health emergency is not a question of if, but how.

Civil liberties have historically been sacrificed in the name of national security. However, there should be serious concern that “overblown and factually unfounded”¹³ claims about mail-voting leading to fraud will be used in an attempt to motivate voters to either sacrifice their individual right to vote or risk their health in the name of a false threat, during a real global pandemic. Judge Brennan, addressing preserving civil liberties during a crisis, observed that “[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”¹⁴ This article addresses the COVID-19 pandemic, the false claims of mail-voting fraud, and the immediate unique opportunity for the U.S. to break the cycle of error repetition. Voters should not be “brav[ing] the flu filled air” as they did in 1918 to cast a ballot, when voters in 2020 have a reliable option to cast ballots through mail.

The types of election adjustments previously used during national emergencies are not applicable for the fluid and novel COVID-19 situation. However, the current crisis, like crises prior, does require a case-specific solution. This article does not offer a specific formula to improve election emergency statutes, although there are strong arguments for categorizing the type of crisis as a way of measuring the necessary response.¹⁵ Nor does this article argue that the nuances of COVID-19 fit into pre-established absentee voter qualifications for normal elections, as discussed below. Instead, this article claims that universalizing mail-voting as a case-specific

⁸ @realDonaldTrump, TWITTER (July 30, 2020, 5:46 AM), <https://twitter.com/realDonaldTrump/status/1288818160389558273>.

⁹ U.S. CONST. art. II, § 1.

¹⁰ An Act to establish a uniform time for holding elections for electors of President and Vice President in all the States of the Union, ch. 1, 5 Stat. 721 (1845).

¹¹ U.S. CONST. amend. XX, § 1.

¹² See Miles Parks, *Why Is Voting By Mail (Suddenly) Controversial? Here's What You Need To Know*, NPR (June 4, 2020), <https://www.npr.org/2020/06/04/864899178/why-is-voting-by-mail-suddenly-controversial-heres-what-you-need-to-know>; Alexander Burns, *Why Trump Has No Power to Delay the 2020 Elections*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/politics/trump-postpone-election.html>;

¹³ Brennan, Jr., *supra* note 1.

¹⁴ *Id.* at 11.

¹⁵ See Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018), for a discussion of ways to improve election emergency statutes by categorizing the emergency as one of three types of situations to apply the appropriate type of relief, ultimately limiting the discretion of election officials and prioritizing delaying, rescheduling, or extending voter periods before votes are cast.

solution for the election during COVID-19 serves two purposes. Firstly, mail-voting during the pandemic is a necessary countermeasure to protect public health and safety. Secondly, this extraordinary year provides opportunity to expedite necessary election modifications that encourage exercise of the franchise and expand accessibility to historically disenfranchised eligible voters.

Part I discusses modifications made in prior elections held during or in the wake of crises. Crises highlighted are the 2001 New York Primary Election during the World Trade Center terrorist attack, the 2012 Presidential Election days after Hurricane Sandy, the 1942 and 1944 elections during World War II Japanese American internment, and the 1918 Midterm Election during the infamous flu pandemic. Part II explains the foundation of absentee voting, highlighting its origins and development through election law. Part III differentiates between true and perceived threats during the 2020 election and in mail-voting. It argues that mail-voting should be universally applied during this year's presidential election in order to protect the general public from the global pandemic. However, there are issues with mail-voting that must be considered and fixed prior to November that focus on accessibility for minority populations and not on the unfounded claims that mail-voting leads to greater election fraud or benefits one political party over the other. Part IV shows that challenges to the established absentee voter laws that attempt to fit the pandemic into excuse categories have failed. It then argues that rather than fitting into laws that dictate a normal election year, mail-voting should be implemented as a necessary and contemporary countermeasure to protect public health and safety. This argument is supported by the logic applied in *Jacobson v. Massachusetts*.¹⁶ The article concludes that mail-voting during the COVID-19 pandemic is not only a case-specific solution, it is also a catalyst for necessary improvements to election accessibility.

I. PAST U.S. ELECTIONS DURING CRISIS

States are inconsistent in their statutes and in how they prepare for and execute plans during emergencies. Each state and the District of Columbia assigns the emergency decision making power to a different person, agency, or entity.¹⁷ For example, a survey issued by the National Association of Secretaries of States (NASS) in the wake of Hurricane Sandy showed these differences by highlighting who is given authority by statutes to suspend or postpone an election as a result of an emergency.¹⁸ Eight states confirmed that authority is given to the Governors, the chief state election official, or a combination of the two after a state of emergency is declared by the Governor.¹⁹ In four states, the authority is given to the chief state election official or a local election official.²⁰ And in several states where there is no specific law addressing this issue, states noted in the survey responses that authority could come from a

¹⁶ 197 U.S. 11, 12 (1905) (continuing as the leading authority for state police power regarding public health).

¹⁷ See generally *Election Emergencies Happen*, NAT'L CONF. STATE LEGISLATURES (Aug. 2008), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies-happen.aspx>; *Election Emergencies*, NAT'L CONF. STATE LEGISLATURES (Apr. 7, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>; See NAT'L ASS'N OF SEC'YS OF STATE TASK FORCE, STATE LAWS & PRACTICES FOR THE EMERGENCY MANAGEMENT OF ELECTIONS 1, 15 (2014), <https://www.nass.org/sites/default/files/Election%20Cybersecurity/report-NASS-emergency-preparedness-elections-apr2017.pdf>.

¹⁸ See NAT'L ASS'N OF SEC'YS OF STATE TASK FORCE, *supra* note 17 (noting that of the survey conducted in 2013, thirty-seven state responded and information for the remaining states was gathered by the NASS through researching state laws).

¹⁹ See generally *id.* at 15-16.

²⁰ See *id.* at 16-17.

variety of places, like a court order or legislative action, in an emergency situation.²¹ Needless to say, state emergency response lacks uniformity.

Prior to COVID-19, at least forty-five states had statutes that addressed Election Day emergencies,²² however, these statutes were broad sweeping. For example, some statutes grant governors the broad power “to suspend statutes,”²³ or “to suspend regulatory statutes, which may include statutes related to election,”²⁴ whereas some statutes specify that the power granted is only “emergency power over *some* aspect of an election.”²⁵ While the statutes greatly varied, they most commonly addressed emergency responses that included delaying or rescheduling the election, relocating polling places, and a mix of the two.²⁶ In reality, “most state election codes do not contain provisions that specifically attempt to mitigate the impact of public health crises, extreme weather events, natural disasters, terrorist attacks, and other calamities (collectively, “emergencies”) on the electoral process.”²⁷

For the purpose of Part I, the article will highlight responses to crises during elections. Responses include instances of cancelling election dates or rescheduling election dates at new polling locations, creating polling locations for specifically quarantined populations, and permitting in-person voting to continue as planned. Despite a lack of uniformity among state emergency statutes, there has been a common theme in state actions to preserve the fundamental right to vote – or, at least, an attempt to preserve this fundamental right – when responding to emergencies.

A. 2001 New York Primary Election and the World Trade Center Attack

The polls were open for the New York primary when planes crashed into the World Trade Center the morning of September 11, 2001.²⁸ In that moment, priorities changed as candidates who had been “attending to their last subway stops, interviews, telephone calls and literature distribution[s]” responded to the emergency at hand and “headed for hospitals to donate blood, or their offices to follow the events, or home to join stunned family members.”²⁹

Under the New York Executive Law, Governor George Pataki suspended statutes surrounding the primary election since “compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.”³⁰ The Emergency Primary Election Rescheduling Act of 2001, enacted days later by the state legislature, rescheduled primaries to September 25, 2001, two weeks after the original primary date.³¹ The response to reschedule in

²¹ See *id.* at 17.

²² See *Election Emergencies*, *supra* note 17.

²³ *Id.* (“In at least 14 states (Alabama, California, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Mexico, New York, Tennessee, Utah, Washington, Wisconsin) the legislature has granted the governor power to suspend statutes.”).

²⁴ *Id.* (“In 22 more states (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Texas, West Virginia) the governor may suspend regulatory statutes, which may include statutes related to elections.”).

²⁵ *Id.* (“Kentucky has granted its governor emergency power over some aspect of an election. Seven other states (Florida, Illinois, Louisiana, Oregon, South Carolina, Texas, Virginia) have granted their governor emergency power over some aspect of an election but also fall into other categories.”). (*Emphasis added*).

²⁶ See *id.* (including a table of election emergency statutes for all fifty states).

²⁷ Morley, *supra* note 15.

²⁸ See generally Terence Neilan, *Plane Crashes Collapse World Trade Center Towers*, N.Y. TIMES (Sept. 11, 2001), <https://www.nytimes.com/2001/09/11/continuous/plane-crashes-collapse-world-trade-center-towers.html?searchResultPosition=10>.

²⁹ See Adam Nagourney, *Pataki Orders Postponement of Primaries Across State*, N.Y. TIMES (Sept. 12, 2001), <https://www.nytimes.com/2001/09/12/us/day-terror-elections-pataki-orders-postponement-primaries-across-state.html>.

³⁰ Morley, *supra* note 15, at 554, n.33.

³¹ *Id.* at 554.

order to cope with the disaster effectively closed polls until the rescheduled date. However, some voters had already been to the polls to cast their votes prior to the closure and others had mailed their absentee ballots.³² In an attempt by the Primary Rescheduling Act “to minimize the consequences of the disruption,” votes that had been cast in-person on September 11th, prior to the closure of polling places, were not counted.³³ This meant that voters would have to cast their ballots again, even if the polling place where they voted had not been directly impacted by the attacks and had retained all of the voter information.³⁴

Despite this and other controversies³⁵ that arose as a result of the quick implementation of emergency policies, the state acted in a way to best protect the population and ensure the opportunity to exercise the fundamental right to vote at a later date. Ultimately, the rescheduled primary election had a higher turnout than was expected.³⁶

B. 2012 Presidential Elections and Hurricane Sandy

Just over a decade later, as the 2012 Presidential Elections approached, the east coast, from the mid-Atlantic to New England, braced for Hurricane Sandy.³⁷ Millions of people prepared³⁸ for this “perfect storm.”³⁹ In New York specifically, “370,000 people in low-lying communities” were evacuated, the subway shut down, bus service stopped, and the Nasdaq exchange closed.⁴⁰ When Hurricane Sandy did make landfall on October 29, 2012, “[o]ver 2 million New Jersey residents and 6 million New York residents were left without power and approximately 161,000 families were displaced.”⁴¹

Amid the cleanup and recovery, elected officials held fast to the importance of the approaching presidential election on November 6th. According to New York Governor Andrew Cuomo, “Just because you’re displaced doesn’t mean you should be disenfranchised.”⁴² Lacking an adequate safety plan, “[m]any of [the] adjustments were conceived on the fly, and voting in New York and New Jersey was chaotic.”⁴³ With more than 100 polling places changed in New York State, the city “was setting up polling places in tents powered by generators and outfitted with portable heaters.”⁴⁴ To encourage voter turnout, the New York Board of Elections

³² See *id.*

³³ *Id.*

³⁴ *Id.* at 555.

³⁵ *Id.* at 545 (detailing specifically the legal mechanisms election officials used to respond to the September 11 terrorist attacks in New York City).

³⁶ Clifford J. Levy, *The New York Primary: The Voters; Primary Turnout Much Higher Than Forecast*, N.Y. TIMES (Sept. 27, 2001), <https://www.nytimes.com/2001/09/27/nyregion/the-new-york-primary-the-voters-primary-turnout-much-higher-than-forecast.html?searchResultPosition=1>.

³⁷ See generally Marc Santora, *Urgent Warnings as Hurricane Sandy Heads to Northeast*, N.Y. TIMES (Oct. 27, 2012), <https://www.nytimes.com/2012/10/28/us/hurricane-sandy-on-collision-course-with-winter-storm.html?searchResultPosition=3>.

³⁸ See generally *id.* (estimating more than 50 million people from mid-Atlantic to New England anticipated the impact).

³⁹ See John Schwartz, *Early Worries That Hurricane Sandy Could Be a ‘Perfect Storm,’* N.Y. TIMES (Oct. 25, 2012), <https://www.nytimes.com/2012/10/26/us/early-worries-that-hurricane-sandy-may-be-a-perfect-storm.html?searchResultPosition=4> (referring to the similar conditions of the “perfect storm” of 1991).

⁴⁰ See James Barron, *Sharp Warnings as Hurricane Churns In*, N.Y. TIMES (Oct. 28, 2012), <https://www.nytimes.com/2012/10/29/us/east-coast-braces-for-severe-storm-surge.html?searchResultPosition=1> (detailing the storm preparations and cancellations in areas from North Carolina to Connecticut).

⁴¹ Morley, *supra* note 15, at 564.

⁴² David M. Halbfinger et al., *Officials Rush to Find Way for the Storm-Tossed to Vote*, N.Y. TIMES (Nov. 5, 2012), <https://www.nytimes.com/2012/11/06/nyregion/after-hurricane-sandy-efforts-to-help-the-displaced-vote.html>.

⁴³ Thomas Kaplan, *Using Hurricane Sandy as a Lesson for Future Elections*, N.Y. TIMES (Nov. 12, 2013), <https://www.nytimes.com/2013/11/13/nyregion/lessons-from-hurricane-sandy-being-applied-to-election-planning.html?searchResultPosition=3>.

⁴⁴ Halbfinger et al., *supra* note 42.

coordinated shuttle buses to bring voters from the hardest hit locations to the polling places.⁴⁵ New York and New Jersey also permitted voters who were displaced to use provisional ballots. However, the provisional ballots had some restrictions: although voters could cast the provisional ballots anywhere in their respective states, in many cases, residents were only able to vote in the “statewide contests and in the presidential election.”⁴⁶

Within the response to Hurricane Sandy, the election modifications⁴⁷ implemented by election officials were an effort to protect the opportunity for voters to still exercise their fundamental right to vote. However displaced voters encountered obstacles that, in some cases, limited the extent to which they could vote.

C. 1942 Midterm Election, 1944 Presidential Election, and Japanese American Internment During World War II

Creating voting stations within quarantines has also been a historically implemented election modification.⁴⁸ Two examples illustrate the use and the failure of such a modification. The first was absentee voter stations created for incarcerated Japanese Americans during World War II.

Executive Order 9066⁴⁹ was enacted on February 19, 1942. Under the guise of protecting the U.S. “against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities,” President Franklin D. Roosevelt authorized the military to designate military areas and exclude persons from those military areas.⁵⁰ The following month, Executive Order 9102, addressing the “necessary” removal of persons “in the interests of national security,” established the War Relocation Authority (WRA).⁵¹ The two Executive Orders led to the forcible removal of “over 120,000 Japanese Americans from the Pacific Coast” by the U.S. Government and into one of the ten concentration camps created and operated by the WRA.⁵²

While quarantined within these concentration camps, Japanese Americans seemingly retained their right to vote in the November 1942 midterm election and the 1944 presidential election.⁵³ As a workaround to the constitutional stipulation that voters vote in their residence “of choice,” which was clearly unachievable since the relocation was a forced removal, the Wartime Civil Control Administration announced that “‘qualified citizen evacuees’ – the people held in camps – were entitled to the same absentee voting rights as any other citizen who was unable to be present at his or her registered polling place.”⁵⁴ Despite this apparent encouragement to engage in the fundamental right, the “right was only nominally intact” due to “racially motivated

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ See Morley, *supra* note 15, at 571 (providing a thorough analysis of election modifications, election postponements, and election cancellations using 9/11, Hurricane Katrina, Hurricane Sandy, and Hurricane Matthew as examples).

⁴⁸ See generally Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantine Past and Future*, 80 TEMP. L. REV. 53 (2007) (highlighting specifically how quarantines have historically been used for society to “collectively determine who constitutes the community entitled to protection and who becomes defined as an outsider that endangers the community.”).

⁴⁹ Exec. Order No. 9066, 5 Fed. Reg. § 1407 (1942).

⁵⁰ *Id.*

⁵¹ Exec. Order No. 9102, 7 Fed. Reg. § 2165 (1942).

⁵² *Japanese American Incarceration Facts*, JAPANESE AMERICAN NATIONAL MUSEUM, <http://www.janm.org/nrc/resources/internfs/> (last visited July 8, 2020).

⁵³ See Natasha Varner, *Japanese Americans incarcerated during World War II could still vote, kind of*, PUBLIC RADIO INTERNATIONAL: THE WORLD (Oct. 20, 2016), <https://www.pri.org/stories/2016-10-18/japanese-americans-incarcerated-during-world-war-ii-were-still-allowed-vote-kind>.

⁵⁴ See Varner, *supra* note 53.

intervention and inadequate voter education.”⁵⁵ For example, in 1942, a report stated “that less than 100 Nisei⁵⁶ voted” in Los Angeles, despite 2,000 absentee ballots being sent to voters.⁵⁷ This discrepancy was likely a reflection of “poll watchers” who would “challeng[e] ‘every ballot sent in by anyone with a Japanese name.’”⁵⁸ Additionally, following the lead of Wyoming’s Attorney General, a number of states prior to the 1944 presidential elections “determined that all incarcerated should again register in their precincts of origin since they did not meet the legal requirements for establishing domesticity in the states where they were imprisoned,” creating clear boundaries to eligible voters.⁵⁹

Thus, despite the appearance of providing the ability to vote during a national crisis by implementing election modifications in the form of polling stations, voters were disenfranchised.

D. 1918 Midterm Election and the Flu Pandemic

The second example of a specially created polling place for quarantined individuals occurred during the 1918 flu pandemic. Referred to as the Spanish Flu,⁶⁰ the virus raged through the global community, infecting about one-third of the world’s population and eventually killing around 675,000 people in the United States.⁶¹ Simultaneously, the U.S. prepared for the November 5, 1918 midterm election.⁶²

The attempt and failure of a specially created polling place was detailed in the case *Harper v. Dotson*.⁶³ In the weeks leading to the elections, public gatherings were banned, quarantines were placed, and fear rose regarding the pandemic’s impact on voter turnout.⁶⁴ In early November 1918, students and teachers at the Albion Normal School were quarantined on campus.⁶⁵ The county board of commissioners permitted the installation of “a special precinct in the school so [the voters in quarantine] could vote.”⁶⁶ The county registrar removed the voters at the school from the list of registered voters and created “a separate list for the precinct at the school.”⁶⁷ The special precinct at the school was observed on Election Day by judges.⁶⁸ Despite

⁵⁵ *Id.*

⁵⁶ *Nisei*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/nisei> (“[A] son or daughter of Japanese immigrants who is born and educated in America and especially in the U.S..”)

⁵⁷ Varner, *supra* note 53.

⁵⁸ *Id.* See also ASIAN AMS. ADVANCING JUSTICE, ASIAN AMERICANS FACE HIGHER THAN AVERAGE VOTE-BY-MAIL BALLOT REJECTION RATES IN CALIFORNIA 1 (Aug. 2017), <https://www.advancingjustice-la.org/sites/default/files/issuebrief-vbm-FINAL-1.pdf> (providing a contemporary look at Asian American absentee ballot rejections, typically due to signature mismatch).

⁵⁹ Varner, *supra* note 53 (discussing the election regulations added in 1944 that “made it inordinately difficult to cast a ballot.” Also discussing race-based voter disenfranchisement). See also Ari Berman, *Texas’s Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, THE NATION (Oct. 6, 2016), <https://www.thenation.com/article/archive/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/>; Ari Berman, *GOP States Keep Ignoring Court Orders to Restore Voting Rights*, THE NATION (Oct. 14, 2016), <https://www.thenation.com/article/archive/gop-states-keep-ignoring-court-orders-to-restore-voting-rights/>.

⁶⁰ See Becky Little, *As the 1918 Flu Emerged, Cover-Up and Denial Helped It Spread*, HISTORY (May 26, 2020), <https://www.history.com/news/1918-pandemic-spanish-flu-censorship> (explaining how Spain was the first to report flu cases, which led to incorrect assumptions that the flu originated in Spain).

⁶¹ *1918 Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last visited July 1, 2020).

⁶² See Jason Marisam, *Judging the 1918 Election*, 9 ELECTION L.J. 141, 141, n.2 (2010).

⁶³ 187 P. 270 (Idaho 1920).

⁶⁴ See Marisam, *supra* note 62, at 141 (offering a thorough review of the lead up to the 1918 election).

⁶⁵ See *id.* at 147 (“The Normal School’s reports do not indicate why they were quarantined, but there are two plausible explanations: either bouts of flu were reported at the school or someone living on campus had left Cassia County and, after returning, the county isolated all those in contact with the traveler”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.*

this apparently eligible process, the votes were ultimately thrown out. Since the board of county commissioners had established the courthouse as the sole designated polling place for the precinct, the addition of a polling place within the precinct at the Normal School after the board meeting and prior to the election was in direct conflict with the election statute.⁶⁹ The court held that “[s]ince the statute expressly provides that the thing which was done shall not be done, we conclude the violation renders the election invalid.”⁷⁰ Thus, the attempted modification to ensure that quarantined voters could exercise their fundamental right proved ineffective.

The 1918 election bears a striking similarity to the current situation in the U.S.. The 1918 flu pandemic was first detected in March 1918, leading to an estimated 195,000 deaths in the U.S. by October.⁷¹ While waiting for a vaccine, the Surgeon General and head of the U.S. Public Health Service initially recommended minimal measures like “bed rest for flu-like symptoms.”⁷² Measures changed focus, from the individual to the general public, as the Surgeon General soon after advised “the public to avoid needless crowding and sneezing.”⁷³ When the death toll spiked in October, a bulletin was issued advising a ban on “public gathering,” which prompted church, theater, and saloon closures.⁷⁴ Still, the 1918 election went ahead, with some locations even lifting quarantines, like Washington DC, in time for the polls to open days later.⁷⁵ “The San Francisco Chronicle called the event ‘the first masked ballot ever known in the history of America’”⁷⁶ and other newspapers touted how “De Kalb women braved the flu-filled air and turned out in high numbers.”⁷⁷ With emphasis on the “importance of wartime voting” and unfounded reassurances that “[t]he utmost precautions against influenza infection [were] taken at every polling place,” the election, with in-person voting, commenced as planned.⁷⁸

In retrospect, permitting the election to continue as normal had severe impacts on the franchise and the nation’s health. Firstly, there was a decline in voter turnout in 1918 compared to the 1914 midterm election.⁷⁹ Shockingly, “[i]f just a fraction of the drop” was in response to the flu’s presence, “then the disease was responsible for hundreds of thousands of people not voting.”⁸⁰ Secondly, studies now show that “[t]he cities that followed [] interventions by closing schools, banning public gatherings, isolating flu patients and placing in quarantine people exposed to them, suffered less than the cities that chose not to enforce these measures.”⁸¹ Infection rates coincided with states’ lifting of quarantines in time for the election.⁸² In Nebraska,

⁶⁹ See *Harper v. Dotson*, 187 P. 270, 271 (Idaho 1920) (“The board [of commissioners] may from time to time change the boundaries of, create new or consolidate established precincts, but they must not alter or change any election precinct or change the place of holding election in any precinct after their regular July meeting next preceding any election: Provided, that the precincts established and the places designated in which to hold elections at the time of the taking effect of this chapter shall so remain until changed.”).

⁷⁰ *Id.*

⁷¹ *1918 Pandemic Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last visited July 8, 2020).

⁷² Marisam, *supra* note 62, at 142.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 144.

⁷⁶ See *id.* at 145.

⁷⁷ See *id.* at 144-145 (referring to New York women who would be voting in their first statewide election).

⁷⁸ See *id.* at 145.

⁷⁹ See *id.* at 146.

⁸⁰ See *id.*

⁸¹ Howard Markel et al., *Nonpharmaceutical Interventions Implemented by U.S. Cities During the 1918-1919 Influenza Pandemic*, 298 JAMA 644, 644 (2007).

⁸² See Kristin Watkins, *It Came Across the Plains: The 1918 Influenza Pandemic in Rural Nebraska* 35 (Dec. 18, 2015) (unpublished Ph.D. dissertation, University of Nebraska) (on file with University of Nebraska Medical Center)

local newspapers “not[ed] lifting of the quarantine [] had the greatest number of obituaries and notices of illness of influenza or pneumonia” illustrating “how the political machine disregarded the health and safety of its citizens to the advantage of the government.”⁸³ In an attempt to normalize by permitting in-person voting as if during a typical election year, the 1918 election resulted in lower voter turnout and a spike in influenza cases and deaths.

E. Takeaways: Protecting the Public and Preserving Voting Rights

In the historical examples presented, states offered crisis-specific accommodations – some were successful while others were ineffective - for voters to cast their ballots. Importantly, the measures used in prior crises would not be appropriate in the present crisis. The fluidity of COVID-19 and the unique state responses make it difficult to prepare for the extensiveness of the pandemic in November, however, the CDC’s national forecast⁸⁴ paints a grim picture of the likely climbing death toll. The decision by the Trump Administration to intervene in COVID-19 data collection⁸⁵ adds another troublesome layer. Since the pandemic is not restricted to one area of the U.S. and spread occurs unknowingly by asymptomatic people in crowds, adjusting the election’s date, time, or location of polling places would not be effective. Undoubtedly, the choice to permit voters to gather at polling locations during the 1918 flu, which had deadly consequences, is a worthy lesson to learn from.

Even though the measures used in prior crises are not applicable during the COVID-19 pandemic, in highlighting historical examples of elections during emergencies, there are two important distinctions to be made. First, priority fell on protecting the general public. Second, if there was an opportunity to preserve the fundamental right of voting through election modification, in the midst of responding to the emergency, that option was implemented.

II. ORIGINS OF ABSENTEE BALLOTS AND MAIL VOTING

The Constitution grants each state legislature the power to determine “times, places and manner of holding elections,” permitting Congress to alter the regulations.⁸⁶ Thus, regulations for voting, arguably one of the most important rights of an American citizen,⁸⁷ are created within a system siloed to the individual states.

The movement for an absentee ballot in the U.S. dates to the Civil War. Absentee ballots were implemented to ensure soldiers away from home could still vote.⁸⁸ In fact, this concept has since developed into federal law. Under the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and then amended by the Military and Overseas Voter Empowerment

<https://digitalcommons.unmc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1042&context=etd>.

⁸³ *Id.*

⁸⁴ *Forecasts of Total Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html> (last updated Jul. 15, 2020).

⁸⁵ Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html> (“The Trump administration has ordered hospitals to bypass the Centers for Disease Control and Prevention and send all Covid-19 patient information to a central database in Washington beginning on Wednesday. The move has alarmed health experts who fear the data will be politicized or withheld from the public.”).

⁸⁶ U.S. CONST. art. I §4, cl. 1.

⁸⁷ See Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1533-1534 (2003) (citing survey determining that 93.2% of survey respondents believe that the right to vote is either the most important or one of the most important rights in democracy).

⁸⁸ See e.g. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 492 (2003) (visiting the origins of the Australian Ballot and the Absentee Ballot).

Act (MOVE Act), state officials are required to provide military and overseas voters with voter registration and absentee ballot applications.⁸⁹

In addition to its original purpose, absentee voting has a long history of development and application in every state. In early Florida absentee law, the state's Supreme Court called absentee voting "an outgrowth of modern social and economic conditions" that was intended to provide only military personnel or civilians "whose duties as such made it impracticable for them to attend their polling places on the day of the election" the opportunity to vote.⁹⁰ The court clarified that absentee voting "was not intended as a convenience for those who absented themselves on account of pleasure or free will."⁹¹ On the other hand, the New Jersey Supreme Court, acknowledging that absentee voting was established during war to ensure the enfranchisement of individuals engaged in military service, further noted that "the methods of its exercise have progressively undergone legislative renovations" and "the availability of the privilege has been modernly enlarged to encircle its use in periods of peace, and also by specifically qualified civilians."⁹² Therefore, what started as an option during war expanded to times of peace.

While the name *absentee voting* implies on its own that the voter be absent, absentee voting laws have developed to the extent that the voter need not be physically outside of the voting location on Election Day. Specifically, in *Wood v. State*, the Texas Court of Appeals considered it vital to the case that the state's original absentee voter statute included the phrase "expects to be absent" and maintained this phrase despite being amended twice.⁹³ The statute in question, an updated version of the original absentee voter statute, replaced "expects to be absent" with "is absent."⁹⁴ The lower court determined from this change that an individual must indeed be outside of the voting location on Election Day for the absentee vote to count.⁹⁵ However, in one line of reasoning, the Court of Appeals argued that this was an "impracticable and unworkable" interpretation of the law.⁹⁶ If courts in general were to follow the lower court's reasoning, then "[e]very absentee vote would be the subject of much uncertainty, and every election contest would involve the issue of finding out whether or not each absentee voter was, in fact, absent on election day."⁹⁷ This would "lead[] to such confusion [that] should not be indulged in, unless there is not escape therefrom."⁹⁸ Thus, *absentee* is in the name, but is not required.

As absentee voting continually develops in election law, courts have wrestled with whether absentee voting is a privilege or a right.⁹⁹ In the case *McDonald v. Board. Of Elections Commissioners*, which addressed whether it was constitutional for Illinois' absentee voter laws to declare unsentenced county jail inmates who were awaiting trial not eligible to cast absentee

⁸⁹ *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP'T. OF JUST., <https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act> (last visited Jul. 9, 2020).

⁹⁰ *State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 652 (1939).

⁹¹ *Id.*

⁹² *De Flesco v. Mercer County Board of Elections*, 129 A.2d 38, 40 (N.J. 1957).

⁹³ 126 S.W.2d 4, 7 (Tex. Civ. App. 1956).

⁹⁴ *Wood v. State* 126 S.W.2d 4, 7 (Tex. Civ. App. 1956).

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See generally* Berman, *Texas's Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, *supra* note 59 (comparing Texas and Oregon registration and voter laws. "At a time when states like Texas continue to make it harder to vote, Oregon is not just registering a lot of new voters but reframing the national debate over voting rights—treating the franchise as a fundamental right rather than a privilege.").

ballots, the U.S. Supreme Court referred to absentee ballots as a “*claimed right*.”¹⁰⁰ The Court, holding that this “claimed right” is not equivalent to the constitutional right to vote, reasoned that “the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise.”¹⁰¹ State courts have held similarly with the New Jersey Supreme Court, which reasoned that absentee voting “has the characteristics of a privilege rather than of a right” because “[w]hen, where, and how the voting is to take place are matters prescribed and governed by the will of the Legislature.”¹⁰² In another example, the court in *Anderson v. North Carolina State Board of Election* specified that the North Carolina General Statutes consider “vote by mail-in absentee ballot” to be “an alternative to voting in person,”¹⁰³ not a replacement for the right itself.

Currently, all states permit some type of absentee voting, also called a vote-by-mail ballot option.¹⁰⁴ Thirty-four states and Washington D.C.¹⁰⁵ offer “no-excuse” absentee voting, meaning a voter need not provide an excuse when requesting a mail ballot.¹⁰⁶ Of those thirty-four, five states have all-mail voting.¹⁰⁷ In all-mail elections, each registered voter receives a ballot in the mail during an “election period,” and returns the ballot in the mail in a “secrecy envelop or sleeve” within a regular mailing envelope.¹⁰⁸ Voters also sign an affidavit.¹⁰⁹ Despite all registered voters receiving ballots in the mail, states still maintain an in-person voting option on Election Day.¹¹⁰ Notably, some states have statutory provisions that permit counties to opt to implement all-mail elections or allow some elections to be all-mail elections.¹¹¹ The remaining states offer excuse absentee ballots, which require that the voter requesting the absentee ballot fall into one of the eligible excuse categories. While all states permit absentee voting for voters who will be outside of the county on Election Day and for voters who are aware prior to the election that an illness or disability will prevent the voter from going to the polls, states vary in additional accepted excuses.¹¹² Examples of additional excuses include voters who are election or poll workers, voters over a specified age, and voters whose religious practices prevent them

¹⁰⁰ 394 U.S. 802, 809 (1969) (*Emphasis added*).

¹⁰¹ *Id.*

¹⁰² *De Flesco v. Mercer County Bd. of Elections*, 129 A.2d 38, 40 (N.J. 1957).

¹⁰³ 788 S.E.2d 179, 182 (N.C. Ct. App. 2016). See N.C. GEN. STAT. ANN. §163-226 (West 2020) (example of a no-excuse absentee voting statute).

¹⁰⁴ See generally *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, National Conference of State Legislatures*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last updated June 22, 2020) (explaining terminology to clarify the use of “absentee ballot” and various similar terms. “Some states refer to ‘advance ballots,’ ‘mailed ballots,’ ‘by-mail ballots,’ ‘mail ballots’ or ‘vote-by-mail ballots.’”).

¹⁰⁵ *Id.* (last updated June 22, 2020) (listing the 34 states: Alaska, Arizona, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming).

¹⁰⁶ See *VOPP: Table 1: States with No-Excuse Absentee Voting*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> (last updated May 1, 2020).

¹⁰⁷ See *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, *supra* note 104 (listing the 5 states: Colorado (COLO. REV. STAT. ANN. §1-5-401 (West 2014)), Hawaii (HAW. REV. STAT. ANN. §11-101 (West 2019)), Oregon (OR. REV. STAT. §254.465 (West 2008)), Utah (UTAH CODE ANN. §20A-3a-202 (West 2020)), and Washington (WASH. REV. CODE ANN. §29A.40.010 (West 2013)). It is noteworthy that the Utah statute was formerly cited as UTAH CODE ANN. §20A-3a-302 and the changed was effective as of May 12, 2020).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

from going to a polling place on the day of the election.¹¹³ Many states have created statutes that permit absentee voting for individuals experiencing a personal emergency. These statutes vary.¹¹⁴ For example, a Connecticut statute¹¹⁵ permits a designated person to deliver an absentee application to the clerk on behalf of a voter who is hospitalized within six days of the election and in Nevada, if a voter is “suddenly hospitalized, becomes seriously ill or is called away from home after the time has elapsed for requesting an absent ballot,”¹¹⁶ then the voter can request an absent ballot, which is delivered by the clerk.

Absentee ballots have developed since the Civil War, initially to preserve the enfranchisement of military personnel and then to ensure the enfranchisement of civilians with special circumstances or established excuses. This election modification, though not a replacement for the right to vote, has provided an opportunity for voters to exercise their fundamental right when extenuating factors prevent them from being present at the polls.

III. THE ACTUAL THREAT AND THE PERCEIVED THREAT

As discussed in Part I, the election modifications implemented in prior crises were crisis-specific. Part II described the foundation of absentee voting and, additionally, illustrated how absentee voting has expanded with time and necessity. The issue now is how to protect the public while ensuring a successful presidential election during the COVID-19 pandemic. In remembering the words of Judge Brennan, “[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary” because these perceived crises “are often overblown and factually unfounded.”¹¹⁷ Before discussing the contemporary countermeasure that will protect public health and safety during the COVID-19 pandemic, while also ensuring voters can exercise their right to vote in November, the *actual* security crises and the *perceived* security crises must be distinguished.

A. ACTUAL THREAT: COVID-19 AND PUBLIC SAFETY

The response to COVID-19 fell short in multiple ways, primarily with delayed acknowledgment of the virus’s threat in the U.S. and failure to provide testing measures.¹¹⁸ President Trump declared a national emergency beginning March 1, 2020.¹¹⁹ The U.S. ordered

¹¹³ See *VOPP: Table 2: Excuses to Vote Absentee*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx> (last updated Apr. 20, 2020) (listing a summary of acceptable state excuses).

¹¹⁴ See *generally Absentee Voting in Case of a Personal Emergency*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-voting-in-case-of-a-personal-emergency.aspx> (last updated July 10, 2020) (listing Emergency Absentee Voting options by state).

¹¹⁵ See CONN. GEN. STAT. ANN. §9-150c (West 1998).

¹¹⁶ NEV. REV. STATE. ANN. §2903.316 (West 2017).

¹¹⁷ Brennan, Jr., *supra* note 1, at 11.

¹¹⁸ See Michael D. Shear et al., *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html?searchResultPosition=1> (explaining how the lack of U.S. testing delayed response meant containment was not an option). See also Chad Terhune, *Special Report: How Korea trounced U.S. in race to test people for coronavirus*, REUTERS (Mar. 18, 2020), https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-report-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-idUSKBN2153BW?utm_medium=Social&utm_source=twitter (comparing South Korea’s quick response time to the coronavirus in manufacturing and providing test kits to U.S.’s delayed response that severely impacted the virus’ spread); Alexis C. Madrigal, *How the Coronavirus Became an American Catastrophe*, THE ATLANTIC (Mar. 21, 2020), <https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/> (commenting on how the lack of testing prevented possibility of containment and on how the U.S. COVID-19 response was inadequate).

¹¹⁹ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

federal quarantines for specified travelers¹²⁰ and states issued shelter-in-place orders varying in severity and length.¹²¹ However, insufficient U.S. testing obstructed an accurate case count. Then, testing started. In March, “confirmed cases in the United States increased at a rapid clip.”¹²² Cases passed 100 on March 5th, jumped to 1,000 less than one week later, climbed to 10,000 on March 18th, and by March 27th, tests revealed 100,000 cases.¹²³ This steep rise “reflect[ed] in part that [U.S.] testing capacity had begun to catch up with reality on the ground.”¹²⁴ By early July, the U.S. had reported 3,296,599 total cases and 134,884 total deaths.¹²⁵ The state of Florida had surpassed the total number of infections and deaths of entire countries.¹²⁶ On July 11th, Florida reported 15,300 cases, breaking the record for single day new cases in any state.¹²⁷ With infection numbers continuing to climb, the U.S. is deep into a pandemic period.¹²⁸

Nonpharmaceutical interventions (NPI) have been implemented by multiple states as a measure to protect the public during COVID-19. Studies of the 1918 flu pandemic show how “sustained nonpharmaceutical interventions” benefitted the cities that used them and showed a stark contrast against the cities that did not.¹²⁹ “Cities that implemented nonpharmaceutical interventions earlier experienced associated delays in the time to peak mortality, reductions in the magnitude of the peak mortality, and decreases in the total mortality burden.”¹³⁰ The NPIs used in 1918 primarily consisted of public grade school through high school closures (with private schools and parochial schools generally independently following), public gathering bans, quarantines and isolations, and other adjustments to public operations, such as altering business hours, requiring face masks, or restricting transportation.¹³¹ The NPIs implemented to protect

¹²⁰ See, e.g., Press Release, Ctrs. for Disease Control & Prevention, CDC Issues Federal Quarantine to Repatriated U.S. Citizens at March Air Reserve Base (Jan. 31, 2020) (on file with author), <https://www.cdc.gov/media/releases/2020/s0131-federal-quarantine-march-air-reserve-base.html>.

¹²¹ See, e.g., Exec. Order No. 33-20 (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (directing all California residents to stay home “except as needed”); Exec. Order No. 202.6 (2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf> (cancelling non-essential gatherings and closing non-essential businesses under the “New York State on PAUSE” order); Jiachuan Wu et al., *Stay-at-home orders across the country*, NBC News (Mar. 25, 2020), <https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736> (last updated Apr. 29, 2020).

¹²² Philip A. Wallach & Justus Myers, *The federal government’s coronavirus response – Public health timeline*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Cases and Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html> (last updated July 13, 2020).

¹²⁶ See Holly Yan et al., *Florida has more Covid-19 than most countries in the world. These stats show how serious the problem is*, CNN: HEALTH, <https://www.cnn.com/2020/07/13/health/florida-coronavirus-cases-comparisons/index.html> (last updated July 13, 2020, 4:14 PM).

¹²⁷ See *id.*

¹²⁸ See U.S. DEP’T OF HEALTH & HUMAN SERV.’S, PANDEMIC INFLUENZA PLAN, 1, 1 (2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/hhspandemicinfluenzaplan.pdf> (explaining how The Pandemic Influenza Plan, which was created in response to President George W. Bush’s response to rising fear in the 2000s about a mutated avian flu, used the term “Pandemic Period” to specify the time after extensive spread of an outbreak when applying “control measures” is no longer applicable. Instead, the “Pandemic Period” requires measures beyond an individual quarantine and shifts attention to measures that decrease social contact at a group and community level.)

¹²⁹ Markel et al., *supra* note 81, at 651 (“The combination and choice of nonpharmaceutical interventions also appeared to be critical as confirmed by the multivariate model.”).

¹³⁰ *Id.* at 648. See George P. Smith, *Re-Shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 18 ANNALS HEALTH. 1, 18-19 n.141 (2009) (“A recent study confirmed that nonpharmaceutical interventions used by forty-three cities during the 1918 Spanish flu pandemic had a salutary effect on the management of the emergency.”).

¹³¹ See Markel et al., *supra* note 81, at 651.

against COVID-19 have primarily consisted of shelter-in-place orders, comparable to a “snow-day” option.¹³² California, the first state to issue the stay-at-home order on March 19th, permitted only workers who fell within one of sixteen¹³³ essential operations needed to maintain continuity of operations of the federal infrastructure sectors, to continue work. Other states quickly followed.¹³⁴ In addition to social-distancing and shelter-in-place, by July, more than twenty states had issued mandatory mask requirements, with a few states issuing mandates by specific counties seeing “case rate[s] surpass[ing] government thresholds.”¹³⁵ In Arizona, even Governor Doug Ducey, a longtime advocate of maintaining a statewide standard to “reduce confusion” by “prohibiting local officials from imposing health requirements any stricter than what the state allowed - including a mandate for the use of masks,” acknowledged the spike of statewide cases in June and July and rescinded the ban.¹³⁶

Despite the use of NPIs, the U.S. is preparing for the anticipated worse second wave¹³⁷ while the first wave still rages on.¹³⁸ Research of the 1918 flu pandemic suggests not only that NPIs were beneficial, but also that it was necessary for these interventions to “be ‘on’ throughout the particular peak of a local experience”¹³⁹ in order to have the desired impact. Specifically, studies show that second waves of the 1918 influenza “frequently followed the sequential activation, deactivation, and reactivation of nonpharmaceutical interventions, highlighting the transient protective nature of nonpharmaceutical interventions, and the needs for a sustained response.”¹⁴⁰ In short, research¹⁴¹ suggests that applying multiple and consistent

¹³² See U.S. DEP’T OF HEALTH & HUMAN SERV.’S, PANDEMIC INFLUENZA PLAN, *supra* note 128, at 1, SB-11, SB-12 (describing “snow days” or “self-shielding” as a request that the entire community stay home. *The Pandemic Influenza Plan* notes that snow days “may be instituted for an initial 10-day period,” followed by a situational assessment).

¹³³ See *Identifying Critical Infrastructure During COVID-19*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last updated May 28, 2020) (specifying the essential critical infrastructure workers: Chemical, Communications, Commercial Facilities, Critical Manufacturing, Dams, Defense Industrial Base, Emergency Services, Energy, Financial, Food & Agriculture, Financial, Government Facilities, Healthcare & Public Health, Information Technology, Nuclear Reactors, Materials & Waste, Transportation Systems, and Water).

¹³⁴ See Wu et al., *supra* note 121 (summarizing stay-at-home orders for each state and providing hyperlinks to the official announcements).

¹³⁵ Bill Chappel, *More Than 20 U.S. States Now Require Face Masks in Public*, NPR (July 10, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/10/889691823/more-than-20-u-s-states-now-require-face-masks-in-public>.

¹³⁶ Steven Goldstein et al., *Gov. Ducey Says Arizona Mayors Allowed to Require Face Masks*, KJZZ, <https://kjzz.org/content/1592974/gov-ducey-says-arizona-mayors-allowed-require-face-masks> (last updated June 18, 2020, 12:53 PM). See *id.*

¹³⁷ See, e.g., Jen Christensen, *Second wave of COVID-19 in the fall could be much worse than the current wave, infectious disease expert says*, CNN: WORLD (June 26, 2020, 1:48 AM) https://www.cnn.com/world/live-news/coronavirus-pandemic-06-26-20-intl/h_91c3650ccdb74a005c5dbdcfebdc4953.

¹³⁸ See Nurith Aizeman, *Coronavirus 2nd Wave? Nope, The U.S. Is Still Stuck In The 1st One*, NPR (June 12, 2020), <https://www.npr.org/sections/health-shots/2020/06/12/876224115/coronavirus-second-wave-nope-were-still-stuck-in-the-first-one>; Erika Edwards, *Is this the second wave of COVID-19 in the U.S.? Or are we still in the first?*, NBC NEWS (June 16, 2020), <https://www.nbcnews.com/health/health-news/second-wave-covid-19-u-s-or-are-we-still-n1231087>.

¹³⁹ Markel et al., *supra* note 81, at 651 (“The combination and choice of nonpharmaceutical interventions also appeared to be critical as confirmed by the multivariate model.”).

¹⁴⁰ *Id.* at 653.

¹⁴¹ See *id.* (“Further, our retrospective study is consistent with the results from recent theoretical models of the spread of a contemporary pandemic, which highlight the value of early, combined, and sustained nonpharmaceutical interventions to mitigate a pandemic), *specificity* (best demonstrated in cities with bimodal mortality peaks when the triggers were activated, deactivated, and reactivated), *temporality* (interventions always preceded the reduction of EDR), *dose response* (layering and increased duration of the nonpharmaceutical interventions were associated with better outcomes), *biological plausibility* (these interventions reduce person-to-person interactions and biologically would be expected to reduce the spread of a communicable agent such as influenza), *coherence* (our data align with the established body of knowledge on the epidemiology of influenza), and *analogy* (isolation and social distancing have been demonstrated as effective means of preventing person-to-person spread of

nonpharmaceutical measures is beneficial in lessening the overall impact of a spreading pandemic and reduces deaths. Instead of heeding this warning, a series of states began lifting the shelter-in-place orders in June, rolling back restrictions by reintroducing dine-in options and permitting indoor activities¹⁴² when U.S. COVID-19 cases were still lingering around 20,000 on a seven-day average.¹⁴³ As was feared and predicted, restriction roll backs opened the door to surging coronavirus cases.¹⁴⁴ States have since halted reopening plans.¹⁴⁵ A COVID-19 vaccine does not currently exist. Even with a vaccine discovery and implementation, it is “‘unlikely’ that the U.S. will achieve sufficient levels of immunity to quell the outbreak” since polls reflect that many Americans will choose to not be vaccinated once it is available.¹⁴⁶

Even though President Trump has consistently downplayed the global pandemic, postulating that “cases are young people that would heal in a day” and merely have “the sniffles,”¹⁴⁷ COVID-19 poses a severe and real threat. Since voting by mail ballot is done remotely, it sustains the use of NPIs and serves as an effective countermeasure to COVID-19.

B. PERCEIVED THREAT: VOTER FRAUD

A statement on Georgia’s Secretary of State’s webpage, released prior to the May 19th primary election, explained “[w]ith social distancing as the most important tool for limiting the spread of coronavirus, providing alternatives to voting in person is crucial.”¹⁴⁸ Accordingly, Georgia’s Secretary of State, Brad Raffensperger, issued absentee ballot request forms to 6.9 million voters to prevent crowding at polling places and highlighted steps needed to protect election workers and voters that must vote in person.¹⁴⁹ Meanwhile, President Trump honed his

other respiratory tract diseases, such as rhinovirus, severe acute respiratory syndrome, respiratory syncytial virus, varicella, and seasonal influenza.”).

¹⁴² See *State Pause Plans to Reopen as Cases Soar*, N.Y. TIMES <https://www.nytimes.com/2020/06/29/world/coronavirus-updates.html#link-367611c3> (last updated June 29, 2020) (detailing the states that had paused or reversed plans to reopen); Jasmine C. Lee et al., *See How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last updated Aug. 11, 2020) (providing live tracking of states’ reopening plans and the pauses or reversals of those plans).

¹⁴³ See *Cases in the U.S.*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated Jul. 13, 2020) for new cases by day.

¹⁴⁴ See Julie Bosman & Mitch Smith, *Coronavirus Cases Spike Across Sun Belt as Economy Lurches into Motion*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/coronavirus-united-states.html> (highlighting the surges in Arizona, Texas, and Florida among other states amid reopening.). See also Shawn Hubler & Thomas Fuller, *‘Our Luck May Have Run Out’: California’s Case Counter Explodes*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/us/california-coronavirus-reopening.html> (“And just as in Texas and Florida, the state’s reopening appears to have triggered a large resurgence. Pressured in part by businesses, church groups and conservatives, Mr. Newsom ceded control of much of the timing of reopening to local officials who were eager to regain a sense of normalcy and stem economic losses. The result was a decentralized, haphazard process that sowed confusion and gave residents a false sense that they were in the clear.”).

¹⁴⁵ See Jeremy B. White, *California rolls back reopening plans as new outbreaks force major reversal*, POLITICO, <https://www.politico.com/states/california/story/2020/07/13/newsom-orders-statewide-shutdown-of-california-indoor-businesses-1300309> (last updated Jul. 13, 2020, 5:23 PM).

¹⁴⁶ Elizabeth Cohen, *Fauci says COVID-19 vaccine may not get US to herd immunity if too many people refuse to get it*, CNN: HEALTH (June 28, 2020, 9:15 PM), <https://www.cnn.com/2020/06/28/health/fauci-coronavirus-vaccine-contact-tracing-aspen/index.html>.

¹⁴⁷ Interview by Chris Wallace, *supra* note 4.

¹⁴⁸ Press Release, Georgia Secretary of State, Raffensperger Takes Unprecedented Steps to Protect Safety and Voter Integrity in Georgia, https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia (last visited July 31, 2020).

¹⁴⁹ See *id.* But see Nick Corasaniti & Michael Wines, *Beyond Georgia: A Warning for November as States Scramble to Expand Vote-by-Mail*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/voting-by-mail-georgia.html> (highlighting the issues from Georgia’s primary election and the attempt to run universal mail-in voting and full in-person voting concurrently, leading to confusion, long lines at polling places, and delayed absentee ballots).

attacks on mail-voting. While making remarks about protecting seniors with diabetes, President Trump claimed that “[p]eople that aren’t citizens, illegals” receive mail-ballots¹⁵⁰ and two days later, while making remarks about preventing online censorship, President Trump further insisted that “anybody in California that’s breathing, gets a ballot.”¹⁵¹ The following month, during a visit to Arizona, he even “suggested at one point that mail carriers could be held up as they delivered ballots, which could then be counterfeited by enemies foreign and domestic.”¹⁵² Shortly after, he took to Twitter, “issu[ing] attacks . . . on Democratic-led states like Michigan and Nevada, claiming that their efforts to encourage voters to cast a by-mail ballot are ‘illegal’ actions that contribute to ‘voter fraud.’”¹⁵³ As of June, President Trump had laid blame on Democrats five times for “rigging” elections by use of mail-voting.¹⁵⁴

President Trump’s assertions, though dramatized, are not original. Concerns have surrounded absentee ballots since the early days of voting, with fears of voter fraud heightening in recent decades. For example, in one opinion from the 1930s, the majority wrote that “[e]lection laws should be construed liberally in favor of the right to vote but this is not the rule as to absentee voting laws.”¹⁵⁵ Instead, the majority claimed, absentee voting, “[b]eing in derogation of the common law, [] should be strictly construed. The reason for the difference is that purity of the ballot is more difficult to preserve when voting absent than when voting in person.”¹⁵⁶

Recent studies show that absentee voter fraud is minimal. As discussed earlier, absentee voting began during the Civil War and contemporary changes have been made by states. In November 2000, Oregon became the first all vote-by-mail state in the U.S..¹⁵⁷ While holding office as Oregon’s Secretary of State, Bill Bradbury vocalized his state’s vote-by-mail system’s success citing, among other points, that while critics argue that vote-by-mail is prone to fraud, signature verification is a successful safeguard. Additionally, Bradbury highlighted the voter-friendliness of vote-by-mail, the cost-saving measures, and voter turnout.¹⁵⁸

According to the Vote at Home Institute, over 250 million votes have been cast through mail-in ballots in all fifty states since 2000.¹⁵⁹ Additionally, in 2018 alone, over thirty-one million voters cast their ballots by mail, representing 25.8% of the election participants.¹⁶⁰ “Arizona, California, Montana, North Dakota, and Utah saw by-mail voting rates above 50.0

¹⁵⁰ Donald J. Trump, President, U.S., Remarks on Protecting Seniors with Diabetes (May 26, 2020),

<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-protecting-seniors-diabetes/>.

¹⁵¹ Donald J. Trump, President, U.S., Remarks on an Executive Order on Preventing Online Censorship (May 28, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-executive-order-preventing-online-censorship/>.

¹⁵² Michael D. Shear & Zolan Kanno-Youngs, *In Arizona, Trump Boasts About His Wall and Repeats Unfounded Predictions of Voter Fraud*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/trump-arizona.html>.

¹⁵³ See Edward Perez, *The Bipartisan Truth About By-Mail Voting*, OSET INSTITUTE 1 (May 27, 2020),

https://trustthevote.org/wp-content/uploads/2020/05/27May20_BipartisanTruthAboutByMailVoting_v3.pdf; Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 2, 2020, 4:41 PM), <https://twitter.com/realDonaldTrump/status/1278836342609379328>.

¹⁵⁴ Haberman et al., *supra* note 5.

¹⁵⁵ State *ex rel.* Whitley v. Rinehart, 192 So. 819, 823 (1939).

¹⁵⁶ *Id.*

¹⁵⁷ See, OREGON SEC’Y OF ST., OREGON VOTE-BY-MAIL (2000), <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf>.

¹⁵⁸ Bill Bradbury, *Vote-by-Mail: The Real Winner is Democracy*, WASHINGTON POST (Jan. 1, 2005),

<https://www.washingtonpost.com/wp-dyn/articles/A40032-2004Dec31.html>.

¹⁵⁹ See Wendy R. Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, BRENNAN CENTER FOR JUSTICE (Apr. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

¹⁶⁰ See ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY 2018 COMPREHENSIVE REPORT, 1, 12 (2018), https://eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf; *Id.*

percent in many counties. In addition, counties in Florida, Indiana, Iowa, Main, and Wyoming had by-mail voting rates between 25.0 percent and 50.0 percent in the 2018 general elections.”¹⁶¹

This increase in mail-voting has not been accompanied with confirmed accounts of voter fraud.¹⁶² In fact, The Heritage Foundation, which maintains a database of election fraud cases, has assembled a mere 206 confirmed cases of “fraudulent use of absentee ballots” since 1988.¹⁶³ This may, in part, be a result of effectively implemented types of mail-voting security.

The Brennan Center for Justice, in a report summarizing tools used to protect elections against fraud, highlighted updated technologies that enhance security to ensure integrity for elections.¹⁶⁴ The seven tools highlighted are identity verification, bar codes, ballot tracking through the U.S. Postal Service, secure drop-off locations and drop boxes, harsh penalties, postelection audits, and polling sites as a fail-safe.¹⁶⁵ Identity verification, which is considered “a long-standing and well-established practice to ensure that the ballot received was indeed cast by the correct voter” matches specific identifying information against voter rolls.¹⁶⁶ Bar codes are used to allow voters to track that their ballot was received, but also helps states keep track of individual ballots to avoid accidental or intentional duplicates.¹⁶⁷ Intelligent Mail Barcodes (IMB)¹⁶⁸ support tracking mail pieces through the U.S. Postal Service so voters can monitor their ballot en route to the appropriate election office and election officials can check on the status of ballots mailed to voters to ensure arrival or, if lost in the mail, appropriately send a replacement without possible duplication.¹⁶⁹ Secure drop off locations, which may not be feasible during the pandemic but is a commonly used return option, not only ensures a voter that their ballot was received, but is also monitored by security measures, like pre-installed security cameras on government office buildings overlooking the drop box.¹⁷⁰ Awareness of harsh penalties additionally discourages individuals to participate in voter fraud, not only “because fraud by individual voters is a singularly foolish and ineffective way to attempt to win an election,” but primarily due to prison time and fines under state penalties by risking such action.¹⁷¹ Post-election audits “systematically enable election officials to identify any irregularities of misconduct” by reviewing samples of ballots, which is conducive to mail-voting which always

¹⁶¹ See ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY 2018 COMPREHENSIVE REPORT, *supra* note 160.

¹⁶² See Weiser & Ekeh, *supra* note 159 (“Despite this dramatic increase in mail voting over time, fraud rates remain infinitesimally small. None of the five states that hold their elections primarily by mail has had any voter fraud scandals since making that change.”).

¹⁶³ *Election Fraud Cases*, THE HERITAGE FOUNDATION, https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=0 (last visited July 15, 2020).

¹⁶⁴ See Weiser & Ekeh, *supra* note 159.

¹⁶⁵ See *id.*

¹⁶⁶ See Darrell M. West, *How does vote-by-mail work and does it increase election fraud?*, BROOKINGS (June 22, 2020), <https://www.brookings.edu/policy2020/votervital/how-does-vote-by-mail-work-and-does-it-increase-election-fraud/> (regarding how identity verification for mail-in ballots is used to prevent election fraud). See also Emily Wilkin, *Mail Voting Opens Door to Minority, Student Disenfranchisement*, BLOOMBERG GOVERNMENT (May 15, 2020), <https://about.bgov.com/news/mail-voting-opens-door-to-minority-student-disenfranchisement/> (regarding the risks for disenfranchisement, specifically for minority population). See generally Weiser & Ekeh, *supra* note 159.

¹⁶⁷ See Weiser & Ekeh, *supra* note 159.

¹⁶⁸ See *Vote-by-mail envelope design for California*, CENTER FOR CIVIC DESIGN, 1, 11 (Dec. 15, 2017),

<https://elections.cdn.sos.ca.gov/vote-by-mail/pdf/guidance.pdf>.

¹⁶⁹ See Weiser & Ekeh, *supra* note 159.

¹⁷⁰ See *id.*

¹⁷¹ Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENTER FOR JUSTICE (2007),

<https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>. See *id.*

provides paper records of each vote.¹⁷² Lastly, in-person polling sites, which continue to operate as an option for those who choose not to vote by mail, are viewed as a “fail-safe.”¹⁷³

In sum, measures already in place have successfully prevented mail-voting fraud. Claims of mail-voting fraud are unsupported and, at best, a weak argument against universalizing a longstanding, dependable option to exercise the franchise.

C. PERCEIVED THREAT: LEFT-LEANING ABSENTEE VOTING

In addition to President Trump’s baseless claims surrounding mail-voting fraud, he has also strongly advocated that mail-voting favors the Democratic Party over the Republican Party. In an April tweet, he warned that “Republicans should fight very hard when it comes to state wide mail-in voting” because it “doesn’t work out well for Republicans.”¹⁷⁴

Studies show the outcomes of mail-voting are bipartisan. The data presented and gathered from normal election years in three states¹⁷⁵ - California, Utah, and Washington - prior to the pandemic, conclude that “vote-by-mail modestly increases participation while not advantaging either party.¹⁷⁶ Specifically, “[t]he expansion of vote-by-mail does not appear to tilt turnout towards the Democratic party, nor does it appear to affect election outcomes meaningfully.¹⁷⁷ Additionally, evidence shows that “turnout increased in the year immediately following the introduction of vote-by-mail and turnout was not meaningfully higher before the counties adopted voting by mail.¹⁷⁸ Therefore, mail-voting has historically expanded voter turnout without benefitting one party over the other.

Surveys have also demonstrated general voter support for mail-in voting to ensure a safe election amid COVID-19. As of early April, 79% of Democrats and 65% of Republicans, making up 72% of adults in the U.S., supported implementation of mail-voting for the 2020 general election as a result of the COVID-19 pandemic.¹⁷⁹

There is also bipartisan support illustrated by state officials. In the fifty states and the District of Columbia, comprehensive research found that forty-six states offer a form of mail-voting for all voters without an excuse, meaning that both Democratic-led and Republican-led

¹⁷² See Weiser & Ekeh, *supra* note 159. See also *Post-Election Audits*, NAT’L CONF. STATE LEGISLATURES (Oct. 25, 2019), <https://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx> (summarizing post-election audits and offering results from case studies); Christopher Deluzio, *A Smart and Effective Way to Safeguard Elections*, BRENNAN CENTER FOR JUSTICE (July 25, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/smart-and-effective-way-safeguard-elections> (“Risk-limiting audits are considered the ‘gold standard’ of post-election audits. Political scientists, statisticians, and election-security experts have all lauded the benefits of post-election, risk-limiting audits.”).

¹⁷³ See Weiser & Ekeh, *supra* note 159.

¹⁷⁴ @realDonaldTrump, Twitter (Apr. 8, 2020, 5:20 AM), <https://twitter.com/realDonaldTrump/status/1247861952736526336>.

¹⁷⁵ See Daniel M. Thompson et al., *The Neutral Partisan Effects of Vote-by-Mail: Evidence from County-Level Roll-Outs*, 7-8 (Stanford Institute for Econ. Policy Research, Working Paper No. 20-015, 2020), <https://siepr.stanford.edu/research/publications/neutral-partisan-effects-vote-mail-evidence-county-level-roll-outs> (“To get at the actual effect of the vote-by-mail program, we need to approximate an experiment in which some elections occur under vote-by-mail while other, similar elections do not. To do something like this, we take advantage of the staggered rolling out of vote-by-mail across counties, within California, Utah, and Washington” where all eligible voters receive a mailed absentee ballot without needing to request it and then individuals can choose to mail in the completed ballot, drop off the completed ballot at a voting center, or vote in person.).

¹⁷⁶ *Id.* at 3.

¹⁷⁷ *Id.* at 11.

¹⁷⁸ *Id.* at 13.

¹⁷⁹ See Chris Kahn, *Most Americans, unlike Trump, want mail-in ballots for November if coronavirus threatens: Reuters/Ipsos poll*, REUTERS (Apr. 7, 2020), <https://www.reuters.com/article/us-usa-election-poll/most-americans-unlike-trump-want-mail-in-ballots-for-november-if-coronavirus-threatens-reuters-ipsos-poll-idUSKBN21P3G0> (“The Reuters/Ipsos poll was conducted online, in English, throughout the United States. It gathered responses from 1,116 American adults, including 532 Democrats and 417 Republicans. It had a credibility interval, a measure of precision, of 3 to 6 percentage points.”).

states either already offered no-excuse voting or “recently issued policy changes to loosen restrictions on ‘excuses’ required to obtain an absentee ballot, directly in response to COVID-19 concerns.”¹⁸⁰ Notably, these adjustments were made prior to primary season and policy changes may not be maintained or reinstated for the November general election. “For example, in several states that recently issued policies stating that COVID-19 health concerns (including the desire to self-isolate) are valid reasons to request an absentee ballot, the states also placed a ‘sunset’ on those policies, to clarify that they are valid only for elections before November.”¹⁸¹ Of the forty-six states that offer mail-voting for all voters, whether the states already offered all-mail voting, no-excuse mail voting, or adjusted restrictions in response to COVID-19, twenty-four states have a Democratic governor and twenty-two have a Republican governor.¹⁸² The remaining four states still requiring excuses to vote by mail - Missouri, Mississippi, Tennessee, and Texas – have Republican governors.¹⁸³ This demonstrates two important points: Democratic and Republican state officials believe COVID-19 is an actual threat and Democratic and Republican state officials believe mail-voting is a reliable option.

Despite claims that mail-voting favors the Democratic Party, studies prove that mail-voting does not favor one political party over the other. Furthermore, state action prior to the primary elections prove that state officials generally find mail-voting to be a reliable option and believe COVID-19 to be a legitimate reason for election modifications. Unfortunately, the sunsets placed on some of the policies demonstrate that, though some states were willing to expand mail-voting for the primaries, states may not make the same accommodations for the presidential election, echoing state action in 1918 when “the political machine disregarded the health and safety of its citizens to the advantage of the government.”¹⁸⁴

D. ACTUAL THREAT: DISENFRANCHISEMENT OF MINORITY VOTERS

Although the accusations of mail-voting fraud and Democratic-leaning outcomes are unfounded, there are legitimate concerns that mail-voting disenfranchises specific populations of voters. Certain minority populations and primarily non-white voters have historically encountered frequent accessibility issues and higher numbers of invalidated ballots.

1. Disenfranchisement of Minority Voters

A foundational issue of voting, thereby affecting the accessibility of mail-voting, is implicit bias, which impacts the way election officials educate potential voters.¹⁸⁵ In a University of Southern California study, researchers assessed the responsiveness of legislators to hypothetical white and Latino constituents.¹⁸⁶ In one experiment, researchers sent e-mails two weeks prior to the November 4, 2012 general election to legislators in fourteen states with high Latino populations.¹⁸⁷ The e-mails asked a basic question about whether a driver’s license would be required to vote on Election Day, to which “every legislator could simply respond with a ‘no’

¹⁸⁰ Perez, *supra* note 153, at 4 (“12 states require an ‘excuse’ to vote absentee, but have relaxed restrictions to make COVID-19 concerns a valid excuse to request an absentee ballot.” The states are AL, AR, CT, DE, IN, KY, LA, MA, NH, NY, SC, WV).

¹⁸¹ *See id.* at 7.

¹⁸² *See id.* at 4.

¹⁸³ *See id.* at 5.

¹⁸⁴ Watkins, *supra* note 82.

¹⁸⁵ *See* Arusha Gordon & Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23, 32 (2015).

¹⁸⁶ Matthew S. Mendez & Christian R. Grose, *Doubling Down: Inequality in Responsiveness and the Policy Preferences of Elected Officials*, 43 LEGIS. STUD. Q. 457, 466 (2018).

¹⁸⁷ *Id.* at 467.

answer.”¹⁸⁸ There were four groups: an English-language white-named (Jacob Smith) control group, an English-language Latino-named (Santiago Rodriguez) group, a Spanish-language white-named group, and a Spanish-language Latino-named group.¹⁸⁹ The study showed that legislators sent responses to half of the control group but only sent responses to 44.3% of the English-language Latino-named group.¹⁹⁰ The study additionally showed that legislators had a low response rate to the Spanish-language groups, with responses to 12.8% to the white-named constituents and 10.3% to the Latino-named constituents.¹⁹¹ The results found a correlation between legislators who supported voter identification laws and the response rate, noting strong evidence that legislators who support ID laws will “much more likely respond to white constituents’ requests for information about voting than they are to Latino constituents” and, further, that response rate is higher for English-speaking constituents.¹⁹² Accordingly, the results offer “fairly strong evidence of bias” that “may be rooted in personal attitudes toward ethnicity cued by constituents names.”¹⁹³

Obstacles to registration pose another issue and have been proven to disproportionately impact minority voters. The contentious 2018 Georgia governor’s race between Democrat Stacy Abrams and Republican Brian Kemp demonstrated this severe impact. In 2018, 53,000 Georgians who registered or re-registered to vote had their registrations on hold as a result of the “exact match” verification process.¹⁹⁴ This policy requires that all information on a voter’s application match the information filed with the Georgia Department of Driver Services or the Social Security Administration.¹⁹⁵ An error could be as simple as a dropped hyphen or an added period.¹⁹⁶ Despite Kemp’s campaign spokesman, Ryan Mahoney, arguing that “it has never been easier to vote in our state” because of Kemp’s work as Georgia’s Secretary of State, the disproportionate impact on black voters is clear.¹⁹⁷ “Georgia’s population is approximately 32 percent black,” however, “the list of voter registrations on hold with Kemp’s office [was] nearly 70 percent black.”¹⁹⁸ A 1986 case, *Windy Boy v. Big Horn County*, further exemplifies the long history of election officials unfairly assessing voter registration cards from minority voters.¹⁹⁹ Testimony in *Windy Boy* confirmed that election administrators were “hypertechnical as Indian registration increased and looked for minor errors” in order to refuse Native American voters from registering.²⁰⁰

In addition to obstacles that stand in the way of eligible voters receiving election information and successfully registering, issues also arise when eligible voters attempt to cast the ballot. One challenge to mail-voting trickles down from inaccurate purges. Many voters have been the victims of purges, a process by election officials to remove names deemed ineligible

¹⁸⁸ *Id.* at 468.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 472.

¹⁹¹ *Id.* at 472-473.

¹⁹² *Id.* at 482.

¹⁹³ *Id.*

¹⁹⁴ Ben Nadler, *Voting rights become a flashpoint in Georgia governor’s race*, ASSOCIATED PRESS (Oct. 9, 2018), <https://apnews.com/fb011f39af3b40518b572c8ccea6e906c>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See also Khushbu Sha, *‘Textbook voter suppression’: Georgia’s bitter election a battle years in the making*, GUARDIAN (Nov. 10, 2018), <https://www.theguardian.com/us-news/2018/nov/10/georgia-election-recount-stacey-abrams-brian-kemp>.

¹⁹⁷ Nadler, *supra* note 194.

¹⁹⁸ *Id.*

¹⁹⁹ 647 F. Supp. 1002 (D. Mont. 1986).

²⁰⁰ *Id.* at 1008.

from the voter registration lists.²⁰¹ According to federal law, when accurately completed, purges remove names of individuals with a “disenfranchising criminal conviction,” individuals who have changed residence, individuals who have died, and individuals with “mental incapacity.”²⁰² When flawed, however, purges disenfranchise eligible voters. States vary in how voter purges are conducted.²⁰³ Studies have shown an uptick in purge rates since 2014 in jurisdictions with a history of racial discrimination.²⁰⁴ Research suggests that this uptick was a direct result of the Supreme Court’s holding in *Shelby County v. Holder* in 2013, “which ended federal ‘preclearance,’ a Voting Rights Act provision that was enacted to apply extra scrutiny to jurisdictions with a history of racial discrimination.”²⁰⁵ This Supreme Court case holding is frequently cited to as the moment the dam burst, opening the gates to a flood of new voting restrictions that would otherwise have required pre-clearance under the Voting Rights Act.²⁰⁶

Flawed purges are typically the results of “bad information” or “bad method[s].”²⁰⁷ For example, in 2016, a list sent from the Arkansas secretary of state to county officials included more than 7,700 records “from the Arkansas Crime Information Center (ACIC) of persons who were supposedly ineligible to vote and should be removed from the rolls.”²⁰⁸ In reality, the list included names of people who had “some involvement with the court system,” for reasons including divorce, but were otherwise completely legitimate voters.²⁰⁹ Less than 5,000 of the names purged were corrected within two months of the realization.²¹⁰ In 2012, Texas officials purged voter registration lists based on the Social Security Administration’s Death Master File.²¹¹ However, officials made “weak matches,” meaning minimal information was matched and, without additional investigation, individuals were purged.²¹² Texas has since changed this method.²¹³ Weak matches have been proven to disproportionately impact minority voters, as was the case with Crosscheck, a program that identified “double voters,” which are voters “who have registrations in two states or who actually voted in an election in multiple states.”²¹⁴ Crosscheck used matching criteria that was “based on first name, last name, and birthdate.”²¹⁵ However, non-white voters are more likely to share names.²¹⁶ Specifically, “16.3 percent of Hispanic people and 13% of black people have one of the 10 most common surnames, compared to 4.5% of white

²⁰¹ See JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1, 2 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf; Myrna Perez, *How the Midterm Elections May Be Compromised*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html>

²⁰² BRATER ET AL., *supra* note 201. See Perez, *supra* note 201.

²⁰³ See BRATER ET AL., *supra* note 201, at 1.

²⁰⁴ See *id.* See also Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CENTER FOR JUSTICE (Aug. 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁰⁵ BRATER ET AL., *supra* note 201, at 1. See Morris, *supra* note 204.

²⁰⁶ See generally *New Voting Restrictions in America*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america> (last updated Nov. 19, 2020); Rashawn Ray & Mark Whitlock, *Setting the record straight on Black voter turnout*, BROOKINGS (Sept. 12, 2019), <https://www.brookings.edu/blog/how-we-rise/2019/09/12/setting-the-record-straight-on-black-voter-turnout/>.

²⁰⁷ BRATER ET AL., *supra* note 201, at 5.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 7.

²¹⁵ *Id.*

²¹⁶ *Id.* at 7 n.1.

people.”²¹⁷ Crosscheck, which has since been indefinitely suspended,²¹⁸ displayed how purges based on minimal matching information place minority voters at a larger risk of being purged.²¹⁹

The 2018 governor’s race between Abrams and Kemp also illustrated the deep-rooted impact of voter purging, specifically on minority voters. Kemp, who took office in 2010 and served as the Georgia Secretary of State at the time, overseeing the election for which he was a candidate, had long been criticized for implementing tight voter restrictions, like purging voters from registration lists who had not voted for three consecutive years.²²⁰ As a result, 1.5 million voters were purged between 2012 and 2016, which was twice as many purged between 2008 and 2012²²¹ with 668,000 voters purged in 2017.²²² Of the voters purged in 2017, investigative reporter, Greg Palast, found that over 340,000 of the 400,000 who had supposedly moved had not in fact moved and were purged for having not voted in one or two elections.²²³ As was the case in 2018, often purged voters are unaware that their names have been removed from voter registration lists and only realize the error on or shortly before Election Day, leaving no time to correct the mistake and successfully cast a vote.²²⁴

Another ongoing issue restricting eligible voters are photo ID requirements. According to the Help America Vote Act,²²⁵ “all states require identification from first-time voters who register to vote by mail and have not provided verification of their identification at the time of registration.”²²⁶ The acceptable forms of ID listed include a “current and valid photo identification” or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”²²⁷ As explained by Brennan Center for Justice President, Michael Waldman, the issue is not that photo IDs are required, after all “[e]lection integrity is vital,” but that eligible voters are unable to acquire the photo IDs required.²²⁸ The number of voting-age citizens in the United States who do not have a current government-issued photo ID is disproportionately people of color. In fact, 25% of voting-age citizens without a current government-issued photo ID are black citizens and only 8% are white citizens.²²⁹ Eligible voters consistently face accessibility issues when attempting to acquire free photo IDs. In 2012 “1.2 million eligible black voters and 500,000 eligible Hispanic voters

²¹⁷ *Id.*

²¹⁸ See Press Release, ACLU, ACLU of Kansas Settlement Puts “Crosscheck” Out of Commission for Foreseeable Future; Program Suspended Until Safeguards Added (Dec. 10, 2019) (on file with author), <https://www.aclukansas.org/en/press-releases/aclu-kansas-settlement-puts-crosscheck-out-commission-foreseeable-future-program>.

²¹⁹ BRATER ET AL., *supra* note 201, at 7 n.1.; Perez, *supra* note 201.

²²⁰ See e.g., Richard Fausset, *Georgia County Rejects Plan to Close 7 Polling Places in Majority-Black Area*, N.Y. TIMES, (Aug. 23, 2018) <https://www.nytimes.com/2018/08/23/us/randolph-county-georgia-voting.html> (discussing Georgia’s history of election controversy, including a proposal to close and consolidate polling places, a “no match, no vote” law that keeps voters with uncorrected ballot discrepancies to be removed from registration lists for twenty-six months, an investigation into an Asian-American rights group voter registration activities, and an investigation into the New Georgia Project, which is a minority-focused voter registration group founded by Stacy Abrams.).

²²¹ See BRATER ET AL., *supra* note 201.

²²² Sha, *supra* note 196.

²²³ *Id.*

²²⁴ See e.g., Eliza Sweren-Becker & Myrna Perez, *Voter Purges in an Increasingly Vote-by-Mail World*, BRENNAN CENTER FOR JUSTICE (May 21, 2020), https://www.brennancenter.org/sites/default/files/2020-05/Voter%20Purges%20in%20an%20Increasingly%20Vote-by-Mail%20World_0.pdf.

²²⁵ See 42 U.S.C. §15483

²²⁶ *Voter Identification Requirements – Voter ID Laws*, NAT’L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Intro> (last updated July 9, 2020).

²²⁷ See 42 U.S.C. §15483(b)(1).

²²⁸ KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, *THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1*, i (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Challenge_of_Obtaining_Voter_ID.pdf.

²²⁹ Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CENTER FOR JUSTICE (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>.

live[d] more than 10 miles from their nearest ID-issuing office open more than two days a week.”²³⁰ Additionally, “1.2 million eligible voters whose incomes [fell] below the federal poverty line live[d] more than 10 miles from their nearest state ID-issuing office open more than two days a week.”²³¹ Obviously, those who need a photo ID do not have a driver’s license and, therefore, must rely on other forms of transportation to get to the specified government office.²³² Even for eligible voters who can overcome the logistical challenges to visit the necessary government office, applicants of free photo IDs must pay for required supporting documentation, which can range from \$15 to \$347, depending on what documents are needed.²³³

Obstacles also arise for eligible voters who have photo ID, but whose photo ID is not acceptable based on state law. Since 2010, over twenty-five states have enacted new voting restrictions, including strict photo ID requirements.²³⁴ State voter ID law varies in what qualifies as a voter ID.²³⁵ For example, in Texas, one acceptable form of ID is a Texas license to carry a handgun, but a Texas student ID is not listed.²³⁶ Notably, in 2018 “[m]ore than 80 percent of handgun licenses issued to Texans . . . went to white Texans, while more than half of the students in the University of Texas system are racial or ethnic minorities.”²³⁷ Therefore, eligible voters whose only photo ID is a Texas student ID card must apply for an additional form of photo ID to be eligible to cast a ballot.

If a voter can overcome the hurdles previously discussed, there is still the issue of having their mail-ballot reviewed and rejected. Election officials tasked with matching information on an absentee ballot to the information on file “often need to determine whether [a] mistake is cause to invalidate the ballot.”²³⁸ Determining whether the ballot ought to be discarded can rely on something as simple as comparing if an “r” or an “s” looks the same in the signature on the ballot as the signature on file.²³⁹ After the 2018 election, an analysis done by the Atlanta Journal-Constitution of 245,000 absentee ballots from every Georgia county found that “nearly 7,000 ballots, or 3 percent of the total votes cast,” were rejected “often for relatively minor

²³⁰ GASKINS & IYER, *supra* note 228 at 1.

²³¹ *Id.* at 4.

²³² *Id.* at 3.

²³³ *Id.* at 14 (“An official copy of a birth certificate can cost anywhere from \$15 to \$30, depending on the state” and “a replacement naturalization certificate or certificate of citizenship if \$345.” Additionally, woman who changed their surname after marriage encounter additional hurdles and fees to obtain the documents needed to apply for a photo ID).

²³⁴ *New Voting Restrictions in America*, *supra* note 206 (listing the new voting restrictions specifically regarding photo IDs, which include the following: Alabama requires a photo ID to vote (2016), Arizona extends voter ID requirements to early voting (2019), Arkansas requires specified type of ID to vote and added photo ID requirement to state constitution (2018), Iowa requires voter ID to vote (2018), Kansas requires photo ID to vote (2012), Mississippi requires photo ID to vote (2016), Missouri requires photo ID with some exception (2018), New Hampshire requests a photo ID to vote and requires a voter without a photo ID to be photographed at the polls (2016), North Carolina added photo ID requirement to state constitution (2018), North Dakota restored strict voter ID requirements but “accepts certain tribal identification” (2018), Rhode Island requests a photo ID to vote and offers an “affidavit alternative” for those without a photo ID, South Carolina requires photo ID to vote but offers an alternative for voters with a “reasonable impediment to obtaining ID” (2016), Tennessee requires photo ID to vote (2016), Texas requires a photo ID to vote but an alternative is available for voters with “a non-photo ID from a present list” and with “an affidavit claiming to have certain, enumerated reasonable impediments to obtaining photo ID” (2016), Virginia requires a photo ID to vote (2016), Wisconsin requires photo ID to vote (2016)).

²³⁵ See generally *Voter ID Laws*, VOTE.ORG, <https://www.vote.org/voter-id-laws/> (last visited July 23, 2020).

²³⁶ See Johnson & Feldman, *supra* note 229; *Id.* See also Michael Wines, *The Student Vote is Surging. So Are Efforts to Suppress It*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html> (commenting on how student IDs are not accepted as valid forms of voter ID and how student IDs that are accepted in certain states are subject to strict requirements that universities cannot comply with).

²³⁷ Johnson & Feldman, *supra* note 229.

²³⁸ Gordon & Rosenberg, *supra* note 185, at 30.

²³⁹ Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?_r=0.

transgressions such as marking the outside of the absentee ballot incorrectly.”²⁴⁰ The analysis also found that “[m]inority voters were twice as likely to have their ballots rejected.”²⁴¹ Similar to examples previously discussed of implicit bias dictating lower response rates to Latino constituents or “exact match” verification processes for registration, “[r]esearch into implicit bias indicates that the risk is high that these seemingly ministerial decisions may be infected by unconscious biases.”²⁴² Whether unconscious or intentional, evidence shows that minority voters are feeling the impact.

The severe impacts already illustrated during normal election years will undeniably be heightened when the election is during a national crisis. Therefore, in suggesting mail-in voting as a solution during the COVID-19 pandemic, additional improvements must be made to confirm that eligible voters who have historically been disenfranchised have access to ballots and that their votes are counted.

2. Advocates and Solutions

The historical discrepancies in voting raises great concern about universalizing mail voting. How can we assure voters that universalizing mail-voting will not lead to more rejected ballots?²⁴³ Advocates fighting against disenfranchisement of eligible voters during normal election years offer concrete suggestions for improvement. The pandemic situation provides opportunity to expedite implementation of these tangible solutions that improve minority voters’ accessibility to exercise the franchise.

The first suggestion is universalizing Automatic Voter Registration (AVR). The National Voter Registration Act of 1993 requires states to “offer voter registration opportunities at State motor vehicle agencies,” to offer mail-in registration application opportunities, and to offer voter registration opportunities at specified State and local offices.²⁴⁴ Notably, not all states are covered by the NVRA requirements.²⁴⁵ However, as data collection has shifted from paper to digital in state DMV systems, there has also been movement to automating the voter registration process.²⁴⁶ Various state agencies now participate in state AVR processes.²⁴⁷ The “Oregon Model,” appropriately named after Oregon as the first state to use AVR in 2016, automatically opts an eligible voter into registration after any interaction with the DMV.²⁴⁸ “The voter is later sent a notification informing them that they were registered and that they can opt-out by returning the notification.”²⁴⁹ According to the National Conference of State Legislatures (NCSL), there are four main approaches by states to AVR and, “[a]s of April 2020, 19 states and the District of Columbia are categorized by NCSL as having automatic voter registration.”²⁵⁰ In

²⁴⁰ Chris Joyner & Jennifer Peebles, *AJC Analysis: Absentee voting pitfalls tripped thousands of Ga. Voters*, ATLANTA J.-CONST. (Dec. 23, 2018), <https://www.ajc.com/news/state--regional-govt--politics/ajc-analysis-absentee-voting-pitfalls-tripped-thousands-voters/5Qu6ynxydaKrT4le1edtPL/>.

²⁴¹ *Id.*

²⁴² Gordon & Rosenberg, *supra* note 185, at 31 (explaining how implicit bias impacts all stages of the electoral process, from resource allocation, to registrations, to Election Day voting, to assisting voters with provisional ballots).

²⁴³ Liptak, *supra* note 239 (responding to the comment “The more people you force to vote by mail . . . the more invalid ballots you will generate.”).

²⁴⁴ *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last visited July 27, 2020). See *Automatic Voter Registration*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (last updated Apr. 14, 2020).

²⁴⁵ *The National Voter Registration Act of 1993 (NVRA)*, *supra* note 244.

²⁴⁶ See *Automatic Voter Registration*, *supra* note 244.

²⁴⁷ See *id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

advocating for automatic registration, Heather K. Gerken, senior legal advisor to the Obama Campaign, points to paper applications as plaguing the registration process, leading to errors and incorrect registration lists.²⁵¹ According to Gerken, universal registration “promotes both” access and integrity in elections.²⁵² “Liberals should welcome universal registration because it makes voting easier. Conservatives ought to like the system because it prevents registration fraud.”²⁵³ Furthermore, Gerken counters that a privacy argument against automatic registration is baseless because “voter lists would be compiled using information that the state already has.”²⁵⁴ Whether the argument is based on cost comparisons, accessibility, or the basic understanding that voting is a right of all Americans, there is strong advocacy for AVR. In short, an initial step to ensure that mail-voting does not disenfranchise eligible voters is to implement universal AVR.²⁵⁵

The next suggestion is to modify the purging process. Since election officials will only send mail-in ballots to voters on registration lists, it is vital that the lists be updated and accurate. The Brennan Center for Justice offers suggestions for how to “reduce erroneous purges” of voter rolls.²⁵⁶ As discussed previously, programs like Crosscheck have been proven unreliable and disproportionately impact voters of color because of the weak matching criteria. Therefore, the matching criteria should “require matches across many fields.”²⁵⁷ This would require a match between “first name, last name, address, date of birth, social security number, and driver’s license number,” instead of just a name and address match.²⁵⁸ Additionally, accuracy of the data used should be confirmed by consulting other sources “rather than assuming one source is flawless” and “[u]se of the list should be adjusted in accordance with the list’s reliability.”²⁵⁹ Ideally, this would prevent eligible voter names from being swept up in the purges.

Purges should also be completed with plenty of time to correct any purging errors prior to Election Day. The Brennan Center recommends that purges – including citizen-initiated voter challenges – be completed at least ninety days prior to any federal, state, or local election.²⁶⁰ “While federal law requires systematic maintenance to be completed by 90 days before *federal* elections, the logic behind that blackout period applies equally to state and local elections as well.”²⁶¹ Setting this ninety-day deadline prevents last minute purges and provides sufficient time for election officials to notify the public and individual voters of the purge, thereby alerting eligible voters who have been incorrectly removed from the roll to take action.²⁶²

Implicit bias as a root cause of ballot invalidation must also be addressed. Including implicit bias training as a requirement for all poll workers would offer a first step in recognizing the deeply rooted and far-reaching impacts of implicit biases.²⁶³ Diversifying poll workers could also “lower the risk that implicit biases impact the voting process.”²⁶⁴ Additionally, introducing a

²⁵¹ See Heather K. Gerken, *Make It Easy: The Case for Automatic Registration*, 28 DEMOCRACY: A JOURNAL OF IDEAS 17, 18 (Spring 2013) (highlighting how third-party groups who assist with paper registration have caused additional issues, be it errors or registration fraud, and third-party groups are typically backed by political parties with “skewed” incentives).

²⁵² *Id.* at 20 (asserting that universal registration is less expensive, comparing the costs of registration in the U.S. to Canada).

²⁵³ *Id.*

²⁵⁴ *Id.* at 21.

²⁵⁵ See generally Morris, *supra* note 204.

²⁵⁶ Sweren-Becker & Perez, *supra* note 224, at 2.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 2-3.

²⁶¹ *Id.* at 2.

²⁶² *Id.* at 3.

²⁶³ See Gordon & Rosenberg, *supra* note 185, at 51.

²⁶⁴ *Id.* at 52.

blind review of all voter registration applications could entirely remove the opportunity for implicit biases to surface.²⁶⁵ These adjustments could protect voters from implicit biases that may dictate an election worker’s decision to reject a registration form or ballot based on a minor error or an unclear letter.

Finally, advocates suggest that mail-ballots during COVID-19 can serve as a confirmation tool, thereby expanding accessibility to voters. Firstly, issuing mail-ballot applications to all registered voters serves as a reminder to inactive voters – voters who are still eligible to vote but might be removed from rolls without further action – to confirm eligibility.²⁶⁶ Secondly, the action of requesting a mail-ballot could serve as confirmation to “move[] a voter from the inactive list to the active list,”²⁶⁷ as a sufficient response to an NVRA notice,²⁶⁸ as a registration application by a non-registered eligible voter, or as “[g]rounds to reinstate a voter purged for change of address” by confirmation that the voter did not in fact change address.²⁶⁹ Combining these processes would allow eligible voters to efficiently and effectively cast a ballot.

There are clear accessibility discrepancies among voter populations. In response to the COVID-19 situation, there is an immediate need to universalize mail-voting, which sets the stage for expedited implementations of necessary adjustments outlined by advocates to improve voter accessibility.

3. Lessons Learned from the 2020 Primary Season

Even though states attempted to improve voting accessibility by expanding vote-by-mail options during the 2020 primary season, states’ election officials were not sufficiently prepared. The primary season saw “ballots lost in the mail; some printed on the wrong paper, with the wrong date or the wrong language” and “others arriving weeks after they were requested or never arriving at all.”²⁷⁰ “Thousands of voters in Georgia, Louisiana, South Carolina, Rhode Island, West Virginia and D.C. reported requesting but not receiving absentee ballots in time to vote.”²⁷¹ In Pennsylvania, “roughly 2,000 voters were sent the wrong party ballot in Montgomery County.”²⁷² Additionally, even though Pennsylvania had created an online ballot-request form with ballot tracking, “the system didn’t always register a sent ballot, and the online application was only in English.”²⁷³ Furthermore, Pennsylvania voters could submit the online ballot-request form up to one week before Election Day, which did not provide sufficient time for election officials to mail the absentee ballots to voters and for voters to return the completed ballot for their vote to be counted.²⁷⁴ In Maryland, absentee ballots were mailed to all registered voters, but the registration lists used were outdated and, specifically in Baltimore, “1 in 10 ballots, or about 20,000 total” ballots were returned.²⁷⁵ Voters in Baltimore also vocalized frustrations with lack of information regarding the adjustments made to the election process, leading to Joanne Antoine, the executive director of Common Cause Maryland explaining that “investment needs

²⁶⁵ *See id.*

²⁶⁶ *See* Sweren-Becker & Perez, *supra* note 224, at 3.

²⁶⁷ *Id.*

²⁶⁸ 52 U.S.C. §20507(d).

²⁶⁹ Sweren-Becker & Perez, *supra* note 224, at 4.

²⁷⁰ Corasaniti & Wines, *supra* note 149.

²⁷¹ Wendy R. Weiser, *To Protect Democracy, Expand Vote by Mail*, BRENNAN CENTER FOR JUSTICE (June 30, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/protect-democracy-expand-vote-mail>.

²⁷² Corasaniti & Wines, *supra* note 149.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

to be made in voter education” to avoid future glitches.²⁷⁶ In some cases, states that expanded the mail-voting option removed polling places, perhaps incorrectly assuming a seamless transition into mail-voting and failing to account for voters who require the in-person voting option. In Washington, D.C., where election officials received 15 times more than the normal number of absentee ballot requests, voters who went to polling places “waited as long as four hours” in lines at one of the twenty open polling places, “compared with the usual 143.”²⁷⁷ State and federal officials must recognize these mistakes and make necessary changes prior to November.

Particularly, states need assistance from the federal government. In a report issued by the Brennan Center for Justice and with the consensus of the Alliance for Securing Democracy, Pitt Cyber, and R Street Institution, the costs required to ensure a safe November election during COVID-19 requires federal funding and congressional support beyond the \$400 million in grants issued as part of the March economic relief package.²⁷⁸ In looking specifically at the local and state costs of five states, the report pinpointed the necessary costs to account for absentee ballot education and outreach, processing absentee ballot applications, processing and tabulating absentee ballots, building additional necessary infrastructures, and creating healthy and secure in-person voting options.²⁷⁹ Shockingly, the report found that the federal funding provided in March to assist states with elections during COVID-19 would account for merely 9-10% of Georgia’s needs, 11-12% of Michigan’s needs, 11-13% of Missouri’s needs, 16-18% of Ohio’s needs, and 16-18% of Pennsylvania’s needs.²⁸⁰ States cannot ensure safe and secure voting without additional federal assistance.

Officials and voters must also recognize and accept a different timeline with increased usage of mail ballots. Primarily, results will not be finalized on election night. Instead of expecting an immediate winner, voters and candidates in 2020 should prepare for an accurate final count to be announced days, or even weeks after Election Day.²⁸¹ According to David J. Becker, the director of the Center for Election Innovation and Research, “It’s much more important to get the count right, than to get it fast.”²⁸²

In using universal mail-voting during a global health pandemic to protect public health and safety, there will be old and new issues of accessibility to account for.²⁸³ When successfully prepared for and implemented, mail-voting will not result in insurmountable cases of election fraud, nor will mail-voting favor one political party over another. However, mail-voting could make a difficult situation worse for historically disenfranchised eligible voters if states and the federal government do not take necessary steps to prepare for November.

IV. RESPONDING TO COVID-19

A. CHALLENGES TO ELECTION LAW DURING COVID-19

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See CHRISTOPHER R. DELUZIO ET AL., BRENNAN CTR. FOR JUSTICE, ENSURING SAFE ELECTIONS 1, 1 (2020), https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_FINAL.pdf (referring to the “\$2 trillion economic relief package,” which included funding to assist states with their 2020 elections. The report estimates election expenses for Georgia, Michigan, Missouri, Ohio, and Pennsylvania).

²⁷⁹ *See id.*

²⁸⁰ *See id.*

²⁸¹ Corasaniti & Wines, *supra* note 149 (“More than 48 hours after polls closed on June 2, the biggest county in Indiana was still counting ballots. Four days after its election, also on June 2, Philadelphia was still counting ballots.”).

²⁸² *Id.*

²⁸³ *See supra* Part IV(B).

Since absentee voting originated during a time of crisis – the Civil War – it seems reasonable for contemporary development of absentee and mail voting to accommodate civilians during a pandemic. However, recent challenges have come up short.²⁸⁴ Specifically, two Supreme Court decisions have addressed absentee voting during the pandemic and have set the likely stage for a business-as-usual November election.

In *Republican National Committee v. Democratic National Committee*,²⁸⁵ the Supreme Court reviewed a decision by a Wisconsin District Court. The District Court permitted two adjustments to the April 7, 2020 primary election as a response to COVID-19: the deadline by which municipal clerks could receive ballots was extended from election day to Monday, April 13 and absentee ballots would be counted if received by Monday, April 13 even if postmarked after election day.²⁸⁶ The Supreme Court majority referred to the case issue as a “technical question about the absentee ballot process,” highlighting that extending the postmark date “fundamentally alters the nature of the election.”²⁸⁷ As such, the Supreme Court held that the District Court erred in granting the extension through two lines of reasoning. The first focused on the plaintiff’s preliminary injunction motions, which did not ask for an extension of the postmark date, noting that the District Court gave this unilaterally.²⁸⁸ The second pointed to the extension as changing election rules “so close to the election date,” citing that the Supreme Court “has repeatedly emphasized that lower federal courts should *ordinarily* not alter the election rules on the eve of an election.”²⁸⁹

The dissent, penned by Justice Ruth Bader Ginsburg, addressed the 2020 primary election as being anything but ordinary. Justice Ginsburg highlighted the impact of COVID-19 and the Governor’s stay-at-home order on the election and polling places.²⁹⁰ She specifically cited the surge of absentee ballot requests and the backlog of ballots to be mailed, which were unlikely to reach voters in time to be postmarked by election day.²⁹¹ Justice Ginsburg wrote further that “[t]he Court’s suggestion that the current situation is not ‘substantially different’ from ‘an ordinary election’ boggles the mind.”²⁹² The majority’s claim of inconsistency contradicts the history of election modifications made during times of crisis, as discussed in Part I. The Court, calling the relief requested “extraordinary”²⁹³ and seemingly not appropriate for the present situation fails to acknowledge the crisis of the pandemic or the long history of election modification during or in the wake of a crisis. Justice Ginsburg concluded that “[t]he majority of this Court declares that this case presents a ‘narrow, technical question.’ That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic.”²⁹⁴

²⁸⁴ See Adam Liptak, *More Liberal Supreme Court? Not When It Comes to Voting Rights*, N.Y. TIMES (July 18, 2020), https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html?campaign_id=9&emc=edit_nn_20200720&instance_id=20454&nl=the-morning®i_id=137714071&segment_id=33842&te=1&user_id=ef2528c8b535602a2f208660aa7648d1.

²⁸⁵ 140 S. Ct. 1205 (2020).

²⁸⁶ *Id.* at 1206.

²⁸⁷ *Id.* at 1206, 1207.

²⁸⁸ See *id.* at 1207.

²⁸⁹ *Id.* (*Emphasis added*).

²⁹⁰ *Id.* at 1208, 1209.

²⁹¹ *Id.*

²⁹² *Id.* at 1208, 1210.

²⁹³ *Id.* at 1208.

²⁹⁴ *Id.* at 1211.

The Supreme Court has also seen and denied a request from Texas.²⁹⁵ Texas election code permits qualified voters who are absent from their county of residence on election day,²⁹⁶ have a sickness or physical condition “that prevents the voter from appearing at the polling place on election day,”²⁹⁷ are aged sixty-five or older on election day,²⁹⁸ or are confined in jail and pending trial or serving a misdemeanor sentence²⁹⁹ to vote early by mail. The State Democratic Party, the party chairperson, and three voters brought the case, arguing, among other points, age discrimination under the Texas Election Codes, violating the Twenty-Sixth Amendment by allowing voters only aged sixty-five and older to submit mail-in ballots.³⁰⁰ In May, U.S. District Judge Fred Biery signed an order confirming that, “[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections” due to the pandemic circumstances.³⁰¹ “Texas intervened and filed a notice of interlocutory appeal, which, under Texas law, superseded and stayed the injunction.”³⁰² In response to Judge Biery’s holding, the Fifth Circuit Court of Appeals called the order one “that will be remembered more for audacity than legal reasoning” and granted the motion for stay.³⁰³ Texas Attorney General, Ken Paxton, asserting that absentee voting is a right, not a privilege, argued that since Texas voters maintain the option to vote in-person and “[t]here is no constitutional right to vote by mail,” then voters are not disenfranchised.³⁰⁴ Ultimately, the Supreme Court denied the application to vacate the motion for stay.

While the door is open for challenges to the November election during COVID-19, a successful claim for has yet to come through it. The Court in *Republican National Committee v. Democratic National Committee* welcomed future challenges to the election, concluding that “[t]he Court’s decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate.”³⁰⁵ Adding a comment to the *Texas Democratic Party v. Abbott* decision, Justice Sonia Sotomayor noted she “hope[s] that the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election.”³⁰⁶

Akin to the modifications made during prior crises discussed in Part I, mail-voting prioritizes protecting the general public and preserves the fundamental right to vote. The solution is not an attempt to fit into the standing absentee ballot excuses or challenge state statutes under the Twenty-Sixth Amendment – although there is merit in these arguments and additional cases will likely be brought in the future - but to address the public health crisis first by implementing countermeasures that will prevent the spread of a deadly virus.

²⁹⁵ See Ariane de Vogue, *Supreme Court denies request from Texas Democrats to expand mail-in voting*, CNN, <https://www.cnn.com/2020/06/26/politics/texas-supreme-court-vote-by-mail/index.html> (last updated June 26, 2020, 6:29 PM); Adam Liptak, *Supreme Court Turns Down Request to Allow All Texans to Vote by Mail*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/supreme-court-texas-vote-by-mail.html>.

²⁹⁶ See TEX. ELEC. CODE ANN. § 82.001 (West 1991).

²⁹⁷ TEX. ELEC. CODE ANN. § 82.002 (West 1997).

²⁹⁸ TEX. ELEC. CODE ANN. § 82.003 (West 1991).

²⁹⁹ TEX. ELEC. CODE ANN. § 82.004 (West 1997).

³⁰⁰ See *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020).

³⁰¹ Order Regarding Plaintiffs’ Motion for Preliminary Injunction at 9, *Tex. Democratic Party v. Abbott*, No. SA-20-CA-438-FB (W.D. Tex. May 19, 2020).

³⁰² *Tex. Democratic Party*, 961 F.3d at 394. See Tex. Rules App. Proc., Rule 29.1.

³⁰³ *Tex. Democratic Party*, 961 F.3d at 394.

³⁰⁴ Respondents’ Opposition to Application to Vacate Fifth Circuit Stay of Preliminary Injunction at 1, *Tex. Democratic Party v. Abbott*, No. 19A1055, (W.D. Tex. June 22, 2020).

³⁰⁵ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020).

³⁰⁶ *Texas Democratic Party v. Abbot*, 591 U.S. (2020).

B. MAIL-VOTING AS A COUNTERMEASURE TO COVID-19

Although the 1918 election continued as normal, “[t]he history of epidemics offers considerable advice, but only if people know the history and respond with wisdom.”³⁰⁷ The 2020 election, despite the similarities to 1918, should not continue as normal. In applying the court’s reasoning in *Jacobson v. Massachusetts*,³⁰⁸ the logical conclusion to combat the current crisis is to implement mail-voting as a countermeasure – or NPI – to the pandemic.

Jacobson is the “leading authority for public health police powers.”³⁰⁹ The claim in *Jacobson* was brought in 1905 during a time when smallpox was “prevalent to some extent” in Cambridge, Massachusetts.³¹⁰ State statute permitted the city’s board of health to “require and enforce the vaccination and revaccination of all the inhabitants” if deemed necessary to protect the public health and safety.³¹¹ An updated regulation highlighted the increasing smallpox cases and implemented a mandatory vaccination or revaccination for all Cambridge inhabitants, calling the vaccinations “necessary for the speedy extermination of the disease.”³¹² In reasoning why the smallpox vaccination was permissible under Massachusetts’ police power, the Court noted that the U.S. Constitution “does not import an absolute right” to be “wholly freed from restraint,” citing prior holdings that “recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restrains and burdens in order to secure the general comfort, health, and prosperity of the state.’”³¹³

There are three points in the Court’s reasoning that are necessary to highlight and to apply to the current crisis. The first is the Court’s clarification that the vaccination requirement was only applicable “when, in the opinion of the board of health, [vaccination] was necessary for the public health or the public safety.” Specifically, “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”³¹⁴ This delineates a clear difference between times of crisis and times of peace.³¹⁵ Additionally, it specifies that the measure used for protection must be “necessary,” thus limiting states from utilizing police power in a way “so far beyond what was reasonably required for the safety of the public” during the crisis.³¹⁶ The second is the Court’s acknowledgement that there are opposing theories of how to most effectively protect the public from smallpox, nevertheless, the state legislature “recognized vaccination as at least an effective, if not the best-known way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population.”³¹⁷ This echoes the concept of layering³¹⁸ countermeasures to successfully respond to a pandemic when multiple countermeasures are effective. The third is the Court’s recognition that the means presented in the statute – vaccination to counter the rising smallpox spread – are clearly asserted with “substantial relation” to the goal of protecting public health and safety.³¹⁹ This assertion is

³⁰⁷ David S. Jones, *History in a Crisis – Lessons for COVID-19*, 382 NEW ENG. J. MED. 1681, 1683 (2020), <https://www.cdc.gov/media/releases/2020/s0131-federal-quarantine-march-air-reserve-base.html>.

³⁰⁸ 197 U.S. 11 (1905).

³⁰⁹ Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. DET. MERCY L. REV. 347, 356 (2008).

³¹⁰ *Jacobson*, 197 U.S. at 12.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 26.

³¹⁴ *Id.* at 27.

³¹⁵ *Id.*

³¹⁶ *Id.* at 28.

³¹⁷ *Id.* at 30-31.

³¹⁸ See *supra* note 141.

³¹⁹ *Jacobson*, 197 U.S. at 31.

supported, in part, by the prevalence of many state statutes requiring vaccinations for children attending public school.³²⁰ Therefore, the more commonly used the countermeasure, the most likely there is a proven “substantial relation” between the measure and success in protecting public health and safety.³²¹

Thus, in establishing support for the mandatory vaccination as a pharmaceutical countermeasure to smallpox, the holding relied on three terms. First, that the countermeasure being applied be during an epidemic. Second, that the countermeasure be proven effective. Third, that the countermeasure be “substantially related” to protecting public safety. This article suggests that mail-voting be used for the 2020 general election due to the COVID-19 pandemic. Survey data confirms the effectiveness of mail-voting and debunks the theory that mail-voting leads to heightened election fraud or benefits one political party over the other. Lastly, mail-voting, which supports enacted NPIs, aims to protect public health by removing opportunities for crowds to gather. The three lines of reasoning from *Jacobson* are met.

The *Jacobson* court heavily relied on the logic of a prior case, *Viemester v. White*,³²² which addressed mandatory smallpox vaccinations for public school students. The *Viemester* court reasoned that “[i]f vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated.”³²³ The court further reasoned that even if “some laymen, both learned and unlearned” do not believe vaccination to prevent smallpox, but the “mass of the people” and “most members of the medical profession do accept it,” then vaccination is a proper measure to protect the general public.³²⁴ Most importantly for the analogy at hand is the *Viemester* court’s explanation that if “[vaccination] is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of law,” for example, by statute, then there is good reason to find the measure appropriate.³²⁵ The court concluded that when common belief shares that vaccination prevents smallpox, mandating vaccination is a health law “for the protection of all the people of the state” is an appropriate measure.³²⁶

As if the *Viemeister* court were speaking on current events, “[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by every one.”³²⁷ By applying the reasoning in *Viemeister*, mail-in-voting should be viewed as a countermeasure, much like mandatory vaccinations. In applying this reasoning to the current pandemic, if a countermeasure “prevent[s] the transmission or spread of” COVID-19, it “logically follows” that the countermeasure should be implemented.³²⁸ As discussed previously in the article, lifting quarantine orders prior to the 1918 election and removing shelter-in-place orders in summer 2020 both resulted in heightened flu infection and death rates. Mail-voting, unlike in-person voting, enables voters to vote from home and prevents crowded polling places and lines, thereby avoiding the mistakes made in 1918. Additionally, survey results and recently enacted emergency statutes demonstrate “accept[ance] by the mass of the people”³²⁹ and bipartisan

³²⁰ *See id.* at 32.

³²¹ *Id.* at 31.

³²² 72 N.E. 97 (N.Y. 1904).

³²³ *Id.* at 98.

³²⁴ *Id.*

³²⁵ *Id.* at 98-99.

³²⁶ *Id.* at 99.

³²⁷ *Id.* at 98, 99.

³²⁸ *See id.* at 98.

³²⁹ *Id.*

support to implement mail-voting for the upcoming election. Furthermore, mail-voting, under the name of absentee voting, has been “applied in practice”³³⁰ since the Civil War. Every state and the District of Columbia uses mail-voting in some form and relies on mail-voting to ensure exercise of the franchise. Therefore, despite President Trump’s assertions about fraud and favoritism, mail-voting is more than “generally accepted,” since it has bi-partisan support and is nationally applied in practice. “[F]or the protection of all the people of the state”³³¹ during the COVID-19 pandemic, mail-voting is a necessary contemporary countermeasure.

When implementing mail-voting as a countermeasure, there must remain an exception to accommodate for specific populations who are unable to vote by mail. In *Jacobson*, the court upheld the statute for mandatory smallpox vaccinations, also noting the exception for children who were ““unfit subjects for vaccination,”” proven by a physician’s certificate. Similarly, there are eligible voters who would be disenfranchised if voting was offered solely by mail-in ballots³³² since universal mail-voting alone does not accommodate the needs of all eligible voters. Thus, voters who must vote in-person must also have an accessible option to do so effectively and safely during the pandemic.

During COVID-19, there will be two issues of accessibility to consider: whether all people have access to the tools needed to receive and cast a ballot by mail and whether polling places will be accessible to the voters who require an in-person option. If the suggestions offered in Part III to support minority voters and states’ election officials are successfully implemented, then most eligible voters will receive mail ballots and will cast ballots through mail. Additionally, if states implement AVR or adjust registration requirements for first-time voters, then these voters will not need to rely on in-person voting for same-day voter registration.³³³ The accommodations made at polling places may look different than a typical election year because they will favor those who do not have the tools needed to vote at home. Therefore, election officials must consider specific accessibility needs.

Voters with certain disabilities will require an in-person voting option.³³⁴ “While some voters with disabilities may be able to request large-print or Braille mail and absentee ballots, or receive their ballots electronically, others may require electronic ballot marking systems or other accommodations available only when voting in person.”³³⁵ A 2017 study completed by the U.S. Government Accountability Office (GAO) illustrated how features outside and inside polling places impede voters with disabilities.³³⁶ Out of 137 polling places fully examined by GAO in 2017, some stations could not accommodate people using wheelchairs, “which might have

³³⁰ *Id.*

³³¹ *Id.* at 98, 99.

³³² See Amanda Zoch, *Why Elections Need Both Absentee and In-Person Voting*, NAT’L CONF. STATE LEGISLATURES (Apr. 30, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-canvass-may-2020.aspx>.

³³³ See *id.*

³³⁴ See *e.g., id.*

³³⁵ See *e.g., id.* See also Andrew M. Ballard, *Advocates for Blind Sue States for Mail-In Ballot Discrimination*, BLOOMBERG LAW (July 31, 2020, 7:01 AM) https://www.bloomberglaw.com/exp/eyJdHh0IjoiQ1ZOVyIsImkljoiMDAwMDAxNzMtYTAzOS1kZWRLWFIn2YtZmFiZjZlMjcwMDAxIiwic2lnIjoiUWRTcUpMeHB1V2ZCQkZCRUlqWjFWVzF3a0hZPSIsInRpbWUiOiIxNTk2MjE5MzIyIiwidXVpZCI6IkFZWIRkcHVObzhacU0vYkRWalM4K2c9PUG0eFk2K2lpNmNOB3NIL1Nia0ZtWHc9PSIsInYiOiIxIn0=?usertype=External&bwid=00000173-a039-dedd-ab7f-fabf6a270001&qid=6952269&cti=LSCH&uc=1320028382&et=SINGLE_ARTICLE&emc=bcvbw_cn%3A6&bna_news_filter=true (reporting on recent lawsuits brought against states for their mail-in voting procedures and how advocacy groups claim that the procedures violate the Americans with Disabilities Act).

³³⁶ *Voters With Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance*, GAO (Oct. 3, 2017), <https://www.gao.gov/products/GAO-18-4>.

required someone else to help” the voter.³³⁷ What is an unacceptable polling place environment during a normal election would be catastrophic during a pandemic election, considering the greater risk of COVID-19 to immunocompromised individuals.³³⁸ Therefore election officials must not only secure necessary voting materials for voters with disabilities, election officials must also select easily accessible polling place locations and create polling place layouts that accommodate voters.

Voters with literary or language barriers will also require the in-person voting option.³³⁹ According to the Center for Civic Designs, “poor translations make more work for non-English speakers” and, overall, printed information is not sufficient material to prepare and assist voters with language barriers.³⁴⁰ Therefore, voters with literary or language barriers will rely on assistance from bilingual, multilingual, or trained poll workers.

Furthermore, voters with no permanent address or without mail delivery services will require an in-person voting option.³⁴¹ Voters experiencing homelessness are eligible to vote, however, while these voters can list public shelters, parks, or cross-streets as their address, voters likely do not have a mailing address for receiving the mail-ballot.³⁴² Additionally, voters without mail delivery services to their place of residence encounter absentee-voting obstacles. Native Americans living on reservations may not have addresses or may have “non-traditional addresses.”³⁴³ According to the Native American Rights Fund, in addition to the postal service not delivering to these addresses, “some precincts prohibit the delivery of election materials to non-traditional addresses.”³⁴⁴ Additionally, Native Americans who are unable to receive postal service to their place of residence must use P.O. boxes, for which there are few, and the P.O. boxes are often very far, in rural areas where mail is frequently delayed.³⁴⁵ Therefore, not only do Native American voters need in-person voting options, these voters also need polling places at tribally designated buildings, akin to accommodations made in Washington.³⁴⁶ Washington, one of the five all-mail states, permits federally recognized tribes to request state facilities be designated for voter services to ensure access to voting.³⁴⁷

Additional voter populations may also need in-person voting access and eligible voters may fall into more than one of these populations. Therefore, open polling places must have all necessary material to ensure voters can vote, be it through a regular ballot or a provisional ballot.³⁴⁸

The pandemic situation also requires heightened safety measures at polling places. The CDC has published guidance for how to prevent the COVID-19 spread while preparing election

³³⁷ See Zoch, *supra* note 332.

³³⁸ See *People Who Are at Increased Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html> (last updated June 25, 2020).

³³⁹ See Zoch, *supra* note 332.

³⁴⁰ *Vol. 103 Planning language access*, CENTER FOR CIVIC DESIGN, <https://civicdesign.org/fieldguides/planning-language-access/> (last visited July 16, 2020).

³⁴¹ See Zoch, *supra* note 332.

³⁴² See e.g., *You Don't Need a Home to Vote*, NAT'L COALITION FOR THE HOMELESS, <https://nationalhomeless.org/campaigns/voting/> (last visited July 16, 2020); Steven Cuevas, *Yes, You Can Vote If You Are Homeless*, KQED (Oct. 17, 2016) <https://www.kqed.org/news/11127168/yes-you-can-vote-if-you-are-homeless>.

³⁴³ *Vote By Mail*, NATIVE AMERICAN RIGHTS FUND, <https://www.narf.org/vote-by-mail/> (last visited July 16, 2020).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ 2019 Wash. Sess. Laws 32.

³⁴⁸ See Sweren-Becker & Perez, *supra* note 224, at 4-5 (offering additional suggestions for how polling places can best prepare during COVID-19 for in person voters and can ensure that provisional ballots are counted).

polling locations.³⁴⁹ Unsurprisingly, the reoccurring recommendation for how to maintain healthy operations highlights the need for alternative voting methods in order to minimize crowds and contact.³⁵⁰ Fewer in-person voters creates a safer environment for voters and poll-workers alike. Efficiency at polling places will be key to avoid crowding and long lines, even with fewer in-person voters. Poll workers must be thoroughly trained on the election adjustments resulting from COVID-19 and must also have extensive understanding of provisional ballots³⁵¹ in order to assist voters clearly, quickly, and from a safe distance. Election officials must also follow a cleaning schedule to ensure consistent disinfecting of surfaces, shared objects, and voting-associated equipment.³⁵² Additionally, election officials must enforce social-distancing measures and modify polling place layouts.³⁵³

Combining universalized mail-voting with in-person voting options for specific populations provides voters safe options for casting a ballot in the November 2020 election. To paraphrase the *Viemeister* court, although mail-voting is not universally supported, the naysayers led by President Trump should not be the controlling factor, especially where history, logic, and a mass of the voting population have proven that mail-voting is generally “accepted in theory and generally applied in practice.”³⁵⁴ While arguments may continue as to whether mail-voting merely offers convenience or honors and preserves the right of suffrage,³⁵⁵ it has nonetheless proven to be a reliable and established form of voting. Implementing mail-voting during the national pandemic protects public health and public safety while providing individuals a safe and accessible opportunity to exercise their fundamental right to vote.

CONCLUSION

In the future, when the COVID-19 public health crisis is contained, the U.S. will look back and assess. Reports will detail the numbers of infected and deceased. Researchers will expose the long-term impacts of the virus on survivors. Academics will compare the 2020 presidential election with prior elections held during and in the wake of a crisis. The U.S. will either “remorsefully realize[]” that it was again unable to appropriately respond to a “perceived security crisis”³⁵⁶ or the U.S. will prove that it learned the lessons of pandemics and crises past by “respond[ing] with wisdom.”³⁵⁷

Following President Trump’s “overblown and factually unfounded”³⁵⁸ claims about mail-voting would undoubtedly place an incorrectly perceived threat over the health and safety of the general public during a true global pandemic. Not only is mail-voting a necessary contemporary countermeasure to protect the public during COVID-19, but the pandemic situation also puts voting accessibility discrepancies at the forefront and provides the chance to expedite improvements. The opportunity is here to universalize mail-in voting to protect the public during

³⁴⁹ *Considerations for Election Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated June 22, 2020).

³⁵⁰ *Id.*

³⁵¹ See 42 U.S.C. §15482 (explaining that the provisional ballot is used by voters whose eligibility is uncertain because their name is missing from the voter rolls or the voter does not have the required photo ID, or another issue arises where the voter cannot confirm their eligibility).

³⁵² See generally *Considerations for Election Polling Locations and Voters*, *supra* note 349.

³⁵³ See generally *id.*

³⁵⁴ *Viemeister v. White*, 72 N.E. 97, 98-99 (N.Y. 1904).

³⁵⁵ See e.g., Fortier & Ornstein, *supra* note 88.

³⁵⁶ Brennan, Jr., *supra* note 1, at 11.

³⁵⁷ Jones, *supra* note 307.

³⁵⁸ See quote cited *supra* note 1.

a national crisis and to correct errors in the election process that have historically disenfranchised minority populations. The question is, will we take it?