

New York's Primary Election: Challenges in the Lead-Up to November

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Since the coronavirus outbreak first arrived in the United States, New York has remained at the epicenter of the ongoing public health crisis that will implicate the 2020 election. During New York's June 23 primary, administering a safe election proved especially difficult in the densely populated New York City area. Despite single party control that might avoid the policy disagreements paralyzing other states' response to the pandemic, New York experienced a variety of administrative challenges in its primary.

In June, the state's election system confronted both a rapid expansion of vote-by-mail and the challenge of maintaining in-person voting options. Although the state attempted to rapidly address these changes, voters in New York City, in particular, experienced high absentee ballot rejection rates and delays in the delivery of ballots. Consequently, the results of some races were not known until six weeks after the election. The problems New York faced in its primary represent an object lesson for all states as to the emergency measures that must be taken immediately to prepare for November.

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Summary

New York held its primary election on June 23, 2020. After the state's initial decision to [cancel](#) its presidential primary due to the apparent certainty of the race and risks posed by the COVID-19 pandemic, a federal judge [mandated](#) that the election be held. This marked the first time in New York's history in which both the presidential and state/local primaries occurred on the same day.

New York confronted several COVID-related obstacles in administering the primary election. Both the expansion of absentee balloting and the adaptation of in-person polling places presented challenges:

- Many voters did not receive their absentee ballots on time, did not receive them at all, or had them rejected once returned.
- Some of those who sought to vote in-person encountered closed polling locations, long lines, and untrained poll workers.
- The state was unprepared to process the significant number of absentee ballot requests and absentee ballots, which led to delays in tabulation and announcement of results.
- The amount of funding received did not match the needs for administering the election. The state's 58 Boards of Elections [split](#) approximately \$20 million in federal CARES Act funding and the state government [provided \\$4 million](#) in additional aid. The New York State Board of Elections' leadership [noted](#) that a majority of that funding was used to support the primary, meaning that the state's administrators are in need of additional funding for the November election.

I. Challenges Posed by the Expansion of Absentee Voting

The June primary revealed the challenges New York faces with scaling its mail voting system to meet high demand. Governor Andrew Cuomo expanded absentee ballot access due to COVID-19 by signing [executive orders](#) to automatically mail every registered voter a ballot application and allow all voters to vote by mail. The state also allowed voters to apply for a ballot online. The changes, which

allowed for no-excuse absentee voting in the state, differ from measures to institute all-mail elections, in which all voters are automatically provided with mail-in ballots. New York’s modifications nevertheless resulted in a significant increase in absentee voting – a change that was particularly challenging in New York City. Board of Elections data indicates that [767,000 ballots](#) were requested in the city, but only 403,000 were returned. Still, 403,000 ballots constitutes a considerable [increase](#) from the 23,000 returned absentee ballots in the 2016 primary.

Although neighboring states like New Jersey and Connecticut have [adapted their voting laws](#) to allow for the expansion of vote-by-mail in November, New York has yet to approve no-excuse absentee balloting for the general election. [Senate Bill S8015D](#), sponsored by Senator Alessandra Biaggi and signed by Governor Cuomo, modifies the state’s definition of “illness” in order to allow any New York voter who wishes to avoid the risk of contracting COVID-19 to vote by mail in November. The state’s leadership has yet to address whether New York voters will again automatically receive absentee ballot applications in the mail, but voters are now able to request an absentee ballot online. New York City voters can fill out their ballot applications via [nycabsentee.com](#) (a statewide application portal is [coming soon](#)). New York is thus likely to face an even greater increase in mail-in voting in November.

A. Printing and Mailing Delays

In June, New York’s election apparatus struggled to manage the unprecedented rise in mail-in voting – a challenge that was compounded by the state’s ballot-printing delay. The state [did not start printing ballots](#) that included presidential candidates until mid-May, when its leadership was legally required to reverse course after the April cancellation of its presidential primary. Several news outlets reported that the state’s ballot vendors additionally [struggled to meet](#) high demand. Some New York voters [complained](#) that they had received ballots without return envelopes or envelopes that did not contain a ballot. This printing delay created a mailing delay, leaving some voters to receive their ballots as late as Election Day, and others to never receive them at all.

B. Postmark Requirements and Errors

New York’s absentee ballot requirements, which include a voter signature and date on the back of the envelope and a postmark requirement, confused voters and postal workers alike. The state’s [postmark requirements](#) for the June 23 primary were as follows:

1. If the ballot arrived on or before Election Day, it was considered valid irrespective of whether or not it was postmarked.

2. If the ballot arrived within one week after Election Day, it was considered valid with a postmark of Election Day or earlier.
3. If the ballot did not have a postmark or had a postmark later than Election Day, it was deemed invalid.

Some ballots were rejected because they were missing a postmark and did not arrive on or before Election Day. According to several media reports, this was partly due to a miscommunication within USPS. [The Washington Post](#) and [The New York Times](#), among additional outlets, reported that voters typically provide their own stamp – a marker that signifies first-class mail and is therefore always postmarked by USPS to ensure that the stamp is not reused. Cuomo’s executive order, however, stated that all voters be provided with business-class [postage-paid](#) return envelopes. According to [The Washington Post](#) and [The New York Times](#), this class of mail is not habitually postmarked by USPS, though the postal service maintains that it is committed to postmarking all ballots, regardless of their mail class. In states like New York, where such widespread absentee voting was never before seen, postal workers were unfamiliar with ballot postmarking procedures. Therefore, when voters dropped their business-class postage-paid envelopes in a mailbox, some ballots simply went directly to their destination *without being postmarked*, which was cause for ballot invalidation if they arrived after Election Day. According to Senator Zellnor Myrie, who represents New York’s 20th senatorial district, this error [disproportionately affected](#) voters in Kings County, where the USPS office has been heavily criticized for its postmarking and processing procedures.

Others argued that different features of the mail-ballot processing system were to blame for postmarking errors. During a New York Senate Committee [public hearing](#) on election administration in a pandemic, Douglas A. Kellner, Co-Chair of the NY Board of Elections, stated that whether or not an envelope has a stamp does not indicate its likelihood of being postmarked. Thus, a ballot’s lack of a postmark may be due to an entirely different system flaw. Automated postmarking machines, for example, [may reject mail](#) for other reasons, such as an improper fold. While election officials [reported](#) extensive communication with USPS to ensure that all ballots were postmarked – some postal workers even postmarked ballots [by hand](#) if they were rejected by the machine – the state’s large influx of absentee ballots was [hastily managed](#) at some USPS locations. Though it remains unclear exactly which procedural errors are to blame for a lack of postmarks, lawmakers are seeking to address postmark invalidation through legislation. [S.8799A/A.10808](#) provides that any absentee ballot received by a board of elections office by the day after Election Day be counted regardless of whether it is postmarked. The bill is discussed below.

Postal errors are not solely to blame for New York City’s absentee ballot rejection rate. Voters, many of whom had never voted by mail before this election, additionally made mistakes of their own.

Some signed their ballots in the wrong place or forgot to sign entirely, while others failed to check the correct boxes or returned the wrong papers. Each of these errors, in addition to more obscure mistakes like [sealing](#) a ballot envelope with tape, can lead to ballot rejection.

C. Ballot Rejection

After all votes were counted, it was revealed that the NYC Board of Elections had rejected about [84,000 absentee ballots](#), which is equivalent to approximately [21%](#) of all mail-in ballots received in the city. The city did not have a responsibility to notify voters of the fact that their ballot had been rejected or give them the opportunity to cure the defect (an issue addressed by [S. 8370B/A. 10830](#), discussed below). The invalidation rates across NYC reveal [disproportionate rates of ballot rejection](#); in the state's 12th Congressional District, 19% of absentee ballots in Manhattan were rejected, as compared to 28% of those in Brooklyn. [The Intercept](#) and [Gothamist](#) reported that in the 12th District, about one in five mail-in ballots were rejected for envelope errors (signatures or postmarks) and were never opened.

D. Counting Delay

The state's high rate of absentee voting resulted in a counting delay, with two races – those in the 12th and 15th Congressional Districts – [left undecided](#) for six weeks. These delays were due in large part to the fact that mail-in ballots take longer to process. According to NY state law, officials may not begin counting absentee ballots until [eight days after](#) a primary election, which [marks](#) the end of the counting period for in-person votes. Since each mail-in ballot must be opened and verified, the counting process can be cumbersome and lengthy. Furthermore, some officials described a [lack of sufficient BOE staff](#) to process the ballots.

II. In-Person Voting Challenges

New York Election officials [forecasted](#) lower than usual in-person turnout on Election Day, largely due to the statewide transition to mail-in voting. In some precincts, however, higher than expected in-person turnout led to [long lines](#) after thousands of voters [failed](#) to receive mail-in ballots. Nevertheless, unlike the [Wisconsin](#) and [Georgia](#) primary elections, in which hours-long lines and malfunctioning election equipment bedeviled election officials statewide, problems with in-person voting during New York's June 23rd primary election were isolated and largely constrained to the New York City area.

The majority of polling places across the state [remained open](#). 89 polling places in New York City moved to a [different location](#). These changes represent 7% of the city's 1,231 total polling stations and are an improvement from the 2016 elections, during which [20%](#) of polling sites changed location. In New York City, little advance notice by the city Board of Elections meant that communicating [last-minute location changes](#) fell largely to the candidates in affected precincts. Daily subway cleanings scheduled to take place from 1 a.m. to 5 a.m. and subsequent subway delays forced several polling places to open later than their slated 6 a.m. start time due to late or absent poll workers. The Metropolitan Transit Authority arranged for-hire transportation alternatives for affected poll workers at the agency's expense.

At several New York City polling places, voters reported receiving only [partial ballots](#). Due to the postponement of the Democratic presidential primary, presidential candidates appeared on one page of the ballot while candidates for state and congressional races appeared on another. The two-paged ballots generated confusion among poll workers, some of whom said they received little information from city election officials. Voters in several precincts were forced to wait as poll workers [scrambled](#) to find ballots. The [majority](#) of the country's veteran poll workers are over 60, a population that is vulnerable to complications from COVID-19. In New York City, some older workers decided not to work on Election Day and were [replaced](#) by less experienced volunteers. The city Board of Elections [said](#) that a message was sent to poll workers reminding them to give both pages of the ballot to voters.

Come November, some issues faced by election administrators during the primary will no longer be concerns: there will not be separate ballots, for example. However, most issues will remain and have the potential to affect thousands of votes. Whether or not New York decides to proceed with an election conducted largely by mail in November, in-person voter turnout in the general election will be higher and may very well be a function of how many voters fail to receive ballots in a timely manner. For those who do vote in person, whether by choice or for lack of a mail-in alternative, strong channels of communication between state and local boards of elections and poll workers and public information campaigns for voters may determine whether the state can conduct a safe, equitable, and accessible election.

III. Relevant Litigation

A. Objection to use of postmark for ballot invalidation

Gallagher et al. v. New York State Board of Elections et al.

A group of plaintiffs including Suraj Patel, candidate for New York House District 12, and state assembly candidate Emily Gallagher, filed a federal [lawsuit](#) on June 25 arguing that thousands of ballots that were mailed by Election Day were invalidated because they were not postmarked. New York state election law requires absentee ballots to be postmarked by Election Day in order to be tallied. Under an [executive order](#) signed on April 24 by Governor Andrew Cuomo, registered voters were sent absentee ballots with pre-paid return envelopes which are [not typically](#) postmarked. The lawsuit, which names Governor Cuomo and the state Board of Elections among others as defendants, sought for all ballots received by June 30 to be counted regardless of whether they were postmarked.

In sworn testimony, Postal Officials acknowledged that some ballots had mistakenly not been postmarked. On August 3, a federal judge [ruled](#) that at least 1,000 of the 12,500 disputed ballots should be counted despite their lack of a postmark. Under the decision, ballots received one day after Election Day must be counted regardless of whether they were postmarked by June 23. The ruling also validates ballots received by June 25 as long as they did not have a postmark later than June 23. The decision applies statewide. The New York State Board of Elections has [appealed](#) the decision, arguing that it will impose an undue burden on already overwhelmed local Boards of Elections. Appellate review is ongoing.

B. Challenge to voter registration deadline

League of Women Voters v. Board of Elections

On July 28, the ACLU [filed](#) a preliminary injunction in an [existing suit](#), *League of Women Voters v. Board of Elections*, which seeks to change New York's voter registration deadline. Under state election law, voters must register to vote 25 days before Election Day in order to vote. The suit charges that the current cutoff arbitrarily and needlessly [prevents thousands of eligible voters](#) from casting a ballot "just as the stakes of an election are greatest and clearest to many voters." The ACLU and other plaintiffs are seeking to move the registration deadline forward to 10 days before election day, giving voters an additional 15 days to register. The case is ongoing.

C. Challenge to lack of ballot cure process

League of Women Voters v. Board of Elections

Prior to Election Day, the League of Women Voters filed a federal [lawsuit](#) challenging New York State's ballot cure process. [Ballot curing](#) involves notifying voters whose absentee ballots have

been rejected of the reason the ballot was rejected and allowing them the opportunity to make corrections in order to ensure that their vote is tabulated. Under current state election law, election officials are not required to contact voters whose ballots are rejected for problems like signature mismatch. Citing the state’s historically high ballot rejection rates, the complaint asks the state Board of Elections to create a cure method for “voters whose ballots are rejected for a signature-related issue, including forgotten signatures or a mismatch signature.” The plaintiffs expect a decision in early September.

IV. Conclusion: Preparing for November

With the November general election under three months away, New York – and in particular the New York City region – certainly faces electoral challenges, especially as COVID-19 remains an imminent threat. The state’s June primary revealed a struggle to process and disseminate absentee ballots and to remedy poll worker shortages while providing sufficient training. According to Douglas A. Kellner, Co-Chair of the NY Board of Elections, the state faced a [total of just 800,000](#) NYC voters who participated in the 2020 primary in comparison to the 2.7 million individuals who voted in the 2016 presidential election. In an August 4 [memo](#) to the commissioners of the NYC Board of Elections, Kellner stressed that the city must further adapt its election system in the lead-up to November and made a wide range of suggestions to election officials. The state should focus its efforts on the New York City area, which encountered the most significant problems in June. The options on the table – some of which have already been adopted or are in the process of being addressed by the legislature – can be divided into three main categories:

1. Adjustments to absentee ballot procedures and voter registration, including:
 - a. Active legislation:
 - i. [Senate Bill S.8799A](#), which would adjust the state’s postmark requirement so that any mail-in ballot is deemed valid as long as it is received and time stamped *by the day after Election Day, regardless of whether or not it has a postmark*. The bill has been passed by both the Senate and the Assembly and will now go to the Governor’s desk for approval.
 - ii. [Senate Bill S.8370B](#), which would require that voters be notified of deficiencies in their absentee ballot and be given the option to cure such deficiencies in order to safeguard their vote. The bill has been passed by both the Senate and the Assembly and will now go to the Governor’s desk for approval. Providing voters an opportunity to cure their ballots is among the chief concerns in *League of Women Voters v. Board of Elections*, discussed above.

- iii. [Senate Bill S.8783A](#), which would allow boards of elections in the state to begin receiving and processing absentee ballot applications *earlier than* the current provision of thirty days before the election. The bill has been passed by both the Senate and the Assembly and will now go to the Governor's desk for approval.
- iv. [Senate Bill S.8806](#), which would establish an automatic, electronic voter registration system. All eligible New Yorkers who interact with specified government agencies or institutions will be automatically registered to vote. The system will also update existing registrations. The legislation, which has been passed by both the Senate and the Assembly and will now go to the Governor's desk for approval, has an effective date of January 1, 2023.
- b. Preparing, in accordance with USPS, for an influx of absentee ballot applications and completed ballots. This includes ensuring that postal workers and election officials coordinate on the implications of postmark requirements.
 - i. William Cook, the Director of Legislation for the National Association of Letter Carriers N.E. NY Branch, has suggested that post offices conduct [sample balloting](#) prior to the November election in order to identify faults in the ballot processing system. He has additionally highlighted that envelopes contain [intelligent mail barcodes](#) which inherently indicate when a piece of mail was processed – a marker that could aid election officials in identifying the timeliness of ballot return.
- c. Expanding the state's online absentee ballot application process, which was established by the Governor for the June 23 primary in [Executive Order 202.23](#) and, if extended, would again allow voters to submit their applications electronically for the general election.
- d. Providing for faster and more efficient ballot processing, which includes:
 - i. Hiring additional board of elections staff to count and verify ballots for the general election.
 - ii. Ensuring that additional space and equipment is available to accommodate an increase in staff while meeting social distancing guidelines.
- e. Moving the state's absentee ballot request deadline back from 7 days to 14-15 days before an election. Many election officials and legislators [agree](#) that the current week-long timeline does not give voters enough time to request, receive, and cast their ballots. In fact, the USPS [advises](#) voters to mail their *completed* ballots one week before Election Day to guarantee adequate processing time.
- f. Improving the design of absentee ballots and request forms to prevent voter errors.

- g. Allowing counting of absentee ballots to begin on Election Day, as per Kellner’s [recommendation](#).
 - i. Such a legislative change would require the establishment of a system to make clear when an absentee ballot has been counted in case the same voter attempts to vote in person.
- 2. The expansion of poll worker recruitment and training to prevent poll closure, which may [involve](#):
 - a. Capitalizing on enacted legislation, such as:
 - i. [Election Law § 3-500](#), which allows a board of elections to “design an alternative poll site staffing plan to more efficiently conduct an election.” The New York City Board of elections currently adheres to a district model, in which check-in tables are organized in accordance with election districts. Adjusting this model could provide for greater efficiency.
 - ii. [Election Law § 3-400\(7\)](#), which allows poll workers to split their shifts rather than work for the entire day. Publicizing this option may allow for enhanced poll worker recruitment.
 - iii. [Election Law § 3-400\(8\)](#), which allows enrolled students who are at least 17 years-old to act as election inspectors or poll clerks. Capitalizing on this option would allow for the recruitment of younger poll workers who are less vulnerable to COVID-19.
 - b. Enhancing poll worker recruitment efforts through partnerships with local and national organizations.
 - c. Ensuring that all NY Boards of Elections are transparent about where assistance and equipment are needed, and where excess is available.
 - d. Limiting wait times at in-person polling places by not only hiring additional workers, but also by setting up more check-in tables. These changes require additional physical space, especially due to social distancing requirements, and may be best suited to an outdoor voting environment, which would require city measures to shut down streets.
- 3. Expansion of voter education, in order to:
 - a. Make voters aware of timeline requirements for mailing their absentee ballots and ballot applications.
 - b. Ensure that voters understand absentee ballot requirements (signature/date, no tape, postmark) to prevent ballot invalidation. This includes widespread education on the correct way in which to fill out a NY absentee ballot.

- c. Increase awareness around early voting options to prevent long lines at polling places and ensure that more voters can cast their ballots.
- d. Highlight the option for absentee ballots to be cast at board of elections offices, all of which allow voters to use an electronic [Ballot Marking Device \(BMD\)](#). Voters may also [drop](#) their completed absentee ballots off at any board of elections office, at polling places on Election Day, or at early voting polling locations – an option which would prevent postmark confusion and disenfranchisement.