



Pre-Election Mail Voting Litigation in the Coronavirus Pandemic



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Abstract:

Facing projections that 80 million Americans or more might choose to vote by mail in the November 2020 general election, stakeholders turned to the courts to clarify the appropriate ways for election officials to adapt, apply, and administer the rules of mail voting in the highly competitive elections taking place during the coronavirus pandemic. Plaintiffs across the country filed over 340 lawsuits between March 4, 2020, and November 3, 2020 (Election Day), challenging election procedures affected by the coronavirus pandemic, including nearly every aspect of the absentee balloting process. They asserted claims under a variety of state and federal laws and constitutional provisions. This report outlines the many legal challenges to absentee and mail voting systems brought from the beginning of the coronavirus pandemic in March up to Election Day, largely in response to the pandemic.

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Introduction

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The increase in the rates of mail voting over the last two decades accelerated significantly during the coronavirus pandemic. The November 2020 general election set a new record for vote-by-mail turnout. Approximately 46% of all votes—approximately 73 million ballots—were cast by mail or absentee ballots (the terms are used interchangeably here), more than double the percentage of vote-by-mail turnout in the 2016 general election, according to the Survey of the Performance of American Elections.

Heading into the election, it was clear that more Americans were eligible to vote by mail in the general election of 2020 than [in any general election in U.S. history](#). States such as [Utah](#) and [Hawaii](#) joined universal mail voting states Colorado, Oregon, and Washington for their first presidential elections as universal mail voting states. Several states, such as [Nevada and New Jersey](#), sent mail ballots to all voters solely in response to the pandemic. Many other states [expanded access to mail voting](#) in other ways in response to the pandemic. More than [90 million](#) Americans received mail or absentee ballots. It was also clear that millions of voters would be voting by mail for the first time, largely to avoid the health risks posed by in-person voting during the pandemic. They would be using unfamiliar processes to apply for, complete, and return their ballots, relying on infrastructure that, in many cases, was [never designed to handle](#) such a massive volume.

To address the surge in demand for mail voting, election officials across the United States scrambled to scale up their vote-by-mail systems and operations. They worked with state legislatures, governors, and secretaries of state to adapt existing rules and procedures for mail voting during the coronavirus pandemic. Many state-level initiatives sought to accommodate the increased demand, and even encourage it, by relaxing rules that created obstacles to mail voting. Other initiatives sought to slow the growth of vote-by-mail and limit accommodations, citing the need to deter voter fraud. Sometimes those forces collided within an individual state, as political parties within the same state pursued different approaches, leading to heated political debate, deadlock, and an enormous amount of litigation.

Disputes over the rules of mail voting played out in the courts, triggering an avalanche of litigation regarding the appropriate ways to adapt, apply, and administer elections during the pandemic. Since March 2020, more than [400](#) election-related lawsuits were filed in federal and state courts in almost every state, marking what was perhaps [the most litigated election season](#) in the past two decades. And [most](#) of this litigation, particularly before Election Day, related to the rules associated with mail voting.

To promote public awareness of the stress the pandemic placed on election and voting laws across the country, a team of us at the [Stanford-MIT Healthy Elections Project](#) compiled,¹ summarized, and categorized the 2020 election cases that arose from, or took on increased importance in light of, the coronavirus pandemic. We organized the data in our publicly available [COVID-Related Election Litigation Tracker](#). The tracker is designed to help election officials, legislators, scholars, and the interested public find, sort, and better understand the large volume of election-related lawsuits in 2020. Users can [search](#) cases in the tracker by [issue](#), state, date, and party name. Each case includes a short summary, key-issue tags, and links to key court documents.

For readers who want a broad run-through of the litigation, without skimping on the important details, this five-part report, “Mail Voting Litigation During the Coronavirus Pandemic,” discusses and contextualizes many of the cases in the [Stanford-MIT COVID-Related Litigation Tracker](#). It outlines the various types of legal challenges to mail voting practices and procedures brought between March 2020 and November 3, 2020 (Election Day), largely in response to the pandemic.² Most of the lawsuits discussed here were brought against states and counties and their respective officials responsible for the mail voting rules.

This survey of litigation reveals a wide array of legal claims and challenges regarding absentee and mail voting. Most cases sought to expand the availability of, or loosen restrictions associated with, mail voting. But some cases challenged the expansion of vote-by-mail and proposed or defended restrictions. They argued that the restrictions were reasonable or necessary to reduce fraudulent votes that could dilute the weight of genuine votes, or that state election officials and/or courts were acting outside of their authority in adopting various accommodations to address voting during a public health crisis. There was [no evidence of widespread fraud](#) in mail voting in 2020, even though it was widely alleged by President Trump and some of his allies.

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

¹ We gratefully acknowledge the generous contribution of Professor Justin Levitt in helping to compile the election cases and court documents in our tracker.

² For an analysis and summary of the post-Election Day lawsuits, see the Stanford-MIT Healthy Elections Project report [Post-Election Litigation Analysis and Summaries](#).

This five-part report is organized loosely according to the stages in which absentee ballots are cast by voters and processed and counted by elections officials: application for a ballot, the proper completion of the ballot, options for returning the ballot, verification of absentee voters' identities by election officials, and challenges to absentee ballots. The report does not discuss every one of the hundreds of cases that addressed mail balloting in 2020, but it discusses the trends and the major cases.

Parts I through IV relate to various efforts to expand mail voting or make it more accessible; Part V relates to efforts to curb such expansion.

Part I covers lawsuits related to the availability of absentee or mail voting, including challenges to eligibility requirements (in states which do not allow all registered voters to vote by mail) and to the ballot application processes. Overall, plaintiffs who sought to relax restrictions around the availability of absentee ballots were unsuccessful. Courts were hesitant to overturn the judgment of elected political officials and, instead, chose to uphold absentee ballot restrictions under rational basis or *Anderson-Burdick* review. Going forward, the increasingly conservative tilt of federal courts suggests that expansions to absentee voting availability will need to come from the legislative branches.

Part II explores claims related to the rules governing the submission and return of completed mail ballots. In particular, it explores litigation challenging four types of ballot-submission-related state rules: requirements that absentee ballots be *received* by Election Day (instead of *postmarked* by Election Day), requirements that the marked absentee ballot be placed into an inner envelope known as a “secrecy sleeve,” requirements that the voter supply postage for return mail ballots, and the sufficiency of measures taken by election officials to provide reasonable accommodations for voters with disabilities who seek to complete absentee ballots. On the whole, plaintiffs did not see much success in their challenges to ballot submission procedures. Courts often determined that certain rules—such as those requiring voters to pay for ballot postage—did not place heavy burdens on the right to vote. Plaintiffs did have some limited success in Election Day deadline-related litigation, as the U.S. Supreme Court permitted court-ordered extensions of ballot receipt deadlines in North Carolina and Pennsylvania to stand.

Part III surveys legal challenges designed to expand options for mail ballot drop-off and delivery. It explores challenges to restrictions on collecting and returning ballots for other voters (sometimes referred to as “ballot harvesting” by Republicans and “ballot collecting” by Democrats), challenges to limits on the number or location of absentee ballot drop-off locations, and challenges to operational changes made by the [U.S. Postal Service \(USPS\)](#) that many plaintiffs viewed as a threat to mail voting. The USPS cases were unique, because they

were the only cases seeking to expand or protect mail voting that were not directed at state officials. Rather, they were filed against the federal government and the postmaster general. Plaintiffs were largely unsuccessful in ballot collection and delivery challenges, as courts generally found that such restrictions did not place a severe burden on voters. Some district courts were receptive to challenges against attempts to limit the availability of drop boxes, though federal appellate courts stayed some of the district court injunctions. Plaintiffs were most successful in USPS-related litigation, winning nationwide injunctions against the Postal Service's operational changes that risked delaying ballot delivery.

Part IV surveys legal challenges to the processes used by election officials to verify that the person who submitted a mail ballot was the duly registered and intended voter. These processes include signature verification (a practice that entails comparing the signature on a ballot return envelope with an image of the intended voter's signature on file at the elections office to see if they match) and the requirement, in some states, that one or more witnesses sign a voter's mail ballot or return envelope, attesting to the voter's identity. Although outcomes were mixed, litigants were generally successful in pushing states to implement "notice and cure" procedures to allow voters to remedy defective absentee ballots so they were not rejected. Interestingly, the 2020 election did not see a significant spike in the percentage of ballots rejected for errors, suggesting that broader public education and voter awareness succeeded even where litigation had mixed results.

Whereas Parts I through IV focus on legal efforts to expand vote-by-mail and make it more accessible to more voters, Part V focuses on cases that sought the opposite—cases that challenged the expansion of mail voting and the relaxation of the associated restrictions. These cases sought to halt various vote-by-mail accommodations and restrict the use of mail voting. The suits typically challenged policy modifications on one or both of two grounds: that mail voting increases voter fraud and/or that the officials implementing the challenged policies are not authorized by law to do so. Primarily brought by the Trump campaign and Republican Party operatives, these cases challenged decisions by state officials to send vote-by-mail applications or actual mail ballots to all voters in a state, to provide ballot drop-off locations that made it more convenient for voters to return their ballots, to relax voter verification procedures, and to extend the deadlines for the receipt of mail ballots because of the pandemic. The fraud-related challenges were uniformly unsuccessful, with federal and state judges routinely dismissing the claims for lack of standing or insufficient evidence.

Most of the cases challenging the authority of various actors to change the rules of mail voting alleged *ultra vires* executive action—executive action beyond authority granted. The outcome of these cases was largely fact-dependent and varied based on the measure taken, the authority of the official who took it, and the particular state law at issue.

The most significant case alleging lack of authority related to the ability of state courts to expand mail voting access to protect rights guaranteed by a state's constitution. Vote-by-mail opponents appealed a decision of the Pennsylvania Supreme Court, revitalizing an argument endorsed by three concurring justices in *Bush v. Gore*, that *only* the state legislature is permitted to alter state voting procedures in elections for federal office—not state executives acting to address an emergency or state courts seeking to redress violations of state constitutional law. They argued that the Pennsylvania Supreme Court's extension of a mail ballot receipt deadline during the pandemic violated the [Elections Clause](#) of Article I of the U.S. Constitution, which states that the "Times, Places, and Manner" of elections to federal office "shall be prescribed in each State by the Legislature thereof"

On October 19, an equally divided U.S. Supreme Court [denied](#) the GOP's application to stay the decision. With one U.S. Supreme Court seat vacant, due to the death of Justice Ruth Bader Ginsburg, the court's 4-4 tie on the issue left the Pennsylvania Supreme Court decision intact. Thus, the high court has yet to decide this issue on the merits. If widely adopted, the GOP's argument would significantly hamper the ability of state courts to alter election requirements to protect the right to vote under state constitutions, as the Pennsylvania Supreme Court (and other state courts) did during the 2020 election cycle.

Part I: Efforts to Expand Applications For and Eligibility to Vote By Mail

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In 2020, most states and the District of Columbia [allowed any registered voter](#) to vote via an absentee ballot without providing an excuse. However, several states made absentee voting available only to certain classes of voters, typically those more likely to have difficulty reaching the polls, such as the elderly, or those who expected to be out of town on Election Day. During the 2020 election, the coronavirus pandemic made many voters unable or reluctant to vote in person for fear of contracting the virus that causes COVID-19, a serious respiratory illness. Thus, litigants in a number of states brought lawsuits to compel states to give more voters access to the absentee ballot.

This report considers four categories of lawsuits that sought to expand vote-by-mail application and eligibility.

First, litigants challenged the application processes for mail ballots. In some states, the coronavirus pandemic had increased demand for vote-by-mail applications beyond the capacity of existing infrastructure, leading voters to file suits to ensure that states provided sufficient opportunity for voters to apply for a mail-in ballot. Other lawsuits pushed back on state initiatives that would have made the application process for mail-in voting more difficult.

Second, some complaints sought to make absentee voting available to any registered voter, even in states where the law restricted mail voting to certain enumerated groups. These complaints generally argued that limitations on who can vote absentee unduly burdened the right to vote, particularly during the pandemic, when in-person voting risked exposing voters to the coronavirus.

Third, some plaintiffs filed lawsuits arguing that state laws allowing absentee voting in cases of illness or disability should include voters who lack immunity to the coronavirus. But courts were reluctant to extend these statutory provisions to the [vast majority of the electorate](#) that still, at that time, lacked immunity to the virus.

Finally, several lawsuits challenged state restrictions that limited absentee voting to seniors above a certain age. They argued that such state law restrictions violated the Twenty-sixth Amendment's prohibition on using age as a basis to deny or abridge a citizen's right to vote.

These arguments prevailed in several state courts, but federal courts uniformly refused to find that age restrictions violated the U.S. Constitution.

Overall, lawsuits challenging absentee ballot application procedures and eligibility requirements were almost universally unsuccessful. Courts were unwilling to strike down voting restrictions during a politically fraught campaign, choosing instead to defer to legislative or executive fact-finding. This reluctance carried over into the courts' legal analysis, with state and federal courts either subjecting voting restrictions to rational basis review or finding that the restrictions minimally burdened the right to vote. Thus, the 2020 election highlighted an overarching judicial skepticism about intervening with state absentee voting laws, particularly in the shadow of an impending election.

Applying to Vote by Mail

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

In [*LULAC of Iowa v. Pate*](#), two plaintiff groups in Iowa challenged a law that made the application process more difficult. For decades, election officials in Iowa had been authorized to use, and had been using, available voter database information to insert missing data or fix incorrect data on voters' applications for absentee ballots, and then sending absentee ballots to those voters. But in June 2020, the Iowa legislature passed a law that prohibited officials from looking in voter databases and supplying missing or corrected information. Instead, officials were required to retrieve the missing information by contacting the voters themselves, often by mail. This change converted a simple and routine process into a more arduous and time-consuming one, at a time when the number of absentee ballot applications was expected to skyrocket, especially from voters unfamiliar with the absentee process. Plaintiff groups argued that the law imposed a severe burden on the right to vote because it prevented voters from receiving and submitting ballots in time to vote in the election. The Iowa Supreme Court [rejected](#) the plaintiffs' challenge, reasoning that the law did not impose a severe burden and was justified by the state's interests in protecting the security and integrity of the absentee ballot system and preventing voter fraud.

Enforcement of this law resulted in a substantial disruption to absentee voting applications. Pursuant to this new law, Iowa's secretary of state issued a directive prohibiting county election officials from sending out absentee ballot request forms pre-populated with any of the voter's information. When some county officials did anyway, the Republican National Committee (RNC)

and the Trump campaign [sued](#), asking an Iowa state court to enjoin the county election officials from processing these forms. The court granted the injunction, thereby [invalidating](#) approximately 64,000 absentee ballot applications that had already been submitted by voters. The state Democratic Party filed its [own lawsuit](#), seeking to strike down the secretary of state's directive as inconsistent with Iowa administrative and constitutional law. But the Iowa Supreme Court [rejected](#) this challenge, finding that the secretary of state's directive was authorized by state law.

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

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

Absentee Balloting Without an Excuse

Although most states allowed any registered voter to vote by mail in the elections of 2020, some states required voters to have one of several pre-defined acceptable "excuses" for voting absentee. Plaintiffs in several states with such requirements brought legal challenges, seeking to make absentee voting available without excuse to every eligible voter in the state. These claims generally asserted that the right to vote—protected by either the state's constitution or the U.S. Constitution—requires that *all* voters be eligible to vote by mail, at least during the pandemic. Overall, these claims were unsuccessful.

In [*NAACP v. Missouri*](#), a Missouri state court rejected a challenge to the excuse requirement for voting absentee brought under state law. The [Missouri Constitution](#) states that “[q]ualified electors of the state who are absent . . . may be enabled by general law to vote at all elections by the people.” The court interpreted this language as permitting but not requiring absentee voting. The court explained that “[t]he word ‘may’ denotes discretion, not an obligation,” and it pointed to an earlier Missouri Supreme Court decision that held that absentee voting was a “special privilege,” not a right. The court concluded that the Missouri Constitution does not guarantee a “constitutional right to cast an absentee ballot in any election for any reason.” It also found that “strict compliance with the statutory requirements for absentee voting” was necessary to combat what the state claimed were absentee voting’s “unique risks of fraud and abuse.” The Missouri Supreme Court [affirmed](#) the decision.

Some state trial courts initially ruled the other way, only to be overturned on appeal. In [*Fisher v. Hargett*](#), a Tennessee state court initially interpreted the Tennessee Constitution to guarantee a universal right to vote by mail. The trial court ruled that voting was a fundamental right under the Tennessee Constitution. The court evaluated the alleged infringement on the state constitutional right to vote under the *Anderson-Burdick* test, the test widely used by federal courts to assess the constitutionality of voting restrictions.

The *Anderson-Burdick* test comes from the U.S. Supreme Court’s decisions in [*Anderson v. Celebrezze*](#) and [*Burdick v. Takushi*](#)—the former was a case in which an independent presidential candidate challenged state laws that prevented him from appearing on the ballot, and the latter challenged Hawaii’s write-in voting prohibition. Since then, however, the test has been applied more generally to assess challenges to a wide variety of election laws alleged to infringe on the right to vote under the U.S. Constitution. The *Anderson-Burdick* test is a balancing test that requires the court to balance the burden that a voting regulation imposes on the electorate against the state’s interests in the regulation. The *Anderson-Burdick* standard does not fit neatly into the traditional tiered review of equal protection claims. Courts generally (but not uniformly) adopt a [sliding scale approach](#): the greater the burden a law places on the franchise, the more robust the state’s justification for the law must be. Reasonable nondiscriminatory restrictions generally require only that the state have an important regulatory interest to justify it. But severe restrictions or burdens are subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. For restrictions falling in between these extremes, the court weighs the burden imposed by the regulation against “the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.”

After extensive factual findings, the trial court in *Fisher* determined that Tennessee’s law on absentee voting, which extended mail-in ballots only to those physically unable to vote in

person, was not sufficiently justified by its interests. The court found that the state could easily process and verify absentee ballots from more voters and that absentee voting did not pose a special risk of voter fraud. Moreover, the court found that the state's restrictions imposed a substantial burden on voters because it required voters to show up at polling places during a pandemic that could pose a serious health risk.

The Tennessee Supreme Court promptly reversed, finding only a minimal burden under the *Anderson-Burdick* test. The court held that most voters had no unique vulnerability to COVID-19 and could still safely show up at the polls. The court declined to do its own analysis of the state's justifications for the restrictions on absentee balloting. It deferred instead to the legislature's stated reasons—that the limits imposed furthered the state's interests in “1) prevention of fraud; 2) fiscal responsibility; and 3) feasibility.”

The most significant federal court decision on the issue of eligibility for absentee voting came out of the U.S. Court of Appeals for the Fifth Circuit. In [Texas Democratic Party v. Abbott](#), the plaintiffs argued that the Fourteenth Amendment required Texas to implement universal no-excuse absentee balloting. Plaintiffs saw initial success in the federal district court, which invalidated Texas's restrictions on absentee voting during the pandemic, characterizing the restrictions as a return to the “yesteryear of the Divine Right of Kings.” However, in a more rhetorically tempered opinion, the Fifth Circuit stayed the lower court's injunction.

The Fifth Circuit [declined](#) to apply the *Anderson-Burdick* test, initially finding that the U.S. Supreme Court's earlier decision in [McDonald v. Board of Election Commissioners](#) controlled instead. In *McDonald*, the Supreme Court upheld a state law that denied certain incarcerated individuals the ability to vote by mail. The court held that this law did not implicate the right to vote because it did not “absolutely prohibit[]” the affected individuals from voting but, instead, simply denied them access to one particular mechanism designed to make voting easier. Applying *McDonald*, the Fifth Circuit held that the U.S. Constitution does not require universal absentee voting. It found that Texans had not been “absolutely prohibited” from voting because, the coronavirus pandemic notwithstanding, they could still vote in person. The Fifth Circuit reviewed Texas's excuse-required mail voting laws under rational basis review, probing only whether the challenged laws had some “rational” connection to a “legitimate government interest.” A subsequent Fifth Circuit panel [vacated](#) the trial court's injunction entirely. But that court noted that it was “hesitant” to apply *McDonald* and ruled that the previous stay of injunction had no precedential value.

The U.S. Court of Appeals for the Seventh Circuit followed the Fifth Circuit's approach. In [Tully v. Okeson](#), plaintiffs in Indiana brought a challenge under the Fourteenth Amendment, alleging that Indiana's mail voting system abridged their right to vote. Indiana, like Texas, required

voters to have an excuse from a predefined list in order to vote absentee. Voters are eligible to vote by mail in Indiana only if they fall into one of 13 statutorily enumerated categories. Citing *McDonald*, the Seventh Circuit found that limitations on absentee voting did not fall within the scope of the right to vote because they do not absolutely prevent the plaintiffs from voting. The court also rejected the plaintiffs' equal protection claim, holding that Indiana's scheme satisfied both rational basis review and the *Anderson-Burdick* test. The court found that the denial of absentee balloting was a minimal burden on the plaintiffs' ability to vote and that this minimal burden was justified by the state's interest in "ensuring safe and accurate voting procedures."

Fear of Contracting COVID-19 as an Excuse

Several states allowed citizens to vote by mail only if they had an illness or disability that made it difficult to vote in person. During the 2020 election, the global pandemic made it potentially dangerous for almost anyone to show up at the polls, which have often involved large groups of people waiting in long lines. Plaintiffs in various states asked courts to interpret the excuse provisions of absentee voting laws to include anyone susceptible to COVID-19. However, most of these claims failed, with courts concluding that the mere chance of contracting COVID-19 was not enough.

This issue was litigated most extensively in [Texas](#). In March, the Texas Democratic Party (TDP) filed a suit in state court, seeking a declaration that a lack of immunity to coronavirus that caused the dangerous respiratory illness known as COVID-19 should constitute a "disability" under the Texas Election Code. The party argued that anyone without immunity to the coronavirus should be permitted to vote by mail. (For all intents and purposes, in March 2020, this would have included all voters, as no one was known to have immunity at that time.) The [Texas Election Code](#) defines a disability as "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." The Texas Democratic Party (TDP) argued that lack of immunity to the coronavirus disease met this definition. It is a "physical condition," the TDP argued, that could easily "injur[e] the ... health" of a voter who is exposed to the coronavirus at a polling place.

The trial court agreed with the TDP, holding that any qualified voter who lacked immunity to the coronavirus would be eligible to vote by mail. However, the Texas attorney general then issued an order directing election officials not to accept absentee ballots from voters whose only excuse for voting by mail was that they lacked immunity to COVID-19. This appeared to run afoul of the trial court's holding, which barred the state from issuing any guidance that prevented counties from accepting mail-in ballots based on COVID-19-related disability claims.

An intermediate Texas appellate court reinstated the trial court's injunction pending appeal. The state then [petitioned](#) the Texas Supreme Court for a writ of mandamus to compel election officials to deny mail-in ballots based on a COVID-19-related disability.

The Texas Supreme Court denied the petition. It agreed with the state that voters were not eligible to vote by mail just because they lacked immunity to the coronavirus disease. The majority opinion reasoned that an absence of immunity to disease was not a "physical condition" under the Election Code because it did not result in a unique "incapacity" relative to the general population. But the court did make one important clarification. It explained that voters applying for an absentee ballot did not need to explain or provide proof of their disability; they simply needed to check a box on the application indicating that they had a disability. The court found that state election officials had no "duty ... to look beyond the application" or "investigate each applicant's disability."

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

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

Not every state interpreted its law so narrowly. In [Fay v. Merrill](#), a Connecticut state court considered a challenge to the governor's order allowing any eligible voter to vote by mail. The Connecticut Constitution allows the legislature to authorize voting by mail only for particular groups of qualified voters, including those "unable to appear at the polling place on the day of the election ... because of sickness or disability." The court construed this constitutional provision to permit absentee voting for any qualified voter concerned about contracting COVID-19 during the pandemic. The court found that the words "because of sickness" did not

require the voter to suffer from the sickness. Instead, the “existence of a raging global pandemic” was justification enough. The court distinguished its ruling from that of the Texas Supreme Court, arguing that the Texas Election Code contained distinct language permitting absentee voting only when the voter has contracted the sickness.

Age Limits

Several states limit no-excuse absentee voting to qualified voters over a certain age—usually drawing the line at 60 or 65. Plaintiffs brought lawsuits challenging these age limits, seeking to make absentee voting universally available to younger voters as well. These claims asserted that the age limits violated younger citizens’ right to vote and that they discriminated on the basis of age, in violation of the Twenty-sixth Amendment. The [Twenty-sixth Amendment](#) says: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

These age claims were consistently rejected by state and federal courts. Although the U.S. District Court for the Western District of Texas initially [granted](#) a preliminary injunction on an age discrimination claim, the U.S. Court of Appeals for the Fifth Circuit reversed the lower court in [Texas Democratic Party v. Abbott](#). In addition to its claims under state law and under the Fourteenth Amendment, the Texas Democratic Party also challenged Texas’s absentee voting law under the Twenty-sixth Amendment. It argued that the law unconstitutionally discriminated on the basis of age. The plaintiffs argued that the law should be subject to strict scrutiny, pointing to the text of the Twenty-sixth Amendment, which states that the right to vote “shall not be denied or abridged ... on account of age.” The circuit court, relying on *McDonald*, reasoned that, if limits on absentee voting do not deny or abridge the right to vote at all, then neither could they deny or abridge the right to vote “on account of age.” The court, therefore, refused to apply strict scrutiny and applied only rational basis review, which the challenged law easily survived. The U.S. Supreme Court [refused](#) to stay the Fifth Circuit’s decision, but Justice Sonia Sotomayor remarked that the underlying issue was “weighty but seemingly novel.”

Courts that applied the *Anderson-Burdick* test upheld age limits on no-excuse absentee voting as well. The U.S. Court of Appeals for the Seventh Circuit considered a Twenty-sixth Amendment challenge in Indiana in [Tully v. Okeson](#). The court first found that *McDonald* controlled and that the age limit on absentee voting did not implicate the right to vote. But the court also held, in the alternative, that the age limit would survive review under the *Anderson-Burdick* test. The court found that many younger voters would still be eligible to vote by mail because they could meet other vote-by-mail requirements and that any minimal burden on voters who had to

show up at a polling place was justified by the state’s interest in “ensuring safe and accurate voting procedures.”

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

Sending Mail Ballots To All Voters

Plaintiffs in several states brought lawsuits seeking to require election officials to send mail ballots to all eligible voters. But few courts ruled on the merits of these claims. In one example, the city of [Green Bay, Wisconsin](#), brought a constitutional claim, arguing that, in light of the pandemic, state election officials should be required to send ballots automatically to all eligible voters. But the case was dismissed for lack of subject matter jurisdiction under a doctrine that holds that municipal organizations lack standing to bring an equal protection challenge against their own state government. Plaintiffs in another case, in Connecticut, voluntarily [dismissed](#) their claims. And a federal district court in Georgia [dismissed](#) various challenges to state election and absentee voting procedures, including the failure to send mail-in ballots to all registered voters. The court found that the claims all presented nonjusticiable political questions.

Part I Conclusion

Despite the wave of litigation over the application process and eligibility requirements for voting by mail, courts were reluctant to get involved. Litigants asserted claims under nearly every relevant source of law—local, state, and federal; administrative, statutory, and constitutional. But the courts were generally unwilling to wade into the political thicket. The *Anderson-Burdick* test, along with the U.S. Supreme Court’s decisions in *McDonald* and *Purcell*, provided convenient doctrinal escape valves for state and federal judges who were unwilling to issue politically contentious decisions on voting access. The resulting precedent is likely to hamper efforts to expand mail or absentee voting access in future elections.

Part II: Challenges to Barriers to Submission of Mail Ballots

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Part II addresses litigation surrounding the submission of mail-in ballots. It surveys lawsuits brought by voting rights advocates during the pandemic, arguing that various mail-ballot submission rules illegally burdened the right to vote. It focuses specifically on legal challenges that aimed to remove four types of barriers to submitting a vote via mail ballot: (i) Election Day deadlines for receipt of returned ballots, (ii) requirements that ballots be returned in a “secrecy sleeve,” (iii) requirements that voters incur the cost of postage to return mail ballots, and (iv) the lack of accommodations for voters with disabilities. In general, the claims were based on the Constitution, but plaintiffs also employed some statutory arguments.

Overall, plaintiffs had little success on the ballot postage claims or the highly publicized secrecy sleeve litigation in Pennsylvania, but they did see mixed results in accessibility challenges and Election Day receipt deadlines.

Ballot Receipt Deadlines

Litigation challenging absentee ballot receipt deadlines was some of the most active election litigation in 2020. Some states, such as [Florida](#), [Oklahoma](#), [Georgia](#), [Maine](#), [Michigan](#), [Pennsylvania](#), and [Texas](#), had laws that mandated absentee ballots be *received* by election officials no later than Election Day in order to be counted. Other states, such as [California](#), [Illinois](#), and [Nevada](#), required that mail ballots be *postmarked* by Election Day and received by election officials within some specified number of days after, typically two to seven days. In practice, Election Day ballot receipt deadlines can result in tens of thousands of ballots being rejected. In the 2020 primaries, for example, more than [50,000 ballots](#) were rejected for arriving late, including more than [20,000](#) in Florida alone. According to data from the [2018](#) and [2016](#) Election Administration and Voting Survey, late receipt was the number-one cause nationwide of mail ballots being rejected.

Some plaintiffs challenging ballot receipt deadlines initially won injunctive relief at the federal district court level, only to see appellate courts stay those injunctions. However, plaintiffs did obtain extensions of deadlines for ballot receipt in North Carolina and Pennsylvania, when the U.S. Supreme Court declined to block extensions granted or approved by lower courts. Plaintiffs brought at least four types of federal law challenges to Election Day ballot receipt deadlines, three under the U.S. Constitution and one under the Voting Rights Act.

Federal Constitutional Claims

Plaintiffs articulated at least three different types of U.S. constitutional claims over mail ballot receipt deadlines during the pandemic. They argued that deadlines requiring that absentee ballots be received by Election Day (i) constituted an undue burden on the right to vote under the *Anderson-Burdick* test, (ii) violated the Fourteenth Amendment by denying procedural due process, and (iii) violated the Fourteenth Amendment by denying equal protection of the law. Plaintiffs initially saw some success on the constitutional claims, with district courts granting plaintiffs' requests for preliminary injunctions in Georgia and Wisconsin and with a state court in Minnesota approving a consent decree extending the ballot receipt deadline. However, appellate courts subsequently stayed these injunctions, and the U.S. Supreme Court largely supported these appellate court stays, as in the case of *DNC v. Wisconsin State Legislature*, discussed below.

The [*New Georgia Project v. Raffensperger*](#) case, filed in May 2020, illustrates the undue burden and procedural due process arguments in operation. For their undue burden claims, plaintiffs relied on the *Anderson-Burdick* balancing test. Plaintiffs [argued](#) that Georgia's requirement that mail ballots be received on or before Election Day posed a severe burden on the right to vote by requiring voters to learn the deadline, request and receive their ballots with enough time to complete and return them, and accurately estimate the number of days it would take their ballots to reach election officials through the mail service. Plaintiffs further argued that even those voters who met the deadline suffered a burden on their right to vote because they were deprived of the ability to consider their choice of candidate right up until Election Day, the same as in-person voters, due to the requirement their ballots be in the mail soon enough to reach election officials by the Election Day ballot receipt deadline.

In addition, plaintiffs [argued](#) that Georgia's Election Day ballot receipt deadline violated the due process clause under the [*Mathews*](#) test articulated by the U.S. Supreme Court in [*Mathews v. Eldridge*](#). The *Mathews* test calls for the consideration of three factors: (i) the importance of the individual's liberty interest affected by official action, (ii) the risk of an erroneous deprivation of that interest with the procedure in question and the value of additional or substitutional safeguards, and (iii) the government's interest in the challenged regulation, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Plaintiffs argued that Georgia's failure to count any ballots received after Election Day and its requirement that mail voters cast their votes early, deprived the mail voters of their protected liberty interests "to vote and have that vote count." They argued it also deprived them of the ability to "cast a meaningful and informed vote," because they would have "incomplete information" when they had to mail their ballots sooner than in-person voters. Plaintiffs

claimed the state could address its interests by counting mail ballots *postmarked* by Election Day and received within five business days of the election. Because “Georgia is not required to finalize its election results until seventeen days after the election,” plaintiffs [argued](#), the state could extend its deadline by five days without putting “an administrative burden” on the state.

In other cases, plaintiffs argued that Election Day receipt deadlines violated the Fourteenth Amendment’s equal protection clause. Plaintiffs in [Lewis v. Hughs](#), for example, argued that Texas’s Election Day receipt deadline resulted in disparate treatment of voters because different counties enforced the deadline with differing degrees of strictness. A federal district court in Texas [determined](#) that plaintiffs “adequately alleged their equal protection claims,” allowing their claims to survive a motion to dismiss. The Fifth Circuit summarily [affirmed](#) the lower court decision but not on the merits of the equal protection claim; it simply agreed plaintiffs’ claims were not barred by the doctrine of sovereign immunity. But a month later, the Fifth Circuit [withdrew](#) its affirmance and agreed to hear the state’s appeal. (As of the time of writing, the case is still pending.)

In [Gallagher v. New York State Board of Elections](#), a federal district court in New York considered similar equal protection claims in more depth than the *Lewis* court. The *Gallagher* plaintiffs [argued](#) that, given two voters who mail their ballots on the same day, it is possible that only one of those votes might be counted, due only to differences in the U.S. Postal Service’s operations and mail delivery times across different areas of the state. The court [granted](#) a preliminary injunction, requiring local boards of elections to accept ballots received one day after the deadline, or two days if the ballots were postmarked by the deadline.

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

Similarly, in [DNC v. Bostelmann](#), in response to a challenge to Wisconsin’s Election Day ballot receipt deadline during the state’s primary elections, a federal district court ruled that the

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

On October 26, 2020, just eight days before Election Day, the U.S. Supreme Court, in a 5-3 vote, [rejected](#) the request of the DNC and voting rights groups to lift the Seventh Circuit's stay. The court did not issue a majority opinion but, in multiple concurrences, Chief Justice John Roberts Jr. and Justices Neil Gorsuch and Brett Kavanaugh criticized the federal district court's intervention in state election procedures. Chief Justice Roberts leveled criticism not only at the district court that ordered an extension of Wisconsin's receipt deadline but at district courts more broadly. In describing the Wisconsin court's deadline extension as "improper," Roberts noted that, "[i]n this case, as in several this Court has recently addressed, a District Court intervened in the thick of election season to enjoin enforcement of a State's laws." Justice Gorsuch similarly found the district court's order inappropriate on the basis of both separation of powers and voter confusion concerns. Under the Constitution, according to Justice Gorsuch, judges cannot "improvise with their own election rules in place of those the people's representatives have adopted." He stressed the measures already taken by the Wisconsin legislature to respond to the coronavirus pandemic to illustrate his view that the district court was simply complaining that "the state hasn't done *enough*." Gorsuch voiced concern that there were no clear rules for a judge to use in determining exactly when a ballot receipt deadline would be acceptable. Additionally, Gorsuch raised the possibility that "[l]ast-minute changes" to election procedures run the risk of "confusion and chaos and eroding public confidence in electoral outcomes."

In his concurring opinion, Justice Kavanaugh articulated three reasons why the district court's injunction extending the ballot receipt deadline was unwarranted. First, the injunction violated the *Purcell* principle by altering state election laws close to an election. Justice Kavanaugh explained that the *Purcell* principle serves to ensure that the "rules of the road" are clear leading up to the election, reducing voter and election official confusion, promoting efficiency, and giving citizens confidence in the election result. Apparently anticipating that critics might

argue there is irony in barring the earlier district court decision so close to Election Day in the name of *Purcell*, but allowing the federal appellate court to overturn the district court even closer to Election Day, Kavanaugh said the appeals court action was necessary to correct the lower court's violation of *Purcell*.

Second, Justice Kavanaugh stated that the district court's injunction "misapprehended the limited role of the federal courts in COVID-19 cases" because it is the role of the state legislature to "address the health and safety of the people." He cited recent cases in which the Supreme Court had stayed federal court injunctions that "second-guessed state legislative judgments about whether to keep or make changes to election rules during the pandemic" and noted that federal courts lack the expertise required to change election laws due to the pandemic.

Third, Justice Kavanaugh wrote that "the District Court did not sufficiently appreciate the significance of election deadlines." Under the *Anderson-Burdick* test, he said, a state's "reasonable deadlines" for voting procedures do not raise constitutional issues because "a State cannot conduct an election without deadlines." He asserted that states with Election Day receipt deadlines "want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the result of an election." He further noted that quick election results help to preserve the stability of elections.

In a footnote, Justice Kavanaugh endorsed a view articulated by Chief Justice William Rehnquist in his concurring opinion in 2000 in *Bush v. Gore*, that state courts are limited in their ability to "rewrite state election laws for federal elections" because the Elections Clause of Article II states that rules in presidential elections are to be established by state legislatures. Some understand Justice Kavanaugh's footnote to embrace Chief Justice Rehnquist's legal theory in *Bush* that state courts do not have authority to strike down state statutes regulating elections for federal offices—a theory that would eliminate the ability of state courts to remedy state election statutes that violate state constitutions. If adopted by the Court, this interpretation of the Elections Clause would have far-reaching implications for the balance of power within states to regulate presidential elections.

In dissent, Justice Elena Kagan took issue with what she deemed Justice Kavanaugh's and the Seventh Circuit's "misunderstanding of *Purcell*'s message." She stated that *Purcell* instructed courts to "consider all relevant factors, not just the calendar." While some autumn injunctions might run the risk of confusing voters, she wrote, "there is not a moratorium on the Constitution as the cold weather approaches." The federal district court was correct in issuing its order, Kagan argued, since, in this case, a ballot receipt deadline extension would not confuse voters about how to cast their ballots or discourage Wisconsin residents from exercising their right to vote. The majority opinion, Kagan emphasized, would have detrimental effects on

Wisconsin voters' enfranchisement. "Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day," Kagan wrote. "Without the district court's order, they must opt between 'brav[ing] the polls,' with all the risk that entails, and 'los[ing] their right to vote.'"

Just three days after the Supreme Court's decision in *DNC v. Bostelmann*, a three-judge panel of the Eighth Circuit, responding to a similar challenge and using similar reasoning, [blocked](#) the extension of Minnesota's absentee ballot receipt deadline, in *Carson v. Simon*. As a result of litigation earlier in the year regarding the state's Election Day deadline, Minnesota Secretary of State Steve Simon had voluntarily entered into a [consent decree](#), directing election officials to count absentee ballots received up to a week after Election Day, provided they were postmarked on or before Election Day. Plaintiffs, the Minnesota Alliance for Retired Americans Education Fund and some of its members (the "Alliance"), had alleged the receipt deadline was unconstitutional under the First and Fourteenth Amendments because it could disenfranchise thousands of voters who would timely mail their ballots but not have them count because the ballots were not received by the receipt deadline. This was a concern that was driven by the coronavirus pandemic and an anticipated increase in absentee ballots overwhelming the U. S. Postal Service. The consent decree was approved by a state court. A Republican state legislator and a Republican activist, both of whom would also [serve](#) as presidential electors, challenged the consent decree in a federal district court, which dismissed the case on the grounds that the plaintiffs lacked standing.

But just five days before the general election, an Eighth Circuit panel [ruled](#) that appellants did have standing to challenge the consent decree, and the court proceeded to rule on the merits. The Eighth Circuit panel reversed the lower court and granted plaintiffs' preliminary injunction, concluding that the extension of Minnesota's ballot receipt deadline "likely" violated the Electors Clause of Article II of the U.S. Constitution "because the Secretary extended the deadline for receipt of ballots without legislative authorization." Under Article II, Section 1 of the U.S. Constitution, the court reasoned, the secretary of state cannot "override" the state legislature, stating that "[t]here is no pandemic exception to the Constitution."

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

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

Finally, a notable federal case arising out of the New York June 23, 2020, primary, [Gallagher v. N.Y. State Board of Elections](#), illustrated the interplay between ballot deadlines and postal service operations. The court in that case found violations of both the *Anderson-Burdick* balancing test and the equal protection clause. In response to the pandemic, the New York State Legislature [modified](#) the Election Day ballot receipt deadline to require that “absentee ballots postmarked on or before Election Day be counted,” provided the ballot arrived by June 30, a week after Election Day. Thousands of absentee ballots for the June 23 primary were mailed in and delivered prior to June 30 but, for some reason, were never *postmarked* by the post office. Thus a large number of absentee ballots, especially in New York City, were [invalidated](#) because they lacked a postmark. Plaintiffs brought suit in federal court, claiming violations of their First and Fourteenth Amendment rights, as well as corresponding rights under the New York Constitution.

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

In assessing plaintiffs’ equal protection clause claim, the court also examined whether the postmark requirement “created a voting process where the state ‘by later arbitrary and disparate treatment, value[s] one person’s vote over that of another.’” The court determined that whether an individual’s vote would be counted might depend on “something completely arbitrary—their place of residence.” In particular, the court found that votes were valued differently in two ways. First, the U.S. Postal Service handled postmarks for ballots differently across the state. Second, because ballots travel through the mail at different speeds, ballots mailed at the same time on the same day might, by chance, be treated differently—one might be counted and the other might not. The court held that this arbitrary treatment did not meet

“sufficient guarantees of equal treatment” and was the type of “differential treatment that the Supreme Court has found to violate the ‘one person, one vote’ principle.”

Having found a substantial likelihood of success on the merits, as well as a strong public interest in granting an injunction, the court determined that the equities tipped in plaintiffs’ favor. In early August, the court [granted](#) a preliminary injunction [requiring](#) local elections boards to count otherwise valid absentee ballots which were “(1) received by June 24, 2020 without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.” In September, plaintiffs [asked](#) the court to extend the injunction to all future elections, including November’s general election, but the court [denied](#) plaintiffs’ request, determining that plaintiffs lacked standing.

Federal Statutory Claims - Voting Rights Act

In addition to claims arising under federal constitutional law, plaintiffs also challenged ballot receipt deadlines under Section 2 of the Voting Rights Act. For example, plaintiffs in [Middleton v. Andino](#) [argued](#) that South Carolina’s ballot receipt deadline “abridge[s] and in some cases entirely den[ies] the rights of African American voters,” due in part to structural inequities in South Carolina, which leave Black voters disproportionately vulnerable to serious complications should they contract COVID-19. The federal district court [denied](#) plaintiffs’ motion for a preliminary injunction extending the receipt deadline on these grounds.

In [Yazzie v. Hobbs](#), plaintiffs were also unsuccessful in bringing a challenge, in a federal district court in Arizona, under the Voting Rights Act. Plaintiffs in that case, six members of the Navajo Nation, live on their reservation in Apache County, Arizona. Most members [residing](#) in the Navajo Nation “do not have access to home [mail] delivery,” and there are only about two dozen post offices and postal provider offices to serve the entire 11,000-square-mile county. As such, plaintiffs [argued](#) that the Election Day absentee ballot receipt deadline violated Section 2 of the VRA in denying members of the Nation the “same rights of other members of the electorate to participate in the political process and elect representations of their choice.” After the district court denied an injunction, the Ninth Circuit [ruled](#) that plaintiffs lacked standing because they failed to plead a “concrete and particularized injury.” The Ninth Circuit also found that a favorable decision would not redress plaintiffs’ alleged injury because it would be infeasible for election officials to identify and separate mailed ballots cast by on-reservation Navajo Nation members from those cast by other voters.

State Law Claims

Plaintiff victories were more likely to survive appeals in federal courts when the decisions were rooted in state law grounds. In a closely watched case at the Pennsylvania Supreme Court, plaintiffs secured an extension of the vote-by-mail ballot deadline for the general election by relying on state constitutional grounds. But four members of the U.S. Supreme Court expressed support for a novel interpretation of the Elections Clause of Article I of the U.S. Constitution, which, if adopted by the U.S. Supreme Court, could dramatically alter the balance of powers within states for regulating presidential elections.

On September 8, in [Pennsylvania Democratic Party v. Boockvar](#), the Pennsylvania Supreme Court voted 4-3 to [extend](#) the state's statutory Election Day ballot receipt deadline and "adopt the Secretary's informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8 p.m. on Election Day to reduce voter disenfranchisement." The majority justified the decision as necessary due to pandemic conditions to protect voters' rights under the Free and Equal Elections Clause of the state constitution.

In late September, Republican state legislators and the Republican Party of Pennsylvania [filed](#) emergency applications at the U.S. Supreme Court for a stay of the Pennsylvania Supreme Court's order pending a final decision by the Supreme Court on the merits. They [argued](#) that the receipt deadline extension granted by the Pennsylvania Supreme Court violated federal law that requires holding "all elections for Congress and the Presidency on a single day throughout the Union." They said it also violated the Elections Clause of the U.S. Constitution by "seizing the authority to set the times, places, and manner of federal elections from the state legislature." The legislators argued that the Elections Clause grants direct authority to the Pennsylvania General Assembly to regulate federal elections in Pennsylvania and that only Congress, not the Supreme Court of Pennsylvania, can alter the General Assembly's election regulations.

In response, [Secretary of the Commonwealth Kathy Boockvar](#) and [Pennsylvania Democrats](#) [argued](#) that the legislators' stay request raised concerns of federalism. "This Court should not second-guess the Pennsylvania Supreme Court's straightforward construction of the Commonwealth's constitution," Boockvar stated in her brief. The secretary urged that "state courts be left free and unfettered by [this Court] in interpreting their state constitutions." In addition to federalism implications, the brief noted that a decision by the U.S. Supreme Court to grant the legislators' stay request could result in the rejection of thousands of ballots, an outcome that could potentially decide the results of the 2020 presidential election in the battleground state in which Trump won in 2016 by a narrow margin of just 44,000 votes.

In mid-October, the U.S. Supreme Court denied Republicans' emergency request for a stay, effectively [permitting](#) Pennsylvania officials to count ballots received up to three days after the election. At the U.S. Supreme Court, there must be five votes to issue a stay, but there was a vacancy on the court due to Justice Ruth Bader Ginsberg's death, and the Court was [tied](#), 4-4, with Chief Justice Roberts siding with the court's more liberal justices. Neither side of the court explained its position. Following the Supreme Court's denial of a stay, Pennsylvania Republicans [applied](#) to the U.S. Supreme Court for expedited consideration of the merits of their challenge, which the court unanimously [declined](#) on October 28. However, in the only opinion published, Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch stated that "there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution" and that "[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." They said "[i]t would be highly desirable to issue a ruling . . . before the election," but they reluctantly concluded that "there is simply not enough time at this late date to decide the question before the election." Justice Alito, writing for himself and Justices Thomas and Gorsuch, noted that the petition for certiorari was still pending and that the court could potentially rule on the case after the election. He also invited petitioners to seek an order from the Supreme Court that Pennsylvania election officials segregate ballots that arrive after Election Day. Newly confirmed Justice Amy Coney Barrett did not [participate](#) in the decision, according to the court's press office, "because of the need for a prompt resolution" of the question "and because she has not had time to fully review the parties' filings."

On November 6, three days after Election Day, Pennsylvania Republicans accepted the invitation of Justices Alito, Gorsuch and Thomas, and [filed](#) an emergency application for an injunction. They asked the U.S. Supreme Court to require state election officials "to log, to segregate, and otherwise not to take any action related to any ballots" that arrived after 8 p.m. on Election Day and within the three-day extension window. The state of Pennsylvania opposed the Republicans' emergency application, arguing it sought an "injunction ordering Pennsylvania's counties to do that which the Commonwealth has already directed counties to do and which the counties are already doing." Justice Alito, the supervising justice for the Third Circuit, which includes Pennsylvania, granted Republicans' request in part, issuing an [order](#) directing Pennsylvania officials to segregate ballots arriving after 8 p.m. on Election Day. The Court did not, however, direct election officials to stop counting the ballots. On February 22, the Supreme Court [denied certiorari](#), with Justices Thomas and Alito dissenting.

In a different decision, from North Carolina, the U.S. Supreme Court also [declined](#) to block an extension of the state's absentee ballot receipt deadline in late October. In September, the

North Carolina State Board of Elections [extended](#) the state's ballot receipt deadline by six days to allow ballots postmarked by Election Day and received through November 12 to be counted (the prior deadline for receipt had been November 6). The extension was made pursuant to a [consent decree](#) in a state court that was subsequently [upheld](#) by a federal district court. Republicans appealed the district court decision to the Fourth Circuit U.S. Court of Appeals, but the appeals court, sitting en banc, [denied](#) an emergency stay of the district court's order by a vote of 12-3. Republicans appealed the Fourth Circuit's decision, and the U.S. Supreme Court, in a 4-3 decision, [allowed](#) North Carolina's absentee ballot receipt deadline extension to stand. Once again, Justices Thomas, Alito, and Gorsuch dissented, saying that they would have blocked the extension agreed to by the North Carolina State Board of Elections in the consent decree. They said "a state court and the Board [of Elections] worked together to override a carefully tailored legislative response" to COVID-19 in violation of the Elections Clause of the U.S. Constitution. The dissenting justices pointed to the court's decision from just a few days earlier in [Bostelmann](#), the Wisconsin case, as the guiding principle. Justice Barrett did not participate in the decision.

Plaintiffs also brought state law claims mirroring federal undue burden claims, with mixed results. For instance, plaintiffs in [Alliance for Retired Americans v. Dunlap](#) challenged Maine's ballot receipt deadline as an undue burden under both the federal and state constitutions. The court denied plaintiffs' motion for a preliminary injunction, [stating](#) that, "even in 2020, [the Election Day ballot receipt deadline] imposes only a modest burden on the right to vote." The Maine Supreme Judicial Court [affirmed](#) the superior court's denial of injunctive relief.

Michigan state courts were initially split on how the Michigan state constitution applied to this issue but ultimately found no state constitutional grounds to alter the Election Day ballot receipt deadline. In [League of Women Voters of Michigan v. Benson](#), the Michigan Court of Appeals rejected a claim that the Michigan Constitution required a "postmarked by Election Day" rather than "received by Election Day" ballot deadline for the primary election. The Michigan Supreme Court [denied](#) plaintiffs leave to appeal, on July 31. Six weeks later, however, in [Michigan Alliance for Retired Americans v. Benson](#), a different Michigan state court [enjoined](#) enforcement of Michigan's Election Day ballot receipt deadline, holding that, "as applied to plaintiffs . . . the ballot receipt deadline violates plaintiffs' constitutional rights" under Article II, Section 4 of the Michigan Constitution. It ruled that an "absent voter ballot that is postmarked by no later than November 2, 2020, and received within 14 days after the election, is eligible to be counted." However, in mid-October, a state appellate court [reversed](#) that ruling, citing *League of Women Voters of Michigan v. Benson* for the proposition that the Election Day receipt deadline complied with the state's constitution.

Ballot Secrecy Sleeve Requirements

Another salient category of vote-by-mail litigation concerned ballot “secrecy sleeve” rules—rules that require absentee voters to place their completed ballots into an inner envelope (often called a “secrecy sleeve”) and then enclose that inner envelope into the outer, or return, envelope. The purpose of secrecy sleeves is to separate the voter’s identifying information from the ballot itself, in order to protect the voter’s privacy. (Some states have voters fill out personal identifying information directly onto the outer return envelope, but other states do not, so as to avoid exposing voter information to mail and election workers in the delivery and sorting processes.) At least 16 [states](#) have laws requiring election officials to provide absentee voters with secrecy sleeves but, in many of those states, use of the secrecy sleeve is optional and failure to use it is not grounds to reject the ballot. For a detailed analysis of individual state rules regarding secrecy sleeves, see the Stanford-MIT Healthy Elections Project report [Secrecy Sleeves and the Naked Ballot](#).

In a high profile case in Pennsylvania, *Pennsylvania Democratic Party v. Boockvar*, plaintiffs argued that a voter’s failure to use the secrecy sleeve (meaning the voter placed the completed ballot directly into the outer return envelope) should not, by itself, result in rejection of the ballot. In fact, most Pennsylvania counties [accepted](#) so-called “naked ballots” during the state’s June 2020 primary. Plaintiffs [argued](#) that the language of Pennsylvania’s secrecy sleeve statute did not require rejection of “naked ballots.” On September 17, 2020, the Pennsylvania Supreme Court [held](#) that election officials must reject naked ballots in the November general election. The court [determined](#) that the language of the statute is “neither ambiguous nor unreasonable.” It reached what it called “the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.”

After the ruling, Philadelphia’s City Commissioner Lisa M. Deeley [predicted](#) that over 100,000 ballots across the state could be rejected for missing secrecy sleeves. The Pennsylvania Supreme Court’s decision “[sparked](#) a flurry of voter education efforts from nonprofit organizations and political campaigns to highlight the now-required secrecy envelope.” In the end, only 7,411 absentee ballots were rejected in Pennsylvania for any reason, including lack of a secrecy sleeve, during the 2020 general election. The low number of voters forgetting to use the secrecy sleeve was likely due at least in part to the publicity around the secrecy sleeve lawsuit and the educational efforts to help voters understand the requirement.

Cost of Postage for Mailing Ballots

Another set of legal challenges in 2020 targeted states' failure to cover the costs of mailing completed mail-in ballots. About 17 [states](#) provided mail voters with postage-prepaid ballot return envelopes—including Hawaii, Oregon, and Washington, which [regularly conduct](#) all elections by mail. But most states do not. In these states, voters were required to pay for postage to return their completed ballots by mail.

Plaintiffs brought suit in several states, including [Georgia](#), [Florida](#), [Oklahoma](#), [Maine](#), [South Carolina](#), [North Carolina](#), [Texas](#), and [Pennsylvania](#). The lawsuits typically alleged one or both of two constitutional violations. First, plaintiffs argued that requiring voters to pay for postage to cast their votes or to apply for ballots constituted a poll tax in violation of the Fourteenth and Twenty-fourth Amendments. Since 1966, the U.S. Supreme Court has [held](#) poll taxes violated the equal protection clause of the Fourteenth Amendment. The Twenty-fourth Amendment [provides](#) that the right to participate in an election for federal office “shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” Second, plaintiffs asserted that forcing voters to pay for stamps is an impermissible burden under the *Anderson-Burdick* balancing test. Plaintiffs were universally unsuccessful in their claims challenging the ballot postage requirement. Courts largely denied plaintiffs' motions for preliminary injunctions on both their poll tax and *Anderson-Burdick* ballot postage claims, generally finding that paying for postage is not a poll tax and that burdens on voters do not outweigh the state's interest in requiring voters to incur the cost.

The case of [Black Voters Matter Fund v. Raffensperger](#) provides an illustrative example of the postage-as-poll-tax argument. Georgia law [allows](#) voters to vote absentee for any reason after [applying](#) for an absentee ballot. Plaintiffs sued Georgia's secretary of state, challenging the requirement that voters pay postage for both the application for absentee ballots and to return the completed absentee ballot. Plaintiffs [contended](#) the cost of stamps is tantamount to a poll tax, even though there are no “statutes or regulations that require government officials to charge voters postage on absentee ballot applications.” They argued that the pandemic made it unrealistic for many voters to cast ballots in-person, so the requirement essentially forced such voters to pay in order to participate in democracy. The suit sought a preliminary injunction to require election officials to provide prepaid returnable envelopes for absentee ballots and absentee ballot applications, arguing that election officials know how to do this because state law already requires them to provide prepaid postage on return envelopes for other purposes.

A federal district court [dismissed](#) plaintiffs' poll tax claim in early August. Although the court [recognized](#) that in-person voting is “potentially a difficult” option for many voters, “particularly

during a pandemic,” the court [held](#) that, because in-person voting “theoretically remains an option,” “stamps are not poll taxes under the Twenty-fourth Amendment prism.” In September, plaintiffs [appealed](#) the district court’s poll tax ruling to the Eleventh Circuit. As of the time of this report, there has been no movement in response to plaintiffs’ appeal.

Other plaintiffs challenging postage requirements as poll taxes met a similar fate. In [Nielsen v. DeSantis](#), a U.S. district court summarily [dismissed](#) plaintiffs’ claim that a Florida [statute](#) requiring voters to pay postage for mail ballots constituted a poll tax. The court said that “[r]equiring a voter to pay for postage to mail a registration form or ballot to a Supervisor of Elections is not unconstitutional or otherwise unlawful.” In [Alliance for Retired Americans v. Dunlap](#), a Maine state court [denied](#) plaintiffs’ motion for a preliminary injunction in late September, similarly concluding that requiring postage on a mail-in ballot is not a poll tax. And a federal district court in Oklahoma reached the same conclusion in [DCCC v. Ziriaux](#).

In one outlier case, [Lewis v. Hughs](#), the U.S. District Court for the Western District of Texas [held](#) that it was sufficient, at the motion to dismiss stage, for plaintiffs to have alleged that a Texas [law](#) requiring voters to pay for ballot postage constituted a fee voters must pay if they wished to avoid risking “harming their health to vote in person.” The district court’s decision that plaintiffs’ claims were not barred by the doctrine of sovereign immunity was [appealed](#) to the Fifth Circuit (which summarily [affirmed](#) and then [withdrew](#) its affirmance), but the court has not reached the merits of the poll tax claim as of the time of writing.

A lawsuit in Pennsylvania may have contributed to the state deciding to cover the costs of postage for mail-in and absentee ballots. In [Crossey v. Boockvar](#), the Supreme Court of Pennsylvania dismissed plaintiffs’ postage claims as moot after Secretary Boockvar [announced](#) that the Pennsylvania Department of State would provide funding to county boards of election for postage on mail-in and absentee ballots at no cost to the voter for the 2020 general election.

Plaintiffs also brought claims that postage requirements are an impermissible burden on the right to vote, under the *Anderson-Burdick* balancing test. Parties alleged a variety of burdens, many of which they asserted were exacerbated by the pandemic. Plaintiffs in [Black Voters Matter Fund v. Raffensperger](#), for instance, [alleged](#) that a failure to provide prepaid postage burdened the right to vote by requiring voters who are least able to afford stamps (such as people who lack internet access, credit cards, or a means to travel to the post office) to risk their safety by going to the post office during a pandemic to purchase postage for their ballot. Plaintiffs in [Lewis](#), [Alliance for Retired Americans](#), and [New Georgia Project](#) made similar arguments, asserting that the government interest in saving money was insufficient to justify these burdens.

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

Finally, in addition to federal constitutional law claims, plaintiffs brought postage requirement suits grounded in state constitutional law. For example, plaintiffs in [Stringer v. North Carolina](#) alleged, among other claims, that a postage requirement for mail ballots violates the Free Elections Clause of the North Carolina Constitution, which [states](#) that "[a]ll elections ought to be free." Plaintiffs dropped this postage claim, without any concession from the state on this issue, as part of a larger [settlement](#) with the state involving another related case, in which plaintiffs obtained concessions on other claims.

In sum, plaintiffs' claims that requiring voters to incur the costs and burden of supplying postage on mail ballots or mail ballot applications violated the U.S. and state constitutions failed on the merits.

Failure to Provide Accommodations for Voters with Disabilities

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

Voting by mail typically entails filling out a paper ballot by hand and placing the completed ballot in the mail. While existing mail voting processes may allow individuals without disabilities to vote secretly and independently, voters with visual or manual disabilities are likely to need assistance to read and mark their paper absentee ballots, stripping them of the privacy available to non-disabled voters. Some plaintiffs [described](#) their dilemma as having to make the "unconscionable choice of either leaving their homes in order to receive in-person assistance

with voting at the closest polling place—thereby facing the threat of severe illness or death [during the pandemic]—or staying home and foregoing the right to vote privately and independently (if third-party assistance is available), or the right to vote entirely (if it is not).”

These cases were largely brought in federal court, asserting violations of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. [Title II](#) of the ADA requires public entities to provide individuals with disabilities an equal opportunity to access the entity’s services or benefits. Similarly, [Section 504](#) of the Rehabilitation Act forbids organizations that receive federal financial assistance from denying people with disabilities an equal opportunity to enjoy the organization’s benefits or services.

In [Rivero v. Galvin](#), a federal district court case in Massachusetts, plaintiffs brought [claims](#) under both Title II of the ADA and Section 504 of the Rehabilitation Act. Plaintiffs were a group of people with disabilities and organizations advocating on behalf of people with disabilities. They [alleged](#) that, under Massachusetts’s accessible vote-by-mail program, the process voters had to follow to cast their electronic ballots was “replete with barriers to accessibility for Plaintiffs and similarly situated voters who are blind or have low vision, mobility/dexterity disabilities, or other disabilities that make it difficult or impossible for them to effectively access standard printed text.” Plaintiffs argued that the state’s program violated Title II of the ADA because plaintiffs “cannot vote privately and independently by remote means, while others can.” Similarly, plaintiffs alleged that the program violated Section 504 because the state failed to meet its “obligations to provide voters with print disabilities meaningful access to vote that is equal to the opportunity provided to other voters.”

Both Title II and Section 504 claims centered on the failure of states to offer reasonable accommodations to voters with disabilities. Plaintiffs in disability cases sought several different accommodations, including online ballot marking tools. For instance, disability rights advocates in New York [urged](#) the state to implement ballot marking tools available in other states. Similarly, after a Pennsylvania state court [ruled](#) that the state’s mail-in ballot process violated the ADA and Rehabilitation Act, Pennsylvania implemented an online ballot marking tool. And the court in *Rivero* [ordered](#) the state to provide voters with disabilities the option of completing an accessible electronic ballot operated by VotingWorks.

Some plaintiffs sought a different accommodation for blind voters: an electronic ballot delivery system that some states use for military and overseas citizens, to comply with the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). Michigan, for example, voluntarily entered into a [consent decree](#) to make its UOCAVA PDF ballots available to blind voters for the state’s May primary election. Although Michigan does not currently permit all voters to

electronically transmit completed ballots, it did allow voters with disabilities to use such technology to increase accessibility of voting for such voters.

On the whole, plaintiffs had more success in bringing claims alleging failure to accommodate voters with disabilities than in some other areas of litigation, as evidenced by the numerous orders directing states to implement online ballot systems to expand accessibility.

Part II Conclusion

Voters brought a wave of challenges against ballot submission requirements, including mail ballot receipt deadlines, the required use of secrecy sleeves, and the requirement to pay for postage. With a few exceptions, most of these claims did not succeed in court on the merits. Though some plaintiffs won preliminary injunctions at the lower court level, they saw most of those wins reversed by appellate courts—both state and federal. Plaintiffs did see two successes on the absentee ballot deadline issue. In Pennsylvania and North Carolina, the U.S. Supreme Court declined to block extensions of Election Day receipt deadlines by lower courts based on state law. Both decisions were close, however, and were made without participation by the high court's newest member, Justice Amy Coney Barrett. The Pennsylvania decision was a 4-4 tie, and the North Carolina decision was 5-3. Apart from those wins, plaintiffs generally failed in their efforts to extend ballot receipt deadlines, as well as in their challenges to postage requirements and secrecy sleeve requirements. Plaintiffs had a bit more success in obtaining accommodations for voters with disabilities seeking new ways to vote at home independently.

Part III: Challenges Seeking to Expand Return Ballot Delivery Options

Authors: Lane Corrigan, Christopher Meyer, and Alexander Perry

As a [record](#) number of voters requested and returned mail ballots in the 2020 general election, states faced the challenge of using mail voting infrastructure that, in many cases, was [not designed](#) to handle such an increased volume. Coping with the surge in demand and the high number of [first-time mail voters](#), states confronted three challenges associated with the return of completed mail ballots.

First, states needed a ballot collection system that could handle the rapid growth in mail-in ballots. Some states chose to [expand](#) the infrastructure for the return of completed absentee ballots through the use of drop boxes and other ballot drop-off locations, seeking to meet the increased demand and protect public health during the pandemic. Other states [limited](#) ballot drop-off options, typically asserting that expanding drop-off options could exacerbate election fraud.

Second, states considered absentee voter assistance rules—that is, how much and what kind of assistance voters should be allowed to receive when filling out and returning their absentee ballots. To what extent should third parties be allowed to collect completed ballots from absentee voters and deliver them to a drop box or to an elections office on the voters’ behalf? And to what extent could third parties be allowed to help voters in need of assistance, such as voters with certain disabilities, to complete their ballots? Although some states made it [easier](#) for third parties to assist voters in the vote-by-mail process, others [defended](#) bans or limitations on third-party assistance (particularly on ballot collection, which is often pejoratively labeled “ballot harvesting”).

Third, states had to consider the role of the U.S. Postal Service in delivery of mail ballots. The postal service is responsible for receiving and delivering mail ballots across the country. Private carriers, such as FedEx or UPS, do not deliver or receive mail ballots.

Part III surveys litigation in 2020 regarding efforts to expand or improve options for the return and delivery of mail ballots. Specifically, it reviews lawsuits that challenged (i) state laws that prohibit third parties from helping absentee voters complete or deliver their ballots (“absentee voter assistance”), (ii) the adequacy of ballot drop-off locations, and (iii) operational changes at the U.S. Postal Service that risked delays in the delivery of mail ballots in [almost every state](#).

Challenges to laws restricting assistance to absentee voters generally failed. Courts were reluctant to strike down state voting regulations without clear evidence that they placed a severe burden on the right to vote. Lawsuits regarding ballot drop box availability had mixed results. As in Election Day ballot receipt deadline litigation, plaintiffs saw some success at the district court level, but several appellate courts stayed lower court injunctions. Litigation challenging operational changes at the U.S. Postal Service was more successful, as plaintiffs in these cases secured favorable rulings from several federal courts.

Bans and Restrictions on Absentee Voter Assistance

Laws that ban or restrict the ability of third parties to assist absentee voters include laws that [restrict](#) the type of person from whom the voter may seek assistance, [criminalize](#) the acceptance of compensation for helping return an absentee ballot, [limit](#) the number of ballots that a third-party assistant may collect, and [narrow](#) the circumstances in which an absentee voter may seek assistance. Plaintiffs had mixed success in 2020 challenging these limiting statutes under the U.S. Constitution or the Voting Rights Act of 1965. On the flip side, some courts upheld permissive ballot collection statutes in the face of legal challenges.

Plaintiffs challenging restrictions on assistance to absentee voters alleged two federal constitutional violations. First, plaintiffs argued that restrictions on third-party assistance to absentee voters were an undue burden on the fundamental right to vote. Courts often evaluate laws alleged to burden the franchise under the [Anderson-Burdick balancing test](#), which balances the burdens that a voting regulation imposes on the electorate against the state's interests in the regulation. Courts generally found that voter assistance restrictions do not place a severe burden on the electorate under *Anderson-Burdick*. In [American Federation of Teachers v. Gardner](#), a New Hampshire state court refused to enjoin the state's restrictions on ballot collection and delivery—such as limitations on who could serve as a third-party agent to deliver an absentee ballot—concluding that it was “not persuaded” that the law “even impose[d] a burden on a voter.” In [Memphis A. Phillip Randolph Institute v. Tre Hargett](#), a federal district court in Tennessee upheld a state law that, among other things, barred a person who was not a member of the state election commission from delivering an unsolicited mail-in ballot request form to a voter. The court found that these restrictions imposed a “moderate,” but not “severe,” burden on voters. In [Middleton v. Andino](#), a federal district court in South Carolina similarly declined to find that a “candidate collection ban,” which prohibited political candidates or paid campaign staff from collecting and returning completed absentee ballots, posed a severe burden on the right to vote. The court determined that the ban was “rationally related to the government's interest in preserving the integrity of elections and preventing voter fraud” and that “[t]he restriction is therefore likely to be upheld as constitutional.”

Courts took a skeptical view of challenges to voter assistance bans even without resorting to an *Anderson-Burdick* analysis. For example, the Pennsylvania Supreme Court [refused](#) to enjoin state officials from banning third-party delivery of absentee ballots. Although the plaintiffs in that case raised an *Anderson-Burdick* argument in their [complaint](#) and [brief](#), the court simply pointed to [past](#) cases that had upheld the state ban on voter assistance. The *Anderson-Burdick* standard does not appear in the court's per curiam opinion.

Second, plaintiffs filed claims alleging that state restrictions on assistance to absentee voters infringed on civic and political organizations' First Amendment rights of free speech and association. Some courts were not receptive to these claims either. Plaintiffs in [New Georgia Project v. Raffensperger](#), for instance, argued that third-party ballot delivery and collection was protected as expressive conduct under the First Amendment. They claimed that Georgia's ban on ballot delivery and collection programs, in which local organizations delivered absentee ballots to and collected them from Georgia voters, inhibited civic organizations' ability to express their views on the importance of voting. The district court rejected this argument, noting that both the [Fifth](#) and [Ninth](#) Circuits had held that collection of ballots and voter applications is not expressive conduct. Because the court found Georgia's limitations on ballot collection did not implicate the First Amendment, it subjected the law only to rational basis review. Under this lenient standard, the court concluded that Georgia's stated interest in "combating election fraud and verifying the eligibility of voters" was likely sufficient to uphold the law. In [American Federation of Teachers v. William Gardner](#), plaintiffs in New Hampshire brought a similar claim in a state court. That court also cited Fifth and Ninth Circuit rulings in arriving at the conclusion that "the practice of collecting and delivering absentee ballots is not expressive conduct implicating the First Amendment." On the other hand, a Minnesota state court [granted a preliminary injunction](#) against a state law that limited third parties from collecting more than three ballots each, finding that the law would likely impose an unconstitutional burden on protected minorities' right to vote and right to free speech. The Minnesota Supreme Court affirmed the injunction.

Plaintiffs also filed claims that state restrictions on absentee voter assistance violated two separate provisions of the Voting Rights Act (VRA): Section 208 and Section 2. Section 208 of the VRA states that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice." In cases in Michigan ([Michigan Alliance for Retired Americans v. Benson](#)) and South Carolina ([Middleton v. Andino](#)), plaintiffs asserted that restrictions on absentee assistance prevented voters with disabilities from receiving assistance from the person of their choice. Neither court resolved this claim on the merits. In *Middleton*, a U.S. district court [dodged](#) the VRA question, noting that the plaintiffs had failed to raise it in their motion for a preliminary injunction. In *Michigan*

Alliance, a Michigan state court [enjoined](#) the state law that allowed only immediate family members (or a person residing in the voter's household) to return a voter's absentee ballot. But the court based its ruling on the Michigan Constitution, not the VRA. And a state appellate court subsequently [reversed](#) the lower court ruling, reinstating Michigan's limitations on third-party absentee ballot collection and delivery.

One of the most high-profile ballot collection cases in 2020 was first filed in 2019 and centered on alleged violations of Section 2 of the Voting Rights Act. Section 2 prohibits voting practices and procedures that discriminate or have a discriminatory impact on the basis of race. In [Arizona Republican Party v. Democratic National Committee](#), currently pending before the U.S. Supreme Court, the plaintiffs challenged Arizona state law H.B. 2023, which imposed criminal penalties for assisting with ballot collection, unless the ballot collector is the voter's caregiver, family member, or household member. A federal district court [upheld](#) the law but, in January, a divided Ninth Circuit, sitting *en banc* in [Democratic National Committee v. Hobbs](#), reversed. It ruled that H.B. 2023 was enacted with discriminatory intent, in violation of Section 2 of the Voting Rights Act. The court determined that the law disparately burdened Native American, Hispanic, and Black voters, as compared to white voters. Among other things, the court noted that minority groups in Arizona were more likely to change residences frequently, lacked reliable access to mail services, and were unable to afford adequate transportation. Therefore, those groups disproportionately rely on others to collect and return their early ballots. In April, the Arizona Republican Party [filed](#) a petition for certiorari to the U.S. Supreme Court, which the court [granted](#) in early October. The court held [oral arguments](#) in the case on March 2, 2021, and the court is expected to rule later in 2021.

On the flip side of the coin, plaintiffs who opposed ballot collection by third parties challenged laws that permitted or expanded the practice. They raised claims that permitting ballot collection caused voter-dilution (because fraudulent votes would be counted along with valid votes) and direct disenfranchisement (because some ballot collectors would fail to deliver some ballots). These claims made limited headway. In [Election Integrity Project of Nevada v. State of Nevada](#), plaintiffs sought a preliminary injunction against a new Nevada law that repealed a criminal prohibition against "ballot harvesting" and replaced it with new provisions that plaintiffs alleged "fail to adequately deter voter intimidation." The court denied the preliminary injunction, finding that the plaintiffs had put forward only "unfounded speculations regarding voter fraud." Similarly, in [Driscoll v. Stapleton](#), the Montana Supreme Court granted a preliminary injunction against Montana's restrictions on ballot collection. The court found no evidence "of voter fraud or ballot coercion, generally or as related to ballot-collection efforts."

Thus, challenges both to expand and constrict ballot collection saw mixed results.

Limits on Absentee Ballot Drop-Off Locations and Curbside Voting

The second category of cases relating to the return of mail ballots involved challenges to state limitations on where voters could drop off ballots. Many voters in 2020 preferred to deposit their ballots at drop boxes to avoid the health risks of in-person voting during the pandemic and to avoid the risk of late arrival inherent in returning ballots via mail. Governors in both Texas and Ohio issued executive orders to limit the quantity and location of such ballot drop boxes. Plaintiffs challenged these restrictions in both [Texas](#) and [Ohio](#), emphasizing the burden such restrictions placed on the many voters who planned to deposit their ballots in drop boxes and the disproportionate impact of such restrictions on minority and densely populated communities. In both cases, plaintiffs won injunctions staying the restrictions at the federal district court level then saw those wins overturned by U.S. courts of appeals ruling in favor of the state.

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

In a suit brought in the U.S. District Court for the Western District of Texas, the plaintiffs claimed that the governor's order violated the First and Fourteenth Amendments as an impermissible burden on the right to vote. They also challenged the governor's order under Section 2 of the Voting Rights Act, claiming it had a disproportionate impact on Latino voters, who were disproportionately affected by the coronavirus pandemic. In an [order](#) enjoining the state from implementing the restrictions on drop-off locations, U.S. District Judge Robert Pitman noted that it was "perplexing" that the state could "simultaneously assert the [drop off centers] do not present a risk to election integrity on Election Day but somehow do present such a risk in the weeks leading up to" Election Day. However, the Fifth Circuit [stayed](#) the lower court's injunction pending appeal. Although the appeals court suggested in a footnote that *Anderson-Burdick* may not apply to the Texas case (the court suggested that *McDonald* might apply instead), it concluded that the state of Texas would likely prevail under the *Anderson-Burdick* standard anyway. The governor's order, the court argued, effectively *expanded*

voting access because it extended the period to hand-deliver absentee ballots by 40 days, rather than confining the drop-off period to Election Day.

Parallel proceedings in state court were also unsuccessful. On October 15, just days after the Fifth Circuit's stay, a Texas state court temporarily enjoined Governor Abbott's one-per-county limit on drop-off centers. Travis County Judge Tim Sulak [enjoined](#) that portion of the governor's proclamation, stating that it "would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden" the right to vote under the Texas Constitution. A state appellate court upheld Judge Sulak's order, but the Texas Supreme Court [reversed](#) on October 27, just one week before Election Day. The state's highest court explained that it is the role of the legislature and governor (using his emergency powers) to craft the appropriate policy response to the pandemic, and not the courts. The court went on to criticize the *Anderson-Burdick* test, a test it had previously adopted, for inviting courts to make policy judgements. A concurring opinion repeated the Fifth Circuit's reasoning that the governor's order *expanded* options available to voters—it did not curtail options—and thus did not "disenfranchise anyone."

A similar story played out in Ohio. Ohio Secretary of State Frank LaRose issued [Directive 2020-16](#), which authorized a single secured drop box, and no more, outside each county board of elections office. Plaintiffs filed lawsuits in both [federal](#) and [state](#) court to compel the state to designate additional drop box locations. In mid-September, the Franklin County Common Pleas Court [determined](#) that the secretary of state's ban on the placement of multiple drop boxes per county at various locations was "arbitrary and unreasonable." In response to this state court order, the secretary of state [permitted](#) each of Ohio's 88 county boards of elections to install more than one drop box, but still required that they be located directly outside of each county's board of elections offices.

On October 8, Ohio U.S. District Court Judge Dan Aaron Polster [issued](#) an injunction against enforcement of Directive 2020-16. The injunction halted the directive's prohibition on drop boxes not located directly outside the offices of the boards of elections, thus allowing drop boxes to be placed in additional locations. The judge's order also enjoined a ban on the deployment of county board staff to any such non-elections-office ballot boxes. Judge Polster said there was no evidence that additional drop boxes were prohibited by state law and no evidence "that multiple drop boxes cannot be as secure as the single drop box required at each board of elections." But shortly after Judge Polster issued his decision, a divided Sixth Circuit panel [stayed](#) the district court's injunction pending interlocutory appeal. The court found that the state was likely to win under *Anderson-Burdick* test because "the limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee and physically drop off their absentee ballot)." The plaintiffs [concluded](#) there was no point to

continue to litigate and did not oppose the state's [motion to dismiss](#) the appeal, which the Sixth Circuit [granted](#).

Plaintiffs in Alabama challenged a state restriction on another kind of ballot drop-off option: curbside or “drive-thru” voting, a practice that allows voters to cast their ballots in person but outside of a poll site, without leaving their car. While not pervasive, counties in [several states](#) offered this option as a way to accommodate voters especially at-risk of serious complications from COVID-19, voters with disabilities, and/or elderly voters in the 2020 general election. Alabama Secretary of State John Merrill prohibited local election officials from implementing curbside voting. In [People First of Alabama v. Merrill](#), voting and disability rights groups in Alabama filed a federal [lawsuit](#) seeking to enjoin that state’s ban on curbside voting. The district court [ruled](#) in favor of plaintiffs, concluding that the ban violated the First and Fourteenth Amendments, as well as the Americans with Disabilities Act. The court issued a permanent injunction against the ban, allowing counties the option, but not requiring them, to provide curbside voting as an accommodation. The state appealed, and the 11th Circuit [refused to stay](#) the injunction pending appeal. But on October 21, in a 5-3 vote, the U.S. Supreme Court [stayed the injunction](#) pending appeal to the Eleventh Circuit and, if applicable, the U.S. Supreme Court, without providing any reasoning. Justices Sonia Sotomayor, Elena Kagan, and Stephen Breyer dissented, pointing to the factual record developed at the district court to support the conclusion that the option for counties to provide curbside voting is a reasonable accommodation for voters with disabilities.

Although they were successful in lower courts, plaintiffs ultimately failed when states appealed lower court injunctions against state executive restrictions limiting the number and location of ballot drop boxes and prohibiting drive-thru voting.

USPS Operational Changes

While almost all election lawsuits in 2020 were filed against states, counties, and/or their representatives, a unique group of lawsuits targeted the one national entity that delivered millions of ballots during the election season: the U.S. Postal Service (USPS). In July 2020, newly appointed U.S. Postmaster General Louis DeJoy announced the implementation of a number of [operational changes](#) at the USPS, including a reduction in [overtime pay](#) and the discontinuance of several hundred [high-speed mail sorters](#). The changes [resulted](#) in nationwide [mail delivery delays](#). DeJoy [explained](#) that the changes were necessary for budget reasons to make the agency “financially solvent,” but the timing and impact of the changes [raised suspicions](#) that they might also be designed to slow the delivery of mail ballots (which were generally forecasted to lean in favor of Democrats) and possibly target areas with more Democratic

voters. For the detailed story of the USPS changes and the 2020 elections, see the Stanford-MIT Healthy Elections Project report [The U.S. Postal Service and the 2020 Elections](#).

In response to the announced changes and the associated delivery delays, 24 state attorneys general filed federal lawsuits against the Trump administration and Postmaster General DeJoy in [Washington](#), [Pennsylvania](#), and the [District of Columbia](#). Civil rights organizations and individual petitioners filed similar lawsuits in the District of Columbia ([three related filings](#)), [Pennsylvania](#), and [Illinois](#). Several members of the New York legislature also joined individual voters in a [complaint](#) filed in U.S. District Court for the Southern District of New York. These lawsuits were all filed within a three-week period between the middle of August and the start of September. They sought to enjoin the postal service from eliminating overtime hours for workers processing the mail, decommissioning mail sorting machines that help speed the processing of mail, removing post office mail collection boxes, and declassifying election mail as first-class mail. The lawsuits alleged that the postal service's actions violated various federal statutory and constitutional provisions.

The central statutory claim involved the [Postal Reorganization Act](#) ("PRA"), which created the Postal Service's [Board of Governors](#) and the [Postal Regulatory Commission](#). Under [39 U.S.C. § 3661\(b\)](#), the Postal Service must request an advisory opinion from the Postal Regulatory Commission before making a "change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis." The complaints alleged that the postal service implemented these "[transformative](#)" changes in mail service on a nationwide basis without obtaining an advisory opinion from the Postal Regulatory Commission. The lawsuits sought to enjoin the postal service from implementing any changes that would have a nationwide effect on delivery service without first satisfying the necessary statutory and regulatory procedures.

The lawsuits also raised constitutional claims. The individual and civil rights plaintiffs alleged that the postal service's actions—which might have delayed the delivery of millions of mail ballots and resulted in their rejection—were an [unconstitutional infringement](#) on the right to vote in violation of the First and Fourteenth Amendments and the *Anderson-Burdick* test. Separately, the state attorneys general [alleged](#) that the postal service's actions "on the eve of the 2020 election—well after the [s]tates have established systems for voting using the Postal Service—to no longer support the manner chosen by the [s]tates" impermissibly interfered with the states' constitutional right to set the "Time, Places, and Manner of holding Elections for Senators and Representatives," under [Art. I, § 4](#) of the U.S. Constitution, and to appoint presidential electors "in such manner" as their legislatures direct, under [Art. II, § 1](#).

At least four different federal district courts sided with the individual and state plaintiffs. On September 17, Judge Stanley Bastian of the Eastern District of Washington [granted](#) a

nationwide injunction against the postal service’s operational changes. At the end of October, the court [ordered](#) the USPS to report an “all clear” status with respect to election mail on a daily basis between November 1 and November 10 and to “make every effort to deliver” any incoming ballots identified in the “all clear” process.

A few days later, on September 21, Judge Victor Marrero of the Southern District of New York also enjoined the postal service from instituting its operational changes. Among other things, Judge Marrero’s detailed [order](#) required the postal service to treat all election mail as First-Class or Priority Express mail, mandated the approval of requested overtime between October 26 and November 6, and required the postal service to draft a “guidance memorandum” for managerial staff on the proper handling of election mail.

The following week, on September 28, two more district courts issued injunctions. The U.S. District Court for the Eastern District of Pennsylvania enjoined the postal service’s operational changes in a ruling that [explicitly adopted](#) Judge Marrero’s order. The Pennsylvania order also forbade future implementation of the proposed operational changes until the postal service received an advisory opinion from the Postal Regulatory Commission. Judge Emmet Sullivan of the U.S. District Court for the District of Columbia [issued an injunction](#) on September 28. And, in early November, Judge Sullivan issued a further series of orders in the District of Columbia case with directives for the USPS regarding its handling of election-related mail. On November 1, Sullivan [instructed](#) the USPS to use express mail to expedite delivery of ballots. Two days later, on Election Day, Sullivan [ordered](#) the USPS to sweep its facilities to discover and mail out delayed ballots in Florida, Pennsylvania, Michigan, and Georgia, among other states. The next day, Sullivan entered a similar [order](#) requiring the USPS to conduct immediate sweeps of its Texas facilities.

Part III Conclusion

The widespread adoption of vote-by-mail spurred litigation designed to facilitate the return and delivery of mail ballots. Challenges to restrictions on third-party ballot collection and delivery gained little traction, as courts declined to find that such restrictions placed severe burdens on voters. Challenges to drop box restrictions and limits were mixed: Federal district courts in Texas, Ohio, and Pennsylvania were receptive to plaintiffs’ claims, but federal appellate courts ultimately stayed the injunctions issued in Texas and Ohio. Proponents of vote-by-mail were most successful in their USPS-related litigation, as numerous federal district courts enjoined the postal service’s operational changes and ordered USPS to conduct emergency sweeps of its facilities to mail out delayed ballots.

Part IV: Challenges to Mail Ballot Voter Verification Procedures

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Parts I-III of this report reviewed litigation over rules and requirements for obtaining an application to vote by mail, eligibility requirements to be approved for an absentee ballot, submission rules for marking and preparing mail ballots, receipt deadlines for returning mail ballots, and restrictions on who can help voters in the process. Part IV examines litigation challenging how election officials verified that a submitted mail ballot was cast by the intended voter and what processes they used for rejecting ballots that did not meet the verification requirements.

Every state has a process for verifying the identity of each voter who casts an absentee ballot. Election officials use these procedures to ensure that the person who submitted the ballot is, in fact, the duly registered voter who requested the ballot. The processes are designed to ensure against voter fraud in mail voting, as there is no poll worker standing by every absentee voter to verify the voter's identity. While there was [no evidence of widespread fraud](#) in mail voting in the United States, there were [isolated cases](#).

Almost all states required the voter to sign an official return ballot envelope or certificate to affirm that the person casting the vote was the intended voter, was eligible to vote absentee, had not already voted in the election, and that the voter information provided on the envelope or certificate was true and correct. Most states additionally verified the identity of mail voters in one of two ways: (i) by comparing the voter's signature on the ballot return envelope or certificate to the voter's signature on file with the election office to confirm they matched, or (ii) by having a witness or a notary public sign the ballot, return envelope, or certificate to attest that the ballot was completed by the intended voter. [Arkansas](#) additionally required that voters return a photocopy of identification with their absentee or mail ballot, and [Ohio and Minnesota](#) asked voters to write their driver's license number or the last four digits of their Social Security number on their return envelope or certification statement.

In some states, when election officials determined that a ballot failed to meet any of the signature or witness requirements, they simply did not count the vote, and the voter may never have known. In most states, however, and largely in response to litigation over the last several years, election officials notified voters of any ballot "defect" (e.g. a missing voter signature, a "mismatched" voter signature, or a missing witness signature) and provided them an opportunity to fix or "cure" the problem.

While the coronavirus pandemic significantly [increased demand](#) for mail balloting in the 2020 elections, the surge in mail voting also raised some concerns. Some voters in states with witness requirements for absentee balloting feared the health risks of complying with witness requirements, given the growing pandemic. From a policy perspective, some were concerned that a huge number of mail ballots would be rejected. According to a [study](#) by National Public Radio, 550,000 mail ballots were rejected nationwide in the 2020 primary elections, with signature mismatches and missing signatures among the most common reasons for rejection (late arrival was the other most common reason). This was substantially more ballot rejections than in the 2016 general election (318,728).

As a result, signature verification practices and witness requirements came under renewed scrutiny ahead of the November election. Voting rights advocates filed a flood of lawsuits, challenging state absentee voter verification practices and state policies governing the rejection of mail ballots for defects where voters are not first afforded an opportunity to cure the defects.

Initial data from the 2020 general election [suggested](#) that mail ballot rejection rates [did not spike](#). In most states that have [reported](#) rejection rates (as a share of total ballots cast), rates were actually [lower](#) than they were in 2016. A variety of factors likely contributed to the lower-than-feared rejection rates of absentee ballots, including revised and relaxed verification procedures (some of which resulted from litigation), expanded cure processes (some of which resulted from litigation), increased voter education which led more voters to mail in their ballots early, and, perhaps, the reluctance of state officials to discard mail ballots during a pandemic.

This section surveys the litigation challenging states' signature verification practices and witness requirements leading up to the 2020 general election. The success of such litigation was mixed. Many lawsuits resulted in consent decrees or voluntary dismissals after the state voluntarily adopted new voter verification policies likely to reduce the rejection rate of mail ballots. For those lawsuits that reached rulings on the merits, for federal constitutional law claims, outcomes generally turned on the court's views of (i) how severe a burden the ballot verification requirement imposed on voters, (ii) the strength of the state's argument that the ballot requirement was appropriate or necessary to deter voter fraud and protect the integrity of elections, and (iii) whether voting by mail is a state-created liberty interest subject to procedural due process protection under the *Mathews* test. Courts were mixed on the constitutionality of state laws that permitted rejection of mail ballots with no opportunity for the voter to cure.

Signature Verification Requirements

For the 2020 general election, at least 31 [states](#) required election officials to compare the signature on the ballot return envelope or certificate with the intended voter's signature on file, to see if they matched. For a detailed summary of the rules and processes used for signature verification, see the Stanford-MIT Healthy Elections Project report [Signature Verification and Witness Requirements for Mail Ballots in the 2020 Elections](#).

In recent elections, a significant number of absentee ballots have been rejected for signature-related defects. In the 2016 presidential election, about 91,000 ballots (about [.275% of all mail ballots cast](#)) were rejected for “mismatched signatures”—because election officials determined the signature on the ballot envelope did not match the signature(s) on file. About 66,000 ballots (about [.2% of all mail ballots cast](#)) were rejected because the voter's signature was missing. In the 2018 midterm elections, about [64,000 ballots](#) (about .2% of all mail ballots cast) were rejected for mismatched signatures, and almost [as many ballots](#) were rejected for missing the voter's signature. In aggregate, that means between .4% to .475% of ballots were rejected in 2016 and 2018 for voter signature issues. The rejection rates in the 2020 primaries were even higher, causing some to fear that massive numbers of absentee ballots might be rejected in the 2020 general election, particularly as the ballot rejection rates tend to be [higher](#) among first-time mail ballot users.

Given the anticipated [increase](#) in absentee voting because of the coronavirus pandemic, signature requirements for absentee ballots were a frequent subject of litigation. Challenges to signature verification laws were among the most voluminous claims brought during the 2020 elections.

Plaintiffs generally challenged two kinds of practices. First, they challenged the use of the signature verification process as a basis to reject ballots, particularly in states that lacked statewide standards and training. Second, and often in the alternative, plaintiffs requested that states adopt so-called “notice and cure” procedures that would require local election officials to notify voters and provide them with an opportunity to fix defective ballots before they are rejected.

The success of the pre-Election Day litigation was mixed. Lawsuits in several states resulted in new rules that made it less likely that election officials would reject ballots for signature mismatches and made it easier for voters to remedy signature defects on ballots, thus reducing the number of ballot rejections. Many lawsuits resulted in consent decrees or voluntary

dismissals after the state voluntarily adopted new voter verification policies likely to reduce the rejection rate of mail ballots.

For those lawsuits that reached rulings on the merits, some plaintiffs won, and others lost. For federal law claims, outcomes generally turned on the court's views of (i) how severe a burden the ballot verification requirement imposed on voters, (ii) the strength of the state's argument that the ballot requirement was appropriate or necessary to deter voter fraud and protect the integrity of elections, and (iii) whether voting by mail is a state-created liberty interest subject to procedural due process protection under the *Mathews* test. Courts were mixed on the constitutionality of state laws that permitted rejection of mail ballots with no opportunity for the voter to cure.

Lack of Uniform Standards and Training for Signature Verification

Lawsuits challenging signature verification processes, sometimes called “matching processes,” typically alleged that the state lacked uniform standards or criteria for deciding whether signatures on ballot envelopes matched signatures on record with election offices. Plaintiffs argued that officials responsible for comparing signatures lacked the necessary expertise and training to perform such comparisons and were, thus, prone to making errors. They claimed that these weaknesses violated the U.S. Constitution's guarantee of equal protection because the votes of different voters were subject to disparate treatment.

Several such cases in 2020 led to consent decrees or states voluntarily altering their policies. In Michigan, for example, the progressive advocacy organization [Priorities USA](#) [sued](#) the state in December 2019 (before the pandemic), alleging that Michigan lacked uniform statewide standards for reviewing and comparing signatures. That deficiency, the lawsuit said, allowed election officials throughout the state to employ arbitrary and divergent criteria in the matching process. The complaint also alleged that many officials engaging in the matching process did not have sufficient training and skills to compare signatures accurately. In April 2020, the Michigan secretary of state released new [signature verification guidance](#), and plaintiffs dropped the [suit](#). The new guidance, which was reissued on October 6, 2020, for the general election, did not eliminate the practice of signature verification altogether, but it implemented a statewide standard designed to reduce erroneous rejections. It stated:

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

the signature on file. Slight dissimilarities should be resolved in favor of the voter whenever possible.

This guidance was in effect for the 2020 general election but was invalidated by the Michigan court of claims after the election. On March 9, 2021, the court [ruled](#) that the October 6, 2020, guidance constituted a “rule” as defined by the state’s Administrative Procedures Act (APA) and that it was unlawfully issued without following the formal rule-making procedures required by the APA. Thus, the guidance is no longer in effect for future elections.

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

The Pennsylvania case did not end there, however. The Trump campaign challenged the secretary’s new guidance in federal court. The U.S. district court [dismissed](#) the lawsuit on October 10, 2020. In doing so, it stated: “A plain reading of the Election Code demonstrates that it does not impose a signature-comparison requirement for mail-in ballots and applications.” It further held that the *lack* of signature-comparison does not violate the due process or equal protection clauses of the U.S. Constitution. Finally, on October 23, in response to a petition filed by Secretary Boockvar, seeking declaratory relief, the Pennsylvania Supreme Court [unanimously held](#) that “county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.” The court explained that the state’s election code permitted use of signature matching to verify in-person voters and provisional ballots but not for absentee or mail-in ballots. The court clarified, however, that absentee ballots may be rejected for the voter’s failure to sign and date the “declaration envelope” altogether.

In Maine, voter advocacy groups filed a [state court case](#) alleging, among other things, that the state failed to provide any training on handwriting analysis or signature comparison and simply instructed election officials to determine whether the signatures “appear to have been made by the same person.” Plaintiffs argued that Maine’s guidance “forces its election officials to make subjective, arbitrary and standardless determinations as to whether to count a voter’s ballot” and that such judgments were error-prone. Moreover, plaintiffs alleged, these flawed processes

were used to reject votes with no notice to the voter, imposing an undue burden on the right to vote and in violation of procedural due process. The lawsuit also alleged disparate treatment of absentee voters in violation of the equal protection clause because the state undertook signature matching only for [some absentee voters](#)—those who requested an absentee ballot by mail, in-person, or by fax. It did not conduct signature matching for absentee voters who made their request for an absentee ballot online or over the telephone, where no signature was required from the voter as part of the request process, so no signature was on file. In response to the lawsuit, which alleged a host of state and U.S. constitutional violations, the state’s secretary of state instructed the state’s election officials to implement robust [notice and cure procedures](#).

In sum, election officials in Michigan, Pennsylvania, and Maine all adopted new policies regarding signature verification after lawsuits were filed challenging their state procedures and before any court ordered them to do so. The new policies in each case were designed to reduce the likelihood that absentee ballots cast by eligible voters would be rejected.

Lack of Notice and Opportunity to Cure

Most signature verification lawsuits in 2020 challenged the failure of election officials to notify voters and afford them an opportunity to cure a signature defect before officials tossed the ballots. Short of asking for the elimination of signature matching altogether, these claims sought injunctions to prohibit election officials from discarding any mail ballots for signature mismatch without first notifying the voter and allowing them an opportunity to fix the error. Partially due to litigation over the past several years, [more and more states](#) now require election officials to notify voters and afford them an opportunity to cure ballot signature defects prior to rejecting their ballots.

In 2020, plaintiffs sued in [14 states](#), seeking to prevent ballots from being rejected without the voter being notified and provided an opportunity to cure the error. At least 10 states—[Indiana](#), [Maine](#), [North Dakota](#), [Michigan](#), [New Jersey](#), [New York](#), [South Carolina](#), [North Carolina](#), [Mississippi](#), and [Louisiana](#)—created or enhanced their notice and cure policies in the 2020 general election in response to lawsuits, often through settlements or consent decrees. In the end, for the 2020 general election, at least [21 states](#) offered an opportunity to cure absentee ballots rejected due to voter signature defects, several in response to litigation.

Lawsuits seeking to require states to adopt notice and cure policies argued that the lack of notice and cure violates multiple constitutional provisions. The two most common claims were that rejecting ballots without notice and cure (i) creates a severe burden on the fundamental right to vote, in violation of the First and Fourteenth Amendments (see lawsuits in [Kentucky](#),

[Arizona](#), [Maine](#), [North Dakota](#), [New Jersey](#), [South Carolina](#)), and (ii) deprives voters of their liberty interest in voting, without procedural due process, in violation of the Fourteenth Amendment (see lawsuits in [Louisiana](#), [Maine](#), [North Dakota](#), [New Jersey](#), [South Carolina](#)). Additionally, some lawsuits alleged various state statutory and constitutional violations. A lawsuit in [North Carolina](#) alleged violation of the state constitution's Free Elections Clause and fundamental right to vote protections. And a lawsuit in [Maine](#) alleged violations of the state constitution's guarantees of due process and equal protection, as well as state laws governing qualifications of electors.

Some states voluntarily implemented notice and cure processes after litigation commenced. In New York, after plaintiffs filed a [lawsuit](#) in federal court, the parties reached a [settlement agreement](#) on September 17, 2020, specifying how voters would be contacted if their ballots were rejected and how they could fix the problem. In Louisiana, after plaintiffs [sought](#) a cure process in May, the legislature passed an emergency rule providing voters the opportunity to cure signature deficiencies in the June primary election, and plaintiffs withdrew the cure-related claims. The state legislature later [renewed](#) the emergency rule for the November general election. Similarly, after a [lawsuit](#) was filed in Mississippi, the state's secretary of state implemented [new rules](#) on October 7, 2020, providing for notice and cure. And in response to a [lawsuit](#) filed in Maine, which alleged a host of state and U.S. constitutional violations, the state's secretary of state instructed the state's election officials to implement robust [notice and cure procedures](#).

A case in New Jersey resulted in a consent decree. In *League of Women Voters of New Jersey v. Way*, the plaintiffs [challenged](#) New Jersey's signature verification process, which [required](#) the county clerk to reject a ballot if they determined the signature on the envelope did not match the one on file, without providing any notice or cure opportunity to the voter. Officials doing the comparisons received no training. Plaintiffs [sought](#) a right for voters to be notified and given an opportunity to cure signature defects on their ballots prior to rejection. They argued that the then-existing procedure violated the due process and equal protection clauses and created an impermissible burden on the fundamental right to vote, in violation of the First and Fourteenth Amendments.

For their procedural due process claim, plaintiffs contended that voters faced a high risk of being erroneously deprived of their right to vote, and they said the implementation of notice and cure procedures that could mitigate that risk would impose only a minimal burden on the state. For their equal protection claim, plaintiffs argued that the absence of statewide standards or training led to arbitrary differences in the way votes were analyzed. They noted that votes counted depending on which county the voter resided in and that no state interest was furthered by that process. Finally, for their *Anderson-Burdick* claim, plaintiffs argued that the

current process imposed a severe burden on the right to vote, as ballots could be entirely rejected. They argued that this burden was exacerbated by increased reliance on mail voting during the pandemic, and they argued that no sufficiently weighty interest could be offered by the state to justify this burden.

Following a [stipulation](#) agreement between the parties, the federal district court in New Jersey [granted](#) plaintiffs' request for a preliminary injunction for the July 7 primary—but only for the primary. Under the order, the secretary of state was required to direct those responsible for verifying ballots to issue cure letters to voters whose ballots were rejected, explaining how they could verify their identity and cure their ballot defect so the ballot would be counted. The state also agreed to conduct a public awareness campaign to educate voters about the signature requirements and the new cure process and to issue new signature analysis and matching guidance for all signature evaluators. The New Jersey legislature [passed a bill](#) in August to provide a [notice and cure](#) procedure for the November 3, 2020, general election.

In cases where courts reached decisions on the merits of claims that sought an opportunity for the voter to cure a ballot before it could be tossed out for signature reasons, results were mixed.

Several courts in 2020, as in prior years, were receptive to claims seeking notice and cure opportunities for voters prior to rejection of their ballots, particularly those who considered absentee voting to be a state-created liberty interest subject to procedural due process considerations. Such states included North Dakota, Indiana, and South Carolina.

This reasoning was especially compelling in cases where elections were held entirely by mail. In North Dakota, for example, which held an all-mail election for its June primary, a U.S. district court issued a [preliminary injunction](#) prohibiting the state from rejecting any ballot on the basis of signature mismatch “absent adequate notice and cure procedures.” In analyzing plaintiffs' procedural due process claim, the court wrote that it was “[b]eyond debate” that “the right to vote is a constitutionally protected liberty interest.” It reasoned that, “although ‘the right to apply for and vote via absentee ballot is not constitutionally on par with the fundamental right to vote,’ a state that creates a system for absentee voting ‘must administer it in accordance with the Constitution.’” It further reasoned that, “[b]ecause there is no possibility of a meaningful post-deprivation process when a voter’s ballot is rejected (there is no way to vote after an election is over, after all), sufficient pre-deprivation process is the constitutional imperative.” The court concluded the state’s lack of notice or opportunity to cure constituted no process at all and, in August, issued a [permanent injunction](#) prohibiting the rejection of any absentee ballot on the basis of signature mismatch without “adequate notice and cure procedures.”

Similar reasoning was applied by courts in states that did not conduct all-mail elections. In a case filed prior to the pandemic but resolved during the pandemic, a federal district court in Indiana granted a [permanent injunction](#) after finding that the state's rejection of ballots for mismatched signatures with no notice and cure violated two constitutional provisions. Citing numerous district court precedents, the court ruled that the policy violated the due process clause of the Fourteenth Amendment because, though the right to vote *by absentee ballot* is not a fundamental right, "having extended the privilege of mail-in absentee voting to certain voters, the State 'must afford appropriate due process protections to the use of [mail-in] absentee ballots.'" The court reasoned that, because the law does not require voters be "given notice or an opportunity to respond *at any point* either before or after their ballots are rejected, '[t]his all but ends the inquiry.'" The court also held, under the *Anderson-Burdick* balancing test, that Indiana's policy created an undue burden on the fundamental right to vote under the equal protection clause of the Fourteenth Amendment because, although only a narrow class of voters were affected by rejections, the magnitude of the burden on those voters was substantial.

A U.S. district court in [South Carolina](#) also [enjoined](#) the state and its affiliate county boards from disqualifying otherwise-valid absentee ballots on account of mismatched signatures unless affected voters were provided notice and a timely procedure to cure the ballot. The court found that rejecting ballots without notice and cure failed both the *Anderson-Burdick* test and the *Matthews* test.

Upholding Ballot Rejection Without Opportunity for Voter to Cure

Though lawsuits seeking a notice and cure procedure for signature defects were among the most successful mail voting claims brought by voting rights advocates in 2020, they did not succeed in all cases. The [Fifth Circuit](#) (in a case filed in Texas) and U.S. district courts in [Tennessee](#) and [Arkansas](#), for example, all upheld state policies of tossing out ballots where election officials determined that the signature on the ballot did not match that on file, without any requirement to provide a cure process for the voter. Plaintiffs in these cases brought claims that rejection of their absentee ballots based on perceived signature mismatch, without an opportunity to cure, violated both their procedural due process rights and their fundamental right to vote.

In [Richardson v. Texas Secretary of State](#), plaintiffs challenged a Texas state law that required election officials to notify voters within 10 days *after* the election that their ballot had been rejected but provided no option to cure or challenge the rejection. A U.S. district court in Texas [ordered](#) the state to either implement notice and cure procedures or refrain from comparing signatures altogether. In a 103-page [order](#) issued September 8, 2020, the court applied the

Mathews test to the procedural due process claim. It explained that, because “Texas has created a mail-in ballot regime . . . the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots.” Citing several U.S. district court precedents that applied the same reasoning, the court held that the state’s lack of any cure process violated procedural due process. The court indicated the result would be the same under the *Anderson-Burdick* balancing test.

In a rare circuit court decision on this issue, on October 19, 2020, the Fifth Circuit Court of Appeals [stayed](#) the district court’s injunction, pending appeal. The court strongly suggested that the right to vote, though fundamental, is not a liberty interest for purposes of due process. It [concluded](#) that the state was likely to succeed on its argument that the right to vote “does not implicate any state-created liberty interest under the Due Process Clause.” The court was even more skeptical that the right to vote *absentee* implicated a state-created liberty interest, stating that it would “stretch [] the concept too far to suggest that a person is deprived of liberty ‘when the Court has said that he has no right to the object of his alleged liberty interest.’” The court also concluded that, regardless of whether there was a liberty interest at stake, the *Anderson-Burdick* framework, and not the *Mathews* test, was the appropriate test for all challenges to “the voting process.” And under the *Anderson-Burdick* test, the court said, “Texas’s strong interest in safeguarding the integrity of its elections from voter fraud far outweighs any burden the state’s voting procedures place on the right to vote.” The unanimous three-judge decision bucked the general trend among district courts of applying the *Mathews* test to procedural due process challenges to laws that allowed election officials to reject ballots with no opportunity for the voter to cure.

A U.S. district court in Tennessee also concluded the right to vote does not constitute a liberty interest, in a case affirmed by the Sixth Circuit on other grounds. In [Memphis A. Phillip Randolph Institute v. Hargett](#), plaintiffs challenged a state law that required election officials to *notify* voters “immediately” of a ballot rejection due to signature mismatch, but did not provide the voter an opportunity to *cure* the ballot. Instead, notified voters could cast a provisional ballot or submit a new absentee ballot on or before Election Day. The court [rejected](#) plaintiffs’ claims that discarding absentee ballots based on a perceived signature mismatch, without an opportunity for the voter to cure the signature, violated voters’ right to procedural due process under the Fourteenth Amendment and their fundamental right to vote under the First and Fourteenth Amendments. Regarding the procedural due process claim, the court concluded: “The right to vote is fundamental, but it is not a ‘liberty’ interest for purposes of procedural due process....” Because no liberty interest was at stake, the court declined to apply the *Mathews* test to determine whether such interest was deprived without due process of law. Regarding the fundamental right to vote claim, the court applied the *Anderson-Burdick* balancing test but did not consider the burden of ballot rejections based on erroneous conclusions that signatures

did not match. The court characterized that concern as a recast of the procedural due process claim. Instead, it considered only the burden of the requirement to sign the ballot application and the ballot envelope and to subject each of those signatures to a matching comparison. With that framing, the court found that the state's signature verification law presented a burden that is "moderate at most" and balanced that burden against what it found to be the state's compelling interest in preserving the integrity of elections. The court concluded that the law does not impermissibly infringe on the right to vote.

In a two-to-one decision on October 15, 2020, a Sixth Circuit Court of Appeals panel [affirmed](#) the district court decision, but it did so on a basis different from that relied on by the district court. The Sixth Circuit affirmed on the grounds that plaintiffs—individuals and voting rights organizations—did not have either organizational or representative standing because they "failed to demonstrate that they [we]re facing an actual, concrete, particularized, and imminent injury." The court said plaintiffs' claims were based on speculation of what might happen in the election. Though it expressly noted that it "need not go further," the court went on to provide what it called "limited commentary to guide the district court" on the merits of the two claims—the procedural due process claim and the fundamental rights claim. The court explained that the Sixth Circuit had never answered the question "whether procedural due process claims are viable in voting rights cases outside the *Anderson-Burdick* framework." It declined to resolve the question of "whether *Anderson-Burdick*'s 'single standard' encompasses procedural due process claims" and said it wanted "to highlight the ongoing uncertainty in this circuit regarding the viability" of procedural due process claims in voting rights cases. The court cast doubt on the future of procedural due process claims in election cases in the Sixth Circuit; it implied the *Mathews* test is inapplicable to such claims and questioned the viability of such claims under the *Anderson-Burdick* framework. Judge Karen Nelson Moore issued a piercing [dissent](#), defending the rationale and need for two separate tests.

Timeline to Cure

Another category of notice and cure lawsuits focused on the timeline to cure errors. Cure deadlines [vary](#) by state. Most states with notice and cure procedures gave voters some specified number of days *after* Election Day to cure the mistake, ranging from just two days after Election Day (e.g. Florida) to up to 14 days after Election Day (e.g. Illinois). The cure deadline in California was two days before the state's certification of the vote. Some states required voters to cure ballot defects by the close of polls on Election Day. Election Day cure deadlines and deadlines close to Election Day meant some voters, particularly those who submitted their ballots on or just a few days before Election Day, were unlikely or less likely to receive notice of a defect in time to cure it.

In a few states that provide a notice and cure procedure, plaintiffs filed suit before the election seeking to extend the amount of time a voter had to cure their ballot. In Arizona, for example, the state already had a notice and cure procedure in place, but voters had only until Election Day to cure ballots with *missing* signatures. By contrast, voters had until five business days after Election Day to cure signature *mismatches*. In [*Arizona Democratic Party v. Hobbs*](#), plaintiffs sought an extension of the Election Day deadline for curing missing signatures. On September 10, a federal district court issued a [permanent injunction](#) giving voters who failed to sign their ballots until five business days *after* Election Day to fix the missing signature, the same amount of time voters had to fix mismatched signatures. The court [found](#) that the Election Day cure deadline, in the circumstances, failed the *Anderson-Burdick* test even under “the most deferential level of scrutiny” and constituted a procedural due process violation under the *Mathews* test.

But on October 6, the U.S. Court of Appeals for the Ninth Circuit put the district court’s order [on hold](#) while the state litigated its appeal. The Ninth Circuit panel concluded that the state was likely to win on appeal because the requirement that voters supply a missing signature by Election Day imposed only a “minimal” burden on the voter. The panel said “the public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour.” The court noted that the U.S. Supreme Court had repeatedly admonished lower federal courts not to change the rules of an election in the run-up to that election. As of the time of writing, the appellate court has yet to rule on the merits.

Similarly, plaintiffs in Ohio sought to enjoin the state’s policy of rejecting ballots for signature mismatch without giving voters what plaintiffs deemed to be adequate time to cure the ballot signature deficiency. Under the state policy, election officials notified voters by mail of the ballot defect, and voters could cure it by mail. Ballots were required to be corrected within seven days of Election Day (down from 10 days, under a new law). Plaintiffs sought a longer cure period or a requirement that boards of elections promptly contact voters by telephone and email in sufficient time to correct absentee ballots rejected on the basis of signature mismatch. Plaintiffs asserted that the cure period was “particularly burdensome in light of the serious delays in delivery time the U.S. Postal Service is currently experiencing,” slowing the multiple trips through the mail required for correcting a deficient absentee ballot by mail. A federal district court in Ohio [denied](#) plaintiffs’ motion on September 27, 2020. Applying the *Anderson-Burdick* test, the court found that Ohio’s signature-matching procedures place “some burden on the right to vote ” but that this burden must be considered in the context of “the alternative voting opportunities that Ohio provides.” The court further concluded that the state’s “substantial” interests in preventing fraud, promoting confidence in elections, and maintaining orderly election administration outweighed the “moderate burden” on the right to vote. The court applied similar reasoning to plaintiffs’ procedural due process claim, noting that

plaintiffs failed to demonstrate that the state's cure period and process deprived voters of their liberty interest in voting absentee and the state's interests were substantial.

In sum, although lawsuits seeking a notice and cure procedure for signature defects were among the most successful mail voting claims brought by voting rights advocates, plaintiffs did not win in all cases. For fundamental-right-to-vote claims, courts did not agree on the severity of the burden placed on a citizen's right to vote when their mail ballot was rejected for signature defects without a notice and cure process. And courts did not agree on the weight of the state interest served by not having a notice and cure procedure in place. Courts also disagreed on how to analyze procedural due process claims regarding election laws and on whether voting absentee, and even voting at all, constituted a state-created liberty interest subject to procedural due process protections under *Mathews v. Eldridge*. They also disagreed on whether to use the *Mathews* test or *Anderson-Burdick* test for procedural due process challenges to election schemes that rejected ballots without notice and cure. Several district courts, including the [Western District of Texas](#) (in *Richardson*), concluded or just assumed that rejection of mail ballots for signature mismatch without an opportunity for the voter to cure implicated a cognizable state-created liberty interest and applied [the *Mathews* test](#). In contrast, the Fifth Circuit and Sixth Circuit appeared to assume that there was not a liberty interest (though the Sixth Circuit [declined](#) to take a clear position).³ And, in *Richardson*, the Fifth Circuit rejected *Mathews* in favor of applying the more flexible *Anderson-Burdick* test.

Witness or Notary Requirements

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

The specifics of these witness requirements [varied](#) by state. Most states required the ballot to be signed by a single witness or a notary. Alabama required the signature of [two witnesses or a notary](#). [Oklahoma](#) and [Missouri](#) required the ballot to be notarized but provided alternatives for voters incapacitated or confined due to illness or disability. [Minnesota](#) required a witness or a notary but stipulated that the witness must be a registered voter in the state—a requirement that made absentee voting difficult for a voter who was living temporarily in another state. A

³ Similarly, on October 2, 2020, in *New Georgia Project v. Raffensperger*, the Eleventh Circuit rejected the application of the *Mathews* test to a state law that set the receipt deadline for absentee ballots to be Election Day, claiming that to treat this law as a cognizable liberty interest “would stretch concepts of due process to their breaking point.”

few states took legislative action to relax these requirements during the pandemic. North Carolina, for example, [reduced](#) its requirement from two witness signatures to one for the 2020 elections.

Witness requirements can be particularly [confusing](#) to voters and witnesses, as they often include multiple components—the witness’ signature, printed name, address, and date of signature—each in a specific location on the back of either the ballot’s return envelope or the inner “secrecy sleeve” (an envelope that goes inside of the outer return envelope), or on the back of the ballot or on a separate certificate document. In North Carolina, in the 2016 general election, [2,700 absentee ballots](#), or 55% of all rejected absentee ballots, were rejected due to witness errors.

Election season lawsuits in 2020 challenged witness or notary requirements in every state that had them. Plaintiffs generally asked courts to either suspend the requirement during the pandemic or at least require a notice and cure procedure that would enable voters to fix witness and notary-related mistakes. Plaintiffs brought a host of federal and state constitutional and statutory claims. Several states approved consent decrees in response to the lawsuits, and some of those consent agreements were challenged by intervenors. In cases where courts ruled on the merits of the witness requirements, the results were mixed, with state law generally proving a more fruitful avenue for plaintiffs than federal law.

Legal Claims

The most common federal claim alleged that requiring the absentee voter to obtain a witness or notary placed an unconstitutional burden on plaintiffs’ fundamental right to vote, in violation of the First and Fourteenth Amendments to the U.S. Constitution (see lawsuits in [Alabama](#), [Louisiana](#), [Minnesota](#), [Kentucky](#), [Oklahoma](#), [South Carolina](#)). For these claims, plaintiffs argued that the witness requirements, as applied during the coronavirus pandemic, failed the *Anderson-Burdick* test because they left voters, particularly immuno-compromised voters, with an untenable choice between their health and their vote.

Plaintiffs also alleged that the witness or notary requirements violated the equal protection clause of the U.S. Constitution (see lawsuits in [South Carolina](#), [Alabama](#)) and Section 2 of the Voting Rights Act (see lawsuits in [Louisiana](#), [South Carolina](#), [Virginia](#)) because they had a disproportionately adverse impact on Black voters. Plaintiffs also argued that witness requirements constituted an impermissible “test or device” in violation of Sections 3(b) and 201 of the Voting Right Act (VRA) (see lawsuits in [Alabama](#), [South Carolina](#)) and that witness requirements, as applied to voters with disabilities who feared exposure to the coronavirus, violated Title II of the Americans with Disabilities Act (ADA) (see lawsuit in [Alabama](#)).

Plaintiffs additionally challenged witness or notary requirements under various state constitutional and statutory grounds, including under the state constitutions of [Alaska](#), [Minnesota](#), [Missouri](#), and [North Carolina](#), and under [Oklahoma state law](#).

Consent Decrees and Settlements

Several states voluntarily relaxed or waived witness or notary requirements in the face of legal challenges during the coronavirus pandemic. [Missouri](#), for example, in response to a [lawsuit](#), relaxed its requirement that absentee ballots be notarized. Under its new rules, voters who chose to vote absentee because they were at a heightened risk of complications from COVID-19 were not required to have their mail ballot notarized.

Some of the states that voluntarily relaxed or waived their witness requirements in the face of litigation faced new legal challenges to those changes. In Virginia, Rhode Island, and Minnesota, for example, Republican Party groups sought, unsuccessfully, to stop these changes. In Virginia, despite opposition from the state Republican Party, a federal district court approved a [consent decree](#) that waived the state's witness requirement for the November general election. In Rhode Island, a U.S. district court also approved a [consent decree](#) that waived the state's witness requirement during the pandemic, and the Republican National Committee (RNC) [appealed](#) to the First Circuit U.S. Court of Appeals seeking a stay of the district court order. The First Circuit allowed the RNC to intervene but [upheld](#) the district court order finding that, under the *Anderson-Burdick* test, plaintiffs were likely to succeed on the merits. The RNC then filed a stay petition with the U.S. Supreme Court, which [denied the petition](#) on the grounds that the RNC did not have standing. The Supreme Court's order noted that, unlike in some other cases, here "the state election officials support the challenged decree, and no state official has expressed opposition."

In Minnesota, the Trump campaign and RNC [sought to intervene](#) in three different lawsuits in which a state official approved a consent decree relaxing the state's witness requirement. The intervenors cited concern about voter fraud and alleged collusion between plaintiffs and the Minnesota secretary of state, a Democrat. A state judge [approved the consent decrees](#) in two of the lawsuits, while a federal judge [denied the consent decree](#) in the third. The Republican intervenors appealed the consent decree approved in the state court cases but subsequently [dismissed](#) their appeals, and the consent decrees stood.

In North Carolina, Republican opposition to a settlement relaxing the state witness requirement was more successful. After the North Carolina State Board of Elections (NCSBE) [settled a suit](#) brought in state court by North Carolina Alliance for Retired Americans, the State Board issued

[new guidance](#) in September to make both witness and signature defects [broadly curable](#) via affidavit. The Trump campaign and North Carolina General Assembly leaders [objected](#) to the settlement and new guidance. After a dizzying array of inter-related state and federal lawsuits and, *after early voting had already started and many absentee ballots had already been submitted*, a federal court issued an [injunction](#) on October 14 that split the baby. It [required state officials](#) to reject ballots that lacked a witness signature altogether but to provide a standard notice and cure process for other ballot defects, such as an incomplete witness address, a witness or voter signature on the wrong line, or a missing voter signature. The decision was appealed (primarily on other issues in the case) but [left in place](#) by an en banc ruling of the Fourth Circuit U.S. Court of Appeals, and an October 28 [decision](#) of the U.S. Supreme Court to deny injunctive relief.

Federal Law Challenges to Witness Requirements

While some states agreed to consent decrees, other states fiercely defended their absentee ballot witness or notary requirements. In federal courts, plaintiffs who challenged these requirements saw some success on the merits at the district court level, but largely lost on appeal. Cases in Alabama, Wisconsin, and South Carolina illustrate the point.

In Alabama, in the face of extensive litigation before the state's July primary runoff, state officials defended the state's requirement that absentee ballots be submitted with the signature of *two* witnesses or a notary. In [People First of Alabama v. Merrill](#), a U.S. district court judge issued a preliminary injunction that barred the state from enforcing its witness requirement in the July 14 runoff, but *only* for voters who provided a written statement outlining a medical condition that placed the voter at a severe risk if the voter were to contract COVID-19. The state appealed the narrow exception all the way to the U.S. Supreme Court, which [stayed](#) the preliminary injunction on July 2, reinstating the witness requirement just 12 days before the state's primary. With an eye to November, the plaintiffs continued to litigate at the district court and won a permanent injunction against the witness requirement for the general election. But on October 13, the Eleventh Circuit [stayed](#) the district court's permanent injunction, effectively reinstating the witness requirement. Despite all the litigation, the state's requirement of two witnesses or a notary remained intact for the general election, with no exception for immuno-compromised voters.

Similarly, in [DNC v. Bostelmann](#), a federal district court [suspended](#) Wisconsin's witness requirement during the pandemic. But the Seventh Circuit U.S. Court of Appeals [overturned](#) the decision, concluding that the district court "did not give adequate consideration to the state's interests." It cited precedent that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government."

A notable and high profile example of the legal whiplash of witness or notary litigation during the 2020 election season was [Middleton v. Andino](#) in South Carolina. In May, a federal district court in South Carolina issued a [preliminary injunction](#), suspending the witness requirement for the June primary due to pandemic-related concerns. The litigation continued in two separate lawsuits seeking to extend the injunction to November. In September, a federal district court [enjoined](#) the witness requirement for the November election as well. On appeal, a Fourth Circuit panel [stayed](#) the injunction (thus restoring the witness requirement), but one week later, the Fourth Circuit, [ruling en banc](#), reversed and reinstated the injunction (thus suspending the witness requirement). Finally, on October 5, *after absentee voting had already started*, the U.S. Supreme Court [reversed](#) the Fourth Circuit's en banc injunction (thus reinstating the witness requirement). The Supreme Court exempted ballots already received by the state and any ballots received within two days of the order (as these ballots were presumably submitted in reliance on Fourth Circuit ruling that no witness was required). Justice Brett Kavanaugh, in concurrence, offered two reasons for his vote with the majority. First, he explained, the state's legislature "should not be subject to second guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." And second, he said, under the *Purcell* principle, the district court should not have made procedural changes so close to the election. (The district court issued its preliminary injunction in May, which was in effect for the state primary, and its permanent injunction on September 18, 2020.)

Although most federal court claims were constitutional claims, plaintiffs also brought federal statutory claims under the Americans with Disabilities Act (ADA) and the Voting Rights Act. In [People First of Alabama v. Merrill](#), a U.S. district court addressed the issue of whether, in the context of the pandemic, Alabama's requirement of two witnesses or a notary violated the ADA by discriminating against individuals who were particularly vulnerable to developing serious complications with COVID-19. The court [found](#) that the requirement did not violate the ADA "[b]ecause the witness requirement is deemed a condition precedent to eligibility under state law, and essential eligibility requirements are not subject to reasonable modifications." In [Thomas v. Andino](#), another court rejected a claim that South Carolina's witness requirement is a "test or device" prohibited under the Voting Rights Act. The court [construed](#) the witness requirement as necessary to establish the voter's identity, not a qualification to vote and, therefore, not the kind of test or device that Section 201 was enacted to prohibit (such as literacy tests).

State Law Challenges to Witness Requirements

Plaintiffs had some success challenging witness requirements under state law. Plaintiffs prevailed in Alaska. On October 12, the Alaska State Supreme Court upheld a preliminary

injunction, [waiving](#) the state's witness requirement for the general election and affirming a lower court's [conclusion](#) that plaintiffs were likely to succeed on the merits. Applying a state law balancing test similar to *Anderson-Burdick*, the court reasoned that the witness requirement, as applied during the pandemic, impermissibly burdened the right to vote in violation of Article 1, Section 5 of the Alaska Constitution. Having to choose between voting and protecting one's health, the court said, placed a severe burden on the right to vote.

In Oklahoma, the state supreme court [struck down the notarization requirement](#) for absentee ballots on the grounds that it contravened a state law (12 O.S. §426) that required the state to accept, for state government purposes generally, personally signed statements made under penalty of perjury. The state legislature amended that state law two days later, to reverse the Oklahoma Supreme Court and reinstate the notarization requirement; but, the new law made an exception for the June 30, 2020, primary and any other election within 45 days of a state-declared emergency. During that primary and such emergencies, voters would be permitted to sign and submit a statement under penalty of perjury and send in a photocopy of an approved identification as an alternative to notarization. Plaintiffs in a [new lawsuit](#) challenged this new requirement in federal district court on U.S. constitutional grounds, but the court [denied the relief](#). The court noted that fraud is an "exceeding rarity in Oklahoma history" and, nonetheless, ruled that the state's interests in preventing voter fraud were "legitimate and weighty."

As noted above, lawsuits that brought state constitutional claims in [Missouri](#), [Minnesota](#), and [North Carolina](#) all resulted in consent decrees that relaxed or eliminated the witness or notary requirements.

Part IV Conclusion

There was a large volume of litigation in 2020 regarding how states verified the identity of voters who cast mail ballots. Lawsuits challenging states' signature verification practices were among the most successful. Several states voluntarily altered their signature verification policies after being sued. Some issued new signature matching guidelines that were likely to result in fewer erroneous ballot rejections (e.g. Michigan, New Jersey). Others decided not to reject ballots for signature mismatches at all (e.g. Pennsylvania). Several voluntarily implemented procedures to provide voters an opportunity to cure signature defects to avoid having their ballots rejected (e.g. Maine, New York, Louisiana, Mississippi). Court rulings on the merits of legal challenges in cases seeking implementation of notice and cure procedures for signature defects were mixed. Voting rights advocates succeeded in several district courts (e.g. South Carolina, North Carolina, Indiana). But they lost in the Fifth Circuit and a district court in

Tennessee, and the Sixth Circuit indicated it would likely reject such claims. Courts did not agree on the outcome of the *Anderson-Burdick* balancing test as applied to laws that rejected mail ballots for signature mismatch without an opportunity to cure. Nor did they agree on the question of whether voting absentee, or even voting at all, constituted a state-created liberty interest subject to procedural due process protections under *Mathews v. Eldridge* analysis.

Plaintiffs who challenged witness or notary requirements for absentee ballots won favorable concessions and consent decrees in several states (e.g. Missouri, Virginia, Rhode Island, and Minnesota). They also prevailed in a couple of states where they brought state law claims (e.g. Alaska and Oklahoma). For federal law claims decided on the merits, however, though plaintiffs saw some success at the district court level, they generally saw their claims fail on appeal (e.g. Alabama, Wisconsin and South Carolina).

In the end, [predictions](#) that the increased use of mail ballots in November 2020 could result in a higher *percentage* of ballots being rejected were not borne out. The [early data](#) indicates that, despite the dramatic increase in first-time mail voters, election officials [rejected a lower percentage of mail-in ballots](#) in November 2020 than in previous years.⁴ Of the [23 states that have reported](#) so far, 20 states reported lower rates of absentee ballot rejections in November 2020 compared with November 2016. Nonetheless, because mail voting as a percentage of overall voting [increased substantially](#) in November 2020, [several states](#) saw an increase in the absolute *number* of ballots rejected as compared with prior years, even though the *percentage* of rejections declined.

In the aftermath of the 2020 general election, legislators in many states began [seeking to shore up their voter verification laws](#). Proposed legislation in Pennsylvania and South Carolina—states where courts enjoined, respectively, the use of signature matching as the basis of rejecting a ballot and the practice of rejecting a ballot for signature mismatch with no opportunity to cure—seeks to bring back the enjoined practices. Bills in several states seek to make it harder to satisfy witness requirements. A bill in Arizona seeks to require that all mail ballots be notarized. A bill in South Carolina would require witnesses to include their driver's license or state voter registration number. And two Virginia bills would require witnesses to print their names and provide their residential address. Just as voters are learning the details of how to vote by mail, proposed legislation in states around the country would make it harder to complete an absentee ballot.

⁴ As of the time of writing, the 2020 general election data from the Election Administration and Voting Survey (EAVS), which includes granular data on the numbers of and reasons for mail ballot rejections, are not yet available.

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

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The potential disruption of in-person voting because of the coronavirus pandemic prompted [varied reactions](#) from state governments during the 2020 election. Some states, such as California, Nevada, New Jersey, and Vermont, announced plans to send mail-in ballots to all registered voters. Other states, such as [Connecticut](#), expanded the list of acceptable excuses for absentee voting to include fear of contracting COVID-19. But not everyone supported the expansion of mail voting, even as a temporary response to the pandemic. In several states, such as Texas and Alabama, state legislatures declined to expand or facilitate access to mail voting. Just as some plaintiffs sought to expand opportunities for absentee voting, others sought to restrict it.

This Part—the last in a five-part report on mail voting litigation—discusses the legal challenges filed prior to Election Day that were aimed at *stopping* the expansion or facilitation of mail voting during the 2020 elections.⁵ These included challenges to state statutes, regulations, and policies that authorized the automatic delivery of ballots or ballot applications to all registered voters, relaxed restrictions on third-party collection of ballots, expanded options for the return of mail ballots, and suspended requirements for witnesses. Overall, opponents of the expanded availability of absentee voting generally failed to win court orders to bar such expansion.

Mail-voting opponents made three central arguments against laws and policies that expanded or facilitated mail voting.

First, opponents claimed that expanded mail voting would lead to fraudulent votes, thereby diluting the value of legal votes, in violation of the First and Fourteenth Amendments. State and federal courts across the country uniformly rejected this argument, noting the paucity of evidence that mail ballots were particularly susceptible to widespread [fraud](#). Unless evidence of widespread malfeasance emerges, which it did not in the 2020 general election, this argument appeared unlikely to win over courts in later election cycles.

Second, mail-voting opponents argued that state election officials, such as governors, secretaries of state, and county election officials, lacked the legal authority to implement measures that conflict with state statutes that govern mail voting. The results in these cases

⁵ For a discussion of the post-Election Day lawsuits, see the Stanford-MIT Healthy Elections Project's [Post-Election Litigation Analysis & Summaries](#).

were mixed, because the cases were fact-specific and depended on the measure challenged, the authority of the state official in question, and the state law.

Third, mail-voting opponents argued that state courts lacked authority to invalidate state election statutes on the grounds that they violate state constitutions. Although lower federal courts tended to reject this argument, conservative justices of the U.S. Supreme Court indicated openness to such challenges in the future. Thus, recent litigation against the expansion of mail voting may have laid the groundwork for a more enduring overhaul of voting rights jurisprudence in future elections.

Fraud and Vote Dilution

Plaintiffs in nine states—[Pennsylvania](#), [Nevada](#), [Virginia](#), [New Jersey](#), [Illinois](#), [Montana](#), [Hawaii](#), [Vermont](#), and [Texas](#)—challenged state and county regulations that expanded access to mail ballots, arguing that mail voting would increase the incidence of voter fraud. Six of those cases reached decisions on the merits. The plaintiffs in Virginia [voluntarily](#) withdrew their case, and federal judges in Nevada and Vermont dismissed the lawsuits on [standing grounds](#), finding that the plaintiffs had not alleged a particularized injury, because any potential vote dilution would affect *all* voters, not just the plaintiffs in the lawsuits. In Nevada, although the federal case was dismissed, a [similar case](#) remained in state court.

The pre-general election lawsuits challenging state expansions of mail voting on the grounds of vote dilution followed a consistent formula. The plaintiffs asserted that mail ballots were inherently prone to fraud and that the states had failed to establish basic minimum safeguards to ensure ballot reliability. The complaints often included anecdotal references to individual instances of voter fraud at the state or local level, using examples from within and outside the state where the suit was filed. The complaints then alleged that the law or policy challenged would result in a spike in fraudulent mail ballots that would dilute validly cast votes, thereby depriving legitimate voters of their right to vote under the First and Fourteenth Amendments.

The Pennsylvania lawsuit [Trump for President v. Boockvar](#) is a prominent example of this pattern of legal argument. In this federal court case, filed in June, the Trump campaign challenged the state's recently passed mail voting law, Act 77, which [adopted](#) no-excuse mail-in voting for any registered voter. The complaint [alleged](#) that mail voting “is the single greatest threat to free and fair elections.” It quoted from a 2005 [report](#) prepared by the Commission on Federal Election Reform, which was co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, that noted, “[a]bsentee ballots remain the largest source of potential voter fraud.” The complaint also alleged that Pennsylvania has a history of fraudulent elections and

that mail ballots would create administrative difficulties and encourage hard-to-detect ballot harvesting.

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

Federal courts roundly rejected the challenges to the expansion of mail voting that were based on vote dilution from potential fraud. In the Pennsylvania case, *Trump v. Boockvar*, the court [granted](#) summary judgment for Pennsylvania on the grounds that the plaintiffs lacked standing because they failed to allege a concrete injury. In a 137-page opinion that touched on multiple aspects of state and federal law, the court held that the Trump campaign's voter fraud claims were speculative and were "at most ... a sequence of uncertain assumptions." The court also rejected the Trump campaign's claims that disparate placement of drop boxes in Pennsylvania counties would lead to vote dilution. The court concluded that disparate drop box placement was not an equal protection violation because "the result of . . . uneven implementation [of drop boxes] will not be votes in certain counties being valued less than others . . . [or]. . . voters who vote in person [having] their votes valued less Instead, if Plaintiffs are right, any unlawful votes will dilute all other lawful votes in the same way."

Judges in Montana, Illinois, and New Jersey took a similarly skeptical view. In Illinois, a federal judge [held](#) that the plaintiff's allegations of voter fraud relied "primarily on unsupported speculation and secondarily on isolated instances of voter fraud in other states and historical examples from Illinois...." In New Jersey, a judge [concluded](#) that the Trump campaign had "faile[ed] to connect...past instances of voter fraud with the relief that they [sought]." And in Montana, a judge tersely [described](#) the allegations of widespread voter fraud in Montana as "fiction."

State courts were equally skeptical. In a Nevada district court for Clark County, which includes Las Vegas, the Elections Integrity Project challenged a statute ([AB 4](#)) that authorized state officials to send mail ballots to every registered voter in the state and permitted third-party

ballot collection. In an [order](#) denying a preliminary injunction, a Nevada state court concluded that the plaintiffs' allegations of voter fraud were speculative and lacked "any concrete evidence." On October 7, the Nevada Supreme Court [upheld](#) the decision on the same rationale.

Lack of Legal Authority of State Executives

Several challenges to measures that expanded mail voting in 2020 argued that state officials lacked the legal authority to adopt or implement such measures. There was considerable overlap between this category of lawsuits and lawsuits that focused on alleged voter fraud. Several of the alleged potential fraud cases discussed above—such as those in [Montana](#) and [Texas](#), for example—also argued that state officials expanded mail voting without the statutory authority to do so. The outcome of these cases was fact-specific and depended on the election measure challenged, the scope of authority of the state official who implemented it, and state law.

Some cases made executive overreach the centerpiece of their argument. In Montana, for example, the Trump campaign argued that Governor Steve Bullock issued his executive order in "direct usurpation of the legislature's authority." The court rejected that claim, [holding](#) that Governor Bullock had the authority to suspend the state's mail voting statute.

In Michigan, plaintiffs filed a state court lawsuit challenging Secretary of State Jocelyn Benson's decision to send mail ballot applications to all registered voters. The [complaint](#) alleged that the secretary of state had no authority under state law to mail out the applications. After [denying](#) the plaintiffs' motion for a preliminary injunction, the state trial court [granted summary judgment](#) for the secretary of state. The court concluded that Michigan law gave the secretary "clear and broad authority to provide advice and direction with respect to the conduct of elections and registrations." This included the authority to mail unsolicited absentee ballot applications, the court concluded, because the applications informed voters about their "self-executing right" under the Michigan constitution to cast an absentee ballot. A Michigan appellate court later [upheld](#) the ruling.

Other cases challenged the authority of local election officials. In Texas, on August 25, Chris Hollins, the clerk of Harris County, [announced](#) that his office would send mail voting applications to the more than two million registered voters in the county. Texas Attorney General Ken Paxton, on behalf of the state, [sought](#) an injunction in state court to stop the action. He argued that a county clerk "lacks the authority to send vote-by-mail applications to every registered voter in Harris County" and that the practice risked leading ineligible voters to

cast fraudulent mail ballots. The district court [declined](#) to issue the injunction, and an intermediate appellate court [affirmed](#) the lower court decision. The appellate court noted that the claims of potential fraud were “speculative” and that the attorney general had not proven that voters would intentionally violate Texas law by fraudulently applying for mail ballots. The Texas Supreme Court eventually [struck down](#) the decision, however, holding that the Texas Elections Code did not authorize county clerks to send unsolicited mail ballot applications, especially to voters who were ineligible to vote-by-mail in the first place because they lacked one of the enumerated excuses required by state law.

Local officials in other states also saw little success in bucking state-level guidance. An Arizona state court [ruled](#) that Adrian Fontes, the clerk of Maricopa County, did not have the authority to instruct absentee voters to cross out any erroneous selection they marked on their ballots, rather than request a new ballot. The Arizona Supreme Court eventually [affirmed](#). In Iowa, the state supreme court [ruled](#) that election officials in three Iowa counties did not have the authority to mail absentee ballot applications with pre-filled voter information, because the Iowa secretary of state had ordered counties to send only blank applications.

Lack of Legal Authority of State Courts

The most significant case on lack of authority relates to the ability of state courts to expand mail voting access to protect rights guaranteed by a state’s constitution—in this case, Pennsylvania’s constitution. (This case is also discussed in the “Ballot Receipt Deadlines” section in Part II.) Under the Pennsylvania Statutes, completed mail ballots [must](#) be received by election officials no later than 8 p.m. on Election Day in order to be counted. In mid-September, the Pennsylvania Supreme Court [ruled](#) that enforcing the Election Day deadline during the coronavirus pandemic would violate the Pennsylvania constitution’s [Free and Equal Elections Clause](#). That clause requires elections to be “free and equal” and bars any “civil or military” power from “interfer[ing] to prevent the free exercise of the right of suffrage.” The majority on the state’s highest court concluded that the pandemic was functionally a “natural disaster” that threatened equal access to the right to vote, in violation of the state constitution. As a remedy, the court ordered state officials to count ballots that arrive within three days of Election Day, “unless a preponderance of the evidence demonstrates that [the ballot] was mailed after Election Day.”

On September 28, in *Republican Party of Pennsylvania v. Boockvar*, the Trump campaign filed an [application](#) with the U.S. Supreme Court, seeking an emergency stay against the Pennsylvania Supreme Court order to extend the deadline. Among other things, the filing argued that the Pennsylvania Supreme Court’s decision violated the [Elections Clause](#) of Article I of the U.S.

Constitution, which states that the “Times, Places, and Manner” of elections to federal office “shall be prescribed in each State by the Legislature thereof” By extending the deadline, the petitioners argued, the Pennsylvania Supreme Court was supplanting the state legislature’s authority to determine the “Times, Places, and Manner” of the election.

On October 19, the U.S. Supreme Court issued its order [denying](#) the emergency stay application. With one seat vacant on the high court, due to the death of Justice Ruth Bader Ginsburg, the court’s 4-4 tie on the issue left the Pennsylvania Supreme Court decision intact.

Because tied Supreme Court rulings have no precedential value, the Pennsylvania petitioners’ Elections Clause argument remains unresolved by the U.S. Supreme Court. If adopted in the future, it would effectively invalidate state court rulings that state election statutes violate state constitutions. A literal and narrow interpretation of the word “legislature” in the Elections Clause could invalidate efforts by state courts to protect voting rights guaranteed by state constitutions by, for example, extending absentee ballot deadlines or augmenting ballot delivery options. Three conservative justices adopted a similar argument as an [alternative](#) means of resolving *Bush v. Gore* in 2000. There, the concurring justices argued that “to attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate [the Court’s] responsibility to enforce the explicit requirements of [the Electors Clause].”

It is worth noting that the U.S. Supreme Court has already endorsed a more expansive reading of the Elections Clause than the one advanced by the Pennsylvania petitioners in *Republican Party of Pennsylvania v. Boockvar*. In 2015, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, a 5-4 majority [concluded](#) that the word “legislature” in the Electors Clause of Article I of the U.S. Constitution means the “lawmaking power” of a state. Writing for the majority, Justice Ginsburg rejected a narrow interpretation of the word “legislature” that encompassed “the legislative body alone.” Instead, she said, a state’s “legislature” can include the citizen initiative process and executive vetoes. Her opinion did not explicitly address whether state court decisions grounded in state constitutional law are also part of a state’s “lawmaking power.”

The fact that four justices would have stayed the Pennsylvania Supreme Court decision suggests that a more conservative U.S. Supreme Court might, in the future, adopt the petitioners’ argument. The Court [refused](#) to expedite its consideration of the petition and then denied certiorari on February 22, 2021. With the confirmation of Justice Ginsburg’s replacement, Justice Amy Coney Barrett, the possibility exists that this issue could be raised again and substantively resolved by a majority of the Court. Thus, *Boockvar* foreshadows the potential of a

significant development for election jurisprudence.

Part V Conclusion

On balance, litigation opposing state measures to expand mail voting before the primary and general elections of 2020 favored state officials who sought to meet the surge in demand caused by the coronavirus pandemic. Challenges based on vote dilution and the potential for widespread fraud generally failed on the merits, with judges ruling that the alleged voter fraud claims were too speculative to warrant relief or that plaintiffs lacked standing because they failed to identify injuries that were sufficiently particularized or concrete. Challenges based on claims that state officials acted outside of their authority were mixed, depending on the particular facts and circumstances of each case. However, the U.S. Supreme Court's 4-4 split in *Republican Party of Pennsylvania v. Boockvar* raised the prospect of a potential new interpretation of the Elections Clause of Article I of the U.S. Constitution. If adopted, it would restrict the ability of state courts to strike down state election laws that violate state constitutions and impede the ability of state election officials to adapt state election laws to address a public health crisis.

Conclusion

This report surveyed the vast array of lawsuits relating to all aspects of mail voting in 2020, the year of the coronavirus pandemic. Part I explored challenges to absentee ballot application procedures and eligibility requirements, based largely on healthy concerns about the possibility of becoming infected with the coronavirus while voting in-person. These challenges were almost universally rejected. Courts chose instead to defer to legislative or executive decisions, in some cases resulting in the invalidation of tens of thousands of absentee ballot applications.

Part II investigated challenges to ballot submission procedures. Plaintiffs had little success challenging ballot postage requirements or secrecy sleeve requirements and had mixed success in their accessibility challenges and requests for Election Day receipt deadline extensions.

Part III analyzed lawsuits that sought to expand options for returning absentee ballots. Challenges to laws restricting assistance to absentee voters had limited success; challenges to restrictions on the availability of ballot drop boxes had mixed results; and, challenges to operational changes in the U.S. Postal Service were more successful, with numerous federal district courts enjoining the postal service's operational changes and ordering the USPS to conduct emergency sweeps of its facilities to mail out delayed ballots.

Part IV looked at challenges to voter verification requirements for absentee ballots, such as signature verification and witness requirements. Lawsuits challenging these requirements resulted in substantial changes. Many such lawsuits led to consent decrees or voluntary dismissals, after states voluntarily adopted new voter verification policies likely to reduce the rejection rate of mail ballots. Some states issued new signature matching guidelines, and others decided not to reject ballots for signature mismatches at all or not to reject them without providing voters an opportunity to cure signature or witness-related defects to avoid having their ballots rejected.

Lastly, Part V explored lawsuits brought by claimants seeking to narrow the ability of voters to vote by mail. These lawsuits argued that expanded mail voting would lead to fraudulent votes, that state election officials lacked the legal authority to implement measures that conflict with state statutes, and/or that state courts lacked authority to invalidate state election statutes on the grounds that they violate state constitutions. The claims that alleged voter fraud or challenged the legal authority of the executive branch made very limited headway, while the charges leveled against state courts were mixed.

Across all domains of mail voting litigation, plaintiffs brought state and federal, statutory and constitutional claims. Courts often applied the *Anderson-Burdick* balancing test, which applies a sliding level of scrutiny, to conclude that barriers to voting did not sufficiently burden the franchise. Or they cited the *Purcell* principle, to defer to state legislative guidelines as an election approached. Courts did not agree on whether and when the *Matthews* test applied to procedural due process claims challenging the rejection of votes based on signature or witness defects without providing the voter an opportunity to cure.

Based on this memo's survey of the major election litigation related to mail voting during the coronavirus pandemic in the 2020 election cycle, several trends emerged:

- The courts were generally reluctant to expand access to absentee ballots, particularly in the months leading up to the elections, highlighting the need for legislative and executive action well in advance of Election Day to change election rules;
- The federal appeals courts seemed skeptical that mail ballot submission and delivery requirements—such as secrecy sleeves, receipt deadlines, and bans on ballot collection—unduly burden the right to vote, even where there is little-to-no evidence that such requirements are justified by actual and potential widespread voter fraud;
- There is a value to voting rights advocates to consider non-constitutional claims (such as the Administrative Procedure Act claims against USPS or state law claims based on the state's Election Code) in combating voting restrictions, especially given courts' increasingly narrow reading of the federal constitution's voting protections;
- There is a likelihood of frivolous claims of voter fraud and an ongoing need for transparent safeguards to prove the integrity of elections; and
- There is division among courts regarding whether voting generally, and absentee voting in particular, is a state-created liberty interest subject to procedural due process protection under the Fourteenth Amendment. The resolution of this question could determine the extent to which the Constitution requires election officials to provide voters an opportunity to cure signature and witness defects before rejecting their ballots.
- The paradigm-shifting argument of plaintiffs in *Republican Party of Pennsylvania v. Boockvar*—that only state legislatures may change election rules—if adopted by the Supreme Court, could significantly curtail the ability of state executive officials and election officials to adapt voting policies and practices as exigencies emerge and curtail the ability of state courts to strike down state election laws that violate state constitutions.

Election officials [praised](#) the accuracy and security of the 2020 general election. The widespread use of [absentee voting](#) in the election may accelerate demand for and adoption of mail voting

in future elections. Indeed, legislators in several states are already advocating and introducing [bills to expand and facilitate mail voting](#). State bills include measures to permit all voters to vote by mail, to ensure voters are notified and have an opportunity to cure ballot defects before their ballot is rejected, to require the availability of drop boxes for the return of ballots, to redefine ballot deadlines from date of *receipt* to date of *postmark*, and to allow election officials to start processing mail ballots before Election Day. Additionally, on March 3, the U.S. House of Representatives passed [H.R.1](#), an expansive bill designed to make voting easier in many respects, including through expanded access to mail voting. As of the time of this report, the bill would guarantee [no-excuse access](#) to mail voting and many of the same mail voting accommodations proposed by state legislators. The bill passed the House by a vote of 220-210, largely along [party lines](#). Its passage in the Senate is expected to be more difficult and require the Senate to drop its current rules allowing filibuster (which requires 60 votes to allow a bill to proceed to a vote).

At the same time, state legislators in many states are [seeking](#) to erect barriers to voting, including absentee voting, often using baseless allegations of fraud to justify the proposed restrictions. The Brennan Center reported that, as of March 2021, [361 bills in 47 states](#) were seeking to restrict voting, including mail voting. Among the proposed measures are [bills that would curtail eligibility to vote by mail](#), prohibit the use of ballot drop boxes, make it harder to obtain a mail ballot, require notarization of absentee ballots, beef up witness requirements, add signature matching requirements, move ballot receipt deadlines earlier, make it easier to purge lists of permanent mail voters, and [block early voting on Sundays](#).

Thus, litigation over mail voting restrictions and expansions will likely continue in future elections, when mail voting advocates (it is hoped) will lack the compelling policy rationale of a nationwide pandemic. Meanwhile, the cases reviewed here underscore the importance of voter education and public awareness of mail ballot procedures and requirements in order to minimize ballot rejection rates due to voter error.