

Testimony of  
Professor Justin Levitt,  
LMU Loyola Law School, Los Angeles

Before the  
United States Commission on Civil Rights

Update to:  
An Assessment of Minority Voting Rights Obstacles in the United States

July 8, 2020

Chair Lhamon and distinguished Commissioners, thank you for inviting me to supplement my earlier testimony, in light of the Commission’s update of its 2018 report.

My name is Justin Levitt. I am a tenured Professor of Law at Loyola Law School, in Los Angeles.<sup>1</sup> I teach constitutional law and criminal procedure, and I focus particularly on the law of democracy, including election law and voting rights — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish, and the election statutes that implement the democratic structures it establishes. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have recently returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to supervise and support much of the federal government’s work on voting rights, among other issues. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections — including in this period of election administration and preparation in light of the pandemic; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

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<sup>1</sup> My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated. This testimony is delivered at the request of the U.S. Commission on Civil Rights, and on behalf of no other person beyond myself. I am indebted to Eda Haroutounian and Erika De La Torre for their exceptional research assistance.

I have had the privilege to seek voting rights for clients and constituents, and the privilege to teach others how to do the same. I have had the privilege to pursue research cited by the courts, and to testify as an expert to them — and to this body and several of its state advisory committees. And I have had the privilege to advise, and occasionally represent, elected officials and election officials, of both major parties and neither major party, and those whose partisan affiliation I simply do not know.

I am delighted to provide this supplement to my 2018 testimony on minority voting rights obstacles in the United States, to assist you in your deliberations and recommendations. Without question, the COVID-19 pandemic is and should be the primary focus of any update. It is not that the problems and concerns that the Commission highlighted and identified in 2018 have all been corrected: many of those concerns persist, and I do not mean to minimize that persistence here. And others have arisen or recurred since the 2018 report, and would in other times would be grist for a more fulsome examination by the Commissioners as well: for example, the continuing multi-year struggle to give effect to Florida voters' 2018 decision to restore the voting rights of those once convicted of felonies.<sup>2</sup>

### **The pandemic**

But the pandemic has thoroughly upended the electoral process, as it has upended so many other institutions and activities many Americans once took for granted. And the simple scale of that disruption both exacerbates our pre-existing electoral conditions and creates entire new ones. I used to say that voting rights work in an election year is like looking for enough duct tape to cover the holes in the bucket; in the time of COVID-19, we are looking for enough to make a bucket from scratch out of duct tape. As in so many other areas, many of those problems fall disproportionately on communities that are otherwise underrepresented: racial, ethnic, and language minorities, voters with disabilities, poorer voters, and voters who live in very rural and very urban locations. This testimony will focus on those issues specifically occasioned by the pandemic crisis, and especially on their capacity to put minorities' exercise of the franchise in jeopardy.

The COVID-19 pandemic itself, pervasive as it is, strikes unevenly at the population — and this unequal effect also pertains to its electoral impact. As of July 8, 2020, there were near 3.0 million confirmed COVID-19 cases in the United States, and more than 131,000 total confirmed deaths.<sup>3</sup> This impact is not evenly distributed. As recently reported based on newly revealed national data, “Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner that spans the country, throughout hundreds of counties in

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<sup>2</sup> See Order, *Jones v. DeSantis*, No. 20-12003-AA (11th Cir. July 1, 2020) (granting initial en banc hearing and staying the trial court's injunction pending that appeal), available at <https://www.courthousenews.com/wp-content/uploads/2020/07/felons-cal1.pdf> [<https://perma.cc/27WB-H747>].

<sup>3</sup> Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in the U.S. (July 8, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/H6JC-KXAV>].

urban, suburban and rural areas, and across all age groups.”<sup>4</sup> Indeed, “Latino and African-American residents of the United States have been three times as likely to become infected as their white neighbors . . . and Black and Latino people have been nearly twice as likely to die from the virus as white people . . .”<sup>5</sup> The data also revealed that Native Americans were “far more likely” to become infected than white people.<sup>6</sup> And though the disparity for Asian Americans was less stark, COVID-19 has also had a disproportionate impact on many Asian American communities.<sup>7</sup>

Many factors help to explain this disparity. These include disparate access to health care and a higher rate of underlying health conditions and risks among minorities; stark disparities in accumulated wealth and emergency financial reserves, and overrepresentation of minorities in essential service jobs where distancing is difficult; inequitable access to private transportation; housing redlining and differential conditions of crowding; overrepresentation in carceral facilities less able or less willing to stop the spread of the virus; and a host of other known socioeconomic disparities on top of any as yet unknown biological propensities. But whatever the underlying causes, the fact remains that minority communities are more at risk from COVID-19. Congregating in groups can be life-threatening for anyone in a pandemic. For minority citizens, the risks are even greater.

### **The pandemic and the election process**

Unfortunately, the standard mode of administering elections in much of the country depends upon congregating in groups. COVID-19 has turned the traditional stereotype of voting in person, on Election Day, at a local polling place, into a proposition that may be dangerous at current turnout levels. And the 2020 primaries have revealed that the traditional stereotype of how we vote may be a best-case scenario. In thousands of local jurisdictions, that tradition relies on hundreds of thousands of community members serving as pollworkers, lending their time either as volunteers or for an exceedingly modest stipend; it similarly relies on thousands of public and private buildings making their space available for physical access to voting booths by members of the general public.<sup>8</sup> In 2018, 58% of pollworkers were older than 60 (and 27% were older than 70) — and in a pandemic with greater health risks for older individuals, thousands of

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<sup>4</sup> Richard A. Opiel, Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/K3E3-KCUK>]. The dataset used to compile these results was only partial, and apparently excluded states like California that have both substantial infection rates and substantial minority populations. There is no reason to believe that the true national totals would reveal a more evenly spread distribution of cases or fatalities.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Mike Firestone et al., *Keep the Polls Open: An Action Plan to Protect In-Person Voting and Voting Rights in the Era of COVID-19*, at 14, VOTER PROTECTION CORPS (June 2020) (describing the distribution of types of polling places), <https://static1.squarespace.com/static/5d4510352755f600012998f7/t/5eeb9e73ee8615767d422e4a/1592499829207/VPC+Report+6.18+FINAL+-+FOR+WEBSITE.pdf> [<https://perma.cc/Y3RP-R7DM>]

pollworkers are simply declining to serve.<sup>9</sup> And there are ample concerns that locations that have traditionally served as polling places may similarly decline to make their space available as the pandemic persists.<sup>10</sup> The 2020 primary elections in Milwaukee revealed the impact of a sudden loss of pollworkers and locations: a dramatic reduction from 180 polling locations to 5, resulting in lines up to two and a half hours long, in a community with three times the proportion of African Americans as the national average.<sup>11</sup>

Although election officials can and must strive to find locations and workers to run those locations safely in pandemic conditions, sufficient to serve the public need — on which, more below — the pandemic presents very real constraints that cannot simply be wished or mandated away, absent a conscription program for which American society is presently ill-prepared. The ability of officials to serve populations voting in person has been radically curtailed throughout the primary season, and even with substantial budget increases and more robust preparation, it will not likely be able to meet the need of standard in-person turnout in a presidential general election this November. Officials must shift radically to voting by mail, whenever possible. The

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<sup>9</sup> Carrie Levine, *Elderly Workers Run Elections. But COVID-19 Will Keep Many Home*, CTR. FOR PUBLIC INTEGRITY (May 13, 2020), <https://publicintegrity.org/politics/elections/democracy-2020/elderly-workers-run-elections-but-covid-19-will-keep-many-home/> [<https://perma.cc/B83B-MBGP>]; Michael Barthel & Galen Stocking, *Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections*, PEW RESEARCH CTR. (Apr. 6, 2020), <https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/> [<https://perma.cc/2TSU-X6YE>]; Pat Beall & John Moritz, *COVID Endangers the Volunteers Who Make Your Vote Count*, USA TODAY (June 18, 2020), <https://www.usatoday.com/story/news/investigations/2020/06/18/coronavirus-election-workers-often-higher-age-risk/3206270001/> [<https://perma.cc/93BK-LQKX?type=image>]. See also John Keilman, *After Chicago Poll Worker Dies from COVID-19 and Others Test Positive, City Warns Voters They Might Have Been Exposed to Virus at Polling Places*, CHI. TRIB. (Apr. 13, 2020), <https://www.chicagotribune.com/coronavirus/ct-chicago-poll-worker-dies-covid-cornavirus-20200413-rz55vqpo6jfbxn7e4i6vkj6n2y-story.html> [<https://perma.cc/PR44-QQUX>]; Scott Bauer, *52 Who Worked or Voted in Wisconsin Election Have COVID-19*, AP (Apr. 29, 2020), <https://apnews.com/6428674bc2668ebd2db3c482f7f703c1> [<https://perma.cc/8MQZ-2KTS>]; Michael Wines, *From 47 Primaries, 4 Warning Signs About Voting in a Pandemic*, N.Y. TIMES (June 27, 2020) (noting that DC “lost 1,700 of its 2,000-odd poll workers for its June primary”), <https://www.nytimes.com/2020/06/27/us/2020-primary-election-voting.html> [<https://perma.cc/CMX7-65J7>]; Patrick Marley & Molly Beck, *Lack of Poll Workers Across Wisconsin, Flood of Absentee Ballots Spark Fears Votes Will Go Uncounted*, MILWAUKEE J.-SENTINEL (Mar. 31, 2020) (reporting that “[m]ore than 100 communities in Wisconsin don’t have any poll workers for the April 7 election,” and that the state was “short almost 7,000 poll workers” one week before election day — and not including those who cancelled in the subsequent week), <https://www.jsonline.com/story/news/politics/elections/2020/03/31/coronavirus-wisconsin-tyler-evers-asks-state-workers-staff-polls/5093547002/> [<https://perma.cc/CS3F-57GV?type=image>].

<sup>10</sup> See, e.g., Al Pefley, *Places Normally Used as Polling Precincts Cancel as Coronavirus Cases Spike*, CBS NEWS 12 (June 30, 2020), <https://cbs12.com/news/local/supervisor-of-elections-needs-polling-places-for-august-primary> [<https://perma.cc/M5ZT-6WLM>].

<sup>11</sup> See, e.g., *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civil Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> [<https://perma.cc/K8WX-MKZ4>]; Mary Spicuzza, *'A Very Sad Situation for Voters': Milwaukeeans Brave Wait Times As Long As 2 1/2 Hours, Top Election Official Says*, MILWAUKEE J.-SENTINEL (Apr. 7, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001/> [<https://perma.cc/XF66-WNYN>]; U.S. CENSUS BUREAU, *Quickfacts – United States; Milwaukee City, Wisconsin*, <https://www.census.gov/quickfacts/fact/table/US,milwaukeecitywisconsin/PST045219> [<https://perma.cc/7QEP-N47N>] (checked July 6, 2020).

goal for most jurisdictions this fall is not to run the election entirely by mail for its own sake. Instead, the goal must be to incentivize (and accommodate) voting by mail for everyone who can comfortably vote remotely, in order to preserve the dramatically limited in-person capacity we are likely to have for those who cannot.

This latter point is critically important. Certain communities — disproportionately minorities — depend on voting in person, and for these groups, the ability to vote by mail is not an adequate substitute. Just as there are recognized populations who are considered “hard to count” for Census purposes,<sup>12</sup> there are populations who are “hard to mail.” The U.S. Postal Service is a marvel, but postal delivery can be spotty in very rural areas like Native American reservations,<sup>13</sup> and in very urban, high-density apartment complexes,<sup>14</sup> and those delivery issues are not equitably spread by race and ethnicity.<sup>15</sup> Individuals with disabilities have an express federal right to the equipment necessary to cast a secure and independent ballot at the polling place;<sup>16</sup> despite the ready existence of technology and a legal mandate to provide equivalent services to those voting by mail as well, those rights are sufficiently underenforced that voters casting ballots by mail cannot always count on sufficient remote voting options in their jurisdiction.<sup>17</sup> Similarly, though language minorities often have a federal right to materials and information available in their primary language<sup>18</sup> — whether voting in person or by mail —

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<sup>12</sup> U.S. CENSUS BUREAU, COUNTING THE HARD TO COUNT IN A CENSUS (July 2019), <https://www.census.gov/content/dam/Census/library/working-papers/2019/demo/Hard-to-Count-Populations-Brief.pdf> [<https://perma.cc/NX2Z-XDMM>].

<sup>13</sup> For example, “many homes on reservations do not have addresses or have ‘non-traditional addresses’ that do not use a street name. The postal service does not deliver to these addresses, so they cannot receive ballots at their homes.” And “Native Americans who lack home mail delivery commonly use PO Boxes to conduct business. Rural post offices can be remarkably far—some Navajo Nation members travel 140 miles roundtrip to access postal services.” Vote by Mail in Native American Communities, NATIVE AMERICAN RIGHTS FUND, <https://www.narf.org/vote-by-mail/> [<https://perma.cc/RR2D-R699>] (last visited July 7, 2020). See also Alisa Wiersema, *Experts Worry Push For 2020 Mail Voting Could Leave Native American Voters Behind*, ABC NEWS (May 7, 2020), <https://abcnews.go.com/Politics/experts-worry-push-2020-mail-voting-leave-native/story?id=70411683> [<https://perma.cc/T6AF-2NYT>]; Matt Vasilogambros, *States Begin Prep for Mail-In Voting in Presidential Election*, PEW STATELINE (Mar. 23, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/23/states-begin-prep-for-mail-in-voting-in-presidential-election> [<https://perma.cc/D37B-SYQS>].

<sup>14</sup> See, e.g., Vasilogambros, *supra* note 13; David Wildstein, *Reports of Vote-By-Mail Ballots Undelivered, Tossed Aside by Postal Workers*, N.J. GLOBE (Apr. 25, 2020), <https://newjerseyglobe.com/campaigns/reports-of-vbm/> [<https://perma.cc/F5CT-PZJQ>].

<sup>15</sup> See Dayna L. Cunningham, *Who Are To Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 393-94 & nn.134-35 (1991) (discussing racial and economic differences in the rates of receiving census forms by mail).

<sup>16</sup> 52 U.S.C. § 21081(a)(3).

<sup>17</sup> Some litigation has recently had some success in this arena. See, e.g., Consent Decree, *Powell v. Benson*, No. 2:20-cv-11023 (E.D. Mich. May 19, 2020), <https://electionlawblog.org/wp-content/uploads/MI-Powell-20200519-settlement.pdf> [<https://perma.cc/XQ4D-ND6G>]; Stipulation of Settlement, *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-04003 (S.D.N.Y. June 2, 2020), <https://electionlawblog.org/wp-content/uploads/NY-Hernandez-20200602-settle.pdf> [<https://perma.cc/94FZ-MSZX>]; *Nat’l Fed. of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016).

<sup>18</sup> 52 U.S.C. § 10503.



those mandates are in practice easier to satisfy at discrete in-person polling locations (which may stock materials centrally in several different languages, or print materials in-language on demand) than they appear to be in the process of voting by mail, when particular materials are sent to particular individuals.<sup>19</sup> Infrequent or new voters needing assistance with the voting process will find official assistance far easier to acquire at the polls than at home. And some communities — including minority communities — have longstanding and quite profound cultural predilections for voting in person, and fears fueled by historical disenfranchisement about the reliability of voting when they cannot observe the process of ballot delivery firsthand; these communities should not be forced into a mode of participation they do not trust.

In order to preserve limited in-person capacity, then, for the voters who need it most, jurisdictions must dramatically expand opportunities to vote by mail, encouraging most of the eligible electorate to vote via an alternative to the polling place. Whatever the merits of vote-by-mail channels in a normal election year,<sup>20</sup> they are a practical necessity during a pandemic, with in-person capacity at a fraction of the norm.<sup>21</sup> Many jurisdictions have recognized as much.<sup>22</sup> Others have resisted, perhaps inflamed or cowed by unwarranted attacks on the current safeguards in the vote by mail system.<sup>23</sup> Those jurisdictions that are hoping that the status quo will be sufficient in the fall are simply sticking their heads in the sand. Industry after industry has been forced to confront the disruption wrought by COVID-19, and the upheaval of business as usual; elections are not immune from the ravages of the pandemic.

### **Voter registration**

The dramatic expansion of voting by mail actually depends on intervention early in the election ecosystem, in voter registration. Minor errors or omissions in the registration rolls can be resolved at the polling place: someone whose apartment address is omitted from their

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<sup>19</sup> The fact that individual pieces of paper are distributed in the mail voting process to specific individuals, often with imperfect information about that individual's language preference, does not relieve officials of their obligation to provide in-language materials under the Voting Rights Act.

<sup>20</sup> See Justin Levitt, "Fixing That": Lines at the Polling Place, 28 J. L. POL. 465, 472-74 (2013).

<sup>21</sup> See, e.g., Nathaniel Persily & Charles Stewart III, Ten Recommendations to Ensure a Healthy and Trustworthy 2020 Election, LAWFARE (Mar. 19, 2020 4:33PM), <https://www.lawfareblog.com/ten-recommendations-ensure-healthy-and-trustworthy-2020-election> [<https://perma.cc/FYU6-Q9YL>].

<sup>22</sup> See Temporary Modifications to Absentee / Mail-in Voting Procedures in Response to the Coronavirus (COVID-19) Outbreak, BALLOTEDIA, [https://ballotpedia.org/Changes\\_to\\_absentee/mail-in\\_voting\\_procedures\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020#Temporary\\_modifications\\_to\\_absentee.2Fmail-in\\_voting\\_procedures\\_in\\_response\\_to\\_the\\_coronavirus\\_.28COVID-19.29\\_outbreak](https://ballotpedia.org/Changes_to_absentee/mail-in_voting_procedures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Temporary_modifications_to_absentee.2Fmail-in_voting_procedures_in_response_to_the_coronavirus_.28COVID-19.29_outbreak) [<https://perma.cc/PC9L-7HHD>] (last checked July 7, 2020).

<sup>23</sup> See, e.g., Amy Gardner & Josh Dawsey, *Trump's Attacks on Mail Voting Are Turning Republicans Off Absentee Ballots*, WASH. POST (July 7, 2020), [https://www.washingtonpost.com/politics/trumps-attacks-on-mail-voting-are-turning-republicans-off-absentee-ballots/2020/07/07/640b6126-bbd4-11ea-80b9-40ece9a701dc\\_story.html](https://www.washingtonpost.com/politics/trumps-attacks-on-mail-voting-are-turning-republicans-off-absentee-ballots/2020/07/07/640b6126-bbd4-11ea-80b9-40ece9a701dc_story.html) [<https://perma.cc/3Q6S-K3Y2?type=image>]; Sam Levine, *Vote Safely By Mail in November? Not So Fast, Say Republicans*, GUARDIAN (Apr. 30, 2020), <https://www.theguardian.com/us-news/2020/apr/30/america-voting-rights-vote-by-mail-republicans> [<https://perma.cc/U526-TS28>].

registration address, or listed with two digits of a street number transposed, is not unduly hindered at the polls. Moreover, each year, about 8% of Americans move locally, within the same county;<sup>24</sup> even when those voters have not re-registered, federal law grants most voters who move within the same county and congressional district the right to update their address at the polls and cast a valid ballot.<sup>25</sup> At the polls, even in the states that do not have systems for full-blown election-day registration, these minor corrections to the rolls are manageable.

But those same minor anomalies may preclude eligible voters from voting by mail, particularly in jurisdictions attempting to serve their voters by taking the initiative to affirmatively deliver mail ballot applications or ballots themselves. Voters whose current address is not correctly represented on the rolls may not receive official electoral information or balloting materials. And as with other aspects of the system, this burden is not borne equally. Racial and ethnic minorities move locally — remaining eligible to vote but less likely to be reached by mail directed to older addresses — disproportionately more often than their Anglo counterparts.<sup>26</sup>

So jurisdictions preparing to expand voting by mail need to start with the voter registration process. That process has already been disrupted by COVID-19. Summer festivals and county fairs have historically presented prime opportunities for campaigns and nonprofits to help new voters register and to help voters already on the rolls confirm or update their registration information. But those events where crowds gather are exceedingly rare in the time of a pandemic, and as a result, many jurisdictions are finding that their 2020 registration volume is substantially below comparable past election cycles.<sup>27</sup> Those rates are also not equally depressed across racial lines: in Florida, for example, the dropoff in African American and Latino registrations has been more severe compared to prior cycles than the dropoff in Anglo

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<sup>24</sup> U.S. CENSUS BUREAU, *Geographic Mobility by Selected Characteristics in the United States: American Community Survey 2010-2018*, <https://data.census.gov/cedsci/all?t=ACSST1Y2018.S0701&vintage=2018&t=Residential%20Mobility> [<https://perma.cc/P2G5-FWVS>] (last visited July 6, 2020).

<sup>25</sup> 52 U.S.C. § 20507(e). This right, in the National Voter Registration Act, applies to voters who move within the same registrar’s jurisdiction and congressional district, and allows the update to occur at the prior polling place or (at the jurisdiction’s choice) either the new polling place or a central registrar’s location. *Id.* In New England and the upper Midwest, the registrar’s jurisdiction is usually a city or town; elsewhere, that jurisdiction is usually the county. Any voter in one of the 44 states subject to the NVRA is protected by these provisions. *Id.* § 20503(b).

<sup>26</sup> U.S. CENSUS BUREAU, *supra* note 24. Approximately 7.1% of Anglo individuals move within the same county each year; that rate is approximately 7.6% for Asian Americans, 8.6% of Native Americans, 8.7% of Latinos, 9.9% of African Americans, and 10.8% of Native Hawaiians and Pacific Islanders. *Id.*

<sup>27</sup> *See, e.g.*, Center for Election Innovation & Research, *New Voter Registrations in 2020* (June 10, 2020), [https://electioninnovation.org/wp-content/uploads/2020/06/New\\_Voter\\_Registrations.pdf](https://electioninnovation.org/wp-content/uploads/2020/06/New_Voter_Registrations.pdf) [<https://perma.cc/5D67-ZQKZ>]; Diana Cao, Healthy Elections Project, *Florida Election Analysis 21* (June 24, 2020), <https://healthyelections.org/sites/default/files/2020-06/Florida%20Election%20Memo.pdf> [<https://perma.cc/WG4L-UEZ7>]; Michael Wines, *COVID-19 Changed How We Vote. It Could Also Change Who Votes*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/voter-registration-coronavirus-2020-election.html> [<https://perma.cc/ZCX8-AGAL>]; Pam Fessler, *Pandemic Puts a Crimp on Voter Registration, Potentially Altering Electorate*, NPR (May 26, 2020), <https://www.npr.org/2020/05/26/860458708/pandemic-puts-a-crimp-on-voter-registration-potentially-altering-electorate> [<https://perma.cc/D5MR-W7J7>]; Daniel P. Tokaji, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-tokaji/> [<https://perma.cc/GR3S-N5B7>].

registrations.<sup>28</sup> Many states have implemented opportunities to register or check registration status online; however, not only are the systems not universal,<sup>29</sup> but voters may or may not be aware that the systems exist at all.

In order to prevent chaos at the polls this fall, jurisdictions must take more of an affirmative approach, reaching out to voters to encourage even those with long histories of participation to check their registration and update or correct any inaccuracies. This means extensive outreach efforts to reach voters where they are, with notices in multiple media and in-language, much like the extensive program of affirmative Census outreach in hard-to-count areas. At the same time, jurisdictions should ensure that any contact with the system, even to check an individual voter's registration status, suffices to render the voter's record "active." And as a best practice, jurisdictions should consider reaching out not only with registration updates, but with a request to flag language preferences. Every voter who feels more comfortable voting by mail due to this outreach, or more informed about how to do so, is another voter spared from the limited in-person options plausible in the face of a pandemic.

### **Voting by mail**

Preparations for voting by mail also extend — obviously — to the mail balloting process itself. In the 2016 general election, three states saw more than 90% voting by mail, and another four were majority vote-by-mail jurisdictions.<sup>30</sup> These jurisdictions are in relatively good shape to drive enough voting by mail to relieve critical pressure on scarce in-person resources. In contrast, less than 15% of voters in thirty states, DC, Guam, Puerto Rico, and the Virgin Islands voted by mail in November 2016.<sup>31</sup> Many of those jurisdictions have substantial minority populations.

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<sup>28</sup> See Cao, *supra* note 27, at 19-20.

<sup>29</sup> In many states, the opportunities to register online are tied to the motor-vehicle system, and limited to those voters with a state driver's license or non-driver's ID. And online opportunities are limited to those with reliable online access.

<sup>30</sup> For these purposes, mail voting includes UOCAVA and domestic civilian mail ballots, as measured by the EAC's Election Administration & Voting Survey. In order by rate of mail voting, these states were Oregon (100%), Washington (100%), Colorado (93%), Arizona (73%), Utah (70%), Montana (65%), and California (59%). Data from U.S. Election Assistance Comm'n, 2016 Election Administration & Voting Survey, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [https://perma.cc/C942-QE2G]. For the four states not already at 100%, mail ballot rates increased in 2018, and Hawaiian voters also cast a majority of their ballots by mail in the 2018 midterms, albeit for a smaller absolute number of ballots. Data from U.S. Election Assistance Comm'n, 2018 Election Administration & Voting Survey, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [https://perma.cc/C942-QE2G].

<sup>31</sup> In order from greatest to least mail voting, those states are Kansas (15%), Virginia (14%), Idaho (13%), Alaska (11%), New Hampshire (10%), Missouri (10%), Minnesota (9%), New Jersey (9%), Mississippi (9%), Rhode Island (9%), Connecticut (8%), Oklahoma (7%), Illinois (7%), Nevada (7%), Texas (7%), D.C. (7%), Maryland (6%), New York (6%), Georgia (5%), Massachusetts (5%), Wisconsin (5%), Pennsylvania (5%), Guam (4%), Alabama (4%), North Carolina (4%), Delaware (4%), Louisiana (3%), Arkansas (3%), Tennessee (3%), Kentucky (2%), West Virginia (2%), Vermont (1%), the U.S. Virgin Islands (1%), and Puerto Rico (0%). Data from U.S. Election Assistance Comm'n, 2016 Election Administration & Voting Survey, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [https://perma.cc/C942-QE2G]. In the 2018 midterms, about 10% of New Mexico voters and about 5% of South Carolina voters cast ballots by mail, joining this list of states; in all of the



The pandemic is turning those figures — and the electoral systems they represent — on their heads. DC, Georgia, Pennsylvania, Rhode Island, West Virginia, and Wisconsin were all on the list of jurisdictions with less than 15% of 2016 general election votes cast by mail, but all reported that a majority of votes were cast by mail in this year’s primaries.<sup>32</sup> Each strained mightily to deliver an electoral process capable of accommodating the primary electorate. Some failed.

It will be that much harder for states with historical single-digit rates of voting by mail to dramatically increase that rate at the magnitude of general-election turnout. Economies of scale exist, but require substantial investment to capture. As just one example: in 2016, Shelby County, Tennessee, processed 4,646 domestic mail ballots and 1,237 UOCAVA ballots — out of 341,731 ballots total.<sup>33</sup> The difference between processing about 6,000 mail ballots and processing several hundred thousand mail ballots is not merely a difference in degree. Difficult does not mean impossible: in the 2020 primary, officials estimate that Kentucky jurisdictions will have processed 800,000 mailed ballots, when just under 46,000 mail ballots were cast in the 2016 general election.<sup>34</sup> The ability to expand scale that dramatically that quickly is praiseworthy. But with a total general election turnout of 1.9 million voters in 2016, even the Kentucky jurisdictions that successfully boosted mail capacity for the primaries must scale up further still in order to meet the general election demand.

This scaling will require profound investment and creativity from administrators. The machinery, physical space, and personnel required to process, store, and tabulate hundreds of thousands of absentee ballot applications, ballot envelopes, and ballots are not the same as that required to process a few thousand.<sup>35</sup> Many local election offices are already planning to handle the volume, but where the resources are simply unavailable at the local level, it may be in their voters’ interest to temporarily centralize aspects of the mail ballot processing operation either

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other states listed above, fewer than 15% of voters cast ballots by mail in 2018 as well. Data from U.S. Election Assistance Comm’n, 2018 Election Administration & Voting Survey, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [<https://perma.cc/C942-QE2G>].

<sup>32</sup> Marshall Cohen, *States Failed to Get Absentee Ballots to Thousands of Voters in Recent Primary Elections, Signaling Problems for November*, CNN: POLITICS, <https://www.cnn.com/2020/06/20/politics/absentee-voting-election-problems/index.html> [<https://perma.cc/JUV4-8GV9>] (last updated June 22, 2020).

<sup>33</sup> Data from U.S. Election Assistance Comm’n, 2016 Election Administration & Voting Survey, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [<https://perma.cc/C942-QE2G>].

<sup>34</sup> *Id.*; Amy Gardner et al., *Despite Poll Worker Crunch, Kentucky Voters Poised to Break Turnout Records As They Embrace Mail Ballots*, WASH. POST (June 24, 2020), [https://www.washingtonpost.com/politics/primaries-voting-kentucky-new-york/2020/06/22/a14ec922-b4ab-11ea-a8da-693df3d7674a\\_story.html](https://www.washingtonpost.com/politics/primaries-voting-kentucky-new-york/2020/06/22/a14ec922-b4ab-11ea-a8da-693df3d7674a_story.html) [<https://perma.cc/KFE7-4GGF?type=image>].

<sup>35</sup> *See, e.g.*, Jessica Huseman, *Voting by Mail Would Reduce Coronavirus Transmission But It Has Other Risks*, PROPUBLICA, Mar. 24, 2020, <https://www.propublica.org/article/voting-by-mail-would-reduce-coronavirus-transmission-but-it-has-other-risks> [<https://perma.cc/YPL8-HRKB>]; Nathaniel Rakich, *Few States Are Prepared to Switch to Voting By Mail. That Could Make For a Messy Election.*, FIVETHIRTYEIGHT (April 27, 2020, 6:00 AM), <https://fivethirtyeight.com/features/few-states-are-prepared-to-switch-to-voting-by-mail-that-could-make-for-a-messy-election/> [<https://perma.cc/BJ7H-ZF9H>]; Edgardo Cortés et al., *Preparing for Election Day: Deadlines for Running a Safe Election*, BRENNAN CENTER FOR JUSTICE (May 11, 2020), <https://www.brennancenter.org/our-work/research-reports/preparing-election-day-deadlines-running-safe-election> [<https://perma.cc/ARU2-8XRW>].

statewide or regionally.<sup>36</sup> The supply chain for ballots and envelopes with specialty printing on specialty paper is straining to keep up with demand, and orders must be locked in as soon as possible.<sup>37</sup> Systems designed for online delivery of blank ballots allow uniformed and overseas citizens and individuals with disabilities to mark, print, and return their ballots independently — and in some circumstances may be the only readily feasible (hence, necessary) means of providing that assurance<sup>38</sup> — but such ballots need to be duplicated or “remade” to be tallied, creating logistical challenges in large quantities.<sup>39</sup> Jurisdictions unaccustomed to large quantities of mailed ballots will have to establish close relationships with local postal officials to troubleshoot and remedy problems.<sup>40</sup> And when states require applications, and set deadlines for submitting those applications, it is important to balance the need to extend deadlines (to encourage as much voting by mail as possible) with the need to ensure that applications submitted at the deadline can actually be processed and delivered in time to ensure that ballots are in voters’ hands before Election Day.<sup>41</sup> When the government fails to timely act on an eligible voter’s application to vote by mail — as occurred in a disheartening array of

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<sup>36</sup> See, e.g., Persily & Stewart, *supra* note 21; Amber McReynolds, Vote at Home Scale Plan 4, NAT’L VOTE AT HOME INST. (Mar. 2020), [https://www.voteathome.org/wp-content/uploads/2020/03/VAHScale\\_StrategyPlan.pdf](https://www.voteathome.org/wp-content/uploads/2020/03/VAHScale_StrategyPlan.pdf) [<https://perma.cc/Z8PE-DLQB>].

<sup>37</sup> See, e.g., Rakich, *supra* note 35; Cortés et al., *supra* note 35; Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html> [<https://perma.cc/G944-QAKZ>]; Kim Zetter, *Why Vote-by-Mail May Not Save Our Elections from the Virus’ Disruption*, POLITICO (Mar. 17, 2020), <https://www.politico.com/news/2020/03/17/vote-by-mail-elections-coronavirus-134618> [<https://perma.cc/N3MT-HPQC>]. Among other issues, the paper must be of sufficient weight, and the printing must be sufficiently precise, to permit large-volume high-speed tabulation.

<sup>38</sup> See, e.g., Nat’l Fed. of the Blind v. Lamone, 813 F.3d 494 (4th Cir. 2016).

<sup>39</sup> See, e.g., Cybersecurity and Infrastructure Security Agency, Elections Infrastructure Gov’t Coordinating Council & Sector Coordinating Council, Joint COVID Working Group, Electronic Ballot Delivery and Marking at 4, 2020, [https://www.cisa.gov/sites/default/files/publications/e-ballot-delivery\\_and\\_marking\\_final\\_508\\_0.pdf](https://www.cisa.gov/sites/default/files/publications/e-ballot-delivery_and_marking_final_508_0.pdf) [<https://perma.cc/2ZNH-MNA9>]; Election Assistance Comm’n, Facilitating UOCAVA Voting Conference, Conference Report at 13 (Sept. 24, 2007), [https://www.eac.gov/sites/default/files/event\\_document/files/uocava%20conference%20report%20public%20meetin%20march%202020%202008.pdf](https://www.eac.gov/sites/default/files/event_document/files/uocava%20conference%20report%20public%20meetin%20march%202020%202008.pdf) [<https://perma.cc/N5VF-EA4M>]; Zetter, *supra* note 37.

Note that I refer here only to systems for online delivery of blank ballots *to* voters, not to any online system for delivering ballots that have already been voted.

<sup>40</sup> See, e.g., Ryan McCarthy & Maryam Jameel, *The Postal Service Is Steadily Getting Worse — Can It Handle a National Mail-In Election?*, ELECTIONLAND (June 15, 2020), <https://www.propublica.org/article/the-postal-service-is-steadily-getting-worse-can-it-handle-a-national-mail-in-election> [<https://perma.cc/9RWT-DWG3>].

<sup>41</sup> See, e.g., *id.*

jurisdictions during the 2020 primaries<sup>42</sup> — the state’s broken promise can in practice be entirely disenfranchising.<sup>43</sup>

Scaling up to dramatically increase the number of valid ballots cast by mail will also require substantial investment in encouraging and informing voters who may not be used to the practice, and eliminating unnecessary barriers to its successful exercise. Jurisdictions will have to approach the problem akin to the investment in product design, marketing, and customer service for a new bet-the-company product launch. This includes outreach like the voter registration (and Census) outreach described above. It includes ensuring that materials are delivered in-language to language minorities, particularly but not exclusively in jurisdictions with a federal obligation to provide such materials.<sup>44</sup> It includes taking steps to — at least — affirmatively send absentee ballot applications to eligible voters, as at least 13 states and DC have done,<sup>45</sup> and to prepay postage, as it may be more difficult than usual to obtain stamps (or,

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<sup>42</sup> See, e.g., Cohen, *supra* note 32 (160,000 ballots in Maryland, and 14,000 ballots in Wisconsin); Darrel Rowland & Rick Rouan, *After a Problem-Plagued Primary, Ohio Leaders Disagree About November Election Plan*, THE COLUMBUS DISPATCH (Apr. 28, 2020, 7:50 PM) (“thousands” of ballots in Ohio), <https://www.dispatch.com/news/20200428/after-problem-plagued-primary-ohio-leaders-disagree-about-november-election-plan> [<https://perma.cc/3VRL-4QDW>]; Amy Gardner et al., *Voting Debacle in Georgia Came After Months of Warnings Went Unaddressed*, WASH. POST (June 10, 2020) (8,000 ballot applications in Fulton County, Georgia), [https://www.washingtonpost.com/politics/voting-debacle-in-georgia-came-after-months-of-warnings-went-unaddressed/2020/06/10/1ab97ade-ab27-11ea-94d2-d7bc43b26bf9\\_story.html](https://www.washingtonpost.com/politics/voting-debacle-in-georgia-came-after-months-of-warnings-went-unaddressed/2020/06/10/1ab97ade-ab27-11ea-94d2-d7bc43b26bf9_story.html) [<https://perma.cc/QKJ2-3BKQ?type=image>].

<sup>43</sup> See, e.g., Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html> [<https://perma.cc/2MFT-BVK3>].

<sup>44</sup> 52 U.S.C. § 10503.

<sup>45</sup> Max Greenwood, *Cuomo Orders Postage-Paid Absentee Ballot Applications To Be Sent to All New York Voters*, THE HILL (Apr. 24, 2020) (New York), <https://thehill.com/homenews/campaign/494542-cuomo-orders-postage-paid-absentee-ballot-applications-to-be-sent-to-all> [<https://perma.cc/3T5Q-B4UD>]; Jeremy Duda, *Trump Threatens Mich. Over Same Policy Arizona Will Use on Early Ballots*, AZ MIRROR (May 20, 2020) (Arizona, Michigan, Nebraska, West Virginia), <https://www.azmirror.com/2020/05/20/trump-threatens-mich-over-same-policy-arizona-will-use-on-early-ballots/> [<https://perma.cc/4WRU-8QR4>]; Nathaniel Rakich & Geoffrey Skelly, *Nine States (And D.C.) have Elections Today. Here Are the Races to Watch.*, FIVETHIRTYEIGHT (June 2, 2020, 7:00 AM) (DC, Idaho, Iowa, New Mexico, Rhode Island, South Dakota), <https://fivethirtyeight.com/features/nine-states-and-dc-have-elections-today-here-are-the-races-to-watch/> [<https://perma.cc/AZB9-Y2L5>]; Sharon Bernstein, *Ohio Set to Send All Voters Absentee Ballot Applications Before Presidential Election*, REUTERS (June 15, 2020) (Ohio), <https://www.reuters.com/article/us-usa-election-ohio/ohio-set-to-send-all-voters-absentee-ballot-applications-before-presidential-election-idUSKBN23N00Q> [<https://perma.cc/B3VA-VBPX>]; Mitchell Schmidt, *Elections Commission Gives Final Approval to Sending Absentee Ballot Applications to 2.7 Million Wisconsinites*, WIS. ST. J. (June 18, 2020) (Wisconsin), [https://madison.com/wsj/news/local/govt-and-politics/elections-commission-gives-final-approval-to-sending-absentee-ballot-applications-to-2-7-million-wisconsinites/article\\_ef20b423-1ebf-5f64-aeed-0c38cd758558.html](https://madison.com/wsj/news/local/govt-and-politics/elections-commission-gives-final-approval-to-sending-absentee-ballot-applications-to-2-7-million-wisconsinites/article_ef20b423-1ebf-5f64-aeed-0c38cd758558.html) [<https://perma.cc/AU7T-YHBU>]. Cf. Emily Brindley, *Connecticut Will Send Absentee Ballot Applications to All Voters for Primary and November Elections Amid Concern that Coronavirus Could Disrupt Voting*, HARTFORD COURANT (May 4, 2020) (noting that Connecticut will send mail ballot applications to all registered voters, despite the fact that an excuse is required to vote absentee), <https://www.courant.com/coronavirus/hc-news-coronavirus-absentee-ballot-20200504-n63avfwskrdbpkca5lotnvtbae-story.html> [<https://perma.cc/ZD4K-W2FU>].

for younger voters, less familiar).<sup>46</sup> It includes waiving requirements for ballots to be notarized, when such services are practically unavailable. It includes bar-coding ballot envelopes so that voters may track their own ballots, and so that election officials can advertise in advance that voters can track their own ballots, increasing trust in the system.<sup>47</sup> It includes user-friendly design<sup>48</sup> of absentee ballot materials — instructions and applications and envelopes and ballots — to reduce rejection rates caused by avoidable error.<sup>49</sup> And should those errors occur, it includes a legal mandate to ignore immaterial errors,<sup>50</sup> and a legal mandate to supply robust procedures to notify voters in the event of a material one, with a practical opportunity to cure the mistake tailored to the pandemic.<sup>51</sup>

As with other electoral lapses, lapses in these latter opportunities may not fall equally on the electorate. Evidence from Florida’s 2020 primary reveals that minority mail ballots — in both the Democratic and Republican primaries — were rejected at higher rates than those cast by Anglo voters, and with African-American voters in both parties’ primaries seeing ballots rejected at more than twice the rate of their Anglo counterparts.<sup>52</sup> The fact of a persistent racial and ethnic disparity in the counting of mail ballots is consistent with findings in other states and in earlier years.<sup>53</sup> And purported errors in signature matching may well disproportionately impact voters with disabilities that impede the production of a consistent signature.

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<sup>46</sup> See, e.g., U.S. Postal Service, Office of Inspector Gen., Millennials and the Mail 6, No. RARC-WP-18-011 (July 30, 2018), <https://www.uspsoidg.gov/sites/default/files/document-library-files/2018/RARC-WP-18-011.pdf> [<https://perma.cc/E5UE-KE8J>].

<sup>47</sup> See, e.g., Democracy Works, Ballot Scout, <https://www.democracy.works/ballot-scout/> [<https://perma.cc/3CP3-SZKJ>] (last visited July 7, 2020).

<sup>48</sup> See, e.g., Center for Civic Design, A Tool Kit of Resources for Scaling Up Vote By Mail (June 18, 2020), <https://civicedesign.org/tool-kit-for-scaling-up-vbm/> [<https://perma.cc/R82Q-GZEX?type=image>]; Drew Davies, U.S. Election Assistance Comm’n, The Role of Design in the Vote-By-Mail Process: Envelopes Get Their Day in the Sun (May 23, 2019), <https://www.eac.gov/the-role-of-design-in-the-vote-by-mail-process-envelopes-get-their-day-in-the-sun> [<https://perma.cc/SVU4-F8MN>].

<sup>49</sup> Sam Levine, *It's Egregious': Thousands of Mail-In Ballots Could Be Rejected Over Small Errors*, GUARDIAN, July 8, 2020, <https://www.theguardian.com/us-news/2020/jul/08/mail-in-ballots-rejected-small-errors> [<https://perma.cc/SV6N-ESFJ>].

<sup>50</sup> 52 U.S.C. § 10101(a)(2)(B); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83 (2012).

<sup>51</sup> See, e.g., Self Advocacy Solutions N.D. v. Jaeger, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 2951012, No. 3:20-cv-00071 (D.N.D. June 3, 2020), <https://electionlawblog.org/wp-content/uploads/ND-Self-Advocacy-20200603-PI-decision.pdf> [<https://perma.cc/JFS2-WAMP>]; Saucedo v. Gardner, 335 F. Supp. 3d 202 (D.N.H. 2018); La Follette v. Padilla, 2018 WL 3953766, No. CPF-17-515931 (Cal. Super. Ct., S.F. Cnty. Mar. 5, 2018); cf. Compromise Settlement Agreement and Release, Georgia Democratic Party v. Raffensperger, No. 1:19-cv-05028 (N.D. Ga. Mar. 6, 2020), <https://www.democracymatters.com/wp-content/uploads/sites/41/2020/03/GA-Settlement-1.pdf> [<https://perma.cc/D2RW-U735>].

<sup>52</sup> See Cao, *supra* note 27, at 17. It should be noted that these denominators are comparatively small: 1.3% of mail ballots cast in the primaries were rejected. *Id.* at 15.

<sup>53</sup> See, e.g., Enrijeta Shino et al., Voting by Mail in a VENMO World: Assessing Rejected Absentee Ballots in Georgia 16, 24-25, 27-28 (May 19, 2020) (2018 Georgia general election), [https://electionscience.clas.ufl.edu/files/2020/05/GA\\_Venmo.pdf](https://electionscience.clas.ufl.edu/files/2020/05/GA_Venmo.pdf) [<https://perma.cc/AA2G-FYV4>]; Anna Baringer et al., Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus 19-20 (April 25, 2020) (2018 Florida general election),

## Voting in-person

The above push to expand opportunities to vote by mail is driven primarily by two other opposing catalysts: the need to provide in-person voting capacity for those who cannot or will not vote by mail, and the pandemic-created scarcity of that in-person capacity. One way to manage the anticipated ample turnout is to divert demand to mail ballots. But jurisdictions will also have to deploy substantial investment and creativity in fostering in-person supply.

In a world impacted by COVID-19, it is inevitable that jurisdictions will have fewer locations available to them for in-person voting, and fewer traditional pollworkers to staff those locations. To be clear, I do not believe that the appropriate measure of election resources is the raw number of locations open for voting; that may be a readily available measure, but it is not always the most accurate. More locations does not always equal better service for voters. For example, consider a jurisdiction that requires each voter to vote at their assigned neighborhood precinct, without exception, and where a given polling place is inconveniently located, poorly lit, inaccessible for individuals with disabilities, staffed by poorly trained pollworkers without language abilities, and difficult to reach for repairs in the event there is a problem on election day. That jurisdiction does not necessarily provide better service than a jurisdiction with fewer locations, but where the voter has her choice of locations at which to vote, where the locations are conveniently located and accessible and efficiently laid out, where the pollworkers are better trained and speak a broader set of languages and where there is better access to ready problem-solving because the personnel and locations are spread less thinly across the jurisdiction.

And obviously, fewer locations does not always equal better service for voters either: closing all of the locations in town, or in one part of town, without adequate substitute is effective disenfranchisement.<sup>54</sup> And even modest changes in precinct location without sufficient publicity can have a disparate impact.<sup>55</sup> The point is that the details matter, and that each jurisdiction must plan to make a limited supply of space and personnel as robust for voters — an in a pandemic, particularly for the underrepresented communities with the greatest need for in-person services — as possible.

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[https://electionscience.clas.ufl.edu/files/2020/04/Baringer\\_Herron\\_Smith\\_VBM\\_FL.pdf](https://electionscience.clas.ufl.edu/files/2020/04/Baringer_Herron_Smith_VBM_FL.pdf) [<https://perma.cc/A87B-THGL>]; Daniel A. Smith, Vote-By-Mail Ballots Cast in Florida 3, 5, 11-13 (Sept. 19, 2018) (2012 and 2016 Florida general election), [https://www.acluf.org/sites/default/files/acluf-vote\\_by\\_mail-report.pdf](https://www.acluf.org/sites/default/files/acluf-vote_by_mail-report.pdf) [<https://perma.cc/Y2Z6-AXV7>]; Joanna Lee & Deanne Kitamura, Asian Americans Face Higher than Average Vote-By-Mail Ballot Rejection Rates in California, Asian Am. Advancing Justice (Aug. 2017) (2016 general election in several California counties), <https://www.advancingjustice-la.org/sites/default/files/issuebrief-vbm-FINAL-1.pdf> [<https://perma.cc/D7JT-HSRD>].

<sup>54</sup> See, e.g., Leadership Conference Education Fund, Democracy Diverted: Polling Place Closures and the Right to Vote 20-21, 33-34, 42, 44, 46 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/G2NM-4HPS>]. Idaho, apparently, offered no in-person options at all during their primary. Cynthia Sewell, *Idaho May 19 Primary Is a Go, But You Get to Stay Home to Vote*, IDAHO STATESMAN (Mar. 30, 2020), <https://www.idahostatesman.com/news/politics-government/election/article241633846.html> [<https://perma.cc/EG7X-PVUV>].

<sup>55</sup> See Brian Amos et al., *Reprecincting and Voting Behavior*, 39 POLITICAL BEHAVIOR 133, 150 (2017) (finding that Latino voters were “significantly more likely to abstain [from voting] as a result of being reassigned” to a different precinct location).



Some jurisdictions were caught flat during the primaries; in Milwaukee, for example, with primaries at the comparatively early stage of the first big wave of COVID-19, the drop from 180 polling places to 5 did not reflect an active choice to consolidate for the benefit of the voters, and were part of the reason for a line more than two hours long.<sup>56</sup> Voters — as in the past, disproportionately minority voters — suffered as a result.<sup>57</sup> Lines in Georgia were up to five hours long, due in part to pandemic-related reductions in pollworker training for the use of new systems (and even longer during early voting periods).<sup>58</sup> Lines in Columbia, South Carolina, were similar.<sup>59</sup> Lines in Las Vegas were nearly seven hours long, with polling locations down from 172 in the 2018 primary, to 3 in 2020.<sup>60</sup>

Some jurisdictions had the benefit of learning from Milwaukee’s experience, and have been planning for months. Louisville had the resources to open only one polling place in its recent primary, but that polling place was a convention center with space for workers and large numbers of voters to socially distance. Though the single option was undoubtedly sufficiently inconvenient to keep some would-be voters home, the convention center location may well have been the least bad of the available alternatives.<sup>61</sup>

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<sup>56</sup> See sources cited *supra* note 11.

<sup>57</sup> See, e.g., Levitt, *supra* note 20, at 466-68 & n.22 (collecting sources finding disparities in the wait times suffered by minority voters, including studies finding a disparate impact even when accounting for the volume of ballots cast); Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 21-23 (2010) (describing the harms of excessive lines).

<sup>58</sup> See Gardner et al., *supra* note 42; Astead W. Herndon & Stephanie Saul, *Major Problems with Voting in Atlanta as 5 States Hold Primaries*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/us/politics/georgia-primary-voting-atlanta.html> [<https://perma.cc/H9PD-TTDS>].

<sup>59</sup> See Herndon & Saul, *supra* note 58.

<sup>60</sup> Michelle L. Price & Scott Sonner, *Big Turnout, But Long Lines at Nevada Polls Draw Complaints*, AP (June 10, 2020), <https://apnews.com/eb8c216987916586cf0b5f68c38871fa> [<https://perma.cc/PQ2E-KWT9>].

COVID-19 was not the only source of egregious lines at the polls in the 2020 primaries. On “Super Tuesday,” before the extent of the pandemic was fully appreciated in America, lines at Texas Southern University, an HBCU in Houston, stretched for nearly seven hours due in part to insufficient numbers of voting systems. Alexa Ura, *Harris County’s Cascade of Election Day Fumbles Disproportionately Affected Communities of Color*, TEX. TRIB. (Mar. 4, 2020), <https://www.texastribune.org/2020/03/04/harris-countys-texas-southern-university-voting-delays-what-happened/> [<https://perma.cc/8NVD-CYSZ>]. And some voters waited up to four and a half hours in Los Angeles County, due in part to problems with electronic pollbooks. Kaylen Ralph, *Young Voters in California and Texas Share Their Struggles From Trying to Vote on Super Tuesday*, TEEN VOGUE (Mar. 6, 2020), <https://www.teenvogue.com/story/young-voters-california-texas-voting-struggles-super-tuesday> [<https://perma.cc/WHH6-5FDT>]; L.A. Cnty. Registrar-Recorder/County Clerk, VSAP Board Report 3 (Apr. 27, 2020), <https://lavote.net/docs/rccc/board-correspondence/VSAP-Board-Report.pdf> [<https://perma.cc/B8TD-6SRP>].

<sup>61</sup> See, e.g., Zach Montellaro, *Coronavirus Threatened to Make a Mess of Kentucky’s Primary. It Could Be a Model Instead.*, POLITICO (July 4, 2020), <https://www.politico.com/news/2020/07/04/coronavirus-voting-kentucky-primary-348611> [<https://perma.cc/6ZE9-L9QF>]; Bruce Maples, *Would Everyone Please Get the Louisville Voting Story Straight?*, FORWARD KY (June 22, 2020), <https://forwardky.com/would-everyone-please-get-the-louisville-voting-story-straight/> [<https://perma.cc/H69F-Y9BS>].

Jurisdictions will need similar investment and creativity this November. That includes exploration of nontraditional polling place locations — like convention centers, arenas,<sup>62</sup> warehouses, and retail or business locations with rare pockets of substantial floor space, particularly in minority neighborhoods.<sup>63</sup> It includes the equitable distribution of in-person locations, to ensure that voting opportunities do not exacerbate pre-existing inequities of representation and access. It includes the deployment of public information systems indicating, even quite approximately, the wait time at individual locations, so that voters may gauge when (and, if the choice is available, where) to vote to minimize time in line.<sup>64</sup> It includes procedures for secure dropboxes and curbside voting — and perhaps take-a-number systems that do not require those who cannot stand for hours to stand for hours. It includes access to ample quantities of personal protective equipment, cleaning solutions, and disposable pens or touchscreen styluses.<sup>65</sup> It includes recruitment of pollworkers from nontraditional populations, including younger members of the community — and may, in some instances, even include deployment of the National Guard, strictly in civilian attire.<sup>66</sup> It includes making all of the above available during periods of early voting before Election Day, where possible, in order to reduce the Election Day demand.

A few of the above adaptations required to deliver the franchise reliably in a pandemic require legal change. Where legislatures have not been willing to act, advocates have turned to the courts.<sup>67</sup> But particularly given the Supreme Court's willingness to stay lower court judgments without explanation,<sup>68</sup> litigation will become less effective as summer turns to fall. And in just a few months, some late-breaking judicial decisions will be legitimately difficult for jurisdictions to implement in time for November.

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<sup>62</sup> See, e.g., Jake Russell, *Hawks Turn Arena Into Voting Station After Georgia Residents Struggle to Get to Polls*, WASH. POST (June 29, 2020), <https://www.washingtonpost.com/sports/2020/06/29/hawks-turn-arena-into-voting-station-after-georgia-residents-struggle-get-polls/> [<https://perma.cc/R2KX-3P2X>].

<sup>63</sup> Some areas of the country may also be able to accommodate outdoor locations in November, though weather and access to reliable outdoor electrical capacity will radically limit the locations where this is plausible.

<sup>64</sup> See Levitt, *supra* note 20, at 477.

<sup>65</sup> See AD HOC COMM. FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, FAIR ELECTIONS DURING A CRISIS 7 (Apr. 2020), <https://www.law.uci.edu/faculty/full-time/hasen/2020ElectionReport.pdf> [<https://perma.cc/24BT-LXN8>].

<sup>66</sup> See, e.g., Capt. Joseph Trovato, *Wisconsin National Guard Provides Poll Workers Statewide* (Apr. 8, 2020), <https://www.nationalguard.mil/News/Article/2141722/wisconsin-national-guard-provides-poll-workers-statewide/> [<https://perma.cc/QG5T-9H43>]; Nathaniel Persily & Tom Westphal, Opinion, *Mobilize Pa. National Guard to Secure the June Primary*, PHILA. INQUIRER (May 27, 2020), <https://www.inquirer.com/opinion/commentary/pennsylvania-election-law-security-national-guard-2020-votes-20200527.html> [<https://perma.cc/2URN-3QZL>].

<sup>67</sup> See Justin Levitt, *The List of COVID-19 Election Cases*, ELECTION LAW BLOG (June 11, 2020, 5:34 PM) (cataloging, as of July 6, 142 COVID-19-related election cases in 40 states and DC), <https://electionlawblog.org/?p=111962> [<https://perma.cc/PSQ5-4HLQ>].

<sup>68</sup> See, e.g., *Merrill v. People First of Ala.*, \_\_\_ S. Ct. \_\_\_, 2020 WL 3604049 (U.S. July 2, 2020), [https://www.supremecourt.gov/orders/courtorders/070220zr\\_n7io.pdf](https://www.supremecourt.gov/orders/courtorders/070220zr_n7io.pdf) [<https://perma.cc/N3KC-N5YT>]; Stephen L. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 130-32, 155-58 (2019) (describing the putative standards for a stay, and examining patterns that suggest that the Court has silently changed its approach).

## Communication

Perhaps fortunately, for most of the adaptations above, existing law is not the primary obstacle to effective implementation. The larger concerns are planning, communication, and funding. Many of the steps that jurisdictions have been taking, and will need to take in the months ahead, falter without clear, consistent, pervasive, and equitable communication to the voters.<sup>69</sup> My home county of Los Angeles — a “local” jurisdiction more populous than the tenth-biggest state<sup>70</sup> — provides an example: on March 3, 2020, before the pandemic was widely recognized as such within America, Los Angeles held a primary election shifting from the traditional neighborhood polling place model to a more consolidated system of better-appointed vote centers open for more days. 31% of voters appearing at the polls on Election Day found out about the switch for the first time that day.<sup>71</sup> New voters were even less likely to have learned about the switch in advance; minority voters and voters with disabilities may also have been less likely to have learned about the switch, though disparities within those results were within the margin of error.<sup>72</sup> And those were the results *after* Los Angeles engaged in a robust multilingual and multi-mode public information campaign, and with comparatively little distracting or confusing information about the voting process in a limited number of other primary states.

Voters who are used to traditional voting procedures — and voters who are new to the voting process — need to be clearly and extensively informed, in-language and through multiple media, about the ways that they may safely and effectively exercise the franchise during the pandemic. Just as the scale of the disruption is unlike other threats to the ballot in past years, so too the scale of the communication — active outreach from each jurisdiction, not just passive display of information on websites — must be unprecedented, in order to reach voters unlikely to pay attention to changes in a system they believe that they know.<sup>73</sup> Jurisdictions will have to engage in extensive campaigns to notify voters about the need to register and check or update registration, about the availability of absentee ballots and any application process, about the steps

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<sup>69</sup> Studies of “street-level bureaucracy” in the electoral process has revealed that communication that is not consciously designed for equity may well be inequitable. For example, a national study testing responses by election officials to inquiries about identification requirements found that emails sent from putatively Latino aliases “are significantly less likely to receive any response from local election officials than non-Latino white aliases and receive responses of lower quality.” Ariel R. White et al., *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. REV. 129, 129 (2015)

<sup>70</sup> U.S. CENSUS BUREAU, 2019 Population Estimates by State, <https://www.census.gov/search-results.html?q=population+by+state&search.x=0&search.y=0&page=1&stateGeo=&searchtype=web> [<https://perma.cc/6NLV-VUA2>] (checked July 6, 2020); U.S. CENSUS BUREAU, Quickfacts – Los Angeles County, California, <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia/PST045219> [<https://perma.cc/32FX-UD57>] (checked July 6, 2020).

<sup>71</sup> Fernando Guerra et al., LMU Thomas and Dorothy Leavey Center for the Study of Los Angeles (StudyLA), Vote Center Experience (Final): 2020 LA Votes Presidential Primary Exit Poll 6, <https://lmu.app.box.com/s/tc9znydkgwp4kezt7x4ac91zv9k35ul> [<https://perma.cc/7NF9-9H6D>].

<sup>72</sup> *Id.* at 27-29. The margins of error were approximately 3-5% for racial subpopulations, approximately 5% for individuals with disabilities, and approximately 6% for first-time voters. Email from Brianne Gilbert, Assoc. Dir., Ctr. for the Study of L.A., to Prof. Justin Levitt, LMU Loyola Law School (July 7, 2020, 3:21PM) (on file with author).

<sup>73</sup> *See, e.g.*, Persily & Stewart, *supra* note 21.

eligible voters must take to ensure that their absentee ballots are counted, about the locations and hours and safety procedures of polling places and the availability of dropboxes, and about the structure for curing any minor mistakes along the way.

And they will have to communicate broadly to the public and to the press that a dramatic increase in voting by mail will likely delay the release of accurate election results; the fact that we may not know the outcome of several elections in several states on election night will likely mean that the system is working, not that it is broken.<sup>74</sup> But an impatient public must be reminded, early and often, that they must prepare to wait a bit.

## Funding

Most of the above work will be undertaken by state and local officials, and nonprofits attempting to support the election process. But there is a clear, and vitally important, role for the federal government. All of this costs money. Aside from the mammoth amount of extra resources needed to run this election, above and beyond the costs in a normal cycle — the investments in machinery and space, the increased cost of scarce supplies, the extra incentives needed to recruit personnel and space in a riskier pandemic environment — officials will need to substantially expand their spending on communicating with the public. In the CARES Act, passed in March of this year, Congress provided \$400 million in emergency election funds.<sup>75</sup> That was a welcome start. But it was only a start, and that money is already spent.<sup>76</sup> Analysts have estimated that the price tag for meeting the need this fall will be billions of dollars:<sup>77</sup> a sum that is at once substantial and a pittance. Representative democracy is the method by which Americans build the world we want to live in, and the election process is its essential

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<sup>74</sup> See, e.g., Ellen Weintraub & Kevin Kruse, Opinion, *Take Some Deep Breaths and Prepare to Wait for Election Results*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/opinion/2020-election-results-delay.html> [<https://perma.cc/72PU-9RSD>]; Miles Parks, *This November, Election Night Could Stretch Into Election Week or Month*, NPR (June 13, 2020), <https://www.npr.org/2020/06/13/875811989/this-november-election-night-could-stretch-into-election-week-or-month> [<https://perma.cc/RKR2-V2SG>]; Nicholas Riccardi & Stephen Ohlemacher, *Election results are delayed again. Get used to it.*, AP (June 24, 2020), <https://apnews.com/4a648b82e65c562e50244f36107d03eb> [<https://perma.cc/FTU9-NJ9W>]; Shane Goldmacher, *A Winner on Election Day in November? Don't Count on It*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/politics/november-2020-election-day-results.html> [<https://perma.cc/MK3D-YBA9>]; Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/> [<https://perma.cc/86AK-N2PW>]; AD HOC COMM., *supra* note 65, at 12-13.

<sup>75</sup> Press Release, ELECTION ASSISTANCE COMM'N, EAC Expediting Distribution of \$400 Million in CARES Act Election Funding for Coronavirus Response (Apr. 3, 2020), <https://www.eac.gov/news/2020/04/03/eac-expediting-distribution-400-million-cares-act-election-funding-coronavirus> [<https://perma.cc/G7TB-4EH5>].

<sup>76</sup> See Wines, *supra* note 9.

<sup>77</sup> Lawrence Norden et al., *Estimated Costs of COVID-19 Election Resiliency Measures* (Apr. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures> [<https://perma.cc/G6K5-4ZZN>].

infrastructure. Given the trillions already spent on pandemic response,<sup>78</sup> a few billion is relative pocket change to ensure that the republic continues to operate with the consent of the governed. We're worth it.

It needs to arrive yesterday. Election officials can only plan with the financial resources they have, not the hypothetical resources that might possibly be forthcoming. The Heroes Act, passed by the House in May and stalled thereafter, includes an additional \$3.6 billion in sorely needed election funding.<sup>79</sup> Whether that particular bill is the vehicle or not, it is imperative that Congress provide local election jurisdictions with the funds they need to deliver an election in disrupted conditions. Immediately.<sup>80</sup>

Without that funding and the ability to plan dramatic expansions of traditional programs for elections now less than four months away, we are likely to see some local jurisdictions with creativity and courage and no small quantum of luck narrowly avoid disaster. We are also likely to see some local jurisdictions fail — as several jurisdictions have already failed to provide reasonable voting options in the 2020 primary season, when there have been fewer voters to serve.

That latter reflection is worth one more observation. Those who are members of underrepresented communities often fare worse than those with higher socioeconomic status, in elections as in other enterprises. And it is possible that some local or federal delay, in planning or resources, is counting on that disparity, with officials believing that they stand to gain electoral advantage from the disparity of access in an election marked primarily by radical insufficiency.

Such an approach is deeply morally compromised. But for those unconvinced by constitutional and civic duty, it is also tactically incompetent. I am not at all sure, even in normal times, that gut calculations about the marginal impact of many electoral limits and restrictions are accurate: recalcitrant officials may be harming their “own” voters more than they know. But whatever the accuracy of those calculations in an average election, they are radically misguided in a pandemic. The pandemic magnifies the unintended consequences of failure — of a jurisdiction’s inability to ensure that its population is adequately registered, to shift its electorate to mail modes of balloting, to provide adequate capacity for voters to vote in-person, and to communicate the whole. Breakdowns are likely to affect voters on the margins, yes, and that would be plentiful reason for concern on its own. But breakdowns will not only affect voters on the margins. When a system this stressed is pushed beyond its limits, the entire system breaks.

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<sup>78</sup> See Andrew Van Dam, *The U.S. Has Thrown More Than \$6 Trillion at the Coronavirus Crisis. That Number Could Grow.*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/business/2020/04/15/coronavirus-economy-6-trillion/> [<https://perma.cc/C55R-FDRT>].

<sup>79</sup> H.R. 6800 at 38, 116th Cong. 2d Sess. (2020), <https://www.congress.gov/116/bills/hr6800/BILLS-116hr6800pcs.pdf> [<https://perma.cc/EJC4-SJA9>].

<sup>80</sup> See Persily & Stewart, *supra* note 21 (making this point, in March); AD HOC COMM., *supra* note 65, at 14 (making this point, in April).



To elaborate with an analogy: there are many differences between the service enjoyed by airline passengers in first-class seats, and those with the middle seat in the last row of the cabin. Incumbents or operatives relying on traditional approaches to the election this fall may be counting on first-class privileges to sustain them on the journey. Those privileges may be meaningful through normal turbulence. But if the plane goes down, the differences between the first-class and economy experiences evaporate. Preparing for a traditional election in the time of a pandemic is a pretty good way to crash the plane. This November's election may well depend — for all of us — on the ability to provide pandemic-resilient procedures for those most in need.