

Testimony of

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Hearing on Protecting the Right to Vote During the COVID-19 Pandemic

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Thank you Chairman Nadler, Ranking Member Jordan, and members of the Committee for the opportunity to submit this testimony describing the steps that this country must take to protect our fundamental right to vote in the throes of a global pandemic. While not the subject of this hearing, I would note that many of these recommendations would also alleviate some of the stresses on election administration during a time of civil unrest – like what we are facing at the moment. The Brennan Center for Justice at NYU School of Law supports this Committee’s efforts to ensure that our elections are not only free, fair, and secure, but also accessible during the COVID-19 crisis.

In this written testimony, I outline the features that each state should have to ensure that no voter is left behind. I also provide in the appendix to this testimony a voluminous amount of resources on the topic. **But the single most important thing this Committee can do to ensure that our elections run smoothly in November is for each member of this Committee to play her or his part in getting election administrators at the state and local level additional financial resources.** While Congress has provided \$400 million to help states and localities make these changes, this is a mere fraction of what is needed. We urge Congress to provide additional support immediately. Election administrators need those resources now. *Please see Appendix A for additional related information.*

I. The Stresses COVID is Placing on Our Election Requires Ameliorative Action

More than 100,000 people across the country have died from COVID-19. Public health experts repeatedly urge physical distancing practicing and habits if we are to minimize transmission. There are certain steps states and localities must take if we want to ensure that no voter is left behind. *Please see Appendix B for additional related information.*

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Director of the Brennan Center’s Voting Rights and Elections Program. I have litigated voting rights cases across the country, and authored several nationally recognized reports and articles, including *Purges: A Growing Threat to the Right to Vote* (July 2018), *Noncitizen Voting: The Missing Millions* (May 2017), and *Election Day Long Lines: Resource Allocation* (Sept. 2014). My work has been featured in media outlets across the country, including *The New York Times*, *The Wall Street Journal*, *MSNBC*, and others. I have testified previously before Congress, as well as several state legislatures, on a variety of voting rights related issues. I teach election law at Columbia Law School and I have also served as an Adjunct Professor of Clinical Law at NYU School of Law. My testimony does not purport to convey the views, if any, of the New York University School of Law.

(1) Expand Voter Registration Opportunities. Pre-pandemic, about 1 out of every 5 eligible Americans were not registered to vote.² In the past, millions of Americans update their voter registration information or register to vote for the first time the months and weeks before every presidential election.³ But now, states across the country have reported decreases in registration rates. According to news reports, the number of new registrations in Kentucky was at 7,000 in February and it dropped to just 500 in March.⁴ This is no surprise. Government agencies that provide voter registration services are closed. Community groups that register voters are unable to do person-to-person outreach because of transmission risks and shelter-at-home instructions. Even if these community groups could venture out, large groups of Americans are not congregating in venues and public spaces that were once desirable spots to perform voter registration.

Our democracy works best when all of us participate. It is imperative that we undertake efforts to bring those eligible, but unregistered, Americans into our electorate. Online registration opportunities are an obvious part of the solution. Ten states do not currently have a way to register to vote online for November.⁵ Those states should develop and implement those systems. Even states with existing registration systems can take steps to maximize their impact. States that limit online registration opportunities to people who have a state identification/driver's license should relax those requirements because motor vehicle offices are closed and people who do not have those IDs cannot get them.

Online registration systems should also be built to withstand increased use by more voters. These systems have crashed in the past at inopportune times.⁶ And, of course, online registration systems need to be accessible for voters with disabilities and persons who prefer to conduct important business in another language.

While online registration systems need to be shored up, we must remember that the digital divide is real, and we must also take steps to ensure that unregistered, but eligible Americans

² The Pew Charitable Trusts, *Elections Performance Index: Methodology* (August 2016), http://www.pewtrusts.org/~media/assets/2016/08/epi_methodology.pdf.

³ See, for instance, Merivaki, Thessalia. 2018. "Access Denied? Investigating Voter Registration Rejections in Florida." *State Politics & Policy Quarterly*, October. <https://doi.org/10.1177/1532440018800334>; Gimpel, James G., Joshua J. Dyck, and Daron R. Shaw. 2007. "Election-Year Stimuli and the Timing of Voter Registration." *Party Politics* 13 (3): 351–74. <https://doi.org/10.1177/1354068807075941>.

⁴ 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>.

⁵ The following states do not have online voter registration: Arkansas, Maine, Mississippi, Montana, New Hampshire, South Dakota, Texas, and Wyoming. The following two states have not yet implemented this policy: New Jersey and Oklahoma. See Brennan Center for Justice, "Preparing Your State for an Election Under Pandemic Conditions," May 29, 2020, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#1/>.

⁶ Laura Vozella, "Voter Registration System Crashes in VA., Preventing Some from Signing Up in Time," *Washington Post*, Oct. 18, 2016, https://www.washingtonpost.com/local/virginia-politics/voter-registration-system-crashes-in-va-preventing%20some-from-signing-up-in-time/2016/10/18/5336f1ae-9558-11e6-9b7c-57290af48a49_story.html?utm_term=.6ce77c14627b; Mark Caputo, "'A Mess': Florida's Online Voter Registration System Panned," *Politico*, Oct. 9, 2018, <https://www.politico.com/states/florida/story/2018/10/09/a-mess-floridas-online-voter-registration-system-panned-641953>.

who cannot use online systems for whatever reason have a lower-tech way to get activated and registered.

(2) Ensuring all eligible Americans have the option to vote by mail. Every state in the country allows at least some of its citizens to vote by mail, and that option should be available to every eligible American so that no voter has to expose themselves or others to the Coronavirus. Currently, there are 15 states where an American who wants to vote by mail may not meet the criteria for doing so in November.⁷ Notwithstanding existing restrictions, we are seeing a massive increase in demand to vote by mail. In Georgia, more than 1 million people have requested a mail ballot than in the 2016 presidential primary.⁸ In Wisconsin, nearly 800 thousand more voters cast mail ballots in the 2020 presidential primary than the 2016 presidential primary.⁹ That increase in mail balloting requires extra capacity in processing applications, counting returned ballots, and providing notice and cure opportunities to any voters whose returned ballots have issues. *Please see Appendix C for additional related information.*

While there is some incendiary and untrue rhetoric being lobbed around, vote by mail is a necessary, and sensible option—especially at the time we find ourselves in. Indeed, some states like Oregon, Colorado, and Washington have been conducting their elections almost entirely by mail for years. There has been no evidence of systematic or widespread abuse of the mail balloting process in those states. That is not surprising. There are numerous security measures at every step of the vote by mail pipeline. First, the ballot has to get mailed to an address, meaning that election administrators and law enforcement know exactly where to look if any investigation is warranted. And, mail ballots can be accompanied with Intelligent Mail Barcodes (or IMBs) that track where the ballot is at all time in the mail.¹⁰ For ballots that are returned in person, the options are drop boxes that have their own security protections, election offices, or polling places that are secure enough to house voting machines. Before the ballot is actually counted, it is examined for a signature—that was made under oath, and in some states there are even more stringent measures like witness or notary requirements (which we do not believe are justified given the threat level).

(3) Providing Safe in Person Voting Options. While more voters are expected to be voting by mail this November, the country is still going to need an adequate number of safe polling places to ensure that no voters are left behind. Vote by mail will not work for every voter. There will be the inevitable glitches that are expected when undergoing such a massive scale up and polling places need to exist to function as a fail-safe. Additionally, there has historically been a racial and age disparity in the use of vote by mail. For some Americans, this preference for in-

⁷ The following states require a voter to provide an excuse to vote by mail: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, South Carolina, Tennessee, Texas, and West Virginia. See Brennan Center for Justice, “Preparing Your State for an Election Under Pandemic Conditions,” May 29, 2020, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t1/>.

⁸ Kevin Morris, “Who’s Requesting Mail Ballots in Georgia’s Upcoming Primary?” Brennan Center for Justice, May 19, 2020, <https://www.brennancenter.org/our-work/research-reports/whos-requesting-mail-ballots-georgias-upcoming-primary>.

⁹ Wisconsin Elections Commission, *April 7, 2020 Absentee Voting Report*, Wisconsin Elections Commission, 2020, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf>.

¹⁰ Wendy R. Weiser and Harold Ekeh, “The False Narrative of Vote-by-Mail Fraud,” Brennan Center for Justice, Apr. 10, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

person voting may be merely habit and custom, but for others, it is a deeply held value. Consistent with this, early examinations in certain counties still reveal a large racial disparity. For example, as of May 3, 26.6% of White registered voters in Georgia had requested mail ballots for the June 9 primary, while just 18.5% of Black voters and 12% of Latino voters had done so.¹¹ For other voters, for example voters with visual or physical impairments, or voters who need the language assistance provided at polling places, in-person voting may be a necessity. And finally, there are some voters who have unreliable mail service, and cannot trust the mail to deliver something as important as their ballot.

In order to ensure that these needed polling places are safe, states and localities should undertake a number of steps. First, there should be sufficient hours and days of early voting to smooth out congestion and minimize lines. Polling places should be sited in venues that can comply with physical distancing protocols. The setup of polls sites should minimize transmission risks by, for example, making sure that entrances and waiting spaces allow for enough distance between voters. Polling places should be equipped with cleansers, water, and drying materials for frequent cleaning of spaces, machines, and hands. Poll workers and voters should have PPE like masks and gloves, and the poll site should have disposable implements like pens to mark paper ballots or Q-tips to press buttons.

It is axiomatic that we need enough polling places to ensure equal access for all voters, including those in traditionally underserved communities. Indeed, in a recent report from the Brennan Center, we learned: Black and Latino Americans spend more time waiting in line to vote on Election Day than white voters – and even more seriously – they were more likely to report especially long wait times at the polls.¹² We also found that counties that became less white over the past decade had fewer electoral resources – namely polling places, voting machines, and poll workers – per voter in 2018 than counties that grew whiter.¹³ Similarly, counties where incomes shrank over the past decade had fewer electoral resources per voter in 2018 than counties where incomes grew.¹⁴

As Covid-19 cases continue to rise, it is more important now to distribute critical electoral resources in an equitable manner to minimize voter wait times for all voters. The findings in our report suggest that allocating equal numbers of electoral resources among counties and precincts is not sufficient to produce equal wait times for all voters, particularly those of color and of lower incomes. Rather, election administrators must also focus special attention on those precincts and counties with a history of long wait times and allocate enough resources to these locations to equalize the wait times. *Please see Appendix D for additional related information.*

(4) Educating Voters About Election Processes. Voter education is always important, but given the uncertainty and disruption in American lives because of COVID-19, voter

¹¹ Brennan Center analysis of data from L2 Political and data from the Georgia Secretary of State, available here: <https://elections.sos.ga.gov/Elections/voterabsenteefile.do>.

¹² Hannah Klain, Kevin Morris, Max Feldman, and Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, 2020, hyperlink forthcoming.

¹³ *Ibid.*

¹⁴ *Ibid.*

education is more critical than ever. At least 13 states have changed their primary dates,¹⁵ and at least two states have made it possible for any voter to request an absentee ballot this November.¹⁶ There are dozens of lawsuits across the country whose outcome could change one or more significant voting rules. Any increased accessibility will be blunted, however, if voters are not aware of the new rules.

Moreover, amidst changes, Americans are vulnerable to misinformation and disinformation. Election officials may send out materials with a date from a prior election, as occurred in Washington D.C.¹⁷ But, deliberate efforts to mislead voters have also been

¹⁵ These include the following: Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and West Virginia. See Connecticut Official State Website, “Governor Lamont Orders Connecticut’s Presidential Primary Election Rescheduled to June 2,” March 19, 2020, <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Governor-Lamont-Orders-Connecticuts-Presidential-Primary-Election-Rescheduled-to-June-2>; State of Delaware Executive Department, Dover, “Sixth Modification of the Declaration of a State of Emergency For The State of Delaware Due to a Public Health Threat,” March 24, 2020, <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>; Georgia Secretary of State Brad Raffensperger Official Website, “Raffensperger Announces Postponement of Primary Election Until June 9,” April 9, 2020, https://sos.ga.gov/index.php/elections/raffensperger_announces_postponement_of_primary_election_until_june_9; Indiana Governor Eric J. Holcomb Official Website, “Gov. Holcomb and Secretary of State Lawson Announce Primary Election to Move to June 2,” March 20, 2020, <https://calendar.in.gov/site/gov/event/gov-holcomb-and-secretary-of-state-lawson-announce-primary-election-to-move-to-june-2/>; Kentucky Official State Website, “Secretary of State Moves To Delay May 19 Elections,” March 16, 2020, <https://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=300>; State of Louisiana Executive Department, “Proclamation Number 46 JBE 2020: Elections – Rescheduled Due to Statewide State of Emergency Caused by COVID-19,” March 13, 2020, <https://gov.louisiana.gov/assets/Proclamations/2020/46-JBE-2020-Elections-Rescheduled.pdf>; State of Maryland Proclamation, “Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19,” March 17, 2020, https://elections.maryland.gov/press_room/proclamation_2020_elections.pdf; Frank LaRose, Ohio Secretary of State, “Directive 2020-06: Order from Director of Health Dr. Amy Acton Closing Polls for the March 17, 2020 Presidential Primary Election,” March 16, 2020, <https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-06am.pdf>; Official Pennsylvania Government Website, “Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election,” March 27, 2020, <https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-response-bills-to-bolster-health-care-system-workers-and-education-and-reschedule-the-primary-election/>; State of New Jersey, “Executive Order No. 120,” April 8, 2020, <https://nj.gov/infobank/eo/056murphy/pdf/EO-120.pdf>; State of New York Executive Chamber, “No. 202.12: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency,” March 28, 2020, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.12.pdf; State of Rhode Island and Providence Plantations, “Executive Order 20-11: Ninth Supplemental Emergency Declaration – Delaying the Primary Elections and Preparing for a Predominantly Mail Ballot Election,” March 23, 2020, <https://governor.ri.gov/documents/orders/Executive-Order-20-11.pdf>; State of West Virginia Executive Department At Charleston, “Executive Order No. 18-20: By the Governor,” April 1, 2020, <https://governor.wv.gov/Documents/2020%20Proclamations/EO%2018-20.pdf>.

¹⁶ Both New Hampshire and Virginia will allow any voter to request an absentee ballot for the November general election. See New Hampshire Secretary of State William M. Gardner and Attorney General Gordon J. MacDonald to New Hampshire Election Officials, April 10, 2020, State of New Hampshire, Elections Operations During the State of Emergency, https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf; John Wood, “Gov. Northam signs laws he says will help expand voting accessibility,” WHSV newsroom, April 13, 2020, <https://www.wHSV.com/content/news/Gov-Northam-signs-bills-to-help-with-voter-turnout-569605261.html>.

¹⁷ Martin Austerhuhle, “Thousands Of D.C. Voters Were Given The Wrong Primary Election Date,” *NPR*, February 24, 2020, <https://www.npr.org/local/305/2020/02/24/808903582/thousands-of-d-c-voters-were-given-the-wrong-primary-election-date>.

documented, for example, on March 3, the Texas Secretary of State's office received reports of a robocall inaccurately informing voters that Democrats were supposed to vote the following day.¹⁸ Likewise, Common Cause has identified “multiple examples of cyber suppression content — social media posts with disinformation or deceptive practices that could cause a voter to be disenfranchised,” during the 2020 Primary Elections.¹⁹

Fortunately, robust voter education efforts from trusted sources can be immensely helpful for motivating and encouraging voters and combatting incorrect information. This education should be culturally competent, in language, and targeted to low information voters and work for voters who do not get their information online. Education methods should include mail, telephone, trusted community leaders, radio, and television.

(5) Be Prepared for New Cybersecurity Threats. Prior to COVID-19, there was high concern that foreign cybercriminals would interfere in our elections. In some ways, this concern should be greater. Resources that should have been available to secure election technology now have to be diverted to ensuring elections happen this November. Additionally, COVID-19 dramatically incentivizes the use of online systems for registration and mail ballot requests by voters, but the increased usage makes those online systems even more attractive targets than they would have been just a few months ago.

The importance of securing our elections against cyber-attack cannot fall off our agenda. We must continue to audit and test those systems. Additionally, we need postelection audits of receipts afterwards to make sure that we can trust the electronic tallies. *Please see Appendix E for additional related information.*

Fortunately, in many places, elected and election officials of both parties are working together to make needed changes. For example, in Kentucky, the Democratic Governor and Republican Secretary of State worked in partnership to expand absentee voting by mail and created a secure online absentee mail ballot application portal for the June 23, 2020 primary election.²⁰ Republican Secretary of State Pate of Iowa launched poll worker recruitment efforts to guard against these problems in the fall.²¹ These leaders should be commended for their bipartisan action. Congress should take heed.

¹⁸ Carrie Levine, “Online Misinformation During The Primaries: A Preview Of What’s To Come?” The Center for Public Integrity, March 11, 2020, <https://publicintegrity.org/politics/elections/online-misinformation-during-the-primaries-a-preview-of-whats-to-come/>.

¹⁹ Common Cause, “Common Cause Documents and Responds to Voting Issues Across the County,” March 3, 2020, <https://www.commoncause.org/press-release/common-cause-documents-and-responds-to-voting-issues-across-the-country/>.

²⁰ Commonwealth of Kentucky, “Governor Beshear, Secretary Adams Issue Statements on June Election Procedures,” April 24, 2020, <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=139>.

²¹ Office of the Iowa Secretary of State, “MEDIA RELEASE: Secretary Pate launches statewide poll worker recruitment for June primary,” April 29, 2020, https://sos.iowa.gov/news/2020_04_29.html.

II. More Resources are Needed

In March, as part of the CARES Act, Congress gave states \$400 million to protect the upcoming presidential and federal elections from any COVID-19 related disruptions.²² While this was an important start, it is insufficient, given the massive changes that are necessary to leave no voters behind.

The Brennan Center has estimated the national cost of implementing its full set of recommendations for running safe and secure elections in 2020 is approximately \$4 billion. Subsequent to release of our estimate, and working in conjunction with the R Street Institute, Alliance for Securing Democracy and the University of Pittsburgh Institute for Cyber Law, Policy and Security, separately interviewed election officials in five states – Georgia, Michigan, Missouri, Ohio and Pennsylvania – to determine the steps they were taking, and would like to take, to ensure free, fair and safe elections in 2020 during the COVID pandemic. It is patently clear that more resources are need.²³ Election officials agree, and multiple states associations, plus more than 150 individual local election officials from both parties have signed letters urging Congress to provide them with more resources to run safe and fair elections this fall. *Please see Appendix F for additional related information.*

Ultimately, the smoothness of the November election will depend in large part on the commitment that elected officials, including Congressmembers, have in supporting our election administrators and their voters during this crisis. During this time of political unrest, we must also recognize the fundamental role voting plays within our democracy and do everything we can to ensure every eligible American is able to have their voice heard. I am hopeful that members of this Committee will model the leadership and commitment our country so desperately needs during this time.

²² Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. (2020).

²³ Christopher R. Deluzio, Elizabeth Howard, David Levine, Paul Rosenzweig, and Derek Tisler, *Ensuring Safe Elections: Federal Funding Needs for State and Local Governments During the Pandemic*, Brennan Center for Justice, 2020, https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_FINAL.pdf.