

Election 2020 and the COVID-19 Pandemic: Legal Issues in Absentee and All-Mail Voting

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As a result of the coronavirus disease 2019 (COVID-19) pandemic, there have been [concerns](#) about the potential impact on the 2020 federal election cycle. [Some states](#) have [delayed](#) primary elections, and, in other jurisdictions, officials have [moved polling places](#) away from high-risk populations. As the public health crisis continues, new questions are emerging about the safety and accessibility of voting in the [remaining federal primaries](#) and the November 3 general election. These concerns are coupled with questions about how to maintain election integrity. As a result, courts across the nation have been considering challenges to key aspects of state election laws.

Much of the recent election law litigation relating to COVID-19 has challenged aspects of state laws addressing absentee voting and [all-mail voting](#), also known as vote-by-mail. In this Sidebar, absentee voting generally refers to state laws that permit eligible voters to request and cast ballots by mail without physically going to the polls on Election Day. All-mail voting generally refers to state laws that provide for automatic mailing of ballots to all eligible voters.

This Sidebar outlines the legal landscape for state and federal election laws, examines recent challenges to state laws in response to the pandemic, and briefly discusses select legislation introduced in the 116th Congress.

Legal Landscape

Although presidential and congressional elections have national impact, they are primarily administered according to state laws. The Elections Clause of the U.S. Constitution provides to the states the initial and principal authority to administer elections within their jurisdictions. As a result of this decentralized authority, states vary significantly in how they administer the voting process and elections. For example, states have enacted differing laws addressing whether and to what degree voters can cast ballots prior to the day of an election, known as [early voting](#). States also have differing laws governing all-mail voting, deadlines for voter registration, circumstances under which voters can cast absentee ballots, and procedures for collecting absentee ballots. At the same time, the Elections Clause provides Congress with the authority to “[override](#)” state laws in order to regulate federal elections. Under that authority, Congress

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has enacted federal laws, such as the [Help America Vote Act](#) and the [National Voter Registration Act](#), that dictate how states must administer aspects of the election process.

According to the [National Conference of State Legislatures](#), all state laws provide some type of absentee voting, with approximately two-thirds of states permitting qualified voters to vote absentee without offering an excuse, which is known as “no excuse” absentee voting. Furthermore, in order to avoid transmission of COVID-19, an [increasing number of states](#) have [expanded access](#) to absentee voting and all-mail voting for certain 2020 elections.

As illustrated in the examples below, litigants have recently challenged state voting laws under various provisions of the U.S. Constitution and key Supreme Court precedent. Challenges have invoked the [First Amendment’s](#) guarantee of freedom of association, the [Fourteenth Amendment’s](#) guarantee of equal protection, the [Twenty-Fourth Amendment’s](#) prohibition on poll taxes, and the [Twenty-Sixth Amendment’s](#) prohibition on abridging the right to vote based on age. In addition, litigants and courts have often cited the Supreme Court’s 2006 ruling in [Purcell v. Gonzalez](#) for the proposition that, in determining whether to enjoin or modify an election law close to Election Day, courts must consider the risk of “voter confusion and consequent incentive to remain away from the polls.” According to the Court in [Purcell](#), that risk increases as the election draws closer.

Recent Challenges

Recent election law litigation relating to the COVID-19 pandemic has involved a range of disputes over state absentee and all-mail voting. Some cases challenged a recent change to a particular voting procedure that was imposed by a court or an election official as a result of COVID-19. Other cases sought a specific interpretation of an existing state law in order to respond to COVID-19. Recent court challenges have concerned various aspects of such voting laws and processes, including expanded all-mail voting procedures, “no excuse” absentee voting, [notary](#) or [witness signature requirements](#), postmark deadlines, prepaid postage, and third-party [collection](#) of ballots (which some refer to as “ballot harvesting”).

While some have argued that states should expand access to absentee and all-mail voting because of COVID-19, others have maintained that voting practices lack legal safeguards needed to protect against voter fraud. Court rulings have sought to balance public health interests with election integrity. In addition, with mixed results, courts have often applied the Supreme Court’s standard in [Purcell](#), which cautions of the risks in enjoining or modifying an election law as Election Day draws near. The results of these cases have varied and, in some instances, may be subject to appeal. Additional [litigation](#) this election cycle is [expected](#).

Deadlines for Casting Absentee Ballots

On the day before Wisconsin’s April 7, 2020 presidential primary election, the U.S. Supreme Court, by a 5-4 vote, [stayed](#) a federal district court’s preliminary injunction that required the state to count absentee ballots postmarked after Election Day on April 7. Five days before Election Day, among other things, the [trial court ordered](#) that absentee ballots *postmarked after Election Day* still be counted so long as they were received by April 13. According to the trial court, because of the COVID-19 pandemic and the “huge backlog” of requests for absentee ballots, voters needed additional time to receive such ballots, and election officials needed additional time to count the “avalanche of absentee ballots” in a safe manner. As a result, the trial court reasoned that the extension was needed to alleviate an unconstitutional burden on Wisconsin citizens’ right to vote. Appealing to the Supreme Court, the [appellants](#) argued that by permitting the counting of absentee ballots postmarked after Election Day, instead of permitting only the counting of ballots postmarked by Election Day, the trial court effectively created more than one voting

deadline. Appellants argued that the “orderly administration” of an election requires imposition of a single deadline for counting ballots.

In a *per curiam* opinion, the Supreme Court disagreed with the trial court’s ruling. According to the High Court, the narrow question presented in this case was whether absentee ballots needed to be postmarked by Election Day in order to be counted, “as [state law](#) would necessarily require,” or if they could be postmarked after Election Day, so long as they were received by April 13. (Although Wisconsin [law](#) does not expressly specify that an absentee ballot be postmarked by Election Day, it requires receipt by Election Day.) According to the Court, a six-day extension of the date by which voters may cast ballots significantly altered “the nature of the election.” Central to the Court’s decision was that the trial court unilaterally extended the postmark deadline, even though the plaintiffs had not requested that extension from the trial court. Furthermore, relying on the *Purcell* [precedent](#), the Court held that the district court violated the principle that courts should not “ordinarily” alter the rules of an election shortly before Election Day. The Court stressed that it was not expressing an opinion on the “wisdom” of Wisconsin holding the election in the midst of the COVID-19 pandemic or if other changes to voting procedures were appropriate.

Written by Justice Ginsburg, the dissent maintained that the concerns articulated by the Court were minor in comparison to the large numbers of voters who might be disenfranchised by the Court’s ruling. According to the dissent, the Court’s “eleventh hour” ruling presented voters with the problematic choice of either voting in person, risking exposure to COVID-19, or losing their right to vote because they did not receive an absentee ballot in time to comply with the April 7 postmark deadline.

Expanded All-Mail Voting

In a case challenging the Nevada Secretary of State’s decision to institute an all-mail election (with one physical polling place) for the June 9, 2020, congressional primary, a federal district court [denied](#) a motion for injunctive relief on April 30. Among other things, the challengers argued that an all-mail election violates the right to vote by not including voter fraud protections, which dilutes legally cast votes, and by not complying with the *Purcell* standard. Rejecting the challengers’ argument that all-mail voting dilutes votes, the court determined that Nevada’s interests in protecting voter health and the franchise outweighed the burdens on the challengers, which the court characterized as merely “an imposition upon their preference for in-person voting.” The court also observed that the plan for an all-mail election did maintain election safeguards against fraud by, for example, requiring identification for first-time voters and imposing [penalties](#) against fraudulent votes. In response to the contention that the Secretary’s decision to institute all-mail voting shortly before Election Day violates the *Purcell* standard, the court determined that *Purcell* applies only to *courts* when they enter orders affecting election procedures, not to state and local election administrators prescribing voting regulations.

“No Excuse” Absentee Voting

On April 17, 2020, a Texas state court temporarily [enjoined](#) Travis County, TX, from rejecting applications for absentee ballots from voters claiming the “disability category of eligibility as a result of COVID-19” for the July 14, 2020, congressional primary [runoff election](#). (Texas [law](#) provides that certain elections require a majority vote, necessitating a runoff election between candidates who receive the highest and second-highest number of votes in the main election.) Under Texas [voting law](#), all eligible voters over age 65 may vote absentee by mail upon request. The law also provides a “disability category of eligibility,” which allows younger voters to obtain such ballots “if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood ... of injuring the voter’s health.” Determining that voters “are reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of

injuring their health,” the court construed the statute to permit absentee voting for voters claiming the “disability category of eligibility as a result of COVID-19.” The State of Texas has [appealed](#), and, in light of a [letter](#) from the state attorney general maintaining a contrary interpretation of the statute, the challengers have [sought emergency relief](#) from the court to enforce the temporary injunction.

Litigants have filed [additional suits](#) arguing that the Texas law permitting voters over age 65 to vote absentee by mail is unconstitutional under the [Twenty-Sixth Amendment](#), which prohibits abridging the right to vote based on age. The challengers argue that the law unconstitutionally prohibits those under 65—a majority of Texas’s voters—from voting by mail because of their age in violation of the text of the amendment. They maintain that because of the COVID-19 pandemic, the law leads to younger voters having to choose between voting on the one hand and risking their health and increasing the spread of the virus on the other. Likewise, a [suit](#) challenging an Indiana “no excuse” absentee voting law includes a claim of age discrimination under the Twenty-Sixth Amendment.

Prepaid Postage for Absentee Ballots

On April 30, 2020, a federal district court [denied](#) a motion for injunctive relief that would have required Georgia to provide return postage for absentee ballot applications and absentee ballots in the June 9 presidential and congressional primary election. The challengers argued that, by requiring voters to pay postage for mailing absentee ballots, the Georgia Secretary of State unconstitutionally imposed a poll tax in violation of the [Twenty-Fourth](#) and [Fourteenth Amendments](#) and an unjustifiable burden on the right to vote in violation of the [First](#) and [Fourteenth Amendments](#). Citing *Purcell*, among other cases, the court determined that time constraints precluded issuing the relief sought. That is, since absentee ballots had already been mailed to hundreds of thousands of voters, the court concluded that requiring the state to add postage instructions to absentee ballot envelopes or mailing postage to voters would “run[] the risk that voters awaiting new instructions do not timely submit their ballots.” However, the court confirmed that the challengers and similar voting rights groups could distribute stamps to voters for the purpose of mailing absentee ballot applications and ballots.

As for future elections—including Georgia’s August 2020 [runoff](#) and November 2020 general—the court reserved judgment about whether injunctive relief was appropriate. In this vein, the court announced that “it would benefit the public for the Parties to immediately discuss means to reach the goal of eliminating barriers to voting posed by the COVID-19 pandemic,” specifically recommending that the parties discuss whether adding an instruction about postage to the revised voter instructions could be a solution. As examples, the court suggested that the state might opt to instruct a voter unable to obtain postage to contact the local board of elections for alternative ballot delivery methods. The court also proposed that the state consider whether a [law](#) allowing in-person delivery of ballots by family members could be construed to permit ballot delivery for voters at high risk for COVID-19 because of underlying conditions or age.

Considerations for Congress

While states have the initial and principal authority to administer elections within their jurisdictions, Congress has enacted specific overriding federal laws in some areas. Similarly, in response to varying state laws and court rulings relating to COVID-19, and within the bounds of the [Constitution](#), Congress may choose to enact legislation addressing absentee voting and all-mail voting procedures in federal elections. For example, introduced in the 116th Congress, S. 26 and H.R. 92 would require states to allow postage-paid, all-mail voting in federal elections and prohibit them from imposing additional conditions, except for a deadline for returning the ballot. S. 3440 and H.R. 6202 would require states to develop contingency plans for voting in federal elections if a significant number of voters or poll workers are quarantined because of COVID-19. The bills state that the contingency plans would need to permit

registered voters to submit online requests for absentee ballots and to vote-by-mail and extend vote-by-mail deadlines if postal service is disrupted because of COVID-19. On the other hand, Congress may wish to defer to state laws and election officials, as interpreted by the courts, regarding federal election voting procedures in the era of COVID-19. CRS discusses additional policy options in this [In Focus](#).

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