

## **Adjustments to Election Law Due to COVID-19**

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The COVID-19 epidemic, which hit the United States in early 2020, brought to the fore questions about how best to protect both democracy and public health when an emergency occurs during an election. As of May 2020, several states had made changes to their electoral rules. All three branches of government have been active, with governors and public-health officials issuing orders; legislatures amending election laws; and courts entertaining claims that states' action (or inaction) abridged the right to vote. The law is changing so rapidly that any attempt to catalogue all of the developments is bound to be overtaken by events nearly as quickly as it is written. Nevertheless, the following discussion should provide a sense of some of the responses that states have made to the crisis — and a sense of some of the controversy that those responses have engendered.

The Democratic National Convention was pushed back a month — from July 13–16 to August 17–20 — and conducted virtually because of concerns about the virus. The Republican National Convention was scheduled to be held in Charlotte, North Carolina, but when the Democratic governor and mayor refused to permit such a large in-person gathering, the RNC revised its plans and prepared to hold most of the convention events in Jacksonville, Florida. When it became clear that holding the convention in Jacksonville also presented an excessive public-health risk, the Republicans moved their convention online, except for a small amount of in-person business in Charlotte.

Many states considered postponing their primary elections or holding them exclusively by mail. In Pennsylvania, for example, a law was passed at the end of March moving the state's primary from April 28 to June 2 and also delaying the deadlines for voters to register and to request mail-in ballots, which are available to all voters. In all, fifteen states delayed their primaries, some more contentiously than others.

Ohio's Director of Public Health ordered the polls closed as a public-health measure less than twenty-four hours before voting in the state's March 17 primary was due to begin. The Ohio legislature shortly thereafter passed legislation creating an entirely vote-by-mail primary that required voters to submit their ballots by April 28. The vote-by-mail procedures were controversial, however. For example, even though there was no option of in-person voting, the state sent absentee ballots to only those voters who requested them. Charging that the procedures would cause thousands of Ohioans to lose their ability to vote, plaintiffs brought suit challenging the new procedures, but a federal district court refused to issue an injunction. Michigan's secretary of state, on the other hand, decided — without any explicit legislative authorization — to send mail-in ballots to all voters, even those voters who did not request them.

New York canceled its presidential primary, but the cancellation was overturned in court. *Yang v. Kellner*, \_\_ F. Supp. 3d \_\_, 2020 WL 2129597 (S.D.N.Y. 2020). Although New York's primary could not possibly determine the presidential nominee (Joe Biden had, practically speaking, secured the Democratic nomination), the court noted that the choice of convention delegates could have implications for the party beyond choosing the nominee, and, therefore, the cancellation abridged the right to vote.

Texas law permitted voters to vote by mail if they would be absent from the jurisdiction on election day and during the entire early-voting period, if they were at least age sixty-five, or if they had a "disability" that prevented them from voting in person. A federal district court ordered the state to permit every voter to vote by mail. In addition to finding that the right to vote was impaired by an in-person voting requirement during a pandemic, the court stated that permitting no-excuse mail-in voting for voters age sixty-five and over violated the Twenty-Sixth Amendment, which prohibits abridging the right to vote on account of age for anyone at least age eighteen. *See Texas Democratic Party v. Abbott*, \_\_ F. Supp. 3d \_\_, 2020 WL 2541971 (W.D. Tex. 2020). Saying that the district court's order "will be remembered more for audacity than legal reasoning," the Fifth Circuit promptly issued a stay. *Texas Democratic Party v. Abbott*, 961 F.3d. 389, 394 (5th Cir.), *motion to vacate stay denied*, 140 S. Ct. 2015 (2020). The Court of

Appeals held that the state was likely to succeed on the merits because the state's limitations on mail-in voting did not "absolutely prohibit[]" anyone from voting, *id.* at 404 (quoting *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 808 n.7 (1969)), and the age classification was supported by a rational basis in easing the burdens on voting disproportionately felt by the aged, *see id.* at 406-08.

In Wisconsin, as elsewhere, the COVID-19 outbreak caused a substantial increase in the number of requests for absentee ballots. The resulting backlog meant that some voters in that state did not receive their ballots until after the April 7 election day — the day that state law not only designated for in-person voting, but the day by which absentee ballots were supposed to be received by election officials. A federal district court issued an injunction extending the deadline for absentee voting until April 13 and permitting voters to mail ballots after April 7, so long as they would be received by April 13. *Democratic National Committee v. Bostelmann*, \_\_ F. Supp. 3d \_\_, 2020 WL 1638374 (W.D. Wis. 2020). The Supreme Court, by a 5-4 vote, stayed part of the injunction, requiring voters to postmark their ballots by election day, but permitting a properly postmarked ballot to be counted even if it was not received until after election day. *Republican National Committee v. Democratic National Committee*, 589 U.S. \_\_, 140 S. Ct. 1205 (2020) (*per curiam*). The Court relied on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) [p. 1141], in holding that the district court's alteration of the electoral rules was particularly problematic because it occurred so close to the election. The "*Purcell* principle" is considered in more depth in Chapter 11. *See also Merrill v. People First of Alabama*, \_\_ U.S. \_\_, 2020 WL 3604049 (2020) (5-4) (staying a lower-court order that had eased requirements for voting by mail). *But see Republican National Committee v. Common Cause Rhode Island*, \_\_ U.S. \_\_, 2020 WL 4680151 (2020) (6-3) (denying a stay of an order that had eased similar requirements, when the order was entered pursuant to a consent decree).

While litigation over Wisconsin's absentee ballots was pending, there was uncertainty over whether the primary would be held on April 7 at all. The day before the election, Wisconsin's governor issued a decree delaying that state's primary election. The decree was immediately challenged, and on the same day, the Wisconsin Supreme Court overturned the governor's order by a 4-2 vote, holding that it exceeded the governor's authority under state law to respond to emergencies.

Stay-at-home orders not only made it difficult to cast ballots; they also hindered the ability to collect signatures on petitions. This hinderance took two forms. First, without exemptions for petition-circulation, stay-at-home orders prevented people from leaving their homes to collect signatures. Second, even if the circulators could leave their homes, it was much more difficult to collect signatures if stay-at-home orders prevented potential signatories from milling about in public areas. In addition, the virus itself made it potentially dangerous to collect signatures in person. Is it constitutional to require in-person signature-gathering during a pandemic?

In challenges to petition requirements during the pandemic, some courts reduced the number of required signatures, although decisions in this area were not consistent. *See Goldstein v. Secretary of Commonwealth*, 142 N.E.3d 560 (Mass. 2020) (reducing the number of required signatures and extending the deadline for collecting them); *Garbett v. Herbert*, \_\_ F. Supp. 3d \_\_, 2020 WL 2064101 (D. Utah 2020) (reducing the number of required signatures). *But see Murray v. Cuomo*, 2020 WL 2521449 (S.D.N.Y. 2020) (denying a request for a further reduction in the number of required signatures after the governor issued an executive order reducing the requirement and shortening the time available for collecting signatures, so that they would be due three days after the order).

Some decisions been relatively aggressive in insisting that governments accommodate signature-gatherers whose activity was hindered by stay-at-home orders. In *Esshaki v. Whitmer*, 813 Fed. Appx. 170 (6th Cir. 2020), the Court of Appeals affirmed a district-court decision enjoining Michigan from enforcing its petition requirements against a candidate who could not satisfy them because the stay-at-home order prevented people from leaving their homes to collect signatures. The Court of Appeals reversed the district court, however, as to the portion of its injunction requiring the state to reduce the number of required signatures by 50%, extending the deadline for collection of signatures, and requiring the state to accept petition signatures by mail. Thus, although the district court was within its authority in determining that Michigan's stay-at-home order made it unconstitutional to enforce the petition requirement, the district court exceeded its authority by rewriting the petition requirement to comply

with constitutional requirements. In the Sixth Circuit's words, "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Id.* at 172; *see also SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020) (following *Esshaki* and holding unconstitutional Michigan's enforcement of its signature requirement despite the stay-at home order).

Similarly, a district court in Idaho required that state "either to certify an initiative for inclusion on the ballot without the requisite number of signatures, or to allow the initiative sponsor additional time to gather digital signatures through an online process of solicitation and submission never before used by the State. When the State chose neither option, the District Court authorized the sponsor to join with a third-party vendor to develop and implement a new online system over the course of nine days." *Little v. Reclaim Idaho*, 591 U.S. \_\_, 2020 WL 4360897 at \*1 (Roberts, C.J., concurring). The Supreme Court stayed the district court's order, with Justices Sotomayor and Ginsburg dissenting.

In *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020) (*per curiam*), the Sixth Circuit showed more reluctance to interfere in the state administration of elections. *Thompson* stayed a district-court order that had extended Ohio's signature-gathering deadline and had enjoined the state from enforcing its requirement that petition signatures be witnessed and that they be signed in ink. The Court of Appeals concluded that the state was likely to succeed on the merits of the challenge, because the restrictions put in place to control the virus did not impose a severe burden on the right to vote. The Sixth Circuit noted that, unlike the Michigan order at issue in *Esshaki*, the Ohio order exempted First-Amendment-protected activity — and specifically petition circulation — from the stay-at-home requirement. Further, the stay-at-home order ended five weeks before the petition deadline, giving petition circulators adequate time to collect signatures. The Michigan order in *Esshaki* was in effect through the deadline for circulating petitions, and it therefore presented a much more severe burden than the Ohio order did. Once again, the Sixth Circuit warned against using federal courts' injunctive powers to "usurp[] a State's legislative authority by re-writing its statutes' to create new law." *Id.* at 812 (quoting *Esshaki* at 172) (alteration in original). *See also Hawkins v. DeWine*, \_\_ F.3d \_\_, 2020 WL 4435524 (6th Cir. 2020) (following *Thompson*).

Other circuits have been less insistent that states "adapt the initiative process to account for new obstacles to collecting signatures." *Reclaim Idaho, supra*, at \*1 (Roberts, C.J., concurring). In *Miller v. Thurston*, 967 F.3d 727 (8th Cir. 2020), the court upheld an Arkansas requirement that petitions be signed in the presence of a canvasser. The in-person-signature requirement, the court held, did not impose a severe burden on First Amendment rights and was a reasonable means of furthering the important interest in preventing fraud or mistakes in the petition-gathering process. Similarly, in *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (*per curiam*), the court brushed aside the plaintiffs' claim that Illinois's petition requirements for initiatives and referenda were unconstitutionally onerous in light of the limitations put in place to deal with the pandemic. The court held that there was sufficient time to circulate petitions before the start of the pandemic, so there was no cause to grant emergency relief from the petition requirements. *Id.* at 651-52. The court also noted that there is no federal right to initiatives or referenda, and suggested that even if Illinois had simply decided "to skip all referenda for the 2020 election cycle, there is no federal problem. Illinois may decide for itself whether a pandemic is a good time to be soliciting signatures on the streets in order to add referenda to a ballot." *Id.* at 652.

Many jurisdictions revised their election policies after looking ahead to the November 2020 elections and anticipating the possibility of disruptions in the normal election procedure. New York's June 23 primary, which did not yield final results until well over a month following the election and in which more than 100,000 votes were invalidated, has caused many observers to worry about similar delays in counting the votes in the general election, as many jurisdictions would be struggling to implement new voting rules and struggling to count millions of mail-in ballots during a highly contentious presidential election. Many states implemented reforms to make it easier for people to vote from home. In August 2020, for example, New York passed laws permitting voters to request absentee ballots because of the risk of illness, and allowing absentee ballots to be counted if postmarked by election day, even if not received until a week later.

Such reforms improved access to the ballot for voters who would have found it difficult to vote in person, but critics alleged that the increased use of absentee ballots would lead to higher printing and

vote-tabulating expenses and delays, as well as risks of fraud. Republicans, and President Trump in particular, were critical of states that decided to mail ballots to all registered voters, even without a request from the individual voters. These critics fear that ballots could be stolen and cast illegally, especially in jurisdictions that allowed people to collect (“harvest”) and submit others’ ballots. Democrats, for their part, have called for additional funds for the U.S. Postal Service to enable it to deliver the large number of mail-in ballots that were anticipated. In late-March 2020, Congress passed a spending package to ease the economic effects of the coronavirus, and part of that package included \$400 million in election funding to aid states in expanding voting by mail, as well as in ensuring safe in-person voting. As of this writing, there has been no agreement on additional funding for the Postal Service. For more discussion on election-related responses to the COVID-19 pandemic, see Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, SSRN, available at <https://ssrn.com/abstract=3604668> (2020) (working paper).