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COVID-19 and the Law: Elections

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COVID-19 and the Law: Elections

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I. Introduction

With one Supreme Court decision, lower federal and state court decisions, pending litigation, and proposals around the country for major changes in how elections are conducted, COVID-19 has already had and likely will continue to have a significant impact on election law.

The discussion that follows proceeds in two parts. The first addresses the initial consequences of COVID-19 as an electoral emergency. Voters were due to go to the polls in states around the country just as the pandemic was gathering force and governors and mayors were calling on people to stay at home and avoid large gatherings – which, of course, often occur at crowded polling places during contested elections. Although many states managed to move their late March and April elections to May, June, or later without incident, heated political and legal battles broke out in Ohio and Wisconsin over changing election dates and formats, with the Wisconsin dispute winding up in both the state and United States Supreme Courts the day before the election, and Wisconsin conducting an in-person election in the middle of a pandemic.

The second part looks beyond the immediate effects of COVID-19 to the middle term, that is, to the host of changes to election laws that will be needed for the November 2020 election if, due to the pandemic, large gatherings remain a public health threat. Some form of primarily vote-by-mail system will be needed, but such a system is currently in place only in five states, and those states took several election cycles to make the transition from traditional polling-place voting. Indeed, right now, one-third of the states permit only voters with one of a limited number of excuses specified in the states' statutes to obtain a mail-in ballot. Widespread changes in voting laws will be necessary if the November elections are to be safe, fair, and secure. Yet,

partisan opposition encouraged by President Trump’s error-filled misstatements about voting-by-mail¹ makes it unclear whether these changes will be made.

II. COVID-19 as Election Emergency

COVID-19 first became a factor in the 2020 elections on March 17, when four major states – Arizona, Florida, Illinois, and Ohio – were set to hold their presidential primaries and other elections. Voting went ahead in the first three states, although the process was troubled in many places by the failure of poll workers – many of whom are over sixty – to report for duty, the resulting last-minute closure of some polling places, and the shortage of hand sanitizer and wipes for the voting machines.² In Arizona and Florida – states with previously high levels of voting by mail and early in-person voting – overall turnout was strong even though there were fewer in-person voters than in the 2016 primaries. Turnout was considerably lower in Illinois, where most voters vote in person on election day and, due to COVID-19 anxieties, many were unable or unwilling to do so.

The situation in Ohio was more complicated. On March 16, Governor DeWine announced at a press conference that it was unsafe to hold the election scheduled for the following day. Although he said he lacked the authority to reschedule the election, he anticipated (and would not contest) a private lawsuit claiming that requiring voters at risk of coronavirus to come to the polls is unconstitutional and seeking a postponement of the election. However, later that day, the Franklin County Court of Common Pleas rejected the suit, finding that it would set a “terrible precedent” to postpone an election 12 hours before polling places were scheduled to open.³ Then, just when it looked like the election would be held as scheduled, the Director of the Ohio Department of Health, presumably acting at the behest of the governor, issued an order closing

¹ <https://www.nytimes.com/article/mail-in-voting-explained.html?searchResultPosition=1>

² https://www.washingtonpost.com/politics/shuttered-polling-places-and-a-dearth-of-cleaning-supplies-voters-confront-pandemic-fueled-confusion-at-the-polls/2020/03/17/55dba1f6-685f-11ea-b313-df458622c2cc_story.html

³ <https://thehill.com/homenews/campaign/487929-judge-refuses-to-reschedule-ohio-primary-amid-coronavirus-fears>

all polling places on health grounds. The Secretary of State – the state’s chief elections officer – followed up with another order rescheduling in-person voting for the 2020 primaries for June 2, 2020; allowing absentee balloting to continue until then; and extending the deadlines for requesting absentee ballots, counting them, canvassing them, and certifying election results.

The secretary most likely lacked the statutory authority to do any of this, and suits were filed challenging his action. On March 21, he sent a letter to the legislature requesting that it set a June 2 primary, allow in-person voting on that day, but also facilitate vote-by-mail by providing that every registered voter be mailed a postage-paid absentee ballot application. He explained that under current public health conditions it would be logistically impossible for election officials to handle the anticipated surge in requests for mail-in ballots any earlier. The Ohio legislature, however, ignored the Secretary’s request – which had been supported by Ohio’s local election officials -- and on March 25 voted to re-set the primary as a nearly all vote-by-mail election for April 28. The governor signed the new law into effect on March 27, but a collection of civil and voting rights groups immediately brought suit challenging the new law. The plaintiffs contended that the law’s “cumbersome, multi-step process for voting by mail” – which requires millions of voters to obtain an absentee ballot application, and then complete and submit it; election officials to review and approve the application, and mail the ballot to the voter; and have the voter receive, complete and return the ballot within a month – would inevitably result in many voters being denied the ability to participate in the election.

On April 3, the federal district court for the Southern District of Ohio rejected the suit. Judge Watson acknowledged that “the compressed timeframe for the completion of absentee voting does pose a burden on voters,” but concluded that the state’s interest in making sure the voting process was resolved in time to have delegates selected for the national party conventions justified the earlier deadline. Nor did the state have to simplify the vote-by-mail process to make it easier for voters to use. “Given the upheaval that the change to the voting process has already created, the Court agrees that the State has a strong interest in minimizing disorder and easing the burdens on county boards of elections. By permitting the boards of elections to continue to use the absentee-balloting system already in place and changing only the deadline for accepting those ballots, H.B. 197 furthers that interest..” In short, Judge Watson concluded “the

Constitution does not require the best plan, just a lawful one,” and the legislature’s plan crossed that low bar.⁴

If Ohio’s response to COVID-19 was messy, Wisconsin’s was a train-wreck. On April 7, Wisconsin was scheduled to hold its spring election, which included a presidential primary, a hotly-contested partisan race for the state supreme court, elections for three seats on the state court of appeals, one statewide and more than one hundred local referenda, and close to three thousand elections for lower court, county, town, village, and school district board positions. On March 12, Governor Evers declared a public health emergency in the state; on March 25 he issued a stay-at-home order, and on April 4, FEMA issued a major disaster declaration for the entire State of Wisconsin as a result of the COVID-19 pandemic. The governor, however, initially declined to postpone the election, explaining that he lacked the authority to do so, and called on the legislature to adopt universal vote-by-mail. At that point, there had already been an unprecedented level of requests for mail-in ballots – nearly five times the level in 2016, and state election officials were having difficulty coping with the demand.

On April 2, a federal judge in the Western District of Wisconsin responded to suits brought by the national and state Democratic parties, voting rights groups, and individual voters by issuing an order modifying Wisconsin’s election law to deal with the surge in demand for mail-in ballots. Specifically, Judge Conley found that due to the backlog in processing ballot requests, it was likely that thousands of voters would not get their ballots in time to have them returned to election offices by 8 pm on Election Day, and so he ordered that ballots be accepted if received up to six days later. In addition, he declined to add a requirement that the ballots be postmarked on Election Day; a ballot would be counted if received by the new deadline, April 13, even if mailed after Election Day. He also extended by one day the deadline for the receipt of absentee ballot applications, and eased the requirement that the ballot be witnessed. The court, however,

⁴ League of Women Voters v. LaRose, (E.D. Ohio) (Watson., J.), Case: 2:20-cv-01638-MHW-EPD Doc #: 57 Filed: 04/03/20.

declined to postpone the election, or to modify the state’s photo ID requirement.⁵ The national and state Republican parties immediately moved to block the court’s order.

On Friday, April 3, the governor called the legislature into special session to adopt universal vote-by-mail for the election. The legislature met on Saturday, April 4, and without debate or discussion immediately adjourned.⁶ On Monday, April 6, with conditions in Wisconsin worsening – due to a lack of poll workers, Milwaukee had reduced the number of polling places from 181 to 5, and Green Bay had consolidated its polling places from 31 to 2 – the governor, relying on his constitutional authority as chief executive and a statute authorizing him to take such action in an emergency as “he or she deems necessary for the security of persons and property,” issued an executive order suspending the April 7 election until June 9, authorizing voters to continue to apply for and return absentee ballots until the election, and calling the legislature back into session.⁷ The Republican-led state legislature promptly sued in the state supreme court to block the governor’s action.

On April 6, the two Supreme Courts – Wisconsin and United States – dividing on party lines⁸ blocked the key emergency actions of, respectively, the governor and the federal district court. The state supreme court, by a 4-2 vote, held that none of the state constitutional provisions the governor invoked gave him the power to suspend or rewrite the state’s election laws. As for his statutory claim, the majority determined that the broad grant in the quoted provision was limited by another subsection of the same law which specifically authorized the governor to “suspend the provisions of any administrative rule” in emergencies. If the broad power to act in an emergency that the governor claimed included the power to suspend statutes, the specific grant of power to suspend administrative rules would have been “pure surplusage.” In other words, by

⁵ Democratic National Comm. v. Bostelman, 20-cv-249-wmc, (W.D. Wisc.) (Conley, J.) (April 2, 2020), <https://www.courtlistener.com/recap/gov.uscourts.wiwd.45522/gov.uscourts.wiwd.45522.170.0.pdf>.

⁶ <https://www.commondreams.org/news/2020/04/03/wisconsin-governor-finally-moves-postpone-states-primary-elections-shift-vote-mail>.

⁷ <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession.pdf>.

⁸ Justices of the Wisconsin Supreme Court are elected. The election is technically nonpartisan, but the candidates run as partisans with party support. The four judges in the majority were elected with Republican support; the two dissenters with Democratic support. For the U.S. Supreme Court, “party” refers to the party of the appointing president.

granting the power to suspend rules the law implicitly denied the power to suspend statutes. The dissenters unsuccessfully argued that as a matter of textual interpretation the statutory grant of authority to protect the “security of persons” included the power to protect voters from the danger of exposure to COVID-19; they also contended that the statutory authority of the state health department to “forbid public gatherings” in order to control the spread of communicable diseases surely meant that the governor could for the same reason bar public gatherings at polling places.⁹

The issue before the United States Supreme Court in the aptly named *Republican National Committee v. Democratic National Committee*¹⁰ was whether to stay the portion of Judge Conley’s order directing Wisconsin election officials to accept absentee ballots through April 13, the new deadline for the receipt of such ballots, even if they were mailed or postmarked after April 7, the original Wisconsin election day. (The portion of the order directing acceptance of ballots arriving after April 7 was not challenged). Like the Wisconsin Supreme Court, the United States Supreme Court also divided along partisan lines, with the five-member majority determining that the district court’s order violated the so-called *Purcell* principle – the rule, based on the Court’s decision in *Purcell v. Gonzalez*, 549 U. S. 1 (2006), “that lower federal courts should ordinarily not alter the election rules on the eve of an election.” As the *per curiam* opinion explained, the *Purcell* principle is intended to prevent the “kind of judicially created confusion” that can result from election law changes on the eve of an election.¹¹ Without acknowledging that the Wisconsin election was probably far more disrupted by the pandemic itself than by the district court’s order, the Court emphasized that allowing voters to mail ballots after election day “is extraordinary relief and would fundamentally alter the nature of the election.”¹² Justice Ginsburg, writing for the four dissenters, emphasized how the unprecedented surge in absentee ballot requests had overwhelmed election administrators, so that tens of thousands of voters

⁹ Wisconsin Legislature v. Evers, Wisconsin Sup. Ct., No. 2020AP608-OA, April 6, 2020, https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

¹⁰ 589 U.S. ____ (2020), No. 19A1016, April 6, 2020 (granting stay of district court order granting preliminary injunction).

¹¹ Id. at 2-3.

¹² Id. at 4.

were unlikely to receive their ballots in time to return them by the April 7 deadline.¹³ As a result, “they will have to brave the polls, endangering their own and others’ safety. Or they will lose their right to vote, through no fault of their own.”¹⁴

The Ohio and Wisconsin experiences with their COVID-19-impacted elections were, fortunately, atypical. At least nineteen states managed to reschedule their primaries or other elections to later dates or to shift from in-person to all-mail elections without the *Sturm und Drang* that marked these two Midwestern states.¹⁵ Nonetheless, the Ohio and Wisconsin cases do provide some important lessons. First, in our federal system it is the states that write the election laws. State election laws also govern elections to federal offices, unless changed by Congress. Many states lack clear rules for delaying or rescheduling an election in the event an emergency makes holding the election as originally scheduled dangerous or impossible.¹⁶ There are certainly reasons to be extremely cautious about enabling a partisan official to postpone an election or rewrite the election laws at the last minute on his or her own. And as the *Purcell* principle confirms, those concerns are not limited to actions by officials elected on partisan lines. Last-minute changes are disruptive and may be seen as having partisan consequences whatever the intention. All states should have rules in place to deal with emergencies, but as the Ohio and Wisconsin experiences indicate, many states do not.

Second, in the absence of clear rules, decisions dealing with an electoral emergency as it unfolds can take on a partisan cast. That was less true in Ohio, where all the major actors – the governor who postponed the election and the secretary of state who sought a long delay, and the legislature which moved up the date for the new election – were Republican, but the partisan divide was evident in Wisconsin between the Democratic governor and the Republican legislature and Republican-dominated state supreme court. Surely the legislature resisted and the state and national Republican parties sued to block the election delay and the liberalization of the rules

¹³ According to one press account published shortly after the election, at least 9,000 ballots were never mailed to voters, and thousands more not returned or nullified because returned too late to count.
<https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

¹⁴ Ginsburg, J., dissenting at 6.

¹⁵ <https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx>.

¹⁶ <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>

governing voting-by-mail ballots at least in part because they assumed they would benefit electorally from the depressed turnout in urban centers like Milwaukee that were particularly hard-hit by COVID-19.¹⁷ This seems to be a national Republican strategy as well.¹⁸

Finally, as Ohio and Wisconsin illustrate, any shift from a predominantly vote-in-person to a predominantly vote-by-mail system will require significant legal and administrative adaptations of the processes by which voters obtain and submit – and administrators transmit and review – mailed-in ballots. The questions that need to be resolved in order to make vote-by-mail widely available this November are the focus of the next section.

III. Moving to Voting-by-Mail

Traditionally, Americans voted by going to a designated neighborhood polling place on a specific date and casting their ballots at that place. Over time, new forms of voting were authorized. Absentee voting enables voters who cannot make it to the polls, such as because of illness or disability or absence from home, to obtain a ballot and mail it in. Over time, the rules governing absentee voting have been liberalized and today twenty-eight states and the District of Columbia provide for so-called “no-excuses” absentee voting, in which anyone can request that a ballot be mailed to them without having to give a reason. In an additional five states – Colorado, Hawaii, Oregon, Utah, and Washington – elections are conducted entirely by mail; ballots are simply mailed to all registered voters at their home addresses several weeks before the election. Seventeen states continue to require the voter to have one of the statutorily determined excuses in order to vote absentee.¹⁹ Many states have also implemented procedures for “early in-person voting” which enables the voter to vote at central locations during a designated period before Election Day. Currently, forty-one states and the District of Columbia authorize early in-person voting.

¹⁷ That strategy appeared to fail in the election for the most important state office on the April 7 ballot, justice on the Wisconsin Supreme Court, <https://www.cnn.com/2020/04/13/politics/wisconsin-election-results-biden/index.html>

¹⁸ <https://www.nytimes.com/2020/04/08/us/politics/republicans-vote-by-mail.html>

¹⁹ <https://www.vote.org/absentee-voting-rules/>.

In the last three election cycles, approximately one-quarter of all ballots were cast by mail, with particularly heavy usage in a handful of western states, including the all-mail voting states.²⁰ In 2018, another one-fifth of voters voted at early in-person voting sites. That, however, means that roughly 55% of voters voted at a polling place on Election Day. In most states that fraction is far higher; in 2018, in 31 states fewer than 15% of ballots were cast by mail.²¹

If the pandemic persists into the fall, it will be impossible for the November elections to be held in a fair and safe manner unless early in-person voting and especially voting-by-mail are available to all Americans. Fifty-eight percent of poll workers are 61 or older – 27% are over 70 – the group at greatest risk of serious illness or death from COVID-19. And of course millions of Americans will reasonably be reluctant to risk their health and that of their families by coming to a crowded polling place. Widespread revision of voting laws to facilitate voting-by-mail is essential.

Among the multiple legislative or regulatory changes many states will need to make are: (i) making it easier for voters to obtain mail-in ballots; (ii) setting reasonable deadlines for voters to request and return ballots; and (iii) adopting procedures for resolving disputes over whether the signature on the voter's application or returned ballot matches the signature on file and for giving voters an opportunity to challenge the rejection of ballots on signature mismatch grounds; and (iv) modifying burdensome voter ID and witnessing requirements, as well as restrictions on the ability of community groups to collect and submit ballots.

On the first point, in many states, the voter has to take the first step of requesting a mail-in ballot. Although in some places this can be done by filing an online application, that option may not be available to voters without internet access; other states require that the voter first request an application, which must be mailed in. One way to deal with this would be for the state to mail a ballot, or at least a ballot application, to all registered voters. The all vote-by-mail States use the former process. Election law specialists concerned about the prospect of ballots being sent

²⁰ U.S. Election Assistance Commission, Election Administration and Voting Survey 2018 Comprehensive Report, https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf at 12-15.

²¹ <https://publicintegrity.org/health/coronavirus-and-inequality/the-coronavirus-supercharges-vote-by-mail-efforts-but-barriers-remain/>.

to addresses from which the voters have moved or to voters who have died, so that the ballots could be subject to fraudulent misuse, object to such mass mailing of ballots (although there is little evidence of fraud in the all-mail states). Mass mailing of applications (ideally with a postage-paid self-sealing envelope) would still place a burden on the voter to apply, but it would at least eliminate one step in the process. Moreover, as long as in-person voting remains an option, it has the advantage of avoiding mailing an unnecessary ballot to a voter who intends to vote in person.

As the Wisconsin litigation indicates, the return date for mail-in ballots is a critical question. Some states require that the ballot be *received* by Election Day; others only that it be *mailed* by Election Day, and received within a defined number of days after Election Day. Giving the voter more time is surely more consistent with protecting the right to vote, especially given the likelihood of delays in postal deliveries of ballots to and returns by voters; it may give election administrators more time to handle a flood of mailed-in ballots. And many voters are likely to fix on Election Day as the day to vote; others may be hesitating between voting in person or by mail. The main downside of the Election Day mailing deadline is that means that the results of some elections may not be known until days after Election Day.

Other new administrative rules or laws are likely to be necessary to standardize the procedures by which election officials check signatures on applications or ballot envelopes to see if they match those on file, and to give voters the opportunity to challenge rejections. Signature-match laws that fail to give voters an adequate opportunity to challenge rejections were already subject to litigation before COVID-19.²² Similarly, at a time when, due to social distancing requirements and the closure of public libraries and similar facilities, it may be difficult for voters to obtain the signatures of witnesses or submit copies of their photo IDs as some states require. One component of the district court preliminary injunction in the Wisconsin litigation, not at issue in the Supreme Court, was the court's order lifting the witnessing requirement for voters attesting that a witness was unavailable. Similarly, restrictions on the ability of community groups to collect and submit absentee ballots – justified by an asserted need to prevent fraud – may

²² https://moritzlaw.osu.edu/electionlaw/litigation/documents/Georgia_Coalition_for_the_Peo-1.pdf.

need to be modified because of the burdens on some voters, such as Native Americans who live in rural areas without adequate mail service. Rules such as these had been challenged by voting rights groups even before COVID-19 became a factor.

At least as important as legal changes will be the significant costs that will have to be incurred in order to switch to a primarily vote-by-mail election. “The equipment that states have to conduct in-person elections won’t work for mail-in elections. The scanners many states have to count ballots in each polling place can’t handle counting ballots en masse from the whole county or state. The kind of scanner that can do that heavy work costs \$500,000 to \$1 million . . . Also, states can’t just mail out the ballots they already have printed. They have to design ballots that can be folded into an envelope. They also need to print instructions for how to fill it out and send it back. And they need to design the ballot to work with the Postal Service.”²³ As one state election official contemplating the switch to vote-by-mail also noted, “part of that calculation is figuring out how to pay for postage for those ballots, so no one has to go out and buy stamps.”²⁴ And, moving rapidly to a primarily vote-by-mail system will require mass retraining of poll workers and education of voters.

All this will cost money. The Brennan Center for Justice estimates that the cost of moving to a primarily vote-by-mail election this year will be between \$1 billion and \$1.4 billion – with most of the expenditure going to ballot processing, secure ballot storage, additional staffing, public education, and, especially, postage costs.²⁵ The Brennan Center study also emphasizes that an estimated \$270 million will need to be spent to assure that in-person voting – which will remain the preferred form of voting for many Americans – is safe and secure, with the money going to make sure polling places comply with public health standards, hire poll workers, and increase access to early in-person voting.²⁶

²³ <https://www.washingtonpost.com/politics/2020/04/03/vote-by-mail-difficulties/>.

²⁴ Id.

²⁵ <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>.

²⁶ Id.

Responding to COVID-19 will also likely require legal changes and new resources to improve voter registration systems. Typically, in the run-up to a presidential election, millions of people update their voter registration information or register to vote for the first time. COVID-19 could severely disrupt this process, making it difficult for Americans to submit timely registration applications or for elections officials to process those applications. The outbreak will certainly reduce access to government offices that provide voter registration services. Although thirty-nine states and the District of Columbia have either fully implemented online voter registration or are in the process of doing so, the other eleven states need to do so before the fall. And all states with online voter registration systems will need to test and bolster their capacity to ensure they can handle the likely surge in usage.

With the states already incurring significant costs in addressing the health crisis posed by COVID-19 while sustaining massive losses in revenues from sales and income taxes due to the pandemic's impact on commerce and employment, some of the funding for addressing COVID-19's impact on our electoral system ought to come from the federal government. Senators Wyden and Klobuchar have introduced legislation that would require all states to offer voting-by-mail and early in-person voting if twenty-five percent of the states have declared a state of emergency due to COVID-19, and would provide federal funds to cover the cost.²⁷

In the negotiations over the development of the CARES Act – the \$2.1 trillion COVID-19 response law enacted in late March – the House of Representatives proposed to appropriate \$4 billion for election safety and security measures that would require all states to institute vote-by-mail, early-in-person voting, and online voter registration. The Senate initially offered only \$140 million. The final bill provided \$400 million but with no requirements for improved access to the ballot or voter registration. That was a step in the right direction but likely inadequate to the full task of conducting fair and secure elections in the face of a pandemic.

The prospects that our election laws will be made COVID-19-ready are uncertain. President Trump has slammed mail-in voting, tweeting that it “doesn’t work out well for

²⁷ <https://www.klobuchar.senate.gov/public/cache/files/9/1/91a07f05-b6b3-4c6e-a363-652ecbe16ac0/142B6E0F07685857CC10772388587756.natural-disaster-and-emergency-ballot-act-of-2020.pdf?eType=EmailBlastContent&eld=0037c6a8-2c01-4ea9-ad12-e02c7a69df44>.

Republicans,”²⁸ and other Republican leaders have followed suit, with House Republican leader Kevin McCarthy calling the continued push by Democrats to include more funding for voting-by-mail in the next COVID-19 relief bill “disgusting.”²⁹ In recent decades, election laws have frequently been assessed in partisan terms, and the response to COVID-19 seems to already be caught up in the partisan divide. If that remains the case, then COVID-19 may turn out to be an even greater disaster for American democracy than it has been for public health.

²⁸ <https://www.cnbc.com/2020/04/08/trump-slams-mail-in-voting-says-it-doesnt-work-out-well-for-republicans.html>.

²⁹ <https://www.cnbc.com/2020/04/08/trump-slams-mail-in-voting-says-it-doesnt-work-out-well-for-republicans.html>.

