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VOTING IN A PANDEMIC: THE EFFECTS OF COVID-19 ON AMERICA'S ELECTIONS

BENJAMIN E. GRIFFITH AND LAUREN E. WARD[†]

I. INTRODUCTION

The United States of America has had a big year in 2020, facing a global pandemic, an economic recession, and a social justice movement aimed at ending racism and police brutality. With respect to the coronavirus pandemic, the country faces the problem of reconciling the right to vote and our in-person voting system with the need to vote at a distance. Unfortunately, most states are ill prepared to handle their 2020 primary elections, let alone the 2020 presidential election through remote voting means. The expectation is that mail delays, voting delays, and slow electoral, judicial, and legislative systems will get in the way of the changes necessary to protect the health of American voters and their right to vote.

It may be particularly helpful for states to look back, as we do here, to America's prior experiences with pandemic voting from the past century, the past decade, or the primary elections that have already been conducted during this pandemic. This could allow states to explore potential pitfalls and solutions to preserving the dignity of the 2020 presidential election. What is true of all these past experiences is that action is required immediately to adequately prepare for November and an election of historic proportions.

II. PAST PANDEMIC ELECTORAL EXPERIENCE

COVID-19 is not the first pandemic or epidemic that the United States has had to weather while also juggling major elections, but pandemic voting is not so common that it has caused states to have thorough plans for the situation.

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However, the United States has handled elections in the midst of major health emergencies, meaning that it can pull from past experience to succeed in the 2020 presidential election, as well as other races held during the extent of the coronavirus pandemic.

A. 1918 MIDTERM ELECTION AND THE SPANISH FLU

In the fall of 1918, the United States was in the throes of another pandemic caused by the Spanish flu. By this time, the spring's first wave had subsided, only to bring a much deadlier second wave that killed approximately 150,000 people in October 1918 alone. Much like the coronavirus pandemic, officials employed social distancing and masking to fight the flu long enough to allow scientists the time to develop a vaccine.¹

The country was also in the midst of World War I and on the verge of an all-important midterm election that saw Democrats attempting to keep congressional control during the final stretch of the war. In November, portions of the country were experiencing different levels of infection, with the western states in the middle of increased outbreaks and the eastern states starting to relax restrictions and reopen.²

The election itself was handled in a variety of ways by the local authorities charged with conducting elections. Voting by mail was not yet a popular option, so in-person voting ruled the day. In San Francisco, voters were encouraged to wear masks at the polls. In other places, poll workers refused to work, as they were either ill or feared catching the virus themselves. Other polling places employed security in order to maintain capacity restrictions, while still other places moved voting stations outside to increase air flow.³

The ultimate outcome led to a Republican victory in Congress, but a defeat in turnout figures. Compared to the 1914 midterm election which saw a turnout of fifty percent of eligible voters, the 1918 election saw an approximate forty percent turnout. The flu was not the only factor to blame for the low turnout, as approximately two million men were enlisted, taking away a large portion of the voting-age population.

The flu and the lifting of some social distancing restrictions, however, were to blame for an increase in infections and deaths that followed election day and the days of celebration following the end of World War I just five days later.⁴ While it was difficult to associate outbreaks with election day in some areas, rural areas, where the flu had been held at bay by social distancing and quarantine

1. Sarah Pruitt, *How the US Pulled Off Midterm Elections Amid the 1918 Flu Pandemic*, THE HISTORY CHANNEL (Apr. 22, 2020), <https://www.history.com/news/1918-pandemic-midterm-elections>.

2. *Id.*

3. Dartunorro Clark, *America Pulled off an Election During the Spanish Flu, but Not Without Paying a Price*, NBC NEWS (June 1, 2020), <https://www.nbcnews.com/politics/politics-news/america-pulled-election-during-spanish-flu-not-without-paying-price-n1218286>.

4. Pruitt, *supra* note 1.

procedures, saw increased cases directly after restrictions were lifted to enable the vote.⁵

What we can learn from the 1918 midterm election are lessons we are already learning in this pandemic: wear a mask, practice social distancing, and quarantine those that are ill. What we can also learn is to expand upon a current system that wasn't yet available: voting by mail. Many states have already taken to this ballot medium, but others still have time to catch on and attempt to prepare in advance of November. The ideology that voting by mail increases the likelihood of voter fraud is seemingly unfounded, where cases of such fraud are virtually nonexistent and fail to support forgoing mail-in ballots over protecting the general health and welfare of voters.⁶ In fact, voters in Nevada alleged that an all-mail-in election violated their constitutional rights. They alleged that it could lead to an increase in voter fraud. Those voters were denied any injunctive relief based on a failure to establish particularized standing on injuries caused by speculative voter fraud.⁷

B. 2009 SWINE FLU PANDEMIC

On a smaller scale, but a pandemic scale nonetheless, an outbreak of the H1N1 influenza virus, more commonly called the swine flu, ravaged the United States in 2009, including November 2009, when some states and cities were holding elections.⁸ Election officials attempted to control the spread of this swine flu by first focusing on hygiene, through the increased use of hand sanitizers at polling locations. Some also employed implements to prevent voters from touching voting equipment that generally required a finger to select a candidate.⁹

States also focused on sanitation and the routine cleaning of voting equipment, as well as the use of masks and gloves. Social distancing also made an appearance, with voting equipment strategically located to extend distance between voters. The use of absentee ballots was also encouraged, especially for those voters experiencing flu symptoms.¹⁰

Much like its deadlier Spanish flu cousin, the swine flu caused states to learn lessons on how to conduct a safe election while preserving the vote. Once again, fear of illness spurred a push towards absentee and mail-in voting. However, we are now in the midst of a more active election year with presidential and congressional seats at issue. Thus, in-person voting, even if done in a safe manner like during the swine flu pandemic, does not appear to be the optimal solution when other alternatives exist, or at least should exist, in all states.

5. Clark, *supra* note 3.

6. Clark, *supra* note 3.

7. *Paher v. Cegavske*, 457 F. Supp. 3d 919, 925-27 (D. Nev. 2020).

8. *2009 H1N1 Pandemic Timeline*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html> (last visited Jan. 28, 2021).

9. Ayana Harry, *H1N1 and Election Day: What States Are Doing to Keep Voters Flu-Free*, ABC NEWS (Nov. 3, 2009 2:34 PM), <https://abcnews.go.com/Health/SwineFlu/h1n1-election-day-protecting-voters/story?id=8987234>.

10. *Id.*

III. COVID-19 AND THE CURRENT ELECTORAL LANDSCAPE

The coronavirus and COVID-19 fall somewhere closer to the Spanish flu, with millions of confirmed cases in the United States and a death rate climbing into the multiple hundreds of thousands each day.¹¹ The virus is also the same as its predecessors: spread through close contact and especially deadly to those with preexisting health conditions and the immunocompromised.

Expanding on the similarities, COVID-19 elections and the precautions, pitfalls, and solutions already being seen in the early elections under this pandemic mirror the solutions attempted during the earlier examples. However, other solutions are starting to emerge, including increased voting by mail, expanded absentee voting, and the delay of elections. Only time will tell if these new solutions fair better in preserving the right to vote, but the following discussion offers a glimpse into their success, or lack thereof, thus far. Specifically, this paper explores how the COVID-19 pandemic affected primary voting in several states through election delays, election cancellations, absentee qualifications based on immunity, absentee ballot notarizations, and reductions in poll locations.

A. THE FIGHT FOR THE WISCONSIN PRIMARY: ABSENTEE BALLOT RETURN WINDOWS AND ATTEMPTS TO DELAY

In one of the most telling election fights during this pandemic, Wisconsin saw its absentee system bombarded prior to the 2020 presidential primary election, with return deadlines extended, modified, and limited in the few days leading up to that election. It also saw its governor attempt to delay the election for a month, only to be struck back by the state legislature and courts. The following section details the fights that occurred in Wisconsin state and federal courts and how they ultimately affected the April 2020 primaries facing the state.

1. *Federal Litigation on Absentee Ballots*

While the country was grappling with the emerging coronavirus pandemic in late March 2020, Wisconsin was also grappling with how to conduct its April 7, 2020 primary election in the face of the easily transmitted virus. In an effort to protect citizens, Wisconsin Governor Evers entered an emergency order advising Wisconsinites to stay at home in order to flatten the curve.¹²

11. See *CDC COVID Data Tracker*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Jan. 26, 2021). As of January 26, 2021, there were over 25 million COVID-19 cases and over 418,000 COVID-19-related deaths confirmed by the CDC in the United States. *Id.*

12. Wis. Emergency Order No. 12 (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

With an eye on the approaching election and understanding that in-person voting was becoming potentially dangerous, many Wisconsin officials encouraged voters to vote via absentee ballot, resulting in a “significant uptick in absentee ballot requests.”¹³ This significant increase created a backlog in election officials’ ability to review the applications and send out the requisite absentee ballots, especially where the U.S. Postal Service was experiencing slowdowns caused by the pandemic.¹⁴ This backlog and the resulting delays became the subject of a federal lawsuit, along with requests to review other witnessing and identification requirements for absentee voting.

In that lawsuit, the district court reviewed the request for injunctive relief, finding:

- (a) The plaintiffs demonstrated an irreparable harm and inadequate remedies at law;¹⁵
- (b) The burden placed on absentee voters by a quick or late return of ballots was severe;
- (c) The state interest in preserving ballot return deadlines was not compelling enough, where many voters returning ballots relied on the state’s deadlines in requesting absentee ballots;¹⁶ and
- (d) Extending the deadline for absentee ballot requests and receipt of the ballots was in favor of the public interest of “permitting as many qualified voters to vote as possible.”¹⁷

With these findings, the court ordered that Wisconsin voters be able to request an absentee ballot by April 3, 2020, at 5:00 p.m. and that they be able to return those ballots by April 13, 2020, at 8:00 p.m., without any restriction on postmark dates, in order to have their vote counted in the April 7, 2020 election.¹⁸

2. *Stay in the U.S. Supreme Court and the Employment of Purcell v. Gonzalez*

The district court’s decision was then sent to the U.S. Supreme Court on a request to stay the lower court’s preliminary injunction pending the appeal. Just a day before the involved election, the Supreme Court granted the requested relief, ultimately finding that in order for a Wisconsin absentee ballot to be counted, it “must be either (i) postmarked by . . . April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered . . . by April 7, 2020 at 8:00 p.m.”¹⁹ The majority opinion was that of the Court’s five traditionally conservative justices.

13. Democratic Nat’l Comm. v. Bostelmann, 451 F. Supp. 3d 951, 961 (W.D. Wis. Apr. 2, 2020).

14. *Id.* at 962.

15. *Id.* at 969.

16. *Id.* at 976.

17. *Id.* at 977.

18. *Id.* at 982. The court also made several other findings related to not delaying the election, witness requirements for absentee ballots, and relief from identification provision. For sake of brevity, those issues are not explored in this paper.

19. Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1208 (2020).

The majority chose to employ precedent from *Purcell v. Gonzalez*²⁰ as a means for emphasizing that lower federal courts “should ordinarily not alter the election rules on the eve of an election” and supporting their last-minute intervention as a proper way to fix the district court’s apparent error.²¹ The dissent likewise employed *Purcell* to highlight the fact that the Supreme Court should not get involved at such a late date, especially where the involvement would result in “massive disenfranchisement” caused by the delayed mailing of absentee ballots.²²

Unfortunately, the Court did not note that *Purcell* came from another time without fear of spreading COVID-19, without a heightened use of absentee ballots, and without elections in the face of an unforeseen pandemic. In fact, *Purcell* ultimately found that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”²³ *Purcell* was the result of the Ninth Circuit entering an interlocutory injunction prior to the involved district court’s provision of a finding of facts and conclusions of law supporting its order denying a preliminary injunction.²⁴

An appellate court moving quicker than a district court’s entry of a formal opinion was not at issue in this matter. There was no subsequent order from the Seventh Circuit staying the absentee ballot receipt extension, and thus no contradiction at the appellate level. Instead, the Supreme Court majority chose to add to the confusion by entering its own contradictory order that created the potential to disenfranchise thousands of Wisconsin voters still waiting for their absentee ballots at the time the majority entered its ruling.

The lesson here for voters and organizations is to get a head start on any challenges in advance of the November 2020 elections, in hopes of avoiding *Purcell*’s use as a mechanism to prevent orders repairing any electoral systems that may falter in advance of the election. This issue persisted until only days prior to the November 2020 Election, when the Supreme Court declined to vacate a Seventh Circuit stay that prevented absentee ballots from being received and counted after Election Day in Wisconsin, falling in line with the predicament during the primary season.²⁵

3. State Court Litigation on Election Delay

If absentee issues were not enough on their own, Wisconsin also faced issues with potentially delaying the election to avoid the harm of in-person voting at the height of the pandemic. In an executive order recognizing the district court opinion on absentee ballots and the resulting appeals likely to jeopardize that

20. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

21. *Republican Nat’l Comm.*, 140 S. Ct. at 1207 (citing *Purcell*, 549 U.S. at 5-6).

22. *Id.* at 1209-10 (Ginsburg, J., dissenting).

23. *Purcell*, 549 U.S. at 4-5 (emphasis added).

24. *Id.* at 3-4.

25. *See Democratic Nat’l Comm. v. Wisc. State Legis.*, 141 S. Ct. 28 (2020).

opinion, Governor Evers required the Wisconsin legislature to convene a special legislative session to consider the sole issue of moving the April 7, 2020 election to May 19, 2020 to provide more time to prepare and combat the effects of the pandemic.²⁶

The Wisconsin legislature briefly convened on April 4, 2020, but closed without substantial consideration of the election delay, causing Governor Evers to call out Republican legislators for “playing politics with public safety and ignoring the urgency of this public health crisis.”²⁷ It also caused Governor Evers to enter another executive order (the day before the election) suspending the April 7, 2020 election and delaying it until June 9, 2020, with another call to legislature to convene and agree on a new election date.²⁸

With speed not often attributed to the judicial branch, the Wisconsin Supreme Court entered an order just hours after Governor Evers delayed the election. That order found the executive order to be invalid and outside of the Governor’s authority, stating that it had “the practical effect of suspending or rewriting numerous election-related statutes.”²⁹ The court enjoined all provisions of the executive order, with the exception of Governor Evers’ call for an additional special session of the legislature.³⁰ Of note, all justices joining in the order had already cast their ballots, either via absentee ballot or early voting, eliminating their ability to empathize with the Wisconsin voters now facing the reality of voting in a pandemic.³¹

4. The Election

With all Hail Mary attempts to delay the election having failed, election day proceeded in Wisconsin on April 7, 2020. That election was riddled with issues directly attributable to the pandemic and its wake, including last minute shortages of elderly poll workers, the state’s failure to timely provide requested absentee ballots, and the U.S. Postal Service’s failure to postmark absentee ballots.³²

26. See Wisc. Exec. Order No. 73 (Apr. 3, 2020), <https://evers.wi.gov/Documents/COVID19/EO073-SpecialSessionElections%20searchable.pdf>.

27. See Tony Evers, Gov., Statement on Special Session, (Apr. 4, 2020), <https://content.govdelivery.com/accounts/WIGOV/bulletins/284ee3b>.

28. See Wisc. Exec. Order No. 74 (Apr. 6, 2020), <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf>.

29. Wisconsin Legislature v. Evers, Case No. 2020AP608-OA (Apr. 6, 2020), <https://www.wicourts.gov/news/docs/2020AP608.pdf>.

30. *Id.*

31. Daniel Bice, *All seven Supreme Court justices voted absentee, even those who hadn’t in the past*, MILWAUKEE JOURNAL SENTINEL (Apr. 13, 2020), <https://www.jsonline.com/story/news/investigations/daniel-bice/2020/04/13/wisconsin-election-supreme-court-justices-all-voted-absentee/5134487002/>.

32. Danielle Root, *Wisconsin Primary Shows Why States Must Prepare Their Elections for the Coronavirus*, CENTER FOR AMERICAN PROGRESS (Apr. 27, 2020 at 12:01 AM), <https://www.americanprogress.org/issues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-elections-coronavirus/>; Laurel White, *Postmark Irregularities Could Disqualify Ballots Sent On Or Before Election Day in Wisconsin*, WISCONSIN PUBLIC RADIO (Apr. 10, 2020 at 6:05 PM), <https://www.wpr.org/postmark-irregularities-could-disqualify-ballots-sent-or-election-day-wisconsin>.

Unsurprisingly, this all occurred in a state with a no-excuse mail-in voting system that was vastly unprepared for the increased demand on mail-in ballots.

Pennsylvania made a similar change to no excuse mail-in voting for its spring primary and upcoming November 2020 election. The Trump re-election campaign and several other organizations challenged the change in federal court. In that matter, *Trump v. Boockvar*, the district court granted the state's motion for *Pullman* abstention, awaiting the state court's resolution of the involved Pennsylvania election statutes.³³ While the push for no-excuse mail-in voting coincides with the expansion of voting mechanisms in other states, the response by the President's reelection campaign coincides with his consistent, unsupported accusations of fraud in the mail-in voting system.

The Pennsylvania Supreme Court did respond on September 17, 2020, by allowing drop box collection for mail-in ballots, extending the mail-in ballot return deadline by three days for those ballots postmarked by election day, and presuming that all ballots received by Election Day were mailed on Election Day, even if they lacked a postmark.³⁴ A Republican attempt to take the matter to the U.S. Supreme Court met its demise in an October 28, 2020. There, the U.S. Supreme Court denied an expedited consideration of certiorari and effectively leaving the delayed receipt of ballots in prior to Election Day.³⁵

The lessons are many from this election. This was the first time *Purcell* was weaponized and applied in a nationwide pandemic, meaning that *Purcell* may need to be reeled in during an unprecedented pandemic. Further, mail-in voters may need to consider getting a ballot as early as possible, and the legislature and courts may want to consider their duty to the public's health and wellbeing when failing to delay in-person voting. Only time will tell whether Wisconsin's future in pandemic voting fairs better than its first foray. Next, we'll review New York's decision not to delay its primary election, like Wisconsin, but to instead cancel it all together.

B. CANCELLING AN ELECTION: NEW YORK'S PRIMARY CANCELLATION AND REINSTATEMENT

Instead of simply postponing the 2020 Democratic presidential primary race in New York, election officials chose to outright cancel it. This cautionary tale has potentially limited reach, as most elections are necessary to the core, and thus incapable of being outright cancelled. However, a discussion of this odd situation could lend assistance in future circumstances where a single state primary election for the office of the President of the United States will have limited effect on the overall candidate chosen.

33. Donald J. Trump for President, Inc. v. Boockvar, 2020 U.S. Dist. LEXIS 152599 (W.D. Pa. Aug. 23, 2020).

34. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 368 (Pa. 2020).

35. Republican Party of Pennsylvania v. Boockvar, 2020 U.S. LEXIS 5188 (Oct. 28, 2020).

1. Candidate and Delay Considerations Prior to the Primary Election

As a result of the COVID-19 pandemic and the exponentially growing case numbers in New York, Governor Cuomo issued an executive order postponing the New York presidential primary election from April 28, 2020 to June 23, 2020.³⁶ Of note here, and as seen throughout this paper, it has not been an uncommon solution for states to simply delay an election, by way of executive or legislative authority. In fact, as of mid-July 2020, 16 states rescheduled elections due to the coronavirus.³⁷ Delays even stretched to the Republican and Democratic National Conventions.³⁸ These delays are good stop-gap measures to provide states with additional time to prepare for an eventual pandemic election. However, it is unlikely that any election can be delayed long enough and in a fair enough manner to outlast the here-to-stay coronavirus while we wait for a vaccine. As such, the time bought by a delay must be used strategically by states.

In advance of said primary election, the State Board of Elections received petitions that qualified eleven Democratic presidential candidates.³⁹ In the months of February, March, and April 2020, ten of those eleven candidates “publicly announced that they are no longer seeking the nomination for the office of president of the United States, or that they are terminating or suspending their campaign.”⁴⁰

Soon after his announcement delaying the primary election, Governor Cuomo signed New York Senate Bill S7506B into law. The law amended an election statute concerning procedures for holding elections for delegates to a national conventional or national party conference.⁴¹ Specifically, the statute was amended to allow, at the discretion of state election commissioners, the removal of a primary candidate for the office of the President of the United States from the ballot for any of the following reasons:

- (a) The candidate publicly announced they are no longer seeking the nomination;
- (b) The candidate announced that they are terminating or suspending their campaign; or
- (c) The candidate sent a letter to the State Board of Elections indicating that they no longer wished to appear on the ballot.⁴²

36. See N.Y. Exec. Order No. 202.12 (Mar. 28, 2020), <https://www.governor.ny.gov/news/no-20212-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

37. Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, THE NEW YORK TIMES (last updated Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>.

38. *Id.*

39. *Yang v. Kellner*, 458 F. Supp. 3d 199, 203 (S.D.N.Y. 2020).

40. *Id.* at 204 (citations omitted).

41. *Id.* at 204; See SB S7506B (N.Y. 2020); See also New York Election Law § 2-122-a.

42. *Yang*, 458 F. Supp. 3d at 204.

2. *The Cancellation*

In an effort to use their power pursuant to this amendment, two Board of Election Democratic Party Commissioners adopted a resolution to remove ten Democratic presidential candidates from the ballot, leaving only former Vice President Joe Biden.⁴³ As a result of this move, all of the candidates for delegates for those presidential candidates were also removed from the ballot, as called for by an additional provision in the same election statute.⁴⁴

An additional New York election statute declares that when only one candidate remains on the ballot, that candidate “shall be deemed nominated or elected . . . without balloting.”⁴⁵ With only Biden remaining on the prospective ballot, the primary election was cancelled on April 27, 2020 by operation of law.⁴⁶

3. *Litigation to Reinstate Election*

A day after the announced cancellation, several New York State Democratic Party voters, including former presidential candidate Andrew Yang, as well as delegate candidates for Yang and former candidate Bernie Sanders, filed a complaint with a request for emergency relief.⁴⁷ After first establishing standing and a discussion on sovereign immunity, the court then turned to an analysis of the requested preliminary injunction.⁴⁸

As to irreparable harm, the court quickly found that such harm was present because (1) the plaintiffs’ right to vote would be abridged if an election was never to be held and (2) if the election did not take place with all qualified candidates listed, the plaintiffs and voters like them would not be allowed to cast votes for candidates and the political views expressed by them.⁴⁹

The court likewise found that the plaintiffs showed a clear likelihood of success on the merits. To do so, it employed the *Anderson-Burdick* framework, finding in sum, as follows:

- (a) The cancellation of the election and the removal of delegate candidates from the ballot imposed a substantial burden on the rights of the plaintiffs, as it effectively eliminated the ability of those delegate candidates to get elected and go on to use their platform to advocate for their political agendas at the national convention;
- (b) The cancellation would not meaningfully advance the state’s interest in limiting the spread of COVID-19 because of the

43. *Id.*

44. *Id.*

45. *Id.* at 205.

46. *Id.*

47. *Id.*

48. *Id.* at 206-10.

49. *Id.* at 209-10.

availability of mail-in absentee voting to every New York voter and the fact that other primary elections were still being held on the delayed date; and

(c) In balancing the public interest, the burden to the right to vote was not overshadowed by the difficulties to be encountered by the state in holding the primary, as it was prepared to do so prior to the adopted resolution and would have nearly two months to properly prepare.⁵⁰

With all of this in mind, the preliminary injunction was granted, the candidate names were restored to the ballot, and New York was ordered to hold the primary election on June 23, 2020.⁵¹ The Second Circuit affirmed the district court's decision.⁵²

4. *The Election*

The election moved forward as ordered by the court. However, the vote counting was slow work and it took more than a month to complete and announce the winning candidates.⁵³ Further, the state delayed printing ballots until after the court's order was entered, causing slowdowns on the mailing and receiving of the larger than usual number of requested absentee ballots.⁵⁴ Worse yet, thousands of votes were not counted for various reasons, including a lack of postmark on absentee ballots, failure to sign the absentee ballot in the correct location, moved polling sites causing the use of affidavit ballots, and the summer heat breaking the seal on mail-in ballots.⁵⁵

This slow counting and the invalidation of thousands of ballots are sure to lead to further legal action by involved candidates. Mostly, they serve as a warning of what unprepared states could be facing in November, when the stakes are higher and the country will be unforgiving of extended vote counts for the next President of the United States.

C. ABSENTEE BALLOTING NEEDS: TEXAS BATTLE OVER FEAR AND LACK OF IMMUNITY

Texas election law allows for voting by mail for absentees, those voters sixty-five years of age or older, those voters with a disability, and certain voters in the jail system.⁵⁶ In light of the coronavirus, some Texas voters sought to expand the definition of disability to include both a lack of immunity to the virus and a fear

50. *Id.* at 211-12.

51. *Id.* at 218.

52. *Yang v. Kosinski*, 960 F.3d 119 (2nd Cir. 2020).

53. Edward-Isaac Dove, *The Chaos in New York is a Warning*, THE ATLANTIC (July 24, 2020), <https://www.theatlantic.com/politics/archive/2020/07/new-york-election-failure-mail-in-voting/614446/>.

54. *Id.*

55. *Id.*

56. TEX. ELEC. CODE §§ 82.001-.004.

of contracting the same at a polling place. What resulted was a journey through the state and district courts and the United States Supreme Court that ended in an election without expansion of mail-in voting to those fearing the virus.⁵⁷

1. State Court Litigation

On March 7, 2020, days after Texas reported its first COVID-19 case and almost a week before the Governor announced a state of emergency related to the coronavirus pandemic, the Texas Democratic Party (“TDP”) filed suit against the Texas Secretary of State and the Travis County⁵⁸ Clerk in Travis County District Court. Essentially, they sought a declaration that the ability for voters to vote by mail be extended by allowing the definition of disability to include voters without an established immunity to the virus.⁵⁹ About a month later, the court agreed, issuing a temporary injunction that declared:

That the plaintiffs were “reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter’s] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.”⁶⁰

The State appealed the order immediately, while the Texas Attorney General moved forward in issuing a public letter to all county judges and election officials. The letter stated “fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail.”⁶¹ The letter further warned that third parties would be prosecuted for encouraging the use of mail-in voting for those claiming fear of COVID-19 as a disability and cautioned that may state officials were misleading voters about their access to mail-in ballots because of COVID-19.⁶²

This letter led the state court plaintiffs to seek immediate enforcement of the Travis County court order in the Texas Court of Appeals.⁶³ The Court of Appeals reinstated the temporary injunction, but the State filed an emergency mandamus petition requesting that the definition of disability be interpreted by the Texas

57. See also *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020) (Tennessee plaintiffs experienced a similar outcome in their state supreme court, with those predisposed to severe illness associated with COVID-19 or those caring for others that are predisposed receiving the ability to vote absentee, while others simply fearing exposure were not allowed a special absentee exception.).

58. Travis County, Texas is home to Austin Texas, the state’s capital.

59. *In re Texas*, 602 S.W.3d 549, 552 (Tex. 2020).

60. *Id.*

61. Letter from, Ken Paxton, Texas Attorney General to County Judges and County Election Officials (May 1, 2020) on file at https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf.

62. *Id.*

63. *In re Texas*, 602 S.W. 3d at 552.

Supreme Court, which stayed the Court of Appeals order and superseded the trial court's order.⁶⁴

After an extensive review of the parties' briefs, the coronavirus pandemic, and preparations being taken across the state to meet a potential increased demand for mail-in voting, the Texas Supreme Court ultimately sided with the State. More specifically and after a review of the state's cautious history of voting by mail, the court decided that (1) "[a] lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition," (2) being disabled involves a physical incapacity, and (3) "in no sense can a lack of immunity be said to be such an incapacity."⁶⁵ With that, voters were stuck with the existing mail-in voting rules with no budging for a fear of contraction.

2. Federal District Court Litigation

Prior to the Travis County District Court's decision to include lack of immunity in the definition of disability for vote by mail purposes, the TDP and other plaintiffs filed suit in the federal district court. There they alleged violation of federal constitutional rights because of Texas's failure to allow certain voters to vote by mail.⁶⁶ They filed a motion for a preliminary injunction to enjoin the State from denying mail-in ballots or from threatening prosecution of those that do issue such ballots.⁶⁷

In this instance and based on essentially the same arguments from the parties, the federal court found contrary to the state supreme court. It held that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances."⁶⁸

More specifically, the court employed the usual four-part test to determine if the preliminary injunction should have been issued. The court held that the plaintiffs:

- (a) were likely to succeed on their 26th Amendment claim regarding the mail-in voting provision limiting access to citizens aged 65 or older;⁶⁹
- (b) were likely to succeed on their First Amendment claims, where the state had placed the burden of prosecution on those that tried to vote by mail under the disability of lack of immunity or fear of transmission;⁷⁰

64. *Id.*

65. *Id.* at 560.

66. *Tex. Democratic Party v. Abbott*, 461 F. Supp. 3d 406 (W.D. Tex. 2020).

67. *Id.* at 413.

68. *Id.* at 420.

69. *Id.* at 445.

70. *Id.* at 448.

(c) would suffer irreparable harm without preliminary relief where being forced to unnecessarily risk illness in order to vote was at issue;⁷¹ and

(d) the requested relief was in favor of the public interest of preserving constitutional rights and preventing the spread of a potentially deadly illness.⁷²

Quickly after the district court's opinion was entered, the case went up to the Fifth Circuit for further review. The Fifth Circuit found contrary to the district court. It decided that the state was likely to prove that the plaintiffs' Twenty-Sixth Amendment rights were not abridged because there was a state interest in allowing older voters, to vote by mail and that voters under the age of sixty-five still had the right to vote in another manner.⁷³ The Fifth Circuit stated that the coronavirus's "emergence has not suddenly obligated Texas to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail."⁷⁴

As to harm, the Fifth Circuit determined that the harm to the State if everyone was eligible for mail-in voting outweighed the potential harm to the plaintiffs, especially where the State could show that it was likely to succeed in its defense against the plaintiffs' claims.⁷⁵ Finally, the Fifth Circuit determined that the public interest in limiting voter and election official confusion in advance of the rapidly approaching primary election weighed in favor of staying the district court's order while the court considered the facts and law.⁷⁶ Thus, the district court's order was stayed pending further consideration of the matter by the Fifth Circuit.

Subsequent applications to the U.S. Supreme Court were denied, leaving the Fifth Circuit's stay in place in advance of the July 14, 2020 primary election.⁷⁷ Prior to the November 2020 Election, the Fifth Circuit vacated and remanded the district court's preliminary injunction, rejecting the plaintiffs' Twenty-Sixth Amendment arguments.⁷⁸ On January 11, 2021, the U.S. Supreme Court further denied plaintiffs' petition for a writ of certiorari before judgment.⁷⁹ As a result of these orders, the involved parties are due to brief the district court by February 22, 2021 on the status of interlocutory appeal efforts and how the case should proceed as a result of the Fifth Circuit's vacation and remand order.

71. *Id.* at 453.

72. *Id.* at 448.

73. *Tex. Democratic Party v. Abbott*, 961 F. 3d 389, 403-09 (5th Cir. 2020).

74. *Id.* at 409.

75. *Id.* at 411-12.

76. *Id.*

77. *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020); *Tex. Democratic Party v. Abbott*, 141 S. Ct. 187 (2020).

78. *Tex. Democratic Party v. Abbott*, 978 F. 3d 168 (5th Cir. 2020).

79. *Tex. Democratic Party v. Abbott*, No. 19-1389, 2021 U.S. LEXIS 323 (2021).

3. *The Election*

Without further court guidance, Texas completed its primary election on July 14, 2020, its first of the COVID-19 era. While court guidance protected the existing mail-in voting laws, Texas saw many issues, including in-person delays, delays by the postal service, and a lack of poll workers.⁸⁰

The main takeaway for Texas is to keep its eye on the pending federal litigation for any further decisions in advance of the November 2020 Presidential election. Such guidance will determine whether voters of all ages can succeed in casting a vote by mail or if the state can continue to put its existing limits on voting by mail.

4. *Similar Absentee Issue in Louisiana*

Like those in Texas, Louisiana voters brought suit over the state's emergency election plan and an alleged failure to protect voters in search of protection from COVID-19.⁸¹ Unlike Texas, Louisiana proactively took steps to include COVID-19 considerations in its absentee balloting system. After moving spring elections back by about three months, the Louisiana legislature approved an Emergency Election Plan that expanded the state's list of accepted excuses required to obtain an absentee ballot by five more excuses related to the coronavirus. More specifically, those five excuses were extended to voters that are:

- (a) at higher risk of severe illness from COVID-19 based on underlying medical conditions;
- (b) subject to medically necessary COVID-19 quarantine or isolations orders;
- (c) advised by a medical professional to self-quarantine due to COVID-19;
- (d) experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- (e) caring for an individual that is subject to such a quarantine or isolation order.⁸²

Voters in this case also brought challenges to an absentee ballot witness requirement and a failure to provide notice and an opportunity to cure and ballot deficiencies, which will be discussed later.⁸³

Without advancing to an analysis of the merits of the plaintiffs' claims, the court dismissed the case for want of standing. The many page standing analysis

80. Alexa Ura, *Runoff Elections Show Texas Not Quite Ready for November's Main Event*, THE TEXAS TRIBUNE (July 15, 2020, 12:00 AM), <https://www.texastribune.org/2020/07/15/texas-primary-runoff-elections-november/>.

81. Clark v. Edwards, 468 F. Supp. 3d 725 (M.D. La. 2020).

82. *Emergency Election Plan for the July 11, 2020 Presidential Primary and August 15, 2020 Municipal General Elections in the State of Louisiana*, LOUISIANA SECRETARY OF STATE (Apr. 20, 2020), <https://www.sos.la.gov/OurOffice/PublishedDocuments/Spring2021EEP.pdf>.

83. Clark v. Edwards, 468 F. Supp. 3d at 732-33.

found that some of the involved voter plaintiffs were eligible to vote absentee even without the COVID-19 excuses eliminating the issues they experienced with that particular requirement or that their inability to qualify for the COVID-19 excuses was speculative at best.⁸⁴ Organizational plaintiffs were also involved, and alleged injury related to their need to redirect funding and time to educate voters on the emergency changes to voting. The court once again determined that these alleged injuries did not rise to the level sufficient to establish standing.⁸⁵

Of note here, and despite the court's dismissal based on standing alone, *Purcell* was once again invoked as a means of potentially curtailing judicial involvement when elections were quickly approaching. Here, the district court acknowledged the recent use of *Purcell* by the Supreme Court in the Wisconsin case, before stating that *Purcell* does not support no judicial intervention in fast-approaching election cases, but instead supports cautious intervention.⁸⁶ This was the court's reason for carefully wading into a standing analysis.

D. NOTARIES FOR ABSENTEE BALLOTS: THE OKLAHOMA SUPREME COURT VERSUS THE OKLAHOMA LEGISLATURE ON REQUIRING NOTARIZATION OF ABSENTEE BALLOTS

In addition to considering who should qualify for an absentee ballot in the midst of a global pandemic, other states have looked to notary requirements for such ballots as any obstacle to overturn to ease the ability to vote absentee. Specifically, voters in Oklahoma sought to clarify existing law to demonstrate that absentee ballots do not need to be accompanied by a sworn, notarized affidavit in order to be considered valid.

1. *Underlying Litigation in the Oklahoma Supreme Court*

On April 23, 2020, the League of Women Voters of Oklahoma and two voters filed an application with the Oklahoma Supreme Court requesting the court assume original jurisdiction and grant the petitioners extraordinary relief.⁸⁷ In essence, the petitioners presented the following to the court:

- (a) That the global coronavirus pandemic created a need to curtail in-person contacts and would likely increase the necessity for absentee voting in upcoming Oklahoma elections;
- (b) That Oklahoma voters seeking to vote absentee were at a serious disadvantage because the State Election Board provided

84. *Id.* at 734-37.

85. *Id.*

86. *Id.* at 736-37.

87. See Application to Assume Original Jurisdiction and Request for Extraordinary Relief, The League of Women Voters of Oklahoma, et al. v. Ziriak, 463 P.3d 524 (Okla. 2020), No. 20-cv-308/20-cv-283, available for download at <https://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=118765&db=Appellate&submitted=true>.

that an absentee ballot “must be accompanied by an affidavit notarized in person by a notary public;” and

(c) That the notary obstacle was a large one, as (1) many notaries were closed due to the pandemic, (2) voters must leave the home to reach a notary, risking exposure to COVID-19, and (3) Oklahoma law prohibited a notary from notarizing more than 20 absentee ballots in a single election.⁸⁸

In spite of these difficulties, the petitioners also informed the court that a solution to these problems already existed in Oklahoma statutory authority. Specifically, they showed that a certain statute allowed an unsworn statement in the writing of the person making the statement and signed under penalty of perjury would suffice whenever, under any law of Oklahoma, a matter is required to be supported by a sworn affidavit.⁸⁹ Essentially, the petitioners believed that this statute would allow voters to complete absentee ballots without need for a notary, as long as they signed the ballot under penalty of perjury, in contravention of the State Board of Elections’ current guidance on the practice.⁹⁰

The petitioners insisted that the inconsistency between the statute and the election notary requirements, especially in the face of the COVID-19 pandemic, required clarification immediately by the court, where informal communications with the Secretary of the State Board of Elections did not resolve the matter.⁹¹ The petitioners also noted that this need for clarification was emergent because of the approaching June 30, 2020 election and its inclusion of an initiative to expand Medicaid in Oklahoma.⁹²

First, the Secretary of the State Board of Elections argued that the court did not have the authority to assume original jurisdiction in this matter. Then, he responded that the statute allowing a statement signed under penalty of perjury in place of a notarized affidavit did not apply because (1) it was a statute governing civil procedure and (2) it only applied to affidavits in judicial or quasi-judicial proceedings.⁹³ The Secretary further argued that allowing the statute to apply in almost all circumstances would render notaries and those legislative acts requiring notaries unnecessary.⁹⁴ In closing, the Secretary also argued that eliminating the notary requirement on absentee ballots would undermine the state’s battle against

88. See Brief in Support of Application to Assume Original Jurisdiction and Request for Extraordinary Relief, *The League of Women Voters of Oklahoma, et al. v. Zirioux*, 463 P.3d 524 (Okla. 2020), No. 20-cv-308/20-cv-283 available for download at <https://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=118765&db=Appellate&submitted=true>.

89. OKLA. STAT. 12, § 426 (2002).

90. Brief in Support of Application to Assume Original Jurisdiction and Request for Extraordinary Relief, *supra* note 33, at 3.

91. *Id.* at 4.

92. *Id.* at 6.

93. Response to Petitioners’ Application to Assume Original Jurisdiction and Request for Extraordinary Relief at 6-7, *The League of Women Voters of Oklahoma, et al. v. Zirioux*, 463 P.3d 524 (Okla. 2020), No. 118765, <https://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=118765&db=Appellate&submitted=true>.

94. *Id.* at 8.

voter fraud, alleging the cause was highly supported by Oklahoma voters through initiatives such as voter ID.⁹⁵

2. *The Court's Decision*

Quickly after the parties made their arguments, the Oklahoma Supreme Court entered an order siding with the petitioners.⁹⁶ In its two-page order, the court determined that notarized affidavit absentee ballots required in Oklahoma were not excluded from the statute allowing for statements sworn under penalty of perjury to take the place of notarization.⁹⁷

With this determination made, the court then instructed the Secretary to (1) recognize absentee ballot affidavits sworn under penalty of perjury, (2) send absentee voters forms and instructions that would facilitate their use of a sworn statement instead of a notarized statement, and (3) cease the issuance of forms or other materials that suggested notarization as the only form through which the absentee ballot could be accomplished.⁹⁸

3. *The Legislature's Reversal*

Within two days of the Oklahoma Supreme Court's order, the Oklahoma House of Representatives took Senate Bill 210 under consideration. This bill sought to amend the very statute at the heart of the court's order.⁹⁹ The specific amendment added any notarized affidavits required by the state's election code to be excepted from the ability to replace such an affidavit with a statement sworn under penalty of perjury.¹⁰⁰ In addition to making this amendment, SB 210 sought to make certain provisions for absentee voting during the COVID-19 pandemic. In particular, it proposed additional statutes that:

- (a) Allowed absentee voters to submit a photocopy of a form of identification, instead of the required notarized affidavit, if the governor had issued a COVID-19 related state of emergency within 45 days of the involved election;
- (b) Allowed for alternative delivery of absentee ballots to those confirmed to a nursing facility during the pandemic or similar medical emergency;
- (c) Expanded the definition of "physically incapacitated" as it applied to absentee ballots to include those that had tested positive for COVID-19, those awaiting the results of a COVID-19 test,

95. *Id.* at 11-15.

96. *See* Order, *The League of Women Voters of Oklahoma, et al. v. Ziriak*, 463 P.3d 524 (Okla. 2020), No. 20-cv-308/20-cv-283, available for download at <https://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=118765&db=Appellate&submitted=true>.

97. *Id.*

98. *Id.* at 2.

99. S.B. 210, 57th Leg., 1st Sess. (Okla. 2020).

100. *Id.*

those with COVID-19 symptoms, and those considered at higher risk of severe illness caused by COVID-19.¹⁰¹

SB 210 passed the House of Representatives in a 74-26 vote on May 6, 2020, and the Senate by a 38-9-1 vote the following day.¹⁰² SB 210 was then approved by the Governor on May 7, 2020 and took immediate effect¹⁰³ less than two months before the June 30, 2020 election.

4. *Absentee Results from the June 2020 Election*

As expected, absentee and early voting played a role in allowing Oklahomans to vote outside of the traditional election day, in-person voting. Of note, the Medicaid expansion initiative of concern to the petitioners in the underlying litigation narrowly passed with 50.49% of voters voting in favor of expanding Medicaid eligibility to thousands of low-income Oklahoma residents.¹⁰⁴ On that initiative alone, 94,614 votes were cast absentee, 34,504 by early voting, 545,473 on election day, working out to absentee and early voting accounting for roughly 19.14% of the overall votes cast.¹⁰⁵ Compared to the 2016 Presidential Election that garnered 17.44% of the votes through absentee and early methodologies¹⁰⁶, this is a slight increase in the use of the methodologies.

5. *Other States*

a. *Alabama*

Alabama similarly dealt with a challenge to the notary, witness, and identification requirements put in place by its absentee system.¹⁰⁷ On one side there were older voters, voters with disabilities, and those with underlying medical conditions, who argued that a notary or two-witness requirement, a requirement to provide identification, and a ban on curbside voting, violated their right to vote, especially where they found themselves most susceptible to the coronavirus.¹⁰⁸ On the other side were state defendants alleging that prevention of voter fraud and preservation of the legitimacy of the election required them to move forward with these requirements, even in the face of a pandemic.¹⁰⁹

The court recognized, among other things, that

101. *Id.* at 3-5.

102. S.B. 210, 57th Leg., 2d Reg. Sess. (Okla. 2020), <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb210&Session=2000>.

103. *Id.*

104. *JUNE 30, 2020 Official Results*, OKLAHOMA STATE ELECTION BOARD, <https://results.okelections.us/OKER/?elecDate=20200630> (last visited Feb. 2, 2021).

105. *Id.*

106. *State Election Results, General Election, November 8, 2016*, OKLAHOMA STATE ELECTION BOARD (Nov. 17, 2016), <https://www.oklahoma.gov/elections/support/2016/20161108-seb.html>.

107. *People First of Ala. v. Merrill*, 467 F.Supp. 3d 1179 (N.D. Ala. 2020).

108. *Id.* at 1192.

109. *Id.* at 1193.

- (a) the plaintiffs would likely be successful on the merits,
- (b) “the witness requirement is unconstitutional as to vulnerable voters who cannot safely satisfy the requirement in light of the COVID-19 pandemic,”
- (c) the state’s interest in enforcing the ID requirement “does not justify the burden on voters . . . who cannot safely obtain a copy of their photo ID,”
- (d) the plaintiffs established a likelihood of irreparable harm based on their choice between voting or not because of their inability to vote safely, and
- (e) the requested injunctive relief was in the public interest.¹¹⁰

The court then entered an injunction preventing Alabama officials from enforcing the notary/witness and ID requirements during the July 14, 2020, runoff election. The requirements were enjoined from being used against individuals that were particularly susceptible to COVID-19, when those individuals provided a sworn statement that they were in such class.¹¹¹ The Eleventh Circuit later denied the state defendants’ request for a stay pending appeal of the injunction.¹¹² However, the U.S. Supreme Court moved forward in granting a stay pending the Eleventh Circuit appeal.¹¹³ Thus, the injunction was stayed at the time the runoff election took place, with voters only to hope that the issue would be dealt with prior to the November 2020 elections.

The Alabama district court later enjoined the notary/witness and ID requirements for the November 2020 Election, along with a ban on curbside voting.¹¹⁴ After expedited briefing, the Eleventh Circuit granted a stay of the district court injunction, as to the notary/witness and ID requirements, while allowing the curbside voting injunction to continue.¹¹⁵ The U.S. Supreme Court would then stay all of the injunction on October 21, 2020.¹¹⁶ Those stays stood for the November election and the related appeals were later voluntarily dismissed.

b. North Dakota

On a similar yet separate note, other states are experiencing issues on how to enforce absentee ballot requirements, much like the notary requirement in Oklahoma. In North Dakota, voters brought suit against the Secretary of State to challenge the process in which absentee ballots are thrown out and left uncounted if the signature on the ballot does not match the signature on the ballot application.¹¹⁷ In that case, the court enjoined the state from throwing out mail-

110. *Id.* at 1206-27.

111. *Id.* at 1226-27.

112. *People First Ala. v. Sec’y of State for Ala.*, 815 Fed. Appx. 505 (11th Cir. 2020).

113. *Merrill v. People First*, 141 S. Ct. 190 (2020).

114. *People First of Ala. v. Merrill*, 2020 U.S. Dist. LEXIS 180038 (N.D. Ala. 2020).

115. *People First of Ala. v. Sec’y of State*, 2020 U.S. App. LEXIS 33371 (11th Cir. 2020).

116. *Merrill v. People First*, 141 S. Ct. 25 (2020).

117. *Self Advocacy Solutions N.D. v. Jaeger*, 464 F. Supp. 3d 1039 (D. N.D. 2020).

in ballots based on mismatched signatures without first affording the voter notice and the ability to cure.¹¹⁸ The parties eventually worked out a procedure prior to the state's June 9, 2020 primary election that allowed for county election officials to contact voters with mismatched signatures and inform them of the problem and allowed voters a specific, multi-day timeframe within which to be heard.¹¹⁹

Of note, the court in this case chose to reject the state defendants' *Purcell*-based argument that the court should not step in and enjoin the election statute at a juncture so close to the election in question. Specifically, the court found that those troubles present in *Purcell*, namely the likelihood that a court order would create voter confusion on the eve of an election, were not present in this instance because the process for voting would not change, only what occurred after election day as ballots were being counted.¹²⁰ As such, *Purcell* was not used as a tool to prevent the court from intervening in a manner that prevented disenfranchisement in North Dakota.

c. Louisiana, Revisited

As previously discussed, Louisiana voters brought suit to challenge absentee witness requirements and the state's alleged failure to provide notice and an opportunity to cure absentee ballot deficiencies.¹²¹ Unlike the Alabama, North Dakota, and Oklahoma courts, the Louisiana court dismissed based on standing before an analysis of the merits of the plaintiffs' claims was conducted.

As to the witness requirement, the court found many of the plaintiffs lacked standing because they lived with others and could easily satisfy the witness requirement.¹²² As to the cure allegation, the defendants promulgated a rule allowing absentee voters to cure ballot deficiencies after the subject action was filed. Further, the plaintiffs did not include it in their motion for injunctive relief. Thus, the cure allegation was not in front of the court for determination.¹²³

E. VOTER ACCESS: POLLING PLACE SHORTAGES IN KENTUCKY PRIMARIES AND RESULTING LITIGATION

In addition to the issues above, voters and election officials are juggling the prevailing concern of physical access to polling locations. This is an especially precarious concern in light of COVID-19 and its ability to spread in the crowded, indoor spaces often associated with election day voting. This was of concern in Kentucky prior to its 2020 primary election, so much so that the election was

118. *Id.*

119. *Self Advocacy Solutions N.D. v. Jaeger*, 2020 U.S. Dist. LEXIS 108854 (D. N.D. 2020).

120. *Self Advocacy Solutions N.D.*, 464 F. Supp. 3d at 1055.

121. *Clark v. Edwards*, 468 F. Supp. 3d 725 (M.D. La. 2020).

122. *Id.* at 737-45.

123. *Id.* at 732.

delayed, and polling places were narrowed to unprecedented levels to deter viral spread on election day.

1. *The Required Reduction of Polling Places*

Upon recommendation by Kentucky Secretary of State Michael Adams, Kentucky Governor Beshear entered an executive order delaying the state's primary election previously scheduled for May 19, 2020 to June 23, 2020.¹²⁴ This order also directed the Kentucky State Board of Elections to "establish procedures for election officials to follow pursuant to this order."¹²⁵ Adams later issued a letter to Governor Beshear recommending certain procedures for implementation during the delayed primary election, including (1) an easing of the requirements to receive an absentee ballot for qualified voters, (2) wider access to the absentee process through additional in-person absentee periods, outdoor voting opportunities, promotion of drive-through voting, and informational advertising of absentee voting availability through postcards to voters and online absentee registration, and (3) the reduction of in-person voting locations on election day, with precautions that align with CDC COVID-19 guidance to be taken at the selected sites.¹²⁶

In response, Governor Beshear entered an additional executive order, requiring the Board of Elections to promulgate emergency regulations in line with Adams's recommendations and mostly encouraging the use of absentee voting.¹²⁷ Pursuant to this guidance, the Board of Elections issued an emergency regulation, which in addition to promulgating the discussed absentee voting procedures, directed County Clerks "to reduce the number of sites for in-person voting for June 23, 2020, with such reduction and such sites to be pre-approved by the State Board of Elections."¹²⁸

Pursuant to the issued requirement to reduce polling place sites, Kentucky's Jefferson, Fayette, and Kenton counties submitted plans to the Board of Elections.¹²⁹ Jefferson County, home to approximately 615,511 registered voters and the City of Louisville, chose to reduce its election day polling locations to one: the Kentucky Exposition Center.¹³⁰ Fayette County, home to approximately 243,739 registered voters and the City of Lexington, chose to reduce its election day polling locations to one: Kroger Field at the University of Kentucky.¹³¹ Finally, Kenton County, home to approximately 137,000 registered voters, also

124. Ky. Exec. Order No. 2020-236 (Mar. 16, 2020), https://governor.ky.gov/attachments/20200316_Executive-Order_2020-236_Elections.pdf.

125. *Id.*

126. Letter from Michael G. Adams, Secretary of State, to Governor Andy Beshear (Apr. 23, 2020), https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf.

127. Ky. Exec. Order 2020-296 (Apr. 24, 2020), https://governor.ky.gov/attachments/20200424_Executive-Order_2020-296_SOE-Relating-to-Elections.pdf.

128. 31 KY. ADMIN. REGS. 4:190E (2020) at § 11.

129. *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 517 (W.D. Ky. 2020).

130. *Id.*

131. *Id.* at 517-18.

chose to reduce its election day polling locations to one: the Northern Kentucky Convention Center.¹³² All three plans were approved by the Board of Elections in early June 2020.¹³³

All three counties cited the following as support for the reductions to single polling places:

- (a) Difficulty in finding a sufficient number of poll workers because many such workers were in the older age group particularly susceptible to COVID-19 exposure;
- (b) Preparation of multiple polling places for poll worker training and acquisition of the PPE for a large number of workers was impracticable in a short amount of time;
- (c) Pandemic closures of traditional polling places;
- (d) Kenton County's check-in software being unable to track whether a voter has already voted at one location prior to voting at another;
- (e) Each of the selected locations allowed for COVID-19 precautions, including social distancing and one-way access; and
- (f) Each of the selected locations was centrally located, located on a bus route, and provided ample free parking.¹³⁴

2. Resulting Litigation

Not long after the Board of Elections approved the three plans, Kentucky residents in those counties filed suit. They alleged violations of the First and Fourteenth Amendments' fundamental right to vote under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act and challenged the use of a single polling place in each of the three counties.¹³⁵ The plaintiffs ultimately requested injunctive relief in the form of a court order for sixteen locations to be added in Jefferson County, nine in Fayette County, and two in Kenton County.¹³⁶

Specifically, those plaintiffs focused on three population groups within the counties: African American, elderly, and disabled citizens.¹³⁷ For African American residents, the plaintiffs alleged that among other reasons, they were more susceptible to the virus and more likely to suffer severe health consequences if they contracted COVID-19 while voting in person.¹³⁸ Plaintiffs further alleged that (1) older voters were "at higher risk for severe illness and death from COVID-19," (2) disabled voters' exposure to the virus would be increased by the travel necessitated by a single polling place and the assistance they would need to vote

132. *Id.* at 518.

133. *Id.*

134. *Id.* at 518-19.

135. *Id.* at 520.

136. *Id.* at 519.

137. *Id.* at 526.

138. *Id.* at 519-20.

after waiting in lines, and (3) all voters would be at risk if a single polling place was used and resulted in the congregation of thousands of residents attempting to vote.¹³⁹

In response to the allegations, the defendant counties asserted that they had received extensive absentee ballot requests with many mailed prior to the court's decision, thus attempting to counter an argument that turnout would be vastly affected. Second, the counties also asserted that free transportation was being arranged for voters in order to mitigate any costs or burdens associated with travel to a single polling place.¹⁴⁰

3. *The Court's Analysis*

After a review of briefs on the plaintiffs' motion for a preliminary injunction, the court recognized that while the right to vote "is of the most fundamental significance under our constitutional structure,"¹⁴¹ "the right to vote in any manner and the right to associate for political purposes through the ballot [were not] absolute."¹⁴²

As to the plaintiffs' First and Fourteenth Amendment claims, the court employed the *Anderson-Burdick* framework: considering the magnitude of the alleged injury, identifying and evaluating the state's justifications for the burdens imposed, and determining the legitimacy and strength of each justification and the extent they are necessary to burden the injured rights.¹⁴³ Under this test, the court found that the plaintiffs' alleged burdens based on exposure and susceptibility of particular residents was modest when viewed in light of Kentucky's contemporaneous expansion of in-person voting and easing of absentee restrictions.¹⁴⁴ In furtherance of this finding, the court found that the defendants "offered evidence of a substantial government interest in implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19" and that those interests justified the modest burden.¹⁴⁵

As to the alleged violation of Section 2 of the Voting Rights Act, the court implemented a two-part test from the Sixth Circuit to determine if there was an unconstitutional denial of the right to vote.¹⁴⁶ Specifically, it examined whether a voting practice resulted in an adverse disparate impact on protected class members, and if so, then considered whether, given the totality of the circumstances, the practice caused a discriminatory impact.¹⁴⁷

139. *Id.*

140. *Id.* at 521.

141. *Id.* at 522 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

142. *Nemes*, 467 F. Supp. 3d at 522 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)).

143. *Nemes*, 467 F. Supp. 3d at 525.

144. *Id.* at 526.

145. *Id.* at 528-29.

146. *Id.* at 529-30.

147. *Id.* at 529-33.

In undertaking this analysis, the court determined that the plaintiffs failed to demonstrate that the burden of a single polling location disproportionately affected members of a protected class. Specifically, the court found that:

- (a) Plaintiffs' assertions related to increased exposure because of transportation to a single location was based on broad evidence not specifically supporting the assertion for Fayette and Jefferson counties' African American residents;
- (b) Disparities in poll wait times based on race were remedied by all voters being required to wait in the same line at a single polling place; and
- (c) Based on the totality of the circumstances, including expansion of other voting avenues and the unprecedented COVID-19 pandemic, plaintiffs failed to show that the reduction to one polling place caused a discriminatory impact.¹⁴⁸

Therefore, the court denied the request for injunctive relief and the election proceeded as planned with the reduced polling places. The plaintiffs have since moved for voluntary dismissal of the matter.

4. *The Election and Its Turnout*

With the election proceeding with the planned precautions and after experiencing a surge of absentee voting, reports showed that approximately 1.13 million Kentuckians voted in the June 23, 2020 election, either in-person or through absentee ballots.¹⁴⁹ This works out to a turnout of an estimated 29% of registered voters.¹⁵⁰ When comparing that number to the 20.6% turnout in the 2016 primary election,¹⁵¹ 13.9% in the 2012 primary election,¹⁵² and 32.2% in the 2008 primary election,¹⁵³ it would appear that the fears over a single polling place did not necessarily result in lower turnout, likely due to increased absentee and early voting.

The lesson to be learned for future elections held during this pandemic is that those limitations on day-of access to the polls can be tempered with an expansion of other reasonable avenues to vote.

148. *Id.*

149. Phil Pendleton, *2020 Kentucky Primary Will Go Down as Historic, Expensive Election*, WKYT (June 30, 2020, 10:11 AM), <https://www.wkyt.com/2020/06/30/2020-kentucky-primary-will-go-down-as-historic-expensive-election/>.

150. *Id.*

151. COMMONWEALTH OF KENTUCKY STATE BOARD OF ELECTIONS, VOTER TURNOUT REPORT FOR THE 2016 PRIMARY ELECTION (5/17/2016) (2016), <https://elect.ky.gov/statistics/Documents/voteturnoutcounty-2016P-20160815-115948.pdf>.

152. COMMONWEALTH OF KENTUCKY STATE BOARD OF ELECTIONS, VOTER TURNOUT REPORT FOR THE 05/22/12 PRIMARY ELECTION (2012), <https://elect.ky.gov/SiteCollectionDocuments/Election%20Statistics/turnout/2011-2019/2012/PR112trnsumm.txt>.

153. COMMONWEALTH OF KENTUCKY STATE BOARD OF ELECTIONS, VOTER TURNOUT REPORT FOR THE 05/20/08 PRIMARY ELECTION (2008), <https://elect.ky.gov/SiteCollectionDocuments/Election%20Statistics/turnout/2006-2010/08pri.pdf>.

IV. WHERE AMERICA GOES FROM HERE

COVID-19 isn't the first epidemic or pandemic that has affected the way U.S. elections run, as the Spanish flu and other illnesses taught us valuable electoral lessons far before the current plight. Further, COVID-19 has been around for a sufficient enough period of time to have taught some electoral lessons of its own, including how to handle the election process when distance is required to keep Americans safe. More specifically, we've already seen that expanded absentee voting and early in-person voting opportunities can aid voters when delayed elections and increased sanitation at polling places just won't suffice.

With time, we will also see the effects of the "shadow docket" emerging from the Supreme Court's contradictory, last-minute involvement in COVID voting cases, especially where *Purcell* is concerned. This effort includes those cases out of Wisconsin, Texas, and Alabama and focuses on the Supreme Court granting emergency stays that were previously denied by the Courts of Appeals or doing the reverse in some seemingly identical cases. Specifically, we will learn whether the Court continues to bypass the regular review process of the Courts of Appeals and replace it with a summary reversal mechanism that should be reserved for only the most extraordinary cases. Perhaps Justice Sotomayor said it best to her colleagues in another COVID-19 case focused on access for ballot initiatives, when she dissented with the following parting words: "Today, by jumping ahead of the Court of Appeals, this Court once again forgets that it is "a court of review, not of first view," and undermines the public's expectation that its highest court will act only after considered deliberation."¹⁵⁴ Or maybe it was in her cutting dissent in another COVID election case:

This Court's inaction continues a trend of condoning disenfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disenfranchisement—a situation that *Purcell* sought to avoid—the Court balks.¹⁵⁵

No matter what, by the time this paper reaches publication, the 2020 Presidential Election will have occurred. We will have the American voters' decision that determines the next four years. And we will, in all likelihood, still be subject to the wrath of COVID-19. Hopefully by that time, the country and its states will have focused on creative and successful methods to ensure an enlarged, yet safe, voter turnout in perhaps the most captivating election of the past century. And while, in all likelihood, COVID-19 will pass with time, the lessons it brought

154. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (quoting *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017)).

155. *Raysor v. DeSantis*, 140 S. Ct. 2600, 2603 (2020) (internal citations omitted).

to the electoral systems in this United States should never be forgotten, as the experience will become a useful one when we face the next life-altering, global emergency.