
VOTING DURING A PANDEMIC

EUGENE D. MAZO*

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* Visiting Associate Professor of Law, University of Louisville Louis D. Brandeis School of Law. I wish to thank Gwen C. Parker for her helpful comments and constructive criticism, as well as the editors of the *Boston University Law Review* for inviting me to contribute this Essay to their journal. I am especially grateful to Kevin Day and Tyler Creighton for their skillful editing and for demonstrating patience with me throughout the publication process.

INTRODUCTION

As public health experts continue to issue widespread reminders to American citizens about the need for social distancing, about two-thirds of U.S. adults (66%) report that they now no longer feel comfortable entering a polling place.¹ When it comes to voting, the unprecedented challenges posed by COVID-19 could not have come at a more precarious time. The pandemic not only arrived during a presidential election year but also at a time when the integrity of American elections was already under threat. For years prior to the pandemic, voting rights advocates had been sounding alarm bells, telling us that we were witnessing an unprecedented assault on the franchise.² Even before Russia interfered in the presidential election of 2016, these advocates were warning us that something greater than the right to vote was in jeopardy. The fundamental trust that American citizens have in the electoral process was also at risk.

Perhaps no voting rights advocate worked harder to warn us of this state of affairs than Professor Richard L. Hasen. Hasen is an election law maven. In addition to running the widely read Election Law Blog,³ he is a prolific scholar who publishes a new book almost every year.⁴ Hasen's latest book, *Election Meltdown*, was published in February. Its aim was to prepare Americans for the dangers their democracy would face in 2020, on the eve of another presidential election.⁵ In particular, Hasen dedicates his book to illuminating four specific threats that undermine the trust that American voters have in their elections.⁶

I. FOUR THREATS TO VOTING

The first threat facing American democracy is voter suppression, Hasen explains. This is practiced in many ways throughout the United States, including when states compel voters to provide documentary proof of their citizenship

¹ *Most Americans Say Coronavirus Outbreak Has Impacted Their Lives*, PEW RES. CTR. (March 30, 2020), <https://www.pewsocialtrends.org/2020/03/30/most-americans-say-coronavirus-outbreak-has-impacted-their-lives/> [<https://perma.cc/FQ7H-ZMV5>].

² The literature on this topic is large, and it has grown significantly since 2016. *See generally* CAROL C. ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018); ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* (2016); GILDA R. DANIELS, *UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA* (2020); CAROLINE FREDRICKSON, *THE DEMOCRACY FIX: HOW TO WIN THE FIGHT FOR FAIR RULES, FAIR COURTS, AND FAIR ELECTIONS* (2019); MICHAEL WALDMAN, *THE FIGHT TO VOTE* (2016).

³ ELECTION L. BLOG, <https://electionlawblog.org/> [<https://perma.cc/79FS-KYNE>] (last visited Oct. 1, 2020).

⁴ *E.g.*, RICHARD L. HASEN, *JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* (2018); RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016).

⁵ *See* RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 6 (2020).

⁶ *Id.*

before they can register to vote,⁷ require voters to present photo identification to vote,⁸ impose restrictions on early voting,⁹ and make it harder for people with prior criminal convictions to vote.¹⁰ Many of these voter suppression tactics are implemented in the name of combating voter fraud, which according to Hasen is a phenomenon that hardly exists.¹¹ In Hasen's telling, these voter suppression tactics are used by Republicans to depress turnout by likely Democratic voters: "only one party is seeking to make it harder to register and vote."¹²

The second threat to American elections consists of administrative incompetence. Unlike voter suppression, incompetence in election administration afflicts both major parties. One significant problem American democracy faces is the fact that the chief election officer in almost every state is a partisan official.¹³ As such, partisan tensions flare whenever problems in voting occur. Hasen calls Brenda Snipes, the Democratic supervisor of elections in Broward County, Florida, "probably the most incompetent election administrator in a large jurisdiction in the United States."¹⁴ He also excoriates Brian Kemp, the former Republican secretary of state of Georgia, for running for governor in a heated election against Stacey Abrams while simultaneously overseeing the election machinery of his state.¹⁵ In close elections, a state's

⁷ *Fish v. Schwab*, 957 F.3d 1105, 1144 (10th Cir. 2020) (enjoining Kansas from implementing a documentary proof-of-citizenship requirement).

⁸ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (upholding Indiana's strict photo identification requirement for voting).

⁹ *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) (striking down North Carolina restriction on early voting because it and other restrictions "target African Americans with almost surgical precision").

¹⁰ *Jones v. DeSantis*, No. 20-12003, 2020 WL 5493770, at *21 (11th Cir. Sept. 11, 2020) (upholding Florida requirement that former felons must pay all fines, fees, costs, and restitution to the state before their voting rights can be restored).

¹¹ *See* HASEN, *supra* note 5, at 32-33. The sentiment that voter fraud is rare is widely shared by scholars and has been subject to empirical examination. *See, e.g.*, JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 7 (2007) (reporting that "voter fraud is extraordinarily rare"); LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 57-76 (2010) (examining the evidence regarding voter fraud); Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 899-902 (2014) (explaining that voter fraud lacks evidentiary support yet is a myth that is passed along among certain segments of society).

¹² HASEN, *supra* note 5, at 44.

¹³ *Id.* at 56.

¹⁴ *Id.* at 49. In one election, Snipes had failed to deliver 58,000 ballots to absentee voters. Another time, she left a question in a voter initiative off the ballot. She also once posted election results on the county's website before polls had closed in a race, and in 2018, she was two minutes late in submitting vote totals from a vote recount in Broward County to state officials, thus throwing the results of both Florida's gubernatorial and U.S. Senate elections of that year into doubt. *Id.* at 48-53.

¹⁵ *Id.* at 65-71.

competence is judged to be as strong as the weakest link in its election apparatus. And in large, complex elections, local incompetence is often on display.

In addition to voter suppression and electoral incompetence, a third threat undermines voters' confidence in elections: so-called "dirty tricks." One such dirty trick involves the use of social media to funnel false information at voters. This serves to inflame passions and undermine confidence in the integrity of elections. Hasen emphasizes that dirty tricks can be both "old-fashioned and newfangled."¹⁶ The Russian government's sophisticated, high-tech campaign to interfere in the 2016 presidential election—which involved running misleading Facebook ads, leaking stolen emails from the Democratic National Committee, and infiltrating numerous state voter registration databases—brought the fear of manipulation to voters and elected officials alike. Yet equally pernicious are low-tech dirty tricks such as the harvesting and manipulation of absentee ballots.¹⁷ For instance, in 2018, political operative Leslie McCrae Dowless Jr. used low-tech methods to steal and alter absentee ballots in Bladen County, North Carolina, on behalf of Republican congressional candidate Mark Harris.¹⁸

Hasen's fourth threat consists of incendiary rhetoric about the legitimacy of our elections. American elections are characterized by their extreme decentralization. Our federal elections are not run by a single central election authority, as tends to be the case in other democracies. So even if the whole country votes on a single day when Americans vote in their presidential election, this national event still happens to be locally administered.¹⁹ This may explain why the country is poorly equipped to deal with election emergencies that impact the voting process. In any event, incendiary rhetoric only exacerbates this problem. Again, Hasen points to the Republican party as the primary source of this threat. As a candidate in 2016, for example, Donald Trump was asked if he would honor the results of the presidential election that year. He answered as follows: "I will totally accept the results of this great and historic election—if I win."²⁰ More recently, Americans have heard a lot of rhetoric from Trump about "rigged" and "stolen" elections. Such claims have been offered without any evidence to back them up. Nonetheless, the rhetoric itself lowers the confidence that citizens have in the fairness of the vote-counting that follows.

Hasen is an astute observer of America's electoral landscape. His book deserves our attention for its exploration of the tensions and contradictions inherent in our electoral processes, particularly because those who fear "voter fraud" and those who worry about "voter suppression" often do not speak the same language. But the warnings offered in his book—while still relevant—have since been overshadowed by an additional threat to American elections. As a result, *Election Meltdown* only partially prepares us for the concatenation of

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 80-88.

¹⁸ *Id.* at 96-101.

¹⁹ *See id.* at 95.

²⁰ *Id.* at 106.

threats to voter confidence that American citizens face in 2020. Hasen's book was published in February 2020. Around or slightly after that time, SARS-CoV-2, the virus that causes the disease known as COVID-19, first made its way to the United States. Soon, the World Health Organization declared that we were living under a global pandemic.²¹ This pandemic has completely transformed the way Americans work, travel, shop, socialize—and, importantly, vote. Not even Hasen could have predicted the many challenges that the COVID-19 pandemic would pose to American democracy. Unlike Hasen's four threats, which constitute abuses to the existing rules and norms of voting, this pandemic has required the rules of voting to be entirely rewritten.

II. THE NEW RULES OF VOTING

COVID-19 has significantly changed the playbook for voting in the United States.²² Prior to March, most voters cast their ballots in person. In November, most voters will be casting their ballots by mail. That fact alone threatens to impede the participation of ordinary citizens in the electoral process to an extent most of us have rarely witnessed. It also means that our state governments, local governments, election officials, and courts will be asked to play an unprecedented role in the upcoming election. How states decide to register new voters, how new and existing voters will choose to cast their ballots, and which segments of the population will vote in the presidential election are all questions for which we have no good answers. The academic literature on voting in times of emergency was nascent and still relatively underdeveloped before COVID-19. Only a few scholars focused their research on questions of how a global pandemic or similar emergency might change the mechanics of voting.²³

The leading scholar in this area, Professor Michael Morley, believes that election officials will have three major goals come November.²⁴ The first is to ensure that all eligible voters have an opportunity to cast a valid ballot without

²¹ The declaration that COVID-19 was a pandemic was made on March 11, 2020, when the Director-General of the World Health Organization held a news conference explaining that 114 countries had reported COVID-19 cases. Press Release, Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/U28X-WRQ9>].

²² See Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES MAG. (July 21, 2020), <https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html>.

²³ Professor Michael Morley has written much of the leading work on election emergencies. See, e.g., Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018); Michael T. Morley, Postponing Federal Elections Due to Election Emergencies (June 4, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3619213.

²⁴ Michael T. Morley, Election Emergency Redlines 1 (March 31, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564829.

risking their health. The second is to protect the electoral process from fraud or mistakes that could impact the outcome of the vote. The third is to ensure that everyone's vote is properly counted, so as to assure the public of the integrity of the final results.²⁵ The new realities of voting during a pandemic make achieving these goals challenging. The challenges differ, moreover, depending on the specific aspect of voting that the pandemic affects.

A. *Voter Registration*

One facet of the voting process impacted by the pandemic is voter registration. Part of the reason Americans vote in lower percentages than their counterparts in Europe is because voting in the United States involves a multistage process: an individual must first register to vote and only then can she cast her ballot.²⁶ The COVID-19 pandemic, however, has severely disrupted both the ability of Americans to register to vote and the capacity of election officials to process voter registration applications. Access to government offices or state agencies that provide registration services, such as the DMV, has been significantly curtailed in every state. Moreover, a significant number of states still do not allow voters to process their voter registration forms online. While much of our attention during the pandemic has focused on casting ballots, Professor Daniel Tokaji has argued that the effects of the pandemic on voter registration have been overlooked.²⁷ Studies suggest that voter registration is down and that groups of people who are typically registered to vote as a result of extensive in-person outreach efforts, including members of many minority groups, will see much lower numbers of registered voters this year.²⁸

Minority voters are not the only ones affected. The increased difficulty of voter registration impacts students as well, given that they typically register to vote for the first time on college campuses.²⁹ Voter registration requirements also impact those who may have recently moved or been forced to relocate as a result of a pandemic. Even in states that offer online voter registration to supplement the traditional paper-based system, registration hurdles remain. In most such states, the online voter registration process is a two-step process that requires a separate validation step to be taken by the state. During this second

²⁵ *Id.*

²⁶ See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 461 (2008) (explaining that every state except for North Dakota requires voters to register before they can vote).

²⁷ See Daniel Tokaji, *Voter Registration in a Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-tokaji/> [<https://perma.cc/A6XM-3YRR>].

²⁸ See *New Voter Registration in 2020*, CTR. FOR ELECTION INNOVATION & RES., <https://electioninnovation.org/new-voter-registrations-in-2020/> [<https://perma.cc/4M7L-ZT8J>] (last visited Oct. 1, 2020).

²⁹ See generally Michael J. Hanmer, Richard G. Niemi, & Thomas H. Jackson, *College Student Registration and Voting in the Time of COVID-19*, 19 ELECTION L.J. 363 (2020).

step, a state official matches the information the voter provides online with that voter's signature and other information that the state already has on file from her driver's license.³⁰ Citizens who do not possess a driver's license (or a nondriver's photo ID card) will not have their signatures on file with the state. Online voter registration efforts cannot help these people, and thus the pandemic will prevent them from registering to vote. There are many eligible voters who will not be able to participate in their state's online registration system this year.³¹ In a presidential election year, millions of people typically register to vote for the first time in the weeks leading up to Election Day. Because of the pandemic, this year at least some of these people will be disenfranchised.

B. *Voting by Mail*

Perhaps no aspect of elections has changed as much with the pandemic as the act of voting itself. At the time the pandemic began, only five states had planned to conduct their elections entirely by mail and had legislation in place to provide for this: Colorado, Hawaii, Oregon, Utah, and Washington.³² Three additional states—California, Nebraska, and North Dakota—allowed their counties to determine individually if an election would be held by mail, with some but not all counties choosing to do so.³³ In most other states where voting by mail was allowed, it was used by a minority of the electorate. These latter states fell into several categories. First, twenty-nine states and the District of Columbia were so-called “no excuse” jurisdictions. These states gave their voters the option of obtaining an absentee ballot without requiring them to provide a reason for why they wanted it. Six of these jurisdictions—Arizona, California, the District of Columbia, Montana, Nevada, and New Jersey—allowed a voter to get on a permanent absentee voter list, such that the voter would be able to vote by mail in every subsequent election without requesting an absentee ballot each time.³⁴ The remaining “no excuse” jurisdictions forced their voters to make their absentee requests at least once a year, every two years, or sometimes before

³⁰ *Online Vote Registration*, NAT'L CONF. ST. LEGISLATURES (Aug. 19, 2020), <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx> [https://perma.cc/C9LQ-QXN8].

³¹ See Lloyd Leonard, *The Problem with Online Voter Registration*, LEAGUE OF WOMEN VOTERS (Dec. 2, 2014), <https://www.lwv.org/blog/problem-online-voter-registration> [https://perma.cc/VTA6-XD64].

³² COLO. REV. STAT. § 1-5-401 (2020); HAW. REV. STAT. § 11-101 (2020); ORE. REV. STAT. § 254.465 (2019); UTAH CODE ANN. § 20A-3a-202 (LexisNexis 2020); WASH. REV. CODE § 29A.40.010 (2020); see also Lisa Lerer, *Washington: Where Everyone Votes by Mail*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/15/us/politics/washington-where-everyone-votes-by-mail.html>.

³³ See CAL. ELEC. CODE §§ 4005-4008 (West 2020); *id.* § 3005; *id.* § 4000; NEB. REV. STAT. § 32-960 (2020); *id.* § 32-952; N.D. CENT. CODE § 16.1-11.1-01 to -08 (2019).

³⁴ *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. ST. LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [https://perma.cc/VQ6N-RHM2].

every election.³⁵ On the other hand, sixteen so-called “excuse” states required their voters to provide the state with a reason for why they needed to vote by mail. The list of acceptable excuses included that the voter would be out of the country, suffered from a disability, was a student outside the county, had to work when the polls were open, was an election worker, or observed a religious practice that prevented her from voting on Election Day. Nationally, vote-by-mail ballots constituted 23.7% of all ballots cast in the 2016 general election, although the actual percentage varied significantly from state to state.³⁶

The pandemic has led to an enormous surge in the number of voters who now wish to vote by mail. How election officials will handle the distribution of their mail-in ballots ahead of the November election depends on the state. In addition to Colorado, Hawaii, Oregon, Utah, and Washington, five states that are universal vote-by-mail jurisdictions and that already had been planning to mail absentee ballots to all of their registered voters automatically, five new jurisdictions—California, the District of Columbia, Nevada, New Jersey, and Vermont—have now also decided to send absentee ballots automatically to all of their registered voters ahead of November.³⁷ Nevada and New Jersey had already taken this step for their caucuses and primaries several months ago, but California, the District of Columbia, and Vermont will do so for the first time this fall. In total, forty-four million registered voters (21% of the electorate) will automatically receive absentee ballots in the mail before November.³⁸

The other states that are allowing their voters to cast an absentee ballot in November will not be sending such ballots to their voters automatically. Rather, most of these states are requiring their voters to request their absentee ballots in person or in writing, although recently at least fourteen states have moved to allowing absentee ballot requests to be processed online as well. The deadlines for requesting an absentee ballot, how state officials verify the information submitted in an absentee ballot request, and how far in advance of the election a state must provide its absentee ballots to voters differs from state to state.³⁹

³⁵ *Id.*

³⁶ See U.S. ELECTION ASSISTANCE COMM’N, THE ELECTION ADMINISTRATION AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT 10 (2016), https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf [<https://perma.cc/F4WF-DVWH>].

³⁷ *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT’L CONF. ST. LEGISLATURES (Sept. 18, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx> [<https://perma.cc/37AR-U2MK>].

³⁸ Juliette Love, Matt Stevens & Lazaro Gamio, *Where Americans Can Vote by Mail in the 2020 Elections*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html>.

³⁹ The thirty-four states in which a voter can vote by absentee ballot without providing an excuse for doing so contain 118 million registered voters (57% of the electorate). Meanwhile, the seven states that require an excuse for absentee voting—Indiana, Louisiana, Mississippi, New York, South Carolina, Tennessee, and Texas—have forty-six million registered voters (22% of the electorate). *Id.* The presidential campaigns are no doubt well aware of these

How absentee voting should be conducted has been hotly debated in recent months among scholars and state officials alike. Professor Morley argues that election officials should not automatically mail absentee ballots to all registered voters in their state. This is because some voters may have been forced to leave their registered addresses due to the pandemic. Also, many state voter registry lists are known to be out of date. In addition, a significant proportion of the registered electorate in any given election will ultimately fail to vote. Professor Morley believes that these conditions “create a substantial risk of ballots being given away, sold, traded, collected by activists, or stolen from trashcans or mailboxes.”⁴⁰ He recommends that states proactively mail absentee ballot request forms or absentee ballot applications to each of their registered voters instead.⁴¹ In this way, each registered voter will be able to communicate to the state how she wishes to vote. In nine of the jurisdictions that are allowing “no-excuse” absentee voting in 2020, every registered voter will automatically be mailed an absentee ballot application form that will allow her to request an absentee ballot. By contrast, in twenty-five “no excuse” jurisdictions this year, the voter will have to apply for an absentee ballot on her own initiative.⁴²

The widespread transition to absentee voting for the 2020 primaries has led to significant challenges that election officials are still trying to resolve before November. During the primaries, many states were overwhelmed by the volume of requests they received for absentee ballots, especially when these requests were sent at the last minute. Indeed, some voters who requested absentee ballots did not receive them, or if they did receive them, then they sometimes failed to return them in time to be counted. States that are allowing their residents to vote by mail in November are trying to do more to educate their voters about their new procedures and deadlines. This is especially a concern in states where ballots must be received, rather than postmarked, by Election Day. A related concern is that many voters often do not know or fully understand the new rules. Those unfamiliar with the procedures for requesting and returning an absentee ballot tend to make errors that often result in their vote not being counted. For instance, most states require an absentee ballot not only to be returned by a certain date but also for the envelope in which it is returned to be signed by the voter. Some states further require the signatures of a witness or notary (or information about the voter such as her driver’s license number) to be included with the ballot. Voters who fail to provide these signatures or the identifying information requested by the state often fail to have their vote counted.⁴³

statistics.

⁴⁰ Morley, *supra* note 24, at 3-4.

⁴¹ *Id.* at 4.

⁴² Love, Stevens & Gamio, *supra* note 38.

⁴³ AMBER McREYNOLDS, AUDREY KLINE, HILLARY HALL & LUCILLE WENEGIEME, NAT’L VOTE AT HOME INST., VOTE AT HOME POLICY ACTIONS: COVID-19 RESPONSE (May 2020), <https://voteathome.org/wp-content/uploads/2020/07/NVAHI-50-State-Policy-Analysis.pdf> [<https://perma.cc/HS3R-QLY7>].

Voting by mail suffers from other challenges as well, such as the possibility that a third party may touch one's absentee ballot before it is returned to state officials and fraudulently alter it in some way. There is also a higher-than-normal probability, as compared to in-person voting, that absentee ballots will be rejected when signature matching is conducted by election officials.⁴⁴ Another seldom-mentioned concern has to do with the added stress that absentee voting creates for election officials. When absentee voting becomes popular, as it has during the COVID-19 pandemic, every facet of the voting process suddenly comes under pressure.⁴⁵ The process for designing and printing absentee ballots, the procedures for requesting and delivering absentee ballots, and the method for verifying and counting them are all placed under stress.⁴⁶ To get around delays, election officials would benefit from having more time to prepare. Professor Richard Pildes has suggested that state officials might consider moving up the deadline by which absentee ballots must be requested or moving back the deadline by which they must be counted, as measures that might be taken to relieve the pressure that election officials face.⁴⁷

At the end of the day, however, the real problem facing election officials is that they do not know how the new rules will affect turnout. Professor James Gardner believes that the upcoming November election is likely to be held under circumstances that place "severe downward pressure on turnout."⁴⁸ This, in turn, may pose a threat to the democratic legitimacy of whoever wins. But the evidence of how COVID-19 affected turnout in the primaries earlier in the year is somewhat inconclusive. When rates of turnout in these jurisdictions are compared to turnout in the same jurisdictions from 2016, it turns out that turnout went up in some states and down in others.⁴⁹ In states where most of the electorate voted by mail, however, it went up.⁵⁰ Turnout levels will drop the most during a pandemic, therefore, when people are forced to vote in person.

⁴⁴ Elise Viebeck, *More than 500,000 Mail Ballots Were Rejected in the Primaries. That Could Make the Difference in Battleground States this Fall.*, WASH. POST (Aug. 23, 2020, 9:15 PM), https://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fbc92-db3d-11ea-809e-b8be57ba616e_story.html.

⁴⁵ Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/> [<https://perma.cc/53B4-7ZT3>].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner/> [<https://perma.cc/8JTV-58JW>].

⁴⁹ Toby S. James & Sead Alihodzic, *When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations*, 19 ELECTION L.J. 344, 354 (2020) (comparing turnout in 2016 and 2020 and arguing that attributing the differences to COVID-19 is problematic because the contests in 2016 featured different candidates).

⁵⁰ Love, Stevens & Gamio, *supra* note 38.

C. Voting in Person

Of course, the nature of in-person voting has changed because of the pandemic. One new question confronting citizens who do not wish to vote by mail, whether it is because they do not trust that their mail-in ballots will be counted or because they do not believe the U.S. Post Office will deliver their mail-in ballots on time, is how and where they can vote in person.⁵¹ Guidelines recently released by the Centers for Disease Control instruct voters to wear a face mask, maintain social distance, and use hand sanitizer before and after touching the surface of a voting machine.⁵² While such requirements obviously make voting less easy, efficient, and comfortable for ordinary citizens, they are not the only impediments confronting in-person voters this year.

An important issue that in-person voters are likely to face is that their regular polling location may have changed, and there probably will be fewer in-person polling places available overall. There are two main reasons why these changes are taking place. First, states are having more difficulty than usual recruiting poll workers, many of whom are older retirees who may be particularly susceptible to COVID-19. Second, during the pandemic, places that have traditionally served as polling sites, such as schools and senior citizen centers, will be less available. The only work-around will be to consolidate numerous polling sites into fewer locations, but that will lead to a new set of problems, including long lines and increased risk of COVID-19 infection. Some cities are using large venues like sports arenas or stadiums to accommodate large numbers of voters, but at the end of the day even these spaces may not feel safe to some voters.⁵³

To solve this problem, Professors Nathaniel Persily and Charles Stewart have suggested that Congress appropriate more federal money to the states and that the states conduct new outreach efforts to recruit additional poll workers (and provide such poll workers with equipment such as visors and facemasks to keep them safe). On top of this, they also implore the states to do a better job of educating voters about where they should vote and what kind of surroundings they should expect to encounter when they vote.⁵⁴ Many states have been conducting such marketing campaigns, but their success in this realm has been

⁵¹ *What the Post Office Service Crisis Means for the November Election*, BRENNAN CTR. FOR JUST. (Aug. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/what-postal-service-crisis-means-november-election> [<https://perma.cc/NE63-T4F3>]; see also ILYA SHAPIRO & JAMES T. KNIGHT II, *ELECTION REGULATION DURING THE COVID-19 PANDEMIC* (2020), <https://www.cato.org/sites/cato.org/files/2020-08/lpb-5.pdf> [<https://perma.cc/T6WA-ZP7Q>].

⁵² *Considerations for Election Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL (June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html#VoterRecommendations> [<https://perma.cc/2NCF-9GM7>].

⁵³ See Nathaniel Persily & Charles Stewart III, *The Looming Threat to Voting in Person*, ATLANTIC (June 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/looming-threat-votingperson/613552/>.

⁵⁴ *Id.*

mixed. In April, 67% of Americans claimed it was very likely or somewhat likely that the COVID-19 pandemic would significantly disrupt their ability to vote in the November election.⁵⁵ We must ensure that does not happen.

III. THE MOST LITIGATED ELECTION EVER

The pandemic's final novelty is the massive amount of litigation it has spawned. This litigation began in earnest in March and April, after Ohio and Wisconsin first tried to change the dates and ballot deadlines for their elections in response to the pandemic.⁵⁶ It has since grown at an alarming rate, leading the *New York Times* to call the upcoming 2020 election "the most litigated election ever."⁵⁷ As of late September, Professor Justin Levitt has tracked more than 260 COVID-19 election-related cases filed in forty-five states, the District of Columbia, and Puerto Rico.⁵⁸ Much of this litigation aims to determine how candidates will compete and how voters will exercise their voice in November.

There are several broad categories into which this litigation falls. The first consists of challenges brought by candidates to contest ballot qualifications.⁵⁹ The pandemic has made gathering in-person petition signatures and other common activities that states require for ballot access more cumbersome, if not outright dangerous, and candidates have sued to loosen the ballot-qualification requirements typically imposed on them. Lawsuits have challenged the threshold number of signatures that candidates must submit to the state to gain ballot access,⁶⁰ the deadline or timeframe allotted by the state to collect these

⁵⁵ *Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19*, PEW RES. CTR. (April 28, 2020), <https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/> [<https://perma.cc/8HZM-GPNG>].

⁵⁶ *Republican Nat'l Comm. v. Democratic Nat'l Comm.* 140 S. Ct. 1205, 1206 (2020) (staying lower court order that would have allowed Wisconsin to count absentee ballots postmarked after the day of the state's primary); *see also* Richard Briffault, *Covid-19 and the Law: Elections*, in *LAW IN THE TIME OF COVID-19*, at 35-41 (Katharina Pistor ed. 2020) (documenting the Ohio and Wisconsin litigation).

⁵⁷ Michael Wines, *An Avalanche of Litigation Catapults the Ballot Box into the Courtroom*, N.Y. TIMES, July 8, 2020, at A6; Michael Wines & Nick Corasaniti, *Legal Battles over Balloting Are Expected to Escalate*, N.Y. TIMES, Sept. 19, 2020, at A19.

⁵⁸ Justin Levitt, *The List of COVID-19 Election Cases*, ELECTION L. BLOG (June 11, 2020, 5:34 PM), <https://electionlawblog.org/?p=111962> [<https://perma.cc/4K27-F7RP>] (last updated Oct. 1, 2020).

⁵⁹ *See COVID-Related Election Litigation Tracker*, STAN.-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/cases> [<https://perma.cc/QPX5-3G9B>] (last visited Oct. 1, 2020); Zack Stanton, *The Lawsuits That Could Decide the 2020 Election*, POLITICO (Sept. 3, 2020, 7:53 PM), <https://www.politico.com/news/magazine/2020/09/03/2020-election-lawsuits-trump-voting-coronavirus-408631> [<https://perma.cc/W7DF-FGZB>].

⁶⁰ *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *Kishore v. Newsom*, No. 2:20-cv-05859 (C.D. Cal. June 30, 2020) (challenging petition signature requirement by

signatures, the requirement that such signatures be attested by a witness or notary,⁶¹ and various other ballot access requirements as well.⁶²

A second set of lawsuits concerns the voting process itself. One strand of cases here has to do with mail-in ballots, including the state's failure to mail ballots to all registered voters, inactive voters, or senior voters; the state's refusal to allow no-excuse absentee voting; or the state's refusal to recognize a voter's fear of catching COVID-19 as a valid excuse for requesting an absentee ballot.⁶³ A related set of cases questions whether states should allow absentee ballots to be returned without being attested by a witness or a notary or, in other circumstances, without including a copy of the voter's driver's license or state ID.⁶⁴ There is also litigation about state standards for the verification of voters' signatures for absentee ballots, how voters get notified of mistakes (such as signature mismatches) in the absentee ballot process, and whether the states have to provide voters with an opportunity to cure such mistakes.⁶⁵ Other cases seek to challenge the deadlines for mail-in ballots and the provisions regulating who can collect ballots and return them to election officials. Related to this, there have been a spate of lawsuits filed against the U.S. Postal Service as well.⁶⁶

Socialist candidate for president and vice president in California); Civil Complaint for Declaratory and Injunctive Relief, *De La Fuente v. Hobbs*, No. 2:20-cv-01276 (D. Ariz. June 29, 2020) (challenging number of signatures Alliance Party candidate needs to get on the ballot for president in Arizona); Complaint, *Whitfield v. Thurston*, No. 4:20-cv-00466, 2020 WL 2094085 (E.D. Ark. Apr. 29, 2020) (challenging number of petition signatures independent U.S. Senate candidate needs to get on ballot in Arkansas); *see also* *Warren v. Griswold*, 462 P.3d 1081, 1087 (Colo. 2020) (denying relief in signature challenge by U.S. Senate candidate in Colorado).

⁶¹ *See* *Thompson v. DeWine*, 959 F.3d 804, 807 (6th Cir. 2020) (challenging signature requirement for initiatives); First Amended Verified Complaint for Emergency Declaratory and Injunctive Relief, *Bambenek v. White*, No. 3:20-cv-03107 (C.D. Ill. Apr. 30, 2020) [hereinafter Amended Complaint] (challenging notary requirement for candidates).

⁶² Amended Complaint, *supra* note 61, at 16-17.

⁶³ Complaint for Declaratory and Injunctive Relief, *Oppenheim v. Watson*, No. 25CH1:20-cv-00961 (Miss. Chancery Ct., Hinds Cty. Aug. 11, 2020) (failing to offer COVID-19 as excuse); Petition for Original Jurisdiction - Emergency Relief Requested, *Bailey v. S.C. State Election Comm'n*, 844 S.E.2d 390 (S.C. Apr. 22, 2020) (No. 2020-000642) (same); Class Action Petition for Injunctive and Declaratory Relief, *Mo. State Conference of the NAACP v. Missouri*, No. 20AC-CC00169 (Mo. Cir. Ct., Cole Cty. Apr. 17, 2020) (same).

⁶⁴ Amended Complaint for Injunctive and Declaratory Relief, *DCCC v. Ziriaux*, No. 4:20-cv-00211 (N.D. Okla. June 11, 2020) (contesting Oklahoma's notarization, witness, and photo ID requirements for absentee ballots); *League of Woman Voters of Okla. v. Ziriaux*, 463 P.3d 524, 524 (Okla. 2020) (overturning voter's notarization requirement).

⁶⁵ Complaint for Injunctive and Declaratory Relief, *Ariz. Democratic Party v. Hobbs*, No. 2:20-cv-01143, 2020 WL 5535933 (D. Ariz. June 10, 2020) (seeking cure for no or missing signature); First Amended Complaint, *League of Women Voters of N.J. v. Way*, No. 2:20-cv-05990 (D.N.J. June 3, 2020) (seeking signature cure requirements).

⁶⁶ Plaintiffs' First Amended Complaint, *Richardson v. Trump*, No. 1:20-cv-02262 (D.D.C. Sept. 11, 2020) (challenging postal practices); First Amended Complaint, *Jones v. U.S. Postal*

The third category of lawsuits concerns various limits that have been placed on in-person voting because of COVID-19. All states that offer vote-by-mail also offer their citizens the option of in-person voting, as many people continue to prefer to vote this way. The litigation over in-person voting concerns the hours and dates of early voting, the number and specific locations of the polling places that a state or municipality provides,⁶⁷ the availability of ballot drop boxes and curbside voting, and related issues concerning the identification or documentary requirements for in-person voting. Finally, a fourth category of litigation involves parties arguing that the election's rules should not have been altered during the pandemic in the first place. After state legislatures and local officials changed the rules, some litigants have protested the changes and have sued to stop them. This maneuver was on display, for instance, when states began moving the dates of their primaries or announcing that because of COVID-19 their primaries would be cancelled altogether, only to witness lawsuits be filed to keep the status quo.⁶⁸ Given the number of issues, it may be no surprise that election-related litigation is at an all-time high. It will continue to grow before November, and we will no doubt see more of it in the weeks to come.

CONCLUSION

The myriad challenges that COVID-19 poses for our elections do not render the threats identified by Richard Hasen irrelevant. Instead, COVID-19 will only exacerbate the effects of any incompetence that might be displayed by our state and local election officials. Moreover, those who engage in voter suppression, dirty tricks, or incendiary rhetoric will now be able to use COVID-19 as cover for their wrongdoing. When consolidating in-person polling places, for example, state officials may try to eliminate the polling places that are most convenient for minority voters. Likewise, they may refuse to take steps to ensure that first-time voters or voters who may have had to move because the pandemic has upended their lives will easily be able to register to vote. In these ways, the threats that Hasen describes remain as relevant now as they were before the pandemic.

Serv., No. 1:20-cv-06516 (S.D.N.Y. Sept. 9, 2020) (challenging postal service practices for mail-in ballots); Complaint, Nat'l Urban League v. DeJoy, No. 1:20-cv-02391 (D. Md. Aug. 18, 2020) (challenging post office procedures).

⁶⁷ Amended Complaint for Declaratory and Injunctive Relief, Donald J. Trump for President, Inc. v. Cegavske, No. 2:20-cv-01445 (D. Nev. Aug. 20, 2020) (contesting in-person early voting and number of vote centers); Complaint, Harding v. Edwards, No. 3:20-cv-00495 (M.D. La. Aug. 3, 2020) (contesting Louisiana rules on in-person early voting); Complaint, Bertrand v. Woodbury Cty., No. 03971 CVCV191798 (Iowa Dist. Ct., Woodbury Cty. Apr. 16, 2020) (challenging number of early voting sites).

⁶⁸ See Complaint, Yang v. N.Y. State Bd. of Elections, No. 1:20-cv-03325 (S.D.N.Y. Apr. 28, 2020) (challenging New York's ability to cancel its presidential primary election due to COVID-19).

In *Election Meltdown*, Professor Hasen did not predict the pandemic, the ways in which it would transform our rules of voting, or the threat to the upcoming election that it would bring. And yet, since March, no other election law scholar has moved more quickly or adeptly to respond to these tremendous challenges.⁶⁹ In part, this is because Professor Hasen understands that the rules governing our electoral process are unsettled, ever shifting, and often up for grabs. While some observers have argued that the threats identified in *Election Meltdown* are “not exactly news,”⁷⁰ repeatedly educating Americans about them—and especially the ways in which they may be used to place doubts in the minds of voters during the era of COVID-19—will continue to be a worthwhile endeavor for some time to come. If the past few months have taught us anything, it is that the excuse of a pandemic can be used to block access to the ballot box just as much as incompetence, dirty tricks, or incendiary rhetoric.

⁶⁹ See generally Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263 (2020). Hasen has also spearheaded a report aimed at advancing best practices for voting during the pandemic. See AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC’S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS (2020), <https://www.law.uci.edu/faculty/full-time/hasen/2020ElectionReport.pdf> [<https://perma.cc/J5MP-EYNH>].

⁷⁰ See Bradley A. Smith, *Liberal Meltdown over Elections*, LAW & LIBERTY (May 18, 2020) (reviewing HASEN, *supra* note 5), <https://lawliberty.org/book-review/liberal-meltdown-over-elections/> [<https://perma.cc/7MYD-YLYA>].