

ONE’S HEALTH VERSUS ONE’S RIGHT TO VOTE: HOW THE COVID-19 PANDEMIC CHANGED THE LEGAL LANDSCAPE OF ABSENTEE/MAIL-IN VOTING IN THE UNITED STATES FROM THE 2020–2024 ELECTION CYCLES

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Abstract

How voting took place during the COVID-19 pandemic in 2020, especially the increased use of absentee/mail-in ballots, has been a point of discussion and debate throughout the United States since the 2020 election cycle. This Article takes an in-depth look into absentee/mail-in voting throughout the United States in early 2020 (pre-pandemic), during the COVID-19 pandemic in 2020, and from 2022–2024 (post-pandemic), including a discussion of litigation filed in various states related to the use of absentee/mail-in ballots from the 2020–2024 election cycles. This Article recommends that more states should expand their access to voting by passing no-excuse absentee/mail-in voting laws because such measures that were put in place during the peak of the COVID-19 pandemic in 2020 allowed more citizens the opportunity to participate in the electoral process without risking their health by going to the polls to vote in person, many voters support it, and a majority of other states already utilize no-excuse absentee/mail-in voting as of 2024.

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INTRODUCTION

The year 2024 is uniquely important due to the presidential election, along with other local, state, and federal elections taking place. Cable news channels, local news reporters, and the Internet are all inundating individuals daily with stories about voting and politics, especially regarding the 2024 presidential election. News stories on such a frequent basis during upcoming election cycles is nothing new and, in fact, voting is one of the most important ways to be engaged in a democratic society in the United States. In the landmark United States Supreme Court case *Reynolds v. Sims*, Chief Justice Earl Warren stated that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic

society, and any restrictions on that right strike at the heart of representative government.”¹ Moreover, when looking back over history,

when, where, and how Americans vote has evolved over the course of 250 years. When the United States first came into being, voters would voice their choices on courthouse steps, out loud and publicly. Toward the end of the 19th century, a paper ballot became common and was increasingly cast in private at a neighborhood polling place.²

Then came the evolution of absentee voting. However, “[t]he idea that ballots could be cast anywhere other than a physical precinct close to a voter’s home hasn’t always been embraced in the United States (and still isn’t in many other countries).”³ Historically, “[w]hat we in the U.S. now call absentee voting first arose during the Civil War, when [both] Union and Confederate soldiers were [given the opportunity] to cast ballots from their battlefield units and have them be counted back home.”⁴ Later laws, especially the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment (MOVE) Act, have been the most effective in encouraging service members to vote by absentee ballots.⁵

States passed the first “absentee ballot laws for civilians in the late 1800s.”⁶ These initial absentee ballot laws were designed to assist “voters who were away from home or seriously ill on Election Day.”⁷ At that time, “[t]he number of absentee ballots distributed was relatively small, and the administrative apparatus was not designed to distribute a significant number.”⁸ By “the 1980s, California became the first state to allow eligible voters to request absentee ballots for any reasons at all, including their own convenience.”⁹

Now, a majority of states allow “voters to cast ballots before Election Day, either in person at designated early voting sites, or via a ballot that

1. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

2. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT’L CONF. OF STATE LEGS., <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#excuses> [https://perma.cc/8JMG-FAMB] (last updated Mar. 7, 2024).

3. *Voting by mail and absentee voting*, MIT ELECTION DATA & SCI. LAB., <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [https://perma.cc/HPZ5-Z976] (last updated Feb. 28, 2024).

4. *Id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Voting by mail and absentee voting*, *supra* note 3.

has been mailed to the voter's home."¹⁰ In addition, in every state, all voters who have a qualifying excuse for not physically being able to cast their vote in-person on Election Day have the ability "to request a ballot in advance, and many states allow all voters to request a ballot in advance without requiring a reason."¹¹

However, "[s]tates vary on what extent they offer these options, including some states that deliver ballots to all voters while maintaining some in-person voting locations for those who prefer to vote in person or may need assistance."¹² Therefore, when the COVID-19 pandemic hit the United States in early 2020, election officials rushed to try to figure out measures and processes to put in place to ensure that citizens would be able to vote for their candidate of choice during the various 2020 elections. How voting took place during the COVID-19 pandemic, especially the increased use of absentee/mail-in ballots, has been a point of discussion and debate throughout the United States since the 2020 election cycle. Specifically, research shows that a wave in "expansion of voting by mail occurred during the 2020 election season, in which many states temporarily altered their absentee/mail ballot laws to grant greater access to mail balloting during the COVID-19 pandemic. The result was the significant increase in voting by mail for 2020."¹³

This Article takes an in-depth look into voting in early 2020 (pre-pandemic), during the COVID-19 pandemic in 2020, and from 2022–2024 (post-pandemic), with a focus on the use of absentee/mail-in ballots during these time frames. Part I provides a general overview of the terms "absentee ballots" and "mail-in ballots;" definitions of each term; and a comparing and contrasting of these terms, including whether the terms "absentee ballots" and "mail-in ballots" are interchangeable, synonymous, or different. Part II discusses the use of absentee/mail-in ballots to vote in the United States, including a summary of state laws regarding the use of absentee/mail-in ballots immediately prior to the COVID-19 pandemic as of January 2020 (pre-pandemic), during the COVID-19 pandemic and the 2020 election cycle, and during the 2022 election cycle (post-pandemic), in addition to providing 2020 and 2022 statistics on the use of absentee/mail-in ballots in the United States. Part II also includes a discussion and debate regarding the use of absentee/mail-in ballots during both the 2020 and the 2022 election cycles. Part III provides a comparative analysis of how the COVID-19 pandemic caused some states to make changes to their absentee/mail-in ballot laws from 2020–2022, including an overview of each state's pre-

10. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 2.

11. *Id.*

12. *Id.*

13. *Voting by mail and absentee voting*, *supra* note 3.

pandemic absentee/mail-in ballot measures that were already in place versus absentee/mail-in ballot changes that were implemented during and after the COVID-19 pandemic from 2020–2022. Part IV provides details regarding various lawsuits filed regarding the use of absentee/mail-in ballots in elections during and after the COVID-19 pandemic from 2020–2024, including lawsuits filed in 2020 in Tennessee and in other southeastern states, including Alabama, Georgia, North Carolina, and Virginia, as well as other lawsuits filed in 2022, 2023, and 2024. Part IV also gives insight into the status of state absentee/mail-in voting laws during the 2024 primary election cycle as of March 2024, including whether an excuse was required for absentee/mail-in voting in each of the 50 states and the District of Columbia or whether the state conducted all-mail elections in recent 2024 elections. This Article’s Conclusion discusses the advantages and disadvantages of absentee/mail-in voting and concludes with recommendations, including that more states should expand their access to voting by passing no-excuse absentee/mail-in voting laws because such measures that were put in place during the peak of the COVID-19 pandemic in 2020 allowed more citizens the opportunity to participate in the electoral process without risking their health by going to the polls to vote in person, many voters support it, and a majority of other states already utilize no-excuse absentee/mail-in voting as of 2024.

I. GENERAL OVERVIEW OF THE TERMS “ABSENTEE BALLOTS” AND “MAIL-IN BALLOTS”

One often hears the terms “absentee ballots” and “mail-in ballots” when there is a discussion about voting, especially during election years. This Section provides a general overview of the terms “absentee ballots” and “mail-in ballots,” including definitions of each term; a comparing and contrasting of both terms; and whether the terms “absentee ballots” and “mail-in ballots” are interchangeable, synonymous, or different.

A. *Definitions of “Absentee Ballots”*

There are various definitions of the term “absentee ballots,” but the definitions are often very similar. For example, one source states that absentee ballots allow for duly qualified residents of a state who will be absent from their voting district on election day to have their vote counted in their election district so long as the voter applies at least seven days before the election and returns the ballot to state election officials by the time polls close on election day.¹⁴

Another source notes that a person voting by absentee ballot is a qualified voter who “is unavoidably absent from home on election day,”

14. See 52 U.S.C. § 10502(d) (2018).

as opposed to a qualified voter who is absent from home “merely on account of pleasure,” although vacations can be statutorily permitted as a valid reason for allowing someone to cast an absentee ballot.¹⁵ A voter must provide a “primary reason for being unavoidably absent from [their] voting place on the election day.”¹⁶ If the voter is physically able to vote in person at their polling precinct on election day and decides to do so, generally, the voter must use his or her absentee ballot.¹⁷

In addition, the USA.gov website notes that the purpose of an absentee ballot is to allow a voter “to vote by mail.”¹⁸ Each state has different requirements for a voter to qualify to receive an absentee ballot (e.g., illness, disability, travel, and/or attending an out-of-state college or university).¹⁹ Each state also has different requirements as to whether and how a person who has received an absentee ballot can still physically vote in person on election day instead.²⁰

Moreover, the National Conference of State Legislatures (NCSL) provides a great overview of the term “absentee ballot” and how it has evolved over time. They state the following:

A ballot that has been sent to a voter and is voted outside of a polling place or election official’s office has traditionally been referred to as an “absentee ballot” and the person who votes that ballot has been called an “absentee voter.” This terminology is common in state law and comes from the concept that voters would use this option only when they were “absent” from their neighborhood polling place on Election Day. As time has gone on and more and more voters request a ballot in advance as their default voting method—and as states have begun offering more opportunities for voters to do so—the terminology has evolved. Some states refer to “advance ballots,” “mailed ballots,” “by-mail ballots,” “mail ballots,” “mail-in ballots” or “vote-by-mail ballots.”

In this report NCSL uses “absentee/mail ballots” to reflect the traditional terminology and also the evolution of the term’s use. Note that this term refers to ballots that are mailed out to voters by election officials and does not indicate the method voters choose to return the ballot. Often these “absentee/mail ballots” are returned via methods other

15. 29 C.J.S. *Elections* § 348 (2022).

16. *Id.*

17. *See id.*

18. *Absentee and Early Voting*, USA.Gov (Sept. 17, 2024), <https://www.usa.gov/absentee-voting> [<https://perma.cc/W3Z5-MYR8>].

19. *See id.*

20. *See id.*

than mail, i.e., in person at a voting location or at a secure drop box.²¹

B. *Definitions of “Mail-In Ballots”*

In addition to various definitions of the term “absentee ballots,” the term “mail-in ballots” has various definitions that are basically the same. For example, “mail-in voting,” which is often referred to as “vote-by-mail” or “all-mail voting,” is when a state automatically mails ballots to all registered voters without the voters having to request the ballots.²² Furthermore, “vote-by-mail” typically occurs in states where all registered voters receive a ballot via mail, and there are not usually in-person voting options.²³ Moreover, the National Conference of State Legislatures notes that voting by “mail-in ballot” is sometimes referred to as “all-mail voting,” which is a type of “no-excuse absentee voting” in some states.²⁴ “No-excuse absentee voting” is when a person mails in their absentee ballot and is physically absent from their polling location on election day without needing to meet an excuse requirement.²⁵ “All-mail voting” specifically occurs when “all registered voters are [automatically] sent a ballot in the mail,” and no request or application is necessary.²⁶ Although all qualified voters receive a ballot by mail in “all-mail voting” states, these states may also provide in-person voting options.²⁷

C. *Comparing and Contrasting of the Terms “Absentee Ballots” and “Mail-In Ballots”*

When comparing and contrasting the terms “absentee ballots” and “mail-in ballots,” and determining whether these two terms are interchangeable, synonymous, or different, there have been attempts to answer this particular question regarding the usage of these two terms: “absentee ballots” (sometimes referred to as “absentee voting”) and “mail-in ballots” (sometimes referred to as “mail-in voting” or “vote-by-

21. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 2. This Article’s author uses the term “absentee/mail-in voting” the same as the NCSL.

22. See *Knowing the Difference: Voting Absentee vs. By Mail*, LEAGUE OF WOMEN VOTERS (Sept. 10, 2020), <https://www.lwv.org/blog/knowning-difference-voting-absentee-vs-mail> [<https://perma.cc/9LVV-VMGA>]; see also *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, *supra* note 2.

23. See Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE 45, 45 n.1 (2020).

24. See *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 2.

25. See *id.*

26. *Id.*

27. *Id.*

mail”).²⁸ Authors often use both terms interchangeably in their respective writings.²⁹ As an example, one author stated the following: “Throughout, I will use ‘absentee voting’ and ‘mail-in voting’ interchangeably.”³⁰ However, this same author noted that there are “technical” differences between the two terms and explained the differences as follows:

But in more technically precise terms, absentee voting typically means that a voter must request an absentee ballot, which can either be returned by mail or dropped off in person (at designated drop-off sites or at the polls). “Vote by mail” is often used to refer to voting procedures in certain states, in which all voting is done by mail. Vote-by-mail states typically mail out absentee ballot request applications to all registered voters and often lack in-person voting options. Most voting by mail this fall will be in the form of no-excuse absentee voting. Professor Paul Gronke has offered an effort to clear up terminological confusion on these and related issues.³¹

In addition, other articles draw similarities between the current usage of the terms “absentee ballots” and “mail-in ballots” while explicating the historical and state-specific nuanced distinctions.³² Currently, most states use the terms interchangeably, but historically, “absentee ballot” was to be used only for people *with* a valid/accepted excuse who would be absent from their polling location on election day.³³ As noted by other authors:

Absentee voting and balloting by mail have generally been viewed as synonymous in the United States because historically, absentee ballots were distributed by mail to voters temporarily away from their homes, and no one else was typically allowed to use this mode of voting. For this reason, both topics are considered together in this explainer.³⁴

Moreover, as noted by the League of Women Voters, although the terms “absentee voting” and “vote-by-mail” (i.e., “mail-in voting”) are frequently used interchangeably, “absentee voting” is when the voter has to request generally by mail (although e-mail requests are allowed in

28. Pildes, *supra* note 23.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 2.

33. *Id.*

34. *Voting by mail and absentee voting*, *supra* note 3, at 1.

some states), for a ballot to be sent to the voter.³⁵ Depending upon the state, the voter requesting the absentee ballot may or may not be required to provide a valid “excuse” in order to receive the absentee ballot.³⁶ In contrast to “absentee voting,” the League of Women Voters explains that “vote-by-mail” is when a state automatically mails ballots to all registered eligible voters without voters having to request the ballots.³⁷

In sum, research shows that the terms “absentee voting” and “vote-by-mail” (also known as “mail-in voting” or “balloting by mail”) in the United States are often interchanged and are usually considered as synonymous when used in discussions surrounding voting. However, technically, as stated above throughout this Section, these two words can have different meanings. That is why there have been efforts “to clear up terminological confusion on these and related issues.”³⁸

II. THE USE OF ABSENTEE/MAIL-IN BALLOTS TO VOTE IN THE UNITED STATES

As previously stated, the use of absentee ballots to vote (i.e., absentee voting) in the United States is nothing new and dates back to the Civil War.³⁹ However, state laws regarding the use of absentee/mail-in ballots vary.

A. *Summary of State Laws Regarding the Use of Absentee/Mail-In Ballots*

Since state laws regarding the use of absentee/mail-in ballots vary throughout the United States and because this issue has been a topic of debate, especially during and after the COVID-19 pandemic, it is important to review those various laws to see if there are any similarities and differences. This Section provides a summary of state laws regarding the use of absentee/mail-in ballots (1) immediately prior to the COVID-19 pandemic as of January 2020 (pre-pandemic); (2) during the COVID-19 pandemic and the 2020 election cycle; and (3) during the 2022 election cycle (post-pandemic).⁴⁰

35. See *Knowing the Difference: Voting Absentee vs. By Mail*, *supra* note 22, at 2.

36. See *id.* (stating that many absentee voting states “require ‘excuses’ for why [a voter’s] requesting an absentee ballot and can’t show up in person to vote on Election Day. Some acceptable excuses include being out of the country on Election Day, having an illness or a disability, or working during the voting hours”).

37. See *id.*

38. Pildes, *supra* note 23, at 45.

39. See *Voting by mail and absentee voting*, *supra* note 3.

40. The author of this Article began extensively researching and reviewing various state laws regarding absentee voting and mail-in voting during the Summer of 2020 during the peak of the COVID-19 pandemic and has continued to do so from 2020–2024, up until submission of this Article for publication.

1. State Laws Regarding the Use of Absentee/Mail-In Ballots Immediately Prior to the COVID-19 Pandemic as of January 2020 (Pre-Pandemic)

Prior to the COVID-19 pandemic in 2020, research shows that twenty-five percent of all voters mailed in their ballots during the 2018 general election and that close to “42.5 million ballots were mailed to voters for the 2018 election.”⁴¹ In addition, the 2018 Election Administration and Voting Survey (EAVS) found that “26% of voters in no-excuse states cast[ed] their ballots by mail, compared to 9% in states that still required an excuse” in 2018.⁴²

Moreover, a review of state laws regarding the use of absentee/mail-in ballots immediately prior to the COVID-19 pandemic as of January 2020 was conducted. Such review of each state’s statute related to absentee/mail-in ballots is divided below into the following four categories: (a) states in which an excuse was required for absentee/mail-in voting; (b) states in which no excuse was required; (c) states in which all registered voters received a mail-in ballot application and an excuse may or may not have been required for the application to be approved; and (d) states which conducted all-mail elections.

a. An Excuse Was Required for Absentee/Mail-In Voting

When reviewing state statutes that were in place immediately prior to the COVID-19 pandemic as of January 2020 as it relates to absentee/mail-in ballots, the following sixteen states required an excuse for absentee/mail-in voting: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New York, South Carolina, Tennessee, Texas, Virginia, and West Virginia.⁴³

b. No Excuse Was Required

When further reviewing state statutes in place immediately prior to the COVID-19 pandemic related to absentee/mail-in ballots, the

41. Brian Hinkle, *COVID-19: How's It Changing Elections?*, 28 NAT'L CONF. OF STATE LEGS. 22 (June 3, 2020).

42. *Voting by mail and absentee voting*, *supra* note 3.

43. ALA. CODE § 17-11-3 (2022); ARK. CODE ANN. § 7-5-402 (West 2022); CONN. GEN. STAT. ANN. § 9-135 (West 2022); DEL. CODE ANN. tit. 15, § 5502 (West 2022); IND. CODE ANN. § 3-11-10-24 (West 2022); KY. REV. STAT. ANN. § 117.077 (West 2022); KY. REV. STAT. ANN. § 117.085(1)(a) (West 2022); LA. STAT. ANN. § 18:1303 (2022); MASS. GEN. LAWS ANN. ch. 54, § 86 (West 2022); MISS. CODE ANN. § 23-15-715 (West 2022); MO. ANN. STAT. § 115.277 (West 2022); N.H. REV. STAT. ANN. § 657:1 (2022); N.Y. ELEC. LAW § 8-400 (McKinney 2022); S.C. CODE ANN. § 7-15-320 (2022); TENN. CODE ANN. § 2-6-201 (West 2022); TEX. ELEC. CODE ANN. § 82.001 (West 2022); TEX. ELEC. CODE ANN. § 84.012 (West 2022); VA. CODE ANN. § 24.2-700 (West 2022); and W. VA. CODE ANN. § 3-3-1 (West 2022).

following twenty-nine states and the District of Columbia did not require an excuse to apply for and vote by absentee/mail-in ballots: Alaska, Arizona, California, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.⁴⁴

c. All Registered Voters Received a Mail-In Ballot Application and an Excuse May or May Not Have Been Required for the Application to be Approved

When reviewing all state statutes regarding absentee/mail-in ballots in place immediately prior to the COVID-19 pandemic, no states indicated in their statutes that all registered voters in the state received a mail-in ballot application, and an excuse may or may not have been required for the application to be approved.

d. *Conducted All-Mail Elections*

When reviewing state statutes in place immediately prior to the COVID-19 pandemic as it relates to absentee/mail-in ballots, the following five states conducted all-mail elections: Colorado, Hawaii, Oregon, Utah, and Washington.⁴⁵

44. ALASKA STAT. ANN. § 15.20.010 (West 2022); ARIZ. REV. STAT. § 16-541 (2022); CAL. ELEC. CODE § 3000.5 (West 2022); CAL. ELEC. CODE § 3007.8 (West 2022); D.C. Mun. Regs. tit. 3, § 720 (2022); FLA. STAT. ANN. § 101.62 (West 2022); GA. CODE ANN. § 21-2-380 (West 2022); IDAHO CODE ANN. § 34-1001 (West 2022); 10 ILL. COMP. STAT. ANN. 5/19-1 (West 2022); IOWA CODE ANN. § 53.1 (West 2022); KAN. STAT. ANN. § 25-1119(a) (West 2022); ME. REV. STAT. ANN. tit. 21-A, § 751 (2022); MD. CODE ANN., ELEC. LAW § 9-304 (West 2022); MASS. GEN. LAWS ANN. ch. 54, § 86 (West 2022); MICH. COMP. LAWS ANN. § 168.759 (West 2022); MINN. STAT. ANN. § 203B.02 (West 2022); MONT. CODE ANN. § 13-13-201 (West 2022); NEB. REV. STAT. ANN. § 32-938 (West 2022); NEB. REV. STAT. ANN. § 32-941 (West 2022); NEV. REV. STAT. ANN. § 293.309 (West 2022); N.J. STAT. ANN. § 19:63-3 (West 2022); N.M. STAT. ANN. § 1-6-3 (West 2022); N.C. GEN. STAT. ANN. § 163-226 (West 2022); N.D. CENT. CODE ANN. § 16.1-07-01 (West 2022); OHIO REV. CODE ANN. § 3509.02 (West 2022); OKLA. STAT. ANN. tit. 26, § 14-105 (West 2022); 25 PA. STAT. AND CONS. STAT. § 3150.11 (West 2022); R.I. GEN. LAWS ANN. § 17-20-2 (West 2022); S.D. CODIFIED LAWS § 12-19-1 (2022); VT. STAT. ANN. tit. 17, § 2537 (West 2022); WIS. STAT. ANN. § 6.86(1)(ac) (West 2022); and WYO. STAT. ANN. § 22-9-102 (West 2022).

45. COLO. REV. STAT. ANN. § 1-5-401 (West 2022); HAW. REV. STAT. ANN. § 11-101 (West 2022); OR. REV. STAT. ANN. § 254.465 (West 2022); UTAH CODE ANN. § 20A-1-308 (West 2022); and WASH. REV. CODE ANN. § 29A.40.010 (West 2022).

2. State Laws Regarding the Use of Absentee/Mail-In Ballots During the COVID-19 Pandemic and the 2020 Election Cycle

As previously stated in this Article, there was an increase in use of absentee/mail-in ballots, especially during the COVID-19 pandemic in 2020. Therefore, this Article includes a complete review of state laws regarding the use of absentee/mail-in ballots during the COVID-19 pandemic and the 2020 election cycle. Such review of each state's law related to absentee/mail-in ballots is divided into the following four categories: (a) states in which an excuse was required for absentee/mail-in voting; (b) states in which no excuse was required or COVID-19 related reasons could constitute a valid excuse; (c) states in which all registered voters received a mail-in ballot application and an excuse may or may not have been required for the application to be approved; and (d) states which conducted all mail-in elections.

a. An Excuse Was Required for Absentee/Mail-In Voting

When reviewing state statutes in place during the COVID-19 pandemic and the 2020 election cycle as it relates to absentee/mail-in ballots, the following five states required a non-COVID-19 related excuse for absentee/mail-in voting: Indiana, Louisiana, Mississippi, Tennessee, and Texas.⁴⁶

46. IND. CODE ANN. § 3-11-10-24 (West 2022); LA. STAT. ANN. § 18:1303 (2022); MISS. CODE ANN. § 23-15-715 (West 2022); TENN. CODE ANN. § 2-6-201 (West 2022); and TEX. ELEC. CODE ANN. § 82.001 (West 2022); See Benjamin Swasey, *Map: Mail-In Voting Rules By State — And The Deadlines You Need*, NPR (Oct. 14, 2020, 3:00 PM), <https://www.npr.org/2020/09/14/909338758/map-mail-in-voting-rules-by-state> [<https://perma.cc/J2YW-ZKF5>] (showing that during the COVID-19 pandemic in 2020, voters in the states of Indiana, Louisiana, Mississippi, Tennessee, and Texas needed an excuse beyond COVID-19 to request a mail-in ballot, but also noting that Mississippi “[v]oters who [had] an underlying health condition that [put] them at higher risk of COVID-19, [were] in quarantine for COVID-19, or [were] caring for a dependent in quarantine [could] request an absentee ballot.”). *Id.* Also during the pandemic in 2020, a Tennessee judge ordered the state to allow any registered Tennessee voter the option to vote by mail without an excuse. But the Chancellor's order was later overruled by Tennessee's Supreme Court. The court ruled, however, that the state had to inform all registered Tennessee voters “with special vulnerability to COVID-19” or “those who [were] caretakers for persons with special vulnerability to COVID-19” that they were eligible to absentee vote prior to the November 2020 election. See *infra* notes 132–33; Cf. Elaine Kamarck, Yousef Ibreak, Amanda Powers, & Chris Stewart, *Voting by mail in a pandemic: A state-by-state scorecard*, Brookings (Oct. 2020), <https://www.brookings.edu/research/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/> [<https://perma.cc/LBW5-E2YY>] (stating that COVID-19 concerns were permitted in Louisiana in 2020 for voters to request an application for absentee voting). Louisiana and numerous other states made other modifications to voting during the pandemic in 2020. See *Voting Laws Roundup: 2020*, BRENNAN CTR. FOR JUST. (Dec. 8, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020-0> [<https://perma.cc/B6DS-5R87>].

b. No Excuse Was Required or COVID-19 Related Reasons Could Constitute a Valid Excuse

When reviewing state statutes in place during the COVID-19 pandemic and the 2020 election cycle as it relates to absentee/mail-in ballots, the following twenty-two states did not require an excuse or allowed COVID-19 related reasons to constitute a valid excuse to apply for and vote by absentee/mail ballot: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Virginia, and West Virginia.⁴⁷

47. ALA. CODE § 17-11-3 (2022); ALASKA STAT. ANN. § 15.20.010 (West 2022); ARIZ. REV. STAT. ANN. § 16-541 (2022); ARK. CODE ANN. § 7-5-402 (West 2022); FLA. STAT. ANN. § 101.62 (West 2022); GA. CODE ANN. § 21-2-380 (West 2022); IDAHO CODE ANN. § 34-1001 (West 2022); KAN. STAT. ANN. § 25-1119(a) (West 2022); KY. REV. STAT. ANN. § 117.077 (West 2022); KY. REV. STAT. ANN. § 117.085(1)(a) (West 2022); ME. REV. STAT. ANN. tit. 21-A, § 751 (2022); MO. ANN. STAT. § 115.277 (West 2022); MONT. CODE ANN. § 13-13-201 (West 2022); N.H. REV. STAT. ANN. § 657:1 (West 2022); N.M. STAT. ANN. § 1-6-3 (West 2022); N.Y. ELEC. LAW § 8-400 (McKinney 2022); N.C. GEN. STAT. ANN. § 163-226 (West 2022); N.D. CENT. CODE ANN. § 16.1-07-01 (West 2022); OKLA. STAT. ANN. tit. 26, § 14-105 (West 2022); 25 PA. STAT. and CONS. STAT. § 3150.11 (West 2022); S.C. CODE ANN. § 7-15-320 (2022); VA. CODE ANN. § 24.2-700 (West 2022); and W. VA. CODE ANN. § 3-3-1 (West 2022). During the COVID-19 pandemic in 2020, mail-in voting rules changed in the following states wherein all voters in these states could request a mail-in ballot because no excuse was required or COVID-19 fears counted as an excuse: Alabama, Arkansas, Kentucky, Missouri (Missouri “ha[d] different rules for mail-in voting and absentee voting” wherein “[v]oters need[ed] an excuse to vote absentee.”), New Hampshire, New York, South Carolina, Virginia, and West Virginia. *See Swasey, supra* note 46. Also, all voters in the following states could continue to request mail-in ballots during the COVID-19 pandemic in 2020, and they were already in states where no excuse was required to do so even prior to COVID-19: Alaska, Arizona (noting that “[m]ost Arizonans already vote by mail, as voters there can sign up for its Permanent Early Voting List.”), Florida, Georgia, Idaho, Kansas, Maine, Montana (Montana is also unique because individual counties within the state could opt in to mail-in ballots being automatically sent to all voters within specific opt-in counties.), New Mexico, North Carolina (but *cf. Kamarck et al., supra* note 46, noting that “[a]ll registered voters receive[d] an application” for absentee voting in North Carolina during the COVID-19 pandemic.), North Dakota, Oklahoma, and Pennsylvania. *See id.*; Kamarck et al., *supra* note 46, also confirms that “[n]o excuse [was] required for an application” for absentee voting in the following states during the pandemic in 2020: Alaska, Arizona, Florida, Georgia, Idaho, Kansas, Maine, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia, and West Virginia, and the authors show that “COVID-19 concerns [were] permitted to request an application” for absentee voting in the following states during the pandemic: Alabama, Arkansas, Kentucky, New Hampshire, and New York. *Id.* In addition, *Voting Laws Roundup: 2020, supra* note 46, states that New York made substantial modifications to its voting laws during the pandemic in 2020 “to preserve safe access to the ballot box.” *Id.* Specifically,

New York made a range of temporary and permanent changes to their mail and absentee ballot processes so that every New Yorker could vote by mail during

c. All Registered Voters Received a Mail-In Ballot Application, and an Excuse May or May Not Have Been Required for the Application to be Approved

Further review of state statutes in place during the COVID-19 pandemic and the 2020 election cycle as it relates to absentee/mail-in ballots shows that in the following fourteen states, all registered voters received a mail-in ballot application and an excuse may or may not have been required for the application to be approved: Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Ohio, Rhode Island, South Dakota, Wisconsin, and Wyoming.⁴⁸

the pandemic. The permanent changes included a notice and cure opportunity for rejected absentee ballots and a statutory presumption that ballots lacking a postmark were returned on time.

Id.

Also, during the pandemic in 2020, “North Carolina passed four bills, one of which authorized online mail ballot requests.” *Id.* Additionally, Virginia made significant modifications to its voting laws during the pandemic and in fact,

Virginia took the most ambitious steps to pass expansive legislation. After flipping the state House of Delegates and gaining a trifecta in 2019, Virginia Democrats enacted legislation to . . . allow no-excuse absentee voting [and] create a permanent absentee voter list option . . . These changes were made largely before the worst impacts of Covid-19 took hold.

Id.

Specifically, Virginia was one of eight states (Connecticut, Delaware, Massachusetts, Missouri, New Hampshire, New York, South Carolina, and Virginia) that legislatively expanded eligibility to vote-by-mail in 2020; however, it was the only state out of these eight states that made this a permanent change beyond just the pandemic. *See id.* Also, Virginia was one of four states (Michigan, New Jersey, New York, and Virginia) that “created or expanded notice and cure processes through new legislation.” *Id.* Additionally, Virginia (along with the District of Columbia, Maryland, Massachusetts, and New Jersey) enacted “new legislation to provide prepaid postage for mail ballots,” but this became only a permanent change in Maryland. *Id.*

48. CONN. GEN. STAT. ANN. § 9-135 (West 2022); Conn. Exec. Order No. 2020 CT EO 7QQ (May 20, 2020); DEL. CODE ANN. tit. 15, § 5502 (West 2022); 10 ILL. COMP. STAT. ANN. 5/19-1 (West 2022); IOWA CODE ANN. § 53.1 (West 2022); MD. CODE ANN., ELEC. LAW § 9-304 (West 2022); MASS. GEN. LAWS ANN. ch. 54, § 86 (West 2022); MICH. COMP. LAWS ANN. § 168.759 (West 2022); MINN. STAT. ANN. § 203B.02 (West 2022); NEB. REV. STAT. ANN. § 32-938 (West 2022); OHIO REV. CODE ANN. § 3509.02 (West 2022); R.I. Gen. Laws Ann. § 17-20-2 (West 2022); S.D. CODIFIED LAWS § 12-19-1 (2022); WIS. STAT. ANN. § 6.86 (1)(ac) (West 2022); and WYO. STAT. ANN. § 22-9-102 (West 2022). During the COVID-19 pandemic in 2020, absentee/mail-in voting rules changed in the following states wherein mail-in ballot applications were automatically sent to all voters in the state, and voters in the state could request a mail-in ballot as no excuse was required or COVID-19 fears counted as an excuse: Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Ohio, Rhode Island, South Dakota, Wisconsin, and Wyoming. *See Swasey, supra* note 46; Kamarck et al., *supra* note

d. Conducted All Mail-In Elections

When also reviewing state statutes in place during the COVID-19 pandemic and the 2020 election cycle as it relates to absentee/mail-in ballots, the following nine states and the District of Columbia conducted all mail-in elections (i.e., mail-in ballots were automatically sent to all voters): California, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, Oregon, Utah, Vermont, and Washington.⁴⁹

46, states that “[a]ll registered voters receive[d] an application” for absentee voting in the following states during the pandemic: Delaware, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Ohio, and Wisconsin. “No excuse [was] required for an application” for absentee voting in the following states during the pandemic: Minnesota, Rhode Island, South Dakota, and Wyoming. Kamarck et al., *supra* note 46. “COVID-19 concerns [were] permitted to request an application” for absentee voting in Connecticut during the pandemic. *Id.* In addition, Connecticut and Delaware enacted temporary “legislation to expand vote-by-mail eligibility.” *See Voting Laws Roundup: 2020, supra* note 46. Also, Maryland “passed new legislation to provide prepaid postage for mail ballots” that was a permanent, not temporary, change. *Id.* Moreover, “Massachusetts [temporarily] expanded options and eligibility for absentee . . . voting, . . . and mailed absentee ballot applications to all voters.” *Id.* In addition, Michigan “created or expanded notice and cure processes through new legislation” for mail ballots. *Id.*

49. CAL. ELEC. CODE § 3007.8 (West 2022) (repealed post-pandemic in 2022 by Stats.2022, c. 161 (A.B.2608), § 9, eff. Aug. 22, 2022); CAL. ELEC. CODE § 3000.5 (West 2022); COLO. REV. STAT. ANN. § 1-5-401 (West 2022); D.C. Mun. Regs. tit. 3, § 720 (2022); HAW. REV. STAT. ANN. § 11-101 (West 2022); NEV. REV. STAT. ANN. § 293.309 (West 2022) (repealed post-pandemic and was no longer in effect after December 31, 2021, and was repealed by Laws 2021, c. 248, § 91, eff. Jan. 1, 2022); N.J. STAT. ANN. § 19:63-3 (West 2022); OR. REV. STAT. ANN. § 254.465 (West 2022); UTAH CODE ANN. § 20A-1-308 (West 2022); UTAH CODE ANN. § 20A-3a-301 (West 2022); VT. STAT. ANN. tit. 17, § 2537 (West 2022); and WASH. REV. CODE ANN. § 29A.40.010 (West 2022). During the COVID-19 pandemic in 2020, mail-in voting rules changed in the following states and in the District of Columbia, where mail-in ballots were automatically sent to all voters, which were different than each state’s and the District of Columbia’s absentee/mail-in ballot law in effect pre-pandemic: California, District of Columbia, Nevada, New Jersey, and Vermont. Swasey, *supra* note 46. However, in the following states, the rules remained the same wherein mail-in ballots continued to be automatically sent to all voters within the state: Colorado, Hawaii, Oregon, Utah, and Washington. Also, “California passed legislation to affirmatively mail ballots to all voters” and “extended [its] mail ballot receipt deadlines via statute.” *See Voting Laws Roundup: 2020, supra* note 46. In addition, the District of Columbia during the COVID-19 pandemic in 2020 enacted “bills to expand voting access in 2020,” including “pass[ing] new legislation to [temporarily] provide prepaid postage for mail ballots.” *Id.* Also, Nevada passed new laws and “mailed ballots to all voters.” *Id.* In addition, New Jersey “[c]reated or expanded notice and cure processes through new legislation,” and it “passed new legislation to provide prepaid postage for mail ballots” that was only a temporary change. *Id.* Utah also made important modifications to voting during the COVID-19 pandemic in 2020 “to preserve safe access to the ballot box” and “where Republicans passed a number of important pro-voter reforms” including “pass[ing] a number of permanent reforms in an omnibus elections bill aimed at responding to Covid-19, including . . . authorizing mail ballot drop boxes.” *Id.*

3. State Laws Regarding the Use of Absentee/Mail-In Ballots During the 2022 Election Cycle (Post-Pandemic)

After the COVID-19 pandemic and the 2020 election cycle, some states kept in place some of the changes that were enacted during the 2020 election cycle, whereas other states reverted to their pre-pandemic rules regarding the use of absentee/mail-in ballots. Below is an overview of state laws regarding the use of absentee/mail-in ballots during the 2022 election cycle. The review of each state's law related to absentee/mail-in ballots during this time frame is divided into the following three categories based upon mail-in voting types: (a) states in which an excuse was required for absentee/mail-in voting; (b) states in which no excuse was required; and (c) states which conducted all-mail elections.

a. An Excuse Was Required for Absentee/Mail-In Voting

When reviewing the state laws in place during the 2022 election cycle as it relates to absentee/mail-in ballots, the following sixteen states required an excuse for absentee/mail-in voting: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, New York, South Carolina, Tennessee, Texas, and West Virginia.⁵⁰ The list of acceptable excuses to

50. ALA. CODE § 17-11-3 (2022); ARK. CODE ANN. § 7-5-402 (West 2022); CONN. GEN. STAT. ANN. § 9-135 (West 2022); DEL. CODE ANN. tit. 15, § 5502 (West 2022); IND. CODE ANN. § 3-11-10-24 (West 2022); KY. REV. STAT. ANN. § 117.077 (West 2022); KY. REV. STAT. ANN. § 117.085(1)(a) (West 2022); LA. STAT. ANN. § 18:1303 (2022); MASS. GEN. LAWS ANN. ch. 54, § 86 (West 2022); MISS. CODE ANN. § 23-15-715 (West 2022); MO. ANN. STAT. § 115.277 (West 2022) (This Missouri statute that was in effect as of June 4, 2020 was to be replaced by proposed legislation that was set to take effect on August 28, 2022); *see also Organization for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790 (2020); N.H. REV. STAT. ANN. § 657:1 (2022); N.Y. ELEC. LAW § 8-400 (McKinney 2022); S.C. CODE ANN. § 7-15-320 (2022); TENN. CODE ANN. § 2-6-201 (West 2022); TEX. ELEC. CODE ANN. § 82.001 (West 2022) (detailing which applicants were eligible and which were ineligible for early voting by mail); *see* TEX. ELEC. CODE ANN. § 84.001 (West 2022) (providing instructions for how to apply for an early voting ballot); TEX. ELEC. CODE ANN. § 84.012 (West 2022) (stating that the clerk shall mail an early voting ballot application to all who request the application form); TEX. ELEC. CODE ANN. § 84.0111 (West 2022) (stating that applications for early mail-in ballots may only go to those who request them). Moreover, *see* *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 193 (2020) (negative treatment of Tex. Elec. Code § 82.001 holding that since persons under 65 did not have no-excuse absentee voting prior to the pandemic, being required to vote in person during the pandemic with safety measures in place did not amount to an unconstitutional status quo when the conferring of a benefit on the 65+ class did not deny or abridge the Plaintiffs' 26th Amendment right to vote. The case was remanded regarding the question of equal protection); and W. VA. CODE ANN. § 3-3-1 (West 2022); *see* *Table 2: Excuses to Vote Absentee*, National Conference of State Legislatures (Mar. 15, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx> [<https://perma.cc/PU3J-5K4W>] (listing the states that required an excuse to vote absentee and displaying various acceptable excuses to vote absentee in each of the sixteen

vote using absentee/mail-in ballots in these states in 2022 included the following reasons: “Out of County on Election Day, Illness or Disability, Persons Over a Certain Age, Work Shift is During all Voting Hours, Student Living Outside of County, Election Worker or Poll Worker, Religious Belief or Practice, Address Confidentiality Program Participant, Incarcerated (but Still Qualified to Vote), and Jurors.”⁵¹

(16) states in 2022); *see also The Evolution of Absentee/Mail Voting Laws, 2020-22*, National Conference of State Legislatures (updated Oct. 26, 2023), <https://www.ncsl.org/elections-and-campaigns/the-evolution-of-absentee-mail-voting-laws-2020-through-2022> [<https://perma.cc/Q3DN-VLQY>] (providing a comprehensive discussion, along with various tables, about how each state’s absentee/mail voting law changed from 2020–2022 and noting that “[t]he decision for no-excuse absentee voting states to mail absentee/mail ballot applications to all registered voters was a novel option in 2020, with the goal of making existing no-excuse absentee voting more convenient for voters. NO states made this temporary accommodation permanent in 2021 or 2022,” likely because “[t]he cost of the additional mailing, plus some voter confusion, may have led these states to return to pre-pandemic practices.”). *Id.*

51. *See Table 2: Excuses to Vote Absentee, supra* note 50 (displaying the following acceptable excuses to vote absentee in each of the following respective sixteen (16) states in 2022: Alabama (Out of County on Election Day, Illness or Disability, Work Shift is During all Voting Hours, Student Living Outside of County, and Election Worker or Poll Worker); Arkansas (Out of County on Election Day, and Illness or Disability); Connecticut (Out of County on Election Day, Illness or Disability, Election Worker or Poll Worker, and Religious Belief Or Practice); Delaware (Out of County on Election Day, Illness or Disability, Work Shift is During all Voting Hours, and Religious Belief Or Practice); Indiana (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 65-plus, Work Shift is During all Voting Hours, Election Worker or Poll Worker, Religious Belief Or Practice, and ACP* Participant). “*ACP stands for Address Confidentiality Program, which protects the information of victims of domestic violence, sexual assault or stalking.” *Id.*; Kentucky (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 65-plus, Work Shift is During all Voting Hours, Student Living Outside of County, ACP* Participant, and Incarcerated (but Still Qualified to Vote); Louisiana (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 65-plus, Work Shift is During all Voting Hours, Student Living Outside of County, Election Worker or Poll Worker, ACP* Participant, Incarcerated (but Still Qualified to Vote), and Jurors); Massachusetts (Out of County on Election Day, Illness or Disability, Student Living Outside of County, and Religious Belief Or Practice); Mississippi (Out of County on Election Day, Illness or Disability, and Persons Over a Certain Age: 65-plus); Missouri (Out of County on Election Day, Illness or Disability, Election Worker or Poll Worker, Religious Belief or Practice, ACP* Participant, and Incarcerated (but Still Qualified to Vote)); New Hampshire (Out of County on Election Day, Illness or Disability, Work Shift is During all Voting Hours, and Religious Belief Or Practice); New York (Out of County on Election Day, Illness or Disability, and Incarcerated (but Still Qualified to Vote)); South Carolina (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 65-plus, Work Shift is During all Voting Hours, Student Living Outside of County, Election Worker or Poll Worker, Incarcerated (but Still Qualified to Vote), and Jurors); Tennessee (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 60-plus, Work Shift is During all Voting Hours, Student Living Outside of County, Election Worker or Poll Worker, Religious Belief or Practice, and Jurors); Texas (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: 65-plus, ACP* Participant, and Incarcerated (but Still Qualified to Vote)); and West Virginia (Out of County on Election Day, Illness or Disability, Persons Over a Certain Age: “Advanced Age,” Work Shift is During all Voting Hours,

b. No Excuse Was Required

In contrast to the states listed above in Section II(A)(3)(a), when reviewing state laws in place during the 2022 election cycle related to absentee/mail-in ballots, it was noted that the following twenty-six states and the District of Columbia did not require an excuse to absentee/mail-in vote: Alaska, Arizona, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia, Wisconsin, and Wyoming.⁵²

c. Conducted All-Mail Elections

When reviewing state laws in place during the 2022 election cycle related to absentee/mail-in ballots, the following eight states conducted

Student Living Outside of County, ACP* Participant, and Incarcerated (but Still Qualified to Vote)); *see also The Evolution of Absentee/Mail Voting Laws, 2020-22, supra* note 50; *see also* ALA. CODE § 17-11-3 (2022); ARK. CODE ANN. § 7-5-402 (West 2022); CONN. GEN. STAT. ANN. § 9-135 (West 2022); DEL. CODE ANN. tit. 15, § 5502 (West 2022); IND. CODE ANN. § 3-11-10-24 (West 2022); KY. REV. STAT. ANN. § 117.077 (West 2022); KY. REV. STAT. ANN. § 117.085(1)(a) (West 2022); LA. STAT. ANN. § 18:1303 (2022); MASS. GEN. LAWS ANN. ch. 54, § 86 (West 2022); MISS. CODE ANN. § 23-15-715 (2022); MO. ANN. STAT. § 115.277 (West 2022); *see Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790 (2020); N.H. REV. STAT. ANN. § 657:1 (2022); N.Y. ELEC. LAW § 8-400 (McKinney 2022); S.C. CODE ANN. § 7-15-320 (2022); TENN. CODE ANN. § 2-6-201 (West 2022); Tex. Elec. Code § 82.001 (West 2022); Tex. Elec. Code § 84.001 (West 2022); TEX. ELEC. CODE ANN. § 84.012 (West 2022); TEX. ELEC. CODE ANN. § 84.0111 (West 2022); *see Tex. Democratic Party v. Abbott*, 978 F.3d 168, 193 (2020); and W. VA. CODE ANN. § 3-3-1 (West 2022).

52. *See Table 1: States with No-Excuse Absentee Voting*, National Conference of State Legislatures (Jan. 1, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> [<https://perma.cc/J7GM-KANT>] (listing the states that did not require an excuse to vote absentee in 2022 and noting that “Rhode Island lists several excuses to vote absentee, but also specifies ‘No specific reason necessary.’ Since any Rhode Islander can request an absentee ballot, NCSL has categorized it as no excuse.”); *see also The Evolution of Absentee/Mail Voting Laws, 2020-22, supra* note 50; *see also* ALASKA STAT. ANN. § 15.20.010 (West 2022); ARIZ. REV. STAT. ANN. § 16-541 (2022); D.C. Mun. Regs. tit. 3, § 720 (2022); FLA. STAT. ANN. § 101.62 (West 2022); GA. CODE ANN. § 21-2-380 (West 2022); IDAHO CODE ANN. § 34-1001 (West 2022); 10 ILL. COMP. STAT. ANN. 5/19-1 (West 2022); IOWA CODE ANN. § 53.1 (West 2022); KAN. STAT. ANN. § 25-1119(a) (West 2022); ME. REV. STAT. ANN. tit. 21-A, § 751 (2022); MD. CODE ANN., ELEC. LAW § 9-304 (West 2022); MICH. COMP. LAWS ANN. § 168.759 (West 2022); MINN. STAT. ANN. § 203B.02 (West 2022); MONT. CODE ANN. § 13-13-201 (West 2022); NEB. REV. STAT. ANN. § 32-938 (West 2022); N.J. STAT. ANN. § 19:63-3 (West 2022); N.M. STAT. ANN. § 1-6-3 (West 2022); N.C. GEN. STAT. ANN. § 163-226 (West 2022); N.D. CENT. CODE ANN. § 16.1-07-01 (West 2022); OHIO REV. CODE ANN. § 3509.02 (West 2022); OKLA. STAT. ANN. tit. 26, § 14-105 (West 2022); 25 PA. STAT. AND CONS. STAT. ANN. § 3150.11 (West 2022); R.I. GEN. LAWS ANN. § 17-20-2 (West 2022); S.D. CODIFIED LAWS § 12-19-1 (2022); VA. CODE ANN. § 24.2-700 (West 2022); WIS. STAT. ANN. § 6.86 (1)(ac) (West 2022); and WYO. STAT. ANN. § 22-9-102 (West 2022).

all-mail elections: California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington.⁵³

B. *Statistics on the Use of Absentee/Mail-In Ballots in the United States*

There was an increased use of absentee/mail-in ballots, especially during the COVID-19 pandemic in 2020. Therefore, it is important to look at the statistics regarding the use of absentee/mail-in ballots in the United States during the COVID-19 pandemic and the 2020 election cycle and the use of absentee/mail-in ballots during the 2022 election cycle.

1. 2020 Statistics

As shown by research and as mentioned above in this Article in Section II(A)(2),

the COVID-19 pandemic led to a variety of changes in voting methods across the country in 2020, and the ways people could cast ballots varied widely from state to state. Many states maintained traditional voting procedures, but some expanded early voting, and others automatically sent all registered voters a ballot that could be returned by mail.⁵⁴

Moreover, research indicates that due to these changes, there was an uptick in absentee/mail-in voting during the COVID-19 pandemic in 2020. Using data from the Current Population Survey's (CPS) November 2020 Voting and Registration Supplement, the United States Census Bureau reported that sixty-nine percent of Americans surveyed expressed that they voted nontraditionally in the 2020 presidential election. Voting traditionally was defined as voting in person on Election Day.⁵⁵ This number turned out to be "the highest rate of nontraditional voting for a presidential election . . . since questions regarding voting method have

53. See Table 1: *States with No-Excuse Absentee Voting*, *supra* note 52 (listing the states that conducted all-mail elections in 2022 and listing Vermont as having "All-mail elections (general elections only)"); see also *The Evolution of Absentee/Mail Voting Laws, 2020-22*, *supra* note 50; see also CAL. ELEC. CODE § 3000.5 (West 2022); COLO. REV. STAT. ANN. § 1-5-401 (West 2022); HAW. REV. STAT. ANN. § 11-101 (West 2022); NEV. REV. STAT. ANN. § 293.269911 (West 2022); OR. REV. STAT. ANN. § 254.465 (West 2022); UTAH CODE ANN. § 20A-3a-302 (West 2022); VT. STAT. ANN. tit. 17, § 2537a (West 2022); and WASH. REV. CODE ANN. § 29A.40.010 (West 2022).

54. See Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), <https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html> [<https://perma.cc/4PSH-NNCG>] (referring to voters as casting their ballot nontraditionally if they voted by mail including those who voted by absentee ballot, and/or voters who voted early before Election Day).

55. See *id.*

been included in the survey.”⁵⁶ By contrast, only approximately forty percent of Americans voted nontraditionally in the 2016 presidential election, meaning they voted by mail and/or prior to Election Day in 2016.⁵⁷

Research further shows that this surge in nontraditional voting was mostly “due to an increase in mail-in voting.”⁵⁸ Specifically, “[i]n 2020, 43% of voters cast ballots by mail and another 26% voted in person before Election Day” for the 2020 presidential election versus “[i]n 2016, 21% mailed in their ballots and 19% voted in person prior to Election Day” for the 2016 presidential election.⁵⁹ Thus, these numbers reveal over a fifty percent increase (i.e., forty-three percent versus twenty-one percent) in the number of voters who voted by mail in the 2020 presidential election in comparison to the 2016 presidential election.⁶⁰ Other researchers also found that the 2020 election brought an uptick in absentee/mail-in voting.⁶¹ As stated by some researchers, “We may have seen it coming, but now we know for sure: The coronavirus pandemic made the 2020 election look different from any other election in recent memory. Due to the massive expansion of mail voting, a staggering number of Americans cast their ballots before Election Day.”⁶²

According to preliminary findings from the 2020 Survey on the Performance of American Elections, . . . 46 percent of 2020 voters voted by mail or absentee — up from 21 percent in 2016, which at the time was considered high. Only 28 percent of people reported voting on Election Day — less than half of the 60 percent who did so in 2016. In-person early voting also reached a modern high (26 percent), although the change from 2016 (when it was 19 percent) was less dramatic.⁶³

Additionally, the 2020 Survey on the Performance of American Elections (SPAЕ) revealed that “47 states and the District of Columbia” all witnessed an increase in mail-in voting from 2016 to 2020, with the three exceptions being from “states that have held predominantly mail

56. *Id.*

57. *See id.*

58. *Id.*

59. *Id.*

60. *See id.*

61. *See* Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like In All 50 States*, FIVETHIRTYEIGHT (Feb. 9, 2021), <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/> [<https://perma.cc/MX3U-4AJN>] (noting that during the 2020 election, absentee voting “was historically popular — and historically Democratic”).

62. *Id.*

63. *Id.*

elections for years: Colorado, Oregon, and Washington.”⁶⁴ Conversely, “the five states that clung to the requirement that voters provide a non-pandemic-related excuse in order to vote by mail (Indiana, Louisiana, Mississippi, Tennessee and Texas) saw some of the smallest increases.”⁶⁵ For example, Texas’s rate of mail voting in 2020 was only four percent higher than in 2016, while Mississippi’s was only six percent higher than in 2016.⁶⁶

Researchers also pointed out the partisan differences in voter turnout and voting method due to the rhetoric used by the presidential candidates supporting or critiquing the mail-in ballot voting, especially during the 2020 election.⁶⁷ In fact, some researchers commented that because of “false claims” being touted “that mail voting would lead to election fraud, a huge partisan gap emerged between ballots cast by mail and ballots cast on Election Day” in November of 2020.⁶⁸ These same researchers “collected data on the partisanship of absentee and Election Day votes from state election officials—and the numbers [were] striking,” and although their study only contained data for fifteen of the fifty states in the United States, it told “a consistent story” about the 2020 election: the Republican presidential candidate won the Election Day vote in 14 out of the 15 states, and the Democratic presidential candidate won the absentee vote in 14 out of the 15 states.⁶⁹

2. 2022 Statistics

Reports from 2023 show that, even post-pandemic, “[t]he COVID-19 pandemic, so far, has had some lasting effects on how people cast ballots in the U.S.”⁷⁰ In fact, “[a]ccording to a new report from the U.S. Election Assistance Commission, mail voting rates in the U.S. ‘remained higher than pre-pandemic levels’ during last year’s midterm elections, when

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* Rakich & Mithani, *supra* note 61 (referring to “how blue absentee votes were and how red Election Day votes were”).

68. *Id.*

69. *See id.* (15 states that the researchers provided data for were Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maryland, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas. The “remaining 35 states plus Washington, D.C., either do not break down statewide election results by voting method or did not respond to our data requests.”).

70. Ashley Lopez, *Mail voting is still pretty popular, even without the pressure of the pandemic*, NPR (July 3, 2023, 2:38 PM ET), <https://www.npr.org/2023/07/03/1185843074/mail-voting-is-still-pretty-popular-even-without-the-pressure-of-the-pandemic> [<https://perma.cc/3A6S-6EDR>]; *see also* U.S. ELECTION ASSISTANCE COMM’N: ELECTION ADMINISTRATION AND VOTING SURVEY 2022 COMPREHENSIVE REPORT (2023).

more than 35 million mail ballots were cast and counted” in 2022.⁷¹ In fact, the U.S. Election Assistance Commission “found that 31.9% of voters who cast a ballot in 2022 did so by mail. That’s compared to 25.6% of voters who voted by mail in the 2018 general election. According to the survey, almost half of all voters in 2022 voted in person on Election Day.”⁷² National Public Radio (NPR) also reported in 2023 that “[t]he relative popularity of voting by mail in the U.S. has persisted despite the fact that various states—mostly Republican-led states—have passed new restrictions on mail ballot programs since 2020.”⁷³

C. Discussion and Debate on the Use of Absentee/Mail-in Ballots

There was much discussion and debate regarding the use of absentee/mail-in ballots throughout the 2020 election cycle that occurred during the COVID-19 pandemic and post-pandemic, including during the 2022 election cycle. Below is an overview related to some of those discussions and debates.

1. During the COVID-19 Pandemic and the 2020 Election Cycle

During the early months of the COVID-19 pandemic in 2020, important conversations were being held amongst “the nation’s political leaders, elections administrators, and scholars about how to hold a safe, accessible, and fair election in November 2020.”⁷⁴ Thus, “[w]ith the COVID-19 pandemic dramatically disrupting everyday life in the United States, state and local election officials sought to adapt the way that they administer[ed] elections to ensure the safety of voters and their workers, while still securing access to the ballot and the integrity of elections.”⁷⁵

Trying to effectively balance these concerns during a public health crisis was a major topic of discourse and public debate in 2020.⁷⁶ In fact, United States senators, top election law scholars, leading political science experts, courts throughout the United States, and current and former United States presidents all expressed their opinions on this important subject.⁷⁷ In addition, “[b]y the end of August 2020, 20 states had made a change to their vote by mail policies, allowing at least 83% of American

71. Lopez, *supra* note 70; *see also* U.S. ELECTION ASSISTANCE COMM’N, *supra* note 70 (“[A]lthough the use of mail voting decreased in 2022 compared to the 2020 general election, mail voting rates remained higher than pre-pandemic levels.”).

72. Lopez, *supra* note 70.

73. *Id.*

74. Thad Kousser et al., *How do Americans want elections to be run during the COVID-19 crisis?*, SAGE JOURNALS (Apr. 28, 2021), <https://doi.org/10.1177/20531680211012228> [<https://perma.cc/72RM-DY6M>], at 1.

75. *Id.*

76. *See id.*

77. *See id.*

voters to cast a ballot by mail.”⁷⁸ In response to the public debate, a group of researchers conducted a study using a sample of over 5,600 Americans to determine how Americans preferred to vote in the November 2020 election during the COVID-19 pandemic because they believed that “the voice of America’s voters themselves” was “[i]mportant to informing this vital public debate.”⁷⁹ The study, conducted over three days in April of 2020, focused on eligible voters’ preferences surrounding the use of absentee ballots in the November 2020 general election.⁸⁰ Based on their study, the researchers ultimately found that a majority of the respondents wished to see vote-by-mail procedures expanded, four in ten voters preferred casting their ballot by mail over in-person, and the respondents given scientific projections for the pandemic were more likely to trust and favor the absentee and mail-in voting process.⁸¹

Also, when comparing data related to absentee voting during the 2016 and 2020 presidential elections, researchers from FiveThirtyEight noted that (1) “[i]n 2016, several states had negligible differences between absentee and Election Day votes, but in 2020, even the smallest differences were gaping chasms;” (2) the current President “indeed would not have won without mail votes, but there is no evidence that a significant number of these votes were cast fraudulently. Rather, the increase in their use was a response to the pandemic—one that was even encouraged by most election officials;” and (3) “[b]y casting doubt on the security of mail ballots,” the former President “all but ensured that most of his voters would cast their votes using traditional methods, leaving the pool of absentee ballots strikingly—but not surprisingly—blue.”⁸²

In August 2020, other researchers were also aware of the debate around mail-in voting and wanted to determine the impact of mandatory vote-by-mail (VBM) measures on voter participation rates and electoral outcomes during the COVID-19 pandemic in 2020.⁸³ They noted that

Beyond these handful of states, many other local, state, and even federal policy-makers have publicly and prominently debated making changes to move toward all-mail voting; both nominees for president have spoken widely on the merits of mandatory VBM, too many legislators to mention have gone back and forth on the merits of all-mail elections, and numerous activist groups (e.g., the American Civil

78. *Id.*

79. *Id.*

80. *See* Kousser et al., *supra* note 74.

81. *See id.*

82. Rakich & Mithani, *supra* note 61.

83. *See* Michael Barber & John B. Holbein, *The participatory and partisan impacts of mandatory vote-by-mail*, 6 *SCI. ADVANCES* 1 (2020), <https://doi.org/10.1126/sciadv.abc7685> [<https://perma.cc/4PFB-977P>].

Liberties Union, Action Network, and FreedomWorks) have a move toward a universal VBM system. Many of these debates hinge crucially on whether mandatory VBM advantages one party over the other . . . Consequentially, the debate over the merits of this electoral reform has become contentious and highly polarized. Recent polls have found that while more than 8 in 10 Democrats supported all-mail elections, only 4 in 10 Republicans held the same position. Many assume, act as if, or even directly argue that VBM will substantially advantage Democrats at the ballot box.⁸⁴

These researchers also discussed the impact of mandatory VBM systems seen in a few states.⁸⁵ Specifically, their research focused on reviewing and analyzing historical data over the past thirty years and involving over forty million voting records within the states of Washington and Utah, wherein they sought to determine the effect that mandatory vote-by-mail had on voter turnout and election outcomes.⁸⁶ Their study found that while it may slightly increase voter turnout, VBM did not affect election outcomes at various governmental levels and did not provide a substantial advantage for one political party over the other.⁸⁷ These researchers concluded that “[o]ur results find meaning given contemporary debates about the merits of mandatory vote-by-mail. Mandatory VBM ensures that citizens are given a safe means of casting their ballot while simultaneously not substantially advantaging one political party over the other.”⁸⁸ These same researchers also emphasized the following:

[W]hile VBM’s effect on turnout is modest, the counterfactual one uses matters a great deal. In elections—like the present one—where citizens have to choose between minimizing the chances that they contract or spread COVID-19 and fulfilling their civic duty to vote, levels of voter participation could likely stagnate, decline, and/or become more unequal than they already are. Given this possibility, allowing citizens to cast their ballots from the safety of their own homes is a viable approach to ensuring that elections continue despite the deadly COVID-19 pandemic.

In short, mandatory VBM preserves public safety while also maintaining the current balance of power between the two

84. *Id.* (internal reference omitted).

85. *See id.*

86. *See id.*

87. *See id.*

88. *See Barber & Holbein, supra* note 83, at 1.

dominant political parties. VBM preserves both public health and the integrity of elections.⁸⁹

Another researcher, Andrew Hall, also wrote in October 2020 that the national debate regarding the use of absentee ballots was becoming increasingly partisan, and that the trends and conversations surrounding the November 2020 election may have contributed to the partisan divide following the expansion of mail-in voting and absentee ballot procedures, including the harsh rhetoric by Republicans condemning the expansion and warning of voter fraud.⁹⁰ However, this researcher pointed to other studies and continued to conclude, including within his own study, that voting by mail, including universal vote-by-mail, does not meaningfully advantage one party or the other, even if one party may statistically use the method more.⁹¹ Instead, this researcher concluded that this method of voting could encourage all voters in 2020 who wished to be active participants in the electoral process amid a nationwide pandemic to vote-by-mail, if legislators could work together to address the logistical issues, including potentially higher rejection rates, surrounding vote-by-mail.⁹²

2. Post-Pandemic and During the 2022 Election Cycle

After the COVID-19 pandemic emerged during the 2020 election cycle, many continued to discuss and debate the use of absentee/mail-in ballots during future elections, including during the 2022 election cycle. Following the 2020 presidential election, researchers in 2021 continued to discuss the absentee/mail-in voting debate:

In the United States, the 2020 election, the coronavirus disease 2019 (COVID-19) pandemic, and the debate around the legitimacy of the election that culminated in the events of 6 January 2021 poured gasoline onto an already raging debate about how the nation should administer its elections and, in particular, about voting by mail. While the two parties disagree vehemently over its value, pundits and practitioners on both sides seem to agree that it increases turnout and helps Democrats, pointing out that the 2020 election featured an unprecedented expansion of voting by mail in response to the pandemic, had an unusually high turnout, and resulted in unified Democratic control at the federal level. This conventional wisdom, despite being at

89. *Id.*

90. See Andrew Hall, *Stanford Inst. for Econ. Pol'y Rsch., How does vote-by-mail change American elections?*, INST. FOR ECON. POL'Y RSCH. 4 (Oct. 2020), <https://siepr.stanford.edu/publications/policy-brief/how-does-vote-mail-change-american-elections> [https://perma.cc/V6CR-53GN].

91. *See id.*

92. *See id.*

odds with the beliefs of most election administration experts, structures the partisan debate over vote-by-mail, with many Republican state legislatures considering or implementing reforms to roll back vote-by-mail, while most Democrats support its expansion.⁹³

These researchers looked at the causal relationship between no-excuse absentee voting, which is considered “the most common form of vote-by-mail,” and voter participation in the 2020 presidential election during the COVID-19 pandemic.⁹⁴ They also reviewed aggregate trends in voter turnout data amongst all fifty states as well as analyzed micro-level data from Texas and Indiana on approximately three million voters for a deeper dive into their no-excuse absentee voting analysis.⁹⁵ Specifically, the researchers focused on providing “a causal analysis of the impact of absentee vote-by-mail during the COVID-19 (coronavirus disease 2019) pandemic.”⁹⁶ They ultimately found that although “[t]he 2020 U.S. election saw a record turnout, saw a huge increase in absentee voting, and brought unified national Democratic control . . . these facts alone do not imply that vote-by-mail increased turnout or benefited Democrats.”⁹⁷ In fact, the researchers discovered that by

[f]ocusing on natural experiments in Texas and Indiana, we find that 65-year-olds voted at nearly the same rate as 64-year-olds, despite the fact that only 65-year-olds could vote absentee without an excuse. Being just old enough to vote no-excuse absentee did not substantially increase Democratic turnout relative to Republican turnout. Voter interest appeared to be more important in driving turnout across vote modes, neutralizing the electoral impact of Democrats voting by mail at higher rates during the historic pandemic.⁹⁸

Also, when using and analyzing nationwide data, the researchers found “that states that implemented absentee voting for the 2020 election saw no obvious, dramatic increases in turnout relative to states that did not. Turnout was up across the board in 2020 and increased markedly in states that did not expand their absentee voting programs at all.”⁹⁹ The researchers ultimately concluded the following to sum up the debate about how absentee voting impacted the 2020 election in the United

93. Jesse Yoder et al., *How did absentee voting affect the 2020 U.S. election?*, 7 *Sci. ADVANCES* 1, 1 (2021) (all references and notes omitted).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Yoder et al., *supra* note 93, at 7.

States during the COVID-19 pandemic:

The results of our paper do not offer a clear recommendation for the policy debate around vote-by-mail, but they do suggest that both sides of the debate are relying on flawed logic. Vote-by-mail is an important policy that voters seem to like using, and it may be a particularly important tool during the pandemic. Despite all that, and despite the extraordinary circumstances of the 2020 election, vote-by-mail's effect on turnout and on partisan outcomes is muted, just as research before the pandemic would have suggested.

Documenting that the effect of vote-by-mail on turnout is so muted even during a historic pandemic is important for our theories of why people vote. Even during COVID-19, the chance to cast your vote without having to go to the polls in person made little difference for participation. Instead, turnout increased markedly everywhere because voters on both sides cared more than usual about the outcome. This does not mean that the costs of voting are never important, but it does suggest that expanding participation requires understanding how to engage voters and make them interested in the election more than it requires focusing on the details of different convenience voting reforms.¹⁰⁰

Additionally in October 2022, another researcher commented on how the 2020 election was unprecedented in several ways and remarked that many states looked towards absentee and mail-in voting methods in response to the COVID-19 pandemic to ensure voters could participate in the electoral process regardless of their circumstances.¹⁰¹ Also, many professionals and analysts believe that the policy changes to mail-in voting seen in 2022 in preparation for the midterm elections were part of a much longer curve of trends and that the pandemic and 2020 election only “supercharged” shifts in those voting trends that were already occurring: “[Early and mail-in voting] had been slowly increasing over time, but 2020 just turned everything around,” said [University of Florida political scientist Michael] McDonald, who wrote a book that analyzed turnout trends in the 2020 election.”¹⁰²

Moreover, “scrutiny of all election policies accelerated in the aftermath of the 2020 presidential election and the pandemic, and concerns about election security and subsequent efforts to expand, limit or fine-tune absentee/mail-in voting policies continued to dominate

100. *Id.*

101. Miles Parks, *2020 changed how America votes. The question now is whether those changes stick*, NPR (Oct. 28, 2022, 5:00 AM ET), <https://www.npr.org/2022/10/28/1128695831/united-states-2022-patterns-mail-early-voting> [<https://perma.cc/TR7P-99SD>].

102. *Id.*

public discourse and especially media coverage through the November 2022 general election.”¹⁰³

III. COMPARATIVE ANALYSIS OF HOW THE COVID-19 PANDEMIC CAUSED SOME STATES TO MAKE CHANGES TO THEIR ABSENTEE/MAIL-IN BALLOT LAWS FROM 2020–2022

The COVID-19 pandemic in 2020 caused many states to make changes to their absentee/mail-in ballot laws from 2020–2022, as previously shown above in this Article, especially in Sections II(A)(2) and II(A)(3). The following Section includes a comparison of several states’ pre-pandemic absentee/mail-in ballot measures versus absentee/mail-in ballot changes that several states implemented in response to the pandemic from 2020–2022.

When comparing states’ pre-pandemic absentee/mail-in ballot measures that were already in place versus absentee/mail-in ballot changes that several states implemented in 2020 during the COVID-19 pandemic and beyond, it was clearly shown that “[c]ontinuing concerns about the coronavirus have spurred state officials to take action to temporarily permit voters to cast ballots from home instead of having to travel to the voting booth to make their voices heard.”¹⁰⁴ Prior to the COVID-19 pandemic, in less than twenty states, voters had to give an “eligible excuse to take advantage of the option” to absentee vote.¹⁰⁵ However, due to the pandemic, many of these absentee vote-by-excuse states in 2020 “eas[ed] absentee voting limitations,” including Delaware, Indiana, Kentucky, Massachusetts, New Hampshire, New York, South Carolina, and West Virginia.¹⁰⁶ For example, although Kentucky voters were previously required to provide an excuse to absentee vote, in 2020, “[a]ction taken by the governor dropped the requirement for the June 23 state and presidential primary” wherein voters were “able to request an absentee ballot via an online portal.”¹⁰⁷ South Carolina’s Governor Henry McMaster also signed a bill into law in 2020 that “allow[ed] any eligible voter in the state to request an absentee ballot for the state’s June 9 primary.”¹⁰⁸ Likewise, New York’s Governor Andrew Cuomo took “executive action to send absentee ballot applications to voters for the June 23 state primary” in 2020 and Delaware Governor John Carney in 2020 “announced the state will mail absentee ballot applications to all

103. *The Evolution of Absentee/Mail Voting Laws, 2020–22*, *supra* note 50.

104. Keith Goble, *At least 20 states revise absentee voting rules*, LAND LINE (May 22, 2020), <https://landline.media/at-least-20-states-revise-absentee-voting-rules-2/> [<https://perma.cc/M68H-CHJ9>].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

eligible voters ahead of the June 2 presidential primary.”¹⁰⁹ Additionally, some states, including Massachusetts and New Hampshire, temporarily extended “absentee voting eligibility . . . to voters based on concerns related to COVID-19.”¹¹⁰

Moreover, because of the COVID-19 pandemic, many no-excuse absentee voting states also implemented changes to their voting procedures in 2020, including Georgia, Iowa, Maryland, Nevada, New Jersey, and South Dakota.¹¹¹ For example, Iowa voters “receive[d] absentee ballot request forms for the June 2 state primary,” and both Georgia voters and South Dakota voters were sent absentee ballot request forms in the mail prior to their respective state primaries and presidential primaries.¹¹² Moreover, other states—such as Maryland—in 2020 went “a step further to implement voting largely by mail for the June 2 state and presidential primary,” with “[a] limited number of in-person polling centers also . . . available” and similarly, “[a]head of the July 7 primaries in New Jersey, Gov. Phil Murphy issued an executive order for all registered voters to receive mail-in ballots. A limited number of in-person polling places and ballot drop boxes also . . . [were] available.”¹¹³ Also, Nevada and counties in both Montana and North Dakota moved to all-mail voting for the June 2020 elections.¹¹⁴

In addition, many other states took action to utilize mail-in ballots for voting during the 2020 fall election cycle, including Connecticut and Michigan, whose Secretaries of State “announced plans for their state primaries and the Nov. 3 presidential election to be done by mail-in ballot.”¹¹⁵ Likewise, California’s Governor Gavin Newsom “signed an executive order directing counties to send mail-in ballots ahead of the presidential election” in 2020.¹¹⁶

Research further shows that, during the COVID-19 pandemic in 2020, mail-in voting increased at different rates in different states. Researchers in February 2021 found

[T]he biggest spikes in mail voting occurred in places that went the furthest to encourage mail voting (i.e., those that automatically sent every registered voter a ballot), especially those with little history of mail voting prior to 2020. These include New Jersey (where only 7 percent of voters voted by mail in 2016, but 86 percent did so in 2020), the District of

109. *Id.*

110. Goble, *supra* note 104.

111. *See id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *Id.*

116. Goble, *supra* note 104.

Columbia (12 percent in 2016 versus 70 percent in 2020) and Vermont (17 percent in 2016 versus 72 percent in 2020).¹¹⁷

NPR reported in July 2023 the following based upon the spikes in voting by mail due to the COVID-19 pandemic during the 2020 election cycle and the continued popularity in the United States of mail-in voting:

In the wake of the 2020 election, some states have passed laws that curtail drop box usage for mail voters, shorten timelines for requesting and returning ballots and add new ID requirements for mail voting. Proponents of these laws have said such changes are necessary to prevent voter fraud, even though voter fraud is a very rare occurrence in U.S. elections.¹¹⁸

Additionally, in October 2023, the National Conference of State Legislatures reported the following updates regarding absentee/mail-in voting over the last several years following the COVID-19 pandemic in 2020:

In 2021 and 2022, each state's policymaking on elections was informed by the specific challenges it faced during the 2020 election, both administratively and politically. Unlike the initial responses to COVID, which came almost entirely from the executive branch or state boards of election, policy debates in 2021 and 2022 took place in legislative chambers. By and large, though, most states' absentee/mail voting policies were not significantly impacted by the pandemic.

...

While the topic swirled in the media, legislatures were busy—but not with a seismic shift from normal. The traditional debate about voter access vs. ballot integrity continued, with a focus on absentee/mail voting. And yet, in 2021, 3,677 election-related bills were introduced in state legislatures, 25% more than in any previous odd-numbered year since 2001, as far back as NCSL has records. Proof, then, of an uptick in interest, but hardly a change in magnitude. Of those, 290 election-related bills were enacted, on par with the last several odd-numbered years. Legislative action on elections in 2022 were even calmer, with 2,120 bills and 280 enactments.¹¹⁹

Moreover, when analyzing the various changes that states implemented during the COVID-19 pandemic from 2020 up through

117. Rakich & Mithani, *supra* note 61.

118. Lopez, *supra* note 70.

119. *The Evolution of Absentee/Mail Voting Laws, 2020–22*, *supra* note 50.

2022, the National Conference of State Legislatures further found that “[t]here was no nationwide roll back of absentee/mail voting after the pandemic, counter to the narrative often seen in the media. No states curtailed absentee/mail voting eligibility between 2020 and 2022. To the contrary, absentee/mail voting eligibility increased.”¹²⁰ In fact, their research revealed the following:

- In January 2020, 16 states required voters to identify an excuse, or reason, to request an absentee ballot: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New York, South Carolina, Virginia, Tennessee, Texas and West Virginia. The other 34 states plus the District of Columbia either allowed all voters to choose to vote an absentee/mail ballot or sent a mail ballot to all voters.
- In time for the 2020 general election, 14 of the 16 states (Alabama, Arkansas, Connecticut, Delaware, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New York, South Carolina, West Virginia and Virginia) had changed their requirements for getting an absentee ballot.
- By November 2022, only one of the 16 states had permanently moved from excuse needed to no-excuse needed: Virginia, which did so through legislative action in 2020.¹²¹

Also, “[i]n an effort to give voters maximum choice in the pandemic election of 2020, a dozen ‘no excuse absentee states’ mailed absentee/mail ballot applications to voters; this was the most notable election administration adaptation in 2020 to COVID. That practice was not continued post-2020 in any state, and three states have since prohibited doing so again.”¹²² It was further reported that “[t]he COVID pandemic accelerated the existing slow trend toward mostly-mail elections. At the start of 2020, five states conducted elections almost entirely by mail; by the 2022 general election, eight states did, and the District of Columbia made this move in 2023 as well.”¹²³ Notably, “[n]o states moved in the opposite direction.”¹²⁴

120. *Id.*

121. *Id.* (table reference omitted). Note that for the 2020 general election above, this source only listed the 13 states cited above, not 14 states, that had changed their absentee ballot requirements.

122. *Id.*

123. *Id.*

124. *Id.*

IV. VARIOUS LAWSUITS FILED REGARDING THE USE OF ABSENTEE/MAIL-IN BALLOTS IN ELECTIONS DURING AND AFTER THE COVID-19 PANDEMIC FROM 2020–2024 AND THE STATUS OF STATE ABSENTEE/MAIL-IN VOTING LAWS DURING THE 2024 PRIMARY ELECTION CYCLE

Numerous lawsuits have been filed throughout the United States over the last several years regarding the use of absentee/mail-in ballots in elections during and after the COVID-19 pandemic from 2020–2024. The following Section includes a review of several lawsuits filed during the COVID-19 pandemic in 2020 regarding the use of absentee/mail-in ballots in Tennessee and in some other southeastern states, including Alabama, Georgia, North Carolina, and Virginia, and it gives an overview of lawsuits filed in various states in 2022 and in 2023 on this same topic. The Section below also provides information on some of the most recent lawsuits filed in 2024 across the country on the usage of absentee/mail-in ballots, as well as the status of state absentee/mail-in voting laws during the 2024 primary election cycle as of March 2024. The discussion includes information about whether an excuse was required for absentee/mail-in voting in each of the fifty states and the District of Columbia or whether the state conducted all-mail elections in recent 2024 elections.

A. 2020 Lawsuits

Numerous lawsuits were filed across the country regarding the use of absentee/mail-in ballots during the COVID-19 pandemic in 2020. In fact, from March 16, 2020, to November 19, 2020, Ballotpedia maintained a list of various lawsuits that were filed in states throughout the country pertaining to voting and the administration of election issues during the COVID-19 pandemic.¹²⁵ Below is a summary of lawsuits filed in 2020, focusing on Tennessee first and then on the following additional southeastern states: Alabama, Georgia, North Carolina, and Virginia.

1. Tennessee

*Memphis A. Philip Randolph Institute v. Hargett*¹²⁶ was one of the most high-profile legal battles in Tennessee during the COVID-19

125. See *Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA (last updated Nov. 19, 2020), [https://ballotpedia.org/Changes_to_election_dates_procedures_and_administration_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020#Relevant_litigation](https://ballotpedia.org/Changes_to_election_dates_procedures_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020#Relevant_litigation) [<https://perma.cc/3V5M-RV27>] (providing a comprehensive state-by-state absentee/mail-in voting analysis along with legal developments, including a list of numerous lawsuits filed in every state in 2020 and their outcomes).

126. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548 (6th Cir. 2021).

pandemic in 2020 and garnered national attention leading up to the 2020 election.¹²⁷ The lawsuit, brought by the Memphis A. Philip Randolph Institute, the Tennessee State Conference of the NAACP, a few other organizations, and two Tennessee voters, was filed on May 1, 2020, against Defendants Tennessee Secretary of State Tre Hargett, Tennessee’s Coordinator of Elections Mark Goins, and District Attorney General for Shelby County, Tennessee, Amy Weirich, contesting, among other things, Tennessee’s “[o]verly [n]arrow [e]ligibility [c]riteria for [m]ail-[i]n [v]oting in the [c]ontext of a [p]andemic” in 2020 in violation of the First and Fourteenth Amendments to the United States Constitution.¹²⁸ Specifically, the Plaintiffs asserted that the state’s requirement that voters provide an excuse unrelated to fear of COVID-19 transmission to vote by absentee ballot was “overly narrow.”¹²⁹ The Plaintiffs argued

In advance of the August 6 and November 3, 2020[,] elections, Tennessee maintains one of the most restrictive lists of excuses to qualify for the casting of an absentee ballot in the country. Unless Tennessee voters satisfy one of the thirteen enumerated excuses (“Eligibility Criteria”), they must either opt to go in person to vote in the upcoming elections, or not vote at all.

....

Tennessee is one of only seven states that, in the face of the pandemic, continues to require their voters to provide an excuse before they may vote by absentee ballot. Other states, that in normal circumstances maintain similarly limited eligibility requirements for voting absentee, have recognized that the extraordinary circumstances caused by the pandemic require loosening of those requirements. These states include Alabama, Delaware, New Hampshire, Virginia, and West Virginia, which have each agreed to permit any voter to use COVID-19 as a valid excuse for requesting to vote by mail.

127. See *id.* at 553; *COVID-19 Voting Information*, ROCK THE VOTE (last updated Aug. 13, 2020, 10:30 AM EST), <https://web.archive.org/web/2020081721132320240427190226/https://www.rockthevote.org/how-to-vote/nationwide-voting-info/covid-19-voting-information/> [https://perma.cc/B3YN-54DR] (providing rules for absentee/mail-in voting and explaining an earlier ruling by the district court in the *Hargett* litigation).

128. See Complaint at 6, 18, *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548 (6th Cir. 2021) (No. 3:20-mc-09999), <https://lawyerscommittee.org/wp-content/uploads/2020/05/2020.05.01-FILED-Tennessee-VBM-Complaint.pdf> [https://perma.cc/3XBA-2QKS].

129. *Id.* at 18.

In Tennessee, however, voters who seek to exercise their fundamental right without exposing themselves to the serious health risks posed by voting in person during a pandemic are not clearly encompassed by any of the Eligibility Criteria. As a result, in the midst of this public health crisis, the choice between exposure and voting poses far more than mere inconvenience; it imposes an undue burden on voters' exercise of their fundamental right to vote.¹³⁰

In addition, the lawsuit asked the court to allow first-time voters to cast absentee ballots, modify the signature matching process to let voters "cure" their rejected ballots for a longer period of time, and remove the threat of criminal penalties that amount to a misdemeanor offense for anyone who was not an election commission employee who distributed unsolicited requests for absentee ballot applications to anyone.¹³¹

In the interim, in June 2020, a Davidson County Chancellor in Nashville, Tennessee issued a temporary injunction requiring that "the state of Tennessee give any registered voter the option to cast a ballot by mail, paving the way for widespread mail-in voting in light of the coronavirus pandemic," and although "[t]he risk of being exposed to coronavirus was not considered justification to submit a vote by mail," Chancellor Ellen Hobbs Lyle, on June 4, 2020, "ordered the state government to abandon this restriction and no longer require a specific excuse for why a resident could not vote in person."¹³² However, on August 5, 2020, the Tennessee Supreme Court vacated the Chancellor's order but instructed the State of Tennessee to ensure that Tennessee registered voters were informed that "persons with special vulnerability to COVID-19" or "those who [were] caretakers for persons with special vulnerability to COVID-19" were eligible "to vote absentee by mail in advance of the November 2020 election."¹³³

Additionally, on September 9, 2020, a United States District Court judge for the Middle District of Tennessee granted the Plaintiffs in

130. *Id.* at 19–20.

131. *See id.*, at 5, 7. In fact, statutorily pursuant to Tenn. Code Ann. § 2-6-202(c)(4) "[a] person who is not an employee of an election commission commits a Class A misdemeanor if such person gives an unsolicited request for application for absentee ballot to any person." If convicted, they could face a sentence of up to 11 months and 29 days in prison, a fine of up to \$2,500, or both. *Id.* at 5.

132. Brett Kelman, *Nashville judge orders Tennessee to permit vote by mail for all registered voters*, TENNESSEAN (updated June 5, 2020, 7:25 AM), <https://www.tennessean.com/story/news/2020/06/04/nashville-judge-orders-tennessee-permit-vote-mail-allresidents/3144766001/> [<https://perma.cc/9NUM-EEL4>].

133. *Fisher v. Hargett*, M2020-00831-SC-RDM-CV (Tenn. 2020), at *2, 684 S.W.3d 381, 385, available at https://www.tncourts.gov/sites/default/files/fisher.earlee._and_lay.benjamin.c.opn__0.pdf [<https://perma.cc/P8UY-SVTD>].

Memphis A. Philip Randolph Institute v. Hargett a preliminary injunction and temporarily blocked Tennessee's law that required first-time voters to cast their ballots in person with a valid photo ID before being eligible to vote by mail.¹³⁴ Essentially, this law otherwise would have excluded all first-time voters from using absentee or mail-in ballot options for the November 3, 2020 election, valid excuse or not.¹³⁵ Defendants then filed motions to both stay the injunction and reconsider the district court's decision, both of which were denied, and Defendants subsequently appealed the district court's decision to the Sixth Circuit Court of Appeals.¹³⁶ After hearing arguments on December 15, 2020, in a 2-1 decision, the Sixth Circuit Court of Appeals on June 22, 2021 vacated the lower court's preliminary injunction decision, once again requiring that first-time Tennessee voters appear in person with a valid photo ID to cast their ballots.¹³⁷ The case was again remanded to the district court for further proceedings consistent with the court's opinion,¹³⁸ but the case was ultimately dismissed on July 9, 2021.¹³⁹

2. Alabama

Similar to Tennessee, lawsuits were also filed in Alabama during the COVID-19 pandemic in 2020 related to absentee and mail-in voting. For example, in *People First of Alabama v. Merrill*, several Alabama voters and various voting rights organizations filed a lawsuit on May 1, 2020, against numerous Defendants, such as Secretary of State John Merrill, the State of Alabama, county circuit clerks and absentee election managers throughout Alabama, and probate judges who served as the chief election officials in their respective counties.¹⁴⁰ The Plaintiffs requested declaratory and injunctive relief and asserted in their complaint that three provisions within Alabama's election laws, specifically (1) either a notary or two witnesses being required to sign absentee ballot affidavits; (2) absentee voters being required to provide a copy of their photo identification when submitting an absentee ballot application; and (3) imposition of a de facto curbside voting ban, violated their First Amendment fundamental right to vote, the Equal Protection Clause, the

134. See *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021).

135. See *id.*

136. See *id.*

137. See *id.* at 561.

138. *Id.*

139. *Tennessee 2020 Absentee Voting Challenge, Memphis A. Philip Randolph Institute v. Hargett*, DEMOCRACY DOCKET, <https://www.democracydocket.com/cases/tennessee-2020-absentee-voting-challenge/> [<https://perma.cc/E5XN-RWFB>].

140. See *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1109–31 (N.D. Ala. 2020).

Americans with Disabilities Act, and the Voting Rights Act, both on their face and as applied during the 2020 COVID-19 pandemic.¹⁴¹

On September 30, 2020, the United States District Court for the Northern District of Alabama granted the Plaintiffs' request for both declaratory and injunctive relief during the November 3, 2020, general election due to the COVID-19 pandemic that changed Alabama's voting laws.¹⁴² Overall, the district court judge temporarily enjoined or restricted enforcement of the three challenged provisions of Alabama's election laws, including suspension of the witness requirements for absentee/mail-in voting requirements for voters with underlying medical conditions and the photo ID requirements for absentee voters over 65 or those under 65.¹⁴³ The judge also lifted the curbside voting ban to allow any counties in Alabama who wanted to implement the practice the opportunity to do so, but he also made clear that there was no mandate that counties had to provide curbside voting in Alabama.¹⁴⁴ This case was appealed and on October 13, 2020, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court's September 30, 2020 order and reinstated both Alabama's witness and photo ID requirements, but the curbside voting ban remained suspended as ordered by the district court for Election Day.¹⁴⁵

3. Georgia

In May 2020, a non-partisan voter education and registration group, the New Georgia Project, along with several Georgia voters, filed a lawsuit against Georgia Secretary of State and Chair of the Georgia State Election Board Brad Raffensperger, numerous other state election officials, and members of seventeen county boards of election in *New Georgia Project v. Raffensperger*.¹⁴⁶ On June 10, 2020, the Plaintiffs filed for declaratory and injunctive relief requesting that the United States District Court for the Northern District of Georgia in Atlanta consider whether Georgia's statutory requirement that absentee ballots be received by the closing of polls on Election Day, which was by 7:00 p.m. on November 3, 2020, was an unconstitutional infringement upon the Plaintiff's right to vote, and to block the State of Georgia from enforcing several absentee ballot related rules, regulations, and practices.¹⁴⁷ On August 31, 2020, the district court granted in part and denied in part the

141. *Id.* at 1076.

142. *Id.* at 1093.

143. *Id.*

144. *Id.*

145. *See Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic*, *supra* note 125.

146. *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1279 (N.D. Ga. 2020).

147. *See id.*

Plaintiffs' motion for a preliminary injunction.¹⁴⁸ The district court judge agreed with the Plaintiffs that the receipt deadline for absentee ballots should be extended, but the judge rejected and dismissed the Plaintiffs' other asserted claims, including requiring pre-paid postage for the return of all absentee ballots cast by mail.¹⁴⁹ Regarding the receipt deadline extension, the district court judge ruled that valid absentee ballots from qualified voters postmarked by Election Day on November 3, 2020, and received at their respective county's office by no later than three (3) business days after Election Day (i.e., by November 6, 2020) by 7:00 p.m. were to be counted, in contrast to the five (5) business day extension the Plaintiffs had requested.¹⁵⁰ An appeal was filed with the U.S. Court of Appeals for the Eleventh Circuit, and on October 2, 2020, the appellate court ordered reinstatement of the original November 3, 2020, Election Day deadline for the receipt of absentee ballots cast by mail in Georgia.¹⁵¹

4. North Carolina

On June 12, 2020, North Carolina Governor Roy Cooper signed a law that temporarily reduced the witness signature requirement on a completed absentee ballot from two witness signatures to one during the 2020 election cycle because of the COVID-19 pandemic.¹⁵² Usually, either a notary or two witnesses were required to observe North Carolina voters complete their absentee ballot.¹⁵³ Witnesses were instructed on the ballot to print their name and full address and include their signature in order for the absentee vote to count.¹⁵⁴

Similar to Georgia, legal battles started in North Carolina, including on the issue of whether absentee ballots could be counted if they were received after the November 3, 2020, Election Day deadline, up until November 12, 2020.¹⁵⁵ On August 10, 2020, Plaintiffs North Carolina Alliance for Retired Americans and North Carolina voters filed a lawsuit, *North Carolina Alliance for Retired Americans v. The State of North*

148. *Id.* at 1308.

149. *See id.*

150. *Id.*

151. *See Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic, supra* note 125.

152. *See id.*

153. Elise Viebeck, *A legal fight over how to fix ballot errors in North Carolina has left thousands of voters in limbo. Nearly half are people of color*, WASH. POST (Oct. 12, 2020, 8:01 AM EDT), https://www.washingtonpost.com/politics/north-carolina-ballot-errors/2020/10/12/cd7bd50a-0981-11eb-a166-dc429b380d10_story.html [<https://perma.cc/AB2S-396X>].

154. *See id.*

155. *See North Carolina Alliance for Retired Americans v. The State of North Carolina*, Complaint (General Court of Justice Superior Court Division, Aug. 10, 2020), <https://www.democracydocket.com/wp-content/uploads/2020/08/2020.08.10-NC-Alliance-for-Retired-Americans-v.-State-Complaint-1.pdf> [<https://perma.cc/23AK-A8CQ>].

Carolina, against the State of North Carolina, the North Carolina State Board of Elections, and the Chair of the North Carolina State Board of Elections, Damon Circosta, requesting both declaratory and injunctive relief and seeking relief in several areas including, but not limited to, stopping the enforcement of North Carolina's absentee ballot receipt deadline and requiring implementation of a cure requirement for defective absentee ballots for the remaining elections in 2020 so as not to unconstitutionally burden their right to vote during the COVID-19 pandemic.¹⁵⁶ A month later, on September 22, 2020, North Carolina's State Board of Elections issued an announcement based upon a settlement it had reached with the Plaintiffs in the case, relating to (1) extending the absentee/mail-in ballot receipt deadline and (2) submission of voter affidavits to cure any absentee/mail-in ballot deficiencies.¹⁵⁷

On October 2, 2020, a Wake County Superior Court Judge approved the settlement's terms.¹⁵⁸ Nevertheless, the very next day on October 3, 2020, a United States District Court Judge for the Eastern District of North Carolina issued a temporary restraining order thereby blocking the approved settlement as well as consolidated three other similar federal lawsuits pertaining to North Carolina's absentee/mail-in ballot voting procedures and transferred all of the cases to another judge.¹⁵⁹ On October 14, 2020, the judge entered an order upholding enforcement of the state's witness requirement for absentee/mail-in ballots.¹⁶⁰ However, the judge allowed the absentee/mail-in ballot receipt extension deadline of November 12, 2020 for ballots postmarked on or before the November 3, 2020 Election Day to remain in place and permitted voters to cure issues with their absentee ballots.¹⁶¹ Therefore, due to this judge's decision, North Carolina's State Board of Elections issued a memo on October 19, 2020 directing all county boards of elections to accept and count all mailed-in absentee ballots received by 5:00 p.m. on November

156. *See id.*

157. *See Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic, supra* note 125; *see also* North Carolina Alliance for Retired Americans v. The State of North Carolina, Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, No. 20-CVS-8881 (General Court of Justice Superior Court Division, Sept. 22, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/08/2020.08.10-NC-Alliance-for-Retired-Americans-v.-State-Complaint-1.pdf> [<https://perma.cc/B3CU-W7SW>].

158. *See Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic, supra* note 125.

159. *See id.*

160. *See id.*; *see also* Viebeck, *supra* note 153.

161. *See id.*; *see also* Viebeck, *supra* note 153.

12, 2020 as long as the ballots were postmarked on or before Election Day on November 3, 2020.¹⁶²

North Carolina officials filed an appeal with the U.S. Court of Appeals for the Fourth Circuit due to the injunction.¹⁶³ On October 20, 2020, the appellate court issued its decision wherein it refused to “block the extension of North Carolina’s absentee/mail-in ballot return and receipt deadlines.”¹⁶⁴ The court thereby permitted North Carolina’s State Board of Elections to proceed with its process for voters to fix (i.e., “cure”) absentee/mail-in ballot errors, and it also upheld the absentee/mail-in ballot deadline extension wherein all ballots that were postmarked on or before Election Day had to be counted if they were received on November 12, 2020 by 5:00 p.m.¹⁶⁵ On October 28, 2020 and again on October 29, 2020, the U.S. Supreme Court refused to intervene, which allowed North Carolina’s absentee/mail-in ballot deadline extension to remain in place during the November 3, 2020 Election Day.¹⁶⁶

5. Virginia

Virginia, like other states, was involved in litigation during the COVID-19 pandemic in 2020. On April 17, 2020, Plaintiffs League of Women Voters of Virginia and several Virginia voters filed a lawsuit, *League of Women Voters of Virginia v. Virginia State Board of Elections*, against several Defendants, including the Virginia State Board of Elections and various state officials. Plaintiffs asserted that Virginia’s witness signature requirement for absentee ballots was “an unconstitutional burden on the right to vote as applied during the COVID-19 pandemic.”¹⁶⁷ On April 21, 2020, Plaintiffs filed for a preliminary injunction seeking to (1) enjoin the State Defendants’ enforcement of Virginia’s statutorily mandated witness requirement (i.e., the requirement that absentee ballots must be signed by a witness prior to submission) during the June 23, 2020 primaries and for all future elections in Virginia until in-person contact was deemed safe; (2) require the State Defendants to release guidance to city and county election officials mandating that they count validly submitted absentee ballots that were just missing a witness signature for the June 23, 2020 primary elections; and (3) require

162. See Patrick Gannon, *County Boards of Elections Now Contacting Voters with Absentee Ballot Deficiencies*, North Carolina State Board of Elections (Oct. 19, 2020), <https://www.ncsbe.gov/news/press-releases/2020/10/19/county-boards-elections-now-contacting-voters-absentee-ballot> [<https://perma.cc/Y3KR-3BNT>].

163. See Viebeck, *supra* note 153.

164. See *Changes to election dates, procedures, and administration in response to the coronavirus (COVID-19) pandemic*, *supra* note 125.

165. See *id.*

166. See *id.*

167. *League of Women Voters of Va. v. Va. State Bd. of Elections*, 481 F. Supp. 3d 580, 581 (W.D. Va. 2020).

the State Defendants, in coordination with city and county election officials, to engage in a public information campaign notifying Virginia voters that the witness signature requirement had been eliminated.¹⁶⁸ A few days after the Plaintiffs filed their preliminary injunction motion, six voters and the Republican Party of Virginia filed motions to intervene in the case, but the court only allowed the Republican Party of Virginia to intervene and proceed as a defendant in the case.¹⁶⁹ The parties then reached a settlement and on April 27, 2020, the Plaintiffs and State Defendants' jointly filed a proposed partial consent judgment and decree with the United States District Court for the Western District of Virginia for approval that provided for the suspension of Virginia's witness requirement for absentee ballots for the June 23, 2020 primaries solely.¹⁷⁰ On May 5, 2020, the district court signed an order approving of the jointly filed partial consent decree.¹⁷¹

Moreover, on July 24, 2020, the Plaintiffs filed another preliminary injunction motion seeking basically the same relief requested in their first preliminary injunction, but the new motion sought to suspend Virginia's witness requirement for absentee ballots for all November 3, 2020 elections, as opposed to the June 23, 2020 primary elections that had already taken place.¹⁷² The parties reached another settlement, and on August 5, 2020, they jointly filed a new proposed partial consent judgment and decree with the United States District Court for the Western District of Virginia. The new decree provided for the suspension of Virginia's statutorily mandated witness requirement for absentee ballots for Election Day on November 3, 2020.¹⁷³ Under the terms of the proposed settlement, state election officials again agreed not to enforce the witness signature requirement.¹⁷⁴ On August 21, 2020, the District Court signed an order approving the jointly filed partial consent decree, thereby approving of the terms of the proposed settlement agreement reached by the parties.¹⁷⁵

168. *Id.* at 584.

169. *Id.*

170. *Id.*

171. *Id.* at 585.

172. *League of Women Voters of Va.*, 481 F. Supp. 3d at 585.

173. *Id.* at 585–86.

174. *See id.* at 586.

175. *See id.* at 596.

B. 2022 Lawsuits

As shown above, the 2020 election cycle saw many organizations joined by individual voters filing lawsuits and battling over state voting laws throughout the United States, including policies and practices related to absentee/mail-in voting, in order to ensure free and fair elections during the COVID-19 pandemic. However, the absentee/mail-in ballot debate has continued over the last several years to fall along partisan lines, including in 2022. Democrats have repeatedly favored opening and expanding voter access with absentee/mail-in ballot policies and early voting procedures, whereas Republicans have often argued that absentee/mail-in ballots need to be more heavily regulated to ensure the safety, security, and integrity of elections.¹⁷⁶

This partisan divide persisted into 2022 when state legislators continued to focus their attention on absentee/mail-in voting “with half of the 10 new restrictive laws creating new barriers to voting by mail,” including “new requirements that voters provide identification numbers when they apply to vote by mail, prohibitions against drop boxes, and limitations on permanent absentee voting,” according to the Brennan Center for Justice in October 2022.¹⁷⁷ The Brennan Center noted that such restrictive measures were a “backlash against mail voting follow[ing] the 2020 elections when a much larger proportion of the electorate relied on mail voting than in the past due to the Covid-19 pandemic.”¹⁷⁸ It was further noted that “[t]he expansion of mail voting in 2020 helped ensure that elections could continue during the height of the pandemic and would be beneficial to many voters—including voters with disabilities, elderly voters, and student voters away from home—regardless of the pandemic.”¹⁷⁹

Moreover, besides several bills in state legislatures being debated and enacted as it related to absentee/mail-in voting, numerous lawsuits were also filed in 2022 related to this topic, including cases that were heard by the United States Supreme Court. In fact, as of October 27, 2022, over

176. See Hall, *supra* note 90; see also *Arguments for and against no-excuse absentee/mail-in voting*, BALLOTPEDIA, https://ballotpedia.org/Arguments_for_and_against_no-excuse_absentee/mail-in_voting [<https://perma.cc/QRK8-XJXT>] (featuring various arguments and opinions from editorials, research papers, and politicians on the use of absentee/mail-in ballots over the years, including during and at the height of the COVID-19 pandemic in 2020); see also *Republicans and Democrats Move Further Apart in Views of Voting Access*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access/> [<https://perma.cc/WP2U-C6PW>].

177. *Voting Laws Roundup: October 2022*, BRENNAN CTR. FOR JUST. (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022> [<https://perma.cc/26XU-TSUI>] (citing “MO H.B. 1878, NJ A.B. 3819, NJ A.B. 3820, OK H.B. 3364, SC S.B. 108.”) (footnotes omitted).

178. *Id.*

179. *Id.*

100 lawsuits were filed in battleground states ahead of the midterm elections; this was “the most litigation ever before an election.”¹⁸⁰ These lawsuits were mostly filed “by Republicans [and] target[ed] rules over mail-in voting, early voting, voter access, voting machines, voting registration, the counting of mismarked absentee ballots and access for partisan poll watchers.”¹⁸¹ However, Democrats also filed their fair share of lawsuits too and focused their legal efforts prior to the 2022 midterm elections “on making voting easier and helping those denied a chance to vote, through legal hotlines and volunteers.”¹⁸² In fact, a group of attorneys led by attorney Marc Elias and his law firm single-handedly litigated “roughly 40 cases in 19 states.”¹⁸³ It was also highlighted in 2022 that “[I]tigation around elections is nothing new; almost every election begets some legal challenge. But the bulk of this litigation generally occurs after the votes have been cast, not before Election Day.”¹⁸⁴

During the litigious 2022 election cycle as it related to voting rights and election litigation, one statistical report revealed, among other things, the following: (1) 175 new democracy-related lawsuits were filed in 31 states; (2) more anti-voting lawsuits as opposed to pro-voting lawsuits were filed; (3) there was a fairly steady rise in new lawsuits being filed each month ahead of the 2022 midterm elections, but “there was a dramatic surge of new lawsuits—the number of lawsuits filed in November (47) nearly doubled from October (24);” (4) the “top three most litigation-heavy states” were Arizona (35 lawsuits), Pennsylvania (21 lawsuits), and Wisconsin (16 lawsuits); (5) most (76%) of the lawsuits were filed in state courts (133 lawsuits) and the other 24% of the lawsuits were filed in federal courts (42 lawsuits); and (6) most of the lawsuits (when excluding the 40 post-election lawsuits filed in 2022) focused on the following four major topics: vote by mail (51 lawsuits),

180. Associated Press, *Election Day is Nov. 8, but the legal challenges have already begun*, NBC NEWS (Oct. 27, 2022, 7:44 AM CDT), <https://www.nbcnews.com/politics/2022-election/election-day-nov-8-legal-challenges-already-begun-rcna54271> [<https://perma.cc/ZEV5-SFTC>].

181. *Id.* (noting that the “RNC said it has built a multimillion-dollar ‘election integrity’ team, hiring 37 lawyers in key states, holding more than 5,000 trainings to teach volunteers to look for voter fraud, which is rare, and filing 73 lawsuits in 20 states.”).

182. *Id.* (noting that “Democratic-led groups ha[d] initiated roughly 35 lawsuits that focus[ed] largely on making voting easier,” including a lawsuit “filed on behalf of Voto Latino and the Arizona Alliance for Retired Americans to stop intimidation over using drop boxes in Arizona. The ACLU of Pennsylvania sent a letter to Allegheny County officials on mail-in ballot concerns.”).

183. *Id.*

184. *Id.*

followed by election administration (47 lawsuits), in-person voting (28 lawsuits), and registration (22 lawsuits).¹⁸⁵

As noted above, Pennsylvania “saw the second most democracy-related lawsuits” during the litigious 2022 election cycle.¹⁸⁶ In fact, one of the major absentee/mail-in ballot disputes was in Pennsylvania, where the question of whether to count timely but undated mail-in ballots in the official returns had been at issue ever since the 2020 election; the question was at the heart of a litany of unresolved litigation throughout the state surrounding the issue.¹⁸⁷ Pennsylvania passed a significant mail-in ballot law that took effect in 2020 that allowed absentee voting without an excuse, in contrast to its previous law that only permitted vote-by-mail “when a person was disabled, ill, or had plans to be away from home and could not vote in person.”¹⁸⁸ After this new Pennsylvania law took effect in 2020, multiple lawsuits were filed in various courts, especially concerning “whether the law’s language stating that voters shall date the envelopes in which ballots are returned is a requirement for ballots to be valid.”¹⁸⁹ In 2020, the Pennsylvania Supreme Court ruled in *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* that absentee ballots should be counted for the 2020 presidential election for any voter who mistakenly failed to date their returned absentee ballot envelope, but the date requirement should be enforced in all future elections.¹⁹⁰

On January 3, 2022, the Commonwealth Court of Pennsylvania in *Migliori v. Cohen* ordered that undated mail-in ballots should not be counted in a Lehigh County judicial election held on November 2,

185. See *2022 Litigation Report: How Republicans Lost and Voters Won in Court?*, DEMOCRACY DOCKET (Jan. 9, 2023), <https://www.democracydocket.com/analysis/2022-litigation-report-how-republicans-lost-and-voters-won-in-court/> [<https://perma.cc/3W45-UX6D>] (categorizing a lawsuit as a “pro-voting” lawsuit “if it seeks to protect or expand the right to vote” and focuses on “making voting accessible for all eligible voters as well as promoting free and fair elections,” versus an “anti-voting” lawsuit as one “that seek[s] to suppress voting through tactics such as tightening the rules around voter registration, adding more obstacles to mail-in or in-person voting processes and more.”). It was noted that some of the lawsuits fell into more than just one of the above-named four topical categories. *Id.*

186. Paige Anderholm, *What’s at Stake in Pennsylvania’s State Supreme Court Race?*, DEMOCRACY DOCKET (Oct. 10, 2023), <https://www.democracydocket.com/analysis/whats-at-stake-in-pennsylvanias-state-supreme-court-race/> [<https://perma.cc/LU7Z-SCNL>].

187. See Marley Parish & Peter Hall, *U.S. Supreme Court throws out lower court ruling that undated vote-by-mail ballots must be counted*, PA CAPITAL-STAR (Oct. 11, 2022, 5:02 PM), <https://penncapital-star.com/campaigns-elections/u-s-supreme-court-throws-out-lower-court-ruling-that-undated-vote-by-mail-ballots-must-be-counted/> [<https://perma.cc/9N4W-EGZS>].

188. *Id.*

189. *Id.*

190. See Parish & Hall, *supra* note 187; see also *In re Canvass of Absentee and Mail-In Ballots of November 2020 General Election*, 241 A.3d. 1058, 1079–80 (Pa. 2020) (Opinion of Justice Wecht); *id.* at 1090–91 (Opinion of Justices Dougherty, Saylor, and Mundy).

2021.¹⁹¹ This ruling caused several Pennsylvania voters as Plaintiffs, represented by the American Civil Liberties Union of Pennsylvania, to file a section 1983 federal lawsuit in the Eastern District of Pennsylvania on January 31, 2022, against Defendant Lehigh County Board of Elections, alleging violations of their voting rights pursuant to the Materiality Provision of the Civil Rights Act.¹⁹² This Act is a federal law that forbids any ““person acting under color of law [from] deny[ing] the right of any individual to vote in any election because of an error or omission . . . if such error or omission is not material in determining whether such voter is qualified . . . to vote in such election.””¹⁹³ This case became one of many lawsuits filed before state and federal courts to determine whether undated or misdated mail-in ballots should be counted in elections.¹⁹⁴ The Plaintiff voters argued that the county election board’s decision not to count their votes in the judicial election solely because they failed to date the outside return envelope violated their federal civil rights under the Materiality Provision of the Civil Rights Act.¹⁹⁵ Two of the candidates for the three judicial vacancies, David Ritter and Zachary Cohen, intervened in the lawsuit, and all parties in the lawsuit filed motions for summary judgment.¹⁹⁶ On March 16, 2022, the district court granted both Lehigh County Board of Elections’ and Ritters’ motions for summary judgment, finding “that there was no private right of action to enforce the Materiality Provision,” so the date requirements had to be met for their mail-in ballots to count.¹⁹⁷ The Plaintiff voters then appealed this case to the U.S. Court of Appeals for the Third Circuit.¹⁹⁸ The appellate court heard arguments on May 18, 2022, and issued an opinion on May 27, 2022, holding that dates on the outer return envelopes of otherwise timely submitted mail-in ballots were not mandatory for such ballots to be counted, and that the refusal to count undated ballots in the November 2, 2021 Lehigh County judgeship races would “violate the

191. See Parish & Hall, *supra* note 187; see also *Migliori v. Cohen*, 36 F.4th 153, 158 (3rd Cir. 2022).

192. See *Cohen*, 36 F.4th at 156 (referring to the “Materiality Provision” and citing 52 U.S.C. § 10101(a)(2)(B)).

193. *Id.*; 52 U.S.C. § 10101(a)(2)(B).

No person shall deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

194. See Parish & Hall, *supra* note 187.

195. *Cohen*, 36 F.4th at 158.

196. *Id.* at 157–58.

197. *Id.* at 158.

198. See *id.*

Materiality Provision by denying Voters their right to vote based on an omission immaterial to determining their qualifications to vote.”¹⁹⁹ A petition for writ of certiorari was filed by Ritter and was granted by the United States Supreme Court.²⁰⁰ On October 11, 2022, the United States Supreme Court, in a 7-2 decision, vacated (i.e., voided) the Third Circuit Court’s judgment and remanded the case back to that appellate court “with instructions to dismiss the case as moot,”²⁰¹ meaning “that there [was] no longer an issue for the court to resolve.”²⁰² Therefore, in 2022, the Pennsylvania state court and federal court rulings prohibiting the exclusion of absentee/mail-in ballots over immaterial dates remained good law.²⁰³

Additionally, Pennsylvania’s Supreme Court on October 21, 2022 agreed to hear a petition in *Ball v. Chapman* filed on October 16, 2022 by the Republican National Committee, the National Republican Congressional Committee, the Republican Party of Pennsylvania, and several Republican voters against Acting Secretary of the Commonwealth Leigh Chapman (D) alleging that the Pennsylvania Department of State’s guidance that permitted election officials to count undated or incorrectly dated absentee and mail-in ballots that were timely received for the 2022 general election violated Pennsylvania’s election law statute.²⁰⁴ On November 1, 2022, the Pennsylvania Supreme Court granted in part and denied in part the Petitioners’ request for injunctive and declaratory relief and ultimately ordered the Pennsylvania county boards of elections to not count absentee or mail-in ballots that were timely received for the November 8, 2022 general election but that were in undated or incorrectly dated outer return envelopes.²⁰⁵ The court was evenly split (3-3) on whether the failure to count such ballots ran afoul of the Materiality Provision of the Civil Rights Act, 52 U.S.C.

199. *Id.* at 153, 164.

200. *See Ritter v. Migliori*, 143 S. Ct. 297, 298 (2022).

201. *See id.* at 298 (noting Sotomayor, J., and Jackson, J, would have denied the petition for writ of certiorari).

202. Ellis Champion, *SCOTUS Vacates Ruling Requiring Counting of PA Undated Mail-in Ballots*, DEMOCRACY DOCKET (Oct. 11, 2022), <https://www.democracymocket.com/news-alerts/scotus-vacates-ruling-requiring-counting-of-pa-undated-mail-in-ballots/> [https://perma.cc/QM4V-E79V].

203. *See* Champion, *supra* note 202 (“While today’s decision could have implications for counting mail-in ballots in Pennsylvania in future elections, as it currently stands, undated mail-in ballots will continue to be counted in Pennsylvania due to election guidance and state court rulings.”).

204. *Court Cases - Pennsylvania Undated and Wrongly Dated Mail-in Ballots Challenge (Ball)*, DEMOCRACY DOCKET, <https://www.democracymocket.com/cases/pennsylvania-undated-and-wrongly-dated-mail-in-ballot-challenge/> [https://perma.cc/2FBC-JQDG].

205. *See Ball v. Chapman*, Order, No. 102 MM 2022 (M.D. Pa. 2022), available at <https://www.democracymocket.com/wp-content/uploads/2022/10/PA-ORDER-.pdf> [https://perma.cc/5GAY-F4NG].

§ 10101(a)(2)(B).²⁰⁶ Thus, the Pennsylvania Supreme Court's deadlocked 3-3 decision kept in place the lower court judge's decision to deny issuance of a preliminary injunction that would have prevented Pennsylvania voters from curing absentee and mail-in ballots mistakes, such as incorrect or missing dates, ahead of the November 2022 midterm election.²⁰⁷ Therefore, for the November 2022 midterm election, ballot curing was allowed to continue, and misdated or undated absentee and mail-in ballots were counted in Pennsylvania.²⁰⁸

Wisconsin was one of the other top three states that was involved in a lot of litigation in 2022.²⁰⁹ As it related to vote-by-mail, the Republican National Committee won legal battles "in Wisconsin on ballot curing and drop boxes."²¹⁰ In fact, "one conservative group filed five separate lawsuits in a single day challenging the use of drop boxes throughout various major cities in the Badger State."²¹¹ Another huge number of mail-in voting lawsuits that were filed in 2022 surrounded who could vote-by-mail.²¹² For example, in Delaware, "conservatives brought a successful challenge against the state's new no-excuse mail-in voting law" and "in Arizona and Pennsylvania, Republicans filed lawsuits seeking to invalidate these states' robust mail-in voting systems, both of which were supported by Republicans when they were initially implemented."²¹³ Lawsuits were also filed in the states of Michigan and New York that sought to "restrict mail-in voting," but those lawsuits were unsuccessful, which "allow[ed] voters to take advantage of their states' mail-in voting opportunities during the 2022 midterm elections."²¹⁴

C. 2023 Lawsuits

Democracy Docket tracked litigation filed throughout 2023 related to voting rights and election laws and on January 18, 2024, it provided a comprehensive report on those various lawsuits, including litigation surrounding absentee and mail-in voting.²¹⁵ The report found that

206. *See id.*; *see also* 52 U.S.C. § 10101(a)(2)(B).

207. *See* Anderholm, *supra* note 186 (referencing *Ball v. Chapman*).

208. *See id.*

209. *See 2022 Litigation Report, supra* note 185.

210. Associated Press, *supra* note 180.

211. *2022 Litigation Report, supra* note 185.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See Democracy Docket's 2023 Litigation Report*, DEMOCRACY DOCKET (Jan. 18, 2024), <https://www.democracydocket.com/analysis/democracy-dockets-2023-litigation-report/> [<https://perma.cc/5383-HN2A>]. Also, for a comprehensive overview of election-related bills and enacted legislation by state in 2023, especially those related to absentee and mail voting, election security, and voting technology, *see Report: 2023 Election Enactments*, Nat'l Conf. of St.

“[c]onsidering it was not a federal election year, 2023 was quite busy for democracy in the courts.”²¹⁶ Specifically, the report revealed the following statistical data for 2023: (1) 73 new democracy-related lawsuits were filed in 31 states; (2) more pro-voting lawsuits (51 lawsuits) were filed mostly by nonpartisan organizations including the NAACP and the League of Women Voters as opposed to the number of anti-voting lawsuits (22 lawsuits) that were filed mostly by Republican litigants at 68%; (3) the top three most litigious states in 2023 were Arizona, Florida, and Mississippi (6-7 new lawsuits filed in each state); (4) lawsuits were evenly filed in state and federal courts; and (5) most of the lawsuits focused on the following six topics in descending order: election administration (26 lawsuits), followed by registration (22 lawsuits), mail-in voting (17 lawsuits), in-person voting (10 lawsuits), post-election litigation (6 lawsuits), and felony disenfranchisement (6 lawsuits).²¹⁷ Although Arizona, Florida, and Mississippi were the three most heavily litigated states in 2023 with only 6-7 new voting lawsuits being filed in each state, the rest of the 28 out of the 31 states only saw on average approximately two voting lawsuits being filed during 2023.²¹⁸ Florida and Mississippi were mostly involved in “pro-voting litigation” in 2023 versus Arizona where most of the lawsuits were filed by “anti-voting litigants.”²¹⁹ Also, most of the voting lawsuits filed in 2023 focused heavily on election administration, then voter registration, with mail-in voting being the third most prevalent litigated area in 2023 with 17 lawsuits being filed.²²⁰

D. 2024 Lawsuits

Early in the 2024 presidential election year, litigation was filed in a couple of states regarding absentee and mail-in ballots. In fact, lawsuits were filed against three states in the first two months of 2024. Lawsuits were filed in the states of Mississippi, Minnesota, and Pennsylvania in January and February of 2024.²²¹ These lawsuits challenge mail-in ballot

Legislatures (updated Jan. 5, 2024), <https://www.ncsl.org/elections-and-campaigns/2023-election-enactments> [<https://perma.cc/U8EQ-38DP>].

216. *Democracy Docket's 2023 Litigation Report*, *supra* note 215.

217. *See id.* It was noted that some of the lawsuits fell in more than just one of the above named six topical categories. *Id.*

218. *See id.*

219. *Id.*

220. *See id.*

221. *See Vote By Mail*, DEMOCRACY DOCKET, <https://www.democracymail.com/topic/vote-by-mail/?s=>. [<https://perma.cc/SQW3-9VHA>] (After searching for lawsuits under the “Vote by Mail” topic in “All” states and looking for cases “Filed” in 2024, the following three cases appeared: (1) *Republican National Committee v. Wetzel*: a “Mississippi Mail-In Ballot Receipt Deadline Challenge” that was filed on January 26, 2024 that involves a “[l]awsuit filed on behalf

receipt deadlines, witness signature requirements, and absentee ballot return policies in each state, respectively.²²²

E. *Status of State Absentee/Mail-In Voting Laws During the 2024 Primary Election Cycle*

The National Conference of State Legislatures provided an overview of the status of state absentee/mail-in voting laws across the United States during the 2024 primary election cycle prior to the March 5, 2024 Presidential Primary Election, and each state's law related to absentee/mail-in ballots during this time frame is divided into the following three categories based upon mail-in voting types: (1) states in which an excuse was required for absentee/mail-in voting; (2) states in which no excuse was required; and (3) states which conducted all-mail elections.²²³

1. An Excuse Was Required for Absentee/Mail-In Voting

When reviewing the state laws in place during the 2024 primary election cycle as it relates to absentee/mail-in ballots as of Super Tuesday,²²⁴ the following fourteen states required an excuse for absentee/mail-in voting: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire,

of Republicans challenging a Mississippi law that allows mail-in ballots that are postmarked on or before Election Day to be counted if they are received within five business days of the election;" (2) *Zimmerman v. Schmidt*: a "Pennsylvania Absentee Ballot Return Policy Challenge" that was filed on January 30, 2024 that involves a "[l]awsuit filed on behalf of members of the Pennsylvania House of Representatives challenging Pennsylvania laws and guidance that allow voters to submit absentee ballots to their local Board of Elections;" and (3) *Minnesota Alliance for Retired Americans v. Simon*: a "Minnesota Witness Requirement Challenge" that was filed on February 13, 2024 that involves a "[l]awsuit filed by the Minnesota Alliance for Retired Americans and two voters against Minnesota Secretary of State Steve Simon (D) challenging the state's requirement that absentee voters obtain the signature of a witness to cast an absentee ballot."). *Id.*

222. *See id.*

223. *See Table 2: Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (last updated Jan. 3, 2024), <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee> [<https://perma.cc/JC6W-J95A>].

224. Super Tuesday was held on Tuesday, March 5, 2024. Super Tuesday is "when voters in 16 states and one territory cast their ballots in the 2024 presidential primaries," is "traditionally the biggest day nationwide for primary elections and caucuses before the actual Election Day in November," can include states "choosing who should run for governor or senator for their state, and some district attorneys, too," is "almost always the first Tuesday in March," and is when "Democrats and Republicans vote on who they want to run for president and other offices." Colleen Long, *What to know about Super Tuesday and why it matters*, AP NEWS (updated Mar. 5, 2024, 5:56 PM CST), <https://apnews.com/article/what-is-super-tuesday-80f71138b69691fc8edbeb07fd1c7774> [<https://perma.cc/SM76-QN6X>].

South Carolina, Tennessee, Texas, and West Virginia.²²⁵ The list of the acceptable excuses to vote absentee in these states vary but continue to include the following reasons: “Out of County on Election Day, Illness or Disability, Persons Over a Certain Age, Work Shift is During all Voting Hours, Student Living Outside of County, Election Worker or Poll Worker, Religious Belief or Practice, *ACP [Address Confidentiality Program] Participant, Incarcerated (but Still Qualified to Vote), and Jurors.”²²⁶

2. No Excuse Was Required

As of Super Tuesday on March 5, 2024 during the 2024 primary election cycle as it relates to absentee/mail-in ballots, the following twenty-eight states did not require an excuse to vote by absentee/mail-in ballot: Alaska, Arizona, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia, Wisconsin, and Wyoming.²²⁷

3. Conducted All-Mail Elections

Also, when reviewing state laws in place during the 2024 primary election cycle as it relates to absentee/mail-in ballots as of Super Tuesday on March 5, 2024, the following eight states and the District of Columbia conducted all-mail elections: California, Colorado, District of Columbia, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington.²²⁸

CONCLUSION

How voting took place immediately before, during, and since the COVID-19 pandemic in 2020 regarding the use of absentee/mail-in

225. See *Table 2: Excuses to Vote Absentee*, *supra* note 223 (providing the applicable state statute while listing states that require excuses to vote absentee along with the various acceptable excuses to vote absentee in each of these respective states as of early 2024).

226. *Id.*

227. *Table 1: States with No-Excuse Absentee Voting*, NAT’L CONF. OF STATE LEGISLATURES at 3 (updated Dec. 20, 2023), <https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting> [<https://perma.cc/LV3F-76GL>] (providing the applicable state statute while listing the states with no-excuse absentee voting in 2024. It was noted that “Rhode Island lists several excuses to vote absentee, but also specifies ‘No specific reason necessary.’ Since any Rhode Islander can request an absentee ballot, NCSL has categorized it as no excuse.”). It was also stated that “‘no-excuse’ absentee voting . . . means that any voter can request and cast an absentee/mail ballot, no excuse or reason necessary.” *Id.*

228. *Id.* (providing the applicable statutes and listing that the District of Columbia and these states were conducting all-mail elections in early 2024, “which means voters do not need to request a ballot, and instead automatically receive one.”). *Id.* It was noted that Vermont has all-mail elections for “general elections only.” *Id.*

ballots continues to be a point of discussion and debate throughout the United States even in 2024. In general, there are three main categories of vote-by-mail: (1) “absentee voting with a valid, legally delineated excuse”; (2) “no-excuse” absentee voting; and (3) “universal vote-by-mail.”²²⁹ A small number of states require a valid excuse in order for voters to be allowed to vote absentee in that state, whereas a majority of states have “no-excuse” absentee voting where all eligible voters have the option to request and obtain a mail-in ballot in order to vote-by-mail.²³⁰

In addition, of the three main categories of vote-by-mail, “universal vote-by-mail” is considered by some to be “[t]he most intense version,” wherein all registered voters are mailed a ballot by the state.²³¹ Voters in “universal vote-by-mail” states normally are given three options: “They can mail their ballots in after filling them out; they can return the ballots in person; or they can decide to vote in person at a polling center.”²³² As previously discussed within this Article and as noted by other researchers, “[p]rior to 2020, only Colorado, Hawaii, Oregon, Utah, and Washington employed universal vote-by-mail.”²³³ However, “California was in the process of phasing it in across counties.”²³⁴ Moreover, “[i]n response to COVID-19, three more states, Nevada, New Jersey, and Vermont, along with the District of Columbia, . . . implemented the policy, while California accelerated its ongoing implementation. Montana . . . also began to phase in the practice[]”²³⁵ of universal vote-by-mail.

There was commentary in December 2020 about COVID-19 in the Brennan Center for Justice’s “*Voting Laws Roundup 2020*” article published shortly after the 2020 presidential election. Specifically, the article stated the following:

Covid-19 dominated legislative agendas on voting and elections this year. Many states took steps to protect voters and ensure safe and efficient election administration during the global pandemic. Overall, 29 states and the District of Columbia enacted 79 different bills to expand voting access in 2020. The majority of these bills expanded eligibility for and access to mail voting, while others addressed issues such as early voting, voter registration, polling place standards, and disability and language access. Even during a global

229. Hall, *supra* note 90.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*; see also Section II(A)(1)(d).

234. See Hall, *supra* note 90.

235. *Id.*

pandemic, however, six states enacted laws that restrict voting access.²³⁶

In addition, these researchers pointed out the following:

Among the 29 states and the District of Columbia that enacted expansive voting laws, seven states stand out for particularly ambitious legislative action to protect the right to vote in the face of significant constraints posed by the pandemic. These measures aimed to smooth election administration and protect voters and election workers from Covid-19. California, Connecticut, Massachusetts, New York, Nevada, Utah, and Virginia all made substantial changes to their election laws this year to preserve safe access to the ballot box.²³⁷

Research also reveals that in 2022, there were some states that continued to put measures in place following the 2020 COVID-19 pandemic to allow more citizens the opportunity to participate in the electoral process with absentee and mail-in ballots. In fact, prior to the November 2022 midterm elections, “[n]ine laws in six states ma[d]e mail voting easier or improve[d] the mail voting process,” including in the states of Arizona, Connecticut, Louisiana, Massachusetts, New York, and Rhode Island.²³⁸ As of 2024, several of these states (e.g., Arizona, Massachusetts, New York, and Rhode Island) may be considered by some as “model” states to look at since, over the years, they have provided easier access to voting, and/or have provided the greatest opportunities for eligible voters within their respective states to participate in the democratic electoral process, by utilizing the mail-in voting process. For example, Massachusetts passed MA S. 2924 that is considered a “comprehensive expansive law that ma[d]e several pandemic-era reforms permanent and enact[ed] other new expansive policies,” including “codif[ying] the state’s no-excuse mail voting policy implemented as a response to the pandemic,” and such law was in effect during the 2022 midterm elections.²³⁹ Similarly, as of 2024, Arizona, New York, and Rhode Island are no-excuse absentee/mail-in voting states.²⁴⁰

236. *Voting Laws Roundup: 2020*, *supra* note 46 (citing that the 29 states and the District of Columbia “include[d]: AK, CA, CO, CT, DE, DC, ID, IL, IA, LA, MA, MI, MS, MO, NE, NV, NH, NJ, NM, NY, NC, OK, RI, SC, SD, UT, VT, VA, WA, WY”) (footnote omitted).

237. *Id.* at 3.

238. *Voting Laws Roundup: October 2022*, *supra* note 177 (citing “AZ S.B. 1638, CT H.B. 5262, LA H.B. 646, LA H.B. 1074, MA S. 2924, NY S.B. 253, NY S.B. 7565, RI S.B. 2007, RI H.B. 7100”) (footnotes omitted).

239. *Id.*

240. *See supra* note 227.

Additionally, despite the often contentious debate amongst the two leading political parties as it relates to mail-in voting,²⁴¹ bipartisan groups have found that “[m]ail voting is a safe, secure, and reliable voting method used by voters of all political parties.”²⁴² Although voter fraud is often stated as a reason to oppose mail-in voting, numerous studies show that voter fraud is minimal when it comes to absentee/mail-in voting.²⁴³ In addition, procedures are generally in place to authenticate and validate absentee ballots cast by mail. For example, in most states, “[b]efore they are counted, election officials vigorously verify the validity of every mail ballot submission Mail ballots suspected of fraudulent activity are set aside for further investigation and, when appropriate, are referred to law enforcement for prosecution.”²⁴⁴ Specifically, after a voter returns a mail ballot, it then proceeds through a verification process, which is required for every returned mail ballot.²⁴⁵ Mail ballot return envelopes usually require “a voter’s signature, identification number, or other identifying information” and prior to the mail ballot being counted, “election officials check to make sure that the signature or identification number matches that which is on file.”²⁴⁶ Mail ballots “also must be postmarked, received by an election official, or both by a date set in state law.”²⁴⁷ After validation, each mail ballot “is separated from its envelope and sorted for counting.”²⁴⁸

Moreover, the Bipartisan Policy Center notes the following relating to maintaining the security of voting by mail:

241. See Devon Hesano, *New Study Tells Compelling Story of Support for Various Election and Voting Policies*, DEMOCRACY DOCKET at 2 ((Mar. 1, 2024), <https://www.democracydocket.com/analysis/new-study-tells-compelling-story-of-support-for-various-election-and-voting-policies/> [<https://perma.cc/5W2B-C2SP>] (noting that a recent 2024 report from the Pew Research Center shows that “[t]he biggest partisan divide over a voting policy surveyed by Pew came down to mail-in voting. Just 28% of Republicans support allowing anyone to vote by mail, compared to 84% of Democrats and 57% of independents.”). *Id.*; see also *Bipartisan Support for Early In-Person Voting, Voter ID, Election Day National Holiday*, PEW RSCH. CTR. (Feb. 7, 2024), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2024/02/PP_2024.2.7_voting_REPORT.pdf (noting the “[w]idening partisan divides over vote-by-mail and registration policies”).

242. Elections Project Staff, *Mail Voting is Safe and Secure*, BIPARTISAN POL’Y CTR. (Aug. 26, 2022), <https://bipartisanpolicy.org/report/mail-voting-is-safe-secure/> [<https://perma.cc/KH/U4-UQVD>].

243. See *supra* note 118; Lisa Danetz, *Mail Ballot Security Features: A Primer*, BRENNAN CTR. (Oct. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer> [<https://perma.cc/7SMH-8SVK>].

244. Elections Project Staff, *supra* note 242.

245. See *id.*

246. *Id.*

247. *Id.*

248. *Id.*

In addition to verifying the identity of mail voters, many election officials also take the following precautions to ensure the security of mail voting:

- Using an election management system to track every ballot issued and prevent double voting.
- Updating voter registration lists daily to ensure the voter's correct residence address and mailing address is on file so that the correct ballot is sent to the voter.
- Balancing the number of ballots received against the number of voters who applied for a ballot.

If a voter submits more than one mail ballot or tries to vote in person after already voting by mail, only one ballot will be counted and the instance of double voting will be flagged for further investigation.²⁴⁹

With these measures in place, voters should feel more confident in the security of mail-in voting. In addition, most, if not all, of the 12 recommendations provided in the 2021 Bipartisan Policy Center Task Force for Elections Report, after the COVID-19 pandemic in 2020, should be implemented in all 50 states and the District of Columbia in order to ensure all voters are able to easily engage in the electoral process, including voters who desire to vote by mail.²⁵⁰ Such recommended reforms include the following: (1) states should proactively develop detailed emergency response plans and election procedures that include contingencies for weather, terrorism, or other disasters along with the detailed plan documenting who is the decision-maker in such emergency situations; (2) local election offices should be required to develop and submit detailed emergency election procedures to their relevant state authorities for review, assistance, and coordination; (3) states should expand return of vote-by-mail ballot options to include secure drop boxes, including inside elections offices and/or in elections offices' parking lot; (4) voters should be given the option to early vote or vote in-person for at least seven days prior to any federal election; and (5) “[s]tates should provide a balance of early, mail, and Election Day voting options that are informed by voter behavior” in order to give states the

249. *Id.*

250. See Rachel Orey & Matt Weil, *Improving the Voting Experience After 2020 – A Report from the Bipartisan Policy Center's Task Force on Elections*, BIPARTISAN POL'Y CTR. (Apr. 6, 2021), <https://bipartisanpolicy.org/report/voting-experience-2020/> [https://perma.cc/GB7S-UHY2].

greatest “flexibility to balance different modes of voting in ways that work best for their voters.”²⁵¹

Voters should be given options for casting their votes in elections, and no one size fits all voters. Although every voter’s wish cannot be accommodated, requiring in-person voting for most voters on Election Day simply is not necessary and can be overly burdensome to certain populations of voters, including the elderly, disabled, and college students. As a fundamental right and as stated by one U.S. District Judge, “voting is an inviolable right, occupying a sacred place in the lives of those who fought to secure the right and in our democracy, because it is ‘preservative of all rights.’”²⁵² Therefore, since voting is at the cornerstone of our democracy, no unnecessary restrictive barriers should be in place that would limit any qualified voter within the United States from easy access to the ballot box within their respective state, including during the national health crisis we all witnessed in 2020 due to the COVID-19 pandemic. Some states definitely made commendable adjustments to their election laws and voting procedures to ensure the safety of the voting public as well as election workers during the COVID-19 crisis that were much better than several other states.

Moreover, the National Conference of State Legislatures has also continued to weigh in on this topic, including reporting both the advantages and disadvantages when allowing absentee/mail-in voting, and providing some best practices when state legislatures are considering changing their current voting laws and practices to permit more voters to “‘vote at home,’ or vote by mail, or vote absentee.”²⁵³ In their recent March 2024 updated report, they list three advantages and six disadvantages to voting by mail.²⁵⁴

The three advantages are as follows: (1) “[v]oter convenience and satisfaction” because voters “can review their ballots at home and take all the time they need to study the issues . . . [and a] survey from Pew Research Center in 2020 shows that 65% of voters support no-excuse absentee voting;” (2) “[f]inancial savings” since “[j]urisdictions may

251. *Id.* at 7–15; see also Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359 (2023) (noting how two global pandemics, the Spanish Flu in 1918 and COVID-19 in 2020, “highlight[ed] the need for states to address the impact of election emergencies, including public health crises, on the electoral process” by adopting election emergency laws, and the need for courts to be adaptable in order to effectively adjudicate election emergency lawsuits when they arise during pandemics and other disasters).

252. *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1091 (N.D. Ala. 2020) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)) (footnote omitted).

253. See *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, National Conference of State Legislatures (updated Mar. 7, 2024), <https://www.ncsl.org/elections-and-campaigns/voting-outside-the-polling-place> [https://perma.cc/DY3A-FP5L].

254. *Id.*

save money because more absentee/mail voting can reduce the need to staff and equip traditional polling places;” and (3) “[t]urnout” because “[s]ome reports indicate that because of convenience, voter turnout increases.”²⁵⁵

Conversely, the six listed disadvantages are as follows: (1) “[f]inancial considerations” due to “increase[d] printing costs for an election,” the possibility of “up-front costs for a jurisdiction to transition from mostly in-person to more absentee/mail voting, although overall fewer voting machines are required in jurisdictions that have more absentee/mail voting and count ballots at a centralized location,” and return ballot postage costs, if applicable, depending on the state; (2) “[a]n increase in voter ‘errors’ or ‘residual votes’” because “a voter can potentially mark more selections in a contest than the maximum number allowed (called an overvote) or mark fewer than the maximum number allowed, including marking nothing for one or more contests (called an undervote),” which in-person voting machines alerts voters about, and “[d]amaged absentee/mail ballots may be harder to correct as well;” (3) “[t]radition” because “[t]he civic experience of voting with neighbors at a local school, church or other polling place is lost when voting with an absentee/mail ballot;” (4) “disparate effect on some populations” because “[m]ail delivery is not uniform across the nation . . . Low-income citizens move more frequently and keeping addresses current can pose problems. Literacy can be an issue for some voters, as well[,] since election materials are often written at a college level;” (5) “[t]he potential for coercion” because “[i]f a voter is marking a ballot at home, and not in the presence of election officials, there may be more opportunity for coercion by family members or others;” and (6) “[s]lower results reporting” because “[b]allots may continue to arrive up to and even after Election Day (depending on state law)” but “[a]llowing ballot processing before Election Day can mitigate this effect.”²⁵⁶

Despite the numerous legal challenges over the last several years and the above cited disadvantages, the advantages of providing absentee/mail-in voting as an option for more voters outweighs the disadvantages. Therefore, it is recommended that more states should expand their access to voting by passing no-excuse absentee/mail-in voting laws because such measures that were put in place during the peak of the COVID-19 pandemic in 2020 allowed more citizens the opportunity to participate in the electoral process without risking their health by going to the polls to vote in person, many voters support it, and a majority of other states already utilize no-excuse absentee/mail-in voting as of 2024.²⁵⁷ Moreover, as further noted by the Bipartisan Policy

255. *Id.*

256. *Id.*

257. See National Conference of State Legislatures, *supra* notes 227 and 255.

Center Task Force for Elections, although many policymakers continue to “debat[e] the highest profile election policy changes—restricting or expanding vote by mail and early voting, changing voter registration, altering funding structures, and more—based on how they perceive different policies may benefit voters of their parties,” it is important to remember that “the electoral process transcends politics and demands reforms that are in the best interest of all Americans, regardless of party,” and “[s]tate legislators must continue their leadership on voting reforms and implement bipartisan changes to improve the voting experience and enhance the security of the process that can be implemented within current resource constraints.”²⁵⁸

Additionally, other emergencies during election seasons are sure to come.²⁵⁹ However, the way state legislatures and election officials throughout the United States respond to such future emergencies while also protecting a citizen’s right to vote in elections remains to be seen. Yet, now “[a]rmed with the lessons learned from COVID-19, [they] can hopefully be even better prepared for the next crisis before it arises.”²⁶⁰

258. Orey & Weil, *supra* note 250, at 16.

259. See Morley, *supra* note 251.

260. See Morley, *supra* note 251, at 442.