

## THE UCLA VOTING RIGHTS PROJECT<sup>1</sup>

### Improving the March 23, 2020 House Bill on Expanded Vote-by-Mail

While the bill put forth by the House of Representatives on March 23rd follows many of the policy recommendations of the UCLA Voting Rights Project report on vote-by-mail, there are three major areas for improvement that should be addressed in any COVID-19 election response bill. The COVID-19 bill should include **(1) reasonable alternatives to signature matching and clear procedures for signature verification; (2) more expansive curing requirements for any rejected ballots; (3) sufficient appropriated funding to ensure that all eligible citizens are able to exercise their right to vote.**

While states should maintain flexibility in adapting a vote-by-mail program to work best in their jurisdictions, it is critical that the federal government establish minimum requirements so that no state diminishes equal voting rights for all citizens. Historically, states have devised ways to circumvent federal election laws to dilute or deny citizens of their right to vote. Indeed, following the rollback of Section 5 of the Federal Voting Rights Act in 2013, over sixty<sup>2</sup> lawsuits have been filed to curtail state practices that dilute or deny citizens their right to vote. The United States has a substantial history of state efforts to dilute or deny the right the vote. Because of this intentional obstruction of voting rights by some jurisdictions, any new federal election laws must provide clear mandates for the states, while also respecting state flexibility in implementation.

#### I. Signature Matching

The March 23rd bill requires signature verification for all absentee ballots without providing any alternative process for voters to verify their identity. Signature verification is a leading reason

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<sup>2</sup> Khorri Atkinson, *Report Finds Protections for Minority Voters Have Plunged Since AXIOS* (Sep. 12, 2018), <https://www.axios.com/voting-rights-minorities-doj-civil-rights-commission-875243f9-01be-4d9f-be5b-c57fbaa53641.html> (“61 lawsuits challenging discriminatory election practices were filed after 2013.”).

why voters' ballots are not counted and it often can lead to unfair disenfranchisement during an all-mail election. Research by political scientist Dr. Daniel Smith<sup>3</sup> has demonstrated that signature verification systems can lead to some ballots being improperly rejected. Problems with signature matching include: arbitrary rejection of signatures because of a lack of signature verification standards, lack of signature verification training for election officials, the age of signature on file, and a host of intentional and unintentional factors which may alter a voter's signature, such as a voter's illness, injury, pen type, writing surface, signing position, and more.<sup>4</sup> Accordingly, voters of color, the elderly, and the disabled may have their ballots rejected at higher rates.<sup>5</sup>

The most current bill allows the states to create and adopt procedures for signature matching with little federal government oversight. The bill requires that:

“A State may not accept and process an absentee ballot submitted by any individual with respect to an election for Federal office unless the State verifies the identification of the individual by comparing the individual's signature on the absentee ballot with the individual's signature on the official list of registered voters in the State, in accordance with such procedures as the State may adopt (subject to the requirements of paragraph (2)).” 322(a)(2)(b)(1).

Paragraph 2 of the bill only requires that at least 2 election officials make a determination of whether there is a signature discrepancy and that each official who makes the determination has received training in procedures used to verify signatures. 322(b)(2)(C)(i)(ii).

This language should be updated to provide clearer procedures for election officials, including:

- Requiring statewide standards for signature verification; these guidelines must help resolve questions that inevitably arise during signature comparison evaluations, including what stylistic variations suggest that two signatures were made by different individuals, and what threshold number of variations is required to conclude that the signature on the mail-in ballot carrier envelope, the mail-in ballot application, or previous documents is executed by a person other than the voter.
- Publication of each local official's standards for signature verification two weeks before ballots are mailed; this outreach must be reasonably calculated to reach voters and provide some predictability for voters aiming to have the signatures verified.
- Documentation and public advertisement of each election official's successful completion of signature verification training 14 days before ballots are mailed.

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<sup>3</sup> Daniel Smith, *Analysis of Absentee (“Vote-By-Mail”) Ballots Cast in Florida*, ELECTION SMITH, (Sept. 13, 2016), <https://electionsmith.files.wordpress.com/2016/10/smith-coie-jenner-report-dnc-fdp.pdf>.

<sup>4</sup> *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 212 (D.N.H. 2018).

<sup>5</sup> *Saucedo*, 335 F. Supp. 3d at 212.

Because signature verification disproportionately burdens certain groups and relies on the discretion of election officials, the bill should require states to provide alternative methods to verify voter identity. Election officials should refer to these alternative verification methods before notifying a voter that there is a discrepancy with their ballot.

Alternatives to signature matching include:

- Clear language that states “in addition to a signature, voters can provide the following other methods of identity verification”
- Alternative methods for identity verification include allowing voters to submit:
  - The last four digits of their social security number;
  - Voter’s bank or utility statements;
  - Drivers’ license number;
  - Passport number;
  - Digital photograph matching a photograph on file with a state's department of motor vehicles;
  - A fingerprint that matches one on file with a government agency;
  - A sworn statement attesting under penalty of perjury to the voter’s identity.

These alternatives are already used by states to verify a voter’s identity during in-person voting on election day, and are often used in other contexts to verify identity.

## II. Curing Provision

In addition to providing alternatives to signature verification, it is important that any voter receive notice and have the opportunity to correct or “cure” any errors or faults in their ballot. Further, curing provisions must be clear and provide meaningful opportunities for voters to correct their ballots in order to pass Constitutional muster. A federal court ruling on Florida’s law stated “[t]he precise issue in this case is whether Florida’s law that allows election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection—passes constitutional muster. The answer is simple. It does not.”<sup>6</sup>

The “curing” provision in the March 23, 2020 bill falls short of providing voters with workable opportunities to cure their ballots. The current provision in the bill only extends to signature discrepancies, not all discrepancies in a voter’s ballot. The bill provides for only a seven-day curing period starting the date of the election. This provision could be inequitable because ballots that are mailed or submitted **on the day of the election** could have discrepancies that a voter rightfully should be able to cure but cannot because they have fallen outside of the seven-day period due to a lag in ballot counting by election officials.

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<sup>6</sup> *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017,1022 (N.D. Fla 2018).

Additionally, the bill does not require election officials to document attempts made to notify voters of the need to cure and only requires election officials to make a good faith effort to notify a voter by mail, telephone, and (if available) electronic mail, without defining what constitutes a “good faith effort.” Leaving the quantum of effort to the discretion of election officials will inevitably result in a failure to reach many voters.

The language of the curing provision should be amended in the following ways:

- If an absentee ballot is missing a signature or has a signature discrepancy, the envelope must remain sealed.
- Voters shall be able to cure or correct any discrepancies that exist with their absentee ballot.
- Election officials must allow an individual to cure discrepancies with their ballot through all of the following methods: telephone, e-mail, through a website or other online method, and in-person.
- Discrepancies can be cured during a 21-day period which begins on the date of the election. It is only after this 21-day period that an uncured ballot will not be counted.
- All attempts to contact a voter, as required by the curing provision, must be documented by election officials and kept on record.
- States are required to provide voters an opportunity to cure their ballot through a replacement ballot and return envelope if a ballot is reject prior to election day.
- Rejected ballots may be reviewed de novo in an election contest filed by a candidate.

### **III. Appropriation of Sufficient Funding**

The current legislation appropriating \$400 million for election administration in 2020 by the Senate COVID-19 response bill is not enough to ensure that all eligible citizens can cast a ballot in November. Election law expert Professor Rick Hasen affirmed that “\$400 million is too low — there’s going to be increased costs associated with the November election resulting [from] more employees and scanners for mail-in voting in all states.”<sup>7</sup> The current allocation represents *less than* 0.02% of the \$2.2 trillion on safeguarding the November 2020 presidential election.

Sufficient Funding ranges:

- A low estimate of the funding needed for ensuring vote-by-mail is between \$982 million and \$1.4 billion.<sup>8</sup>

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<sup>7</sup> Jack Brewster, *Senate Stimulus Bill: Democrats wanted \$4 Billion in Election Assistance- They Got \$400 Million*, Forbes (Mar. 25, 2020), <https://www.forbes.com/sites/jackbrewster/2020/03/25/senate-stimulus-bill-democrats-wanted-4-billion-in-election-assistance---they-got-400-million/#6d6177a851f4>.

<sup>8</sup> Larence Norden, et al., *Estimated Costs of COVID-19 Election Resiliency Measures*, Brennan Center (March 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>.

- At minimum, appropriate funding for sending ballots by mail and pre-paid postage return is estimated to cost between \$413 million and \$593 million.<sup>9</sup>
- Moderate estimates of the funding needed to implement the necessary changes to election administration run as high as \$2 billion.<sup>10</sup>

The \$400 million in the Senate bill therefore will not cover the amount needed to meet the House bill's vote-by-mail measures. We estimate that sufficient funding for to the 50 states and D.C. for implementation of expanded vote-by-mail elections is \$4 billion, which represents less than one fifth of 1% of the \$2.2 trillion package.

### **Other Considerations**

Other considerations not included in the current House bill include:

- Requiring states to classify election workers and volunteers as emergency personnel;
- Requiring states to identify and train existing state, county and local employees who do not perform otherwise critical functions, as emergency election personnel that can be activated when there is a shortage of regular election workers
- A provision that would allow voters to remain registered as permanent absentee voters for future elections;
- Mandating how many early voting locations per number of voters a state is required to provide during the 15-day early voting period.

### **Conclusion**

The improvements to the language of the March 23rd, 2020 bill listed above are reasonable measures that should be implemented in any COVID-19 response bill passed by Congress. This new language would ensure that election protections passed by Congress in practice enable eligible citizens to have an equal right to vote.

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<sup>9</sup> *Id.*

<sup>10</sup> Michael Wines, *Stimulus Money to Protect Elections Falls Short, Critics Say*, N.Y. Times (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/us/coronavirus-voting-stimulus.html>.