

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

### Analysis of New York State's Absentee Ballot Laws and Process and the Immediate Need for Absentee Ballot Reform

As the COVID-19 pandemic persists as a serious threat to residents of New York State, it is imperative to take additional measures to ensure that eligible voters are able to register and cast a ballot safely. In light of this, Governor Andrew Cuomo issued Executive Orders for the June 2020 primary elections providing that the pandemic constitutes good cause for all New Yorkers to vote by absentee ballot;<sup>2</sup> requiring Boards of Elections to automatically mail all New Yorkers a postage-paid absentee ballot application for the June 23 primary election;<sup>3</sup> allowing voters to request absentee ballots electronically or by phone;<sup>4</sup> and requiring Boards of Elections to provide a postage-paid return for absentee ballots.<sup>5</sup> These temporary orders were important accommodations for the June 23 election, but have now expired. As a result, there continue to be critical deficiencies in New York's absentee voting laws, including deficiencies that were not addressed by the Governor's executive orders. Given that the COVID-19 pandemic is projected to continue until 2021,<sup>6</sup> the need to implement policies and procedures to permit safe registration and voting for **the November 3, 2020** election has become even more urgent.

In recent election cycles, approximately only five percent of votes have been cast by absentee ballot, but this number will considerably increase as voters opt to avoid the virus and vote from the safety of their homes.<sup>7</sup> In fact, nearly 1.8 million New York voters requested absentee ballots following the prompting of Governor Cuomo and the New York State Board of Elections (NYSBOE).<sup>8</sup> However, the State Attorney General's Office and several counties across the state collectively received thousands of complaints from residents about late and missing mail ballots.<sup>9</sup> Consequently, some voters that intended to vote-by-mail were now expected to cast their ballot in-person at a local polling site. These voters confronted scattered issues

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<sup>2</sup> N.Y. Executive Order 202.15, Apr. 9, 2020.

<sup>3</sup> N.Y. Executive Order 202.23, Apr. 24, 2020.

<sup>4</sup> N.Y. Executive Order 202.15, Apr. 9, 2020.

<sup>5</sup> NY. Executive Order 202.26, May 1, 2020.

<sup>6</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2020/a0309-covid-19-update.html> (last visited March 4, 2020).

<sup>7</sup> U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2018 Comprehensive Report: A Report to the 116th Congress*, at 30, Overview Table 2, June 2019 (2018 EAC Report) (reporting only 3.9% of New York voters in November 2018 cast by mail); 2016 EAC Report (reporting only 5.2% of New York voters in November 2016 cast by mail).

<sup>8</sup> "New York Primary Voters Might Await Results Into July." U.S. News & World Report. U.S. News & World Report. Accessed July 13, 2020. <https://www.usnews.com/news/best-states/new-york/articles/2020-06-23/new-york-votes-after-primary-season-like-no-other>.

<sup>9</sup> Id.

throughout the state due to the unprecedented impact of the virus on voter registration and polling procedures. Since most residents do not vote-by-mail in a conventional election, some voters were unable to register for the election because of their inexperience with the absentee voting application process.<sup>10</sup> There are also reports of voters not receiving their mail ballot, and being denied from voting in-person because of registration discrepancies attributable to polling site consolidations.<sup>11</sup> Between the last-minute changes to polling locations and late starts at several polling sites, residents were not made aware with sufficient time to account for the Election Day adjustments.<sup>12</sup> Therefore, the measures proposed below are necessary to prevent the anticipated influx of absentee voters during the November general election from causing the pervasive disenfranchisement that occurred during the June 23 primary election.

We call on the New York State Legislature, the New York State Board of Elections, and Governor Cuomo to do the following for the November 2020 election:

1. Continue to ensure all New York voters remain eligible to cast absentee ballots for public health reasons arising out of the COVID-19 pandemic through the passing of legislation by the New York Legislature;
2. Continue to provide all voters with postage-paid absentee ballot applications as well as the ability to apply electronically or by phone;
3. Continue to provide postage-paid return envelopes for absentee ballots for all elections;
4. Accept mail ballots mailed on or before Election Day and received within seven days of Election Day, regardless of whether they have a postmark;
5. Create a uniform standard for reviewing absentee ballots to reduce New York's high ballot rejection rate;
6. Provide voters with notice of and an opportunity to cure deficiencies in absentee ballots;
7. Start the process of administering absentee ballots for the November General Election in August 2020;
8. Raise standards for ballot processing and election administration; and
9. Adopt the New York Voting Rights Act (NYVRA), requiring the pre-clearance of polling sites and changes to election procedures to be approved by the New York State Attorney General.

New York's outdated election laws threaten to disenfranchise thousands of voters during this pandemic. Therefore, these measures should be implemented to ensure that all eligible voters in New York can safely, securely, and equitably access the ballot box throughout 2020.

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<sup>10</sup> *Id.*

<sup>11</sup> Mays, Jeffery C. "Primary Voters in New York City Face Scattered Problems." The New York Times. The New York Times, June 23, 2020. <https://www.nytimes.com/2020/06/23/nyregion/voting-nyc-primary.html>.

<sup>12</sup> *Id.*

## I. Lessons from the New York 2020 Primary Election

Amidst the urging of Governor Cuomo for residents to vote-by-mail, the NYSBOE announced that voters were requesting absentee ballots at record numbers. According to a survey of County Boards of Elections before the election, over 1,070,198 absentee ballots were requested for the June primary, a rate nearly seven times the 157,885 total mail ballots requested in the 2016 presidential primary.<sup>13</sup> The NYSBOE also confirmed that 92,000 people voted during the nine-day early voting period.<sup>14</sup>

In New York City, the board of elections has released absentee ballot counts as recently as July 7.<sup>15</sup> In Assembly Districts 23 through 40, which represents most of Queens, nearly one in every four absentee ballots was rejected.<sup>16</sup> Though in some districts, such as 31 and 32, the rejection rate was one in every *three* absentee ballots. Both are minority-majority districts where residents of color make up more than 90% of the total population.<sup>17</sup> In contrast, the only three Assembly Districts – 26, 28, and 36 – that are majority White had the lowest, second-lowest, and fourth-lowest absentee ballot rejection rates. The assembly districts with the five highest ballot rejection rates returned, on average, over three thousand less mail ballots when compared to the assembly districts with the five lowest ballot rejection rates. However, the former districts only had, on average, 71 less ballots rejected than districts with lower rejection rates. It is evident that there is a divergence in voter outreach when evaluating how these two communities voted by mail. Those five districts with the highest ballot rejection rates have, on average, one thousand more voting age citizens than the districts with lowest rejection rates. Yet, they requested nearly three thousand less absentee ballots per district when compared to their counterparts. It is not likely a coincidence that voters with higher levels of education that make, on average, at least ten thousand more than the median earnings in Queens, are less likely to have their ballot rejected.

While the majority of in-person voting sites remained available on Election Day, the coronavirus pandemic unquestionably altered their accessibility. In New York City, there are

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<sup>13</sup> “Voting Options and Deadlines for the New York State June 23, 2020 Primary Election.” New York State Board of Elections, June 12, 2020. Accessed July 6, 2020.

<sup>14</sup> Honan, Katie, and Jimmy Vielkind. “New York Primary Faces Ballot Problems, While Low Voter Turnout Expected Amid Coronavirus.” The Wall Street Journal. Dow Jones & Company, June 23, 2020. <https://www.wsj.com/articles/on-primary-day-new-york-faces-ballot-problems-while-low-turnout-expected-amid-coronavirus-11592931915>.

<sup>15</sup> “Absentee Ballot Totals.” Absentee Ballot Totals | NYC Board of Elections. Accessed July 13, 2020. <https://www.vote.nyc/page/absentee-ballot-totals>.

<sup>16</sup> Rejected ballot totals were reported by the New Reformers PAC following their direct communication with the Queens Elections Commissions Office.

<sup>17</sup> All demographic data reported are 5-year American Community Survey 2018 estimates retrieved through the Census Reporter, a service provided by the U.S. Census Bureau. “Census Reporter.” Grid View: Table B29002 - Census Reporter. Accessed July 16, 2020. <https://censusreporter.org/data/table/?table=B29002>.

reports of poll locations opening late because poll workers were without transportation amid the overnight subway closure.<sup>18</sup> The New York City Board of Elections Commissioners stated that the primary election was threatened by an absence of healthy poll workers, a shortage of envelopes for the postage-paid absentee ballot applications, and the abrupt surge in requests for mail ballots.<sup>19</sup> As a result, the New York Times reported that days before the election, approximately 29,000 of the city’s 708,000 absentee voters had not received their mail ballots.<sup>20</sup> For reference, the five counties that comprise New York City – Bronx, Kings, New York, Queens, and Richmond – contain 39.44% of the state’s citizen voting-age population and approximately 66.1% of the state’s voters that applied for an absentee ballot.<sup>21</sup> Ultimately, the late transition to absentee voting means that the final results of competitive local elections across the state will not be entirely known for weeks. The difficulties experienced by primary voters in New York, a state critically impacted by COVID-19, are reminders that states should establish the necessary infrastructure and an emergency plan to conduct elections during a pandemic.

## **II. Areas of Improvement for the New York Absentee Ballot Process**

### **A. Signature Provision**

New York consistently has a high absentee ballot rejection rate.<sup>22</sup> In 2010, New York rejected a quarter of the 22,000 absentee ballots it received.<sup>23</sup> In the Election Assistance Commission’s 2018 Election Administration and Voting Survey, New York was listed as having the highest by-mail ballot rejection rates of returned ballots; thirteen percent of mail ballots were rejected.<sup>24</sup> The New York Board of Elections does not provide information on the reasons why these ballots were rejected, leaving voting rights advocates to speculate as to the cause of this high rejection rate.

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<sup>18</sup> Mays, Jeffery C. “Primary Voters in New York City Face Scattered Problems.” The New York Times. The New York Times, June 23, 2020. <https://www.nytimes.com/2020/06/23/nyregion/voting-nyc-primary.html>.

<sup>19</sup> “Commissioners’ Meetings.” Commissioners’ Meetings | NYC Board of Elections. Accessed July 7, 2020. <https://vote.nyc/page/commissioners-meetings>.

<sup>20</sup> Corasaniti, Nick, and Stephanie Saul. “Vote-by-Mail Ballot Requests Overwhelm New York City Elections Agency.” The New York Times. The New York Times, June 19, 2020. <https://www.nytimes.com/2020/06/19/us/politics/nyc-vote-by-mail.html?action=click>.

<sup>21</sup> Citizen voting age populations were calculated by using the values provided by the 2018 American Community Survey - Demographic and Housing Estimates 5-year data profile for New York State and the five counties that comprise New York City – Bronx, Kings, New York, Queens, and Richmond. The absentee voters populations were calculated by dividing the preliminary value reported by the New York City Board of Elections by the total number of requested absentee ballots reported by the New York State Board of Elections on June 12.

<sup>22</sup> ELECTION ADMINISTRATION COMMISSION, 2018 ELECTION ADMINISTRATION AND VOTING SURVEY REPORT 4 (2019), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf).

<sup>23</sup> Adam Liptak, Lost Votes, Problem Ballots, Long Waits? Flaws Are Widespread, Study Finds, N.Y. Times (Feb. 5, 2013), <https://www.nytimes.com/2013/02/06/us/politics/us-voting-flaws-are-widespread-study-shows.html> citing PEW, THE FIRST COMPREHENSIVE ASSESSMENT OF ELECTION ADMINISTRATION ACROSS THE NATION (2013).

<sup>24</sup> ELECTION ADMINISTRATION COMMISSION, 2018 ELECTION ADMINISTRATION AND VOTING SURVEY REPORT 4 (2019), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf).

An absentee ballot may be rejected or voided if it is deemed that a voter's signature on the absentee ballot envelope is "substantially different" from the signature on the voter's registration card.<sup>25</sup> Since New York courts have not elaborated on what makes a signature substantially different from one another, this provision can lead to inconsistent interpretations when reviewing absentee ballots.<sup>26</sup>

Evidently, the disparity in signature matching can pose a significant threat to the voter rights. Litigation in California revealed that as many as 45,000 vote-by-mail ballots were rejected by election officials in the November 2016 general election alone due to a signature mismatch, and voters were never notified or afforded an opportunity to cure their ballot's defect.<sup>27</sup> In her supporting declaration to the complaint upon appeal, Dr. Mindy Romero declared that in the 2016 general election, "[l]atino voters' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 11 of the 29 counties, while Asian-Americans' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 6 counties."<sup>28</sup>

The signature provision required for voting by absentee ballot disproportionately impacts voters of color. There are likely multiple deficiencies in New York's election law that cause the state's high rates of ballot rejections. However, the failure of the New York State Board of Elections to provide data on the reasons for rejection is evidence that the State should establish a uniform and lenient standard for evaluating absentee ballots.

## **B. External Markings on Ballots**

New York law is unclear about whether and when certain markings or other substances on the ballot may invalidate the ballot entirely, but cases and anecdotal evidence suggest that this lack of clarity has resulted in preventable disenfranchisement. A failure to date the signature, write outside of allotted boxes, or application of tape to the ballot envelope all might cause a ballot to be rejected. There are two different methods for determining if a ballot is void because of markings on the ballot under New York case law. In *Young v Fruci*,<sup>29</sup> the court held that a

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<sup>25</sup> N.Y. ELN § 8-506.

<sup>26</sup> In *Hosley v. Valder*, 160 A.D.2d 1094, 1096 (1990), the court simply said "[t]he signature on the voter registration card was substantially different than the signature on the absentee ballot envelope. These signatures do not match." Furthermore, in *Lynn v. Dewitt*, 19 Misc. 3d 1118(A), 862 N.Y.S.2d 815 (Sup. Ct. 2008), the court found that signatures found on a voter's envelope must be clearly legible and must correspond between those inside the ballot, on record, and possibly other ballots cast.

<sup>27</sup> *Peter La Follette v. Padilla*, No. CPF 17-515931, 2018 WL 4050727, (Cal. Super. Apr. 09, 2018). Ultimately the ensuing appeal of the trial court's ruling in favor of plaintiffs was dismissed because On September 17, 2018, the Governor of California signed Senate Bill No. 759 (2017-2018 Reg. Sess.), which amended former section 3019(c)(2) to provide voters an opportunity to cure a mismatched signature before the certification of election results. As revised, the statute now provides the remedy sought by plaintiffs in the underlying litigation. (Elec. Code, § 3019, subs. (d)(1)-(2) [notice provision] & (d)(3) [cure procedure].)

<sup>28</sup> *Id.* Court of Appeals Complaint at 31.

<sup>29</sup> 112 AD 3d 1138 [3rd Dept 2013].

ballot in which the voter drew lines through the yes or no boxes and wrote “NO VOTE” rendered the entire ballot invalid. Under this rule, “where the challenged marks on a ballot constitute written words, deliberately placed on the ballot by the voter, the entire ballot is rendered void because those markings ‘could distinguish the ballot from others cast and consequently mark the ballot for identification.’” A year later, in *Rosenblum v Tallman Fire Dist.*,<sup>30</sup> the court looked at voter intent, stating that “[s]ince the voter clearly indicated his or her selection, the fact that his or her use of multiple marks did not strictly comport with the ballot instructions and did not render the ballot invalid.” These are wildly different interpretations of § 9-112, and the lack of clarity has the potential to cause arbitrary application of the law or inconsistencies across New York county boards of election.

### C. Curing After Rejection

New York voters who have their ballots rejected are not afforded the ability to correct whatever error or inconsistency led to the rejection, no matter how trivial. This is because New York law does not provide any meaningful process for notifying voters about defects in their absentee ballots or for offering voters any opportunity to cure those defects and ensure that their ballots are counted. It is unclear if individual counties have their own process that they elect to administer to allow voters to correct discrepancies with their ballots. These measures are uniquely strict and undesirable on their face.

For instance, expert Dr. Daniel Smith conducted an analysis of absentee ballots cast in Florida,<sup>31</sup> and found “clear evidence that across the state’s 67 counties a higher rate of absentee ballots cast by Democratic electors were rejected than absentee ballots cast by Republican electors” in Florida’s 2012 Election.<sup>32</sup> Lacking the ability to cure defects, *thousands* of votes were rejected. Younger and minority ballots were twice as likely to be rejected than those cast by older white voters.<sup>33</sup> In his expert report for litigants in Georgia, Dr. Smith presented findings that black registered voters are disproportionately more likely to cast an absentee ballot that is rejected by election officials than are their white counterparts.<sup>34</sup>

Further, failing to provide an adequate signature verification and curing process is a violation of procedural due process based on the fundamental right to vote. Federal and state courts all over the United States have invalidated statutes that require election officials to reject a ballot without providing notice to voters and curing periods. In *Zessar v. Helander*, a federal

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<sup>30</sup> 117 AD3d 1064 (2nd Dept. 2014).

<sup>31</sup> More than 28% of registered Florida voters cast their ballot by mail in the 2012 Election. *See*, Dr. Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU FLORIDA, September 18, 2018.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* This was true in both the 2012 and 2016 Florida General Elections.

<sup>34</sup> Daniel A. Smith, *Expert Report of Daniel A. Smith, Ph.D.* Document 168. *Fair Fight Action et al. v. Raffensperger et al.*, No. 1:18-cv-05391-SCJ, (N.D. GA Dec. 16, 2019).

court held Illinois' laws, which permitted election officials to reject mail-in absentee ballots that they determined did not match the signature on record, violated due process because voters were not able to "remedy the loss of vote in *that* election."<sup>35</sup> In *Fla. Democratic Party v. Detzner*,<sup>36</sup> the court invalidated Florida's election law scheme which provided an opportunity to cure ballots with no signature, but denied voters whose ballots were deemed to have a mismatched signature an opportunity to cure.<sup>37</sup> In *Democratic Exec. Comm. of Fla. v. Detzner*,<sup>38</sup> the court found unconstitutional a Florida law that allowed county election officials to reject vote-by-mail and provisional ballots for mismatched signatures. In *La Follete v. Padilla*,<sup>39</sup> the California Supreme Court found that California's election code which required officials to reject an absentee ballot if the signatures on the ballot did not "compare" was facially unconstitutional. The Court reasoned that because voting is a fundamental right under both the federal and California constitution, notice and opportunity to contest deprivation of one's right are fundamental to due process.<sup>40</sup> New York state has an even more restrictive process, since they do not allow voters to cure their ballots *at all*.

Accordingly, New York's process is at odds with the fundamental right to vote and the right to due process, among other constitutional and statutory rights. New York should provide voters with adequate notice that their ballot has been rejected and provide a curing process that is not illusory in order to ensure that voters are not deprived of their constitutional rights.

### **III. Necessary Improvements and Framework to Implement Positive Change**

#### **A. Canvas All Ballots Received Within Seven Days of the Election**

New York should change their postmark requirement to accept ballots received within seven days of the election, regardless if they are postmarked by USPS. The United States Postal Service (USPS) does not uniformly affix postmarks, and not every piece of mail receives a postmark date.<sup>41</sup> Further, USPS has stated that it will carry and deliver ballots through the mail if they lack sufficient postage, creating the possibility that some ballots submitted on Election Day will not carry a postmark date.<sup>42</sup>

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<sup>35</sup> *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at \*7 (N.D. Ill. Mar. 13, 2006).

<sup>36</sup> No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016).

<sup>37</sup> *Id.* at \*1.

<sup>38</sup> *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. supp. 3d 1017 (N.D. Fla 2018).

<sup>39</sup> No. CPF 17-515931, 2018 WL 4050727, (Cal. Super. Apr. 09, 2018).

<sup>40</sup> *Id.* at \*2.

<sup>41</sup> "As indicated by this excerpt and confirmed by numerous local election officials, a postmark date is not uniformly applied during these processes and may look different in various jurisdictions." See discussion of USPS Mail Processing Guidelines <https://elections.wi.gov/node/6846>.

<sup>42</sup> Sam Levine (@srl), TWITTER (Apr. 22, 2020, 2:30 PM), <https://twitter.com/srl/status/1253067025263595520>.

Since some ballots may be carried through the mail without a postmark, election officials will not be able to discern when the ballots were sent. In these circumstances, it is important that all ballots received within seven days of Election Day should be counted. Assembly Bill 10844 was introduced in the NY State Legislature after the June primary, and proposes provisions to count absentee ballots without postmarked dates that are received within three days of the election.<sup>43</sup> However, the standard of accepting ballots received within seven days of the election is clear and manageable, providing assurance to voters that their absentee ballot will be counted regardless of the postmarking procedures carried out by USPS. In fact, bill 10843, currently in the State Assembly, establishes a presumption that any absentee ballot without a dated postmark received within seven days of the June 23 election was timely mailed and delivered.<sup>44</sup>

A reputable alternative to postmarking ballots is the Intelligent Mail barcode provided through the Postal Service. The Intelligent Mail barcode is a 65-bar postcode used to sort and track letters, which would expand the board of elections ability to track absentee ballots.<sup>45</sup> The barcode can also be used for address correction services, alerting county boards of elections when a ballot could not be received by a voter due to registration discrepancies.<sup>46</sup>

Further, canvassing ballots after Election Day in the manner prescribed is equivalent to extending poll hours when voters face election day access issues, as is sometimes ordered by federal courts.<sup>47</sup> When conditions render polls less accessible, federal courts are regularly willing to extend the time in which ballots may be cast and counted. In light of COVID-19, New York should do just the same, adopting this clear standard provides voters with more time to mail their absentee ballot. Of course, this measure is not merely crisis-oriented and is a fairer, more sensible policy under normal circumstances.

## **B. Clarify Existing Absentee Ballot Excuse Language**

Adopting the S.8015C bill would change New York's election law, codifying the illness definition to include any physical condition or lack of immunity to viruses such as COVID-19. The New York Legislature should adopt and enact S.08015 to ensure that voters are able to fairly and equitably access mail ballots, even during a pandemic.<sup>48</sup>

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<sup>43</sup> N.Y. State Legislature, Assembly Bill 10844, introduced July 24, 2020.

<sup>44</sup> N.Y. State Legislature, Assembly Bill 10843, introduced July 24, 2020.

<sup>45</sup> "Intelligent Mail Barcode 4-State Specification (Rev H)" (PDF). United States Postal Service. April 20, 2015. p. 1. Retrieved 2020-7-15.

<sup>46</sup> *Id.*

<sup>47</sup> *See, e.g.,* Idaho State Democratic Party v. Rich (B. Lynn Winmill, D. Idaho 1:16-cv-491); In re 2016 Primary Election (Susan J. Dlott, S.D. Ohio 1:16-mc-5); Obama for America v. Cuyahoga County Board of Elections (Solomon Oliver, Jr., N.D. Ohio 1:08-cv-562); Ohio Democratic Party v. Cuyahoga County Board of Elections (Dan Aaron Polster, N.D. Ohio 1:06-cv-2692).

<sup>48</sup> "S08015 Summary." New York State Assembly | Bill Search and Legislative Information. Accessed July 16, 2020. [https://nyassembly.gov/leg/?default\\_fld=](https://nyassembly.gov/leg/?default_fld=).



### **C. Provide Paid-Postage Return Envelopes for Absentee Ballot**

Since New York has substantially limited who may vote absentee, most New York voters have never had to pay to cast their ballot. Governor Cuomo extended paid postage to absentee ballot return envelopes through Executive Order 202.26 for the June 23 primary. Executive Order 202.26 does not apply to any village or special purposes district elections that was rescheduled to September 15, 2020 or that would occur later in the year. Nor does this apply to the November 2020 General Election. Under these circumstances, the state should adopt the S.8004 bill to guarantee that voters will receive paid-postage envelopes with absentee ballots indefinitely.<sup>49</sup>

As stated above, COVID-19 is projected to continue into 2021 and, as a result, voters may not have the ability or means to acquire a stamp. If New York does not continue to provide paid postage, then many of the voters who cannot acquire a stamp and must vote absentee because of the pandemic will conceivably be disenfranchised. Providing paid postage for every election occurring in 2020 will ensure that all voters in New York can cast a ballot regardless of financial means or whether they are fit enough to risk accessing a purveyor of stamps. Furthermore, where public health measures make vote-by-mail a necessity for most, if not all, residents, requiring voters to pay for postage to cast their ballot safely can amount to an unconstitutional poll tax.

### **D. Change Signature Matching Provision and Provide Alternative Methods of Verification**

Instead of their overly stringent and arbitrary signature verification procedures, New York should modify their signature standards and provide multiple ways for voters to verify their identity, including by signature or other verification means. New York should issue statewide standards for signature verification to prevent individual counties from using overly harsh or too lenient match algorithms. To maximize voter compliance, New York should publish their signature matching verification process two weeks before absentee ballots are mailed.<sup>50</sup> In addition to verification by signature, verification should be possible through alternatives that may be provided by a voter and relied upon if the signature cannot be verified/validated. Verification tools that are used for voter registration and in-person voting for New Yorkers who do not provide a voter identification document with their registration, include the use of the last four digits of a voter's Social Security Number, bank statement or utility bill, drivers' license number or non-drive photo ID, paycheck, government check, or other government document

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<sup>49</sup> "S08004 Summary." Accessed July 16, 2020. [https://nyassembly.gov/leg/?default\\_fld=](https://nyassembly.gov/leg/?default_fld=).

<sup>50</sup> See, e.g., Colorado's Secretary of State publishes a Signature Verification Guide. See CO. SEC. OF STATE, <https://www.sos.state.co.us/pubs/elections/docs/SignatureVerificationGuide.pdf> (last visited Mar. 22, 2020).

showing a voter's name and address.<sup>51</sup> Other methods of identity verification can include a digital photograph of the voter, a fingerprint affixed to the ballot, or a sworn statement.

#### **E. Creation of Curing Process for Absentee Ballots**

New York should adopt S.8730 to allow voters to correct mistakes on their absentee ballots. The bill provides that before a final determination is made to reject a ballot, the voter will receive a written notice through the mail within twenty-four hours describing the challenge and allowing them to cure their ballot.<sup>52</sup> The voter would then have three days from the date that the notice was received, and no longer than seven days since it was mailed, to address the deficiency in question.<sup>53</sup> Similar measures are already in place across the country to ensure that voters are given a meaningful opportunity to correct mistakes in the ballots they cast via mail.

#### **F. Best Practices for Election Administration**

New York should take every measure to maintain social distance between voters, help minimize crowds, and generally reduce risk at the polls. First, the State should recruit election administrators and inspectors from populations the lowest at risk for severe reactions to COVID-19. This includes inspectors for absentee ballot administration, as well as any in-person voting that may occur during the November 2020 General Election. Additionally, New York should increase the number of election administrators and inspectors for both the June 23 and November 2020 elections. The State should classify election administrators, officials, volunteers, and any other election-related workers (including part-time workers or independent contractors) as emergency personnel.

The State should also remove any long-term care or senior living facilities as planned polling places, as senior citizens are especially susceptible to COVID-19. Polling stations should be situated in larger rooms with space for distancing, such as school gymnasiums. Precincts should maximize the number of polling machines at each site and strategically allocate limited polling machines to areas most likely to experience voter build-up. These polling stations should be regularly and thoroughly cleaned throughout each day, sanitization stations with sterilizer dispensers should be dispersed throughout each station. Voters should be provided with gloves and masks if they are not otherwise equipped. Polling stations should encourage voters to bring their own pens. They should also have clearly demarcated standing areas providing for 6+ feet of

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<sup>51</sup> LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, FIRST VOTE: A GUIDE FOR NEW VOTERS IN NEW YORK STATE 4, [https://my.lwv.org/sites/default/files/leagues/wysiwyg/%5Bcurrent-user%3Aog-user-node%3A1%3Atitle%5D/firstvote\\_nyc\\_english\\_0.pdf](https://my.lwv.org/sites/default/files/leagues/wysiwyg/%5Bcurrent-user%3Aog-user-node%3A1%3Atitle%5D/firstvote_nyc_english_0.pdf).

<sup>52</sup> "S08370 Summary." New York State Assembly | Bill Search and Legislative Information. Accessed July 16, 2020. [https://nyassembly.gov/leg/?default\\_fld=](https://nyassembly.gov/leg/?default_fld=).

<sup>53</sup> *Id.*

space between voters and workers. Counties should endeavor to hire more election officials to administer day-of election procedures, and especially election officials that are at lower risk of severe reactions to COVID-19.

Finally, New York should offer extensive early voting to minimize crowds. More days of early voting will help reduce crowds on Election Day. These polling locations should adopt the above recommendations. The State should also consider modified voting hours for elderly or at-risk populations, emulating the efforts of stores nationwide to protect the most vulnerable.<sup>54</sup>

### **G. Mail-In Submission or Ballot Drop-off**

New York should establish a stronger working relationship with USPS. The June primary revealed that the consequence of insufficient communication between the NYSBOE and USPS is the inadvertent disenfranchisement of New York voters. Formulating a schedule, reviewing postal regulations, utilizing intelligent mail barcodes, coordinating ballot tracking measures, and leveraging cost efficiency with high-volume rates can all be accomplished if a stronger partnership is established.

In addition, New York should implement secure and visible drop boxes in both currently planned polling locations and new drop box locations. Placing ballot drop-off boxes in planned polling locations will minimize voter confusion. Additional drop-off boxes throughout jurisdictions will maximize access. Ballot drop-off boxes should be visible, with large signage, and ADA accessible areas of or near public buildings such as schools, public works, municipal meeting areas, malls, public parks, and other highly frequented areas for maximum voter convenience and confidence. Drop-boxes should be locked or sealed with a tamper-evident seal. Unstaffed drop-boxes should be securely fastened to an immovable object. Staffed drop-boxes should be fastened to an immovable object, placed behind a counter, or otherwise safeguarded. If possible, drop-boxes should be monitored by video surveillance.

### **H. Creation of a Real-Time Ballot Tracking System**

Many states, including California, Arizona, Washington, and Colorado, provide voters with an ability to track their ballots in real-time. Vote-by-mail systems should allow voters to track their ballot from the time it is mailed to the time it is scanned and finally accepted. This is especially important because voters can see if their ballot has been counted or whether their ballot has been flagged for a discrepancy. Tracking ballots should be available online through the

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<sup>54</sup> This is already implemented by grocery stores and other institutions in the US and Europe. *See* Denise Lavoie, *Stores Set Up Senior Shopping Hours Amid Coronavirus Fears*, A.P. (Mar. 20, 2020, 4:48 AM), <https://www.usnews.com/news/business/articles/2020-03-20/stores-set-up-senior-shopping-hours-amid-coronavirus-fears>.

respective county registrar or clerk’s office.<sup>55</sup> Counties must prepare envelopes that have individual barcodes that are scanned at specific points during the reception of the voted ballot, counting of the ballot, and either acceptance or rejection of the ballot. Other tracking options should include text, email, and phone. Nearly half of California counties allow voters to receive automatic emails, SMS or text messages, or voice call notifications about the status of their ballot using software provided by BallotTrax.<sup>56</sup>

## **I. Easily Implementable Policies Other States Use Now**

New York should follow suit of other states that have substantial vote-by-mail programs, while maintaining in-person voting. Both California and Arizona permit no-excuse absentee voting. These states also provide voters with the ability to cure their ballot. In Arizona, if a signature is deemed to be inconsistent with that on the voter’s registration record, the county recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the inconsistent signature and allow the voter to correct or the county to confirm the inconsistent signature” within five days after Election Day.<sup>57</sup> In California, election officials cannot reject a ballot due to signature mismatch if a voter delivers a signed signature verification statement either in-person, by mail, fax, or email that is received no later than 5 pm two days prior to the certification of the election.<sup>58</sup> In California, if a voter fails to sign the absentee ballot envelope, they have until 5 pm two days prior to the certification of the election to complete and submit an unsigned ballot statement.<sup>59</sup>

Sixteen states have statutes that address signature matching discrepancies and provide voters a process to ensure their votes are counted.<sup>60</sup> Among these 16, Minnesota,<sup>61</sup> Oregon,<sup>62</sup> and Washington<sup>63</sup> provide particularly exceptional models for curing provisions. In Colorado, voters are notified if they have any missing or mismatched signatures within three days of any

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<sup>55</sup> Counties such as Denver and Boulder utilize a program called Ballot TRACE, which enables election officials and voters to track their ballots from the printer, to the county’s mail facility, to a local postal carrier, and back again through the mail to the respective election division. Additionally, voters in counties that use Ballot TRACE can choose to receive messages about their ballot’s status through email or text message. DENVER GOV., <https://www.denvergov.org/content/denvergov/en/denver-elections-divison/voter-election-information/ballot-life-cycle.html> (last visited May 11, 2020). Washington state created an online system that enables voters to enter their first and last names and date of birth to track their ballot. See WASH. SEC. OF STATE, <https://voter.votewa.gov/WhereToVote.aspx> (last visited May 5, 2020).

<sup>56</sup> CAL. SEC. OF STATE, <https://www.sos.ca.gov/elections/ballot-status/wheres-my-ballot/> (last visited May 2, 2020).

<sup>57</sup> AZ. Rev Stat § 16-550 (2018).

<sup>58</sup> Cal. Elec. Code § 3019.

<sup>59</sup> *Id.*

<sup>60</sup> NAT. CONF. OF STATE LEGISLATURES, [https://www.ncsl.org/research/elections-and-campaigns/verification-of-absentee-ballots.aspx?fbclid=IwAR2Cr0iMIEUJC4gPz\\_nJCtObO9pO8Z1o2nk\\_y0qfnBu2\\_Aml7ggIKsu84dM](https://www.ncsl.org/research/elections-and-campaigns/verification-of-absentee-ballots.aspx?fbclid=IwAR2Cr0iMIEUJC4gPz_nJCtObO9pO8Z1o2nk_y0qfnBu2_Aml7ggIKsu84dM) (last visited May 2, 2020).

<sup>61</sup> Mn. State. 203B.121(subd. 2).

<sup>62</sup> Ore. Rev. Stat. § 254.431 (2015).

<sup>63</sup> WAC 434-261-050.

discrepancy.<sup>64</sup> Voters cure through a confirmation form and send back the letter notification to the county clerk and recorder eight days after Election Day. In Washington, voters are notified by mail if their ballot may be rejected due to a mismatched signature and can cure their ballot by signing and returning a curing statement within a 21 days after Election Day.<sup>65</sup> Any of these processes can be implemented by New York to ensure that their absentee voting period does not disenfranchise voters, especially first-time absentee voters.

## **J. Adoption of the New York Voting Rights Act and Preclearance for Polling Sites**

On January 20, New York State Senator Zellnor Myrie introduced the New York Voting Rights Act (NYVRA) to address a variety of violations that threaten voting equity in the state, and to propose protections of the right to vote. The NVRA provides comprehensive regulations inspired by the federal civil-rights-era Voting Rights Act that was largely dismantled by the 2013 Supreme Court Decision *Shelby v. Holder.*, while offering new protections for the right of New York voters to participate in the political process.<sup>66</sup>

Notably, the legislation would establish the “pre-clearance” of election procedures – requiring election officials to receive approval from the state attorney general before changing any voting processes or moving polling sites.<sup>67</sup> As New York election law currently stands, local election officials have no responsibility to inform voters of polling site changes within an adequate amount of time to accommodate for the necessary adjustments. Among other prominent voter protections, the NYVRA would remove some of the barriers to voting that disproportionately impact unrepresented voters.

## **IV. Critical Takeaway & Must-Haves**

New York’s election laws regarding absentee ballots should be improved to ensure that an expanded vote-by-mail election would provide all voters with an equitable opportunity to cast their ballot and have that ballot counted. The following improvements should be made to existing law:

1. Continue to ensure all New York voters remain eligible to cast absentee ballots for public health reasons arising out of the COVID-19 pandemic through the passing of legislation by the New York Legislature;

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<sup>64</sup> Colo. Rev. Stat 1-7-5- 107.3.

<sup>65</sup> WAC 434-261-050.

<sup>66</sup> Myrie, Zellnor. “On Martin Luther King Weekend, Senator Zellnor Y. Myrie Introduces New York Voting Rights Act.” NY State Senate, January 21, 2020. <https://www.nysenate.gov/newsroom/press-releases/zellnor-myrie/martin-luther-king-weekend-senator-zellnor-y-myrie-introduces>.

<sup>67</sup> *Id.*

2. Continue to provide all voters with postage-paid absentee ballot applications as well as the ability to apply electronically or by phone;
3. Continue to provide postage-paid return envelopes for absentee ballots for all elections;
4. Accept mail ballots mailed on or before Election Day and received within seven days of Election Day, regardless of whether they have a postmark;
5. Create a uniform standard for reviewing absentee ballots to reduce New York's high ballot rejection rate;
6. Provide voters with notice of and an opportunity to cure deficiencies in absentee ballots;
7. Start the process of administering absentee ballots for the November General Election in August 2020;
8. Raise standards for ballot processing and election administration; and
9. Adopt the New York Voting Rights Act (NYVRA), requiring the pre-clearance of polling sites and changes to election procedures to be approved by the New York State Attorney General.

The recommended policy changes listed in this report directly address the challenges presented by the COVID-19 pandemic and the administration of a substantial, fair, and safe absentee ballot program for all elections held this year.