

# VOTING WITH THE VIRUS: ENSURING DEMOCRACY VIA BYPASSING THE EXCUSE REQUIREMENTS IN ABSENTEE VOTING

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*One of the many difficulties posed by measures undertaken to curb the spread of the COVID-19 pandemic may be an inability to vote. Should this pandemic bleed into the fall, gathering at polling places, for example, would contravene guidelines prohibiting large gatherings particularly in cramped quarters. As such, jurisdictions must act immediately to broaden the use of absentee voting. Unfortunately, seventeen states, either via statute or constitutional provision, presently require an “excuse” to vote absentee. This could theoretically pose a problem insofar as fear of contracting the disease or spreading it to others may or may not qualify. This Article discusses how states could address this requirement, namely via legislative or constitutional alterations, rule promulgation, or simply arguing said fears fall under an acceptable excuse. Each of these options is discussed, including costs and benefits, in the hopes of ensuring each American need not choose between the franchise and her wellbeing come November.*

## INTRODUCTION

In the lamenting words of Dale Ho, the director of the ACLU’s Voting Rights Project, to open his op-ed in the *New York Times*: “As if we didn’t already have enough to worry about during this election season . . . the coronavirus pandemic has come along to threaten the administration of the presidential vote.”<sup>1</sup> He’s absolutely right.

Just days after COVID-19’s emergence in the United States, the virus began substantially impacting the political arena. The presidential

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\* J.D., Harvard Law School; B.S., Massachusetts Institute of Technology. I would like to thank all of the brave men and women serving in essential roles across the country to keep us healthy, safe, and secure during this crisis. We are forever indebted to you for risking your well-being to provide for us. I write this Article as a token of my gratitude and in the hopes of doing what I can to eliminate another source of risk in these unprecedented times. I would also like to thank the editors of the *Fordham Law Review* for their excellent work on this Article. All errors are my own.

1. Dale Ho, Opinion, *Voting by Mail Will Save the 2020 Election*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/opinion/coronavirus-election-vote-mail.html> [<https://perma.cc/S4P3-CE8Z>].

campaigns of both Senator Bernie Sanders<sup>2</sup> and former Vice President Joe Biden<sup>3</sup> dramatically adjusted their events to a COVID-19-carrying population in addition to President Trump's analogous pivot.<sup>4</sup> So, too, has the messaging and focus of the campaigns themselves, with candidates focused as much on the pandemic and its financial and social implications as any other issue.<sup>5</sup>

The administration of the democratic process has already begun to change as a result of the virus, too. On March 13, Louisiana was the first state to announce it had officially postponed its Democratic primary “back to June 20 from the planned date of April 4.”<sup>6</sup> Fifteen other states and two territories have also postponed their Democratic primaries.<sup>7</sup> The political conventions, often seen as events trumpeting the virtues of democracy, are also in peril of closure altogether.<sup>8</sup> But “while states can shift primary dates, the Nov. 3 federal election is set by federal law, as the Constitution mandates that the new Congress convene on Jan. 3 and the [P]resident is inaugurated on Jan. 20.”<sup>9</sup>

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2. See Quint Forgy, *Sanders: Coronavirus Has ‘Radically Changed Our Campaign,’* POLITICO (Mar. 13, 2020, 3:53 PM), <https://www.politico.com/news/2020/03/13/bernie-sanders-campaign-coronavirus-128767> [https://perma.cc/8DGA-ER75]. Senator Sanders has since suspended his presidential campaign. See Scott Detrow, *Bernie Sanders Suspends His Presidential Campaign*, NPR (Apr. 8, 2020, 11:24 AM), <https://www.npr.org/2020/04/08/814291136/bernie-sanders-is-suspending-his-presidential-campaign> [https://perma.cc/XJC5-FM6T].

3. See Katie Glueck, *Joe Biden Will Host ‘Virtual Events’ as Coronavirus Fears Heat Up*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/us/politics/biden-coronavirus-campaign-events.html> [https://perma.cc/4SX6-K4UU].

4. See Tal Axelrod, *Trump Campaign Turns to Virtual Tools Amid Coronavirus Spread*, HILL (Mar. 13, 2020, 5:42 PM), <https://thehill.com/homenews/campaign/487519-trump-campaign-turns-to-virtual-tools-amid-coronavirus-spread> [https://perma.cc/A6UV-9UWK].

5. See, e.g., Lisa Lerer & Reid J. Epstein, *How the Coronavirus Changed the 2020 Campaign*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/us/politics/coronavirus-2020-campaign.html> [https://perma.cc/H43P-RMSP].

6. Jacob Pramuk, *Louisiana Postpones Democratic Primary Over Coronavirus, the First State to Do So*, CNBC (Mar. 13, 2020, 3:23 PM), <https://www.cnbc.com/2020/03/13/louisiana-postpones-democratic-primary-over-coronavirus-the-first-state-to-do-so.html> [https://perma.cc/3TEY-Q7SQ]. In fact, Louisiana has pushed its primary back a second time to July 11. See Gregory Korte, *Louisiana Postpones Democratic Primary Again: Campaign Update*, BLOOMBERG (Apr. 14, 2020, 4:41 PM), <https://www.bloomberg.com/news/articles/2020-04-14/campaign-update> [https://perma.cc/C7YM-T2JM].

7. See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here’s a List*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> [https://perma.cc/SX7W-Q629] (“Alaska, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Pennsylvania, Rhode Island, West Virginia and Wyoming, and Guam and Puerto Rico—have either pushed back their presidential primaries or switched to voting by mail with extended deadlines.”) New York “attempted to cancel its already-postponed presidential primary . . . but a federal judge ordered that the election go forward in June.” *Id.*

8. See, e.g., Laurie Garrett, *It’s Time to Cancel the U.S. Presidential Campaign as We Know It*, FOREIGN POL’Y (Mar. 11, 2020, 2:30 PM), <https://foreignpolicy.com/2020/03/11/cancel-us-president-primary-campaign-democrat-coronavirus/> [https://perma.cc/FR6P-TT7X].

9. Amy Klobuchar & Ron Wyden, Opinion, *Here’s How to Guarantee Coronavirus Won’t Disrupt Our Elections*, WASH. POST (Mar. 16, 2020), <https://www.washingtonpost.com/opinion/here-s-how-to-guarantee-coronavirus-wont-disrupt-our-elections/2020/03/16/>

The implementation of social distancing, an ever-growing number of state and municipal bans on events drawing substantial crowds,<sup>10</sup> and the recent declaration of a national emergency<sup>11</sup> appear as harbingers of more drastic measures in the not-too-distant future,<sup>12</sup> which could certainly impact the general election's voting process. Indeed, on *Good Morning America* on March 10, 2020, U.S. Surgeon General Dr. Jerome Adams, who is charged with "providing Americans with the best scientific information available on how to . . . reduce the risk of illness and injury" and who "oversees the U.S. Public Health Service,"<sup>13</sup> said: "People should know this [crisis] is likely going to get worse before it gets better."<sup>14</sup> Irrespective of whether such measures are ever fully realized, though, we need to begin grappling immediately with the nonpartisan, administrative implications of the virus. Namely, we need to make sure all Americans can vote.

Thankfully, some lawmakers have begun to act. Senators Amy Klobuchar and Ron Wyden introduced the Natural Disaster and Emergency Ballot Act<sup>15</sup> (the "Act"), which "would require all states to offer an option for voters to mail in or drop off hand-marked paper ballots if 25 percent of the states have declared a state of emergency related to an infectious disease," including COVID-19.<sup>16</sup> Unfortunately, despite optimism surrounding its inclusion, the Act did not get folded into early legislation to combat the virus.<sup>17</sup>

For that reason, this Article focuses on how to make sure voting can be put in place as widely as possible in each state. Notwithstanding other significant issues presented by the form and requirements of absentee voting,<sup>18</sup> this Article homes in on the seventeen states that presently impose a particular

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[www.washingtonpost.com/opinions/2020/03/16/heres-how-guarantee-coronavirus-wont-disrupt-our-elections/](https://www.washingtonpost.com/opinions/2020/03/16/heres-how-guarantee-coronavirus-wont-disrupt-our-elections/) [<https://perma.cc/B4QF-PJ6Q>]; see U.S. CONST., amend. XX, § 1.

10. See, e.g., John Woolfolk et al., *Coronavirus: Gov. Newsom Orders Statewide Cancellation of Gatherings over 250*, MERCURY NEWS (Mar. 12, 2020, 7:59 AM), <https://www.mercurynews.com/2020/03/12/coronavirus-gov-newsom-says-cancel-gatherings-over-250-statewide/> [<https://perma.cc/7PYH-8WGB>].

11. See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (declaring a national emergency concerning the COVID-19 outbreak).

12. Cf. Angela Dewan, *The US Is Starting to Look like Italy on Coronavirus Lockdown. It Could Learn a Thing or Two*, CNN (Mar. 13, 2020, 7:41 PM), <https://www.cnn.com/2020/03/13/americas/coronavirus-us-italy-south-korea-lessons-intl/index.html> [<https://perma.cc/R3MU-34QQ>] ("Individual freedoms that many Americans hold onto so dearly will need to be compromised. Freedom of movement, to assemble and protest, and the right to privacy could be among liberties first to go in the battle to control the virus.").

13. *Office of the Surgeon General (OSG)*, U.S. DEP'T HEALTH & HUM. SERVICES, <https://www.hhs.gov/surgeongeneral/index.html> [<https://perma.cc/N87R-5GLA>] (last visited Mar. 19, 2020).

14. *Good Morning America* (ABC television broadcast Mar. 10, 2020).

15. S. 3529, 116th Cong. (2020).

16. Robert Mackey, *Pandemic Planning Should Ensure All Votes Can Be Cast by Mail in November, Experts Say*, INTERCEPT (Mar. 16, 2020, 9:30 PM), <https://theintercept.com/2020/03/16/pandemic-planning-ensure-votes-can-cast-mail-november-experts-say/> [<https://perma.cc/9GTA-XNQ3>].

17. See Michael Wines, *Stimulus Money to Protect Elections Falls Short, Critics Say*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/25/us/coronavirus-voting-stimulus.html> [<https://perma.cc/D6UV-K6PR>].

18. See Ho, *supra* note 1 (indexing other issues in absentee voting).

constraint on the process—namely, requiring an “excuse” for why one needs an absentee ballot—while the other thirty-three as well as Washington D.C. lack such a prerequisite.<sup>19</sup>

First, this Article lays out the problem and its context: what is “excuse” versus “no-excuse” absentee voting, where is each deployed, and what are the pros and cons of each? Next, it reviews a few potential solutions: modifying the laws in the remaining states, promulgating rules to side-step the legislative process, and marshalling healthcare workers to “prescribe” that voters avoid voting in-person. This Article also details the strengths and weaknesses of all three potential solutions. Finally, this Article concludes by recommending one path and opining on the situation at large.

#### I. “EXCUSE” V. “NO-EXCUSE” ABSENTEE VOTING: WHAT ARE THEY AND WHY ARE THEY?

Before we address how to bypass excuse absentee voting to inhibit spreading COVID-19, we must understand what it is. Moreover, to determine the most viable path towards bypassing excuse absentee voting to weather the virus, we must understand why some believe excuses are noble pursuits and why others feel otherwise.

##### A. *What Is Excuse Absentee Voting?*

Ho puts forward a number of exceptional suggestions vis-à-vis absentee voting, all of which should be adopted immediately, and categorizes them into four overarching goals: “[r]amp up public education on voting by mail”; “[b]roaden access to voting by mail”; “[p]ermit early processing of absentee ballots”; and “[p]rotect the rights of absentee voters.”<sup>20</sup> With respect to broadening access, Ho advocates for states to remove any requisite “excuses” one must provide in order to obtain an absentee ballot.<sup>21</sup>

This is because, save for “conducting elections almost entirely by mail, as is already done in Colorado, Hawaii, Oregon and Washington,”<sup>22</sup> one must request an absentee ballot, and the decision to issue one is controlled by a local election board.<sup>23</sup> When an excuse is required, that board determines whether the voter’s offered reasoning is permissible under the state’s framework delineating the acceptable excuses.

Permissible excuses range in specificity and type, both within and amongst the states. In Alabama, for example, a person can request an absentee ballot simply because she will be “out of the county or the state, or the municipality for municipal elections, on election day,” but she may also do so if she “has

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19. See *infra* notes 23–44 and accompanying text.

20. Ho, *supra* note 1.

21. See *id.*

22. *Id.*

23. See, e.g., *Absentee Voting*, N.Y. ST. BOARD ELECTIONS, <https://www.elections.ny.gov/votingabsentee.html> [<https://perma.cc/JM6U-KCBY>] (last visited Mar. 19, 2020) (explaining that a New York voter may request an absentee ballot by application or letter to her county election board).

any physical illness or infirmity which prevents . . . her attendance at the polls,” “work[s on] a shift which has at least 10 hours which coincide with the hours the polls are open,” “is enrolled as a student at an educational institution located outside the county,” or “has been appointed as an election officer or named as a poll watcher at a polling place other than . . . her regular polling place.”<sup>24</sup> Indiana, on the other hand, would not issue an absentee ballot for students living elsewhere but would for all persons older than sixty-five years old (under the assumption of increased health risk) or if voting conflicts in any way with a religious practice or belief.<sup>25</sup> Louisiana issues absentee ballots for incarcerated voters—assuming they still qualify to vote—or voters serving on jury duty, but Louisiana does not recognize the religious practice excuse that Indiana does.<sup>26</sup>

Per the National Conference of State Legislatures, the following seventeen states require an excuse of some kind<sup>27</sup>: Alabama,<sup>28</sup> Arkansas,<sup>29</sup> Connecticut,<sup>30</sup> Delaware,<sup>31</sup> Indiana,<sup>32</sup> Kentucky,<sup>33</sup> Louisiana,<sup>34</sup> Massachusetts,<sup>35</sup> Mississippi,<sup>36</sup> Missouri,<sup>37</sup> New Hampshire,<sup>38</sup> New York,<sup>39</sup> South Carolina,<sup>40</sup> Tennessee,<sup>41</sup> Texas,<sup>42</sup> Virginia,<sup>43</sup> and West Virginia<sup>44</sup> (the “Excuse Required States”).

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24. ALA. CODE § 17-11-3(a)(1)–(4), (6) (2020).

25. See IND. CODE § 3-11-10-24 (2020).

26. See LA. STAT. ANN. § 18:1303 (2020). For a complete comparison of justified excuses by state, see “Qualifying for an Absentee Ballot” in *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/N3K5-UDM4>] (last updated May 19, 2020).

27. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra* note 26, (listing the thirty-three states (and the District of Columbia) that permit “no excuse” absentee voting as well as the seventeen states that require it).

28. See ALA. CODE § 17-11-3.

29. See ARK. CODE ANN. § 7-5-402 (2020).

30. See CONN. GEN. STAT. § 9-135 (2020).

31. See DEL. CODE ANN. tit. 15, § 5502 (2020).

32. See IND. CODE § 3-11-10-24 (2020).

33. See KY. REV. STAT. ANN. §§ 117.085(1)(a), 117.077 (West 2020). Notably, following an agreement with Kentucky Secretary of State Michael Adams, Kentucky Governor Andy Beshear signed an executive order permitting all Kentuckians to request an absentee ballot for the state’s postponed primary, *see supra* note 7, in order to “avoid in-person voting during the coronavirus pandemic.” Ben Tobin & Phillip M. Bailey, *Kentucky to Allow Mail-In Ballots for Every Registered Voter in June 23 Primary*, COURIER J. (Apr. 24, 2020, 6:59 PM), <https://www.courier-journal.com/story/news/2020/04/24/coronavirus-kentucky-mail-voting-allowed-2020-primaries/3019216001/> [<https://perma.cc/39LS-W4YA>].

34. See LA. STAT. ANN. § 18:1303 (2020).

35. See MASS. GEN. LAWS ch. 54, § 86 (2020).

36. See MISS. CODE ANN. § 23-15-715 (2020).

37. See MO. REV. STAT. § 115.277 (2020).

38. See N.H. REV. STAT. ANN. § 657:1 (2020).

39. See N.Y. ELEC. LAW § 8-400 (McKinney 2020).

40. See S.C. CODE ANN. § 7-15-320 (2020).

41. See TENN. CODE ANN. § 2-6-201 (2020).

42. See TEX. ELEC. CODE ANN. §§ 82.001–82.007 (West 2020).

43. See VA. CODE ANN. § 24.2-700 (2020).

44. See W. VA. CODE § 3-3-1 (2020).

*B. Why Does Excuse Absentee Voting Exist?*

Finally, why is such a requirement imposed in the first place? Three chief arguments undergird requiring an excuse: absentee voting is unreliable, absentee voting decreases voter turnout, and excuse requirements specifically deter fraud. The first two reasons pertain to the alleged detriments of absentee voting generally; requiring an excuse, logic dictates, would therefore discourage absentee voting, in turn supporting the case for such requirements.

*First*, some argue that absentee voting is unreliable. And, yes, some statistics arguably buttress this claim. As one critic explains:

Nationwide, roughly 24 percent of all votes in the 2016 presidential election were cast via absentee ballots. That's 33 million votes[.] But . . . nearly 400,000 of those ballots were never counted, having been disqualified for reasons ranging from invalid signatures to simply being late. While 400,000 votes may not make a difference in a landslide, most elections don't end in a landslide. For example, the 2000 presidential election was decided in Florida by 537 votes.<sup>45</sup>

*Second*, others argue that absentee voting decreases voter turnout. For example, a 2008 study performed by American University “concluded that the efforts of states to increase turnout by implementing different forms of ‘convenience’ voting such as no-excuse absentee balloting and early voting were a ‘failure’” insofar as they had an inverse effect on voter participation generally.<sup>46</sup> In this vein, others simply argue that there is no impact on turnout one way or another, and the lesser impact is far outweighed by other costs.<sup>47</sup>

*Third*, there is a belief that an excuse requirement decreases the risk of fraud. To be sure, “[t]he vast majority of voter fraud prosecutions touted by conservative groups like the Heritage Foundation involve absentee ballots that were illegally cast. And the only voting fraud schemes with the potential to actually swing elections involved mail-in ballots, not impersonation at the polls.”<sup>48</sup> And why is that the case? Because that sort of fraud is easier to

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45. Warren Richey, *Voting by Mail Grows in Popularity—but Is It Reliable?*, CHRISTIAN SCI. MONITOR (Dec. 21, 2017), <https://www.csmonitor.com/USA/Politics/2017/1221/Voting-by-mail-grows-in-popularity-but-is-it-reliable> [<https://perma.cc/H2EM-4RJH>] (“Despite its obvious convenience and growing popularity, [the absentee ballot] can be an extremely unreliable way to cast a ballot.”).

46. Hans von Spakovsky, *The Costs of Early Voting*, HERITAGE FOUND. (Oct. 3, 2017), <https://www.heritage.org/election-integrity/report/the-costs-early-voting> [<https://perma.cc/29BM-46EV>].

47. See N.Y. STATE BAR ASS'N, SPECIAL COMMITTEE ON VOTER PARTICIPATION FINAL REPORT 35 (2013), <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/SpecialCommitteeOnVoterParticipationFinalReport.pdf> [<https://perma.cc/6Y33-Z2Q5>] (“As with Early In-Person Voting the case has not been made that use of No-Excuse Absentee Ballots increases voter participation significantly.”).

48. See Mark Joseph Stern, *Voter Fraud Exists. Republican Restrictions Won't Stop It*, SLATE (Sept. 1, 2016, 12:48 PM), <https://slate.com/news-and-politics/2016/09/voter-fraud-exists-through-absentee-ballots-but-republicans-wont-stop-it.html> [<https://perma.cc/U6R7-9NHR>].

commit. One need only sell one's absentee ballot to another away from a polling monitor or other government oversight. As U.C. Irvine law professor Richard L. Hasen summarized: "A far smarter way to steal an election is through the sale of absentee ballots. That transaction can be done in private. The person buying the ballots can buy blank ones from cheating voters, then cast the votes herself. These ballots can be cast simply by mailing them."<sup>49</sup>

To be sure, there are counterarguments for each of these arguments. For example, other experts put forth credible and persuasive arguments that absentee balloting would *increase* voter turnout and that other safeguards more robustly protect against voter fraud than other proposed alternatives such as voter ID laws.<sup>50</sup> There are also additional benefits to "no excuse" absentee systems, including that they would dramatically reduce the costs of administering the election, such as by diminishing the cost of counting absentee ballots.<sup>51</sup>

Whether delineated excuses should or should not be requirements for absentee voters in a vacuum is a fair question, but the argument drastically changes in the shadow of COVID-19. Suffice it to say, the arguments in favor of requiring excuses are substantially blunted when counterbalanced by potentially decreased voter turnout for fear of contamination and subsequent infection. Absent specific protocols and procedures, voters will likely be left in chaos not unlike what has unfolded in Texas. There, following several rounds of litigation in trial and appellate courts,<sup>52</sup> the Texas attorney general petitioned the Supreme Court of Texas for a writ of mandamus to compel the Harris County clerk, the Travis County clerk, the Dallas County elections administrator, the Cameron County elections administrator, and the El Paso County elections administrator "to reject applications for mail-in ballots that claim 'disability' . . . based solely on the generalized risk of contracting a virus."<sup>53</sup> The Supreme Court agreed, issuing the stay.<sup>54</sup> Adding further confusion, a federal district judge ruled

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49. Richard L. Hasen, *Exorcising the Voter Fraud Ghost*, REUTERS: GREAT DEBATE (Apr. 30, 2014), <http://blogs.reuters.com/great-debate/2014/04/30/exorcising-the-voter-fraud-ghost/> [<https://perma.cc/2YLM-JJAB>].

50. See NAT'L VOTE AT HOME INST., POLICY AND RESEARCH GUIDE 18–20 (2020), <https://www.voteathome.org/wp-content/uploads/2019/03/VAH-Policy-and-Research-Guide.pdf> [<https://perma.cc/6XQZ-S6B8>].

51. See *Hearing on Improving Opportunities to Vote in New York State: Assemb. Standing Comm. on Election Law & Subcomm. on Election Day Operations & Voter Disenfranchisement*, 2017–2018 Leg., Reg. Sess. 2 (N.Y. 2018) (statement of Jerry H. Goldfeder) ("A no-excuse absentee voting system is likely to reduce both polling site lines and the administrative burden on election officials, thereby decreasing the total cost of administering elections. A 'no-excuse' system also removes the principal basis for challenging absentee ballots, thereby reducing the number of challenged and litigated ballots.").

52. See Chris Boyette & Kella Mena, *Texas Supreme Court Halts Counties from Issuing Mail-In Ballots to Voters Afraid of Virus*, CNN (May 15, 2020, 11:54 PM), <https://www.cnn.com/2020/05/15/politics/texas-supreme-court-mail-in-ballots/index.html> [<https://perma.cc/96EM-RNVG>].

53. Petition for Writ of Mandamus at x, *In re State*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020).

54. See Boyette & Mena, *supra* note 52.

the following week “that all voters afraid of catching the novel coronavirus can request absentee mail-in ballots due to the pandemic,”<sup>55</sup> only to have that ruling halted by the Fifth Circuit.<sup>56</sup>

Facing such harrowing circumstances and the certain uncertainty that would emanate absent decisive action, we *must* do what we can to permit individuals to vote while abiding by experts’ orders of social distancing and preventing dangerous mass gatherings at polling places—particularly when elections are commonly held at facilities for the elderly.<sup>57</sup> As such, arguments over excuses as a general matter should be temporarily halted, only to be resumed once our country has weathered this crisis, enabling no-excuse absentee voting across the board until the virus has been neutralized.<sup>58</sup>

With this important background in mind, we turn to potential solutions.

## II. THE POTENTIAL SOLUTIONS (AND THEIR STRENGTHS AND WEAKNESSES) TO TEMPORARILY OVERCOME EXCUSE REQUIREMENTS

There are a few potential solutions to bypassing excuse requirements: pass new legislation to remove the excuse requirement, even for one election cycle; promulgate rules to the extent possible to bypass the requirement; and coordinate healthcare workers to “prescribe” that patient-voters stay away from polling locations. The pros and cons of each solution are described herein.

### A. Pass New Legislation and/or Constitutional Amendments

In the most straightforward solution, state lawmakers could pass laws that abolish the excuse requirement. To stay true to viewing this as a temporary measure, such a law could have a sunset provision, a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.”<sup>59</sup> In certain contexts, however, the sunset is triggered by “some pre-specified date *or event*,”<sup>60</sup> meaning the law could be written in such a way as to expire upon a predefined circumstance wherein the state, if not the country, has indeed withstood the

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55. Kelly Mena, *Federal Judge Rules Texans Afraid of Catching Covid-19 Can Vote by Mail*, CNN (May 20, 2020, 7:56 PM), <https://www.cnn.com/2020/05/19/politics/texas-federal-coronavirus-absentee-voting-granted/index.html> [https://perma.cc/4NNM-3HH].

56. See James Barragán, *Federal Appeals Court Puts Coronavirus Mail Voting Expansion on Hold Again*, DALL. MORNING NEWS (May 20, 2020, 11:25 PM), <https://www.dallasnews.com/news/public-health/2020/05/20/federal-appeals-court-puts-coronavirus-mail-voting-expansion-on-hold-again/> [https://perma.cc/BX6U-PPT3].

57. See Joanne Kaldy, *Make This Election Easy for Residents*, CARING FOR AGES, Sept. 2016, at 1, 11 (“[T]he Federal Voting Accessibility for the Elderly and Handicapped Act . . . has resulted in many nursing homes becoming polling places, as they are accessible to people with disabilities and therefore appropriate settings for these individuals to vote.”).

58. Hopefully this will happen in 2020 but that is far from certain.

59. *Sunset Law*, BLACK’S LAW DICTIONARY (11th ed. 2019). For an excellent history on the use of federal sunset legislation, see Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1014–15 (2011).

60. Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1078 (2019) (emphasis added).



pandemic. This could be defined in myriad ways—by the number of new cases in a given period of time, the number of total cases in a given period of time, the death toll, etc. Like all three routes to overcoming absentee excuses, advocating for new laws has both strengths and weaknesses.

### 1. Strengths

A new law has one chief advantage: clarity. A new law passed specifically to accommodate voting in the age of COVID-19 is clear and declarative. Such certitude, particularly in uncertain and turbulent times, would be a welcomed signal from a state legislative body of the importance of voting and of taking precautions seriously. Moreover, in fifteen of the seventeen Excuse Required States, those requirements are statutorily bound; thus, a new law is almost certainly unlikely to engender significant challenges in court, particularly on statutory or constitutional grounds.<sup>61</sup>

Depending on one's view, it could be said that passing a law with an expiration date begets passing it in perpetuity. In the tax context, for example, commentators have argued that sunset laws “are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date.”<sup>62</sup> If that is the case, those who would like to see the excuse requirement abolished altogether would view this intermediate measure as a very positive step in the right direction,<sup>63</sup> realizing former White House Chief of Staff Rahm Emanuel's famous advice: “You never want a serious crisis to go to waste.”<sup>64</sup>

### 2. Weaknesses

Unfortunately, the weaknesses with pushing for a new law in a time of crisis are numerous and varied. However, they can be boiled down to two themes: “pressure and time.”<sup>65</sup>

Former Congressman turned Chief Judge of the United States Court of Appeals for the District of Columbia Circuit Abner Mikva once referred to Congress as a “reactive body unable to enact legislation until the problem at hand reaches crisis proportions.”<sup>66</sup> At the time of this Article's publication (May 2020), the nation is in full-on crisis mode. The nation's leaders are

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61. Of course, this strength would not apply in New York and South Carolina, where the excuse requirement comes in the form of a constitutional provision. In these states, then, a law would have to come in the form of a constitutional amendment, discussed *infra*.

62. Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 658 (2007).

63. This author included.

64. Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008, 12:01 AM), <https://www.wsj.com/articles/SB122721278056345271> [<https://perma.cc/6KRJ-XFE3>]. The full quote reads: “Things that we had postponed for too long, that were long-term, are now immediate and must be dealt with. [The 2008 financial] crisis provides opportunity for us to do things that you could not do before.” *Id.*

65. THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

66. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983).

working day and night to weather the crisis's crescendo. As such, voting may well be a very high priority, but it may still come secondary to actually *saving* lives.

The lack of focus and pressure does not rest solely with the nation's leaders; its population is equally at fault, this author included. As other commentators have remarked, "hospitals in developed countries with the world's best health care risk becoming triage wards[.]"<sup>67</sup> Thus, none could blame Jane Q. Citizen for disregarding who should be elected to office when the prospect of death raps on her door daily. But while none could blame Jane, the problem nonetheless persists.

The perverse irony afoot is the grave *importance* of democratic leadership in crisis. At such moments, the importance of ensuring the republic's continuity as well as the democratic principles undergirding it is at its zenith. One election—Wisconsin's—has already been tainted by failures to adequately protect voters and their ability to vote simultaneously.<sup>68</sup> Indeed, as of April 21, "Milwaukee health officials said they had identified at least seven people who contracted the coronavirus from participating in Election Day on April 7, which was held despite a stay-at-home order issued throughout the state."<sup>69</sup> One could hardly blame voters for fearing going to the polls in future elections across the country, thereby jeopardizing the "fundamental political right" of voting.<sup>70</sup>

As such, we must do what we can to ensure voting takes place during this time, peril notwithstanding. It is with hope that articles like this one or Mr. Ho's op-ed incite further pressure.

But pressure is only half the equation; its parallel flaw is time. As we saw in the aforementioned Wisconsin election, an inability to address this crucial issue created chaos when Governor Tony Evers waited until the day before the election to seek a delay due to the virus, only to let multiple court rulings within a matter of hours dictate the final outcome.<sup>71</sup> Additionally, the presidential election is only a few months away.

While a few months sounds like a long time, passing legislation can take anywhere from months to years. In Indiana, for example, "it usually takes

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67. Jason Horowitz, *Italy's Health Care System Groans under Coronavirus—a Warning to the World*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html> [https://perma.cc/M86S-GDFB].

68. See *How Coronavirus Risk, Missing Ballots Impacted Wisconsin Voters*, MSNBC: AM JOY (Apr. 11, 2020), <https://www.msnbc.com/am-joy/watch/how-coronavirus-risk-missing-ballots-impacted-wisconsin-voters-81931845553> [https://perma.cc/9Q6U-JK94] (highlighting how "Coronavirus risks . . . deeply impacted the [2020] Wisconsin election").

69. See Nick Corasaniti & Reid J. Epstein, *At Least 7 in Wisconsin Got Coronavirus During Voting, Officials Say*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/wisconsin-election-coronavirus-cases.html> [https://perma.cc/2HFL-F37X].

70. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

71. See Molly Ball, *What Went Wrong in the Wisconsin Election, and What We Can Learn from It Before November*, TIME (Apr. 9, 2020, 4:18 PM), <https://time.com/5818773/wisconsin-coronavirus-elections/> [https://perma.cc/BKB6-3FUJ].

an average of three to five years to get a bill signed into law.”<sup>72</sup> And in Indiana, the legislature sits regularly, which is not the case in each of the other sixteen Excuse Required States. For example, Texas’s constitution limits its legislative session to 140 calendar days per two years,<sup>73</sup> and the most recent legislative session has already come and gone.<sup>74</sup> And though “[t]he governor *can* direct the legislature to meet at other times[, such] special sessions[] can last no more than 30 days and deal only with issues chosen by the governor.”<sup>75</sup> Thus, seven months, even at maximal pressure, may not be enough.

In the alternative, consider New York, where the excuse requirement is a constitutional provision.<sup>76</sup> The state senate passed a constitutional amendment over a year ago removing the restriction;<sup>77</sup> as of the publication of this Article, no change has been made to the state’s voting rules—and that was before a pandemic outbreak.

Finally, adding insult to injury, this *all* assumes that the legislatures will continue to convene. Unfortunately, that may not be the case. For example, South Korea, considered the model for containment,<sup>78</sup> has closed both its courts and its legislature.<sup>79</sup> Were that to happen in one of the Excuse Required States, making structural legislative changes would be impossible. Therefore, those seeking to protect the franchise should look at operating within the system as it sits and leave larger structural problems for luxurious moments not counterbalanced by existential threats.

For that reason, pursuing legislation may be worthwhile in the abstract or once COVID-19 passes, but it may be too little too late at the moment. Instead, we may instead hope for state election boards—which can move far more swiftly—to promulgate rules whenever possible to achieve the same effects without the inherent delay of the legislative process. We could also more straightforwardly lobby for physicians to “prescribe” their voting

72. *The Legislative Process*, ST. IND., <https://www.in.gov/gpcpd/2354.htm> [<https://perma.cc/KF8Z-M4RL>] (last visited Mar. 19, 2020).

73. *How a Bill Becomes a Law*, TEX. HOUSE REPRESENTATIVES, <https://house.texas.gov/about-us/bill/> [<https://perma.cc/3N5E-UJNE>] (last visited Mar. 19, 2020).

74. *See Dates of Interest for the 86th Regular Session*, LEGIS. REFERENCE LIBR. TEX., <https://lrl.texas.gov/whatsNew/client/index.cfm/2018/8/7/Dates-of-Interest-for-the-86th-Regular-Session> [<https://perma.cc/A4GY-YP2G>] (last visited Mar. 19, 2020).

75. *How a Bill Becomes a Law*, *supra* note 73.

76. N.Y. CONST. art. II, § 2.

77. Press Release, N.Y. State Senator Leroy Comrie, No-Excuse Absentee Constitutional Amendment Passes Senate (Jan. 15, 2019), <https://www.nysenate.gov/newsroom/press-releases/leroy-comrie/no-excuse-absentee-constitutional-amendment-passes-senate-0> [<https://perma.cc/3H2B-FXEV>].

78. *See* Paige Winfield Cunningham, *The Health 202: Why South Korea, Not Iran, Is a Model for U.S. Coronavirus Response*, WASH. POST: POWERPOST (Mar. 13, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2020/03/13/the-health-202-why-south-korea-not-iran-is-a-model-for-u-s-coronavirus-response/5e6a58be88e0fa101a747d62/> [<https://perma.cc/8YS3-CET4>].

79. *See* Yosuke Onchi, *South Korea Shuts Parliament and Courts as Coronavirus Swells*, NIKKEI ASIAN REV. (Feb. 25, 2020, 3:23), <https://asia.nikkei.com/Spotlight/Coronavirus/South-Korea-shuts-parliament-and-courts-as-coronavirus-swells> [<https://perma.cc/GW8P-36JC>].

patients to forego their polling places for fear of contracting or spreading COVID-19, as all seventeen Excuse Required States recognize an “excuse” of an illness.

### *B. State Election Rule Promulgation*

Each state has a governing body of some sort to oversee elections, whether secretaries of state that oversee elections<sup>80</sup> or specific state election boards statutorily created to do so.<sup>81</sup> And seventeen Excuse Required States view illness as a permissible excuse. As such, to the extent practicable, these governing bodies could promulgate rules and regulations that, during a global health pandemic, fear of contracting illness or passing it along to others constitutes a sufficiently reasonable excuse.

#### 1. Strengths

The key strengths of rule promulgation are procedural in nature. Governmental agencies or boards are nimbler than legislatures; they are able to make a rule and promulgate it fairly efficiently and without substantial need for lengthy—and potentially caustic—deliberations. To be sure, such deliberations are a necessary feature of genuine democracy,<sup>82</sup> wherein all deserve to be heard, and in trying to capture the “marketplace of ideas.”<sup>83</sup> But desperate times indeed call for desperate measures, and expediting such action arguably serves the greater good, even at the expense of deliberation. Moreover, as the pandemic has progressed and more and more states have at various times issued stay-at-home orders, the official discouragement of group gatherings has indeed become an asset on the road to a flattened curve and functional country.

#### 2. Weaknesses

Admittedly, this route also has a few weaknesses. First, rulemaking, while swift in announcement, can take time to enact. For example, in New York, “agencies must accept comment for a required statutory period of time (minimum of 45 days) after the proposal is first published.”<sup>84</sup> Other states impose different delays, too. Arkansas requires the governor to sign off on

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80. *See, e.g.*, ALA. CODE § 17-1-3(a) (2020) (“The Secretary of State is granted rule making authority for the implementation of Chapter 2 under the Alabama Administrative Procedure Act.”).

81. *See, e.g.*, N.Y. ELEC. LAW § 3-102 (McKinney 2020) (granting the state election board delineated authority).

82. *Cf.* *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 188 (1946) (Frankfurter, J., dissenting) (“[M]ere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.”).

83. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

84. *See What is Rule Making in New York?*, N.Y. DEP’T ST. DIVISION ADMIN. RULES, [https://www.dos.ny.gov/info/pdfs/whatisrulemaking\\_flyer.pdf](https://www.dos.ny.gov/info/pdfs/whatisrulemaking_flyer.pdf) [https://perma.cc/R98M-FJVE] (last visited Mar. 19, 2020).

proposed rules before the thirty-day public comment period begins;<sup>85</sup> Delaware requires all rules to be proposed for publication by the fifteenth of a given month to be published the first day of the next month, thereby including a fifteen-day delay;<sup>86</sup> Indiana requires that, following the notice-and-comment period, the attorney general evaluate the proposed rule for an indefinite period of time, and the rule is to go into effect 30 days after securing such approval (absent a different effective date);<sup>87</sup> and Tennessee permits someone to request a hearing about a proposed rule but, even absent such a hearing, the rule “will become effective in 150 days from the first of the month following the filing.”<sup>88</sup> These are not outliers. As of this Article’s publication, these delays have not yet foreclosed the opportunity for change via rule promulgation, but with every passing day, they get closer and closer to doing so.

Second, because rulemaking can begin to infringe on the legislative prerogative, promulgation may well be challenged in court. Those who would wish to challenge the rule are likely to argue it is a bridge too far, “reach[ing] beyond [the Executive’s authority] and assum[ing] the power of the Legislature to set State policy in an area of concededly increasing public concern.”<sup>89</sup> As to who would challenge the rule, two groups of individuals are likely candidates: those who are not persuaded by the risks COVID-19 poses and thus see it as an opportunistic pretext for changing the absentee voting laws;<sup>90</sup> or those who would subscribe to the United Kingdom’s now-former proposed strategy of herd immunity<sup>91</sup> and believe these rules are

85. ARK. ATT’Y GEN. LESLIE RUTLEDGE, GENERAL PROCEDURES FOR PROMULGATING A RULE 1 (2017), [https://www.arkansasag.gov/site/assets/files/1094/rule\\_prom\\_handouts.pdf](https://www.arkansasag.gov/site/assets/files/1094/rule_prom_handouts.pdf) [<https://perma.cc/JYK7-NKWH>].

86. See *101 Regulation Governing Administrative Rulemaking Procedures*, DEL. OFF. REGISTRAR REGULATIONS, <https://regulations.delaware.gov/AdminCode/title29/101.pdf> [<https://perma.cc/7GLE-3TZL>] (“Pursuant to 29 Del.C. §§ 10115 and 10118, an agency shall file its regulation and its public notice or final order by 4:30 p.m. on the fifteenth day of the month for publication in the Register issued on the first of the next month . . . . Any regulation received after the deadlines provided in subsections 3.1 and 3.2 for publication in the next calendar month shall be held for publication in the Register for the calendar month that follows the missed publication date.”) Therefore, if a rule is proposed on May 16, it is not by published until June 1, creating further delay.

87. *Rulemaking Process Overview*, ST. IND., <https://www.in.gov/iurc/2660.htm> [<https://perma.cc/H2NW-VKRRK>] (last visited Mar. 19, 2020).

88. *Pending Rules and Regulations*, TENN. SECRETARY ST., <https://sos.tn.gov/products/division-publications/pending-rules-and-regulations> [<https://perma.cc/W4DT-C2AS>] (last visited Mar. 19, 2020).

89. *Rapp v. Carey*, 375 N.E.2d 745, 747 (N.Y. 1978).

90. In reference to the purported strength named *supra*.

91. See Owen Matthews, *Britain Drops Its Go-It-Alone Approach to Coronavirus*, FOREIGN POL’Y (Mar. 17, 2020, 4:56 PM), <https://foreignpolicy.com/2020/03/17/britain-uk-coronavirus-response-johnson-drops-go-it-alone/> [<https://perma.cc/9AXF-9PR6>] (describing Britain’s adoption and subsequent reversal of a “herd immunity” policy). At its core, herd immunity is the scientific principal that if enough people are nonlethally infected with the virus, “it is difficult for infectious diseases to spread, because there are not many people who can be infected.” *Herd Immunity (Herd Protection)*, OXFORD VACCINE GROUP, <https://vk.ovg.ox.ac.uk/vk/herd-immunity> [<https://perma.cc/7JCR-36MK>] (last updated Aug. 29, 2019).

inappropriate if not altogether harmful to the immunity strategy. Such individuals could try to enjoin the promulgation of such rules and effectively tie them up in litigation. And because state laws often require voters to request absentee ballots many days in advance of a given election, ensnaring solutions in court could spell their death knell.

There is a persuasive counterargument, though. Again, New York provides an interesting exemplar, particularly given that the state consistently ranks among the states with the lowest voter turnout despite its size.<sup>92</sup> The state legislature created the New York State Board of Elections to oversee election issues such as these. Indeed, the Board is not only authorized to, but has the *duty* to “issue instructions and promulgate rules and regulations relating to the administration of the election process.”<sup>93</sup> To be sure, whether one can vote via absentee ballot bears directly on the administration of the election process, and such a rule “is also consonant with the core policy of the Election Law of encouraging the broadest possible voter participation.”<sup>94</sup> Moreover, it could be argued that the doctrine of separation of power is not violated when the executive is simply enforcing the legislature’s absentee voting laws.<sup>95</sup> This is especially true when the “executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement.”<sup>96</sup>

Notwithstanding these counterarguments, at minimum those potential challengers have a colorable claim, meaning that this solution suffers from potential vulnerability to fatal delay.

### 3. Doctors’ Notes and the Excuses

The final potential avenue is the proverbial Occam’s razor—ramp up requests to doctors for notes or “prescriptions” to satisfy the excuse

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92. See Jonathan Wolfe, *New York Today: Why We Don’t Vote*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/nyregion/new-york-today-why-we-dont-vote.html> [<https://perma.cc/EU7Q-NP2E>]. New York’s low voter turnout is particularly interesting when considering that in 2016, both major candidates hailed from the Empire State. See Jillian Jorgensen, *Donald Trump, Hillary Clinton and the Presidential Battle of New York*, OBSERVER (July 20, 2016, 6:00 AM), <https://observer.com/2016/07/donald-trump-hillary-clinton-and-the-presidential-battle-of-new-york/> [<https://perma.cc/24ZH-7CJZ>]. The same is true for two of the three final contestants vying for the presidency in 2020. See Edward Helmore, *Trump and Sanders Grew Up 15 Miles Away from Each Other, but Worlds Apart*, GUARDIAN (Mar. 10, 2016, 6:58 AM), <https://www.theguardian.com/us-news/2016/mar/10/donald-trump-bernie-sanders-young-new-york> [<https://perma.cc/82W4-UVRK>].

93. N.Y. ELEC. LAW § 3-102(1) (McKinney 2020). Notably, so too is the board duty bound to “recommend such legislation or administrative measures as it finds appropriate to promote fair, honest and efficiently administered elections, including, but not limited to, legislation to adjust the contribution limitations set forth in article fourteen of this chapter.” *Id.* § 3-102(11). By this provision, though, the board should also vociferously support legislation proposed *supra*.

94. Bd. of Elections v. Mostofi, 108 N.Y.S.3d 819, 830 (N.Y. Sup. Ct. 2019).

95. See Gross v. Albany Cty. Bd. of Elections, 819 N.E.2d 197, 199 (N.Y. 2004). “Thus, in New York, the right to vote by absentee ballot is purely a statutory right.” *Id.* (first citing N.Y. CONST. art. II, § 2; then citing N.Y. ELEC. LAW § 8-400 (McKinney 2020)).

96. Clark v. Cuomo, 486 N.E.2d 794, 797 (N.Y. 1985).

requirements currently on the books. Like the other proposed solutions, it is not without its merits and demerits.

*a. Strengths*

An obvious immediate strength of this solution is that it requires no legislative or administrative change whatsoever. It does not require convening the legislature—which in and of itself presents a risk of spreading the virus and could violate restrictions on gatherings exceeding a certain number of people—nor does it require the issuance of rules that may themselves be delayed for myriad reasons, from court challenges to deliberate and statutorily required procedural delays.

In a related strength, some case law already exists that suggests a doctor’s preventive and preemptive proscriptio is enough to warrant an absentee vote. For example, in New York, an absentee voter in the 1950s—the last time the nature of an “illness” for purposes of an absentee ballot was stringently challenged—was granted an absentee ballot when a doctor’s note affirmed that she was to stay in Florida because she was allergic to frost and winter conditions, which caused her asthma and a cardiac condition.<sup>97</sup> And in some cases, like that of Missouri, one may not even need a doctor’s note; rather, the Missouri Court of Appeals has interpreted the absentee voting statute to “simply allow the voter to state that he expects to be ill or disabled,” which one could easily state given the nature of the coronavirus’s reach.<sup>98</sup>

*b. Weaknesses*

As was the case elsewhere, this solution too is not without its warts. First and foremost, where a doctor’s note is required, there may simply not be enough medical doctors. As was the case in Italy, “ordinary doctors and nurses [have] to make extraordinary decisions about who may live and who may die”;<sup>99</sup> they may simply be unwilling and unable to take time out of their day treating the sick and dying to write such a note.

A second important weakness is the decentralized decision-making process. The above-cited New York case, for example, arose out of a local election board’s rejection of a would-be absentee voter. Following the board’s rejection, the individual had to sue the election board to enjoin its decision and order them to issue her a ballot.<sup>100</sup> Were even one local election board to take an inappropriately narrow view of what constitutes illness in these harrowing times, the subsequent suits to obtain ballots would be nearly impossible to file in light of court closures.<sup>101</sup> Moreover, even if courts were

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97. See, e.g., *In re Austin*, 165 N.Y.S.2d 381, 384, 394 (N.Y. Sup. Ct. 1956).

98. *State v. Redpath*, 668 S.W.2d 99, 103 (Mo. Ct. App. 1984).

99. Horowitz, *supra* note 67.

100. *In re of Austin*, 165 N.Y.S.2d at 394.

101. See, e.g., Press Release, N.J. Courts, Chief Justice Rabner Announces Two-Week Suspension of Municipal Court Sessions (Mar. 14, 2020), <https://njcourts.gov/pressrel/2020/pr031420a.pdf> [<https://perma.cc/9UL9-G5X7>]; *State Courts Close for Non-essential*

open, such a deluge of suits could easily overwhelm the system, thereby inhibiting equal access to the polls in time for the vote itself.

There are certainly counterarguments to both of these vulnerabilities. With respect to the former, some doctors will be able to serve in this capacity. To be sure, the vast majority of the medical workforce is being pressed into service, including retired professionals or those with expired licenses, to swell the ranks in preparation for the imminent rise of severely ill patients.<sup>102</sup> Nonetheless, there will almost certainly be some who will not join their ranks—not out of selfishness, but because they do not want to take up ICU beds themselves. To wit, per the Federation of State Medical Boards’ biennial census:

[T]he number of licensed physicians between 60 and 69 years old grew to almost 192,000 (19.5%) in 2018, up 38% from the 139,000 doctors in their 60s in 2010. Also, the number of licensed physicians 70 and older grew to more than 106,000 (10.8%) in 2018. That’s nearly a 40% jump from the 2010 figure of 76,000.<sup>103</sup>

For this very reason, Britain’s Royal College of Physicians recommended to English health-care professionals that those considered high-risk “consider not treating patients with COVID-19.”<sup>104</sup> As such, those at-risk doctors

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*Functions*, SPECTRUM NEWS NY1 (Mar. 16, 2020, 6:06 AM), <https://www.nyl.com/nyc/all-boroughs/news/2020/03/16/new-york-state-courts-close-for-non-essential-functions--> [<https://perma.cc/MC5Y-ZR65>]; Jesse Wells, *Coronavirus Leads to Closure of Most Criminal Court Systems in Indy*, FOX59 (Mar. 16, 2020, 4:43 PM), <https://fox59.com/news/coronavirus-leads-to-closure-of-most-criminal-court-systems-in-indy/> [<https://perma.cc/E8BY-PRAU>]; see also DJ McAneny, *Coronavirus Cancellations, Rescheduling, and Other Calendar Adjustments Throughout Delaware and Beyond*, WDEL (Mar. 13, 2020, 1:19 PM), [https://www.wdel.com/news/coronavirus-cancellations-rescheduling-and-other-calendar-adjustments-throughout-delaware-and/article\\_cf9606da-654e-11ea-a0a8-7b15732ff6dc.html](https://www.wdel.com/news/coronavirus-cancellations-rescheduling-and-other-calendar-adjustments-throughout-delaware-and/article_cf9606da-654e-11ea-a0a8-7b15732ff6dc.html) [<https://perma.cc/J3HF-BC6T>].

102. See, e.g., Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Three-Way Agreement with Legislature on Paid Sick Leave Bill to Provide Immediate Assistance for New Yorkers Impacted by COVID-19 (Mar. 17, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-three-way-agreement-legislature-paid-sick-leave-bill-provide-immediate> [<https://perma.cc/7S99-DQ4T>] (“The Governor also announced that the state is reaching out to qualified former doctors, nurses and other healthcare professionals to supplement the personnel at hospitals. The State Department of Health and the State Education Department have sent letters to retired health care professionals and all schools of nursing, public health and medicine encouraging qualified health care personnel to sign up for on-call work during the COVID-19 crisis.”).

103. Andis Robeznieks, *For Growing Number of Doctors, Life in Medicine Extends into 70s*, AM. MED. ASS’N: PHYSICIAN DIVERSITY (Oct. 7, 2019), <https://www.ama-assn.org/practice-management/physician-diversity/growing-number-doctors-life-medicine-extends-70s> [<https://perma.cc/NM9C-V24W>].

104. See Vincent Wood, *Coronavirus: At-Risk NHS Workers Told to Put Their Health First As Volunteer Doctor Dies*, INDEPENDENT (Apr. 1, 2020, 11:22 PM), <https://www.independent.co.uk/news/health/coronavirus-latest-nhs-medical-ethics-treatment-death-alfa-saadu-royal-college-physicians-a9441426.html> [<https://perma.cc/PZ94-VLGG>]. Indeed, there may be medical ethics rules affecting doctors’ decisions in this regard, see Kwame Anthony Appiah, *What Are My Obligations If I’m a Doctor Who Is High Risk?*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/magazine/coronavirus-medical-ethics.html> [<https://perma.cc/6TFG-JULE>], though such discussions are outside the scope of the Article.



could evaluate voters via videoconference—from the safety of isolation—and substantiate voters’ fears of contracting the illness should they be forced to vote in person come November.

Regarding the issue of state boards, the strongest counterargument is simply to have faith. One must hope that individuals who serve on state or local election boards do so because they believe in the franchise and want their fellow Americans to exercise their right to vote. Indeed, “[t]here is danger that, if [such a board] does not temper its doctrinaire logic with a little practical wisdom, it will convert the [requirement] into a suicide pact.”<sup>105</sup>

#### CONCLUSION

This is an unquestionably scary time for the country. News headlines and seemingly extreme actions shock the system—rightly so—instilling a fear that the worst is yet to come as things change by the moment; indeed, this very Article may well be obsolete by the time it is published in May. Refusing to loosen the reins on in-person voting could only exacerbate matters, as many may choose to participate in an election (a genuine act of patriotism)<sup>106</sup> notwithstanding the adverse effects it may incur on their health and that of their loved ones. This Article has fleshed out one unfortunate provision widely deployed that may make that choice more frequent: requiring excuses to obtain an absentee ballot.

To be sure, none of the solutions discussed in this Article are a panacea. For that reason, each should be pursued immediately such that *at least* one achieves success. If anything, increased attention paid to absentee voting during social distancing has the possibility to reverse our nation’s troubling voter participation, namely that our citizenry has “been social distancing from American democracy for years.”<sup>107</sup>

Notwithstanding these formidable obstacles, there is cause for hope.

[T]he measure of a country’s greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.<sup>108</sup>

This “moral heritage . . . when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear

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105. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

106. *Cf. The Public, the Political System and American Democracy*, PEW RES. CTR. (Apr. 26, 2018), <https://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/> [<https://perma.cc/NKT2-XQFK>] (concluding that 74 percent of Americans view election participation as more important in determining the quality of one’s citizenship than paying taxes or obeying the law).

107. *The Late Show with Stephen Colbert, And on the Second Day of Quarantine, Stephen Colbert Discovered Fire*, YOUTUBE (Mar. 17, 2020), <https://www.youtube.com/watch?v=eWPKrGJ7ksI> [<https://perma.cc/Z6WF-K7MR>].

108. *Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring).

to be insurmountable.”<sup>109</sup> As officials and healthcare professionals bravely battle this disease and the general populace continues to work to protect the vote, the difficulties we will overcome sound in both the health of our citizens and the health of our democracy.

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109. *Cooper v. Aaron*, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring).