



ACLU of New York

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April 30, 2020

Hon. Andrew M. Cuomo  
Hon. Andrea Stewart-Cousins  
Hon. Carl E. Heastie  
Members of the New York State Legislature  
New York State Capitol Building  
Albany, New York 12224

New York State Board of Elections  
40 North Pearl Street, Suite 5  
Albany, New York 12207-2729

**Dear Governor Cuomo, Leaders and Members of the New York State Legislature, and Officials of the New York State Board of Elections:**

As the people responsible for the health of New York's democratic process at this challenging moment, we appreciate your leadership in addressing the difficulties posed by COVID-19 to the State's voters and elections. We applaud the decision to recognize that the pandemic and public health measures required to fight it afford all New Yorkers a valid reason to safely vote absentee.<sup>1</sup> We also applaud the decisions to send postage-paid absentee ballot applications to every registered voter,<sup>2</sup> and to allow voters to apply to vote by mail electronically or over the phone.<sup>3</sup>

We write because New York must do more to safeguard its residents' rights and health in the midst of this pandemic. We all witnessed unconscionable scenes from Wisconsin's April 7 election, which resulted in dozens of voters and poll workers testing positive for COVID-19.<sup>4</sup> New York faces a similar challenge to Wisconsin in terms of the transition from elections where voters cast their ballots predominantly in-person to

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<sup>1</sup> Executive Order 202.15, April 9, 2020.

<sup>2</sup> Executive Order 202.23, April 24, 2020.

<sup>3</sup> Executive Order 202.15, April 9, 2020.

<sup>4</sup> Chris Boyett, *Dozens of Coronavirus Cases Connected to US Primary Election Voting*, CNN, April 28, 2020, [https://www.cnn.com/world/live-news/coronavirus-pandemic-04-29-20-intl/h\\_639052a862721ae271c3aef64557e297](https://www.cnn.com/world/live-news/coronavirus-pandemic-04-29-20-intl/h_639052a862721ae271c3aef64557e297); Teran Powell, *40 Coronavirus Cases In Milwaukee County Linked To Wisconsin Election*, Health Official Says, WUWM, April 24, 2020, available at <https://www.wuwm.com/post/40-coronavirus-cases-milwaukee-county-linked-wisconsin-election-health-official-says#stream/0>.

one where voters must predominantly cast their votes by absentee ballots.<sup>5</sup> For example, in the November 2016 election, only 139,988 out of 2,933,000 or 4.7% of all votes in Wisconsin, were cast by absentee ballots compared to 5.2% in New York. However, for the April 2020 election in Wisconsin, 1,138,491 out of 1,551,711 total votes—73% of all votes—were cast by absentee ballots.<sup>6</sup> New York should expect a similar increase in the proportion of absentee ballots cast.

But New York can do better than Wisconsin by acting now to ensure that no one is forced to choose between their health and their right to vote. We urge you to take the following steps as soon as practicable to ensure that the statewide June primary election is safe and accessible for voters, poll workers, essential workers, as well as their families, friends, and neighbors:

**Provide Postage-Paid Return Envelopes for all Absentee Ballots.** On April 24, 2020 the Governor announced that every registered voter would be sent a postage-paid return absentee ballot application, but there has been no similar guarantee *for ballots themselves*. Historically, New York voters have not been provided postage-paid return envelopes for absentee ballots. Instead, absentee ballot return envelopes generally instruct voters to affix proper postage without specifying the amount required.<sup>7</sup> That lack of direction is problematic: absentee ballot return envelopes are oversized; voters are required to enclose in the return envelope not only the ballot, but also the inner envelope with the voter affidavit; the length and weight of the ballot may vary based on the number of races in the count; and few voters have easy access to postage scales or printers.

Providing return postage-paid return envelopes with absentee ballots would alleviate confusion and reduce the number of New Yorkers making extra trips to the post office. Even more importantly, at time when an absentee ballot may be the only way to vote safely and in full compliance with social distancing directives, voters should not be charged a poll tax. New Yorkers are facing record unemployment levels

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<sup>5</sup> See U.S. Election Assistance Commission, The Election Administration and Voting Survey 2016 Comprehensive Report: A Report to the 115<sup>th</sup> Congress, at 24-25, Overview Table 2, June 2017 (“2016 EAC Report”).

<sup>6</sup> Wisconsin Elections Commission, “Unofficial Spring Election Turnout,” <https://elections.wi.gov/node/6853>; “Absentee Ballot Report – April 7, 2020 Spring Election and Presidential Preference Primary,” <https://elections.wi.gov/node/6862>.

<sup>7</sup> United States Postal Service representatives have stated the USPS has a policy of delivering items marked as “Election Mail,” i.e., absentee ballots, even without proper postage; however, the USPS does not publicize this policy and still charges state election authorities for the overages. Susie Armitage, *Mail-In Ballot Postage Becomes a Surprising (and Unnecessary) Cause of Voter Anxiety*, ProPublica, Nov. 1, 2018, <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety>. Moreover, the USPS is currently in dire financial condition and the administration has expressed hostility to funding the postal service adequately, which jeopardizes the continuation of this policy. Allison Pecorin, *Partisan Battle Erupts Over US Postal Service as Some Look to Mail-In Ballots Amid Pandemic*, ABC News, Apr. 28, 2020, <https://abcnews.go.com/Politics/partisan-battle-erupts-us-postal-service-mail-ballots/story?id=70376206>. Regardless, county boards of elections in New York generally provide voters with official absentee ballot return envelopes that explicitly instruct voters to affix postage for their ballots to be delivered.

and insecurity concerning food, housing, healthcare, education, and childcare; prepaid postage would also ensure nobody has to choose between the bare necessities and their right to vote.

**Count All Absentee Ballots Received by the June 30th Deadline, Regardless of Postmark Date.** In Wisconsin, the massive increase in absentee ballot requests overwhelmed elections officials, and the backlogs resulted in many voters not receiving their absentee ballots until *after Election Day*. In the November 2016 election, Wisconsin election officials sent out only 158,846 absentee ballots and reported only 139,988 absentee ballots returned.<sup>8</sup> For the April 2020 primary election, Wisconsin election officials sent out over 1.28 million absentee ballots and reported nearly 1.14 million absentee ballots returned.<sup>9</sup> Delays in mail delivery due to COVID-19 may have also caused a delay in sending out and receiving absentee ballots.<sup>10</sup>

Unlike New York, Wisconsin law does not ordinarily provide for acceptance of absentee ballots received after Election Day. In response to the backlog in Wisconsin, an experienced district court judge and United States Court of Appeals for Seventh Circuit agreed that it was appropriate to expand acceptance within a week after Election Day, regardless of when (or if) those ballots were postmarked. Unfortunately, tens of thousands of voters were disenfranchised when the Supreme Court rejected this solution as too last-minute when offered within days of the election.<sup>11</sup> As a result, polling place lines snaked around the block, and the spread of COVID-19 continued.

New York can and should be better prepared for a similar increase in absentee ballots. New York law already provides that absentee ballots delivered in-person to the Board of Elections through Election Day are counted, and mailed-in ballots are counted if postmarked by the day before Election Day and received by the seventh day after an election.<sup>12</sup> As New Yorkers maintain social distancing to stop COVID-19, more generous acceptance of all absentee ballots can prevent needless trips to the Board of Elections or polling places. Election administrators need extra time to fulfill all absentee ballot requests, and voters deserve the opportunity to cast their ballots regardless of when they receive them, and to have them counted even if a postmark is late or missing, generally through no fault of the voter.<sup>13</sup> At a minimum, all ballots

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<sup>8</sup> 2016 EAC Report.

<sup>9</sup> Wisconsin Elections Commission, “Absentee Ballot Report – April 7, 2020 Spring Election and Presidential Preference Primary,” <https://elections.wi.gov/node/6862>.

<sup>10</sup> Jeanine Santucci, U.S. Postal Service Investigating Issues with Absentee Ballots in Wisconsin That Went Undelivered, USA Today, Apr. 10, 2020, <https://www.usatoday.com/story/news/politics/elections/2020/04/10/usps-investigating-undelivered-wisconsin-absentee-ballot-issues/5135563002/> (last visited April 28, 2020).

<sup>11</sup> *Republican National Committee v. Democratic National Committee*, 559 U.S. \_\_\_, Slip. Op. at 3-4 (2020) (*RNC v. DNC*).

<sup>12</sup> N.Y. Election Law § 8-412(1).

<sup>13</sup> Laura Schulte and Patrick Marley, *Many Wisconsin Absentee Ballots Have Returned Without Postmarks and May Not Be Counted Because of It*, Milwaukee Journal Sentinel, Apr. 10, 2020, <https://www.usatoday.com/story/news/politics/elections/2020/04/10/usps-investigating-undelivered-wisconsin-absentee-ballot-issues/5135563002/>.

postmarked on or before Election Day should be counted. Indeed, even as it rejected other adjustments, the Supreme Court ordered Wisconsin to depart from usual practice and count ballots that were postmarked on Election Day.<sup>14</sup> New York can act ahead of time to better protect its public servants and electorate by encouraging every voter to wait for their absentee ballots to arrive and go no further than the mailbox to vote if possible.

**Apply a Substantial Compliance Standard to Absentee Ballots and Absentee Ballot Applications.** New York has one of lowest rates of absentee ballot usage and one of the highest rates of absentee ballot rejection among all states.<sup>15</sup> That is because under ordinary circumstances, antiquated laws make it unusually difficult for most voters to receive absentee ballots and apply an unforgiving standard to determine which ballots will count. For example, a voter’s otherwise valid absentee ballot might be rejected if the voter signs but fails to date the oath on the inner envelope containing the absentee ballot. For another example, an otherwise valid absentee ballot might be rejected if the name of a write-in candidate is written outside of the specific write-in box. For a third example, an otherwise valid absentee ballot might be rejected if the envelope is sealed with tape or glue.

In recent election cycles, roughly only 4%-5% of votes have been cast by absentee ballot.<sup>16</sup> This year that percentage will increase many times over, but the number of rejected ballots should not. Instead of the usual “strict compliance” standard,<sup>17</sup> Boards of Elections should apply the more lenient standards afforded to in-person voters, or that other states apply to mail-in ballots.<sup>18</sup> This can be easily done; the standard of review is a matter of statute that the Legislature, or the Governor under emergency authority, can alter as needed.<sup>19</sup> New Yorkers casting absentee ballots to “stay-at-home” should not be put at risk of having their ballot discarded, especially as many vote absentee for the first time.

### **Recruit poll workers at lower risk of severe illness from COVID-19.**

Maintaining options for in-person voting is critical to ensuring access to the franchise for historically marginalized voters— particularly voters who require assistance, such as visually impaired voters, homeless voters, or voters with limited literacy—and those who may be unfamiliar with the absentee ballot process. However, a significant portion of New York poll workers fall into higher-risk categories for COVID-19. Counties

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<sup>14</sup> *RNC v. DNC*, 559 U.S. \_\_\_, Slip. Op. at 4.

<sup>15</sup> See, e.g., U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2018 Comprehensive Report: A Report to the 116<sup>th</sup> Congress*, at 30, Overview Table 2, June 2019 (2018 EAC Report) (only 341,270 by-mail ballots out of 6,356,896 total votes cast; but also 34,095 by-mail ballots rejected, 13.69% of by-mail ballots returned).

<sup>16</sup> See *id.* (New York reported only 3.9% of voters in November 2018 cast by mail); see *supra* 2016 EAC Report (New York reported only 5.2% of voters in November 2016 cast by mail).

<sup>17</sup> See, e.g., *Alessio v. Carey*, 49 A.D.3d 1147, 1148, 854 N.Y.S.2d 830, 832 (2008).

<sup>18</sup> See, e.g., *Wells v. Ellis*, 551 So. 2d 382 (Ala. 1989); *Boardman v. Esteve*, 323 So. 2d 259 (Fla. 1975).

<sup>19</sup> See *Gross v. Albany Cty. Bd. of Elections*, 3 N.Y.3d 251, 255, 819 N.E.2d 197, 199 (2004) (“[I]n New York, the right to vote by absentee ballot is purely a statutory right”).

should be urged to proactively recruit individuals from low-risk groups—such as college-age students forced to return home from out-of-state schools—to work as poll workers. While we hope as many voters as possible will vote by mail, we want to ensure that the in-person voting process remains accessible and as safe as possible for voters and poll workers.

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We urge you to adopt and implement these measures for the June 23, 2020 election and for the duration of the 2020 election calendar. It is unclear when the current outbreak will subside, and health officials have warned that even if social distancing measures are successful now, the spread of COVID-19 could rebound in the fall.<sup>20</sup> Please account for the foreseeable risk of continued or renewed viral spread as soon as possible, with time to address the devastating effect it could have on pending major, statewide elections.

We thank you for the leadership you have shown and hope you will continue to show in ensuring that New Yorkers remain safe and healthy while able to fully exercise their constitutional rights. At a time when New Yorkers are making many necessary sacrifices, the strength of our democracy is one we cannot and should not make.

Sincerely,



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<sup>20</sup> See Denise Grady, *The Fear of Coronavirus and Flu Colliding in the Fall*, N.Y. Times, Apr. 22, 2020, <https://www.nytimes.com/2020/04/22/health/coronavirus-flu-season-deaths.html> (“Dr. [Anthony] Fauci . . . said that the nation would still be dealing with the coronavirus in the fall. He said he expected a resurgence then.”).