

March 22, 2020

Re: ACLU urges inclusion of federal mandates to ensure continuity of elections in COVID-19 legislation

Dear Senator:

This letter follows up on our [March 20 letter](#) urging inclusion in the third stimulus legislation federal requirements mandating that states make specific changes to voting options to address the impact of the COVID-19 pandemic on the 2020 elections.¹ We are following up to underscore the importance of Congress enacting substantial federal funding *immediately and federal requirements* for no-excuse mail-in absentee voting and early in-person voting.



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As we outlined in our previous letter, without considerable funding and these minimum federal standards, **states may not be able to achieve no-excuse absentee mail-in voting without overcoming existing legislative or state constitutional blocks.** A federal mandate is necessary to guarantee states can overcome these hurdles and rapidly proceed to institute these changes. Congress has the power to preempt these existing state law restrictions quickly,² allowing states to immediately move ahead with plans to expand vote by mail to their entire eligible populations.

¹ These specific provisions are (1) a federal requirement that all states offer no-excuse mail-in absentee voting to every eligible voter; (2) a federal requirement that all states institute a minimum early voting period of 14 day; (3) \$3 billion in federal funding made available immediately to states, counties, and municipalities; and (4) \$4 million to the U.S. Election Assistance Commission for increased administration duties and additional state support.

² Pursuant to the Elections Clause of the Constitution, Congress has the constitutional authority to require states, rather than simply encourage with funds, to take these important steps to protect the right to vote in a federal election. U.S. Const., Art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives” may at any time be set by Congress); *see also* *Arizona v. ITCA*, 570 U.S.1, 8 (2013) (“The Clause empowers Congress to pre-empt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections.”).

Currently there are approximately 17 states that do not allow no-excuse absentee voting by mail. We need federal legislation **mandating** that states offer all voters an option to vote by mail without the need to provide an excuse. In almost all cases, this limitation on absentee voting is codified in the state law and in some cases within the state constitution.³ Because these limitations are codified, in many states it will be very difficult if not impossible to expand vote by mail in time to help address the COVID-19 pandemic. This is especially true in light of the inability of legislatures to convene at all, given the pandemic situation.

For example, in Texas it is only possible to vote by mail if you are over 65, disabled, will be out of the county where you reside on Election Day and during early voting, or are confined to jail but otherwise eligible. These restrictions are set in Texas law.⁴ The statutory language about being disabled is restrictive – the voter must have “a sickness or physical condition that prevents the voter from appearing at the polling place on election day.”⁵ Arguably, this language could be interpreted to only allow individuals actually sick with the coronavirus to vote by mail, excluding those who may be concerned about their health if they have underlying conditions or the health of a close family member. And it will be very difficult for Texas to change its existing laws, because the Texas legislature is only in session every other year and is not scheduled to sit in 2020.⁶ During the current pandemic, it is difficult to imagine how the Texas legislature can efficiently and safely convene an emergency legislative session.

Additionally, in other states the limitations to absentee voting are within the state constitutions, making the process for changes even more cumbersome. For example, in Massachusetts, current law only allows voters to cast absentee ballots by mail if they are out of town or unable to get to the polls because of a physical disability or religious restrictions.⁷ To change this may require an amendment to the state constitution, which must pass two successive legislatures and be approved by the voters through a ballot initiative.⁸

³ See Nat'l Conf. of State Legislatures, “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options” (Feb. 20, 2020, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>).

⁴ See Tex. Election Code § 82.001–82.007.

⁵ Tex. Election Code § 82.002.

⁶ See Tex. House of Representatives, Frequently Asked Questions, <https://house.texas.gov/resources/frequently-asked-questions/>.

⁷ Mass. Gen. Laws ch. 54, § 86.

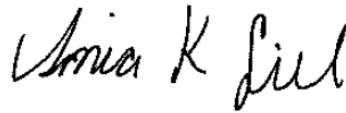
⁸ Mass. Const. Amend. Art. 48, Pt. 4.

It is simply not an option for Congress to fail to act on these basic issues to protect American elections while the pandemic is ongoing. Thank you for your attention to this urgent request. If you have any questions, please do not hesitate to contact ACLU Legislative Counsel Sonia Gill at sgill@aclu.org or (917) 334-1545.

Sincerely,



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