

Written Testimony of

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Thank you for the opportunity to submit this statement on the 2020 New York primary, and plans for the November election. The Brennan Center for Justice has worked for decades to make democracy in New York more accessible.¹ This year's primary elections have served as both a high-stakes test of voting during the coronavirus pandemic and a preview of challenges that New Yorkers may face in November. The results were unsettling: election officials struggled to handle a surge in demand for absentee voting, thousands of voters were forced to go to the polls because they did not receive a ballot they requested, tens of thousands of absentee ballots were discarded, and untold numbers of New Yorkers decided not to vote at all, rather than put their health at risk.

Health experts predict that the coronavirus will remain prevalent well into the fall. So the Legislature, Governor, and elections officials must prepare for an election under similar circumstances and do everything possible to make sure the state is prepared to run a credible, safe and fair election. That means facilitating a massive increase in absentee voting, while providing ample and safe in-person voting opportunities to address the inevitable gaps.

I. The New York primary was a warning for the November election.

The June 23 primary was held under unprecedented circumstances. Plans for the election had to be made while the pandemic was at frightening levels, forcing elections officials to shift on the fly to ramp up absentee voting while still maintaining opportunities to vote in-person for those who needed it. It should be expected that there would be hiccups, but the primary demonstrated areas where improvements must be made before November:

¹ The Brennan Center for Justice at NYU School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's systems of democracy and justice. The opinions expressed in this testimony are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law.

- Too many absentee ballots were rejected. Almost one in five absentee ballots cast in New York City, approximately 84,000, were not counted.² In the general election, when turnout is likely to at least double and the use of voting by mail will surge even higher, these numbers will become even more unacceptable.
- Voters requested absentee ballots and did not receive them. More than thirty thousand ballots were sent the day before the primary, with no hope that they could be delivered to voters in time to vote.³ Reports indicate that tens of thousands of voters either did not receive their ballot on time, or did not receive it at all.⁴
- Properly cast ballots were rejected for lack of a postmark. A federal court found that “despite the postal service’s best efforts, there is uncontroverted evidence that thousands of absentee ballots for the June 23 Primary were not postmarked.”⁵
- Thousands more ballots were rejected for curable errors.⁶ Mistakes such as failing to sign a ballot envelope are common, especially for voters unfamiliar with voting absentee. Rejecting ballots for technical defects undermines confidence in the election, feeds negative narratives about absentee voting, breeds conspiracy theories, and can discourage voters from future participation.
- Polling sites did not open on time.⁷ In part as a result of the overnight closures of the subway system, some poll workers could not make it in time to open polling places. When polling places open late, it can disenfranchise voters who have a narrow window to vote and cause lines to form when they do open.
- Some polling sites were changed at the last minute.⁸ Any changes to polling places run a risk of disenfranchising voters. Changes at the last minute run an even higher chance of causing confusion, sowing distrust, and leading to disenfranchisement.
- It took six weeks to report final results.⁹ It is important for everyone to adjust expectations for election results in November. The shift to more mail voting will cause delay, and that is usually a sign of voter-friendly policies working correctly. For instance, delays will be caused by deadline extensions and providing voters an opportunity to cure technical defects in their ballots. But the delay in New York was extreme and unnecessary.

² Jane C. Timm, “1 In 5 Mail Ballots Rejected in Botched NYC Primary,” NBCNews.com (NBCUniversal News Group, August 7, 2020), www.nbcnews.com/politics/elections/one-five-mail-ballots-rejected-botched-nyc-primary-n1236143.

³ *Gallagher v. New York State Board of Elections*, -- F. Supp. 3d --, No. 20 Civ 5504 (AT), 2020 WL 4496849, at *5 (S.D.N.Y. Aug. 3, 2020).

⁴ Jesse McKinley, “Why the Botched N.Y.C. Primary Has Become the November Nightmare,” The New York Times (The New York Times, August 3, 2020), www.nytimes.com/2020/08/03/nyregion/nyc-mail-ballots-voting.html.

⁵ *Gallagher*, 2020 WL 4496849, at *5.

⁶ McKinley, “Botched N.Y.C. Primary.”

⁷ Jeffery C. Mays, “Primary Voters in New York City Face Scattered Problems,” The New York Times (The New York Times, June 23, 2020), www.nytimes.com/2020/06/23/nyregion/voting-nyc-primary.html.

⁸ Jesse McKinley, Shane Goldmacher, and Matt Stevens, “After 6 Weeks, Victors Are Declared in 2 N.Y. Congressional Primaries,” The New York Times (The New York Times, August 5, 2020), <https://www.nytimes.com/2020/08/04/nyregion/maloney-torres-ny-congressional-races.html>.

⁹ *Ibid.*

II. There are a number of reforms New York must adopt to prepare for November.

In order to avoid a repeat of the problems we saw in June, and ensure that voting is accessible, safe, and secure in November, New York must make changes in four key areas: 1) voter registration; 2) in-person voting; 3) absentee voting; and 4) the counting of absentee ballots.

A. Expand access to voter registration.

The disenfranchisement and delay during the June 23 primary was obvious to all and the subject of a great deal of reporting. But, the coronavirus pandemic has impacted our democracy in another way that was not as apparent to many observers. Registration rates plummeted in the first half of 2020, decreasing by roughly one-third when compared to the same period in 2016.¹⁰ The severe restrictions on public and private life necessitated by the rapid transmission of the virus meant prospective voters were not heading in to government offices that offer voter registration and civic organizations and campaigns were not able to conduct voter registration drives like they would in a typical election year. The effects of these limitations will likely be even more intense in the weeks leading up to the general election, when most registrations typically occur. In order to ensure that limited access to voter registration does not create an obstacle for would-be voters, New York can increase access to voter registration this year in two ways.

First, cut the voter registration deadline from 25 days to the 10 days provided for in the New York Constitution.¹¹ New York's deadline is more restrictive than most of the country. Thirty-two states allow registrations closer to Election Day, including twenty that allow registration on Election Day.¹²

Second, New York could expressly authorize the New York City Campaign Finance Board (CFB) to operate its online voter registration system. We commend the Legislature for passing legislation to provide for statewide online voter registration by 2021. But, New York is now facing a pandemic and a concomitant registration crisis, and it is critical that New Yorkers be given every available option to participate now. The CFB system is ready to go live and the Senate already passed S6463 authorizing it to move forward. The Assembly should do the same.

B. Provide ample opportunities for safe and sanitary in-person voting.

Although most of the issues that cropped up in June were related to rapid expansion of absentee voting, New York still has work to do to ensure that voting in-person is a safe and sanitary option in November. As we have seen, the shift to large-scale mail voting has put significant strains on our election system. In the wake of the disenfranchisement many experienced in June, and as New York "re-opens" through the fall, the overall increased turnout for November will likely include an increase in in-person voting. Moreover, for many voters, including voters with disabilities and those needing language assistance, the services they need to vote privately and independently are available at polling sites and are more challenging to access

¹⁰ According to publicly available data obtained from the New York State Board of Elections, there were just 310,629 new and updated registrations between January 1 and June 30, 2020. In that same period in 2016, there were more than 470,000 new and updated registrations.

¹¹ N.Y. Const. Art. II § 5.

¹² Brennan Center for Justice, Preparing Your State for an Election Under Pandemic Conditions (Aug. 2020), www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions.

via mail. Other voters will be reluctant or even suspicious of casting their vote any other way. This is especially true for Latino, Black, and younger voters who tend to trust and use vote-by-mail at lower rates than other voters.¹³

In order to ensure that voting in person is safe and sanitary, New York should expand early voting options and put plans in place to ensure polling places are properly staffed and open on Election Day. More early voting is consistent with CDC guidelines and recommendations from a bipartisan task force on the November election.¹⁴ Along with a concerted education effort, it will help to ease the surge of voting on Election Day, preventing lines and crowds. As for Election Day, even the best-laid plans often go awry in the midst of a pandemic, so it is critical that elections officials have back-ups in place to account for poll worker and polling place attrition.

This means providing elections officials the resources they need. We understand that these officials need federal funding to keep our democracy running during the pandemic and ensure we can have a free and participatory election in November. The Brennan Center is asking Congress to secure more funds for the November election. If Congress responds as we hope it will, New York will need to act quickly to put those resources to work.

C. Encourage absentee voting.

The most critical change New York needs in place for November is to clarify right away that everyone has the right to cast an absentee ballot. Senate Bill 8015D does that, and Assembly Bill 10807 ensures that voters may do so more than 30 days before the election. These changes are essential for ensuring voters do not have to choose between their health and their vote. We urge the Governor to sign these bills quickly in order to provide certainty for November.

But New York should not stop there. We should encourage voters to use this option and reduce crowding in November. The State should ensure that every voter can make a request for an absentee ballot online. The State should also require Boards of Elections to mail an absentee application to every registered voter, active and inactive, with a prepaid postage return envelope. That mailer should include accurate information about the various options voters have for voting in the general election, including information on requesting an absentee ballot online and information on voting in-person early and on Election Day. Postage should also be prepaid for returning absentee ballots so that having a stamp is not a barrier to voting.

D. Ensure absentee ballots are counted in a timely manner.

Finally, as we saw in June, it is not enough to simply give everyone the right to request an absentee ballot. We must also ensure that absentee ballots are counted and that they are counted without undue delay. This means adjusting receipt deadlines to account for delays in U.S. Mail, beginning the processing of mail-in ballots prior to the close of polls on Election Day, ensuring that ballots are not rejected due to technical or curable defects, and providing the

¹³ Raúl Macías and Myrna Pérez, Voters Need Safe and Sanitary In-Person Voting Options (March 31, 2020), <https://www.brennancenter.org/our-work/research-reports/voters-need-safe-and-sanitary-person-voting-options>.

¹⁴ Centers for Disease Control and Prevention, Considerations for Election Polling Locations and Voters (June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>; National Task Force on Election Crises, COVID-19 Election Guide, 2020, <https://www.electiontaskforce.org/s/COVIDguidance.pdf>.

resources necessary to complete the canvass of ballots efficiently. The Legislature has already taken some action to improve this process, but there is more that can and should be done.

New Yorkers, and Americans more generally, need to understand that election results will not be immediate in November. But the results do not have to take as long as they did in New York this summer, and it is imperative they not take this long in November.¹⁵ Current law authorizes elections officials to begin processing absentee ballots before poll closure and counting absentee ballots immediately after closure.¹⁶

Once counting begins, ballots should not be rejected based on technical defects that do not substantially relate to ensuring that the ballot was actually completed and cast by the voter. Nor should they be rejected without giving the voter notice and an opportunity to cure defects like a missing signature. Senate Bill 8370B provides a notice and cure process that will prevent much of the disenfranchisement we saw in June.

Senate Bill 8799A would require boards of elections to count valid ballots for accepting ballots without postmarks the day after election. This will help address the problem, but the legislature could do far more. In fact, a federal court recently ordered that ballots arriving without postmarks two days after the June 23 primary be counted. After hearing testimony from boards of election and the U.S. Postal Service, the court found with “virtual certainty that absentee ballots received by a board of elections on June 24 or June 25 were cast on or before June 23.”¹⁷ Some states allow elections officials to accept ballots without postmarks that arrive after Election Day if the voter has signed and dated the envelope by Election Day.¹⁸ California has further extended the date for ballots to arrive to 17 days after Election Day this year.¹⁹

We urge the Governor to sign SB 8370B and 8799A, and the Legislature to take further steps to ensure all properly cast ballots are counted in November.

III. New York’s democracy has improved dramatically, but there is still room for improvement.

New York has made great progress on elections in recent years and we applaud the Legislature for enacting many positive reforms.

Still, there is more to do. For years, the Brennan Center has focused its advocacy on voting rights in New York on two policies: automatic voter registration (AVR) and restoring voting rights to New Yorkers on parole. Last month, the Legislature took a big step forward by passing AVR. If it is signed into law by the Governor, AVR will change the way New York residents register to vote by allowing eligible citizens to be automatically registered at state agencies when they apply for many types of services, including drivers’ licenses, Medicaid, unemployment, and public housing. When the bill goes into effect, New York could see a tremendous expansion of its electorate. The inclusion of agencies beyond the DMV will ensure that this expansion is reflective of the diversity of New York’s population.

¹⁵ Federal law requires the presidential electors from each state to meet and vote by December 14, 2020. 3 U.S.C. § 7.

¹⁶ NY Elec. Law § 9-209(2)(a)(i)(A).

¹⁷ *Gallagher*, 2020 WL 4496849, at *22.

¹⁸ See, for instance, Cal. Elec. Code § 3020(c) and Wash. Rev. Code § 29A.40.110.

¹⁹ See Brennan Center for Justice, Preparing Your State for an Election Under Pandemic Conditions (August 4, 2020), www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions.

Unfortunately, the Legislature has not acted to restore voting rights to people on parole. We need to ensure that we do not leave our neighbors behind as we build an improved system of democracy. New York's disenfranchisement law is a shameful relic of a Jim Crow-era attempt to deny Black men the right to vote.²⁰ Today, the law continues to impact people of color at much higher rates: nearly three-quarters of everyone on parole in New York is Black or Latinx.²¹ It is past time for the Legislature to codify and expand upon Governor Cuomo's executive action to restore voting rights for people on parole. Only the Legislature can provide for a truly automatic and fully effective system of rights restoration.

Conclusion

More than a million voters cast mail ballots in June,²² and that number is sure to rise with increased turnout in November. Far too many of those ballots went uncounted. COVID-19 is testing our democracy. But New York has proven to the country that it is possible to overcome the challenges that the virus poses. By making voter registration accessible, enabling elections offices to handle a massive expansion in mail voting, and ensuring safe polling places remain available, New York can do that again in November.

²⁰ See Erika Wood, Liz Budnitz, and Garima Malhotra, *Jim Crow in New York*, 2010, <https://www.brennancenter.org/our-work/research-reports/jim-crow-new-york>.

²¹ State of New York, Dep't of Corrections & Community Supervision, Community Supervision Legislative Report 12 (2019), <https://doccs.ny.gov/system/files/documents/2020/02/community-supervision-legislative-report-2019-final.pdf>.

²² *Gallagher*, 2020 WL 4496849, at *5.