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COMMENTARY

ENSURING THAT EVERY VOTE COUNTS: PROTECTING HISTORICALLY DISENFRANCHISED COMMUNITIES' ACCESS TO THE BALLOT DURING THE COVID-19 PANDEMIC

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The 2020 election season was set to be busy for the voting rights team at the ACLU of California. In preparation, we were gearing up for one of the most consequential elections of our lifetime. Our goal was clear: continue working to remove structural barriers to voter registration and participation in California's elections with a specific focus on historically marginalized communities to ensure that limited English proficient individuals, people impacted by the criminal justice system, people with disabilities, and other underrepresented communities are not intentionally or inadvertently excluded from our democracy. We set to advance these goals by continuing our work on the successful and equitable implementation of the Voter's Choice Act (VCA), particularly in Fresno, Sacramento, and Los Angeles Counties; monitoring the Motor Voter Program;¹ and expanding language access for different language communities.² We were similarly preparing for a ballot campaign to restore voting rights to

¹ "Voting Rights Groups Sue California for Voter Suppression: Legal Action taken due to State's Failure to Comply with 'Motor Voter' Law," ACLU of Northern California, May 9, 2017 Press Release, available at <https://www.aclunc.org/news/voting-rights-groups-sue-california-voter-suppression>; "Voting Rights Groups Reach Agreement on Next Steps for Review and Accountability for Processing of Voter Registrations at DMV," ACLU of Northern California, Feb. 4, 2019 Press Release, available at <https://www.aclunc.org/news/voting-rights-groups-reach-agreement-next-steps-review-and-accountability-processing-voter>.

² "Voting Rights Victory for Limited-English Citizens," ACLU of Northern California, Nov. 4, 2019 Press Release, available at <https://www.aclunc.org/news/voting-rights-victory-limited-english-citizens>; "Secretary of State Denies Arabic- and Somali-Speaking Voters Language-Appropriate Services to Ensure Their Right to Vote This November," ACLU of Northern California, Aug. 6, 2020 Press Release, available at <https://www.aclunc.org/news/secretary-state-denies-arabic-and-somali-speaking-voters-language-appropriate-services-ensure>.



Californians who have completed their prison term,³ while ensuring that individuals in jails were empowered to vote.⁴

COVID-19 did not upend those plans. Instead, the pandemic, together with the Black Lives Matter protests across the state and our country, shined a harsh light on the continued systems of racial oppression and xenophobia plaguing our country from inception, further underscoring how critical and timely the policies we are working on to expand access to the ballot are to ensure that all communities have a say in decisions and policies to help reimagine their communities. When the pandemic hit California we, along with other voting rights advocates, were forced to react to new challenges and uncertainty to the way the election would be administered, while continuing to uplift the needs of historically disenfranchised communities.

As COVID-19 began to spread in March, three significant challenges became apparent. First, many of the typical poll workers, who tend to be older and thus more susceptible to the virus, would no longer be able to or feel comfortable enough to work the polls come November. Second, certain voting locations would simply not work: some locations, such as garages, would be too small and therefore not allow for proper social distancing; some locations, such as retirement homes, were too proximate to vulnerable populations, and therefore risky; and some locations, such as certain government buildings or large convention spaces, would be in too high demand for other emergency needs such as shelters and makeshift hospitals. Third, there was a lack of information about the virus, who it affected, and how long it would last. At the time, there were reports that children may be spared but there was no information about how the virus would eventually disproportionately impact communities of color.⁵ Similarly, it was unclear whether the virus and shelter-in-place policies would still be in place in the fall. All these challenges and uncertainties threatened the election and we were concerned that the impact would disproportionately fall on historically disenfranchised communities.

³ “Free the Vote for Californians on Parole (ACA 6),” ACLU of Northern California (last accessed Aug. 15, 2020), available at <https://www.aclunc.org/our-work/legislation/free-vote-californians-parole-aca-6>.

⁴ Let Me Vote website, ACLU of California (last accessed Aug. 15, 2020) available at <https://www.letmevoteca.org/>.

⁵ Across California, COVID-19 has ravished low-income, Latinx, and Black communities, as well as those who are incarcerated or detained. See for example Rong-Gong Lin II et al, “Coronavirus is killing more Californians than ever before, and cruel inequities are worsening,” *Los Angeles Times* July 24, 2020, available at <https://www.latimes.com/california/story/2020-07-24/coronavirus-hospitalizations-for-children-younger-adults-dramatically-worsen-in-l-a-county>; Nadia Lopez, “California Latinos are among the hardest hit by COVID-19. Experts blame systemic racism,” *Fresno Bee* July 30, 2020, available at <https://www.fresnobee.com/news/coronavirus/article244586767.html>. In Los Angeles County, for example, Latinxs are more than twice as likely than whites to get COVID-19, according to Rong-Gong Lin II, “Latinos now twice as likely as whites to get coronavirus in L.A. County,” *Los Angeles Times* (July 10, 2020), available at <https://www.latimes.com/california/story/2020-07-10/l-a-countys-latinos-residents-contracting-coronavirus-faster-than-other-groups>.



It was also in March that the California Secretary of State convened a working group that we participated in to discuss challenges and potential changes to the way the November election would have to be administered.

In the working group, there were two significant overarching policy questions presented. The first question was how to ensure that voters did not have to choose between their health and their right to vote. One of the key ways to achieve this, and one change that we advocated for,⁶ was through expanding access to voting at home. We understood this to be a commonsense way to protect the vote, since many Californians were already using vote-by-mail: 65% of California voters returned their ballots by mail in the November 2018 general election and 72% in the March 2020 primary election.⁷ We also had experience working with counties that had adopted the VCA and knew that over half of California voters lived in a VCA county and that those in every VCA county except Los Angeles were already automatically receiving their ballots in the mail.⁸ Eventually, California Governor Gavin Newsom would sign Executive Order N-64-20⁹ requiring that all registered voters automatically receive a ballot in the mail. The California legislature codified that requirement in Assembly Bill 860 and added safeguards to ensure that as many valid ballots postmarked by Election Day would be counted.

⁶ “Revised Recommendations for California’s November 2020 Elections,” Letter from Advocates to Governor Newsom and Secretary Padilla, May 22, 2020, available at <https://www.aclunc.org/sites/default/files/Revised%20Recommendations%20for%20California%E2%80%99s%20November%202020%20Elections%205-22-20.pdf>.

⁷ Historical Vote-by-Mail (Absentee) Ballot Use in California, California Secretary of State, accessed Aug. 14, 2020, available at <https://www.sos.ca.gov/elections/historical-absentee/>

⁸ “Over Half of State’s Voters to be Covered by Voter’s Choice Act for 2020 Elections as Tuolumne County Becomes 14th County to Adopt Reform,” California Secretary of State, Press Release, June 26, 2019, available at <https://www.sos.ca.gov/administration/news-releases-and-advisories/2019-news-releases-and-advisories/over-half-states-voters-be-covered-voters-choice-act-2020-elections-tuolumne-county-becomes-14th-county-adopt-reform/>.

⁹ Executive Order N-64-20, Executive Department of the State of California, May 5, 2020, available at <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf>; “ACLU of California Statement on the Governor’s Executive Order on the November General Election,” ACLU of Northern California, May 8, 2020 Press Release, available at <https://www.aclunc.org/news/aclu-california-statement-governor-s-executive-order-november-general-election-0>.



Since these policy actions were taken, we have worked to ensure their success. For example, we have worked to counteract attacks¹⁰ and false claims¹¹ on the security of voting by mail by issuing correct information on voting by mail.¹² We have also worked with the California Secretary of State's office to strengthen California's vote-by-mail and ballot processing system to ensure that all valid ballots are counted.¹³ Together, stronger policies and voter education will help to make vote-by-mail a success in California.

The second significant policy question was whether and how to keep in-person voting locations open. We knew that relying on vote-by-mail alone was not enough, and without meaningful and safe opportunities to vote in person many already-underrepresented voters would be disenfranchised this November.¹⁴ In person voting locations are essential for several reasons. Vote-by-mail may not be an option for voters who are experiencing housing instability, and we are likely to see a greater number of displaced voters this November due to the economic fallout from the pandemic. Many of these voters may not have a stable address to register at in time to receive their vote by mail ballot. Voters with limited-English proficiency or disabilities rely on services that are provided at in-person voting locations. For example, limited-English proficient voters may need to access a translated reference ballot (otherwise known as a facsimile ballot) to help them vote on the English ballot. Black, Latinx, and Native American voters are also historically less likely to use vote-by-mail and may be less accustomed to vote-by-mail procedures and prefer voting in person.¹⁵ New and infrequent voters

¹⁰ See Jeremy White, "Issa sues California over November mail-ballot election," *POLITICO* May 21, 2020, available at <https://www.politico.com/states/california/story/2020/05/21/issa-sues-california-over-november-mail-ballot-election-1285467>; Laura Newberry, "Republicans sue Newsom over vote-by-mail order for November election," *Los Angeles Times* May 24, 2020, available at <https://www.latimes.com/california/story/2020-05-24/republicans-sue-newsom-over-vote-by-mail-order-for-november-election>.

¹¹ See Stephanie Saul and Reid J. Epstein, "Trump Is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts," *New York Times* Aug. 3, 2020, available at <https://www.nytimes.com/article/mail-in-voting-explained.html>

¹² "Vote-by-Mail: Safe, Secure, Reliable," ACLU of Southern California, last accessed Aug. 15, 2020, available at <https://www.aclusocal.org/en/vote-mail-safe-secure-reliable>.

¹³ "Request for the Secretary of State to Promulgate Emergency Regulations in Accordance with AB 1970," Letter to the California Secretary of State dated July 17, 2020, available at https://www.aclunc.org/sites/default/files/Letter_to_Secretary_of_State_re_Compliance_with_AB%201970.pdf; "Proposed Regulations," Letter to the California Secretary of State dated Aug. 5, 2020, available at https://www.aclunc.org/sites/default/files/Final_Regulations_Letter_8-5-20.pdf.

¹⁴ Stonesifer, Brittany & Christina Fletes, "Vote by Mail Not Enough, California Must Also Require Minimum Number of In-person Polls for November Elections, ACLU of Northern California Blog, May 21, 2020, available at <https://www.aclunc.org/blog/vote-mail-not-enough-california-must-also-require-minimum-number-person-polls-november>.

¹⁵ "The California Voter Experience: Why African-American Voters Choose to Vote at the Polls or Vote-by-Mail, and How They Perceive Proposed Changes to California's Voting System," UC Davis Center for Regional Change/California Civic Engagement Project (Sept. 2016), available at <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/57ffe66ff7e0abb9f7b5f3e6/1476388465082/UC>



would also greatly benefit from in-person voting locations to take advantage of the newly-enacted policy we sponsored,¹⁶ California's same day registration law, that allows all eligible voters to register to vote, update their voter registration, and vote in person up to and on Election Day. Understanding the importance of keeping in-person voting options, Governor Newsom signed Executive Order N-67-20¹⁷ and the California legislature enacted Senate Bill 423 to ensure that many voting locations remain open.

These two policies are critical to safeguarding our democracy this fall. However, many historically disenfranchised communities are still at risk of not being able to exercise their vote this fall and there is work left to do between now and November. First, elections officials, public assistance offices, community advocates, and civil rights organizations – the ACLU of California included -- must do everything we can to urge Californians to register to vote and to educate the public on the different voting options. This includes reaching out to voters who are in county jails, voters in medical and treatment facilities, and new and young voters. This also must be a multilingual effort. Second, election officials must do as much as they can to collect voter's language needs and send them voting information and materials in their language. Third, Californians must do their part to ensure that our elections can be properly administered by signing up to serve as poll workers and helping election officials identify voting locations.

This November 2020 election represents a critical moment for our country and democracy. Despite the many administrative and societal challenges, including the ways in which our differences and disparities have been made more apparent, we have an opportunity and responsibility to use all of this as momentum to make our democracy fairer and more inclusive.

[DavisCCEPCVEBriefTwo.pdf](#); "The California Voter Experience: Vote-by-Mail vs. the Polls," UC Davis Center for Regional Change/California Civic Engagement Project (July 2016), available at <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/57ffe6bfe3df28f75af48b3b/1476388544252/UCDavisCCEPCVEBrief1.pdf>; "Vote by Mail in Native American Communities," Native American Rights Fund, last accessed Aug. 15, 2020, available at <https://www.narf.org/vote-by-mail/>.

¹⁶ "Election Day Registration: SB 72," ACLU of Northern California, last accessed Aug. 15, 2020, available at <https://www.aclunc.org/our-work/legislation/election-day-registration-sb-72>.

¹⁷ Executive Order N-67-20, Executive Department of the State of California, June 3, 2020 available at <https://www.gov.ca.gov/wp-content/uploads/2020/06/6.3.20-EO-N-67-20.docx.pdf>; "ACLU of California Statement on the Governor's Executive Order on the November General Election," ACLU of Northern California, June 3, 2020 Press Release, available at <https://www.aclunc.org/news/aclu-california-statement-governor-s-executive-order-november-general-election>.