

# Poll:



Who is from a state that is holding an all mail election for the first time?



# Elections, Access, and COVID-19

2020 Virtual Conference  
Monday, June 1 – Tuesday, June 2

# The Panelists

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# Federal Law and Vote by Mail

Jessica P. Weber

Elections, Access, and COVID-19  
NDRN 2020 Virtual Conference  
Institute

BROWN GOLDSTEIN LEVY

Voting is a quintessential public activity. In enacting the ADA, Congress explicitly found that “individuals with disabilities . . . have been . . . relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals.” *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (quoting 42 U.S.C. § 12101(a)(7)). Ensuring that disabled individuals are afforded an opportunity to participate in voting that is equal to that afforded others, 28 C.F.R. § 35.130, helps ensure that those individuals are never relegated to a position of political powerlessness.

- *National Federation of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016)

# Relevant Laws

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- Voting Rights Act (1965)
- Voting Accessibility for the Elderly and Handicapped Act (1984)
- Help America Vote Act (2002)
- Americans with Disabilities Act (1990)
- Section 504 of Rehabilitation Act (1973)
- Federal and State Constitutions

# Voting Rights Act (1965)

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- “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice” except for an employer or union representative.
- Does not require private and independent vote—about assisted vote
- Only applies to federal elections
- Very little guidance on the nature of the “assistance” that may be provided

# Voting Accessibility for the Elderly and Handicapped Act (1984)

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- Requires accessible polling places and registration facilities
- Only applies to federal elections
- Need to give notice to election officials before suing in court and there are no attorneys' fees
- Silent on vote by mail (except that law provides that if there is no accessible polling place, county can require voter to vote by mail—but gives no guidance or requirements for accessible vote by mail)

# Help America Vote Act (2002)

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- Enacted in wake of botched 2000 elections—focus was on new voting machines
- Requires one accessible voting machine per polling place, but does not mention absentee voting
- No private right of action

# Title II of the ADA (1990)

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- Applies to all public entities (state and local boards of elections)
- Affirmative obligation to provide equal opportunity, including equally effective communication, and to avoid discriminatory treatment
- Requires modifications to generally applicable rules/procedures when necessary to provide equal opportunity
  - Examples: Hawaii dog quarantine law (*Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996)), electronic signature instead of inked signature

# Title II of the ADA (1990)

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- Regulatory update in 2010 (effective 2011): 28 C.F.R. § 35.160(b)(2):
  - “... In determining what types of auxiliary aids and services are necessary, a public entity shall give **primary consideration** to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, **in a timely manner**, and in such a way as to **protect the privacy and independence** of the individual with a disability.” (emphasis added)

# Title II of the ADA (1990)

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In voting context, regulation requires court to consider factors like:

- How does individual with disability want to vote by mail (primary consideration)—with assistance or with ability to vote privately and independently just like everyone else?
- Is requiring voter with disability to travel to polling place or providing a reader/scribe timely provision of an auxiliary aid/service? (even though reader/scribe listed as examples of auxiliary aids under law)
- Is forcing voters with disabilities to rely on third party assistance *as* effective as voting independently?

# Title II of the ADA (1990)

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- Title II applies to nearly everything a public entity does—so includes:
  - State and local elections
  - All types voting: early voting, voting at polling place, vote by mail
    - More than mere ability to vote in some way, some how
- BUT: No freestanding right to any particular equipment, procedure, or even private voting.
  - Equal opportunity is comparative (important to consider voting options and experience available to voters without disabilities)

# Title II of the ADA (1990)

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- Affirmative defenses: Undue burden and fundamental alteration
- Undue burden: administrative/cost issues
  - Cost: not just budgeted line item, but can be a challenge to go beyond overall budget of board of elections (to grants/extra state money available)—worth doing if needed though

# Title II of the ADA (1990)

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- Fundamental alteration: relief would fundamentally change program/activity
  - Giving voters with disabilities an extra vote: FA
  - Having voters with disabilities use a computer to mark a ballot instead of a pen: not a FA
    - Modification to generally applicable rule/law isn't enough!
  - Security concerns likely to turn up here (factual issue—defendant's burden to prove)
- 28 C.F.R. § 35.164: documentation requirements

# Section 504 (1973)

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- Applies to recipients of federal rules (nearly all local/state boards of elections will be covered)
- Nearly identical to Title II of ADA in practice
- Many non-voting 504 cases that have proved helpful in voting context:
  - *American Council of the Blind v. Paulson*, 525 F.3d 1256 (DC Cir 2008) (currency case): “the district court found that while “[t]here was a time when disabled people had no choice but to ask for help to rely on the kindness of strangers[,] . . . [i]t can no longer be successfully argued that a blind person has meaningful access to currency if she cannot accurately identify paper money without assistance.”

# Constitution

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- The right to vote is a fundamental right, but courts have not interpreted due process or equal protection clauses to provide as broad protection and right to equal opportunity as ADA/504.
- Best avenue continues to be ADA/504

# Polling Place Voting Cases

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- Important Title II/504 cases requiring more polling places to be physically accessible that establish that equal opportunity doesn't mean just getting your vote counted—voting experience matters:
- *Kerrigan v. Philadelphia Bd. of Election*, No. CIV. A. 07-687, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008)
  - “[T]he program of voting includes the opportunity to vote in one’s local, assigned, polling place, where the voter can take advantage of the opportunities to meet election judges, see their neighbors, and obtain information from candidates’ representatives.”

# Polling Place Voting Cases

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- *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189 (2d Cir. 2014)
  - “[T]o assume the benefit [of NYC’s voting program] is anything less—such as merely the opportunity to vote at some time and in some way—would render meaningless the mandate that public entities may not afford [] persons with disabilities services that are not equal to that afforded others.”
  - “The right to vote should not be contingent on the happenstance that others are available to help.”
- *California Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229 (N.D. Cal. 2013)
  - Voting privately and independently is “one of the central features of voting, and one of its benefits”

# Vote by Mail Cases

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- *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016)
  - Existing accessible ballot marking tool (developed for UOCAVA voters)—cost not an issue
  - First case to challenge inaccessibility of absentee voting
  - Cross-disability plaintiffs

# Vote by Mail Cases

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- Maryland is no-excuse absentee voting state: plaintiffs who wanted absentee voting for convenience and one who could not vote privately and independently at poll
- Established important principles:
  - Scope of program is absentee voting (not voting as a whole)
  - State certification requirement is not per se fundamental alteration
    - Supremacy clause
    - No evidence of security risks or other issues that certification requirement was intended to control for

# Vote by Mail Cases

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- *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017)
  - No existing ballot marking tool—plaintiffs argued state/counties were required to adopt one
  - District court dismissed vote by mail claim on pleadings (but ruled for plaintiffs on accessible website claim)
  - Adopted state’s argument that allowing plaintiffs to circumvent certification requirement was fundamental alteration to voting—all voting tech has to be certified.

# Vote by Mail Cases

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- Appealed to 6th Circuit, which reversed and held:
  - Waiver of state certification requirement is not per se fundamental alteration
  - Burden is on state to prove, as factual matter, that implementation accessible vote by mail would actually fundamentally alter elections in Ohio in some way
- Worthwhile to listen to oral argument—conservative panel of judges appalled by state's arguments

# Vote by Mail Cases

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- *California Counsel of the Blind v. County of San Mateo*, 15-cv-05784-CRB (N.D. Cal.) (filed 12/17/15, settled 3/20/18)
  - Result: CA now requires accessible vote by mail for all counties and several ballot marking tools have now been certified under CA's stringent process
- Wave of cases being brought now to ensure that vote by mail is accessible in light of COVID-19
  - Not merely matter of convenience, but health and safety issue. Compelling factual circumstances
  - Michigan: consent decree filed 5/19/20 (following interim settlement agreement for May elections): requires accessible electronic vote by mail ballots

# Accessible Websites

- Accessible vote by mail typically requires an accessible elections website to request vote by mail (accessible form), to learn about elections and voting options, and to obtain/log into accessible ballot
- Excellent resource: *Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities*, ACLU and Center for Accessible Technology, <https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities>
- Voting cases addressing accessible elections websites:
  - *Hindel v. Husted*, No. 2:15-CV-3061, 2017 WL 432839 (S.D. Ohio Feb. 1, 2017)
  - *Eason v. New York State Board of Elections*, No. 16-CV-4292 (KBF), 2017 WL 6514837 (S.D.N.Y. Dec. 20, 2017)



# Delivering & Strengthening Democracy

Amber McReynolds, CEO  
National Vote at Home Institute (NVAHI)

# Who is NVAHI?

# What is our Mission?

**Independent. Non-partisan. National.**



- **Research:** Original data from across the country
- **Policy:** Draft & advise regarding mail ballots
- **Implementation:** Support and guidance
- **Education:** Election officials, voters, and organizations,
- **Advocacy:** Messaging Guidance & Activation

**Ultimate goal:** Every American voter gets their ballot automatically delivered to them before every election

**Immediate goal:** make it far easier, in all 50 states, for voters to access "Vote at Home" ballots

# We are unique in our work to....



Support

Support states with implementation.



Train

Train election officials & advise on best practices.



Provide

Provide guidance to policymakers on how best to structure laws & regulations.



Advise

Advise Governors & top officials on the high-level strategy & plan.



## What is the difference between “vote by mail” and “Vote at Home?”

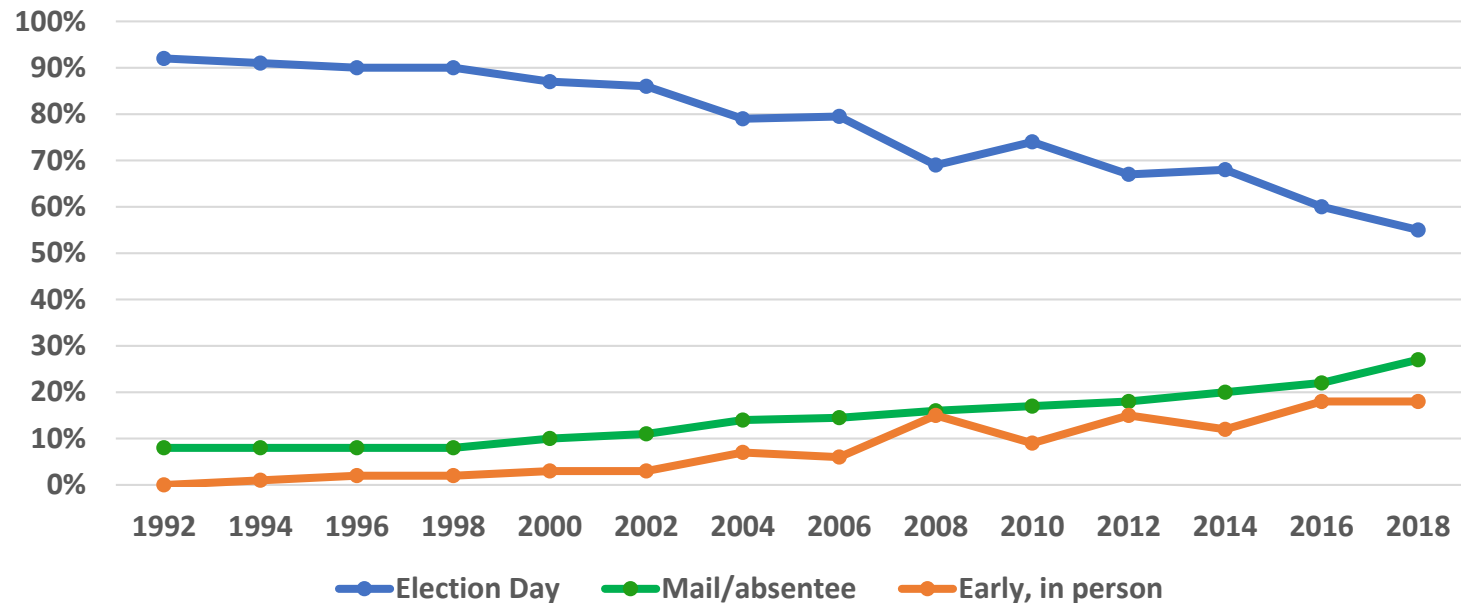
### Current Vote at Home states:

- California\*
- Colorado
- Hawaii
- Oregon
- Utah
- Washington

- Vote at Home is a more comprehensive system than just offering mail ballots
- It retains in-person vote centers and creates more options for voters, especially those with disabilities, voters who are transient or experiencing homelessness, and Native American populations
- It encompasses a whole suite of best practices that include security, accessibility, and communications measures that improve the voter experience

We need your help to continue, and to accelerate, this trend to more Americans voting other than on Election Day

## Percentage of US electorate versus choice of voting method



Sources: 1992-2016:: MIT Election Lab. 2018: PEW Research

# Poll:



**Have you voted at home before?**

# Vote at Home Status by State – May 2020

(does not reflect what appears to be temporary COVID-19 policy)



States with blended policies in the Step 3 – 4 – 5 range.

**UT** 100% VAH in 2019  
**HI** 100% in 2020  
**CA** changing for Nov. 2020. Could drop back to transitioning to 5 after.

**NE** has 11 counties on 100% VAH for 2020

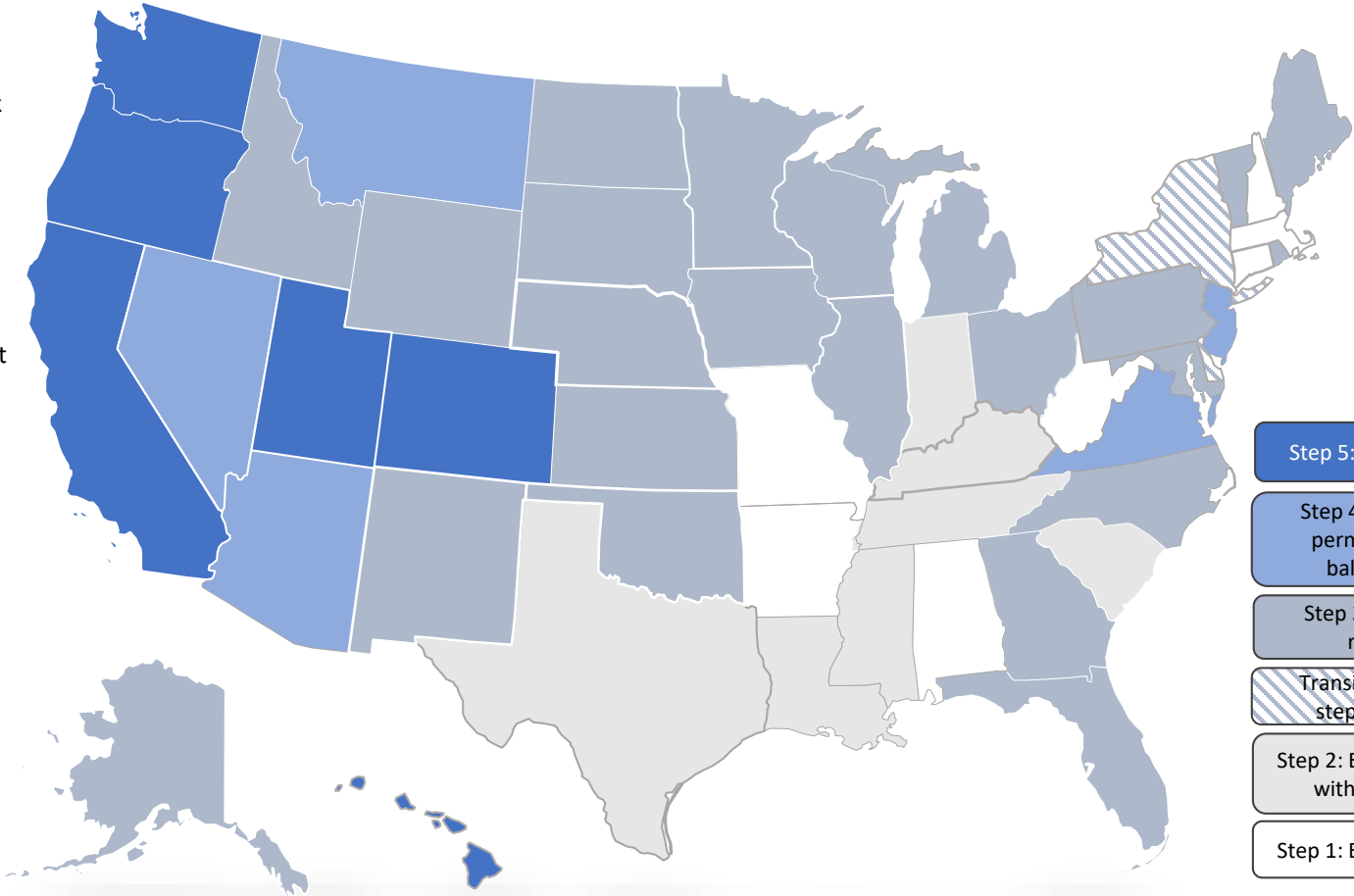
**ND** has 30 counties using 100% mailed-out ballot voting

**OH** sends absentee request forms to all 8M voters, for some elections

**MI, MN & PA** have a permanent absentee list, but periodically send request forms, not ballots, to voters

**AL, KS, & WI** offer permanent absentee status to voters with disabilities

**DC** offers Step 4 to its voters



Step 5: Vote at Home

Step 4: No Excuse,  
permanent mail  
ballot option

Step 3: No excuse  
required

Transitioning from  
step 1 or 2 to 3

Step 2: Excuse required  
with age waiver

Step 1: Excuse required

# Elements of an Effective Vote at Home Model

(Condensed  
from 30+)

- Ballot delivery
- Proactive Address Update
  - ERIC/NCOA
  - AVR
- Easy/effective cure process
- In-person voting experience at Vote Centers
- Ballot drop-off options including 24 hour ballot boxes & drive thrus

- Electronic Delivery for UOCAVA voters & accessible needs
- Risk-limiting audits
- Pre-paid postage
- Ballot tracking tools
- Voter-centric design
- Appropriate penalties to protect voters
- Adjusted processing & counting deadlines



# Vote at Home Policy Actions: COVID-19 Response



A COMPREHENSIVE ANALYSIS OF EXISTING VOTE AT HOME STATE POLICY & URGENT POLICY CHANGES NECESSARY TO SUPPORT SAFE VOTING IN 2020



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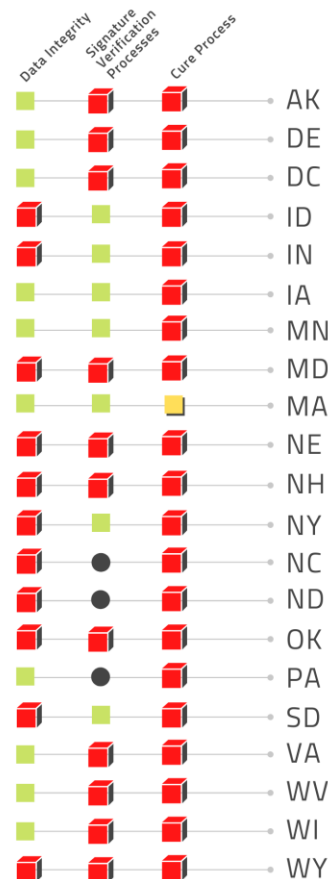
@voteathome

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NationalVoteAtHome

The National Vote at Home Institute is an IRS-approved section 501(c)(3) public charity. Your donation will be tax-deductible to the extent allowed by law.

## 2 STARS



Alaska\*, Delaware, District of Columbia, Idaho, Indiana\*, Iowa, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New York, North Carolina\*, North Dakota\*, Oklahoma, Pennsylvania\*, South Dakota, Vermont, Virginia, West Virginia, Wisconsin\* and Wyoming

States that are missing major pieces of policy or best practices that ensure a secure mail ballot process such as a sufficient data integrity process, signature verification processes and/or a signature deficiency cure process.

There is currently no excuse required to request a ballot in these states, so we recommend that these states fill their respective policy gaps in the remaining 3 base policy categories. We anticipate major growth in demand for absentee ballots, so these policy innovations in order to establish the foundation for safe, secure, and accessible elections. We do anticipate that some of these states may not renew or extend their temporary "no excuse" requirements for absentee ballots. If they do not extend them for November, we would move them back to a 1 star status and recommend they reconsider the policy.

Red cube: Needs Change  
Green cube: NVAHI Approved  
Yellow cube: County Option/Pilot  
Black circle: Pending Litigation



## 5 Star States

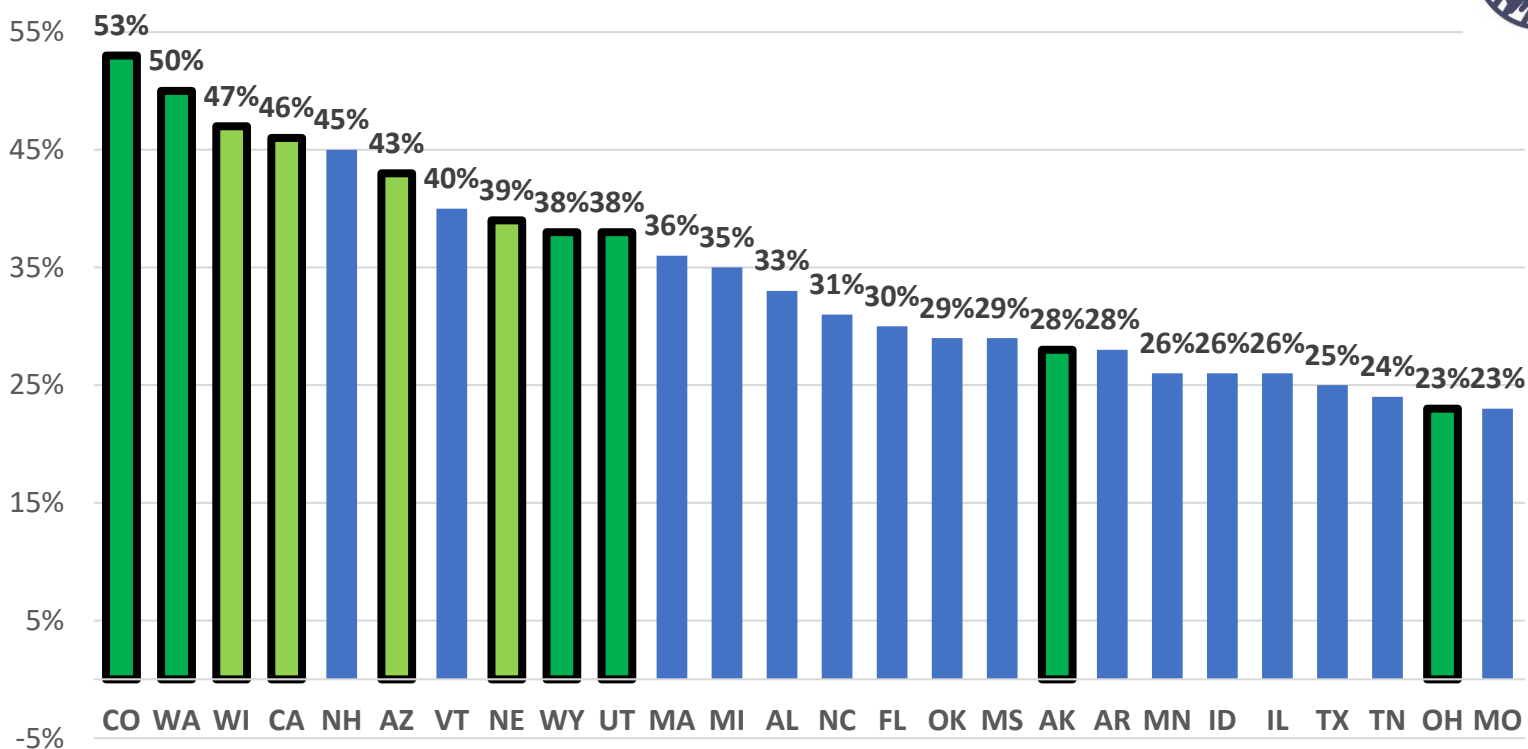


**California,  
Colorado,  
Hawaii,  
Oregon,  
Utah and  
Washington**

- Vote at Home systems: proactively mail all voters ballots, have a system for limited in-person voting, and other voter-centric policies that make them stand above the crowd
- Importantly, not all are the same, and none of them get what we would consider to be a “perfect score” in our grading system
- Recommendations: Move toward Gold Standard policy



## 2020 Primary Turnout\* as of 5/13



\*Percentage of state-reported active registered voters.

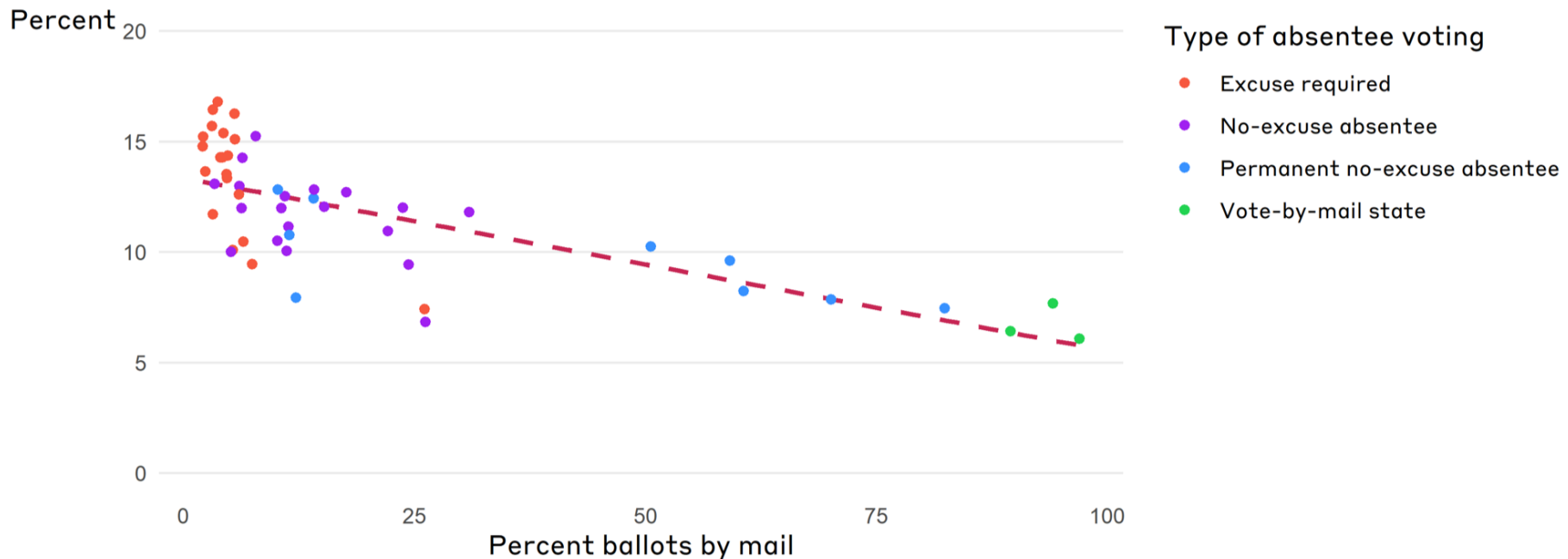
SC & VA not included since they do not capture party affiliation and were only running a D primary. So there is no way to determine the denominator.

~100% Vote at Home >66% Vote by mailed-out ballot Predominately polling place

Note: CO denominator adjusted from state data to just include "active" registered voters, as is used in all other states reporting

## The higher the use of mailed-out ballots, the lower the gap for disabled voter participation

Illness-or-disability-registration-problems indicator (2018)  
by % of ballots by mail



Data source: Voting and Registration Supplement of the Current Population Survey, NCSL  
Graph source: MIT Election Data and Science Lab

# Poll:



**What has created the most barriers for you  
as a voter?**

 NATIONAL

# Aging Machines, Crowds, Humidity: Problems at the Polls Were Mundane but Widespread

, Jessica Huseman, and Isaac Arnsdorf, Nov. 7, 6:04 p.m. EST



DISPATCH

Voting  
Americ

Electi  
long

Fulton County  
machines ... he

By Aaron Diamant



# Resources:

- [Reference Library](#)
- [Strategy Plan](#)
- [Timeline](#) – produced by CISA
- [Center for Civic Design's Toolkit](#)
- [Myths](#)
- [Equity brief](#)
- [50 State Policy Plan](#)



# Accessibility of Vote-By-Mail

How do you make a paper ballot accessible?

# Accessibility Pros and Cons of Vote-By-Mail

- Con – Paper ballot not accessible to blind, low-vision, and other voter with print disabilities
  - Cannot read the print
  - Lack the manual dexterity to mark or handle the ballot

# Accessibility Pros and Cons of Vote-By-Mail

- Pro – Vote-by-mail can be made accessible with electronic ballot delivery
- Voter accesses and marks ballot on a website, or
- Ballot is emailed to voter
- Allows voters to access and mark the ballot using their own computer and access technology
  - Screen reader: JAWS, NVDA
  - Refreshable Braille display
  - Screen magnification: ZoomText, Windows 10
  - Voice recognition software, etc.

# Accessibility Pros and Cons of Vote-By-Mail

- Con – Requires access to a computer with an internet connection and a printer
- Most states require marked ballot to be printed, signed, and returned by regular mail
- Some states permit ballot to be returned by email

# Accessibility Pros and Cons of Vote-By-Mail

Con – Some voters may need assistance signing printed ballot

Pro – Enables voters with print disability to mark their ballot privately and independently

# Considerations When Selecting an Electronic Ballot Delivery System

- No federal guidelines or certification
- Is there an existing system for UOCAVA voters? Is it accessible?

# Considerations When Selecting an Electronic Ballot Delivery System

- **National Federation of the Blind Accessibility/Usability Guidelines**
- Does the system meet the requirements of the Web Content Accessibility Guidelines Level AA?
- PDF ballots must be accessible and fillable.
- Access to an electronic ballot delivery system via an unsupported browser should be denied.
- A minimum of 15 minutes of inactivity should be provided before a system times out. Two warnings should be issued before the system times out.
- Printing instructions should include a list of the order in which pages print.
- There should be one page between the signature page and the ballot to ensure privacy.
- The system should be tested by people with disabilities who use access technology on a regular basis.

# List of Accessible Electronic Ballot Delivery Systems

- Democracy Live
- Five Cedars
- Maryland State Board of Elections
- MyBallot a.k.a. KnowInk
- Nevada EASE

## Resources

- National Federation of the Blind, [\*Accessible-Vote-By-Mail Toolkit and Other Resources\*](#)
- Center for Civic Design/NIST, [\*Principles and Guidelines for Remote Ballot Marking Systems\*](#)

## Contact Us!

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# Q&A



# **Thank You!**

## **Be sure to join us tomorrow at 1:00pm ET.**