

Court Challenges in the 2020 Election

An overview of election-related lawsuits around the country, potential post-election litigation, and the Supreme Court's involvement in election laws.

October 30, 2020



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A large amount of COVID-19 related election lawsuits have been filed

There have already been a number of lawsuits involving election administration issues for the 2020 election. According to the Stanford-MIT Healthy Elections Project, there have been **over 300 election law cases in more than 44 states** related to the impact of COVID-19 alone. This election year could surpass the 2018 record of 394 cases.

Examples of lawsuit targets:



Ensuring mail-in ballots have postage



Allowing ballots postmarked by Election Day to be counted, as opposed to received



Opposing automatic mail-in ballots



Preventing group collection of absentee ballots



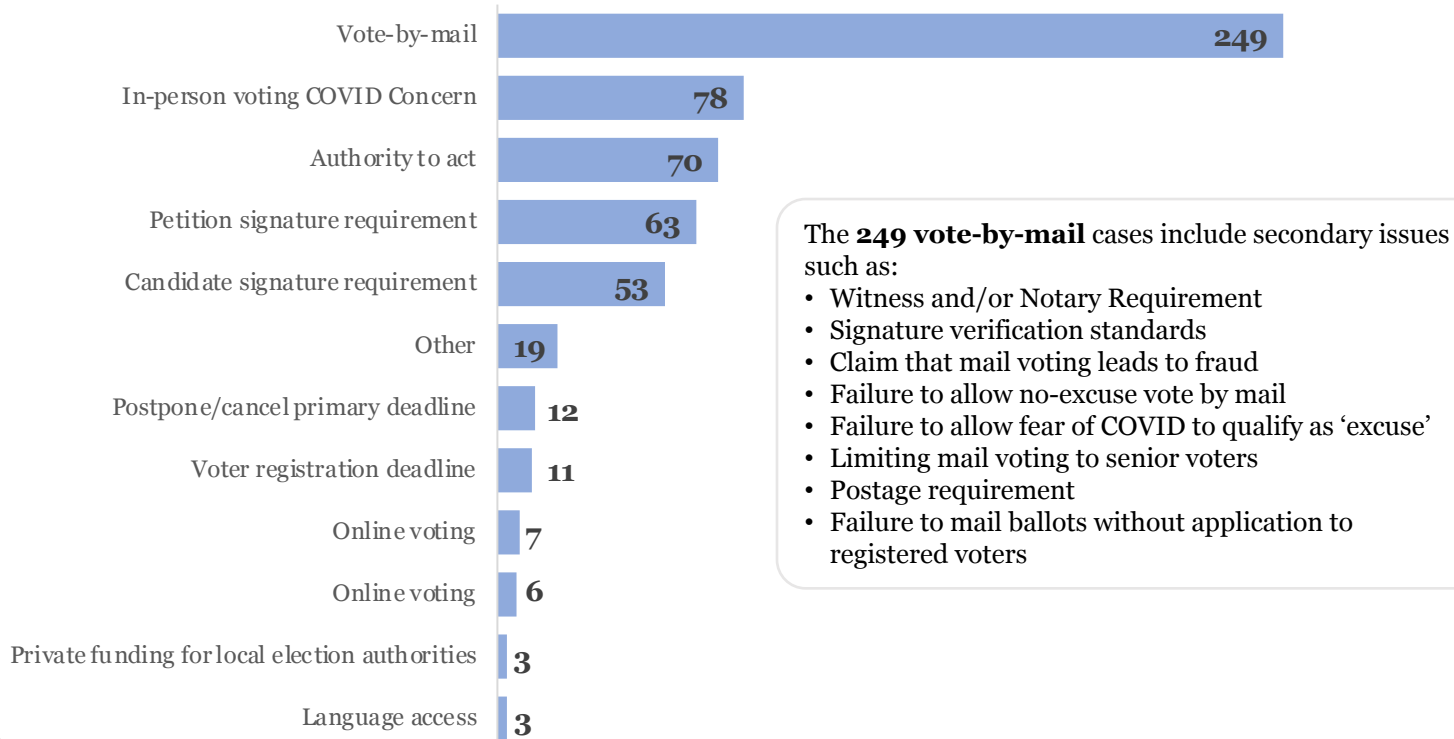
Creating a way for voters to dispute rejected ballots



Almost 250 of the election cases that came out of COVID-19 are related to vote-by-mail

Election law cases that have arisen out the COVID-19 pandemic by primary issue*

STANFORD-MIT HEALTHY ELECTIONS PROJECT, AS OF OCTOBER 30, 2020



*Under one lawsuit, each court is separately tallied, so a suit in trial court that was then appealed is tallied as two cases

SOURCE: Stanford-MIT Healthy Elections Project

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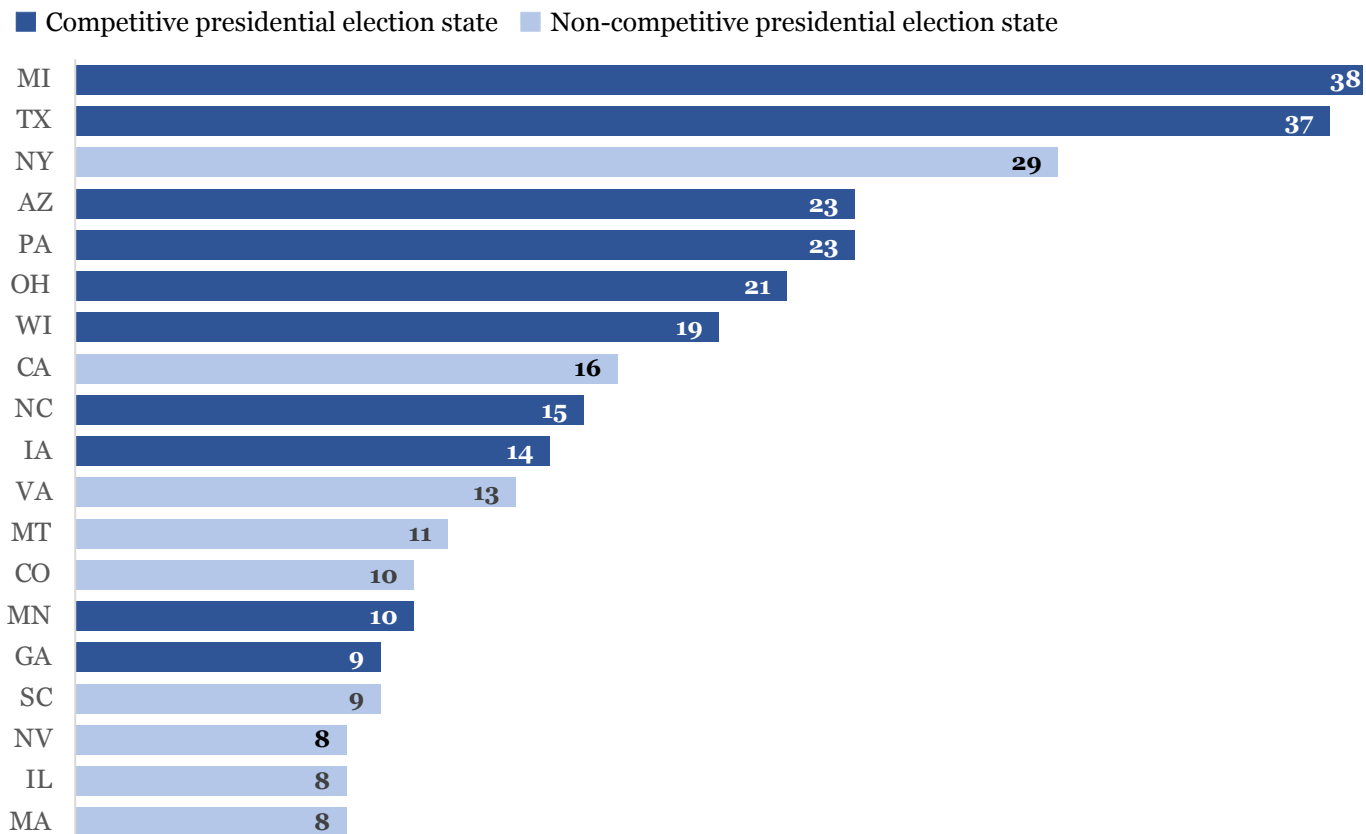


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A number of swing states have a high number of COVID-19-related election lawsuits

Number of COVID-19-related election lawsuits by state

IN TOP 21 STATES; STANFORD-MIT HEALTHY ELECTIONS PROJECT; AS OF OCTOBER 30, 2020



S O U R C E Stanford-MIT Healthy Elections Project, Cook Political Report

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Both pre-election and post-election litigation could impact the 2020 election

There are two potential types of litigation that could impact the 2020 election:

PRE-ELECTION litigation on challenging or seeking modifications to voting procedures in light of COVID-19

- In addition to COVID-19-related litigation, there are other cases that play a large role in the election, such as the Florida case over a requirement for felons to pay fines before being able to vote

POST-ELECTION litigation over ballot-counting procedures

- This could lead to multiple situations similar to the 2000 election across the country, with courts playing a role in determining the election outcome
- However, some amount of litigation is considered standard in presidential elections and a part of the “normal dispute-resolution process” according to law school professor Justin Levitt

IMPACTS

- The impact of the legal battles will likely not be known until after the election, and will depend on how many states have small margins
- In states with close election contests, those contests are more likely to be litigated after the election, leading to potential delays in determining the winner in a state, and possibly the national winner

CAMPAIGN RESPONSE TO LITIGATION

- The Trump campaign and the RNC have earmarked **\$20 million for election litigation** and are working on getting 50,000 volunteers to monitor polling places in battleground states
- The Biden campaign has assembled **600 lawyers** across the country and 10,000 volunteers
- The RNC’s chief counsel Justin Riemer stated that the legal work is “going to be on steroids this year,” and that “capable local counsel is critical”



Most election law cases go to the Supreme Court under the emergency appeals process

SUPREME COURT INVOLVEMENT

- A lot of cases are in lower courts, although a few have reached the Supreme Court on an emergency basis; it is likely this could happen more frequently the closer we get to the election
- The Supreme Court's rulings in election-law cases are more likely to come through the emergency appeal process, where a lower court will issue a preliminary ruling and the losing side might file an emergency request to put the lower court's ruling on hold, while the normal appeal is pending
- Although the hold is meant to be temporary, this would effectively resolve the issue for the upcoming election due to the subsequent timing delay
- So far, cases from Rhode Island, Wisconsin, Texas, and Alabama have all reached the Supreme Court

RELEVANT COURT PRECEDENT

- The **Purcell principle** dictates that courts should not change election rules close to an election because it could create confusion and problems for election officials
- The **Anderson-Burdick** doctrine is a balancing test that requires courts to weigh state-imposed burdens and asserted benefits on electoral participation
- Major election irregularities can lead to **due process violations**, such as when an established election rule with a common understanding is altered or ignored by the state without sufficient justification

2000 ELECTION SPOTLIGHT: *BUSH V. GORE*



- Bush's small margin of victory in Florida on Election Day led to a five-week battle over the election outcome
- Democrats sued to force a recount in select counties, and the case ultimately went before the Supreme Court; SCOTUS voted 7-2 to end the ordered recount
- The Supreme Court also voted 5-4 that no alternative method of recount could be established in a timely matter, effectively ruling that Bush had won the presidency



Election case spotlight: Minnesota



Cook Electoral College rating:



Lean D (10 EC votes)

Senate Cook rating:



Solid D

State party control:

GOVERNOR

STATE SENATE

STATE HOUSE

JAMES CARSON, ET AL V. STEVE SIMON, ET AL

- State Rep. Eric Lucero (R) and GOP activist James Carson filed the lawsuit in opposition to a consent decree in state court that altered election rules so that ballots postmarked on or before November 3 could be accepted until **November 10**
- On October 29, a three-judge panel of the 8th Circuit Court of Appeals ruled that Minnesota absentee ballots arriving after Election Day should be separated from ballots that arrived before or on Election Day
- The ruling does not block Minnesota's seven-day extension for counting absentee ballots, but could put the grace period at risk
- The case was **sent back to a lower court for more proceedings to determine if ballots will be counted if received after November 3**
- US District Judge Nancy Brasel is presiding over the case in the lower court; she previously upheld a state court agreement that allowed ballots postmarked before or on Election to be counted



Election case spotlight: Pennsylvania



Cook Electoral College rating:



Lean D (20 EC votes)

State party control:

GOVERNOR

STATE SENATE

STATE HOUSE

PENNSYLVANIA REPUBLICAN PARTY V. BOOCKVAR

- In mid-September, the Pennsylvania Supreme Court ruled in favor of the Pennsylvania Democratic Party in *Pennsylvania Democratic Party v. Boockvar*
- This ruling allowed changes to certain voting rules, such as permitting voters to **turn in ballots via drop box**, allowing **ballots to be returned up to three days after Election Day**, and blocking partisan poll watchers from being stationed in counties where they do not live
- On September 28, the Pennsylvania Republican Party asked the Supreme Court justices to put the Pennsylvania court's ruling pertaining to accepting mail-in ballots until Nov. 6 on hold, arguing that unclear postmarks could lead to ballots being counted that were sent after Election Day but received before or on November 6
- On October 19, the eight-member Supreme Court denied the request with a 4-4 vote; the Republican Party petitioned the justices to review the case on merits and fast-track a decision again that week
- On October 28, the Supreme Court **rejected the request to expedite consideration** of the petition
- Although the court would not fast-track its consideration of the petition, Justice Alito released a statement that said the court would still consider the petition, and if granted it could be decided “under a shortened timeline”
- He also stated that because the state has directed county election boards to separate ballots received after Election Day, but before November 6, there is a “**targeted remedy**” if the Pennsylvania’s Supreme Court decision is overturned





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