



June 17, 2020

By Email to Judiciary@dccouncil.us

Hon. Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Testimony Concerning June 2020 Primary Election

Dear Chairperson Allen and Members of the Committee:

Thank you for the opportunity to submit this testimony in connection with the Oversight Roundtable scheduled for June 19, 2020.

I am Senior Director for Trial Litigation and Chief of Staff at Campaign Legal Center, a nonpartisan, nonprofit organization based in the District of Columbia and dedicated to advancing democracy through law. In my personal capacity, I have also served as a pollworker and precinct captain for numerous DC elections, including the 2020 primary.

In furtherance of CLC's mission to ensure all voters have a free and fair opportunity to cast their ballots—and in combination with my experience working this election—this testimony highlights lessons that DC and other jurisdictions throughout the United States should learn from the recent primary. If left unaddressed, issues that arose in this primary could severely disrupt the general election this November.

In too many ways, the June primary was an example of inadequate and largely counterproductive responses to genuinely difficult challenges, such as a global pandemic and civil unrest on Election Day. Many voters who requested absentee ballots did not receive them on time. Vote centers were overwhelmed,

forcing some voters to wait in line for hours. And a public-safety curfew that took effect during election hours confused voters and police officers alike.

DC is just one of several jurisdictions where voters are encountering severe barriers to the franchise at this unique moment in American history.¹ Without robust planning, the problems we have seen in DC will only be compounded in the November 2020 general election, which will bring much higher voter turnout.²

I. Large-scale absentee voting makes voting safer and easier for many voters, but it must be implemented properly.

As DC's top election administrators have acknowledged, voting by mail is the safest way to cast a ballot during a pandemic.³ However, conducting an election largely by mail requires intensive preparation. The DC Board of Elections failed in several respects to prepare properly for increased voting by mail.

DC's laws regarding absentee voting are generally well-crafted: they allow any registered voter to request an absentee ballot, and provide for easy return of ballots either by mail or by drop-off at polling places or DCBOE's office.⁴

As early as March, DCBOE correctly recognized the need to encourage more absentee voting, which would reduce the volume of in-person voting and risk of COVID-19 transmission at polling places. DCBOE encouraged all registered

¹ See, e.g., Daren Gregorian, *Voter turnout soared in Georgia despite massive primary day problems*, NBC NEWS (June 12, 2020), <https://www.nbcnews.com/politics/2020-election/voter-turnout-soared-georgia-despite-massive-primary-day-problems-n1230806>; Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html>; John Sadler, *Long lines to vote delay Nevada election returns*, LAS VEGAS SUN (June 9, 2020), <https://lasvegassun.com/news/2020/jun/09/no-mailing-it-in-voters-line-up-to-cast-ballots-in/>.

² As of June 17, approximately 115,000 votes had been counted in the DC primary. *Primary Election 2020 - Certified Results*, D.C. BD. OF ELECTIONS, https://electionresults.dchoe.org/election_statistics/2020-Primary-Election (updated June 17, 2020). By contrast, more the 312,000 DC residents voted in the 2016 general election. *General Election 2016 - Certified Results*, D.C. BD. OF ELECTIONS, https://electionresults.dchoe.org/election_statistics/2016-General-Election (updated June 18, 2018).

³ See Martin Austermuhle, *D.C. To Encourage Absentee Voting By Mail, Limit In-Person Voting For June Primary*, WAMU (Mar. 27, 2020), <https://wamu.org/story/20/03/27/d-c-to-encourage-absentee-voting-by-mail-limit-in-person-voting-for-june-primary/>.

⁴ D.C. Mun. Regs. tit. 3, § 720.

voters to request an absentee ballot through DCBOE’s website, through a mobile app, by telephone, or by returning a paper request form.⁵ Not surprisingly, many DC voters took advantage of these options and requested absentee ballots. By DCBOE’s count, about 91,000 absentee ballots were requested and sent to voters before the primary.⁶

Unfortunately, many voters found that it was difficult or impossible to obtain an absentee ballot through the methods DCBOE provided. One problem was that the Vote4DC mobile app did not work as intended, especially on Android devices. Certain problems became obvious immediately—such as the app failing to send email confirmation of ballot requests—but DCBOE never remedied them. And some voters who attempted to request a ballot through the app received an error message instead.⁷ Ultimately, on the last day before the deadline for absentee ballot requests, the app crashed altogether,⁸ prompting DCBOE to announce—on Twitter, after 9:30 pm—that it would accept requests by email (an option that had not been made public previously) until midnight.⁹

Even among voters who were able to request ballots, many did not receive them in time to vote.¹⁰ On Election Day, Councilmember Elissa Silverman reported that she was receiving, on average, “an email a minute from DC voters who requested an absentee ballot & never received one.”¹¹ Inexplicably, DCBOE appears not to have publicly acknowledged its problems sending out absentee

⁵ *DC Board of Elections Announces New Early Voting Measures Amid COVID-19 Response*, D.C. BD. OF ELECTIONS (Mar. 27, 2020), <https://dcboe.org/CMSPages/GetFile.aspx?guid=db5d3731-c091-497a-bb82-ccc259dccc46>.

⁶ *Primary Election Night Results*, D.C. BD. OF ELECTIONS (June 3, 2020), <https://dcboe.org/CMSPages/GetFile.aspx?guid=afe2f3fc-94f6-4774-b577-7669c68ce212>.

⁷ Martin Austermuhle, *Lost Ballots And Long Lines Mark A Bumpy First Foray Into Vote-By-Mail In D.C.*, DCIST (June 3, 2020), <https://dcist.com/story/20/06/03/dc-primary-vote-by-mail-first-time-problems/>.

⁸ See DC Board of Elections (@Vote4DC), TWITTER (May 26, 2020, 7:48 PM), <https://twitter.com/Vote4DC/status/1265429663347814401>.

⁹ DC Board of Elections (@Vote4DC), TWITTER (May 26, 2020, 9:38 PM), <https://twitter.com/Vote4DC/status/1265457416537243648>.

¹⁰ See Martin Austermuhle, *Lost Ballots And Long Lines Mark A Bumpy First Foray Into Vote-By-Mail In D.C.*, DCIST (June 3, 2020), <https://dcist.com/story/20/06/03/dc-primary-vote-by-mail-first-time-problems/>. Some voters received absentee ballots after Election Day, too late to cast them. See, e.g., Ross Morales Rocketto (@RossMoRock), TWITTER (June 6, 2020, 12:39 PM), <https://twitter.com/RossMoRock/status/1269307816541663234>.

¹¹ Elissa Silverman (@tweetelissa), TWITTER (June 2, 2020, 3:13 PM), <https://twitter.com/tweetelissa/status/1267897183082369032>.

ballots until the deadline had passed, at which point voters were without recourse.

The problem of voters not receiving absentee ballots on time was so widespread that, as Councilmember Silverman’s office announced on Twitter the morning of Election Day, DCBOE began offering a small number of selected voters the unusual option to vote by email.¹² DCBOE never effectively communicated this last-minute accommodation to the public, and it was likely unknown to voters except those who happen to follow Councilmember Silverman’s office on Twitter. Creating an ad hoc voting method specifically for technologically savvy social media users is not a best practice in election administration. In any event, experts agree that electronic voting currently comes with serious security risks.¹³ And, as DC’s own regulations expressly recognize, voting by email compromises the voter’s right to a secret ballot.¹⁴

Ultimately, many DC residents who wanted to vote absentee resorted to voting in person because of DCBOE’s failure to provide absentee ballots in a timely manner.¹⁵ I personally assisted many such voters as an election worker at a vote center. Forcing these voters to vote in person significantly worsened the problem (described below in Part II) of long lines at vote centers on Election Day.¹⁶ In fact, these reluctant in-person voters, through no fault of their own, *disproportionately* contributed to long wait times. This is because, to vote in person, voters who previously requested absentee ballots must complete “special” (i.e., provisional) ballots, which take much longer to complete than regular ballots.

¹² CM Silverman Office (@CM_Silverman), TWITTER (June 2, 2020, 10:52 AM), https://twitter.com/CM_Silverman/status/1267831422053765120.

¹³ See *Election Security*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/e-voting> (last visited June 12, 2020).

¹⁴ A qualified uniformed services or overseas voter may cast a ballot electronically in a DC election, but must certify, “I understand that by electronically submitting my voted ballot I am voluntarily waiving my right to a secret ballot.” D.C. Mun. Regs. tit. 3, § 720.13.

¹⁵ Julie Zauzmer & Fenit Nirappil, *Bowser ally Brandon Todd loses D.C. Council primary to left-leaning challenger; Evans far behind in Ward 2 race*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/local/dc-politics/tuesday-is-election-day-in-dc-though-much-of-the-voting-has-already-happened/2020/06/01/f9738568-a437-11ea-b619-3f9133bbb482_story.html (“About a third of voters interviewed by The Washington Post on Tuesday said they were voting in person because their absentee ballots did not arrive.”).

¹⁶ *Id.* (noting that “D.C. voters braved waits longer than four hours to cast ballots”).

All told, more than 33,000 people voted in person in the primary, between Election Day voters and early in-person voting.¹⁷ If DCBOE had succeeded in providing absentee ballots to all voters who wanted them, there would have been substantially fewer in-person voters, and thus a lower overall risk of COVID-19 transmission at vote centers. Meanwhile, there are surely many DC voters who chose *not* to vote in the primary because, once their absentee ballots failed to arrive, they had no way to vote without running the risk of contracting or spreading COVID-19 at the polls, or had not made the necessary childcare or work arrangements. The voters most likely to be deterred in this way are those at highest risk for severe illness or death from COVID-19: voters over age 65, those with certain underlying health conditions, and Black and Latino voters.¹⁸

The DC primary thus demonstrates that when eligible voters lack reliable access to absentee ballots, elections become less safe and less fair. In the District and around the country, election administrators must take concrete steps to make sure absentee ballots are available to all voters who want them. Any technology used to accept and process requests for absentee ballots—like the Vote4DC app—should be thoroughly tested in advance, and repaired immediately if a breakdown occurs. Election authorities should also make sure they have the physical equipment and software necessary to send absentee ballots promptly to voters who request them. Finally, communication is key: election administrators must disseminate timely and accurate information, particularly when problems arise.

II. Even with widespread absentee voting, election administrators must be prepared for many voters to vote in person.

No matter how well election administrators promote and facilitate absentee voting, many voters prefer to exercise their right to go to the polls in person. DC's primary is one of several recent examples¹⁹ of what can go wrong when officials underestimate the demand for in-person voting on Election Day.

¹⁷ *Primary Election Night Results*, D.C. BD. OF ELECTIONS (June 3, 2020), <https://dcboe.org/CMSPages/GetFile.aspx?guid=afe2f3fc-94f6-4774-b577-7669c68ce212>. This figure appears to be significantly understated because, according to DCBOE's website, it does not include special ballots cast by in-person voters.

¹⁸ *See People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CTRL. & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (updated May 14, 2020); *COVID-19 in Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CTRL. & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (updated June 4, 2020).

¹⁹ *See supra* note 1.

In some ways, DC rose to the challenge of maintaining in-person voting despite the pandemic. DC deserves credit for offering significant early in-person voting opportunities for the primary, and for instituting safety protocols such as mandatory face coverings to reduce the risk of COVID-19 transmission at vote centers.

But at the same time, DC made the mistake of drastically cutting infrastructure for in-person voting on Election Day. Instead of the more than 140 polling places it would normally operate, DC conducted in-person voting at just 20 vote centers—an 86 percent reduction in the number of Election Day voting locations.²⁰ This was, on its face, unrealistic: there was never any reasonable chance that 86 percent of District primary voters would vote by mail.

To make matters worse, DCBOE failed to engage in sufficient recruiting of new workers to staff the vote centers. In DC and around the country, many election workers in a typical election are over age 65.²¹ But people in this age group are also at the highest risk of becoming severely ill or dying from COVID-19,²² so most are understandably less willing to serve as election workers this year than in the past.

Under these circumstances, election authorities must actively work to sign up younger, first-time election workers to avoid having a shortage of staff. For example, administrators could advertise election worker positions to college students living at home due to the pandemic. However, it appears that DCBOE did little, if any, of this outreach. My own experience is demonstrative. As a long-time pollworker who is fortunate not to be in a high-risk category for COVID-19, I contacted DCBOE by phone and email multiple times early in the pandemic to offer to work in the primary but never received any reply. Only because I continued reaching out over several weeks did I eventually happen to contact a DCBOE staffer who put me in touch with another staffer who added me to the training and pollworker lists. How many other would-be

²⁰ Miles Parks, *'First Super Tuesday' Of The COVID-19 Era: Voting Amid Protests, Pandemic*, NPR (June 2, 2020), <https://www.npr.org/2020/06/02/867828420/first-super-tuesday-of-the-covid-era-voting-amidst-protests-pandemic>.

²¹ See Michael Barthel & Galen Stocking, *Older people account for large shares of poll workers and voters in U.S. general elections*, PEW RES. CTR. (Apr. 6, 2020), <https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/>.

²² See *People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CTRL. & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (updated May 14, 2020).

election workers were unable to volunteer because DCBOE, despite an obvious looming shortage, simply did not sign them up?

Election administrators nationwide are being urged to facilitate pollworker recruitment by increasing pay for the position. While DCBOE increased its pay rate for election workers, this raise was not widely publicized; indeed, I first learned about the pay increase on the final day of early voting, after I had already worked five days at a vote center. Raising the stipend without communicating it does not help recruitment.

In sum, by failing to recruit new election workers aggressively, DCBOE ensured that there would not be a sufficient number of vote centers, and that even the small number that opened would be understaffed. This understaffing, combined with DCBOE's failure to provide absentee ballots to all voters who requested them, led to multi-hour wait times at overtaxed vote centers on Election Day.²³ And many voters were undoubtedly deterred from voting altogether by the long lines.

This experience should serve as a wake-up call to election administrators throughout the Nation. It shows that—even during the COVID-19 pandemic and in a primary with overall turnout much lower than what is expected in the November 2020 election—there is significant demand for in-person voting on Election Day. The hard work of preparing for in-person voting in November—especially the recruitment process for new election workers—must begin now. We fear that DCBOE is already on the wrong track for recruitment of new pollworkers for November, listing only the identification of “experienced” pollworkers among its next steps.²⁴

III. Imposing legal limits on movement during voting hours disenfranchises voters.

The DC primary coincided not only with the COVID-19 pandemic, but also with widespread protests against violence and injustice towards Black people. This will not be the last election conducted in a time of civil unrest. When comparable situations arise in the future, leaders should look back on DC's

²³ Julie Zauzmer & Fenit Nirappil, *Bowser ally Brandon Todd loses D.C. Council primary to left-leaning challenger; Evans far behind in Ward 2 race*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/local/dc-politics/tuesday-is-election-day-in-dc-though-much-of-the-voting-has-already-happened/2020/06/01/f9738568-a437-11ea-b619-3f9133bbb482_story.html.

²⁴ *DCBOE June 2020 Primary Election Recap*, D.C. BD. OF ELECTIONS (June 16, 2020), <https://www.dchoe.org/CMSPages/GetFile.aspx?guid=64981f9e-9b7f-44ae-90e1-b8b5854c72d0>.

recent primary as a cautionary tale about the dangers of restricting the freedom of movement during voting hours.

Although polls did not close until 8 pm on Election Day, Mayor Bowser issued a mandatory curfew that went into effect at 7 pm that day. We do not doubt that the mayor took this action in good faith as a response to well-founded public safety concerns. She also rightly included an exemption for voters and election workers in her order imposing the curfew.²⁵

Even so, the decision to place the District under curfew during voting hours immediately raised concerns among democracy advocates. These concerns were greatly heightened when President Trump mobilized federal law enforcement agencies in DC and threatened that the curfew would be “strictly enforced” by “thousands and thousands of heavily armed soldiers, military personnel, and law enforcement officers.”²⁶ Campaign Legal Center sent a letter to Mayor Bowser on the morning of Election Day, highlighting our fears that the curfew would deter voting and force voters into unwanted and potentially dangerous confrontations with law enforcement officers.²⁷

Unfortunately, our fears were realized.

Many eligible voters likely spent Election Day under the misimpression that the curfew legally barred them from being outside after 7 pm to vote. The emergency curfew alert sent to mobile phones in DC on June 1 did not mention any exemption for voting. News articles and social media posts about the curfew often did not discuss or emphasize the voting exemption. After an outcry from Councilmembers, candidates, and the voting rights community, Mayor Bowser eventually highlighted the exemption in a June 1 press

²⁵ Mayor’s Order 2020-069, Continuation of District-wide Curfew during COVID-19 Public Emergency and Second Public Emergency (June 1, 2020), available at https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/release_content/attachments/Mayor%27s%20Order%202020-069.pdf.

²⁶ Statement by the President, WHITE HOUSE (June 1, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/>; see also Kerri Kupec (@KerriKupecDOJ), TWITTER (June 1, 2020, 8:31 PM), <https://twitter.com/KerriKupecDOJ/status/1267614847295991808> (announcing that the U.S. Department of Justice had “deployed all of its law enforcement components—FBI, ATF, DEA, U.S. Marshals, and BOP,” and was “closely coordinating with the Department of Defense and the Department of Homeland Security to maximize federal security presence throughout the District.”).

²⁷ Letter from Campaign Legal Center to Mayor Muriel Bowser re: Effect of Election Day Curfew on Voting Rights (June 2, 2020), <https://campaignlegal.org/sites/default/files/2020-06/June%202%202020%20CLC%20Letter%20to%20Mayor%20Bowser%20.pdf>.

conference,²⁸ and a second alert sent to mobile phones on Election Day stated that voters were exempt from the curfew. However, these measures likely could not fully remedy the initial dissemination of incomplete information.

Even those voters who were aware of the voting exemption may have been justifiably afraid to travel to the polls. At the June 1 press conference, Mayor Bowser stated that anyone traveling in the District after 7 pm was “subject to be stopped and/or arrested,”²⁹ and Chief of Police Peter Newsham suggested that those traveling to vote after 7 pm could be asked for their voting “credentials.”³⁰ This police-enforced curfew created a powerful disincentive for residents of the District, especially Black residents, to exercise their right to vote after 7 pm. The events of the past several weeks have demonstrated in the starkest possible terms that police encounters can be dangerous and potentially deadly, particularly for Black people. Thus, no one will ever know how many people were effectively barred from voting because they chose not to risk police encounters, or were not aware of the voting exemption to the curfew.

When voters did exercise their right to stay in line at vote centers after 7 pm, some were questioned by police, and even ordered to leave vote centers where they were lawfully waiting to vote.³¹ At the Hardy Middle School polling place in Ward 2, a resident reported that a police officer demanded that all of the voters go home.³² Another resident reported that two patrol cars pulled up to the polling place at One Judiciary Square and declared that the voters must go home because of the DC curfew.³³ Deputy Mayor Donahue responded that the Metropolitan Police Department (MPD) was aware of the voting exemption to the curfew, but that one officer “messed up.”³⁴

To be clear, there is no evidence that anyone in the District’s leadership acted with improper motives, or of any coordinated effort by MPD to intimidate voters. Nonetheless, by prohibiting free movement on Election Day, DC set a

²⁸ DC Mayor’s Office, *Mayor Bowser and District Officials Hold Media Availability, 6/1/20* at 2:15, YOUTUBE (June 1, 2020), <https://www.youtube.com/watch?v=01hemk2mHJg>.

²⁹ *Id.* at 1:30.

³⁰ *Id.* at 4:15.

³¹ See James Harnett (@jarharnett), TWITTER (June 2, 2020, 10:07 PM), <https://mobile.twitter.com/jarharnett/status/1268001215255846913>; Sherene Joseph (@ShereneJoseph), TWITTER (June 2, 2020, 7:47 PM), <https://twitter.com/ShereneJoseph/status/1267966134097248257?s=19>.

³² Sherene Joseph (@ShereneJoseph), TWITTER (June 2, 2020, 7:47 PM), <https://twitter.com/ShereneJoseph/status/1267966134097248257?s=19>.

³³ James Harnett (@jarharnett), TWITTER (June 2, 2020, 10:07 PM), <https://mobile.twitter.com/jarharnett/status/1268001215255846913>.

³⁴ Kevin Donahue (@SafeDC), TWITTER (June 2, 2020, 9:21 PM), <https://mobile.twitter.com/SafeDC/status/1267989811081752577>.

dangerous precedent that may embolden other executives with less benevolent intentions to invoke emergency powers to curtail access to the polls. The District and other jurisdictions should commit to avoiding law enforcement measures that may prevent or deter voting in future elections.

* * *

DC is not alone in struggling with the challenges of administering elections amid a global pandemic and a historic protest movement. But DC's experience is particularly instructive, because the District has a well-earned reputation for valuing and protecting voting rights. That such severe problems could arise in a DC primary shows that leaders throughout the U.S. must act now to provide voters with safe, accessible options for both absentee and in-person voting in the November general election.

Respectfully submitted,

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