



October 2, 2020

Sent Via Email: cschmidt@jocogov.org

Connie Schmidt
Johnson County Election Commissioner
Johnson County Elections Office
2101 East Kansas City Road
Olathe, Kansas 66061

Re: Ensuring Voting Access for Johnson County Residents during the Coronavirus Pandemic

Dear Commissioner Schmidt,

The Disability Rights Center of Kansas and the American Civil Liberties Union of Kansas write to request that your office expand existing efforts to ensure that every eligible Kansas voter can safely cast their ballot in the upcoming election without unnecessarily exposing themselves to COVID-19. We are eager to meet with you at your earliest convenience to discuss how we can improve accessibility for all Kansas voters.

The conditions created by the pandemic have increased the need for reliable advance mail ballot and curbside voting. Accordingly, it is imperative that your offices take the following steps: (1) distribute a ballot to every registered voter who submits an application; (2) implement a clear and efficient process for voters to drop off their ballots at polling locations; and (3) outfit each polling location with a device that automatically notifies poll workers when a curbside voter has arrived to vote. These actions are necessary to secure the fundamental right to vote for all Kansans, but particularly persons with special vulnerability to COVID-19 and their caretakers.

As you know, the COVID-19 pandemic presents an enormous public health threat and has disrupted day-to-day life for people across the United States. These disruptions have disproportionately impacted older Americans and people with medical conditions that make them uniquely vulnerable to serious complications and death if they contract the virus.¹ The

¹Janko Nikolich-Zugich et al., *SARS-CoV-2 and COVID-19 in Older Adults: What We May Expect Regarding Pathogenesis, Immune Responses, and Outcomes*, 42 *Geroscience* 505, 508 (2020) (“Older adults are more susceptible to COVID-19 and are at significantly increased risk for morbidity and mortality.”); Zunyou Wu & Jennifer M. McGoogan, *Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19)*

threat of contracting COVID-19 unfortunately will not dissipate on Election Day, and an unprecedented number of voters will face health barriers to voting in-person. Voters with serious, chronic medical conditions—such as diabetes, asthma, or autoimmune deficiencies—would be forced to choose between their health and their vote if limited to traditional in-person voting options. Based on reports received during the primary election, Johnson County was unprepared to accommodate the influx of new voters who turned to advance mail ballots and curbside voting on account of disabilities and health conditions that made them especially vulnerable to COVID-19.

Inadequate access to advance mail or curbside voting undermines Kansans’ right to vote under the United States Constitution and the Title II of the Americans with Disabilities Act (“ADA”). Eligible individuals have a fundamental right to vote under the First and Fourteenth Amendments of the U.S. Constitution *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). An elections practice that places a significant burden on a voter’s access to the ballot will only survive a judicial challenge if it meaningfully advances a valid government interest. *See Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1283 (10th Cir. 2019). Here, the absence of reliable mail ballot and curbside voting in Johnson County places a significant burden on voters by forcing them vote in-person and risk exposure to a deadly virus to exercise their constitutional right. Conversely, your office’s practices further no government interest other than possibly cost savings. It is well established that cost-saving rationales are insufficient to justify voting restrictions. *See Eg. Yang v. Kosinski*, 960 F.3d 119, 135 (2d Cir. 2020). Additional resources must be invested towards the efficient functioning of alternatives to traditional in-person voting in order to avoid violations of the First and Fourteenth Amendment.

Further, the ADA provides that a voter with a medical condition that substantially limits one or more of their major life activities is entitled to an accommodation that will provide them with equal access to the ballot. To meet their obligations under the ADA, election officials must “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of” the voting system. *United States v. Georgia*, 546 U.S. 151, 153–54 (2006); 28 C.F.R. § 35.160(b)(1). Advance mail and curbside voting fall squarely within the services the government may be required to provide in order to comply with the ADA. *See Eg. People First of Ala. v. Sec’y of State for Ala.*, No. 20-12184, 2020 WL 3478093, at *1 (11th Cir. June 25, 2020)(finding state’s restrictions on mail and curbside voting likely violated ADA); *Common Cause RI v. Goreba*,



1:20-cv-00318 (D. RI July 27, 2020)(consent judgment expanding mail ballot voting to satisfy ADA Title II claims).

In short, it is essential that Johnson County improve advance mail and curbside voting options to ensure all voters, but particularly voters with disabilities, can exercise their constitutionally and statutorily protected voting rights.

1. Adopt a Reliable System for Managing Advance Mail Ballot Applications

All eligible Kansas voters are entitled to vote by advance mail ballot. Kan. Stat. Ann. § 25-1119. Johnson County has commendably committed to mailing all voters advance mail ballot applications and accepting their submission via mail, fax, or email.² However, we received numerous reports from voters who timely submitted applications to your office but were never mailed a ballot. Several of these voters returned their ballot via email and have a record of their timely submission.

It is our understanding that your office did not log or otherwise record advance mail ballot applications when they were submitted during the primary. Moreover, it seems that your office's email address, and possibly its spam folder, is not being checked regularly. These practices have caused applications to fall through the cracks and forced voters who wished to avoid the exposure to the coronavirus to vote in person or not vote at all. Please confirm that Johnson County has adopted a policy of logging applications upon receipt and devised a plan to diligently check for applications submitted via email. We realize that managing ballot applications is rife with logistical challenges and you are working with a limited number of staff.

Therefore, we recommend that you use available funding to recruit additional staff to help with mail ballot application processing in order to ensure that voters are not disenfranchised and deprived of their right to vote by mail.

2. Improving Advance Mail Ballot Drop-Off

Voters who did receive their advance mail ballots reported significant issues returning them to a polling location on the primary election day. Voters who sought to avoid standing in line by dropping off their ballot were nevertheless subjected to prolonged potential exposure to COVID-19 because polling locations did not have separate lines for advance ballot return. The voters who submitted complaints reported their polling place lacked signage indicating where they

² Johnson County, Election Office to send advance voting by mail applications to every Johnson County voters (April 23, 2020), <https://www.jocogov.org/press-release/county-management/election-office-send-advance-voting-mail-applications-every-johnson>

could return their ballots. Additionally, poll workers serving as greeters were unaware of how to instruct voters dropping off ballots and advised they should just wait in the same line as people voting in person.

In light of growing concerns around the postal service’s reliability, Johnson County voters are likely to be skeptical of returning their advance ballots by mail. The need for safe and accessible ballot drop-off options will be more critical than ever.

We recommend that at a minimum you display signs at each polling locations that indicates where advance ballot voters can drop off their ballots and train poll workers on how to efficiently serve advance mail ballot voters so that they are not forced to wait for prolonged periods to return their ballot. We further recommend that you implement a curbside ballot drop off system so that voters are not required to enter a polling location at all in order to return their ballot.

3. Expanding Access to Curbside Voting

Kansas law entitles voters—who by reason of age or disability are unable to vote inside a polling location—to vote from their vehicles. Kan. Stat. Ann. § 25-2909(d). Johnson County voters reported trouble with curbside voting at the Johnson County Arts and Heritage Center and Crossroads Church RCA polling locations. In particular, the voters reported it was unclear where they should park and how they should notify poll workers that they wished to cast their ballot from their vehicle. In both instances, the voter was accompanied by a passenger who felt comfortable entering the polling location to request curbside voting. However, voters who need curbside assistance will not always be accompanied by a person who can notify poll workers on their behalf.

The Kansas Secretary of State has provided guidance on curbside voting advising that polling locations should: (1) advertise curbside voting with signs at each accessible parking spot; and (2) implement an accessible system to alert workers inside that a curbside voter wishes to vote.³ Johnson County polling locations must at least follow this guidance in order to ensure voters have meaningful access to curbside voting.

One recommendation would be to designate a parking stall or location for curbside voting at each polling location. The parking stall should include a sign that clearly indicates it is reserved for individuals who are seeking to use curbside voting services. Moreover, the reserved location should be equipped with a baby monitor or other low-cost technological device that

³ Kansas Election Officer Handbook for Disability Accessibility in Voting. KANSAS SECRETARY OF STATE OFFICE,
https://www.kssos.org/elections/12elec/Kansas_Election_Officer_handbook_for_disability_accessibility.pdf



automatically alerts poll workers when a voter parks in the stall. It is critical that your office invest in tools to ensure voters at every Johnson County polling location can vote curbside.

These steps, along with others recommended by the bipartisan National Task Force on Election Crises,⁴ will protect all voters, but are particularly important for older voters and voters with disabilities who are less likely to feel safe voting in person. Please let us know if you would like to discuss any of the concerns that we raised or recommendations that we proposed. We are available for a call or videoconference at your convenience. We look forward to working with you.

Sincerely,

Lauren Bonds, Legal Director
ACLU of Kansas

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Rocky Nichols, Executive Director
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⁴ National Task Force on Election Crises, COVID-19 Election Guide, <https://tinyurl.com/vebv2h>