BUSH V. GORE'S UNIFORMITY PRINCIPLE AND THE 2020 ELECTION

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In Bush v. Gore,[1] *the Supreme Court established a "Uniformity Principle" for election administration, holding that the Equal Protection Clause prohibits "arbitrary and disparate treatment" of various voters participating in an election.*[2] *Although the Court emphasized the limited scope of its holding, throughout the two decades that followed, lower courts have applied the Uniformity Principle in a variety of cases concerning the conduct of elections.*

The principle was invoked in a wide range of cases throughout the 2020 election cycle, shedding further light on its contours. Some of these rulings may have been influenced by the unique circumstances of the 2020 presidential election. Several courts construed the principle narrowly to reject plaintiffs' attempts to invalidate emergency modifications to the electoral process that jurisdictions adopted in response to the COVID-19 pandemic or reject votes cast in accordance with election officials' instructions or court orders. Other jurisdictions, in contrast, adopted sweepingly broad interpretations of the principle—including applying it for the first time to the US Postal Service—to help alleviate the impact of COVID-19 on the election.

Although the 2020 election cycle further confirmed the Uniformity Principle's status as a legitimate, accepted tenet of constitutional law, important questions remain. Some courts have drawn on other language in Bush v. Gore *to conclude that local election officials may adopt substantially different policies and procedures for statewide elections. Others point to reasoning tracing back to the Court's Civil Rights Era ruling in* Katzenbach v. Morgan[3] *to hold that*

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1. 531 U.S. 98 (2000).
2. *Id.* at 104–05.
3. 384 U.S. 641 (1966).

states may provide additional opportunities to vote or reduce barriers to voting for only some voters, without extending such opportunities to all similarly situated members of the electorate. And courts continue to reach conflicting rulings on whether the Uniformity Principle applies to election litigation—that is, whether plaintiffs in election-law cases must seek relief on behalf of all voters within the relevant electorate, or instead may seek to enforce the rights of only certain voters. Courts and commentators should accept the Uniformity Principle as a reflection of fundamental fairness: the commonsense notion that voters participating in the same election should generally be subject to the same rules, procedures, and requirements; face generally equal opportunities and burdens in voting; and have roughly equivalent opportunities to both cast ballots and have those ballots be counted.

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INTRODUCTION

The 2020 election was the most litigated in history.[4] Even before COVID-19 swept across the nation, "plans for unprecedented levels of voting-related lawsuits were openly public. Plaintiffs on the Democratic side . . . already had filed seven suits in battleground states . . . [with] more suits to come."[5] While some of the "non-COVID" lawsuits litigated over the course of the election cycle

4. For a "snapshot of the litigation that embroiled the 2020 election," see Jerry Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 339 (2021).

5. Edward B. Foley, *Election Law*, 47 LITIG. 41, 46 (2020).

targeted recently enacted statutes,[6] others challenged longstanding practices in many states such as ballot-order laws,[7] restrictions on felon voting,[8] signature-match requirements for absentee ballots,[9] and the requirement that voters cast their ballots at their designated polling locations.[10]

The COVID-19 pandemic triggered a deluge of additional litigation. COVID-19 began to spread rapidly across the United States in March 2020, in the midst of primary season.[11] The pandemic triggered nationwide shutdowns, followed by severe restrictions on in-person contact that sought to limit viral transmission.[12] States made emergency adjustments to their election processes, such as reducing the number of signatures required for ballot access, expanding the use of absentee voting, changing the procedures for in-person voting (including requiring poll workers to use personal protective equipment), and sometimes even changing deadlines or rescheduling elections.[13]

Widespread litigation ensued over the rules governing both the 2020 primary and general elections. Many plaintiffs argued that election officials had not done enough to modify the rules governing the electoral process to mitigate the risks of in-person voting.[14] Other

6. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2334, 2350 (2021) (rejecting challenge to H.B. 2023, prohibiting third-party ballot collection).

7. *See, e.g.*, Jacobson v. Fla. Sec'y of State, 974 F.3d 1236 (11th Cir. 2020) (holding plaintiffs lacked standing to challenge Florida's ballot-order statute).

8. *See, e.g.*, Harness v. Watson, No. 19-60632, 2022 U.S. App. LEXIS 23757 (5th Cir. Aug. 24, 2022); *see also* Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018).

9. *See, e.g.*, Richardson v. Hughs, 978 F.3d 220, 239, 241 (5th Cir. 2020) (upholding signature-match requirement because it imposed limited burdens on voters).

10. *See Brnovich*, 141 S. Ct. at 2334, 2350 (rejecting challenge to Arizona laws specifying that provisional ballots may be counted only if they are cast at the correct precinct).

11. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/covid-cases.html (last visited Apr. 7, 2023).

12. *See* Sarah Mervosh et al., *Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html; Lexi Lonas, *The COVID-19 Shutdown: A Timeline of How the Pandemic Changed the US Economy*, THE HILL (May 5, 2022, 3:21 PM), https://thehill.com/policy/finance/3478647-a-timeline-of-the-covid-19-economy/.

13. *See generally* Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, WASH. & LEE L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964186; *see also* Goldfeder, *supra* note 4, at 344–45.

14. *See, e.g.*, A. Phillip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 613 n.18 (N.D. Ohio 2020) (rejecting a Uniformity Principle challenge to the state's directive requiring each county to establish a single drop box for absentee

lawsuits, in contrast, challenged the validity of some of the emergency measures that had been adopted.[15] As Election Day approached, litigants asked courts to suspend several of the requirements governing absentee ballots[16] and even sought judicial relief concerning the US Postal Service's internal operations.[17] Following the election, President Donald J. Trump's refusal to concede, coupled with his unsubstantiated claims of widespread and systemic voter fraud, led to dozens of additional, largely baseless lawsuits—several of which sought to invalidate millions of votes from eligible voters.[18]

The high volume of litigation in such a compressed timeframe contributed to the substantial expansion of precedent concerning the "Uniformity Principle" of *Bush v. Gore*.[19] In *Bush*, the Court

ballots, but granting preliminary relief on alternate grounds), *stay granted*, 831 F. App'x 188 (6th Cir. 2020), *appeal dismissed as moot*, Nos. 20-4063/20-4068, 2020 U.S. App. LEXIS 34133 (6th Cir. Oct. 28, 2020).

15. *See, e.g.*, Paher v. Cegavske, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *4–5, *10–15 (D. Nev. May 27, 2020) (rejecting challenge to Clark County's plan to automatically distribute absentee ballots, without receiving a request, to both active and inactive voters, and to allow election officials to retrieve completed ballots from voters' homes); Donald J. Trump for President, Inc. v. Way, No. 20-10753 (MAS) (ZNQ), 2020 U.S. Dist. LEXIS 196911, at *5, *24 (D.N.J. Oct. 22, 2020) (holding plaintiffs lacked standing to challenge a new statute requiring distribution of mail-in ballots, without receiving a request, to all active voters, allowing absentee ballots without a postmark received within forty-eight hours of Election Day to be counted, and mandating that any in-person voter who appears ineligible to vote be given a provisional ballot); Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 821–23 (D. Mont. 2020) (rejecting challenge to executive order allowing counties to conduct their elections by mail).

16. *See, e.g.*, Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 48 (S.D.N.Y. 2020) (extending deadline for election officials' receipt of completed absentee ballots); Ohio Democratic Party v. LaRose, No. 20CV4997, 2020 Ohio Misc. LEXIS 3410, at *18 (Ohio Ct. Com. P. 2020) (entering preliminary injunction allowing voters to submit absentee ballot requests by e-mail or fax), *rev'd*, 159 N.E.3d 852, 861, 874 (Ohio Ct. App. 2020). Similar challenges arose during the primary elections, many of which occurred just as COVID-19 first swept across the nation. *See, e.g.*, Nielsen v. DeSantis, 469 F. Supp. 3d 1261, 1264–65 (N.D. Fla. 2020) (challenging deadline for receipt of absentee ballots and restrictions on third-party ballot harvesting).

17. *See infra* Subpart II.A.

18. *See, e.g.*, Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020) ("Plaintiffs ask this court to disenfranchise almost seven million voters."), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 388 (3d Cir. 2020); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 387 (W.D. Pa. 2020). The President's claims also fueled the riots of January 6, 2021, which sought to disrupt Congress' counting of electoral votes. *See Mob Attack, Incited by Trump, Delays Election Certification*, N.Y. TIMES, https://www.nytimes.com/live/2021/01/06/us/electoral-vote (last visited Apr. 7, 2023).

19. 531 U.S. 98 (2000) (per curiam).

terminated manual recounts in the 2000 presidential election due to the inconsistent standards various election officials throughout the state had been applying.[20] "Seven Justices of the Court agree[d] that there [we]re constitutional problems with the recount."[21] The majority explained that once a legislature decided to allocate a state's electoral votes based on the outcome of a popular vote, that election must be conducted in accordance with the fundamental constitutional right to vote.[22] Moreover, the Constitution's equal protection principles apply not only to the "initial allocation of the franchise" within a state, but also to the "manner of its exercise."[23]

The Court declared, "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[24] It later added, "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[25] Florida law required election officials to count votes based on the "intent of the voter."[26] The Court held that the wide range of different ways in which election officials throughout the state had interpreted and applied that standard[27] violated these equal-protection requirements by allowing identical ballots to be treated differently.[28] Due to the "absence of specific standards" and "uniform rules" to determine voter intent, the recount did "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right."[29]

The Court created confusion about the durability of this holding, however. The opinion went on to state, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[30] This qualification led to substantial skepticism and confusion about whether *Bush v. Gore*'s Uniformity Principle could be applied in

20. *Id.* at 110.
21. *Id.* at 111.
22. *Id.* at 104.
23. *Id.*
24. *Id.* at 104–05.
25. *Id.* at 109.
26. *Id.* at 105–06 (citing Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000)).
27. *Id.* at 106 (noting that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another").
28. *Id.* at 109 ("The recount process . . . is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."); *see also id.* at 107 (discussing "uneven treatment" of different ballots).
29. *Id.* at 105–06; *see also id.* at 106 (critiquing the absence of "specific rules designed to ensure uniform treatment").
30. *Id.* at 109.

future cases and in other contexts.[31] Even during the 2020 election cycle, some courts continued to question the Uniformity Principle's status as precedent[32] or emphasized the details of *Bush*'s fact pattern to suggest that the principle applies only in narrow, rare circumstances.[33]

In previous work, I traced the history of *Bush v. Gore*'s Uniformity Principle over the two decades following the Court's ruling, through June 2020.[34] That article explored the principle's evolving contours and examined areas in which courts had applied it or declined to do so. Despite the Court's limiting language, litigants continue to invoke the principle in challenges to a wide variety of election-related disparities. Several circuits have expressly recognized the principle,[35] and courts have enforced it on multiple

31. *See* Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 231–32, 238 n.61 (2020).

32. *See, e.g.*, League of United Latin Am. Citizens v. Abbott, 951 F.3d 311, 317 (5th Cir. 2020) (questioning whether "*Bush v. Gore* has precedential value"); Rodriguez v. Newsom, 974 F.3d 998, 1006 (9th Cir. 2020) ("[T]he precedential value of Bush is limited."), *cert. denied*, 141 S. Ct. 2754 (2021); Wise v. Circosta, 978 F.3d 93, 100 n.7 (4th Cir. 2020) (en banc) ("Of course, *Bush* is of limited precedential value."), *injunction pending appeal denied by*, 141 S. Ct. 658 (2020); *see also* Democratic Party of Wis. v. Vos, 966 F.3d 581, 586 (7th Cir. 2020) (citation omitted) ("*Bush v. Gore* addressed the manner of counting votes in Florida in the 2000 presidential election."); Democratic Cong. Campaign Comm. v. Kosinski, No. 22-CV-1029 (RA), 2022 U.S. Dist. LEXIS 124144, at *66 n.16 (S.D.N.Y. July 13, 2022) ("assum[ing] that *Bush v. Gore* has precedential value").

33. *See* Lyman v. Baker, 954 F.3d 351, 369 (1st Cir. 2020) (declining "to read *Bush*, which expressly states that it is 'limited to the present circumstances' (and fairly unique circumstances at that), . , . beyond its facts" (quoting *Bush*, 531 U.S. at 109)); Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 922 (M.D. Pa. 2020) (emphasizing *Bush*'s facts to apply the Uniformity Principle narrowly), *aff'd sub nom.*, Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377 (3d Cir. 2020); *see also* Paher v. Cegavske, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *20 n.16 (D. Nev. May 27, 2020); Davis v. State, 309 So. 3d 318, 320 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring) (suggesting *Bush v. Gore* was "limited to its circumstances"); Rhoden v. Athens-Clarke Cnty. Bd. of Elections, 850 S.E.2d 141, 150 (Ga. 2020) ("*Bush* addressed recount procedures that were ordered by the Florida Supreme Court after the disputed 2000 presidential election."); City of Damascus v. State *ex rel.* Brown, 472 P.3d 741, 749 (Or. 2020) (holding that *Bush* is "about uniformity of procedures for tabulating votes").

34. Morley, *supra* note 31, at 232.

35. Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir. 2012); *see also League of United Latin Am. Citizens*, 951 F.3d at 317 (recognizing that the Equal Protection Clause allows claims for both intentional discrimination as well as for violations of the Uniformity Principle); Lyman v. Baker, 954 F.3d 351, 364–65 (1st Cir. 2020) (endorsing the Uniformity Principle in the context of an unsuccessful challenge to Massachusetts's appointment of presidential electors on a winner-take-all basis); Bognet v. DeGraffenreid, 980 F.3d 336, 361 (3d Cir.

occasions.[36] Building on my earlier research, this Article analyzes the Uniformity Principle's development over the course of the 2020 election cycle. It examines every case citing *Bush v. Gore* issued between January 1, 2020, through September 7, 2022, to determine how the principle continues to develop. [37]

Focusing specifically on the 2020 election cycle is particularly helpful to understand how the unique factors that impacted many of the cases from that period influenced courts' applications of the Uniformity Principle. Some courts were willing to apply the principle surprisingly aggressively—in particular, against the US Postal Service—to ensure that absentee voters in some localities were not subject to a relatively greater risk of being unable to vote due to COVID-19.[38] It is not clear that the principle would, or should, be stretched so far in the absence of a global pandemic.

Conversely, other courts rejected attempts to invoke the principle—often based on unsubstantiated claims of voter fraud or the potential for otherwise illegal votes—as a basis for invalidating

2020) ("[A] state may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another."), *rev'g* No. 3:20-cv-215, 2020 U.S. Dist. LEXIS 200923 (W.D. Pa. Oct. 28, 2020), *vacated as moot*, 141 S. Ct. 2508 (2021); Wexler v. Anderson, 452 F.3d 1226, 1231 (11th Cir. 2006) (assessing whether Florida's varying recount procedures "accord arbitrary and disparate treatment to Florida voters" in violation of *Bush*); *cf.* Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016) (citing the Uniformity Principle in a redistricting dispute); Save Palisade FruitLands v. Todd, 279 F.3d 1204, 1213 (10th Cir. 2002) (distinguishing *Bush* because it involved a situation where "voters who cast identical ballots would have their votes treated differently when choosing electors for president," thereby "effectively dilut[ing]" certain people's votes).

36. *See, e.g.*, *Obama for Am.*, 697 F.3d at 432; *Raleigh Wake Citizens Ass'n*, 827 F.3d at 352.

37. Since the earlier article extended through the first half of 2020, there is an overlap of eleven cases between the two pieces. *See generally* Morley, *supra* note 31. This Article does not delve into cases that cite *Bush v. Gore* for issues other than the Uniformity Principle. Several Justices, for example, cited the case for unrelated reasons. *See* Moore v. Harper, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from denial of application for stay); Republican Party v. DeGraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Numerous circuits also rejected plaintiffs' attempts during the 2020 election cycle to invoke the Uniformity Principle as a basis for rejecting states' winner-take-all systems for allocating their electoral votes. Baten v. McMaster, 967 F.3d 345, 355 (4th Cir. 2020); Rodriguez v. Newsom, 974 F.3d 998, 1006 (9th Cir. 2020); Lyman v. Baker, 954 F.3d 351, 368 (1st Cir. 2020); *League of United Latin Am. Citizens*, 951 F.3d at 316–17.

38. *See infra* Subpart II.D.

pandemic-related emergency voting measures.[39] Courts likewise flatly rebuffed post-election attempts to invalidate votes that had already been cast based on alleged violations of the Uniformity Principle; these challenges frequently relied upon generalized, unsubstantiated concerns about the possibility of voter fraud.[40] The courts' application of the Uniformity Principle in many of these cases may have been influenced by the context in which the issue was raised. Had the plaintiffs sought different remedies, such as a court order prior to the election requiring the state to decide whether to either expand the challenged voting opportunities to all voters throughout the jurisdiction or instead withdraw those additional opportunities, courts may have been more receptive to their claims under the Uniformity Principle.[41] Thus, the unique circumstances surrounding the 2020 election can provide important context for understanding some of the holdings from that period that applied the principle.

After almost a quarter century, doubts about the Uniformity Principle as a legitimate constitutional principle and *Bush*'s status as precedent should be laid to rest. States should not be permitted to

39. *See, e.g.*, Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 386–87, 389 (3d Cir. 2020); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 390 (W.D. Pa. 2020); Paher v. Cegavske, No. 3:20-cv-00243, 2020 U.S. Dist. LEXIS 92665, at *10–12 n.12 (D. Nev. May 27, 2020); *see also* Bailey v. Antrim Cnty., No. 357838, 2022 Mich. App. LEXIS 2232, at *20 (Mich. Ct. App. Apr. 21, 2022). In one case where the Trump campaign provided evidence of recent election-related fraud in the state, the court rejected it on the grounds it was speculative whether such crimes would recur. In *Donald J. Trump for President, Inc. v. Way*, No. 20-10753, 2020 U.S. Dist. LEXIS 196911, at *24 (D.N.J. Oct. 22, 2020), the Trump campaign objected to a New Jersey law requiring absentee ballots be automatically sent to all active voters without individualized requests, due to the potential for voter fraud. The campaign pointed to the arrest of election officials in Paterson, New Jersey, earlier that year for election fraud, as well as the prosecution of a postal worker in Newark, New Jersey, for "willfully discarding hundreds of ballots" that year. *Id.* at *3–4. The court dismissed those examples, saying, "Perhaps [fraud] will recur. But perhaps not. . . . It is no more than speculation to claim that those unfortunate instances will repeat themselves in the November 2020 General Election." *Id.* at *20–21.

40. Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377 (3d Cir. 2020); *cf.* Ziccarelli v. Allegheny Cnty. Bd. of Elections, No. 2:20-cv-1831, 2021 U.S. Dist. LEXIS 5272, at *14 (holding that, where one county counted absentee ballots without a dated postmark and another county refused to do so, state law would require a federal district court to correct any potential equal protection problem by "leveling up" and requiring both counties to count the undated ballots, rather than ordering their rejection by both counties).

41. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

provide substantially different opportunities for voters participating in the same election to cast votes and have them counted. Most basically, the Constitution generally guarantees equal treatment of citizens with regard to the exercise of fundamental rights.[42] The right to vote has long been recognized as one such right.[43] More pragmatically, certain types of regional disparities within a state concerning opportunities to vote in statewide or other multicounty elections may disproportionately benefit candidates of a particular political party. Even apart from such partisan impacts, allowing different jurisdictions within a state to adopt substantially inconsistent election-related policies could contribute to regional disparities in voter turnout, exacerbate the politicization of election administration, and undermine public confidence in the fairness of the electoral system.

Part I of this Article begins by distinguishing the Uniformity Principle from another standard the Court developed to apply the Fourteenth Amendment in election-related cases: the *Anderson-Burdick* test. The Uniformity Principle generally prohibits election officials from applying different rules—or substantially differing interpretations of a vague or general rule—to various voters participating in the same election. The principle applies when inconsistent rules could lead to substantial disparities in the likelihood of voters being able to cast their ballots and have them be counted. The *Anderson-Burdick* test, in contrast, seeks to identify election-related rules that are unduly burdensome. Some courts appear to have conflated these standards during the 2020 election cycle. This Part goes on to identify major facets of the Uniformity Principle that can be derived from courts' holdings in that period.

Part II examines lingering areas of uncertainty concerning the principle. Some lower courts in the 2020 election cycle concluded that the Uniformity Principle does not actually prohibit most disparities in voting opportunities for voters participating in the same election. Such cases sometimes point to language in *Bush v. Gore* itself endorsing local variation in electoral systems.[44] In many of these cases, however, the plaintiffs sought to either enjoin emergency measures that had been adopted in response to COVID-19 or retroactively invalidate votes that had already been cast.

A few other courts declined to apply the Uniformity Principle based on a line of authority tracing back to the Civil Rights Era

42. *See* Plyler v. Doe, 457 U.S. 202, 216–17 (1982) ("[W]e have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.'").

43. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (declaring that "the political franchise of voting" is "regarded as a fundamental political right, because preservative of all rights").

44. *See infra* notes 96–98.

ruling, *Katzenbach v. Morgan*.[45] *Katzenbach* held that the Equal Protection Clause does not limit a state's ability to expand voting opportunities, even if it does so selectively for only certain groups of voters.[46] Both the Uniformity Principle, as well as the normative considerations of fairness and equality underlying it, appear to be in tension with that aspect of *Katzenbach*.[47] When states remove barriers to voting, such reforms should generally be applied throughout the jurisdiction, rather than leaving it to county or local election officials to decide whether to adopt them. Having said that, the principle should not be applied so stringently as to preclude states from making special accommodations for those facing especially severe burdens in exercising their right to vote, such as military voters.[48]

This Part concludes by exploring controversies concerning courts' attempts to apply the Uniformity Principle beyond election officials to the US Postal Service's internal operations. These courts have held that the Equal Protection Clause applies to the Postal Service's staffing, scheduling, budgetary, and other related policies because it transports absentee ballots. To the extent disparities in mail delivery raise questions about the constitutionality of the deadlines for requesting or returning absentee ballots, litigants should challenge those deadlines directly by suing election officials rather than inviting courts to oversee the Postal Service's operations.

Part III examines the Uniformity Principle's applicability at the remedial stage of election litigation. A few courts have suggested that plaintiffs challenging officials' interpretations or applications of election-related legal provisions, or the validity of such provisions themselves, may be required to seek relief on behalf of all voters within the relevant jurisdiction, rather than just certain ones. A brief conclusion follows.

I. THE UNIFORMITY PRINCIPLE

Historically, the Supreme Court did not construe Section 1 of the Fourteenth Amendment as applying to voting rights.[49] Even racial

45. 384 U.S. 641 (1966).

46. *Id.* at 657.

47. *See* Morley, *supra* note 31, at 299.

48. *See, e.g.,* Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff (1986).

49. *See, e.g.*, Pope v. Williams, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. . . ."), *abrogated by* Dunn v. Blumstein, 405 U.S. 330, 363 (1972); Minor v. Happersett, 88 U.S. 162, 178 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one."); *see also* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53–54 (1959); Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion), *abrogated by* Baker v. Carr, 369 U.S. 186, 237 (1962); Taylor v. Beckham, 178 U.S. 548, 581 (1900).

discrimination with regard to voting rights was generally prohibited only by the Fifteenth Amendment, rather than the Fourteenth.[50] Over the course of the twentieth century, the Court re-interpreted the amendment to apply to various aspects of the electoral process,[51] including voter qualifications,[52] the "weight" of people's votes,[53] and even the burdens posed by voting procedures.[54] In 2000, *Bush v. Gore* further extended the Equal Protection Clause to apply to disparities concerning the "nuts and bolts" aspects of election administration.[55] This Part begins by distinguishing *Bush v. Gore*'s Uniformity Principle from the framework courts typically apply when adjudicating Fourteenth Amendment challenges to the rules governing the electoral process. It then identifies various aspects of the principle that can be derived from courts' rulings during the 2020 election cycle and its aftermath.

A. Distinguishing the Principle

Perhaps because the Uniformity Principle is rooted in the Fourteenth Amendment's Equal Protection Clause, several courts in the 2020 election cycle appear to have conflated it with a separate legal standard that governs a different type of Equal Protection challenge in election cases: the *Anderson-Burdick* test.[56] The *Anderson-Burdick* test, derived from the Supreme Court's rulings in *Anderson v. Celebrezze*[57] and *Burdick v. Takushi*,[58] is used to

50. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340, 346–48 (1960); Guinn v. United States, 238 U.S. 347, 362–63 (1915).

51. *See generally* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2097–2108 (2018).

52. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965).

53. Reynolds v. Sims, 377 U.S. 533, 555 (1964); Gray v. Sanders, 372 U.S. 368, 381 (1963).

54. Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983).

55. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001).

56. *See, e.g.*, Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 123 (D.D.C. 2020); Richardson v. Trump, 496 F. Supp. 3d 165, 185 (D.D.C. 2020), *appeal dismissed sub nom.* Richardson v. Biden, No. 20-5367, 2021 U.S. App. LEXIS 5295 (D.C. Cir. Feb. 8, 2021); League of Women Voters of Ohio v. LaRose, 489 F. Supp. 3d 719, 740 (S.D. Ohio 2020); Lewis v. Hughs, 475 F. Supp. 3d 597, 618 (W.D. Tex. 2020), *rev'd sub nom.* Lewis v. Scott, 28 F.4th 659, 662 (5th Cir. 2022) (ordering dismissal due to sovereign immunity); Stringer v. Hughs, Nos. SA-20-CV-46-OG, SA-16-CV-257-OG, 2020 U.S. Dist. LEXIS 221555, at *89–90 (W.D. Tex. Aug. 28, 2020).

57. 460 U.S. 780 (1983).

58. 504 U.S. 428 (1992).

determine whether election-related procedures or other requirements are unduly burdensome.[59] The test was developed to adjudicate claims under the First and Fourteenth Amendments, but the Court explained it "rel[ies] . . . on the analysis in a number of . . . prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment" as well.[60] Under the *Anderson-Burdick* test:

> A court considering a state election law challenge must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[61]

The *Anderson-Burdick* test focuses on the *burden* posed by an election rule. The *Bush* Uniformity Principle, in contrast, is about *disparities* in the rules to which different voters participating in the same election are subject, including inconsistencies in how various election officials interpret or apply a rule. *Bush* condemned the "arbitrary and disparate treatment" of different voters participating in the same election.[62] The *Bush* Court held that Florida election officials had violated the Uniformity Principle because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[63] It neither mentioned nor applied the *Anderson-Burdick* balancing test. Thus, *Anderson-Burdick* claims should be understood as distinct from equal-protection claims under the Uniformity Principle.[64]

B. Defining the Principle

The Uniformity Principle was invoked in numerous cases over the course of the 2020 election cycle. The principle provides that "[a]n equal protection violation occurs when arbitrary disparities in voting mechanisms make it less likely that voters in certain areas will cast

59. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008).

60. *Anderson*, 460 U.S. at 786 n.7.

61. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

62. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

63. *Id.* at 106. For details of other disparities, see Morley, *supra* note 31, at 235–37.

64. *See, e.g.*, Paher v. Cegavske, 457 F. Supp. 3d 919, 927–28 (D. Nev. 2020) (distinguishing between *Anderson-Burdick* and *Bush* frameworks for constitutional challenges).

votes that count."[65] Based on a careful review of the courts' rulings, several major aspects of the doctrine can be identified. These principles are generally consistent with those embodied in the first two decades of case law under the Uniformity Principle.[66]

First, most basically, to establish a violation of the Uniformity Principle, a person must show, at a minimum, that election officials are applying different policies (or different interpretations of policies)

65. Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 134 (S.D.N.Y. 2020); *see* Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 48 (S.D.N.Y. 2020) (holding that it violates the Uniformity Principle for "arbitrary factors [to] lead the state to valu[e] one person's vote over that of another"); Memphis A. Phillip Randolph Inst. v. Hargett, 482 F. Supp. 3d 673, 692 n.14 (M.D. Tenn. 2020) (quoting League of Women Voters v. Brunner, 548 F.3d 463, 477 (6th Cir. 2008)), *aff'd on other grounds*, 978 F.3d 378 (6th Cir. 2020) ("A claim under the Equal Protection Clause of the Fourteenth Amendment also is possible, inasmuch as 'at a minimum . . . equal protection requires "nonarbitrary treatment of voters."'"); Moore v. Circosta, 494 F. Supp. 3d 289, 315 (M.D.N.C. 2020) ("[A]n Equal Protection violation occurs where there is both arbitrary and disparate treatment . . . . [T]he State must ensure equal treatment of voters both at the time it grants citizens the right to vote and throughout the election."), *aff'd sub nom.* Wise v. Circosta, 978 F.3d 93 (4th Cir. 2020) (en banc); *see also* Stringer v. Pablos, Nos. SA-16-CV-257-OG, SA-20-CV-46-OG, 2020 U.S. Dist. LEXIS 16686, at *21 (W.D. Tex. Jan. 30, 2020) ("The Equal Protection Clause applies when state procedures restrict voters' rights."); Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 815 (W.D. Wis. 2020) ("Notwithstanding that the Supreme Court took unusual pains to limit its 'consideration' specifically to the 'present circumstances' surrounding the 2000 Florida recount, . . . other courts have appeared to rely on *Gore* in attempting to analyze subsequent election challenges." (quoting *Bush*, 531 U.S. at 109)), *stay denied*, 976 F.3d 764 (7th Cir. 2020), *reconsideration granted and stay granted*, 977 F.3d 639 (7th Cir. 2020); Donald J. Trump for Pres., Inc. v. Boockvar, 493 F. Supp. 3d 331, 387 (W.D. Pa. 2020) ("It also seems reasonable (or at least defensible) that this proposition should be extended to situations where a state takes two equivalent votes and, for no good reason, adopts procedures that greatly increase the risk that one of them will not be counted . . . ."); Kepi v. Carr, No. 85125/2021, 2021 NYLJ LEXIS 914, at *35 (N.Y. Sup. Ct. Aug. 25, 2021) ("[A]s the U.S. Supreme Court held in Bush v. Gore, one person's vote cannot be valued over another."); Ziccarelli v. Allegheny Cnty. Bd. of Elections, No. 2:20-cv-1831, 2021 U.S. Dist. LEXIS 5272, at *12–13 (W.D. Pa. Jan. 12, 2021) (acknowledging that different counties' conflicting policies on whether to count undated absentee ballots may violate the Uniformity Principle); *cf.* Tenney v. Oswego Cnty. Bd. of Elections, 136 N.Y.S.3d 853, 862–63 (N.Y. Sup. Ct. 2020) (stating that "election integrity requires two things: uniformity and transparency" in the course of a ruling directing county boards of election to recount "challenged and uncanvassed ballots" as required by state law); Mendez v. ADA Cmty. Librars. Bd. of Trs., No. 1:20-cv-00589-DCN, 2021 U.S. Dist. LEXIS 232160, at *9 (D. Idaho Dec. 1, 2021) ("[A]ny discrimination between voters violates the Equal Protection Clause.").

66. *See* Morley, *supra* note 31, at 290–93.

to various voters or ballots.[67] A single, uniform, consistently applied policy—even if potentially invalid on other grounds—does not violate the principle.[68] In *Deutsch v. New York State Board of Elections*,[69] for example, New York law required people to register to vote for the 2020 election by October 9.[70] Applications submitted by mail had to be postmarked by that date and were valid so long as election officials

67. *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 466 F. Supp. 3d 957, 968 (W.D. Wis. 2020) (holding plaintiffs had stated a valid Uniformity Principle claim based on disparities among counties' enforcement of state documentation, postmark, witness, and eligibility requirements for absentee ballots); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1325–26 (N.D. Ga. 2020) (embracing and applying Uniformity Principle in challenge to settlement agreement concerning signature matching procedure for absentee ballots), *aff'd*, 981 F.3d 1307 (11th Cir. 2021); Lewis v. Hughs, 475 F. Supp. 3d 597, 618 (W.D. Tex. 2020) (holding plaintiff stated a valid claim under the Uniformity Principle based on counties' allegedly disparate enforcement of the deadline for absentee ballots and signature match requirements), *rev'd sub nom.* Lewis v. Scott, 28 F.4th 659 (5th Cir. 2022); Jones v. DeSantis, 462 F. Supp. 3d 1196, 1245 (N.D. Fla. 2020) (stating that the plaintiffs had a "substantial" claim under the Uniformity Principle against Florida's implementation of its felon-reenfranchisement provisions), *rev'd on other grounds*, 975 F.3d 1016 (11th Cir. 2020); *see also* Montgomery v. Whidbee, No. 3:19-cv-00747, 2021 U.S. Dist. LEXIS 37610, at *9 (M.D. Tenn. Mar. 1, 2021), *aff'd*, No. 21-5327, 2022 U.S. App. LEXIS 6883 (6th Cir. Mar. 16, 2022); Ariz. Democratic Party v. Hobbs, 18 F.4th 1179, 1196 (9th Cir. 2021) (Tashima, J., dissenting).

68. *See, e.g.*, Wise v. Circosta, 978 F.3d 93, 100 (4th Cir. 2020) (en banc) ("The standard could not be clearer or more uniform: *everyone* must cast their ballot on or before Election Day, and the ballot will be counted for *everyone* as long as it is received within nine days after Election Day."); Donald J. Trump for Pres., Inc. v. Boockvar, 502 F. Supp. 3d 899, 922 (M.D. Pa. 2020) ("Without actually alleging that one group was treated differently than another, Plaintiffs' . . . argument falls flat."), *aff'd sub nom.* Donald J. Trump for Pres., Inc. v. Sec'y of Pa., 830 F. App'x 377, 388 (3d Cir. 2020); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1326–27 (N.D. Ga. 2020) (rejecting Uniformity Principle challenge to settlement agreement concerning the procedures for processing absentee ballots because "no voter . . . was treated any differently than any other voter"), *aff'd*, 981 F.3d 1307 (11th Cir. 2020); A. Phillip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 614 n.20 (N.D. Ohio 2020) (rejecting Uniformity Principle challenge to directive requiring each county to establish a single drop box for absentee ballots because "there are no inter-jurisdictional differences in how the standards in the Directive are implemented," but granting preliminary relief on alternate grounds); Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1299 (N.D. Ga. 2020) (rejecting Uniformity Principle challenge to Georgia's process for updating voter registration lists because "there is no evidence at this stage that the list maintenance process is not uniformly applied"); Bailey v. Antrim Cnty., No. 357838, 2022 Mich. App. LEXIS 2232, at *20 (Mich. Ct. App. Apr. 21, 2022) ("[P]laintiff did not allege that he was treated differently than similarly situated individuals, which is necessary to establish an equal protection claim.").

69. No. 20 Civ. 8929, 2020 U.S. Dist. LEXIS 202906 (S.D.N.Y. Oct. 30, 2020).

70. *Id.* at *2–3.

received them by October 14.[71] Applying these standards, election officials rejected applications from several overseas citizens who e-mailed their applications between October 10 and 14.[72] The applicants sued, claiming among other things that these rules violated the Uniformity Principle because New York effectively had different deadlines depending on the method used to submit an application.[73] The court rejected this argument because all voters were required to submit their applications—including applications sent by mail by October 9.[74] It held that the law neither "create[s] a separate burden on email applicants like Plaintiffs" nor "result[s] in differential treatment of their applications. A physical-mail application arriving after October 9 will still be rejected . . . if it is not postmarked by October 9."[75] Courts reached the same conclusion with regard to deadlines for the submission and receipt of completed absentee ballots.[76]

One of the challenges in applying this deceptively simple rule is that distinctions among various voters or ballots may sometimes be sufficient to warrant differential treatment. The Georgia Supreme Court, for example, properly recognized that the Uniformity Principle did not prohibit the state from treating votes cast for a deceased candidate as invalid, even though the candidate had been alive (and the votes had been legally valid) at the time they were cast.[77] Likewise, absentee voters inherently must be subject to different policies and procedures than in-person voters.[78] Moreover, federal

71. *Id.* at *5–6.

72. *Id.* at *7. Federal law allows overseas citizens to register to vote via e-mail by submitting an electronic version of the federal postcard application. 52 U.S.C. §§ 20301(b)(2), 20302(a)(4).

73. *Deutsch*, 2020 U.S. Dist. LEXIS 202906, at *18–19.

74. *Id.* at *19.

75. *Id.*

76. Wise v. Circosta, 978 F.3d 93, 101 (4th Cir. 2020) (en banc) (rejecting a Uniformity Principle challenge because "[a]ll voters must abide by the exact same restriction: they must cast their ballots on or before Election Day. The change impacts only an element outside the voters' control: how quickly their ballots must be received to be counted."), *injunction pending appeal denied by*, 141 S. Ct. 658 (2020); *see also* Bognet v. Sec'y of Pa., 980 F.3d 336, 343, 361 (3d Cir. 2020) (holding that a federal candidate and voters lacked standing to challenge a court ruling allowing election officials to accept completed absentee ballots that lacked legible postmarks up to three days after Election Day because "no voter—whether in person or by mail—is *permitted* to vote after Election Day"), *rev'g* No. 3:20-cv-215, 2020 U.S. Dist. LEXIS 200923, at *19–20 (W.D. Pa. Oct. 28, 2020) (holding that plaintiffs had standing to challenge rules concerning late-arriving absentee ballots), *vacated as moot*, 141 S. Ct. 2508 (2021).

77. Rhoden v. Athens-Clarke Cnty. Bd. of Elections, 850 S.E.2d 141, 150 (Ga. 2020).

78. *See* Bognet v. Sec'y of Pa., 980 F.3d 336, 360 (3d Cir. 2020) ("It is an individual voter's choice whether to vote by mail or in person, and thus whether to become a part of the so-called 'preferred class' that the District Court

law requires states to extend additional flexibility to military and overseas voters due to the unique burdens they face.[79] The Supreme Court, however, has never identified a standard to use in determining whether circumstances warrant differential treatment among voters or ballots.[80]

Second, relatedly, violations of the Uniformity Principle cannot arise from unintentional mistakes or rule violations by poll workers.[81] So long as the official rules and policies governing a statewide or other multicounty election are the same and are interpreted and applied consistently, the fact that some election officials may inadvertently violate them does not constitute an equal-protection violation. For that reason, disparities that arise from contingencies in operating various election offices or polling locations generally do not give rise to equal-protection violations. For example, as discussed above, the plaintiffs in *Deutsch* claimed that some election boards impermissibly

identified. Whether to join the 'preferred class' of mail-in voters was entirely up to the Voter Plaintiffs."), *vacated as moot*, 141 S. Ct. 2508 (2021).

79. *See* 52 U.S.C. § 20302.

80. The Texas federal district court's ruling in *Stringer v. Pablos* might be somewhat in tension with this requirement. Nos. SA-16-CV-257-OG, SA-20-CV-46, 2020 U.S. Dist. LEXIS 16686, at *21 (W.D. Tex. Jan. 30, 2020); *see also* Stringer v. Hughs, Nos. SA-20-CV-46-OG, SA-16-CV-257-OG, 2020 U.S. Dist. LEXIS 221555, at *89 (W.D. Tex. Aug. 28, 2020) (reiterating holding). That court held that the state of Texas violated the Uniformity Principle (as well as the National Voter Registration Act) by requiring people who "renew or change their driver's license online" to print out and sign a form in order to update their voter registration information. *Pablos*, 2020 U.S. Dist. LEXIS 16686, at *22. In contrast, "[p]ersons who renew or change their driver's license in person or by mail need only check a single box indicating that he/she would like to register or update his/her voter information. After checking the box on the driver's license form, no further steps are necessary." *Id.* Requiring a wet signature to make changes to voting records only for people who updated their driver's records online, the court concluded, violated the Uniformity Principle. *Id.* at *23 (noting that the state "maintains a procedure that accepts simultaneous voter registration for some, while rejecting them for others"). Since both the motor vehicle department and election officials used electronic signatures for other purposes, they should similarly be required to use them in this context, as well. *Id.*

It is unclear from the court's opinion whether the Uniformity Principle was actually applicable in this case, however, since the court acknowledged that even "the in-person and mail-in renewal/change of address forms contain a blank for a signature." Stringer v. Pablos, 320 F. Supp. 3d 862, 872–73 (W.D. Tex. 2018), *rev'd on other grounds*, 942 F.3d 715 (5th Cir. 2019). Thus, it appears possible that people submitting their information online may in fact have been treated similarly to those updating their information in person or by mail. The court, however, dismissed the relevance of such signatures since neither the motor vehicle nor the voter registration agency actually used them for anything. *Id.*

81. Democratic Cong. Campaign Comm. v. Kosinski, No. 22-CV-1029 (RA), 2022 U.S. Dist. LEXIS 124144, at *66–67 (S.D.N.Y. July 13, 2022); *Deutsch*, 2020 U.S. Dist. LEXIS 202906, at *21.

accepted federal postcard applications from overseas voters after the October 9 deadline, while most other boards properly rejected them.[82] The US District Court for the Southern District of New York held that such isolated and inadvertent mistakes neither constituted an Equal Protection violation nor implied that applicants in different counties were being treated "differentially in either a systematic or haphazard manner."[83]

Likewise, in *Democratic National Committee v. Bostelmann*,[84] the plaintiffs brought a Uniformity Principle challenge on the grounds that various election offices in Wisconsin faced a range of different difficulties as they attempted to adjust to the COVID-19 pandemic.[85] The court explained, "[T]he alleged disparate treatment is rooted in poll closings and poll-worker shortages, lack of adequate personal protective equipment at some polling locations and disparate treatment regarding voter registration and requests for absentee ballots."[86] Because such disparities did not arise from various counties or officials following inconsistent procedures, the court rejected the plaintiffs' Uniformity Principle claim.[87] Thus, plaintiffs may bring Uniformity Principle challenges to differences among various jurisdictions' policies, but not isolated mistakes.

Third, on the other hand, a plaintiff need not show that the government sought to discriminate against particular voters[88] or disenfranchise anyone.[89] A plaintiff may state a valid Uniformity Principle claim without having to establish invidious discriminatory intent.

82. *Deutsch*, 2020 U.S. Dist. LEXIS 202906, at *19–20.

83. *Id.* at *21.

84. 488 F. Supp. 3d 776 (W.D. Wis. 2020), *stay vacated*, 976 F.3d 764 (7th Cir. 2020), *reconsideration granted and stay granted*, 977 F.3d 639 (7th Cir. 2020), *application to vacate stay denied sub nom.* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28 (2020).

85. *Id.* at 815–16.

86. *Id.* at 816.

87. *Id.*

88. *See* Democratic Cong. Campaign Comm. v. Kosinski, No. 22-CV-1029, 2022 U.S. Dist. LEXIS 124144, at *67 n.18 (S.D.N.Y. July 13, 2022); Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 129–30 (S.D.N.Y. 2020); *see also* Jones v. Gov. of Fla., 975 F.3d 1016, 1082 (11th Cir. 2020) (Martin, J., dissenting); Mendez v. ADA Cmty. Libraries Bd. of Trs., No. 1:20-cv-00589, 2021 U.S. Dist. LEXIS 232160, at *9 (D. Idaho Dec. 1, 2021); Richardson v. Trump, 496 F. Supp. 3d 165, 185 (D.D.C. 2020), *appeal dismissed sub nom.* Richardson v. Biden, No. 20-5367, 2021 U.S. App. LEXIS 5295 (D.C. Cir. Feb. 8, 2021). *But see* Rodriguez v. Newsom, 974 F.3d 998, 1006 (9th Cir. 2020) (holding it is "unlikely" that *Bush* "would have silently changed a fundamental feature of [the Court's] voting rights equal protection jurisprudence" by abolishing the intentionality requirement).

89. *See* Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 49 (S.D.N.Y. 2020).

Finally, not all variations among jurisdictions' election-related policies violate the Uniformity Principle. Jurisdictions may adopt varying policies concerning aspects of the electoral process that do not directly impact people's ability to vote or have their votes counted, such as rules concerning poll watchers[90] or the arrangement of candidates' names on ballots.[91]

Even when challenging a rule that more directly impacts the validity of votes, a plaintiff must establish that it creates a substantial disparity in the likelihood that people will be able to cast their votes and have them be counted. In *League of Women Voters of Ohio v. LaRose*,[92] for example, the court rejected a Uniformity Principle challenge to the state's signature-matching requirement.[93] The court accepted the plaintiffs' allegations that election officials in different counties used different procedures to determine whether a person's signature on an absentee ballot matched their signature in official election records.[94] It nevertheless held that the plaintiffs had "fail[ed] to show that these differences result[ed] in voters in one county being treated more favorably than in another."[95]

II. CONTROVERSIES CONCERNING THE UNIFORMITY PRINCIPLE

A. Differences Among Localities

Confusion remains regarding the scope of the Uniformity Principle. Language in *Bush v. Gore* emphasized that the ruling did not require all counties and towns within a state to adopt completely identical regulations for statewide elections. The *Bush* Court stated that it was not addressing "whether local entities, in the exercise of their discretion, may develop different systems for implementing elections."[96] Drawing on this language, some courts during the 2020

90. Donald J. Trump for Pres., Inc. v. Sec'y of Pa., 830 F. App'x 377, 388 (3d Cir. 2020) ("Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.").

91. Conforti v. Hanlon, No. 20-08267, 2022 U.S. Dist. LEXIS 97003, at *45–47 (D.N.J. May 31, 2022) (holding that the Uniformity Principle did not prohibit counties' varying "bracketing" rules for the arrangement of candidates' names on ballots because the rules were "nondiscriminatory" and did not "fall into a suspect or quasi-suspect category"); *see also* Nelson v. Warner, 12 F.4th 376, 390 (4th Cir. 2021) (rejecting challenge to statewide ballot-ordering law), *rev'g* 477 F. Supp. 3d 486, 501, 512 (S.D. W. Va. 2020).

92. 489 F. Supp. 3d 719 (S.D. Ohio 2020).

93. *Id.* at 737.

94. *Id.* at 739–40.

95. *Id.* at 740.

96. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam); *see also id.* at 134 (Souter, J., dissenting) ("[T]he Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters'

election cycle concluded that the Uniformity Principle allows fairly substantial local variation in election processes.[97] One Florida district court declared, "[I]t is not unconstitutional or otherwise unlawful for different counties to have different practices on prepaid postage or on the location of ballot drop boxes."[98]

The approach adopted in some of these cases not only appears to be inconsistent with *Bush v. Gore* but would largely doom the Uniformity Principle to practical irrelevance. In several of these cases, however, the courts' refusal to apply the Uniformity Principle may have been influenced by the nature of the plaintiffs' challenges and the relief they sought. For example, some states granted county officials broad discretion to expand the use of absentee or mail-in ballots as a response to COVID-19. Rather than bringing a Uniformity Principle challenge to expand the use of such measures throughout the entire state, the Trump campaign sued to curtail them altogether, often based on unsubstantiated claims concerning voter fraud.[99] Courts may have been more receptive to Uniformity Principle claims that would have provided greater voting

intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.").

97. *See, e.g.*, Conforti v. Hanlon, No. 20-08267, 2022 U.S. Dist. LEXIS 97003, at *47 (D.N.J. May 31, 2022) (upholding differences among counties' rules for bracketing candidates' names on ballots); Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 836–37 (D. Mont. 2020) (upholding executive order allowing mail elections to be held only in some counties); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 389 (W.D. Pa. 2020) ("[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state."); Donald J. Trump for Pres., Inc. v. Boockvar, 502 F. Supp. 3d 899, 922 (M.D. Pa. 2020) ("That some counties may have chosen to implement the guidance (or not)" from the Secretary of State concerning notice-and-cure for procedurally defective absentee ballots, "or to implement it differently, does not constitute an equal-protection violation."), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 387–88 (3d Cir. 2020); *cf. League of Women Voters*, 489 F. Supp. 3d at 740 (upholding differences among counties in how signature-matching standards for absentee ballots were applied, since the plaintiffs "fail[ed] to show that these differences result in voters in one county being treated more favorably than in another").

98. Nielsen v. DeSantis, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020); *see also* Jones v. Gov. of Fla., 975 F.3d 1016, 1090 (11th Cir. 2020) (en banc) (Martin, J., dissenting) (rejecting majority's conclusion that differences among counties in ensuring convicted felons had repaid their fines and other court-ordered payments before accepting their voter registrations were constitutionally permissible).

99. *See, e.g.*, *Boockvar*, 493 F. Supp. 3d at 387 (rejecting equal protection challenge to disparities among counties' usage of drop boxes for absentee ballots based on concerns about purported differences among various counties' vulnerability to the possibility of voter fraud that would result).

opportunities in response to the COVID-19 pandemic, rather than attempts to nullify the responses that states had developed.

In *Donald J. Trump for President, Inc. v. Boockvar*,[100] for example, the Trump campaign argued after the election that Pennsylvania had violated the Uniformity Principle by allowing each county to decide for itself whether to notify each voter who cast a defective absentee ballot, give them an opportunity to cure the defect, and count any subsequently cured votes.[101] The campaign claimed that "such local control is unconstitutional because it creates an arbitrary system where some persons are allowed to cure procedurally defective mail-in ballots while others are not."[102]

The US District Court for the Middle District of Pennsylvania rejected the campaign's arguments. The court tartly noted that the plaintiffs were "ask[ing] th[e] court to disenfranchise almost seven million voters."[103] After concluding that neither the Trump campaign nor voters whose absentee ballots had been rejected possessed standing to seek the disqualification of millions of votes,[104] the court went on to reject their claims on the merits.[105] The court held that applying the Uniformity Principle to disparities among various counties' notice-and-cure policies would "broaden application of [*Bush v. Gore*] far beyond what the Supreme Court of the United States endorsed."[106] It added, "*Bush* does not stand for the proposition that every rule or system must ensure uniform treatment."[107] The court went on to emphasize that the Secretary of State had not given different guidance to each county, but rather let each county decide for itself whether to adopt a notice-and-cure procedure for absentee ballots.[108] According to the court, the fact that different counties implemented this guidance and exercised their discretion differently did not constitute an equal-protection violation.[109] The court concluded, "[R]equiring that every single county administer elections in exactly the same way would impose untenable burdens on counties,

100. 502 F. Supp. 3d 899 (M.D. Pa. 2020).

101. *Id.* at 910. Shortly before the election, the Pennsylvania Supreme Court had held that such notice-and-cure procedures were not statutorily required but did not address whether state law permitted them. *Id.* at 907 (citing Democratic Party of Pa. v. Boockvar, 238 A.3d 345, 374 (Pa. 2020)).

102. *Id.* at 910.

103. *Id.* at 906.

104. *Id.* at 914 ("Prohibiting certification of the election results would not reinstate the Individual Plaintiffs' right to vote. It would simply deny more than 6.8 million people *their* right to vote.").

105. *Id.* at 918, 921, 923.

106. *Id.* at 922.

107. *Id.*

108. *Id.*

109. *Id.*

whether because of population, resources, or a myriad of other reasonable considerations."[110]

This reasoning is inconsistent with *Bush v. Gore* itself. In *Bush*, the Court held that Florida's recount violated the Uniformity Principle because identically marked ballots were being treated differently in different counties, and even by different election officials within the same county.[111] Likewise, in the Western District of Pennsylvania's *Boockvar* case, absentee ballots were being treated differently despite having identical deficiencies in the statutorily required paperwork that accompanied them. If states must apply uniform ballot-counting rules, such uniformity should extend not only to the physical ballot itself but to the legally mandated, contemporaneously submitted information that establishes the ballot's validity.

The district court's reasoning likewise violates the premises underlying the Uniformity Principle. Rather than affording voters "equal treatment," it endorses "arbitrary and disparate treatment" of similarly situated voters in different counties who submit materially identical ballots and accompanying paperwork.[112] Moreover, because voters in certain counties are given a second bite at the apple if their absentee ballot is invalid or otherwise deficient, the likelihood that their vote will ultimately be counted is greater.[113] The impact of such disparities is substantively equivalent to that of the inconsistent ballot-counting standards the *Bush* Court rejected as unconstitutional. At heart, the Uniformity Principle requires rough equality.

Again, it is possible that the court's refusal to apply the Uniformity Principle was influenced by the fact that the Trump Campaign invoked it to challenge COVID-related emergency adjustments to the electoral process and invalidate otherwise legitimate votes. Other courts applied similar reasoning in pre-election cases. The Governor of Montana, for example, issued a directive authorizing counties to conduct the general election by mail ballot.[114] Pursuant to that order, forty-six of the state's fifty-six counties filed mail-ballot plans under which all of their voters could vote by mail without an excuse.[115] The Trump campaign and other plaintiffs challenged the order because it allowed voting to be easier in those counties than in the ten remaining jurisdictions.[116]

110. *Id.* at 922–23.

111. Bush v. Gore, 531 U.S. 98, 107–08, 110 (2000) (per curiam) ("[E]ach of the counties used varying standards to determine what was a legal vote.").

112. *Id.* at 106–07.

113. *Cf. id.* at 107–09.

114. Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 821–23 (D. Mont. 2020).

115. *Id.* at 836.

116. *Id.*

Rejecting that argument, the Court declared, "[F]ew (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause."[117] It added that the plaintiffs had failed to introduce any evidence that the counties without mail ballots "are utilizing procedures that render voters in those counties less likely to have their votes cast" or, conversely, that the counties allowing mail-in voting "[a]re more likely to permit their citizens to successfully cast a ballot."[118] Accordingly, the court concluded, "the Directive does not condone or facilitate any disparate treatment of Montana voters and, instead, is designed to ensure that all eligible Montanans can vote in the upcoming election."[119]

Likewise, in *Paher v. Cegavske*,[120] the Nevada Secretary of State developed a plan to conduct the 2020 primary election principally by mail due to the risks posed by COVID-19.[121] The plan required election officials to automatically send absentee ballots to each active voter in the voter registration database, suspending the requirement that a person must submit an absentee ballot request form confirming their identity and specifying the address to which the ballot should be sent.[122] The Registrar of Voters for Clark County, the state's largest county, where Las Vegas is located, decided to go beyond what the plan required.[123] He decided to automatically mail absentee ballots to *all* registered voters (both active and inactive) and require deputy registrars to collect completed ballots from voters who requested such courier service.[124] The plaintiffs argued that these disparities would give Clark County residents an unfair advantage in statewide elections by making it substantially easier for them to vote than for voters throughout the rest of the state.[125] They sought an injunction against implementation of Clark County's plan.[126]

The court rejected this claim, largely rejecting the notion that the disparities would lead to relatively greater turnout in Clark County.[127] It explained that, if the Clark County registrar had not adopted his modifications to the statewide plan, inactive and other voters could just choose to vote in person.[128] The court also noted that

117. *Id.* at 837.
118. *Id.*
119. *Id.*
120. No. 3:20-cv-00243, 2020 U.S. Dist. LEXIS 92665 (D. Nev. May 27, 2020).
121. *Id.* at *4–5, *14.
122. *Id.* at *14.
123. *Id.* at *6.
124. *Id.* at *6, *20–21.
125. *Id.* at *20.
126. *Id.* at *17–18.
127. *Id.* at *22.
128. *Id.* at *21 ("Plaintiffs' argument necessarily presupposes that inactive voters in Clark County would not alternatively go to the polling sites to vote in the June Primary.").

few Clark County voters had taken advantage of the opportunity to have election officials pick up their ballots.[129] It speculated that, had the ballot pickup service been unavailable, those voters likely would have returned their ballots through some other means.[130] Thus, the court rejected the notion that Clark County's voters were likely to have a substantially greater opportunity to vote than other counties' residents.[131]

The court also rejected the plaintiffs' equal-protection challenge for an independent reason: Clark County had made it easier for its own citizens to vote without making it harder for other counties' citizens to do so.[132] Moreover, other counties were free to adopt similar plans for their own voters.[133] Again, the court may have been more receptive to the plaintiffs' Uniformity Principle claim if they had sought to expand Clark County's program to the rest of the state, rather than attempting to impede the county's response to the COVID-19 pandemic. These cases also demonstrate, however, that several courts remain skeptical of the Uniformity Principle and are reluctant to apply it meaningfully.

B. Katzenbach *and Expansions of Voting Rights*

During the 2020 election cycle, courts made some progress in integrating the Uniformity Principle with other lines of Supreme Court precedent. In the 1969 case *McDonald v. Board of Election Commissioners*,[134] the Supreme Court held that the constitutional right to vote does not include the right to vote by absentee ballot.[135]

129. *Id.* at *22.

130. *Id.* (citation omitted) ("[I]t is unlikely that the mere act of the alternative of picking up an already voted ballot, for which there is also an option to drop off or mail-in with postage provided would result in greater voting strength.").

131. *Id.* at *23.

132. *Id.* at *24 ("Plaintiffs are unlikely to succeed on their claim of an Equal Protection violation where they provide no evidence . . . that the [Clark County] Plan makes it harder for voters in other counties to vote.").

133. *Id.* at *25.

134. 394 U.S. 802, 807 (1969) (stating that the case did not involve "the fundamental right to vote," but rather "a claimed right to receive absentee ballots").

135. Democratic Cong. Campaign Comm. v. Kosinski, No. 22-CV-1029, 2022 U.S. Dist. LEXIS 124144, at *73 n.19 (S.D.N.Y. July 13, 2022); Lewis v. Hughs, 475 F. Supp. 3d 597, 618 (W.D. Tex. 2020), *rev'd sub nom.* Lewis v. Scott, 28 F.4th 659, 662 (5th Cir. 2022) (ordering dismissal due to sovereign immunity); *cf.* Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 122–23 (D.D.C. 2020) (holding that *McDonald* did not preclude the court from applying *Anderson-Burdick* to determine the constitutionality of restrictions on absentee voting); Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1278 (N.D. Ga. 2021) (same); *see also* Richardson v. Trump, 496 F. Supp. 3d 165, 181 (D.D.C. 2020) (same), *appeal dismissed sub nom.* Richardson v. Biden, No. 20-5367, 2021 U.S. App. LEXIS 5295 (D.C. Cir. Feb. 8, 2021).

Despite some earlier rulings to the contrary,[136] courts in the 2020 election cycle were nevertheless willing to consider Uniformity Principle challenges to the rules governing absentee ballots. These rulings are consistent with *McDonald*. Although states do not have a general constitutional obligation to allow absentee voting, once they choose to do so, constitutional protections and restrictions apply.[137]

One of the biggest questions nevertheless remains: the extent to which a state may selectively expand opportunities for voting or remove potential barriers to voting for only certain members of the electorate. Thus, uncertainty arises from the tension between the Uniformity Principle and the equal-protection holding of a critical case from the Civil Rights Era, *Katzenbach v. Morgan*.[138] In *Katzenbach*, the Supreme Court upheld § 4(e) of the Voting Rights Act.[139] That provision prohibited a state from denying the right to vote to anyone who had been educated through the sixth grade in a Spanish-language school in Puerto Rico, on the grounds they were illiterate in the English language.[140] At the time, Congress had not yet completely prohibited literacy tests,[141] and New York required people to be able to read and write in English to be able to vote.[142] Only a few years earlier, the Supreme Court had upheld the constitutionality of literacy tests, so long as they were adopted for nondiscriminatory reasons and administered in a racially unbiased manner.[143]

Katzenbach upheld Congress's selective invalidation of literacy tests for certain voters. It explained that § 4(e) "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or

136. *See* Morley, *supra* note 31, at 303 nn.518–19.

137. *Cf.* Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam).

138. 384 U.S. 641, 650 (1966); *see* Morley, *supra* note 31, at 299–305.

139. *Katzenbach*, 384 U.S. at 653. *See* 52 U.S.C. § 10303(e)(2), *formerly codified at* 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).

140. *Katzenbach*, 384 U.S. at 643.

141. The Voting Rights Act of 1965 prohibited jurisdictions from using literacy tests if less than fifty percent of their voting-age population was registered to vote or had participated in the 1964 presidential election. Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (1965). Congress expanded the prohibition to all jurisdictions in 1970. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315 (1970).

142. *Katzenbach*, 384 U.S. at 643–44.

143. *See* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51–52 (1959) ("The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot . . . . [I]n our society where newspapers, periodicals, books, and other printed material canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.").

administration of government services . . . ."[144] The law's "practical effect" was to require New York to allow its Puerto Rican community to vote, which would help them secure governmental services.[145] The Court further noted that Congress also may have concluded that literacy was unnecessary for "an intelligent exercise of the franchise."[146]

New York argued that § 4(e) "itself works an invidious discrimination" in violation of the Fifth Amendment's Due Process Clause.[147] The law exempted only certain people from New York's literacy requirement while that requirement remained applicable to people illiterate in the English language who graduated from schools in foreign countries or English-language schools, were raised in the continental United States, or never completed sixth grade at all.[148] The Court rejected this argument, emphasizing that § 4(e) "d[id] not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law."[149] Because § 4(e) expanded the franchise rather than restricting it, the provision was subject only to rational basis scrutiny and upheld.[150] Quoting a series of rational-basis cases, the Court reiterated that a "statute is not invalid under the Constitution because it might have gone farther than it did."[151] Moreover, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[152]

Katzenbach authorizes lenient equal-protection review when a legal provision liberalizes or extends voting rights, but not when such rights are restricted. An objectively defensible baseline will seldom exist, however, to determine whether a legal provision is actually extending or restricting voting rights. Indeed, the same substantive outcomes can be achieved by laws drafted in either manner. For example, a state may generally prohibit absentee voting but then extend that opportunity to certain groups of voters. Or that state may instead generally allow absentee voting but then restrict it for people who do not fall within certain categories. The applicability of constitutional restrictions should not depend on the precise manner in which the statute establishing a particular substantive statutory scheme is phrased.

Moreover, when election officials make it easier for members of certain groups or people in certain places to vote, it can also have

144. *Katzenbach*, 384 U.S. at 652.
145. *Id.*
146. *Id.* at 654.
147. *Id.* at 656.
148. *Id.*
149. *Id.* at 657.
150. *Id.*
151. *Id.* (quoting Roschen v. Ward, 279 U.S. 337, 339 (1929)).
152. *Id.* (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955)).

substantial partisan effects, whether intentionally or not. For example, in *Katzenbach*, if Puerto Rican-raised voters who were unable to speak English tended to favor a particular political party, allowing them to vote while barring others who were unable to speak English from doing so could yield that party a disproportionate advantage. Likewise, in *Paher v. Cegavske*, the Nevada Secretary of State approved a plan in response to COVID-19 in which all counties would automatically mail absentee ballots to all active registered voters.[153] Each county could decide for itself whether to also send such ballots to inactive voters and allow "field registrars" to collect completed ballots and return them to election officials.[154]

Only Clark County took advantage of that opportunity.[155] The state's largest county, Clark County is disproportionately Democratic compared to the state's other counties.[156] Those other counties, in contrast, automatically mailed absentee ballots only to active voters and did not allow field registrars to retrieve completed ballots from voters' homes.[157] Consistent with *Katzenbach*, the US District Court for the District of Nevada rejected an equal-protection challenge to this arrangement, holding that a state is "not constitutionally prohibited from making voting easier" for certain people, including residents of just one county.[158]

A similar issue arose in a Seventh Circuit case from 2017. In *Harlan v. Scholz*,[159] the Seventh Circuit upheld a law requiring counties that used electronic pollbooks to allow same-day voter registration at every polling location while requiring counties with paper pollbooks to allow it only at the central county election office.[160] The plaintiff, a Republican congressional candidate, argued that the law "disadvantages voters in smaller counties that do not have e-

153. Paher v. Cegavske, No. 3:20-cv-00234, 2020 U.S. Dist. LEXIS 92665, at *4–6 (D. Nev. May 27, 2020).

154. *Id.* at *6.

155. *Id.* at *6, *22–23.

156. As of August 2020, Clark County had 1,368,934 registered votes (approximately 72% of the state's voters), of whom 566,767 (41.4%) were Democrats and 380,325 (27.8%) were Republicans. *Voter Registration Statistics: Total Voters by County and Party*, OFFICE OF NEV. SEC'Y OF STATE BARBARA K. CEGAVSKE (Aug. 2020), https://www.nvsos.gov/sos/home/showdocument?id=8874. The state's next largest county, Washoe, had 322,807 voters, of whom 114,277 (35.4%) were Democrats and 112,945 (35%) were Republican. *Id.* In Eureka, the state's second-smallest county, there were 1,110 registered voters, including 87 (7.8%) Democrats and 779 (70.18%) Republicans. *Id.*

157. *Paher*, 2020 U.S. Dist. LEXIS 92665, at *6, *24 (holding that, while "Clark County's Plan may make it easier or more convenient to vote in Clark County, [it] does not have any adverse effects on the ability of voters in other counties to vote").

158. *Id.* at *3.

159. 866 F.3d 754 (7th Cir. 2017).

160. *See id.* at 761.

pollbooks, and thus comparatively boosts Democratic voter turnout."[161] The district court agreed, holding that "[t]he application of this legislation favors the urban citizen and dilutes the vote of the rural citizen."[162] The Seventh Circuit reversed, holding that the disparate rules for same-day voter registration were valid because they did not "severely burden[] the smaller-county residents."[163]

Even apart from any potential partisan advantage, the Uniformity Principle counsels that interjurisdictional inconsistencies or disparities that materially affect a person's ability to cast a vote or have it counted in a statewide or other multicounty election are intrinsically suspect and inconsistent with recognition of voting as a fundamental right. The tension between *Bush* and *Katzenbach* requires courts to assess whether the Equal Protection Clause allows states to allow well-financed, high-population counties to offer substantially more opportunities for voter registration, absentee voting, or early voting than smaller counties that lack comparable resources.

C. The Meaning of Uniformity

Another challenging aspect of the Uniformity Principle is that it does not necessarily require states to apply exactly uniform policies across the state, but rather more broadly bars "arbitrary and disparate treatment" of voters concerning their "exercise" of the right to vote.[164] In other words, the fundamental command of the Uniformity Principle is that a state must provide substantively equivalent opportunities for all of its voters to cast ballots and have them counted.

With regard to some aspects of the electoral process, this mandate may require all of a state's election officials and political subdivisions to apply exactly the same policies. For example, in *Bush* itself, the Court held that it was unconstitutional for election officials—both across counties and within certain counties—to apply varying and inconsistent standards for determining voter intent when counting ballots.[165] The court-ordered statewide recount was invalid precisely because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[166] These disparities violated "the rudimentary requirements of equal treatment and fundamental fairness."[167]

161. *Id.* at 757.

162. Harlan v. Scholz, 210 F. Supp. 3d 972, 977 (N.D. Ill. 2016), *rev'd*, 866 F.3d 754 (7th Cir. 2017).

163. *Harlan*, 866 F.3d at 759.

164. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

165. *Id.* at 105–06.

166. *Id.* at 106.

167. *Id.* at 109.

This type of literal uniformity seems generally appropriate for most substantial rules for obtaining, casting, and counting ballots. Such rules include the days and hours for early voting, whether election officials are permitted to fill out absentee ballot request forms with voters' personal identifying information before distributing them,[168] whether election officials may automatically mail absentee ballots based on records in the voter registration database without receiving individualized requests,[169] and the availability of notice and an opportunity to cure otherwise invalid absentee ballots.[170] In such cases, literal uniformity would help to promote equality of voting opportunities.

In contrast, literal uniformity may generally be inappropriate with regard to resource allocation issues such as the number of polling places, voting machines, or drop boxes in each county.[171] Geographically larger or more populous jurisdictions generally require more resources to provide adequate voting opportunities for their residents. Rather than absolute numerical equality among counties, the focus should instead be on ensuring that all counties have the resources necessary to provide approximately equal voting opportunities for their citizens. Such uniformity may be achieved in different ways.

For example, states may be required to ensure that the ratio of voters to polling places or voting machines is consistent across local jurisdictions, even if this requires various counties to deploy differing numbers of voting machines. Likewise, to the extent possible, this principle may require rough equality of physical distance between voters' residences and polling places or drop boxes, even though this would require counties to establish different numbers of drop boxes.

168. *Cf.* Democratic Senatorial Campaign Comm. v. Pate, 950 N.W.2d 1, 7 (Iowa 2020) (holding that county election auditors lacked authority to violate a directive from the Secretary of State barring them from distributing absentee ballot request forms that were prepopulated with voters' personal identifying information from the election database).

169. *Cf.* Paher v. Cegavske, No. 3:20-cv-243, 2020 U.S. Dist. LEXIS 92665, at *23–25 (D. Nev. May 27, 2020) (rejecting equal protection challenge to COVID-19 response plan under which only one county in the state automatically mailed absentee ballots to inactive voters and allowed election officials to personally retrieve completed absentee ballots from voters).

170. *Cf.* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 910, 914, 918, 921–23 (M.D. Pa. 2020) (rejecting Uniformity Principle challenge to disparities among counties' policies concerning whether to notified voters about, and give voters an opportunity to cure, procedural defects in their absentee ballots), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 388 (3d Cir. 2020).

171. *Cf.* Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 387 (W.D. Pa. 2020) (rejecting equal protection challenge to disparities among counties' usage of drop boxes for absentee ballots based on concerns that they would render counties vulnerable to voter fraud to different extents).

Moreover, the unique circumstances of certain groups, such as military and overseas voters, may require substantially different policies so that their opportunity to vote is materially equivalent to that of other voters.[172]

In *A. Phillip Randolph Institute of Ohio v. LaRose*,[173] however, a federal district court held that literal uniformity was sufficient to satisfy the Uniformity Principle, even with regard to resource allocation issues.[174] There, the Ohio Secretary of State had issued a directive requiring each county to establish a single drop box for absentee ballots.[175] The court held that this policy was consistent with the Uniformity Principle because "there are no inter-jurisdictional differences in how the standards in the Directive are implemented."[176] The court did not address the fact that, despite such absolute numerical uniformity, voters in some counties may have

172. *See, e.g.*, 52 U.S.C. §§ 20301–11.

173. 493 F. Supp. 3d 596 (N.D. Ohio 2020), *stay granted*, 831 F. App'x 188 (6th Cir. 2020), *appeal dismissed as moot*, Nos. 20-4063, 20-4068, 2020 U.S. App. LEXIS 34133 (6th Cir. Oct. 28, 2020).

174. *Id.* at 614 n.18.

175. *Id.* at 610.

176. *Id.* at 614 n.20. The Pennsylvania Secretary of State, in contrast, issued guidance allowing each county to decide for itself whether to establish ballot drop boxes, how many drop boxes to operate, and where to locate them. *Boockvar*, 493 F. Supp. 3d at 352–53. Consistent with that guidance, some counties established numerous unstaffed drop boxes, others established a more limited number of staffed drop boxes, and still others did "not us[e] drop boxes at all." *Id.* at 382.

The Trump campaign sued, alleging that counties' inconsistent usage of drop boxes would subject different counties to varying degrees of vulnerability to voter fraud. *Id.* at 387. The district court held that the campaign lacked standing to raise such an argument because the risk of voter fraud was speculative. *Id.* at 342, 376. Moreover, since the presidential election was statewide, any voter fraud that occurred within a particular county would equally dilute the votes of all voters throughout the state. *Id.* at 387. Thus, counties' inconsistent policies concerning drop boxes did not expose voters in different counties to potentially differing levels of fraud in the presidential election. *Id.* (explaining that the plaintiffs "have, at best, shown only that events causing dilution are more likely to occur in counties that use drop boxes. But, importantly, the effect of those events will . . . be felt by every voter across all of Pennsylvania."). The campaign's equal protection argument accordingly failed.

The plaintiffs would likely have had a much stronger claim under the Uniformity Principle if they had argued that the state could not selectively make it substantially easier for people in some counties to vote in a statewide election than voters in other counties by allowing each county to decide for itself whether to authorize drop boxes. *Cf.* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 361 (Pa. 2020) (declining to address equal protection challenge to disparities among various counties' use of drop boxes because the details of their implementation plans were not yet available, and so "an equal protection analysis" was "impossible at this time"), *stay denied*, 238 A.3d 345 (Pa. 2020), *stay denied sub nom.* Republican Party v. Boockvar, 141 S. Ct. 643 (2020), *injunction pending appeal issued*, No. 20A84, 2020 U.S. LEXIS 5345 (U.S. Nov. 6, 2020).

found it substantially easier to vote than voters in others. In geographically larger counties, for example, people may have had to travel much greater distances to get to the single drop box than in smaller or denser counties. While the Secretary's directive imposed the same policy in all counties, it may have resulted in substantially different opportunities for voting.[177] At the very least, the Uniformity Principle likely would—or should—have permitted the Secretary to authorize counties to establish varying numbers of drop boxes based on the size of their respective populations of registered voters.

D. Reaching Beyond Election Officials

While some courts construed the Uniformity Principle narrowly in the 2020 election cycle, others applied it much more broadly than over the previous two decades. A few courts questionably extended the principle beyond election officials to the internal operations of the US Postal Service on the grounds that the agency transports absentee ballots and other election-related materials. Various plaintiffs sued in New York and the District of Columbia to challenge a broad range of policy changes that the US Postal Service had adopted in the summer of 2020, which they claimed would impede absentee voting. These policies included a prohibition on overtime work, a ban on late and extra deliveries, a hiring freeze for managers, restrictions on mail sorting, removal of mailboxes, reduction in the number of high-speed sorting machines, and refusal to treat election-related mail as first-class mail unless election officials paid the additional price for such handling.[178] The Postal Service later attempted to suspend or roll back many of these changes, except for the ban on late and extra deliveries.[179] As a result of these changes, on-time delivery for first-class mail dropped from 91.76 percent to 88.04 percent.[180]

In *Jones v. U.S. Postal Service*,[181] the US District Court for the Southern District of New York held that most of the challenged policies likely violated the Fifth Amendment's equal-protection

177. The plaintiffs prevailed on their *Anderson-Burdick* challenge because the court concluded the Secretary's restriction imposed unwarranted burdens on the voting rights of poor and minority residents. *A. Philip Randolph Inst.*, 493 F. Supp. 3d at 613–14.

178. Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 113–20 (S.D.N.Y. 2020); Richardson v. Trump, 496 F. Supp. 3d 165, 171–74 (D.D.C. 2020); *see also* Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 116 (D.D.C. 2020) (challenging only the ban on late and additional trips).

179. *Jones*, 488 F. Supp. 3d at 120, 135. The evidence demonstrated that the Postal Service had hired more than "88,000 new untrained temporary employees." *Id.* at 115 (quotation marks omitted).

180. *Id.* at 118–19.

181. 488 F. Supp. 3d 103 (S.D.N.Y. 2020).

component.[182] The court concluded that they "render[ed] voters' ability to cast an effective vote dependent on arbitrary factors, such as the particular USPS branch that handles their ballots."[183] The DC district court reached the same conclusion specifically concerning the Postal Service's bans on overtime pay, as well as late and extra deliveries.[184]

All of these rulings treated *Bush*'s Uniformity Principle as applicable to the Postal Service due to the service's role in transporting substantial numbers of absentee ballots.[185] They each quoted *Bush*'s declaration that the government "may not, by . . . arbitrary and disparate treatment, value one person's vote over that of another."[186] *Jones* explained that *Bush* requires "even the nuts and bolts of election administration" to "comport with equal protection."[187] Under the Uniformity Principle, "an equal protection violation occurs when arbitrary disparities in voting mechanisms make it less likely that voters in certain areas will cast votes that count."[188] The courts

182. *Id.* at 127; *see* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding the Fifth Amendment's Due Process Clause imposes equal protection restraints against the federal government parallel to those that the Fourteenth Amendment imposes on states).

183. *Jones*, 488 F. Supp. 3d at 127.

184. *Richardson*, 496 F. Supp. 3d at 189–90; *see also Vote Forward*, 490 F. Supp. 3d at 116, 127–28 (holding that the ban on late and extra deliveries likely violated equal-protection restrictions). Both *Richardson* and *Vote Forward* were decided by the same judge. In *Richardson*, the Court held that the plaintiffs had introduced "little to no evidence" concerning their challenges to the other policies. 496 F. Supp. 3d at 189–90.

185. *Jones*, 488 F. Supp. 3d at 127–30, 135–36 ("[S]tates are relying on USPS as a 'vital partner in administering a safe, successful election.'"); *Vote Forward*, 490 F. Supp. 3d at 123–24, 127 (holding that the Postal Service's responsibility for "handling ballots compels the conclusion that [it] plays an active role in ensuring that elections are conducted in a 'fair and honest' manner," and the challenged policies "directly impact[] and control[] the ability of millions of citizens to have their vote counted" (quoting Burdick v. Takushi, 504 U.S. 428, 433 (1992))); *accord Richardson*, 496 F. Supp. 3d at 182–83.

All of these courts merged their application of the Uniformity Principle with *Anderson-Burdick* balancing, essentially conflating the two types of Equal Protection claims. *See supra* notes 56–64 and accompanying text. The *Jones* Court claimed it was "declin[ing] to answer whether *Anderson-Burdick* should be extended to cases" against federal entities. 488 F. Supp. 3d at 103. It recognized, however, that its Equal Protection analysis involved a balancing test that was substantially equivalent to *Anderson-Burdick*. *Id.*; *see also id.* at 135 (declaring that the plaintiffs would "succeed under any standard").

186. *Jones*, 488 F. Supp. 3d at 127, 135–36; *Vote Forward*, 490 F. Supp. 3d at 127; *Richardson*, 496 F. Supp. 3d at 185.

187. *Jones*, 488 F. Supp. 3d at 130.

188. *Id.*

concluded that "[n]onuniform mail service functions in the same way as the nonuniform vote counting standards at issue in *Bush*."[189]

Applying this principle, the courts identified "a profound and troubling lack of standards and uniformity with regard to USPS's handling of Election Mail."[190] For example, disparities existed as to whether local post offices were still attempting to implement the policies that the Postal Service had suspended or withdrawn.[191] Likewise, differences among the lengths of various post offices' delays were likely to lead to "differential treatment of ballots, . . . constitut[ing] a dilution of votes, an impairment of the right to fair and effective representation, and a violation of the equal dignity owed to each voter."[192] The DC court agreed that if a voter "submits her ballot, but [the ballot] does not make it to her local election office in time because of delays caused by the USPS policy, 'her "right to full and effective participation" . . . is impaired'" relative to voters in places where the Postal Service was operating more efficiently.[193]

The New York court entered a preliminary injunction requiring the Postal Service, "to the extent that excess capacity permits," to treat all Election Mail—including voter registration materials, absentee ballot applications, polling place notices, blank ballots, and completed ballots—as First-Class or Priority Express parcels.[194] It further ordered the Postal Service to "pre-approve all overtime that has been or will be requested" between October 26 and November 6, 2020 (two days after Election Day).[195] The court also required the Postal Service to not only allow late and extra deliveries, but to "encourage[]" them for election mail.[196] The Postal Service was additionally directed to develop a plan for increasing the on-time delivery rates for First-Class mail to 93.88 percent and marketing mail to 93.69 percent.[197] The DC District Court entered partly overlapping preliminary injunctions. One of them enjoined the Postal

189. *Id.*; *see also Vote Forward*, 490 F. Supp. 3d at 127 (quoting *Jones*, 488 F. Supp. 3d at 132) (holding that, if the Postal Service's policy changes led to delays that resulted in a person's ballot being rejected as untimely, that person's right to vote "is impaired relative to that of both in-state and out-of-state voters with access to USPS branches functioning effectively").

190. *Jones*, 488 F. Supp. 3d at 134.

191. *Id.* at 124.

192. *Id.* at 135.

193. *Vote Forward*, 490 F. Supp. 3d at 127 (quoting *Jones*, 488 F. Supp. 3d at 132); *accord Richardson*, 496 F. Supp. 3d at 184 (holding that the Postal Service's prohibition on late and additional trips would "cause inconsistency and arbitrary delays in the delivery of mail across the United States, placing at risk Plaintiffs' ability to receive their mail-in ballots in time or have them arrive at their local election office in time").

194. *Jones*, 488 F. Supp. 3d at 141–42.

195. *Id.* at 142–43.

196. *Id.* at 142.

197. *Id.*

Service from enforcing its prohibition on late and extra trips;[198] the other enjoined both the late and extra trips policy as well as the restrictions on overtime pay.[199]

The Postal Service argued in *Jones* that equal-protection principles do not require that voters in different states be treated equally, particularly since the Senate and Electoral College already create disparities in the weight of votes in different states.[200] Accordingly, elections within each state should be assessed independently of each other. The court rejected that argument, concluding that all voters across the nation are entitled to "equal dignity."[201]

The courts were similarly unpersuaded by the Postal Service's point that voters could avoid potential delays simply by casting their ballots a few days earlier to leave extra time for delivery.[202] They dubiously ruled that encouraging voters to return their absentee ballots a few days sooner would substantially burden their right to vote.[203] The courts reasoned that people would prefer to have as much time as possible to decide which candidates to vote for, particularly when last-minute developments arise in the election.[204]

These applications of the Uniformity Principle were improperly overbroad. ***First***, the Uniformity Principle has generally required equal treatment of voters participating in the same election.[205] Courts have typically declined to require jurisdictions to apply the same rules to voters participating in elections that are independent of each other.[206] In a presidential election, each state conducts a separate election for its own slate of presidential electors. Moreover, applying the Uniformity Principle on an interstate basis could require national uniformity for a variety of election-related rules, policies, and procedures, even in the absence of federal statutes mandating it.[207]

Along those lines, part of the reason the *Bush* Court adopted the Uniformity Principle for election administration issues is because the

198. *Vote Forward*, 490 F. Supp. 3d at 132.

199. *Richardson*, 496 F. Supp. 3d at 190.

200. *Jones*, 488 F. Supp. 3d at 130–31.

201. *Id.* at 132.

202. *Vote Forward*, 490 F. Supp. 3d at 131; *Jones*, 488 F. Supp. 3d at 123.

203. *Vote Forward*, 490 F. Supp. 3d at 131; *Jones*, 488 F. Supp. 3d at 123.

204. *Vote Forward*, 490 F. Supp. 3d at 126 ("Many individuals, including Plaintiffs in this case, rely on the efficient delivery of their mail-in ballots so that they may take the time available to consider the issues and candidates in an election."); *see also Jones*, 488 F. Supp. 3d at 123.

205. Morley, *supra* note 31, at 248–49.

206. *Id.*

207. *Cf.* Michael T. Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL'Y REV. 81, 86–87 (2020) (explaining the implications of applying the Equal Protection Clause across state lines in presidential elections).

Equal Protection Clause already applied to other aspects of the electoral process, including equalizing the weight of people's votes.[208] In presidential elections, however, equal-protection principles generally do not apply on an interstate basis. For example, as mentioned earlier, the structure of the Electoral College does not accord equal voting weight to voters in different states.[209] Thus, the district courts likely erred in concluding that the Constitution requires substantially similar treatment of voters across state lines. Even in the context of a presidential election, the relevant basis for comparison is the statewide electorate within each state.

Second, the district courts were likely incorrect in assuming that the Constitution's voting-related protections allow them to regulate the Postal Service's internal procedures, personnel and budgetary decisions, and general operations. *Bush v. Gore* established its Uniformity Principle as a response to election officials in various counties applying disparate standards in counting ballots.[210] Similarly, the Court developed the *Anderson-Burdick* standard in the context of cases dealing with ballot access for independent presidential candidates[211] and prohibitions on write-in votes.[212] These cases do not suggest that the Constitution's voting-related protections allow courts to reach beyond election officials to regulate the internal operations of government agencies that may indirectly impact the electoral process. Neither the Uniformity Principle nor the *Anderson-Burdick* standard should be construed as allowing federal courts to regulate tangential issues that could indirectly impact voting such as public transportation, parking, housing, education, or the mail. This is especially true for an entity such as the Postal Service, which was acting in a non-sovereign capacity, providing the equivalent of a commercial service.

More fundamentally, the Uniformity Principle was not violated with regard to the actual election-related rules to which absentee voters were subject. All of the absentee voters within each state—apart from military and overseas voters—were subject to the same deadlines for the return of absentee ballots.[213] The gravamen of the plaintiffs' Uniformity Principle claims (as distinct from the courts' *Anderson-Burdick* analyses) was essentially that this consistent, uniform deadline disparately impacted voters in areas where the Postal Service's deliveries were slower.[214] Since the same election-

208. Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam).
209. Gray v. Sanders, 372 U.S. 368, 377 (1963).
210. *Bush*, 531 U.S. at 106–07.
211. Anderson v. Celebrezze, 460 U.S. 780, 786–88 (1983).
212. Burdick v. Takushi, 504 U.S. 428, 433–35 (1992).
213. Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 110 (S.D.N.Y. 2020).
214. *Id.* at 127, 135; Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 127 (D.D.C. 2020).

related deadline was being applied to all domestic absentee voters within each state, the Uniformity Principle challenges should have failed.

Third, as the Postal Service unsuccessfully argued, it appears that the district courts overestimated the burden on voters of having to return their absentee ballots a few days earlier to avoid the possibility of mail delays or backlogs. The Southern District of New York issued *Jones* on September 21, 2020.[215] The DC District Court handed down *Vote Forward* a week later,[216] and *Richardson* shortly thereafter.[217] Even by the time of those rulings, voters had more than enough time to request, complete, and return absentee ballots by Election Day, regardless of any possible differentials in postal-service delays. The fact that some voters may have preferred to wait until the last minute to complete and return their ballots does not mean requiring them to do so a few days earlier would have been an unconstitutional burden.

Finally, even accepting the district courts' conclusion that disparities in the Postal Service's delivery times or procedures affecting election-related materials violated the Uniformity Principle, they could have granted full relief by focusing on election officials rather than postal operations. In *Gallagher v. New York State Board of Elections*,[218] for example, state law specified that an absentee ballot could be counted only if election officials received it by Election Day or it was postmarked by Election Day and election officials received it within a week of the election.[219] The court ordered election officials to accept absentee ballots received after Election Day without postmarks showing they had been mailed by the statutory deadline, due to differences in postmarking procedures used by various New York post offices.[220] The court found that, in the 2020 primary election, post offices in Brooklyn had "handled absentee ballots differently" from post offices in the other boroughs.[221] These differences in internal procedures caused a substantial number of absentee ballots mailed from Brooklyn to lack postmarks.[222] Election officials had rejected approximately 2,000 late-arriving absentee ballots from Brooklyn due to lack of a postmark, while only 20–60 late-arriving ballots from other boroughs lacked postmarks.[223]

State law established a uniform statutory deadline to determine the validity of all domestic absentee ballots. The court nevertheless

215. *Jones*, 488 F. Supp. 3d at 103.
216. *Vote Forward*, 490 F. Supp. 3d at 110.
217. Richardson v. Trump, 496 F. Supp. 3d 165, 165 (D.D.C. 2020).
218. 477 F. Supp. 3d 19 (S.D.N.Y. 2020).
219. *Id.* at 28–29.
220. *Id.* at 52.
221. *Id.* at 47.
222. *Id.* at 34.
223. *Id.*

held that the substantial geographic disparities in ballot rejection rates that resulted from that deadline violated the Uniformity Principle.[224] It explained that voters in different boroughs "cast their votes in the same manner."[225] The validity of their absentee ballots, however, hinged on "random chance," including how quickly the post office delivered the ballot to election officials and whether the post office postmarked it.[226] Allowing such "arbitrary factors" to impact the validity of absentee ballots "valu[ed] one person's vote over that of another."[227] The court declared, "[T]he postmark requirement, in conjunction with the absence of postmarks on timely mailed absentee ballots—a factor outside of a voter's control—creates an arbitrary voting system with insufficient 'guarantees of equal treatment.'"[228] The court concluded that allowing election officials to apply the postmark requirement "subject[ed] absentee voters across the state to unjustifiable differences in the way that their ballots are counted."[229]

On the merits, the district court's ruling raises serious questions under the Uniformity Principle because the court appears to have applied a disparate impact standard rather than ensuring that election officials applied the same rules to all voters in the jurisdiction. Election officials themselves applied a consistent, uniform deadline for absentee ballots. The only disparities in policies were the Postal Service's internal rules for mail processing and postmarking, which affected all mail rather than singling out election-related materials or absentee ballots.[230] It seems unlikely that equal-protection principles confer the right to have all post offices apply the same generic internal procedures across all locations, simply because election-related materials are among the billions of parcels the Postal Service transports.[231]

At the very least, however, the *Gallagher* court granted an appropriate remedy by targeting its injunction at election officials rather than postal officials. Any burden on voters' rights could be alleviated without regulating internal Postal Service procedures by instead ensuring that election officials counted certain ballots without postmarks. Especially since the gravamen of the

224. *Id.* at 47.
225. *Id.* at 47–48.
226. *Id.*
227. *Id.* at 46.
228. *Id.* at 48 (quoting Bush v. Gore, 531 U.S. 98, 107 (2000) (per curiam)).
229. *Id.* at 49.
230. *See id.* at 29–30.
231. *The United States Postal Service Delivers the Facts*, U.S. POSTAL SERV. (July 2020), https://about.usps.com/news/delivers-facts/usps-delivers-the-facts.pdf ("In fiscal year 2019, the Postal Service delivered 143 billion pieces of mail to 160 million delivery addresses and operated more than 31,000 Post Offices.").

constitutional right at stake was having one's vote counted rather than having the Postal Service apply any particular postmarking or delivery rules, such relief was appropriately tailored to enforcing the underlying right.[232] To the extent courts continue applying the Uniformity Principle broadly to disparities arising from governmental agencies and processes outside of the electoral system itself, they should exercise remedial restraint by following *Gallagher*'s example. That is, whenever possible, courts should target their relief—and require that the underlying lawsuits be brought—against election officials rather than outside officials or agencies. Cases like *Jones*, *Vote Forward*, and *Gallagher* may be best understood, however, as potentially overassertive reactions to the unique circumstances of a global COVID-19 pandemic, rather than a foundation for potentially sweeping applications of the Uniformity Principle in future cases.

III. THE UNIFORMITY PRINCIPLE AND ELECTION REMEDIES

The previous Parts discussed the Uniformity Principle as both a restriction on state election laws and procedures, as well as a substantive cause of action. The principle was also invoked during the 2020 election cycle, however, as a potential restriction on courts' authority at the remedial stage of election litigation.[233] Several courts suggested that the Uniformity Principle requires plaintiffs to seek, and courts to grant, relief on a statewide basis when a challenge is raised in the context of a statewide election, rather than limiting relief only to certain voters or counties.[234] Cases considering the issue over the preceding two decades, in contrast, had adopted more mixed views on the issue.[235]

In *Trump v. Biden*,[236] the Trump campaign challenged the validity of absentee ballots in two predominantly Democratic counties where election officials had allegedly violated state law by adding missing information to the ballots' accompanying certifications

232. *See* Rogers v. Lodge, 458 U.S. 613, 628 (1982) ("Where 'a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "condition that offends the Constitution."'" (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977))).

233. To the extent the Uniformity Principle applies to the scope of remedies in election-related litigation, it is a matter of substantive law and does not impact the justiciability of the plaintiffs' claim. *See* Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1272 (N.D. Ga. 2021) (rejecting the argument that "Plaintiffs cannot establish redressability without bringing suit against all Georgia counties," because an injunction against the particular county that was sued "would address at least some of the alleged injuries in this case").

234. *See* Morley, *supra* note 31, at 261–62.

235. *Id.* at 298–99.

236. 951 N.W.2d 568, 570 (Wis. 2020).

concerning the ballots' witnesses.[237] The Wisconsin Supreme Court declined to consider the claim due to laches.[238] It went on to opine that rejecting illegal votes after the election "in only two of Wisconsin's 72 counties" when the same alleged statutory violations had occurred in other counties throughout the state "may even [be] unconstitutional" under *Bush v. Gore*'s Uniformity Principle.[239] Under this approach, a plaintiff challenging election officials' allegedly illegal conduct in a statewide election would have to challenge all such conduct, by all officials who engaged in it, rather than focusing only on particular counties.

The US District Court for the Southern District of New York invoked the principle in *Gallagher v. New York State Board of Elections* to justify a statewide injunction.[240] As discussed earlier,[241] New York required absentee ballots to be postmarked by Election Day.[242] The plaintiffs argued that this requirement violated the Uniformity Principle as applied.[243] The Postal Service's failure rate for postmarking completed absentee ballots was substantially higher in Brooklyn than in New York City's other boroughs.[244] Citing *Bush*, the district court held that the deadline had to be suspended for voters throughout the state.[245] Even though the plaintiffs' claims concerned only New York City, "counting absentee ballots without timely postmarks in New York City but not counting them in the rest of the state would risk running afoul of the Constitution's guarantee of equal treatment."[246] The *Jones* court went even further, citing the principle as a basis for granting nationwide relief against the Postal Service concerning its internal policies that impacted delivery of absentee ballots.[247]

Tenney v. Oswego County Board of Elections[248] is another illuminating example of a court applying the Uniformity Principle as a remedial doctrine.[249] In a congressional election spanning multiple counties, one county board of elections failed to process voter

237. *Id.*
238. *Id.* at 577.
239. *Id.* at 577 n.12.
240. 477 F. Supp. 3d 19, 50–52 (S.D.N.Y. 2020).
241. *See supra,* Subpart II.A.
242. *Gallagher*, 477 F. Supp. 3d at 47.
243. *Id.*
244. *Id.*
245. *Id.* at 48.
246. *Id.* at 52.
247. Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 140 n.21 (S.D.N.Y. 2020) ("The Court determines a nationwide injunction is appropriate here because, given the nationwide scope of Defendants' conduct, to impose anything less would 'risk running afoul of the Constitution's guarantee of equal treatment.'" (quoting *Gallagher*, 477 F. Supp. 3d at 52)).
248. 140 N.Y.S.3d 670 (Sup. Ct. 2021).
249. *Id.* at 681.

registration records and assess the validity of affidavit ballots (i.e., provisional ballots) through the procedure established by state law.[250] After the election, one of the losing candidates asked a New York trial court to order that county board to recanvass particular ballots to which he had objected.[251] The court instead ordered even broader relief, explaining, "[T]he records relating to every single ballot rejected by the Board as 'not registered' must be reviewed, because the Equal Protection Clause requires that the Boards and the Courts treat every single ballot—and every single voter—the same."[252] The court limited its order to only that county board however, notwithstanding the Uniformity Principle, since there was no evidence that any of the other counties' canvasses had violated state law.[253]

A Georgia district court, in contrast, dismissed the idea that granting relief only to certain voters would violate the Uniformity Principle but suggested such disparities could instead be considered under the "public interest" prong when deciding whether to grant injunctive relief.[254] The plaintiffs argued that requiring people to pay postage to return their absentee ballots by mail was unconstitutional.[255] They sought an injunction that, among other things, would require election officials to include postage on the return envelopes they distributed to voters.[256] The defendants noted that 220,000 absentee ballots had already been distributed.[257] Granting such relief would therefore create disparities between voters who had already received return envelopes without postage affixed and others who would receive the postage.[258]

The court stated that such disparities would not violate the Uniformity Principle,[259] but could nevertheless be considered as part

250. *Id.* at 680–81.

251. *See* Tenney v. Oswego Cnty. Bd. of Elections, No. EFC-2020-1376, 2020 N.Y. Misc. LEXIS 11005, at *2 (N.Y. Sup. Ct. Nov. 10, 2020).

252. *Tenney*, 140 N.Y.S.3d at 681.

253. *Id.*

254. Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-01489, 2020 U.S. Dist. LEXIS 75880, at *9–10 (N.D. Ga. Apr. 30, 2020) (holding that requiring election officials to include postage stamps with the return envelopes for absentee ballots when over 220,000 absentee ballots had already been distributed did not violate the Uniformity Principle, but would create disparities that the court could take into account under the "public interest" prong when ruling on a request for injunctive relief), *aff'd*, 11 F.4th 1227 (11th Cir. 2021).

255. *Id.* at *1.

256. *Id.* at *1–2.

257. *Id.* at *8–9.

258. *Id.*

259. *Id.* at *10 (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000) ("[T]he Court does not agree that the relief requested to address the current circumstances actually 'value[s] one person's vote over that of another' . . . .").

of the "public interest" factor for injunctive relief.[260] Without expressly addressing the merits of the plaintiffs' claims,[261] the trial court concluded that the practical challenges election officials would face in attempting to implement such relief in the midst of an ongoing election were too great.[262] Election personnel and finances were already stretched very thin due to the pandemic.[263] The Eleventh Circuit later went on to reject the plaintiffs' claims on the merits.[264]

Thus, while the issue is far from settled, the Uniformity Principle may bar courts from granting only limited relief in election-related cases. In at least some cases, an injunction issued to alleviate unconstitutional burdens on voting rights would have to extend to all voters throughout the state—potentially even those who had not faced unconstitutional burdens. As debates over so-called "nationwide injunctions" demonstrate, however, a range of other principles and considerations may preclude courts from granting relief to third-party non-litigants.[265] When relief in election law cases must extend to all voters, such challenges should proceed, if at all, as Rule 23(b)(2)[266] class actions comprised of all similarly situated voters within the jurisdiction at issue.[267] Even in cases brought by candidates, political parties, or third-party groups under a theory of associational or organizational standing, the Uniformity Principle may require courts to issue relief for all voters in the jurisdiction, rather than just a subset.[268]

260. *Id.*

261. *Id.* at *15 (declining to address the plaintiffs' likelihood of success on the merits).

262. *Id.* at *13.

263. *Id.*

264. Black Voters Matter Fund v. Sec'y of State for Ga., 11 F.4th 1227, 1233–34 (11th Cir. 2021) ("The Plaintiffs' Twenty-Fourth Amendment argument fails because the cost of a postage stamp in this context is neither a penalty nor a tax but is the cost of a service—voters can pay money to have a postal carrier transport their ballot to the county election office instead of dropping it off themselves.").

265. *See generally* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487 (2016) [hereinafter *De Facto Class Actions*]; Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

266. FED. R. CIV. P. 23(b)(2).

267. *De Facto Class Actions*, *supra* note 265, at 553–56; *see also* Morley, *supra* note 31, at 298–99.

268. Sometimes the limitations in a state court's ruling will raise potential concerns under the Uniformity Principle. *See, e.g.*, Bognet v. Sec'y of Pa., 980 F.3d 336, 344–46 (3d Cir. 2020) (discussing the plaintiffs' claim that a state supreme court ruling violated the Uniformity Principle by creating the possibility that people who cast absentee ballots, but not those who voted in person, could submit their votes after Election Day), *vacated as moot*, 141 S. Ct. 2508 (2021). The *Rooker-Feldman* doctrine precludes a losing litigant in state court from

One potential alternative would be for courts to treat a litigant's status as a prevailing party in a lawsuit as a sufficient basis for treating them differently from other, third-party non-litigant voters.[269] Under this approach, a court could generally limit an injunction or declaratory judgment only to the plaintiffs in a case, without being required by Equal Protection principles to extend it to all voters throughout the relevant jurisdiction.

Another possibility would be for courts to apply the *Anderson-Burdick* test as a constitutional limit on the scope of the Uniformity Principle, including at the remedial stage. Under this approach, the principle would presumptively require all counties within a state to adopt the same policies with regard to aspects of the voting process that could otherwise yield substantial disparities in the ability of people to cast votes or have them counted. If plaintiffs demonstrate that such a policy would be unduly burdensome under *Anderson-Burdick* (or otherwise unconstitutional) in certain counties, under some circumstances, or with regard to particular voters, the state could depart from this presumptive uniformity requirement as needed to ensure that everyone throughout the state has constitutionally adequate access to the electoral process. This approach would make uniformity the default constitutional presumption for aspects of the electoral process that impact the ability to vote or have one's vote counted. *Anderson-Burdick* and other constitutional requirements would allow for deviations when necessary to avoid unwarranted burdens or other constitutional violations. In this manner, the Constitution itself would determine the scope of the Uniformity Principle.

This approach may have ramifications at the merits stage that would effectively narrow the Uniformity Principle's scope. A defendant would likely be able to defend against a Uniformity Principle claim by demonstrating that the challenged disparities were constitutionally justified to prevent an *Anderson-Burdick* violation. Similarly, a state could go beyond a uniform baseline to provide

raising a Uniformity Principle challenge to that ruling in a subsequent federal lawsuit. *See* D.C. Ct. of App. v. Feldman, 460 U.S. 462, 482–83 (1983); Rooker v. Fid. Tr. Co., 263 U.S. 413, 415 (1923); *see, e.g.*, Ziccarelli v. Allegheny Cty. Bd. of Elections, 2:20-cv-1831, 2021 U.S. Dist. LEXIS 5272, at *17 (W.D. Pa. Jan. 12, 2021) ("[T]o grant [the plaintiff] relief, the Court would be required to hold that the Pennsylvania Supreme Court's decision violated the federal Constitution. *Rooker-Feldman* deprives this Court of the authority to make such determinations in the context of an 'appeal' by the loser in the state-court lawsuit where that decision was made."). When a state judiciary's final ruling in a case allegedly violates the Uniformity Principle, the only procedurally proper vehicle in which a litigant may raise that issue is a petition for certiorari to the U.S. Supreme Court. *Ziccarelli*, 2021 U.S. Dist. LEXIS 5272, at *17–18.

269. *De Facto Class Actions*, *supra* note 265, at 550–51 ("A person who has filed a lawsuit to enforce his or her rights, by definition, cannot be deemed similarly situated with a person who has not done so.").

additional opportunities to vote for members of certain groups or voters in certain locations when necessary to alleviate unconstitutional burdens they would otherwise face.[270] Such flexibility would be consistent with *Katzenbach*'s holding that the government may provide additional voting opportunities for certain members of the public without necessarily extending them to everyone, while simultaneously providing a boundary for that holding.[271]

On the other hand, this conclusion would allow substantial disparities among voters that may appear to be in tension with the fundamental principle of voter equality underlying the Uniformity Principle.

Thus, courts must determine whether the Uniformity Principle applies at the remedial stage of litigation. The issue poses vexing challenges. On the one hand, requiring litigants in election law cases to seek relief on behalf of all similarly situated voters throughout the jurisdiction could pose practical burdens and complicate the litigation, particularly when it is conducted on an emergency basis. On the other hand, allowing limited relief would effectively empower courts to order disparities in electoral rules of a sort that the Uniformity Principle would have prohibited the legislature or election officials from adopting in the first instance.

CONCLUSION

Bush v. Gore requires states, at least in some important respects, to apply consistent rules and standards to voters participating in an election. Courts have disagreed over the bounds of this principle. In particular, disputes remain over the extent to which local jurisdictions may continue to exercise their traditional discretion to establish their own rules and processes within the bounds set forth by state law. The 2020 election cycle has contributed to the development of precedent concerning *Bush*'s Uniformity Principle. Several of those rulings may have been influenced by unique aspects of the 2020 election, particularly the impact of the COVID-19 pandemic. Moreover, the plaintiffs in several cases sought to either completely invalidate emergency measures states had adopted in response to COVID-19 (rather than extending them to all voters), or even worse, invalidate ballots cast in accordance with election officials' orders or court rulings after voting had concluded.

The Uniformity Principle embodies a notion of fundamental fairness and equal regard for voters' rights. It also helps to reduce opportunities for intentional or inadvertent geographic or partisan advantages in statewide or other multicounty elections. Courts

270. *Cf. supra* Subpart II.B (discussing Supreme Court precedent allowing jurisdiction to make voting easier only for certain groups).

271. Katzenbach v. Morgan, 384 U.S. 641, 657 (1966).

should apply the principle to ensure that all voters participating in an election have substantially equivalent opportunities to obtain ballots, cast them, and have them counted. For most rules governing the electoral process, the principle requires election officials to apply the same procedures, voting opportunities, and deadlines to all domestic voters participating in a statewide or other multicounty election. In contrast, for resource allocation issues, the Uniformity Principle may instead require consistency in the *ratio* of voters to election-related resources, such as the number of voters assigned to each polling place.

Courts should be skeptical of grants of discretion to local election officials, or disagreements among them concerning the interpretation of generally worded or vague state laws, that allow counties to apply substantially disparate voting-related rules. Important issues such as whether election officials can pre-populate absentee ballot request forms with voters' personal identifying information, automatically mail absentee ballots without request to voters, and provide voters who submit invalid absentee ballots with notice and an opportunity to cure the defects should be resolved consistently across the jurisdiction. Courts should not permit unnecessary, substantially inconsistent treatment of voters participating in the same election. At the very least, nearly a quarter century after *Bush v. Gore*, courts and commentators should abandon doubt over whether the Uniformity Principle is a legitimate, binding holding. They should focus instead on developing a consensus concerning its contours.