

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

MARY T. THOMAS, et al.,

Plaintiffs,

v.

MARCI ANDINO, et al.,

Defendants.

Case No.: 3:20-cv-01552-JMC

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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COVID-19 has upended our lives in previously unthinkable ways. But the fundamental right to vote must endure in extraordinary times. This case concerns two requirements that threaten the right to vote of South Carolinians in the ongoing crisis: (a) the requirement preventing voters from requesting a mail-in ballot if they fall outside a list of “excuses” that does not, at present, include self-isolation due to a pandemic (the “Excuse Requirement”), and (b) South Carolina’s witness requirement, which mandates that voters submitting mail ballots must have another individual sign as a witness on the voter’s envelope (the “Witness Requirement,” collectively with the Excuse Requirement, the “Challenged Requirements” or “Requirements”).

In this pandemic, the Challenged Requirements will put voters to an untenable choice between disenfranchisement, on the one hand, and risking their lives and the health of their communities, on the other. Indeed, the Requirements will force tens or even hundreds of thousands of voters to do precisely the opposite of what the Governor and public health officials have ordered or recommended them to do. The Governor has ordered all South Carolinians to remain at home or work unless “commuting for work, visiting family, [or] obtaining essential goods or services.”¹ Yet jointly and separately, these Requirements will compel countless South Carolina voters to venture from the safety of their homes to participate in their democracy, at serious risk to their health. Indeed, “[f]orty people in Milwaukee County may have become infected with the coronavirus as a result of participating in Wisconsin elections on April 7.” Attach. A to Cepeda Decl.² And these Requirements will pose a particularly egregious burden

¹ S.C. Exec. Order No. 2020-21 at 6 (Apr. 6, 2020) <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-06%20eFILED%20Executive%20Order%20No.%202020-21%20-%20Stay%20at%20Home%20or%20Work%20Order.pdf>; see also Off. of Gov. McMaster, *Governor McMaster Issues “Home or Work” Order*, S.C. GOV. (Apr. 7, 2020), <https://governor.sc.gov/news/2020-04/governor-mcmaster-issues-home-or-work-order>.

² See also Teran Powell, *40 Coronavirus Cases In Milwaukee County Linked To Wisconsin Election*, *Health Official Says*, WUWM 89.7 MILWAUKEE’S NPR (Apr. 24, 2020), <https://www.wuwm.com/post/40-coronavirus-cases-milwaukee-county-linked-wisconsin-election-health-official-says#stream/0>.

on Black voters, whom State health officials have acknowledged are at disproportionate risk of fatal or severe illness from the disease.

Without a preliminary injunction, voters will have to choose between accepting disenfranchisement or violating the social distancing rules and recommendations that the State itself has said are critical to preserving public health. This impossible choice severely burdens the right to vote, meriting strict, or at least heightened, scrutiny, which the Challenged Requirements cannot survive. The Excuse Requirement fails because South Carolina already allows voters to vote absentee “because of injury or illness,” and the Constitution demands that election laws be read to protect the lives of voters. Moreover, Defendant Andino admits that the burden to the State of making absentee ballots available to all voters is minimal. Separately, the Witness Requirement will compel thousands of voters who live alone to break social distancing to have a third party sign their ballot while “offer[ing] no benefit” to election officials, as Defendant Andino acknowledged. And it *per se* violates the Voting Rights Act (“VRA”) as an impermissible “test or device.” Even if the Witness Requirement did have some benefit, it is not appropriately tailored to justify the fact that complying with it now puts South Carolina voters in life threatening danger. It needlessly and severely burdens the right to vote and is therefore unconstitutional.

Finally, the balance of the equities and the public interest also support a preliminary injunction. Relief will vindicate the dual public interests of ensuring all qualified voters can vote in June and protecting lives and the public health with little, if any, burden on Defendants. Absent relief, tens or even hundreds of thousands of voters will be forced to risk their health and lives to vote—or simply not vote at all. Plaintiffs therefore request the Court grant a preliminary injunction against the Challenged Requirements for the June 9 statewide primary, and for any

and all subsequent elections in South Carolina at least until such time as in-person interactions needed to comply with them no longer pose a risk to personal safety and the public health.

FACTUAL BACKGROUND

I. The COVID-19 Pandemic

The United States is now the epicenter of the global COVID-19 pandemic. As Plaintiffs' expert Dr. Arthur Reingold explains, the novel coronavirus SARS-CoV-2, causes individuals to contract COVID-19. Declaration of Dr. Arthur Reingold ¶ 7 (attached as Ex. 2). Dr. Reingold is a medical doctor, a public health expert in the area of infectious diseases and epidemiology, and the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health. Reingold Decl. ¶¶ 1, 3. He spent eight years at the Centers for Disease Control and Prevention ("CDC"), has directed or co-directed the CDC-funded California Emerging Infections Program for more than 25 years, and served as President of both the Society for Epidemiologic Research and the American Epidemiological Society. *Id.* ¶ 1.

COVID-19 spreads mainly from person-to-person through close contact with one another and through respiratory droplets when an infected person coughs or sneezes. Reingold Decl. ¶ 8. Medical experts are continuing to learn more about the ease with which COVID-19 spreads, including whether it is "aerosolized, such that tiny droplets containing the virus remain in the air and can be inhaled by others who come into contact with that air." *Id.*³ People infected may transmit the virus to others even without showing symptoms themselves.⁴

³ See also Elizabeth Cohen, *Experts tell White House coronavirus can spread through talking or even just breathing*, CNN (Apr. 4, 2020), <https://www.cnn.com/2020/04/02/health/aerosol-coronavirus-spread-white-house-letter/index.html>.

⁴ See, e.g., *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020).

COVID-19 can cause severe consequences, including long-term illness and death. Reingold Decl. ¶ 7. Estimates from early March put the fatality rate for people infected with COVID-19 at approximately ten times higher than influenza even in a severe season and including in countries with advanced health care systems.⁵

COVID-19 threatens to infect any individual no matter their age. Reingold Decl. ¶ 7.⁶ While people of all ages have contracted and died from COVID-19, it is particularly fatal for older individuals. Reingold Decl. ¶ 7. COVID-19 also poses greater risks for people with preexisting heart and respiratory conditions including asthma and individuals with compromised immune systems. Reingold Decl. ¶ 7.⁷

II. Public Health Guidance Regarding COVID-19

No vaccine currently exists and will likely not for at least another year, at least for the public at large. Reingold Decl. ¶ 13. Public health experts have explained that social distancing measures including maintaining at least six feet of space between people (as well as consistent hygiene practices) are the only known effective measures for protecting against transmission of COVID-19. *Id.* ¶ 10.⁸ Accordingly, the South Carolina Department of Health and Environmental Control (“DHEC”) has urged social distancing by “staying home as much as

⁵See Betsy McKay, *Coronavirus vs. Flu: Which Virus is Deadlier*, WALL ST. JOURNAL (Mar. 10, 2020), <https://www.wsj.com/articles/coronavirus-vs-flu-which-virus-is-deadlier-11583856879>; see also *Castillo v. Barr*, No. 20-00605, 2020 WL 1502864, at *2 (C.D. Cal. Mar. 27, 2020) (“COVID-19 is highly contagious and has a mortality rate ten times higher than influenza.”).

⁶ See also CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC Morbidity & Mortality Wkly. Rep., <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> (last updated Mar. 26, 2020).

⁷ See also *Groups at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last updated Apr. 17, 2020).

⁸ See also Johns Hopkins Medicine & Lisa Lockerd Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine> (last visited Apr. 26, 2020).

possible, staying at least 6 feet away from other people while in public, and avoiding gatherings with many people present.”⁹ According to DHEC, “[t]hese are the best ways to protect yourself and our communities from the spread of COVID-19.”¹⁰

The CDC has also issued guidelines concerning voting during the COVID-19 pandemic. It recommends that states “[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations[,]” including “mail-in methods of voting if allowed in the jurisdiction.”¹¹ This is because there is no evidence that SARS-CoV-2—the virus that causes COVID-19—is being spread through the mail.¹²

The medical risks of widespread in-person voting during a pandemic are increasingly clear, particularly when polling locations are crowded because the State does not make mail-in voting readily available. In Chicago, a poll worker for the March 17 primary died from COVID-19, prompting officials to send letters notifying voters, poll workers, field investigators, and cartage companies who were present at the same polling site.¹³ In Florida, two Broward County poll workers tested positive for COVID-19.¹⁴ And as noted, to date, Wisconsin officials believe

⁹ *Protect Yourself & Those Around You (COVID-19)*, DHEC, <https://www.scdhec.gov/protect-yourself-those-around-you-covid-19> (last visited Apr. 26, 2020).

¹⁰ *Id.*

¹¹ *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019*, CTFS. FOR DISEASE CONTROL & PREVENTION, (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Mar. 27, 2020).

¹² Press Release, U.S. Postal Serv., Media Statement – COVID-19 (Apr. 2, 2020), <https://about.usps.com/newsroom/statements/usps-statement-on-coronavirus.htm> (citing guidance from World Health Organization, CDC, and Surgeon General).

¹³ Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC CHICAGO (Apr. 13, 2020), <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>.

¹⁴ Anthony Man, *Two Broward poll workers, including one who handled voters’ driver licenses, test positive for coronavirus*, S. FLA. SUN SENTINEL (Mar. 26, 2020), <https://www.sun-sentinel.com/coronavirus/fl-ne-broward-elections-poll-workers-coronavirus-20200326-wmgy775dvjc5jis2oagxlpmlule-story.html>.

at least “[f]orty people in Milwaukee County may have become infected as a result of participating in [] elections on April 7.”¹⁵

III. The Effect of COVID-19 in South Carolina

Governor McMaster declared a State of Emergency on March 13, 2020.¹⁶ On March 15, he closed all public schools through March 31,¹⁷ then extended that order through the end of April.¹⁸ He also postponed or rescheduled all elections scheduled on or before May 1, 2020, and delegated responsibility to the State Election Commission (SEC) to ensure that individuals could continue to register to vote.¹⁹ On March 31, he ordered an enumerated list of “non-essential” businesses closed.²⁰ He expanded that order to include retail stores on April 3.²¹

On April 6, Governor McMaster indefinitely ordered all South Carolinians to remain at home or work unless “commuting for work, visiting family, [or] obtaining essential goods or

¹⁵ Attach. A to Cepeda Decl.

¹⁶ S.C. Exec. Order No. 2020-08 (Mar. 13, 2020), [https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-13%20FILED%20Executive%20Order%20No.%202020-08%20-%20State%20of%20Emergency%20Due%20to%20Coronavirus%20\(COVID-19\).pdf](https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-13%20FILED%20Executive%20Order%20No.%202020-08%20-%20State%20of%20Emergency%20Due%20to%20Coronavirus%20(COVID-19).pdf).

¹⁷ S.C. Exec. Order No. 2020-09 §2 (Mar. 15, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-15%20FILED%20Executive%20Order%20No.%202020-09%20-%20Closing%20Schools%20Cancelling%20Elections%20Other%20Provisions%20Due%20to%20COVID-19.pdf>.

¹⁸ *Joint Statement from Gov. Henry McMaster, S.C. Superintendent of Education Molly Spearman*, S.C. Gov (Mar. 24, 2020), <https://governor.sc.gov/news/2020-03/joint-statement-gov-henry-mcmaster-sc-superintendent-education-molly-spearman>.

¹⁹ S.C. Exec. Order No. 2020-09 §3 (Mar. 15, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-15%20FILED%20Executive%20Order%20No.%202020-09%20-%20Closing%20Schools%20Cancelling%20Elections%20Other%20Provisions%20Due%20to%20COVID-19.pdf>.

²⁰ S.C. Exec. Order No. 2020-17 §1 (Mar. 31, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-31%20eFILED%20Executive%20Order%20No.%202020-17%20-%20Closure%20of%20Non-Essential%20Businesses.pdf>.

²¹ S.C. Exec. Order No. 2020-18 §1(C) (Apr. 3, 2020) <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-03%20eFILED%20Executive%20Order%20No.%202020-18%20-%20Closure%20of%20Additional%20Non-Essential%20Businesses.pdf>.

services.”²² Announcing these restrictions, the Governor explained: “‘It is now time to make these recommended actions required’ . . . ‘too many people are not complying with o[u]r requests for social distancing.’”²³ He added: “This is a stay-at-home order.”²⁴ While the Governor has since modified this order to relax certain restrictions on public beach use and retail businesses,²⁵ the Home or Work order remains in effect.²⁶

As of April 25, DHEC reported over 5,253 COVID-19 diagnoses in South Carolina, resulting in 166 deaths.²⁷ The evidence suggests that community transmission of COVID-19 will persist for the next several months as season changes are “unlikely to stop transmission.”²⁸ As Dr. Reingold testifies, “transmission of the virus will continue through the population until the development and widespread use of a vaccine and/or herd immunity.” Reingold Decl. ¶ 12. Moreover, because other coronaviruses “do not appear to demonstrate seasonality of infection” and the “current virus has circulated widely in countries currently in their hot seasons,” these

²² S.C. Exec. Order No. 2020-21, *supra* note 1; *see also* Off. of Gov. McMaster, *supra* note 1.

²³ Joseph Bustos & Maayan Schechter, *Gov. McMaster toughens SC coronavirus stance, ordering state to work or ‘stay home’*, THE STATE (Apr. 6, 2020), <https://www.thestate.com/news/coronavirus/article241807571.html>.

²⁴ *Id.*

²⁵ *See* S.C. Exec. Order No. 2020-25 (Apr. 16, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-16%20eFILED%20Executive%20Order%20No.%202020-25%20-%20Modification%20of%20Emergency%20Restrictions%20for%20Public%20Waters%20%26%20Emergency%20Measures%20for%20Unemployment%20Claims%20%26%20Benefits.pdf>; S.C. Exec. Order No. 2020-28 (Apr. 20, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-20%20eFILED%20Executive%20Order%20No.%202020-28%20-%20Modification%20of%20Restrictions%20for%20Public%20Beaches%20%26%20Waters%20%26%20Incremental%20Modification%20of%20Non-Essential%20Business%20Closures.pdf>.

²⁶ *See* S.C. Exec. Order No. 2020-28, *supra* note 25.

²⁷ News Release, DHEC, South Carolina Announces Latest COVID-19 Update (Apr. 25, 2020), <https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-april-25-2020>.

²⁸ Marc Lipsitch, Harvard T.H. Chan Sch. of Pub. Health, Ctr. for Communicable Disease Dynamics, *Seasonality of SARS-CoV-2: Will COVID-19 go away on its own in warmer weather?* <https://ccdd.hsph.harvard.edu/will-covid-19-go-away-on-its-own-in-warmer-weather/> (last visited Apr. 26, 2020).

facts “suggest that transmission of and infection with the virus may not be affected by the weather.” *Id.* ¶ 12.

State public health officials expect to see 750 cases per week through early May and total cases to grow to almost 7,000 by May 9.²⁹ As of April 20, DHEC advised it ““remain[ed] absolutely critical that everyone continues to perform the recommended activities to stop the spread.””³⁰ “[A]s new activities are allowed,” DHEC stressed, it will be “very important that people continue to practice all of the social distancing measures that have been in place and should remain in place.”³¹

IV. South Carolina’s Upcoming Elections

South Carolina originally had elections for many local races scheduled for late March and April, but Governor McMaster rescheduled all those elections to take place after May 1, 2020.³² He took those actions on his “determination that the [outbreak] poses an actual or imminent public health emergency for the State of South Carolina.”³³

South Carolina will hold statewide Democratic and Republican primaries on June 9 and primary runoffs on June 23. Absentee ballot applications for the June 9 primary must be returned to a voter’s county board of elections in person or by mail by June 5 at 5:00 p.m. S.C. Code Ann. § 7-15-330 (“[C]ompleted applications must be returned. . . before 5:00 p.m. on the

²⁹ Isabella Cueto, *Virus cases to keep rising until May, despite models showing SC past peak, DHEC says*, THE STATE (Apr. 20, 2020), <https://www.thestate.com/news/coronavirus/article242150831.html>.

³⁰ Ray Rivera, *DHEC: Reports show curve for COVID-19 cases in SC may have begun flattening; new cases reported*, LIVE 5 WCSC NEWS (Apr. 20, 2020) (quoting Dr. Linda Bell, DHEC epidemiologist), <https://www.live5news.com/2020/04/20/sc-health-officials-announce-new-cases-covid-more-virus-related-deaths/>.

³¹ *Id.*

³² Press Release, S.C. Election Comm’n, March & April Elections Postponed Due to Coronavirus (Mar. 15, 2020), <https://www.scvotes.org/taxonomy/term/1>.

³³ S.C. Exec. Order No. 2020-09 at 1 (Mar. 15, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-15%20FILED%20Executive%20Order%20No.%202020-09%20-%20Closing%20Schools%20Cancelling%20Elections%20Other%20Provisions%20Due%20to%20COVID-19.pdf>.

fourth day before the day of the election”). Completed ballots must be returned to the county board in person or by mail no later than 7:00 p.m. on election day.³⁴

On March 30, 2020, Defendant Marci Andino wrote various elected officials, including Governor McMaster. Attach. 2 to Cepeda Decl. (hereinafter “SEC Letter”). The SEC Letter highlighted the Commission’s “concern[] about the safe conduct of the June Primaries, November General Election and all other elections scheduled for 2020.” *Id.* at 1. In the SEC’s view, the “main issue is that [South Carolina] elections, as currently prescribed by law, require large numbers of people to congregate in one place—something that everyone is currently being asked not to do by public safety and health officials.” *Id.* It added: “a large percentage of the state’s poll managers fall into high risk categories, which would likely lead to a deficit in the number of managers needed to staff polling places.” *Id.* at 1-2.

The SEC Letter recommended various “changes to our election process” that the SEC understood were advisable “[i]n order to safely and securely conduct elections during and following the coronavirus pandemic” *Id.* at 2. Among them, the SEC explained, South Carolina should “[a]llow no excuse absentee voting,” *id.*, which it considered a “relatively simple change,” *id.* at 4. The SEC Letter also recommended “[r]emov[ing] the witness requirement on ballot return envelopes[,]” *id.*, which it explained “offers no benefit to election officials[,]” *id.* at 3.

To date, South Carolina has not implemented either recommendation.

V. South Carolina’s Absentee Ballot Excuse and Witness Requirements

South Carolina is an “excuse-required” state: only specific categories of qualified voters may vote by absentee ballot. S.C. Code Ann. § 7-15-320. Individuals who apply for an absentee

³⁴ *Absentee Voting*, S.C. Election Comm’n, <https://www.scvotes.org/absentee-voting> (last visited Apr. 26, 2020).

ballot must sign an application that declares a “reason for request,” among other information. *Id.* § 7-15-340. The election laws set out several categories of qualified voters who may vote by mail “whether or not they are absent from their county of residence on election day.” *Id.* § 7-15-320(B). That list includes “physically disabled persons[,]” *id.*, who are voters that “cannot be present in person at [their] voting place on election day” “because of injury or illness,” *id.* § 7-15-310. Neither this category nor any of the others listed in the laws “include self-isolating due to a pandemic.” SEC Letter, at 2.

Individuals may apply for an absentee ballot in person or by mail. S.C. Code Ann. § 7-15-330. Voters must sign the application and affirm an oath stating “I do swear or affirm that I am a qualified elector, that I am entitled to vote in this election, and that I will not vote again during this election. The information above is true in all respects, and I hereby apply for an absentee ballot for the reason indicated above.” *Id.* § 7-15-340. When a registrar receives an absentee ballot application and verifies that the individual properly completed the application and that they are a registered voter in the jurisdiction, the registrar mails to the individual the several items, including: (a) one of each ballot to be used in the election; (b) printed instructions for each ballot; (c) an envelope marked “Ballot Herein” to place completed ballots; and (d) a return-addressed envelope for use to return the “Ballot Herein” envelope and all ballots to the board of voter registration and elections, imprinted with an “oath of absentee ballot applicant.” *Id.* § 7-15-370.

The oath informs, among other things, that the applicant is qualified to vote in the election, has not already voted, and that the applicant received no assistance in voting that they would not have been entitled to receive had they voted in person.

To vote, the voter “must mark each ballot on which he wishes to vote,” place each in the single envelope marked “Ballot Herein,” and then place that envelope in the provided return-addressed envelope. S.C. Code Ann. § 7-15-385. The voter must return their ballot in the return-addressed envelope provided, which must be “signed and witnessed.” *Id.* § 7-15-220. Starting at 9:00 a.m. on election day, managers begin examining all return-addressed envelopes received by the county boards of election. *Id.* § 7-15-420. Managers must make sure that each oath has been properly signed and witnessed and includes the witness’s address. A ballot that has not been properly signed and witnessed or does not include the witness’s address cannot be counted. *Id.* § 7-15-420.

South Carolina law does not afford a voter notice or the opportunity to cure a ballot that is not counted because of a defective witness signature.

VI. South Carolina’s Laws Supporting Absentee Voting Election Integrity

Various South Carolina laws ensure the integrity of absentee balloting procedures. The board of voter registration and elections assigns each absentee ballot application a specific serial number, which is then memorialized in a “record book.” S.C. Code Ann. § 7-15-330. That record book is updated to reflect extensive information about the applicant, including: their name and address, the date on which the ballot and return-addressed envelope are issued, and the date on which the return-addressed envelope (containing the ballot) is received by the board. S.C. Code Ann. §§ 7-15-330, 7-15-370, 7-15-385. Only return-addressed envelopes that are received and recorded in the record book by these procedures are securely stored “in a lock box within the office of the board of voter registration and elections.” *Id.* § 7-15-385. And only ballots in the return-addressed envelopes in the lock box are counted. *Id.* § 7-15-410. Voters must attest under penalty of perjury their identity, residence, and that they will not double vote when they request their absentee ballot. *Id.* § 7-15-340. They must do so again when they sign their ballot

envelope. *Id.* § 7-15-380. Moreover, any elector or qualified watcher may challenge the absentee vote of any person whom they suspect is not a qualified voter. *See* S.C. Code Ann. §§ 7-15-420, 7-13-810, and 7-13-830.

South Carolina also has various criminal laws to prevent and punish misuse of absentee ballots. A person who fraudulently attests to the absentee ballot application by “double-voting” is guilty of a misdemeanor and subject to a fine of up to \$500 or imprisonment for up to a year. S.C. Code Ann. §§ 7-15-340, 7-25-20. They are separately guilty of “voting more than once at elections” and may be fined at the court’s discretion or imprisoned as long as three years. *Id.* § 7-25-110. Other provisions set penalties for “impersonating a voter.” *Id.* § 7-25-120. And for “swearing falsely at elections or taking oath in another’s name.” *Id.* § 7-25-150.

South Carolina is only one of eleven states with a witness or notarization requirement.³⁵ There is no indication that the absentee voting systems of the 39 other states without a witness or notarization requirement are overrun by election integrity issues.

VII. The Public Health and Disenfranchisement Consequences of the Challenged Requirements During Significant COVID-19 Transmission

A. The Excuse Requirement

Voting in person while the risk of transmission of COVID-19 persists is firmly disfavored, and the CDC strongly encourages voters to use “mail-in methods of voting” wherever allowed, among other ways to “minimize direct contact with other people and reduce

³⁵ *See* Chart, “Verifying Authenticity of Absentee/Mailed Ballots,” Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Nat’l Conf. of State Legislatures (Apr. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>; *cf.* Ala. Code §§ 17-9-30(b), 17-11-7, 17-11-10; Alaska Stat. § 15.20.030; La. Stat. Ann. § 18:1306(2)(a); Miss. Code Ann. §§ 23-15-627, 23-15-635, 23-15-633; Mo. Rev. Stat. §§ 115.279, 115.283, 115.295; N.C. Gen. Stat. § 163-231; Okla. Stat. tit. 26, § 14-108; 17 R.I. Gen. Laws § 17-20-23; S.C. Code Ann. §§ 7-15-220, 7-15-230; Wis. Stat. § 6.87(4)(b)(1).

crowd size at locations.”³⁶ “Polling locations are a prime area for increased transmission of SARS-CoV-2 due to the close proximity of a large number of individuals—voters, observers, poll workers—in a limited space.” Reingold Decl. ¶ 17. Moreover, polling sites are “highly likely” to cause increased infection “[d]ue to the transmission of the virus via contaminated environmental surfaces.” *Id.*

These sobering facts will severely burden any South Carolina voter who lacks an absentee “excuse” and must instead decide between voting in person or not at all.

B. The Witness Requirement

For “individuals without another person able to witness in their household, the requirement that they have someone witness their absentee ballot would place them at increased risk of exposure to and/or transmission of COVID-19.” Reingold Decl. ¶ 18. This is because coming “in close enough proximity to witness their ballot would place them at increased risk of infection,” and “would be particularly risky for those who are at a greater risk of complications and death from COVID-19.” *Id.* And for public health purposes, “to prevent increasing the scope of the outbreak of COVID-19, we must assume that anyone could be infected and infect another person.” *Id.* ¶ 11.

Yet according to 2018 American Community Survey (ACS) statistics from the Census Bureau, 14.5% of South Carolinians age 18 and older live alone. Decl. of William Cooper ¶ 6 (attached as Ex. 3). Assuming similar numbers in the 2020 November general election, over 558,826 South Carolinians will face the choice of either risking their health by voting in person or finding a witness for their absentee ballots, or not voting at all. *Id.* Like Plaintiffs, the

³⁶ Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Mar. 27, 2020).

Witness Requirement will force most of these individuals to decide between protecting their lives and communities or not having their ballot counted.

This severe burden on the right to vote will fall more heavily on older people, persons with disabilities, and African Americans, among others. About 222,484, or 39.8%, of all South Carolinians living alone are age 65 and older. Cooper Decl. ¶ 6. That means 24.7% of South Carolinians age 65 and older live alone. *Id.* 148,897, or 26.6%, of South Carolinians 18 and older living alone are disabled and for the subset of 65 and over living alone, 88,940, or 39.2%, are disabled. Cooper Decl. ¶ 7. For the 1.02 million African American of voting age, 170,075, or 16.7%, live alone. *Id.* ¶ 8. Indeed, 33.2% of African Americans households contain person living alone, as opposed to just 28.2% of white households. *Id.* ¶ 11(d). And 14.8% of all African-American households in South Carolina are headed by women who live alone with their children under 18 (*i.e.*, people who are not legally competent witnesses) versus just 3.9% of similar white households. Attach. A to Cooper Decl., at 29.

C. The Challenged Requirements and COVID-19's Severe *Impact on African Americans in South Carolina*

Nationally, the COVID-19 pandemic has had a particularly devastating effect on African-American communities. A CDC report published April 8, 2020, which included data from 1,482 patients hospitalized across 14 states, found that African-American patients made up 33% of those for whom race or ethnicity information was available, despite representing only 18% of the states' populations.³⁷

Plaintiffs' expert, Dr. Courtney Cogburn, an associate professor at the Columbia University School of Social Work, explains that racial disparities in serious illness and death due

³⁷ CDC Morbidity and Mortality Weekly Report, Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019—COVID-NET, 14 States, March 1-30, 2020 (Apr. 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6915e3-H.pdf>.

to COVID-19 are inextricably tied to past and present patterns of racial discrimination in healthcare, housing, and employment, not just poverty. Declaration of Dr. Courtney D. Cogburn ¶ 7-15 (attached as Ex. 4). This includes racial bias in medical care and the rationing of COVID-19 testing and care, higher rates of un-insurance and blue collar “essential” jobs, and even the increased risk of diseases, which is linked to housing segregation. *Id.* Brenda C. Murphy, current president of the South Carolina State Conference of Branches of the NAACP, explains that “empirical evidence” leads her to “strongly believe . . . that this pandemic has exposed underlying inequalities that have long existed.” Declaration of Brenda C. Murphy ¶ 10 (attached as Ex. 5).

Well-documented trends of racially disparate patterns of illness and mortality due to COVID-19 also exist in South Carolina. As of April 16, African Americans in South Carolina represented 41% of reported COVID-19 cases and 57% of related deaths³⁸ despite making up just 27% of the State’s population.³⁹

South Carolina’s long pattern of racial discrimination results in the health and socioeconomic life patterns that put African Americans at greater risk from COVID-19. For example, because of longstanding racial biases in medical care, African Americans with symptoms like cough and fever are less likely to be given one of the scarce COVID-19 tests. Cogburn Decl. ¶ 15.⁴⁰ DHEC has also recognized that African Americans are “disproportionately

³⁸ DHEC, *SC Demographic Data (COVID-19)*, <https://scdhec.gov/sc-demographic-data-covid-19> (last visited Apr. 21, 2020).

³⁹ U.S. Census Bureau, *QuickFacts South Carolina*, <https://www.census.gov/quickfacts/SC> (last visited Apr. 21, 2020).

⁴⁰ *See also* Rubix Life Sciences, *Health Data in the COVID-19 Crisis: How Racial Equity is Widening for Patients to Gain Access to Treatment* (Mar. 20, 2020), <https://rubixls.com/wp-content/uploads/2020/04/COVID-19-Minority-Health-Access-7-1.pdf> (Attach. C to Cepeda Decl.); *see also* Blake Farmer, *The Coronavirus Doesn't Discriminate, But U.S. Health Care Showing Familiar Biases*, NPR (Apr. 2, 2020), <https://www.npr.org/sections/health->

affected by [lack] of access to care,”⁴¹ and that “[u]nderlying medical conditions such as diabetes, heart disease, hypertension, obesity, and asthma might make it more likely that African Americans are admitted to the ICU or die from the disease.”⁴²

Racial discrimination in South Carolina has also resulted in socioeconomic inequalities that disadvantage African Americans. For example, in South Carolina, 24.5% of African Americans and just 15.2% of whites over age 16 work in “blue collar” service occupations—*i.e.*, jobs like grocers, nurses, or other essential workers who are forced to leave home and face increased exposure to COVID-19. Attach. A to Cooper Decl., at 13. Whereas 39.9% of white people versus only 23.1% of African Americans in South Carolina hold management or professional occupations—*i.e.*, “white collar” jobs that are much more likely to allow employees to continue to work safely at home. *Id.*

According to the ACS, in South Carolina, African Americans are also more likely to lack health insurance (11.6% of African Americans and 8.3% of white people), *id.* at 18; have a disability (among people over 65, 38.6% of black and 33.1% of white people have a disability, and, among people 18 to 64, 14.2% of African Americans and 11.6% of whites have a disability), *id.* at 7; lack a high school degree (16.1% of black and only 8.7% of white people), *id.* at 5; and live below the poverty line (in general, 21.1% of African-American and 6.4% of white households, *id.* at 19, and, among those over 65, 17.8% of African Americans over 65 versus 7.1% of whites), *id.* at 22.

[shots/2020/04/02/825730141/the-coronavirus-doesnt-discriminate-but-u-s-health-care-showing-familiar-biases](https://www.youtube.com/watch?v=Vv64tAZI_dY) (Attach. D to Cepeda Decl.).

⁴¹ SouthCarolinaETV, *Governor's Update on Coronavirus (COVID-19) | April 16, 2020*, YOUTUBE (Apr. 16, 2020), https://www.youtube.com/watch?v=Vv64tAZI_dY.

⁴² Tonya Brown, *More African Americans are dying from COVID-19 than other races in South Carolina*, 15 NEWS (Apr. 9, 2020) (quoting DHEC statement), <https://wpde.com/news/coronavirus/more-african-americans-dying-from-covid-19-in-south-carolina> (Attach. E to Cepeda Decl.).

VIII. Injuries and Irreparable Harm to Plaintiffs

Individual Plaintiffs Mary Thomas, Nea Richard, Jeremy Rutledge, Trena Walker, and Dr. Brenda Williams are South Carolina registered voters who regularly vote and wish to do so in the upcoming statewide June 9 primary. Decl. of Mary Thomas ¶ 5 (attached as Ex. 6); Decl. of Nea Richard ¶¶ 2, 5 (attached as Ex. 7); Decl. of Jeremy Rutledge ¶ 10 (attached as Ex. 8); Decl. of Trena Walker ¶ 4 (attached as Ex. 9); Decl. of Brenda Williams ¶¶ 2, 8 (attached as Ex. 10). They all, except Ms. Richard, wish to vote by absentee ballot because of the high risk of exposure to COVID-19 if they vote in person. Thomas Decl. ¶ 5; Richard Decl. ¶ 5; Rutledge Decl. ¶ 10; Walker Decl. ¶ 10; Williams Decl. ¶ 9.

Plaintiffs Rutledge and Walker usually vote in person, do not usually consider themselves unable to vote in person, and are under 65-years-old. Rutledge Decl. ¶¶ 1, 5; Walker Decl. ¶ 10. They do not believe they qualify for any of the absentee “excuses.” Rutledge Decl. ¶ 5; Walker Decl. ¶ 10. Because of the risk of COVID-19 transmission, they will be disenfranchised in the June 9 primary if the Excuse Requirement remains in place or, at a minimum, forced to make a devastating choice between their health and their right to vote. Rutledge Decl. ¶ 11; Walker Decl. ¶¶ 9-10. Plaintiffs Rutledge and Walker both have underlying medical conditions and are at severe risk of complications from COVID-19. Rutledge Decl. ¶¶ 6-7; Walker Decl. ¶¶ 6-7. Were Plaintiff Walker to qualify for an absentee ballot, she would also be disenfranchised by the Witness Requirement, as she lives with three children under the age of 12, none of whom are legally competent to witness and sign her ballot. Walker Decl. ¶¶ 2, 11.

Plaintiffs Thomas and Williams are over 65-years-old and qualify to vote by absentee ballot. Thomas Decl. ¶¶ 1, 5; Williams Decl. ¶¶ 1, 9. However, because Ms. Thomas lives alone, she would have to break social distancing guidelines to have her absentee ballot witnessed or counted to comply with the Witness Requirement. Thomas Decl. ¶¶ 6, 8. She does not intend

to do so and thus will be disenfranchised if the Witness Requirement remains in place for the June 9 primary. Thomas Decl. ¶¶ 8-9. Dr. Williams, meanwhile, currently has COVID-19 and is self-quarantining. Williams Decl. ¶¶ 8, 11. She is concerned that unnecessarily breaking quarantine to have her absentee ballot witnessed or witnessing the ballots of others, like her husband, will endanger their lives. Williams Decl. ¶¶ 9, 11. Neither Ms. Thomas or Dr. Williams intends to vote in a manner that places them or others at higher risk from COVID-19 infection or death. Thomas Decl. ¶¶ 8-9; Williams ¶¶ 9-11; *see also* Murphy Decl. ¶ 12 (describing an elderly and disabled NAACP member who also lacks access to a witness).

Plaintiff Richard intends to vote in person and serve as a poll worker on election day. Richard Decl. ¶ 5. On Election Day, she must closely interact with hundreds of voters in a manner that risks COVID-19 infection. *Id.* ¶ 6. There will not be enough time to properly sanitize voting equipment. *Id.* ¶ 9. Because the Challenged Requirements will needlessly force voters, like Plaintiffs Rutledge and Walker, to vote in person, she worries that further congestion at the polls will place her at higher risk of infection. *Id.* ¶ 7.

Plaintiff the Family Unit, Inc. is a nonpartisan, charitable organization with the mission of empowering and serving the needs of the low-income community of Sumter County, South Carolina. Williams Decl. ¶ 3. It is led by Plaintiff Dr. Brenda C. Williams. *Id.* Its constituents and members are mostly African Americans and/or low-income people with a high school education or less. *Id.* To serve its mission, the Family Unit educates and registers voters; helps eligible voters to navigate absentee voting; restores abandoned homes for working-poor families to live in; helps people find employment; volunteers with elderly people; and advocates for improved school facilities for children in Sumter County. *Id.* In recent years, the Family Unit's members and constituents have had their absentee ballots rejected because of the Witness

Requirement. *Id.* ¶ 4. The difficulties experienced by the Family Unit’s members and constituents in attempting to vote absentee under the Challenged Requirements have been magnified substantially by the COVID-19 pandemic. *Id.*

As a direct result of the Challenged Requirements, the Family Unit has had to divert its limited resources and time from its core activities to investigate, respond to, mitigate, and address the concerns of its members and constituents impacted or disenfranchised by the Challenged Requirements and Defendants’ inadequate efforts to protect voters from COVID-19 ahead of the 2020 elections. *Id.* ¶ 5. For example, after learning about the impact of the Challenged Requirements on its members and constituents, Dr. Williams requested information from county election officials, interviewed affected voters, and reviewed information about the impact of the Challenged Requirements. *Id.* ¶ 6. In absence of the Challenged Requirements, the Family Unit would not have had to engage in these activities. *Id.*

ARGUMENT

A preliminary injunction is warranted if Plaintiffs show: (1) a likelihood of success on the merits, (2) likelihood of suffering irreparable harm, (3) the balance of hardships favor them, and (4) the injunction serves the public interest. *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Here, each factor decisively favors Plaintiffs. In evaluating the burdens on voters, the Court may and should “take judicial notice of official government reports and statistics” including election and voter registration statistics and public health reports from government agencies such as the CDC and DHEC. *United States v. Cecil*, 836 F.2d 1431, 1452 (4th Cir. 1988) (internal citations omitted).

I. Plaintiffs Are Likely to Prevail on the Merits of Their Claims Against the Challenged Requirements.

Plaintiffs “need not establish a ‘certainty of success,’” just “make a clear showing” that they are likely to succeed. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). They are. The First and Fourteenth Amendments do not allow a state to put voters to an unconscionable choice between protecting their health and the health of their families and communities or forfeiting their fundamental rights. The Challenged Requirements will deprive thousands of qualified citizens the right to vote or to have their vote counted. And they will do so by imposing restrictions on the franchise that are directly at odds with the Governor’s stay-at-home order and public health guidance expected to remain in place for the foreseeable future.

Under *Anderson v. Celebrezze* and *Burdick v. Takushi*, any government burden on the right to vote must be balanced against the stated government interest supporting the burden. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Fourth Circuit describes the framework as follows:

When facing any constitutional challenge to a state’s election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state’s interests in ensuring that “order, rather than chaos, is to accompany the democratic processes.”

Fusaro v. Cogan, 930 F.3d 241, 257-58 (4th Cir. 2019) (citation omitted).

Strict scrutiny is proper when the Court considers election laws that impose greater burdens on voters in the context of an emergency. Indeed, courts have recently applied strict scrutiny in challenges to ballot-access laws where “stay-at-home” orders collided with those laws to severely burden a candidate’s ability to collect enough signatures to get on the ballot.⁴³ See

⁴³ Ballot-access laws implicate “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). In the COVID-19 pandemic, state courts have also closely scrutinized the burdens that these laws imposed on voters compelled to remain at home or under social distancing orders. See *Faulkner v. Va. Dep’t of Elections*, No. CL 20-1546, Slip Op. at 2 (Va. Cir. Ct. Mar. 25, 2020) (enjoining Virginia from enforcing 10,000 signature ballot-access requirement; citing state of emergency and stay at home order and noting “the circumstances as they exist . . . are not normal”) (Attach. F to Cepeda Decl.); see

Libertarian Party of Ill. v. Pritzker, No. 20-cv-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (finding that the “combined effect of . . . Illinois’ stay-at-home order and the usual in-person signature requirements [posed] a nearly insurmountable hurdle”); *Esshaki v. Whitmer*, No. 20-cv-10831, 2020 WL 1910154, at *1 (E.D. Mich. Apr. 20, 2020) (noting state’s “insist[ence] on enforcing [ballot-access] requirements as if its Stay-at-Home Order . . . had no impact on the rights of candidates and the people who may wish to vote for them”).

The same has held true in non-pandemic emergencies. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (holding that, because a hurricane “foreclosed the only methods of registering to vote” in the final week of registration, the statutory deadline “severe[ly] burden[ed] on the right to vote”); *Ga. Coal. for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345-46 (S.D. Ga. 2016) (similar); Order, *New Va. Majority Educ. Fund v. Va. Dep’t of Elections*, No. 16-cv-01319, Dkt. No. 10 (E.D. Va. Oct. 20, 2016) (extending registration deadline after the state’s website crashed).

Strict scrutiny applies here because the Challenged Requirements impose particularly severe burdens given the loss of life, toll of sickness from COVID-19, and the risk that violating social distancing protocols pose to Plaintiffs and their communities. Even if the Challenged Requirements ordinarily might pose a tolerable burden to a modest number of voters, it would be “nonsensical” to prioritize them over both the right to vote and people’s lives, “especially given the circumstances here.” *Fla. Democratic Party*, 215 F. Supp. 3d at 1258.

A. The First and Fourteenth Amendment require South Carolina to eliminate the Excuse Requirement under current circumstances.

1. The Excuse Requirement should be assessed under heightened

also Goldstein v. Sec’y of Commonwealth, 2020 WL 1903931, *10 (Mass. Apr. 17, 2020) (ordering the secretary to allow the submission and filing of nomination papers with electronic rather than “wet” signatures).

scrutiny because it severely burdens the rights of all South Carolinians by depriving them of the ability to safely vote in State elections.

The first step under the *Anderson-Burdick* inquiry with respect to the Excuse Requirement is for the Court to assess whether requiring South Carolinians to show up at the polls in person, in the middle of a pandemic, severely burdens the right to vote. The severity of the burden includes an analysis of the both breadth of affected people and the nature of the impact on them. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013).

The Excuse Requirement would force tens or even hundreds of thousands of voters to choose between putting themselves and others in serious physical jeopardy and forfeiting their fundamental right to vote. This severe burden on the right to vote triggers stringent scrutiny.⁴⁴

- a). *Plaintiffs are likely to succeed in demonstrating the Excuse Requirement unreasonably burdens the right to vote of all South Carolina voters who would vote in person outside of the COVID-19 pandemic.*

Plaintiffs are likely to succeed in demonstrating that the Excuse Requirement puts them, like *all* South Carolina voters who lack a clear absentee “excuse,” in an untenable position. On the one hand, the gravity of the COVID-19 threat is clear. South Carolinians are under an unprecedented order to remain at “Home or Work,” and to “take every possible precaution to avoid potential exposure to . . . COVID-19.” S.C. Exec. Order No. 2020-21, at 6. Over 5,250 of their fellow residents have tested positive and over 160 have died.⁴⁵ And no trusted model predicts that South Carolina will be in totally clear from the effects of the pandemic by June 9.

⁴⁴ Even applying a less stringent balancing test the Excuse Requirement must give way. “[W]hen a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden.” *Democratic Exec. Comm. v. Lee*, 915 F.3d 1312, 1318-19 (11th Cir. 2019); *see also Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). The government lacks an interest in forcing citizens to leave their homes amidst a pandemic in direct contravention of what they’ve been directed to do to protect themselves and mitigate its spread.

⁴⁵ DHEC, South Carolina Announces Latest COVID-19 Update (Apr. 25, 2020), <https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-april-25-2020>.

On the other hand, Defendants are clear that voters need an additional “excuse” to vote by mail in the midst of the outbreak. Indeed, anyone who wishes to do so “must fall into one of 18 categories, none of which include self-isolating due to a pandemic.” SEC Letter, at 2.

The Excuse Requirement demands that voters do the opposite of what public health officials have advised all South Carolinians should do. They must leave the safety of their homes in contravention of the Governor’s Home or Work Order; congregate in person at the polls in close proximity to other people; and foreseeably touch and share various surfaces—like writing implements or voting machines or photo IDs—that persons unknown to them will touch as well. Otherwise, they forego their right to vote in their State’s elections.

The burdens on the right to vote “are severe if they go beyond the merely inconvenient.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring). That is clearly the case. For individuals who routinely vote in person, including Plaintiffs Richard, Rutledge, and Walker,⁴⁶ the Excuse Requirement comes as close to fully depriving them of the franchise in this crisis as any restriction could. It forces voters to choose between two intolerable options: the very real risk of infection or disenfranchisement—and forces them to fully bear the costs of their choice. The Constitution demands that such a law survive exacting scrutiny.

b). *Plaintiffs will likely succeed in demonstrating that the Excuse Requirement unreasonably burdens voters who do not qualify to vote absentee and places voters and poll workers at higher-risk of COVID-19 infections.*

Plaintiffs are also exceedingly likely to successfully show that the Excuse Requirement severely burdens voters at high risk of complications from COVID-19 because of a chronic medical condition that falls short of rendering them “physically disabled persons” able to vote absentee. *See* S.C. Code Ann. § 7-15-320(B). Because contracting COVID-19 could easily

⁴⁶ *See* Rutledge Decl. ¶ 5; Walker Decl. ¶ 4.

prove fatal to these voters, the stakes of leaving their home to vote in person are even starker. The Excuse Requirement's burden on their right to vote is therefore extreme. It deserves stringent review. *See Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (“[E]lection laws that impose a severe burden on ballot access are subject to strict scrutiny . . .”).

COVID-19 endangers all, but two distinct groups are at particularly severe risk: the elderly and people with certain underlying medical conditions. Thus, while “geriatric patients are at the greatest risk,” “[l]ikewise, those with immunologic conditions and with other pre-existing conditions, such as hypertension, certain heart conditions, lung diseases . . . diabetes mellitus, obesity, and chronic kidney disease, are at high risk of a life threatening COVID-19 illness.” Reingold Decl. ¶ 7. South Carolina already allows voters “sixty-five years of age or older” to vote absentee in all elections. S.C. Code Ann. § 7-15-320(B).

However, no similar “excuse” currently applies to thousands of voters with various health conditions causing grave risk of illness from COVID-19, but which do not routinely prevent them from being “present in person at [their] voting place on election day.” S.C. Code Ann. § 7-15-310(4). Many of the voters most in danger of illness or death are African Americans like Plaintiffs Thomas and Walker. They have no reason to vote absentee other than “self-isolating due to a pandemic,” which Defendants have advised is not a valid “excuse.” SEC Letter, at 2.

Plaintiff Jeremy Rutledge, a reverend in Charleston, is such a voter. He was diagnosed over a decade ago with systemic scleroderma, an autoimmune disease that manifests in his body by causing the tissue in his lungs to thicken dangerously. Rutledge Decl. ¶¶ 6-7. For years, he has treated his condition by taking immunosuppressant drugs, which both suppress his autoimmune system to keep him safe but put him at extremely high risk of great harm from COVID-19. *Id.* ¶ 7. As a result, Rutledge has strictly self-quarantined himself at home with his

wife and son since at least mid-March and does not anticipate that he will feel safe outside his home until a vaccine or cure for COVID-19 have been developed or found. *Id.* ¶ 8. Rutledge usually votes in person, does not consider himself “physically disabled,” and faces the prospect of not voting in the June 9 primary as a result. *Id.* ¶ 11.

Likewise, Plaintiff Trena Walker would be prevented from requesting an absentee ballot while she strictly self-quarantines, because in spite of her medical history of breast cancer and emphysema, she does not consider herself physically unable to vote in person—she is just rightly fearful that COVID-19 would have a devastating effect on her health or life. Walker Decl. ¶ 10. In rigidly following social distancing and stay-at-home recommendations, Ms. Walker has also closely followed the advice of public health officials to take precautions seriously, because of the disproportionate effect that the virus has already had on Black communities. *Id.* ¶ 8.

Finally, the Excuse Requirement requires poll workers, like Plaintiff Nea Richard, who must closely and personally interact with hundreds of voters on Election Day at heightened risk of infection. Richard Decl. ¶ 7. The Excuse Requirement needlessly, but inevitably will require thousands of voters who would otherwise vote absentee to appear in person and thus endangers the lives of Ms. Richard and hundreds of other poll workers in South Carolina. *Id.* ¶¶ 6-10.

As Dr. Reingold explains, increased absentee voting is a “much safer option” because it “substantially decrease[s] the number of people coming into proximity at polling locations and the spread [of COVID-19] via environmental surfaces.” Reingold Decl. ¶ 17.

2. The Excuse Requirement’s burden on voters is unjustified because Defendants lack an interest in putting voters at risk of COVID-19 infection and have construed a state statute to violate the fundamental rights of voters.

Because the Excuse Requirement imposes severe burdens, the Court should apply heightened review or “strictly scrutinize the state’s interest and the means . . . to achieve those

interests, to ensure that . . . requirements are ‘narrowly drawn’ . . .” *Wood v. Meadows*, 207 F.3d 708, 714 (4th Cir. 2000). The Excuse Requirement fails on this score.

Defendants cannot claim a discernible interest in compelling citizens to vote in person in the midst of a dangerous pandemic. To the contrary, Governor McMaster has required South Carolinians to remain at “home or work” unless absolutely necessary, and expects “the people of the State of South Carolina [to] do their part to slow the spread of COVID-19 . . . by remaining at home whenever possible . . .” S.C. Exec. Order No. 2020-21, at 6. And even “as new activities are allowed,” DHEC has explained that residents must “continue to practice all of the social distancing measures that have been in place and should remain in place.”⁴⁷ While the risk of contagion and bodily harm remains, Defendants cannot state an interest that “make[s] it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789.

Nor could Defendants say that the Excuse Requirement would be “narrowly drawn” to achieve any asserted interest. The forbidding burdens that the Excuse Requirement forces on voters are particularly unjustified because the State’s laws can and should be construed to authorize all voters to vote absentee in this pandemic. South Carolina law allows all persons to vote absentee by mail if “because of injury or illness, [they] cannot be present in person at [their] voting place on election day.” S.C. Code Ann. § 7-15-310(4). In other words, South Carolina’s legislature has already seen fit to provide voters the option to cast a ballot by mail if an illness or ailment keeps them at home on Election Day. Defendants have rejected that construction, opting instead to severely burden the rights of South Carolina voters. The *Anderson-Burdick* framework allows the Court to reach this constitutional harm: “a federal court can review a state official’s interpretation of—or gloss over—state law when it is alleged to violate the United

⁴⁷ *Id.*

States Constitution.” *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1213 (N.D. Fla. 2018). The Court should “enjoin[] the state from enforcing [its] laws as a violation of the First and Fourteenth Amendments.”⁴⁸ *Id.*

In the current environment, the arbitrariness of the Excuse Requirement is clear: voters staying at home to follow social distancing measures prescribed by the Governor and other public health officials are *all* unable to vote in person “because of an illness”—namely, COVID-19. This reading is consistent with the absentee ballot laws, which “shall be liberally construed,” S.C. Code Ann. § 7-15-20, and nowhere say that a voter must personally contract an illness like COVID-19 in order to qualify for an absentee ballot.

It is also sensible. The absentee ballot laws do not say that a voter who fears they *may* have contracted an illness must still vote in person, putting countless other South Carolinians at an unacceptably high risk of contagion. And they do not, of course, say whether a voter must confirm that they either have or do not have COVID-19 to make sure they qualify “because of illness” before requesting an absentee ballot. *See* Reingold Decl. ¶ 11 (“Some individuals who are infected with the virus do not have any symptoms but can transmit the virus and/or are infectious before they develop any symptoms.”).

The Excuse Requirement need not cause widespread unconstitutional burdens on voters’ rights. Several of the remaining “excuse-required” states have construed near-identical disability or illness absentee “excuses” in ways that avoid such harm. For example, all West Virginia voters may vote absentee in forthcoming elections due to “illness, injury or other medical reason

⁴⁸ *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (affirming injunction of Secretary of State’s interpretation of Ohio deadlines where Secretary “construed” the law to apply “particularly high” burdens on non-military voters); *Charles H. Wesley Educ. Found v. Cox*, 324 F. Supp. 2d 1358, 1369 (N.D. Ga. 2004) (construing Secretary of State’s interpretation of state law as state policy and holding Secretary violated federal law), *aff’d* 408 F.3d 1349 (11th Cir. 2005).

which keeps me confined,” because the State now defines “medical condition” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.” W. Va. Code R. §§ 153-53-2-153-53-3.⁴⁹ The State’s construction of law “cannot violate or alter clear statutory requirements” but rather, simply construes existing state law “in favor of enfranchisement, not disenfranchisement.” W. Va. Code R. § 153-53-1.

Similarly, in response to COVID-19, state officials in Alabama,⁵⁰ Arkansas,⁵¹ Delaware,⁵² Kentucky,⁵³ New Hampshire,⁵⁴ and Virginia⁵⁵ have interpreted their absentee voting laws to permit all eligible voters to vote absentee under certain “illness” or “disability” related excuses.

- B. The Witness Requirement Severely Burdens and Violates the Constitution and Fundamental Right to Vote of People who are affected by COVID-19.**
- 1. The Witness Requirement significantly burdens many thousands of South Carolina voters who live alone—especially voters who are older, black, or have disabilities—faced with disenfranchisement or the risk of death.**

⁴⁹ W. Va. Sec’y of State Mac Warner, Admin. Law Div., Notice Of An Emergency Rule (Mar. 20, 2020), <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=53039&Format=PDF>.

⁵⁰ Ala. Leg. Servs. Agency, Absentee Voting During State of Emergency, 17-11-3(e) (Mar. 18, 2020), <https://www.sos.alabama.gov/sites/default/files/SOS%20Emergency%20Rule%20820-2-3-.06-.01ER.pdf>.

⁵¹ Ark. Exec. Order No. 20-08 (Mar. 20, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-08_.pdf

⁵² Governor of Delaware, Exec. Dep’t, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>

⁵³ Letter of Michael G. Adams, Sec’y of State, to Andy Beshear, Governor (Apr. 23, 2020), https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf.

⁵⁴ Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), <https://www.governor.nh.gov/news-media/press-2020/documents/20200410-absentee-voting.pdf>.

⁵⁵ See Va. Dep’t of Elections, *Absentee Voting*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last visited April 5, 2020).

Forcing thousands of people to put their life on the line or face disenfranchisement imposes a severe burden on the right to vote. *See, e.g., Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 107 n.8 (2d Cir. 2008) (noting for “voters who are . . . housebound” the burden of a lack of absentee voting opportunity “could be quite significant”). The Witness Requirement has the potential to require over a quarter of the electorate to make this impossible “choice.”

Under the Governor’s “Home or Work” order, individuals are required to shelter in place. Even if people do leave their homes, the state directs them to maintain at least six feet of distance from others with whom they do not live. And the CDC encourages as many voters as possible “to use voting methods that minimize direct contact with other people.”⁵⁶ These orders reflect the consensus of doctors and public health officials. As Dr. Reingold explains, “[r]equiring individuals to have someone they are not otherwise being exposed to come into close enough proximity to witness their ballot would place them at increased risk of infection.” Reingold Decl. ¶ 18. This risk is even greater for those over 65, who “are at the greatest risk of severe cases, long-term impairment, and death.” *Id.* ¶ 7. Similarly, people with “immunologic conditions,” like Plaintiff Rutledge, and those with “other pre-existing conditions,” like Plaintiff Thomas who has gout and hypertension, “are at high risk of a life-threatening COVID-19 illness.” *Id.* ¶ 17; Rutledge Decl. ¶¶ 6-7; Thomas Decl. ¶ 7.

The number of South Carolinians who will be forced to either brave the polls or break social distancing guidelines to have someone witness and sign their ballot envelope are striking. As of 2018, 14.5% of South Carolinians (*i.e.*, 558,826) 18 and older live alone. Cooper Decl.

⁵⁶ *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Mar. 27, 2020).

¶ 6. At present, South Carolina has over 3.3 million registered voters.⁵⁷ Over 620,000 South Carolinians voted in the June 2018 Democratic and Republican primaries.⁵⁸ And over 540,000 people voted in the February 29, 2020 presidential primary.⁵⁹ Applying this February 2020 figure to the 14.5% of all South Carolina adults living alone, suggests that 78,300 South Carolina voters in the 2020 presidential primary live alone. Conservatively then, because of the expected and unprecedented surge in absentee ballots, the Witness Requirement will force tens of thousands to risk their lives to vote.

Worse, the affected voters will disproportionately be members of populations at heightened risk of death or severe health complications from COVID-19. Although 14.5% of all South Carolinian adults live alone, 39.8% of those South Carolinians living alone are age 65 and older live alone. Cooper Decl. ¶ 6. About 24.7% of South Carolinians age 65 and older live alone. *Id.* ¶ 6. And 26.6% of all South Carolinians of voting age who live alone are disabled; in the subset of residents over 65 who live alone, 39.2% have a disability. *Id.* ¶ 7.

The Witness Requirement places a significantly heavier and deadlier burden on African-American voters amid the pandemic, who face much higher likelihood of death or serious complications from COVID-19. As of April 24, African Americans in South Carolina represented 43% of reported COVID-19 cases and a staggering 56% of related deaths⁶⁰ despite making up just 27% of the State's population.⁶¹ Attach. G Cepeda Decl., at 8, 14. Black South

⁵⁷ *South Carolina Voter Registration Demographics*, <https://www.scvotes.org/cgi-bin/scsec/96vr?countykey=ALL&D1=None> (last visited Apr. 21, 2020).

⁵⁸ S.C. Election Comm'n, 2018 Statewide Primaries Election Night Reporting, <https://www.enr-scvotes.org/SC/75708/Web02-state.203322/#/>.

⁵⁹ S.C. Election Comm'n, 2020 Democratic Presidential Preference Primary, Election Night Reporting, <https://www.enr-scvotes.org/SC/100517/Web02-state.242137/#/>.

⁶⁰ DHEC, *SC Demographic Data (COVID-19)*, <https://scdhec.gov/sc-demographic-data-covid-19> (last visited Apr. 25, 2020)

⁶¹ U.S. Census Bureau, *QuickFacts South Carolina*, <https://www.census.gov/quickfacts/SC> (last visited Apr. 21, 2020).

Carolínians are thus more than twice as likely to have contracted COVID-19 as white people and three times as likely to have died from it. Black people's higher rates of COVID-19 infection and death result from racial disparities in health insurance access, the higher rates of service occupations for African-American workers, which may limit their ability to work from home, and higher rates of disability. *See* Cogburn Decl. ¶ 12; Cooper Decl. at 7, 13, 18. In turn, these racial disparities come from past and present discrimination. *See* Cogburn Decl. ¶¶ 6, 7, 12.

African-American absentee voters are also more likely to have no choice but to defy social distancing guidelines in order to satisfy the Witness Requirement. Black people in South Carolina are more likely to both live alone and live as the alone adult among children under 18 (*i.e.*, legally incompetent witnesses). About 33.2% of all African-American households in the state are people living alone, as compared to 28.2% of white households. And 14.8% of all African-American households in the state are headed by women who live alone with their children versus just 3.9% of similar white households with children.

Beyond statistics, Plaintiffs show the significant barrier that the Witness Requirement imposes on voters. Plaintiff Thomas lives alone and Plaintiff Walker does not live with anyone old enough to witness her ballot. Plaintiff Williams lives with her husband, but her present COVID-19 diagnosis makes it dangerous for her to interact with him. These Plaintiffs cannot both follow public health advice and government orders to isolate and socially distance and have their vote by absentee ballot counted.

Even in normal circumstances, the Witness Requirement causes election officials to reject the ballots of a significant number of absentee voters. In the 2018 elections, 798 South Carolina voters had their absentee ballots rejected for lack of a witness signature. *See* Attach. I to Cepeda Decl. (data from 2018 Election Administration and Voting Survey). But in that election, only

80,271 people or 4.6% of all voters cast mail-in absentee ballots. *Id.*; *see also* Attach. A to Williams Decl. (incorporating correspondence from election officials and records showing that several hundred ballots were rejected because of the Witness Requirement in 2016). Absentee voting in South Carolina is expected to increase exponentially in 2020 because of COVID-19. For example, in Wisconsin’s recent election—where thousands of voters waited in long, crowded lines at the polls⁶²—absentee ballot requests were still *five times higher* than in the 2016 primary.⁶³ Under present circumstances, the Witness Requirement will disenfranchise many thousands more voters than it did in 2018 or 2016.

2. The severe burdens imposed by the Witness Requirement in the context of the ongoing COVID-19 pandemic merit heightened judicial scrutiny.

The breadth and severity of the Witness Requirement’s burdens merits strict scrutiny. The *Anderson-Burdick* framework requires courts to take a context-specific approach to its burden analysis. *Burdick*, 504 U.S. at 434. Strict scrutiny applies where, as here, state laws needlessly force voters to make impossible choices. *Cf. Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1298-99 (8th Cir. 1995) (applying strict scrutiny to state requirements that political parties conduct and pay for primary elections because such provisions had the effect of

⁶² Parker Schorr, *Wisconsin’s pandemic election: Long waits, face masks as voters go to polls*, THE CAP TIMES (Apr. 8, 2020), <https://madison.com/ct/news/local/govt-and-politics/wisconsin-s-pandemic-election-long-waits-facemasks->

[as-voters-go-to-polls/article_bfd2c391-f390-5364-8c14-a88b548fe017.html](https://madison.com/ct/news/local/govt-and-politics/wisconsin-s-pandemic-election-long-waits-facemasks-as-voters-go-to-polls/article_bfd2c391-f390-5364-8c14-a88b548fe017.html); Benjamin Swasey, *Wisconsin Vote Ends As Trump Blames Governor For Long Lines*, NPR (Apr. 7, 2020 12:23 PM), <https://www.npr.org/2020/04/07/828835153/long-lines-masks-and-plexiglas-barriers-greet-wisconsin-voters-at-polls>.

⁶³ *Compare* Wisc. Election Comm’n, Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary, <https://elections.wi.gov/node/6833> (reporting over 1.28 million absentee ballots requested for April 7, 2020 primary) *with* Riley Vetterkind, *Absentee ballot requests in Wisconsin already exceed number in recent spring elections*, WISC. STATE JOURNAL (Mar. 18, 2020), https://madison.com/wsj/news/local/govt-and-politics/absentee-ballot-requests-in-wisconsin-already-exceed-number-in-recent-spring-elections/article_dfb34fc5-6aa8-5428-90c3-26c3f82a1d70.html (noting that just under 250,000 absentee ballots were requested for the spring 2016 Wisconsin primary).

forcing “many voters who wish[ed] to vote in the Republican primary to vote either in the Democratic primary or not at all”). “[T]he severity of the burden the election law imposes on the plaintiff’s rights dictates the level of scrutiny applied by the court.” *Libertarian Party*, 718 F.3d at 317 (quoting *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008)). A law that endangers the lives of thousands of voters demands the most exacting level of scrutiny.

Here, Plaintiffs are “disabled from voting” because they cannot safely “go to the polls on election day” as a result of the COVID-19 crisis and stay-at-home order. *See O’Brien v. Skinner*, 414 U.S. 524, 525 (1974) (striking down an absentee ballot law as-applied to eligible voters in jail). It does not matter that the burdens imposed by the Witness Requirement result from unusual circumstances. *Cf. Libertarian Party*, 718 F.3d at 316-17 (finding that the plaintiff could challenge an election petition law even where his legal injury resulted in part from an unexpected physical injury). Even if the Witness Requirement did not ordinarily burden a large number of voters, which it does, South Carolina cannot impose it when voters cannot comply without endangering their lives and safety. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1258.

3. The Witness Requirement’s severe burdens on voters far outweighs its minimal-to-nonexistent promotion of election integrity.

Because Plaintiffs and other voters face significant danger in voting under the Witness Requirement, it is subject to strict scrutiny. But, even if the Court declines to apply strict scrutiny, the burden on voters in complying with the Witness Requirement far outweighs any nominal benefits to South Carolina from enforcing the witness requirement.

The Witness Requirement does nothing to protect the integrity of an absentee ballot. As Defendant Andino wrote in the SEC Letter urging changes to the elections process in light of the ongoing pandemic: “the witness signature offers no benefit to election officials as they have no ability to verify the witness signature.” SEC Letter, at 3. In fact, South Carolina already

exempts voters in the military or living abroad from the Witness Requirement. S.C. Code Ann. § 7-15-380. Nor does South Carolina even require witnesses to identify themselves by legibly printing their name. S.C. Code Ann. § 7-15-380. The ineffectiveness of witness requirements in securing elections is exactly the reason that Congress eliminated witness signature requirements in the mail-in absentee voter registration process. S. Rep. 103-6, 1993 WL 54278, at *13 (1993).

And, even if the Witness Requirement did marginally serve some interest, South Carolina has ample other methods to police the integrity of absentee ballots, as outlined *supra* at 11-12. Given those robust attestation and verification requirements and criminal penalties, the additional step of requiring a witness signature adds no meaningful protection against fraud. And while instances of fraud are exceedingly rare,⁶⁴ an individual determined to risk the penalties can just as easily forge a witness signature as they can falsely attest when they sign their own name.

Courts have struck down election-related restrictions in similar contexts. In *Libertarian Party of Virginia v. Judd*, for example, the Fourth Circuit applied strict scrutiny to a residency restriction bearing on petition witnesses because it “impose[d] a severe burden” on First Amendment rights. 718 F.3d at 316. Even after presuming that this restriction was effective at preventing fraud, the Court held that the burden was not sufficiently tailored to justify the barrier it imposes on the plaintiffs’ constitutional rights. *Id.* at 317-18.

Similarly, in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), the Sixth Circuit affirmed the invalidation an Ohio law that rejecting absentee ballot

⁶⁴ Even a database from the Heritage Foundation—an organization committed to “[p]reventing, deterring, and prosecuting election fraud,” <https://www.heritage.org/voterfraud>—identifies just one case of election fraud in South Carolina concerning absentee voting in the past 13 years. See The Heritage Foundation, Election Fraud Cases, https://www.heritage.org/voterfraud/search?combine=&state=SC&year=&case_type=All&fraud_type=24489 (last accessed April 26, 2020). During the same time period, approximately 16 million voters cast their ballots in South Carolina elections. See SEC, Voter Participation History (1998-2018), [https://www.scvotes.org/sites/default/files/Voter%20Participation%20History%20\(1998-2018\)_0.pdf](https://www.scvotes.org/sites/default/files/Voter%20Participation%20History%20(1998-2018)_0.pdf).

envelopes that had technical errors in the birthdate or address field. It explained that although “the burden is small for most voters, . . . none of the precise interests put forward by Ohio justifies it” including a generalized interest in “[c]ombating voter fraud.” *Id.* at 632. Because Ohio’s interest was justified by only “the ‘rare’ instances where a fraudster manages to swipe the ballot of a valid voter, forge the signature, and return the ballot” with a voter’s identifying information, a burden on even a few voters was enough to render the law unconstitutional. *Id.*

And, in *One Wisconsin*, the court held that the shortening of the early voting period was only a moderate burden because those voters still had other opportunities to early vote and “can vote using mail-in absentee voting or vote on election day.” 198 F. Supp. 3d at 933. Despite this, the Court held that the rollback violated the fundamental right to vote because the state’s asserted interests “do not justify the moderate burdens that the challenged provisions impose.” *Id.* at 934.

These cases apply with even more force here, where the burdens are significant and the State’s interest marginal (if any). The Witness Requirement cannot survive scrutiny.

4. The Witness Requirement violates the categorical prohibition on “voucher” or supporting witness requirements in Section 201 of the VRA.

Section 201 of the VRA mandates that “[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” 52 U.S.C. § 10501(a). Section 201 defines a “test or device” as including requiring any person to “prove his qualifications by the voucher of registered voters or members of any other class.” 52 U.S.C. § 10501(b)(4).

“All literacy tests and similar voting qualifications were abolished” by Section 201 because, “[a]lthough such tests may have been facially neutral, they were easily manipulated to keep blacks from voting.” *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009). Section 201 “bars certain types of voting tests and devices altogether,” and removes the

burden of demonstrating that a test or device results in discrimination. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 338 n.6 (2000).

Under the Witness Requirement, an absentee “ballot may not be counted unless the oath is properly signed and witnessed” S.C. Code Ann. § 7-15-420. Under the plain text of the VRA, it is *per se* illegal insofar as it is a “prerequisite for voting” that asks a voter to “prove his qualifications by the voucher of registered voters or members of any other class.” 52 U.S.C. § 10501(b); *see also Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) (“when Congress does not add any language limiting the breadth of that word, ‘any’ means all”); 52 U.S.C. § 10310(c)(1) (defining “voting” in the VRA to include “all action necessary to make a vote effective”).

The South Carolina Supreme Court has previously concluded that the Witness Requirement is justified because it has “as its purpose the assurance of the authenticity of the absentee vote” *Gregory v. S.C. Democratic Exec. Comm.*, 247 S.E.2d 439, 444 (S.C. 1978). That justification, however, cannot overcome the plain text of the VRA, which reflects Congress’s judgment that prohibited tests and devices “unduly lend themselves to discriminatory application, either conscious or unconscious.” *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (opinion of Harlan, J.). Indeed, before the VRA, “voucher” or “witness” requirements were likewise justified as necessary to authenticate a voter’s qualifications. *See, e.g., United States v. Ward*, 349 F.2d 795, 799 (5th Cir. 1965); *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965). Whatever the governmental interest, the banned tests or devices are presumptively discriminatory. *See Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981), *aff’d sub nom. Rogers v. Lodge*, 458 U.S. 613, 625 (1982). And, although proof of a discriminatory effect is irrelevant under, the Witness Requirement’s racial impact is clear. *Supra* at 30-31.

The Witness Requirement violates the VRA because it requires absentee voters to either comply with an illegal “test or device” or have their vote discarded.

II. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction.

“Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina* (“*LWV*”), 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). This is because “the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Further, “once the election occurs, there can be no do-over and no redress,” so the injury to “voters is real and completely irreparable if nothing is done to enjoin [the challenged] law.” *LWV*, 769 F.3d at 247.

Here, both individual Plaintiffs and the Family Unit’s members wish to vote by absentee ballot to protect their health. They face an unconscionable risk to their lives and others if they are compelled to vote in person or forced to have their absentee ballots witnessed. There “can be no injury more irreparable” than “serious, lasting illness or death.” *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020). Courts have “specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO.” *Id.* at *7 (collecting cases). A preliminary injunction provides the only effective means for protecting Plaintiffs’ and many other South Carolinians’ constitutional rights to vote in the June primary.

The Family Unit also faces irreparable harm. A voting rights organization is “irreparably harmed when the right to vote is wrongfully denied or abridged—whether belonging to its membership or the electorate at large.” *N.C. State Conf. of NAACP v. Cooper*, No. 18-cv-1034, 2019 WL 7372980, at *24 (M.D.N.C. Dec. 31, 2019); *see also Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1295 (N.D. Ga. 2018) (finding plaintiff organization’s harm “to its organizational interests is coterminous with the harms suffered by its citizen members”);

Common Cause Ind. v. Lawson, 327 F. Supp. 3d 1139, 1154 (S.D. Ind. 2018), *aff'd* 937 F.3d 944 (7th Cir. 2019) (similar).

Further, the Challenged Requirements irreparably harm the Family Unit’s mission of ensuring that qualified citizens are registered to vote. The Family Unit will need to continue divert its limited resources from voter registration to educate its community about the Challenged Requirements. Williams Decl. ¶ 5. These harms are irreparable: “when a plaintiff loses an opportunity to register a voter, the opportunity is gone forever.” *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *see also LWV*, 769 F.3d at 247; *Action NC v. Strach*, 216 F. Supp. 3d 597, 642-43 (M.D.N.C. 2016).

Finally, the harm to Plaintiffs is also imminent. All of the evidence shows that “COVID-19 will continue to transmit widely” through the June 9 primary. *See* Reingold Decl. ¶¶ 14, 16; *see also* Order on Application for Temporary Injunction, *Tex. Democratic Party v. DeBeauvoir*, No. D1-GN-001610 (Travis Cty. Dist. Ct. Apr. 17, 2020) (finding irreparable harm if all Texas voters cannot vote by mail and noting a high “risk of transmission of COVID-19” for Texas’s “July 14, 2020 Run-Off election and all subsequent elections for this year”) (Attach. H to Cepeda Decl.). And Governor McMaster has expressed his “hope” that “businesses and activities . . . may be safely resumed and conducted using personal safety precautions” “by late June,” which is well after the election. ECF No. 1, Ex 1 at 1.

III. The Balance of Equities and Public Interest Support Injunctive Relief.

The public interest “favors permitting as many qualified voters to vote as possible.” *LWV*, 769 F.3d at 247-48 (citations and internal quotation marks omitted). A “state is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an

injunction.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation and internal quotation marks omitted). After all, “upholding constitutional rights surely serves the public interest,” of which the State is the custodian. *Id.*

Enjoining the Challenged Requirements also promotes “the public interest in . . . safeguarding public health.” *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013). “The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease.” *Diretto v. Country Inn & Suites by Carlson*, No. 16-cv-1037, 2016 WL 4400498, at *4 (E.D. Va. Aug. 18, 2016). The State recognizes this. The Governor has ordered people to stay in their homes. S.C. Exec. Order No. 2020-21, at 6. DHEC has urged social distancing by “staying home as much as possible.”⁶⁵ Per DHEC, these are the “best ways” to protect against COVID-19.⁶⁶ The CDC agrees and recommends that voters “use voting methods that minimize direct contact with other people.”⁶⁷ These public health entities’ views are entitled to considerable deference. *See Tolman v. Doe*, 988 F. Supp. 582, 586 (E.D. Va. 1997) (explaining that the CDC’s “views are relied upon by the medical profession as authoritative” and that it is “the type of public medical health officials to which courts should defer”).

Conversely, no public interest will be compromised by an injunction authorizing all South Carolina registered voters to vote absentee to prevent harm to themselves or others and the further spread of COVID-19. Strict vote integrity provisions already protect absentee voting, and the Challenged Requirements are an ineffectual method to achieve that goal, in any event.

CONCLUSION

⁶⁵ DHEC, *Protect Yourself & Those Around You (COVID-19)*, <https://www.scdhec.gov/protect-yourself-those-around-you-covid-19> (last visited Apr. 21, 2020).

⁶⁶ *Id.*

⁶⁷ Ctrs. for Disease Control & Prevention, *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Mar. 27, 2020).

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction: (1) prohibiting Defendants from enforcing the Excuse Requirement, S.C. Code Ann. § 7-15-320 and § 7-15-310, to prevent any eligible voter, regardless of age or physical condition, to request, receive, and have counted an absentee ballot for the June 9 primary; (2) prohibiting Defendants from enforcing the Witness Requirement, S.C. Code Ann. § 7-15-220 and § 7-15-420, for all voters for South Carolina’s June 9 primary; and (3) ordering Defendants to publicly inform all South Carolina voters about the elimination of the Challenged Requirements, in coordination with city and county election officials.

Dated: April 27, 2020

Respectfully submitted,

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*Motion for admission *Pro Hac Vice*
forthcoming