

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

KYLON MIDDLETON; DEON TEDDER;
AMOS WELLS; CARLYLE DIXON;
TONYA WINBUSH; ERNESTINE MOORE;
SOUTH CAROLINA DEMOCRATIC
PARTY; DNC SERVICES
CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE; and DCCC,

Plaintiffs,

v.

MARCI ANDINO, in her official capacity as
Executive Director of the South Carolina State
Election Commission; JOHN WELLS, in his
official capacity as Chair of the South Carolina
State Election Commission; and CLIFFORD J.
EDLER and SCOTT MOSELEY, in their
official capacities as members of the South
Carolina State Election Commission,

Defendants.

Case No. 3:20-cv-1730-JMC

**PLAINTIFFS' MOTION AND INCORPORATED BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs Kylon Middleton, Deon Tedder, Amos Wells, Carlyle Dixon, Tonya Winbush, Ernestine Moore, the South Carolina Democratic Party (“SCDP”), DNC Services Corporation/Democratic National Committee (“DNC”), and DCCC, by and through the undersigned attorneys, bring this motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 to address the immediate and severe effects the coronavirus pandemic is having on the election scheduled for June 9, 2020. Plaintiffs focus this motion on three requirements that threaten South Carolinians’ right to vote during the COVID-19 pandemic: (1) the categorical prohibition on all voters under 65 from casting a mail-in absentee ballot unless they fall into narrow and limited categories such as disabled or confined in jail (“Absentee Ballot Age Restriction”), S.C. Code Ann. § 7-15-320(B)(8); (2) the requirement that a voter must have another person witness and sign their absentee ballot envelope in order for the vote to count (“Witness Requirement”), *id.* § 7-15-380; and (3) South Carolina’s rejection of all mail-in absentee ballots not received by the county by 7:00 p.m. on Election Day (“Election Day Cutoff”), *id.* § 7-15-230 (collectively, the “Challenged Provisions”).¹

Plaintiffs are aware of a related case currently pending before this Court. *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C. filed Apr. 22, 2020) (“*Thomas*”). Those plaintiffs have moved for a preliminary injunction of (1) the Absentee Ballot Age Restriction and (2) Witness Requirement, and the Court has a hearing scheduled for May 15, 2020. ECF No. 30. Plaintiffs join in the *Thomas*

¹ Plaintiffs challenged a number of other requirements in their complaint, including the state’s failure to prepay postage for absentee ballots and prohibition on candidates’ collection and return of absentee ballots. Plaintiffs do not seek to enjoin these requirements in advance of the primary but will separately seek injunctive relief of these and the other provisions at issue in this litigation in advance of the November general election. Pursuant to Local Rule 7.02, counsel for Plaintiffs consulted with counsel for Defendants prior to filing this motion; counsel for Defendants did not consent to this motion.

Plaintiffs' arguments on (1) and (2). In addition to the arguments that the *Thomas* Plaintiffs make for enjoining the Absentee Ballot Age Restriction, Plaintiffs here argue it should be enjoined because it also violates the 26th Amendment to the U.S. Constitution. Plaintiffs are filing concurrently with this Motion a motion to participate in the hearing on the *Thomas* Plaintiffs' preliminary injunction motion in order to present argument on the 26th Amendment and Election Day Cutoff issues. *See* Plaintiffs' Rule 42(a)(1) Motion to Consolidate the Hearing of the Motion for Preliminary Injunction in This Action with the May 15 Hearing for the Motion for Preliminary Injunction in *Thomas v. Andino*, No. 3:20-cv-1552-JMC.

INTRODUCTION

South Carolina's election laws will force people to choose between their health and their right to vote in violation of the United States Constitution. A novel coronavirus pandemic is sweeping through the country, with known infections exceeding 1.2 million and fatalities exceeding 70,000. In South Carolina, there are nearly 7,000 confirmed cases and over 300 deaths due to COVID-19, and that number continues to grow on a daily basis. The virus is highly contagious and affects people of all ages, and many infected people do not exhibit symptoms. The Governor has ordered people to stay home, and public health officials direct that staying six feet away from other people and avoiding contact with contaminated surfaces is the only way to prevent the spread. There is no end in sight to this crisis.

Meanwhile, the election laws at issue in this case will force hundreds of thousands of South Carolina voters to congregate in the same places on election day and thousands of others to engage in what, under the present circumstances, are potentially dangerous one-on-one personal interactions, all in order to exercise their right to vote in the coming June 9 primary election. Most dangerous is South Carolina's Absentee Ballot Age Restriction, which categorically denies access

to mail-in absentee voting for voters under 65, unless they fall into narrow, enumerated categories. Not only is this an impermissible age-based restriction on voting, but it substantially enhances the risk that South Carolina becomes the next Wisconsin, forcing thousands of its citizens to stand in long lines for hours in order to cast their ballots. Despite the fact that many wore masks, gloves, and other protective equipment, multiple infections of the novel coronavirus have since been reported among voters and elections officials who were needlessly exposed to the virus in those overwhelming polling locations. But even for those who qualify to vote by absentee ballot under the current interpretation of South Carolina law will be forced to engage in unnecessary and potentially dangerous interactions with others as a result of the Witness Requirement. Complying with it in these unprecedented times will be especially burdensome for the over 500,000 South Carolinians who live alone and would have to break quarantine in order to exercise their right to vote. Finally, South Carolina's Election Day Cutoff law, which requires ballots to be received by 7:00 p.m. on Election Day to count, threatens to disenfranchise thousands of voters whose ballots do not arrive by the election day deadline, a threat that is substantially exacerbated by an influx of requests to vote by absentee ballot and delays in mail service.

The State has no interest in the enforcement of these unconstitutional provisions. The South Carolina State Election Commission (the "Commission") has expressly requested that public officials suspend the Absentee Ballot Age Restriction and extend the option to vote by absentee ballot to everyone, regardless of age, and eliminate the Witness Requirement, because it serves no purpose for elections officials. As for the Election Day Cutoff, the U.S. Supreme Court approved of an extension similar to what Plaintiffs seek here in light of the current circumstances.

Plaintiffs have made the required showing for a preliminary injunction. They are likely to succeed on the merits of their challenges to these three provisions. They will otherwise suffer

irreparable harm: either potential exposure to a deadly illness or disenfranchisement. The equities also favor the Plaintiffs: the public has an interest not only in its health but also in allowing as many eligible voters as possible to cast their ballots. There is no meaningful hardship on the other side of the balance.

FACTUAL BACKGROUND

A. The COVID-19 Pandemic

The United States is the epicenter of the global COVID-19 pandemic. The virus has infected over 1.2 million people and taken over 70,000 lives in the United States in the past seven weeks alone.² COVID-19 spreads mainly from person-to-person contact, through respiratory droplets when an infected person coughs or sneezes.³ The virus can also spread from “contact with contaminated surfaces of objects.”⁴ The virus is highly contagious and causes severe symptoms and even death in people of all ages.⁵ Elderly Americans are particularly at risk, but so are younger Americans with relatively common pre-existing conditions, such as moderate asthma.⁶ Some healthy young people have died of the virus, while others have suffered severe and debilitating large vessel strokes. Experts cannot predict whether a particular young person will die or suffer serious complications of the virus or be entirely asymptomatic.⁷ Experts encourage social

² CDC, Cases in the U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 6, 2020).

³ CDC, How COVID-19 Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁴ *Id.*

⁵ CDC, Situation Summary, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#risk-assessment>.

⁶ CDC, Groups at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

⁷ Dr. Sanjay Gupta, The mystery of why the coronavirus kills some young people, CNN (Apr. 6, 2020), <https://www.cnn.com/2020/04/05/health/young-people-dying-coronavirus-sanjay-gupta/index.html>.

distancing practices for everyone in large part because of asymptomatic carriers.⁸ In addition, “current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups.”⁹

COVID-19 has hit South Carolina hard. As of May 6, the state has 6,936 confirmed cases and 305 people have died of the virus.¹⁰ The state is on track to meet the South Carolina Department of Health and Environmental Control’s (“DHEC”) April 20 prediction of 7,000 cases by May 9.¹¹ The virus has had a disproportionate impact on South Carolina’s African American residents. Although African Americans make up only 27% of the State’s population, they represent 43% of reported COVID-19 cases and a staggering 46% of related deaths.¹² The elderly are also disproportionately adversely affected: individuals over 70 comprise two-thirds of the COVID-19 related deaths in the State.¹³

⁸ Nick McGregor, University of Utah, *Social Distancing, Explained* (Mar. 17, 2020), <https://healthcare.utah.edu/healthfeed/postings/2020/03/coronavirus-social-distancing.php>.

⁹ CDC, COVID-19 in Racial and Ethnic Minority Groups, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

¹⁰ DHEC, SC Testing Data & Projections (COVID-19), <https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19>.

¹¹ 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>.

¹² U.S. Census Bureau, QuickFacts South Carolina, <https://www.census.gov/quickfacts/SC> (last visited Apr. 21, 2020); <https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-demographic-data-covid-19> (last visited May 5, 2020).

¹³ DHEC, SC Demographic Data (COVID-19), <https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-demographic-data-covid-19> (last visited May 5, 2020).

State health care professionals and epidemiologists have cautioned repeatedly that the pandemic is going to get worse.¹⁴ National trends from the U.S. Centers for Disease Control and Prevention (“CDC”) show that the curve is climbing rapidly.¹⁵ Many scientists believe it will take at least a year to develop a vaccine for COVID-19 and provide it to the general public, but the precise timing is unknown.¹⁶

B. Government Orders & Guidance Regarding COVID-19

To prevent the spread of the disease, the CDC and DHEC recommend that people stay at home and avoid close contact with others. Consistent with that advice, Governor Henry McMaster declared a state of emergency in early March and issued several executive orders closing schools, bars, restaurants, and other business, prohibiting gatherings of 10 or more people, and requiring residents to engage in social distancing and “remain[] at home whenever possible.” Exec. Order No. 2020-21 (Apr. 6, 2020); *see also* Exec. Order No. 2020-08 (Mar. 13, 2020); Exec. Order No. 2020-09 (Mar. 15, 2020); Exec. Order No. 2020-15 (Mar. 28, 2020); Exec. Order No. 2020-16 (Mar. 30, 2020). Although Governor McMaster modified the orders to allow public beaches, certain retail businesses, and restaurants offering outdoor dining to reopen, and lifted the stay-at-home order as of May 4, *see* Exec. Order No. 2020-29 (Apr. 27, 2020); Exec. Order No. 2020-31

¹⁴ *See, e.g., Laurel Mallory, 298 cases of coronavirus, 5 deaths in S.C.; governor orders officials to disperse groups of 3+ in public*, WIS News, Mar. 23, 2020, <https://www.wistv.com/2020/03/23/cases-coronavirus-deaths-sc-governor-orders-officials-disperse-groups-public> (quoting Dr. Linda Bell, DHEC epidemiologist stating South Carolina “is now in the ‘acceleration’ phase of the outbreak”).

¹⁵ CDC, *COVID-19 Cases in the United States by Date of Illness Onset*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Apr. 28, 2020).

¹⁶ Sarah LaFave, *What Will It Take To Develop a Vaccine for COVID-19?*, Johns Hopkins University - The Hub, (Mar. 26, 2020) <https://hub.jhu.edu/2020/03/26/covid-19-vaccine-development-ruth-karron/> (“Scientists estimate that it will take at least one year to make a COVID-19 vaccine available to the general public.”).

(May 3, 2020), he still recommends that those considered to be at-risk based on CDC guidance continue to limit exposure to others.¹⁷

C. South Carolina's Elections

In mid-March, Governor McMaster rescheduled all elections for March and April to take place after May 1, 2020, based on his “determination that the [outbreak] poses an actual or imminent public health emergency for the State of South Carolina.” Exec. Order No. 2020-09 at 1 (Mar. 15, 2020).

On March 30, Commission Executive Director, Defendant Marci Andino, wrote to several elected officials, including Governor McMaster, about the remaining elections scheduled for 2020. ECF No. 1-1. Her 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 2. “[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.* In addition, “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 3. As a result, the Commission recommended “changes to [the] election process” “to safely and securely conduct elections during and following the coronavirus pandemic.” *Id.* Specifically, the Commission urged that South Carolina should “[a]llow no excuse absentee voting,” a “relatively simple change.” *Id.* at 5. It also recommended “[r]emov[ing] the

¹⁷ Crysty Vaughan, *Stay at home order to be lifted by SC Governor: effective Monday*, ABA Columbia (May 2, 2020), <https://www.abccolumbia.com/2020/05/04/stay-at-home-order-to-be-lifted-by-sc-governor-effective-monday/>.

witness requirement on ballot return envelopes[,]” which “offers no benefit to election officials” because they do not and cannot verify the witness signature. *Id.* at 4.

The CDC, anticipating difficulties in conducting elections during the ongoing crisis, has similarly recommended that jurisdictions encourage voting by mail and reduce methods of voting that lead to direct contact with other people, including voters and poll workers.¹⁸ Other federal, state, and local officials have increasingly come to the same realization. Congress, for example, recently authorized \$400 million to help states increase access to mail ballots.¹⁹

Widespread voting in person on a single day during a pandemic is dangerous. For example, in Wisconsin, “[f]orty people in Milwaukee County may have become infected with the coronavirus as a result of participating in Wisconsin elections on April 7,” including a pollworker.²⁰ Thousands of voters stood in long lines, with some waiting, exposed, for hours, in order to cast their ballots.²¹ In Chicago, a poll worker for the March 17 primary died from COVID-19. In Florida, two Broward County poll workers tested positive for COVID-19.²²

¹⁸ CDC, Recommendations for Election Polling Locations, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

¹⁹ Alisa Wiersema & Kendall Karson, Congress pours \$400 million into boosting states’ election efforts amid coronavirus crisis, experts say it’s ‘not enough,’ ABCNews (Mar. 25, 2020), <https://abcnews.go.com/Politics/congress-pours-400-million-boosting-states-election-efforts/story?id=69793454>.

²⁰ 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-casesmilwaukee-county-linked-wisconsin-election-health-official-says#stream/0>.

²¹ 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-waitsfacemasksas-voters-go-to-polls/article_bfd2c391-f390-5364-8c14-a88b548fe017.html.

²² 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-browardelections-poll-workers-coronavirus-20200326-wmgy775dvjc5jis2oagxlpmlule-story.html>.

To date, South Carolina has not implemented the Commission's or CDC's recommendations. South Carolina is scheduled to hold statewide Democratic and Republican primaries on June 9 and primary runoffs on June 23.

D. The Absentee Ballot Age Restriction, Witness Requirement, and Election Day Cutoff

Under South Carolina's current elections regime, the vast majority of South Carolina voters must appear in person at the polls on election day in order to exercise their right to vote. Through the Absentee Ballot Age Restriction, South Carolina categorically prohibits all voters under 65 who are not "absent from their county of residence on election day during the hours the polls are open" from voting by absentee ballot unless he or she qualifies for an enumerated exception: the "physically disabled" or a person attending a sick or physically disabled person, "certified poll watchers, poll managers, county board of voter registration and elections members and staff, county and state election commission members and staff working on election day," "persons admitted to hospitals as emergency patients on the day of an election or within a four-day period before the election," "persons with a death or funeral in the family within a three-day period before the election," persons serving on juries, "persons confined to a jail or pretrial facility pending disposition of arrest or trial," or "members of the Armed Forces and Merchant Marines of the United States, their spouses, and dependents residing with them. S.C. Code Ann. § 7-15-320(B)(8).

Those who qualify to vote by absentee ballot must fulfill additional requirements not imposed on in-person voters. Those who want to vote absentee by mail must return their applications for an absentee ballot "by mail, email, fax, or personal delivery" "before 5:00 p.m. on the fourth day before the day of the election." S.C. Code Ann. § 7-15-330.

To vote absentee by mail, a voter must satisfy the Witness Requirement. It requires that the voter must return their ballot in the return-addressed envelope provided, which must be "signed

and witnessed.” *Id.* § 7-15-220. 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 for witness-related defects.

Pursuant to the Election Day Cutoff, completed mailed ballots must be received by the county board no later than 7:00 p.m. on election day.²³

The State has time after election day to finalize results. Although state law gives county election officials until 12:00 pm on the Saturday after the election to complete the canvass and certify the count to the Board of State Canvassers, S.C. Code Ann. § 7-17-20, the Board of State Canvassers has the authority to *begin its canvassing* 15 days after the election, *id.* § 7-17-230. “Within twenty-four hours of the completion of the canvassing and counting of ballots, the persons in charge of each such election in each county shall notify the State Election Commission of the unofficial results of such election in each such county.” *Id.* § 7-13-1160. But “failure” to do so does not “invalidate the votes cast” within the county. *Id.*

State law does not mandate a time by which officials must release election results. Results of the tabulation of absentee ballots “must not be publicly reported until after the polls are closed.” S.C. Code Ann. § 7-15-420. Under current law, at the “close of the election,” the “managers and clerk shall immediately proceed publicly to open the ballot boxes and count the ballots therein.” S.C. Code Ann. § 7-13-1110. They “shall continue such count, without adjournment or interruption, until it is completed.” *Id.* Then, they “make and sign such statement of the result thereof as the nature of the election shall require.” *Id.*

²³ Absentee Voting, S.C. Election Comm’n, <https://www.scvotes.org/absentee-voting> (last visited May 6, 2020).

E. Impact of Challenged Provisions on South Carolina Voters

Unless the Challenged Provisions are enjoined, Plaintiffs will be faced with an untenable choice between exercising their right to the franchise and keeping themselves and other people in their community safe.

For example, Plaintiff Deon Tedder is a 30-year-old registered voter who cannot vote absentee under the State's interpretation of S.C. Code Ann. § 7-15-320. He wants to vote during the June primary, but is concerned about going to the polls and coming into "close contact with people who could be infected with COVID-19 for a prolonged period of time" and "touch[ing] common objects." Ex. 1, Declaration of Deon Tedder ("Tedder Decl."), ¶ 5. Doing so would risk not only his health but the health of his loved ones and community. *Id.* As an African-American, he is "particularly concerned about becoming infected and spreading the disease to others, as African Americans are infected and die at a disproportionately higher rate than any other demographic group in the State." *Id.*

Plaintiff Kylon Middleton, a 45-year-old registered voter, shares Tedder's concerns. Middleton believes that he does not qualify to vote by absentee ballot under the State's current interpretation of the voting-by-absentee-ballot provision. He is especially wary of voting in person because of his prior experiences waiting in long lines "at times for hours." Ex. 2, Declaration of Kylon Middleton ("Middleton Decl."), ¶ 6. "As recently as the Charleston mayoral runoff election in November 2019, [he] waited in a line that wrapped around the building for over an hour only to enter a cramped space, sometimes standing shoulder-to-shoulder with other voters, to check-in and cast my ballot." *Id.* Middleton is aware that many poll workers have refused to work on election day due to the pandemic, so "the number of available polling places will shrink, meaning voters will have to wait in even longer lines." *Id.* As an African-American and leader of a predominantly African-American congregation, he is acutely aware of the disproportionate impact of COVID-19

on the community. If he is required to go to the polls on election day, he will be “forced to choose” between protecting his life and the health of his community and his right to vote. *Id.* ¶ 7.

LEGAL STANDARD

I. Preliminary Injunction

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)). The Court “take[s] judicial notice of official government reports and statistics” including election and voter registration statistics and public health reports from government agencies. *United States v. Cecil*, 836 F.2d 1431, 1452 (4th Cir. 1988) (citations omitted). 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).

II. First and Fourteenth Amendment Undue Burden Claims

Courts considering challenges to state election laws based on a claim that they impose an undue burden on the right to vote must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that a plaintiff seeks to vindicate against the justifications put forward by the state for the burdens imposed. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). “However slight th[e] burden [on the right to vote] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) (quotation marks omitted). Thus, even “a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that

it serves are minor, notwithstanding that the regulation is rational.” *McLaughlin v. N. Carolina Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995). Moreover, a court need not accept a state’s justifications at face value, particularly where those justifications are “speculative,” otherwise it “would convert *Anderson-Burdick*’s means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe.” *Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018); *see McLaughlin*, 65 F.3d at 1221 n.6.

III. Twenty-Sixth Amendment Claim

The decision to parcel out voting rights “on account of age” is prohibited by the plain text of the 26th Amendment to the U.S. Constitution, which states that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by . . . any State on account of age.” U.S. Const. amend. XXVI, § 1. The goal of the amendment “was not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions.” *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 243 (N.J. 1972). The Twenty-Sixth Amendment guarantees a substantive right to participate equally in the electoral process and broadly protects voters against not just blatant, but also subtle forms of discrimination based on age. *See, e.g., Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972) (holding based on “[h]istory and reason” that the Twenty-Sixth Amendment’s “prohibition against denying the right to vote to anyone eighteen years or older by reason of age applied to the entire process involving the exercise of the ballot and its concomitants”). As a result, laws that deny or abridge the right to vote on account of age, even in part, are unconstitutional. *See id.*

ARGUMENT

I. Plaintiffs are likely to succeed on their claims against the Challenged Provisions.

First, Plaintiffs have made a clear showing that they are likely to succeed on their challenges to South Carolina's Absentee Ballot Age Restriction. Indeed, this restriction would be unconstitutional under any circumstances as prohibited by the Twenty-Sixth Amendment, but it is plainly unsustainable under the present circumstances, where forcing voters under 65 to vote en masse in person at the polls will not only threaten the health of countless of those voters and the poll workers who attend to them, but also their fellow voters, the family members who they return home to, and their broader community. As applied today, the Absentee Ballot Age Restriction also violates the First and Fourteenth Amendments.

Plaintiffs support the *Thomas* Plaintiffs' challenge to the Absentee Ballot Age Restriction on the basis of the First and Fourteenth Amendments. *See Thomas*, ECF No. 7-1. Requiring voters to risk contracting a potentially deadly disease from voting in person on election day imposes a severe burden on the right to vote and triggers strict scrutiny. Although individuals with underlying conditions (some quite common, like asthma) are at higher risk for severe complications, COVID-19 can affect everyone. Some otherwise healthy young people have been severely affected, and there is no way to predict whether one will fall into that category. In addition, the Absentee Ballot Age Restriction directly contradicts government guidance about what all South Carolinians should do during this pandemic. This guidance is necessitated in large part by the fact that it is becoming clearer that the spread of the virus is propelled in many cases by entirely asymptomatic carriers. Thus, self-isolating social distancing is intended to and necessary to keep everyone safe—it does not turn on the risk factor of each unique individual. There is no evidence that public health recommendations will change by June 9.

Courts can and must take external circumstances into account when determining whether the application of an elections law in any given election may impose an unconstitutional burden on voting rights. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020); *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); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (finding in ballot-access case 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”).

Because the burdens imposed on Plaintiffs’ rights by the Absentee Ballot Age Restriction under the current context is severe, strict scrutiny requires the court to rigorously examine the state’s interest and the “means [chosen] to achieve those interests, to ensure that . . . requirements are ‘narrowly drawn’” *Wood v. Meadows*, 207 F.3d 708, 714 (4th Cir. 2000). As the *Thomas* Plaintiffs explain, the State has no interest in the Absentee Ballot Age Restriction and, even if it did, the Restriction is not “narrowly drawn.” The State has no interest in requiring people to vote in person on a single day, especially during an unprecedented public-health crisis. Indeed, all government guidance indicates that the State has an interest in keeping people in their homes, *not*

sending them out to congregate for long periods of time. The State’s interest in the health of its citizens is evidenced by S.C. Code Ann. § 7-15-310(4), which allows 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).²⁴ In other words, the Legislature gave voters the option to cast a ballot by mail if an illness or ailment keeps them at home on Election Day.²⁵ Presumably, the intention behind this provision is at least in part to halt the spread of infectious diseases at the polling place. Finally, the Restriction is not narrowly drawn because it burdens the vast majority of South Carolina voters under age 65.

Plaintiffs bring an additional challenge to the Absentee Ballot Age Restriction under the Twenty-Sixth Amendment which independently provides an additional reason why the Restriction must be enjoined. The Absentee Ballot Age Restriction violates the prohibition on “deny[ing] or abridg[ing]” the right to vote “on account of age.” The analysis is simple: on the face of the statute, everyone over age 65 can vote by absentee ballot, whereas those under age 65 can vote by absentee ballot only if they fall into narrow, enumerated exceptions. During this pandemic, the Absentee Ballot Age Restriction forces younger voters to risk their lives because they must vote in person on election day. Although elderly populations are at higher risk for severe complications from the

²⁴ Although South Carolina has not construed this provision to include individuals quarantining at home to avoid the spread of COVID-19, *compare* S.C. Code Ann. § 7-15-20 (absentee registration and voting laws “shall be liberally construed”), several other states have construed similar laws to do so. *Thomas*, ECF No. 7-1 at 34-35.

²⁵ As a result, the Absentee Ballot Age Restriction fails even under a lower level of scrutiny. The State does not assert that the Absentee Ballot Age Restriction serves the state’s interest in combating voter fraud, ECF No. 1-1, nor could it. Voter fraud is virtually non-existent in SC. *See Thomas*, ECF No. 7-1 at 41 n.64.

virus, 11.4% of the COVID-19 related deaths and over 50% of the reported cases in South Carolina are people under age 60.²⁶

Plaintiffs Middleton and Tedder are two South Carolinian voters faced with the untenable choice created by the State's interpretation of the vote-by-absentee-ballot statute. If they want to vote in the June 9 election, they must go to a polling place in person on the same day as all other registered voters under the age of 65. Plaintiff Middleton has recently experienced long lines when voting in South Carolina, and has every reason to expect he will do so again on June 9. Standing in close proximity to hundreds of other people during a global pandemic is a risky proposition for anyone, let alone for members of the African-American community who are more likely to contract and suffer severe complications from the virus. Absent a preliminary injunction, these Plaintiffs will either be disenfranchised or have to take a serious health risk.

Second, Plaintiffs have also made a clear showing that South Carolina's Witness Requirement is likely unconstitutional. Plaintiffs join in *Thomas* Plaintiffs' arguments about the Witness Requirement. *See Thomas*, ECF No. 7-1. The Witness Requirement requires a voter to interact with and touch the same object as another person. All evidence indicates that COVID-19 spreads from people getting close to other people and/or touching the same objects as another person. And because one cannot know for sure that another person is *not* carrying COVID-19, government and public health officials have told people to assume that anyone could be infected and infect another person. As a result, requiring those who vote absentee by mail to obtain a witness signature and address is burdensome. The requirement is especially burdensome for

²⁶ DHEC, SC Demographic Data (COVID-19), <https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-demographic-data-covid-19>.

individuals who live alone or with someone who cannot be a witness (e.g., a young child). Over 550,000 South Carolinians live alone, according to 2018 data.²⁷ The proportion of South Carolinians who live alone is also more significant in the State's African American population. Indeed, 33.2% of all African American households consist of people who live alone compared with only 28.2% of white households. As the *Thomas* Plaintiffs describe, this severe burden on the right to vote will fall more heavily on older people, persons with disabilities, and African Americans, among others.²⁸ People in those groups already face a higher risk of death or serious complications from COVID-19. "Black South Carolinians 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." *Thomas*, ECF No. 7-1 at 37-38.

Unless it is enjoined, many South Carolina voters will be unable to cast their ballots because of the Witness Requirement. Evidence shows that the Witness Requirement disenfranchises people, especially during a pandemic. In Wisconsin's April 2020 primary election, 12,000 ballots were received and rejected for "insufficient witness certifications."²⁹ And in South Carolina, even before the pandemic, hundreds of absentee ballots were rejected on those grounds. *Thomas*, ECF No. 7-1 at 38-39. This severe burden is unjustified because the Witness Requirement

²⁷ U.S. Census Bureau, American Community Survey Results (2018), https://data.census.gov/cedsci/table?q=south%20carolina%20single%20person%20households&g=0400000US45&hidePreview=false&tid=ACSDP1Y2018.DP02&vintage=2018&layer=VT_2018_040_00_PY_D1&cid=DP02_0001E.

²⁸ *Id.*

²⁹ J.R. Ross, 22,820 Wisconsin absentee ballots were rejected for various reasons, WISN 1130 (Apr. 18, 2020), <https://newstalk1130.iheart.com/content/2020-04-18-22820-wisconsin-absentee-ballots-were-rejected-for-various-reasons/>. It is unknown what percentage of those ballots were sent during the ~24-hour period when the district court's ruling replacing the witness-signature requirement with a personal affidavit for those who were unable to safely obtain a witness signature with reasonable effort was intact. Nevertheless, those ballots evince that individuals were unable to safely obtain a witness with reasonable effort.

does not serve any state interest that can justify it. In fact, the State’s top elections officials have conceded that the Witness Requirement serves no purpose and ask for its removal. ECF No. 1-1. As the *Thomas* Plaintiffs point out, voters in the military and those abroad do not need a witness. S.C. Code Ann. § 7-15-380. The witness need not even print their name. *Id.* Voter fraud in South Carolina is exceedingly rare, and there are numerous other attestation and verification requirements and criminal penalties to prevent it. *Thomas*, ECF No. 7-1 at 18-19, 41. Indeed, most states do not have a witness or notarization requirement and there is no evidence that they are overrun by election integrity issues.

Finally, Plaintiffs are also likely to succeed on their claim that South Carolina’s rejection of mailed absentee ballots not received by the Election Day Cutoff is unconstitutional under the current circumstances. Absent an injunction, the Election Day Cutoff will disenfranchise thousands of South Carolina voters, many entirely due to circumstances completely out of their control. In the 2018 statewide general election, the State discarded over 1,300 ballots received after the Election Day Cutoff.³⁰ That number will only increase as more eligible people choose to vote absentee due to the pandemic.³¹ First-time absentee voters are more likely to mail their ballots later since they are also likely to be less familiar with voting by mail, including the Election Day Cutoff. Nor would it be unreasonable for them to think that their ballots can be mailed later in the election cycle as long as they are postmarked by Election Day, as many other deadlines in South Carolina voters’ lives—including voter registration deadlines—are postmark deadlines. S.C. Code Ann. § 7-5-155 (“The postmark date of a mailed application is considered the date of mailing. If

³⁰ S.C. Election Comm’n, Historical Absentee Reports, [https://www.scvotes.org/sites/default/files/Absentee%20Stats%202019-02-15%20\(GE\).xls](https://www.scvotes.org/sites/default/files/Absentee%20Stats%202019-02-15%20(GE).xls).

³¹ The number will also increase if this Court strikes down the Absentee Ballot Age Restriction.

the postmark date is missing or illegible, the county board of voter registration and elections must accept the application if it is received by mail no later than five days after the close of the registration books before any election.”).

As of May 6, nearly 66,000 South Carolinians had requested an application to vote by absentee ballot for the June primary election.³² In comparison, in the 2018 primary, only approximately 19,000 South Carolinians voted absentee by mail.³³ This influx of requests is likely to create scenarios where voters who lawfully request absentee ballots by 5:00 p.m. on June 5 do not even receive them by June 9, the election day deadline. Commission Director Andino noted that “[e]ven before the coronavirus pandemic, elections officials were challenged with a significant increase in the number of absentee ballots.” ECF No. 1-1. In fact, *even earlier this year before the state of emergency*, some counties in South Carolina mailed absentee ballots late to voters.³⁴ Moreover, the Postal Service faces unprecedented challenges from the pandemic and budgetary constraints.³⁵

³² S.C. Election Comm’n, Fact Sheets (May 6, 2020), [https://www.scvotes.org/sites/default/files/2020-05-06%20Absentee%20Stats%20\(Statewide%20Primaries\)_0.xlsx](https://www.scvotes.org/sites/default/files/2020-05-06%20Absentee%20Stats%20(Statewide%20Primaries)_0.xlsx).

³³ Jason Raven, *Because of coronavirus concerns, officials prepare for increase in SC residents voting absentee by mail in primaries*, WIS News 10, Apr. 23, 2020, <https://www.wistv.com/2020/04/23/because-coronavirus-concerns-officials-prepare-increase-sc-residents-voting-absentee-by-mail-primaries>.

³⁴ Matt Moore, *Mailed absentee ballots sent late in Greenville County*, <https://www.wyff4.com/article/south-carolina-democratic-primary-absentee-ballots-mailed-late/31138127> (Feb. 28, 2020).

³⁵ Kyle Cheney, *House panel warns coronavirus could destroy Postal Service by June*, Politico (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>; Nicholas Fandos & Jim Tankersley, *Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail*, N.Y. Times (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-stadiest-services-the-mail.html>.

The recent experience in the primary election Wisconsin is instructive. There, thousands of voters did not receive their ballots by the election day deadline due to the increase in absentee requests and mail delays.³⁶ The district court, in an order affirmed by the Supreme Court, extended the deadline by six days. *See Democratic Nat'l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020), *clarified*, ECF No. 122 (W.D. Wis. Apr. 3, 2020), *stayed in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). As a result, ballots received by April 13 counted as long as they were postmarked³⁷ by election day, April 7. *Id.* Over 140,000 ballots were counted that would have otherwise been discarded because of that extension.³⁸ In addition, approximately 4,678 additional absentee ballots were rejected because

³⁶ <https://elections.wi.gov/node/6825>; Daphne Chen *et al.*, ‘They should have done something’: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows, Milwaukee Journal Sentinel (Apr. 21, 2020), <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/>. The investigation was conducted by the Milwaukee Journal Sentinel, the PBS series FRONTLINE, and Columbia Journalism Investigations.

³⁷ The Postal Service does not follow uniform standards and procedures in postmarking absentee ballots. The term “postmark” refers to any type of imprint applied by the U.S. Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before election day unless the preponderance of the evidence demonstrates it was mailed after election day.

³⁸ The data regarding ballots that arrived between April 8 and April 13 can be found at <https://elections.wi.gov/blog>; see also <https://electionlawblog.org/?p=110746>. As of 8 p.m. on April 7, there had been 990,129 absentee ballots returned. <https://elections.wi.gov/blog>. WEC reports that, ultimately, 1,132,923 absentee ballots were returned and counted, suggesting that 142,794 ballots were able to be counted that would not otherwise have been. See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf>.

they arrived after 4:00 p.m. on April 13; it is not yet known how many of these rejected ballots were timely mailed on or before April 7.³⁹

As the Supreme Court recognized, extending the Election Day Cutoff does not impede the State’s interest in orderly elections. Given that the Board of State Canvassers has the authority to begin its canvassing 15 days after the election, S.C. Code Ann. § 7-17-230, a 10-day extension of the ballot-receipt deadline will not meaningfully disrupt election procedures. This Court can order county clerks to wait to begin counting ballots until the new receipt deadline, *id.* § 7-13-1110, and extend the deadline for county officials to complete the canvass and certify the count to the Board of State Canvassers from noon on the Saturday after the election (June 13, here) to noon on the Tuesday after the new receipt deadline (here, June 23), *id.* § 7-17-20. Then the Board of State Canvassers can begin canvassing on June 24, 15 days after June 9. The Court may want to affirmatively prohibit release of any results until the extended absentee receipt deadline.⁴⁰ In Wisconsin, results were not announced until the new receipt deadline passed on April 13 at 4:00 p.m.

As a result, an extension of the Election Day Cutoff is necessary to avoid unconstitutionally disenfranchising thousands of South Carolina voters.

II. Plaintiffs will suffer irreparable harm absent a preliminary injunction.

As the *Thomas* Plaintiffs explain: “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); *see also Obama for Am. v. Husted*, 697 F.3d

³⁹ *See* 2020 Spring Election and Presidential Preference Vote Ballot Status as of April 17, 2020, Wis. Elections Comm’n, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf>.

⁴⁰ However, an affirmative prohibition might not be necessary if county clerks cannot even open the ballot boxes until the new receipt deadline. *See* S.C. Code Ann. § 7-13-1110.

423, 436 (6th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011) (infringement on constitutional rights caused irreparable harm); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm.”). “[O]nce 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. “[S]erious, lasting illness or death” is also irreparable injury. *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020).

Plaintiffs (and the *Thomas* Plaintiffs) and thousands of South Carolina’s voters will suffer irreparable injury absent a preliminary injunction. Given the Absentee Ballot Age Restriction, *almost all* voters under 65 must either risk serious, lasting illness, and even death or not vote. In addition, the restriction based on only age is a continuing violation of the Twenty-Sixth Amendment. Voters who live alone must either risk serious, lasting illness or not have their votes counted. Many of those who live alone are age 65 and over and/or African-American and would be risking death. Finally, the Election Day Cutoff will disenfranchise thousands of South Carolinians for no justifiable reason. Those who do not receive their ballots on time to mail them back will be faced with the same untenable choice: risk serious illness/death or not vote.

This harm is imminent. The election is just over a month away, and COVID-19 continues to spread at alarming rates. There is no evidence that the COVID-19 threat will abate by the early June primary. ACLU Br. at 38 (citing 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”). Governor McMaster can only “hope” that “businesses and activities . . .

may be safely resumed and conducted using personal safety precautions” “by late June,” well after the election. *Thomas*, ECF No. 1-1 at 1.

III. The balance of hardships and the public interest favor the Plaintiffs.

The weight of the equities tips entirely to the Plaintiffs’ side. An injunction would protect the lives and health of thousands of South Carolinians *and* prevent disenfranchisement by removing barriers to voting during a time of an unprecedented public health crisis. The Commission effectively conceded that it can manage the administration related to eliminating the Absentee Ballot Age Restriction and extending voting by absentee ballot to everyone and dispensing with the Witness Requirement when it made its request to state officials that they do exactly that. ECF No. 1-1. But, in any event, any administrative burden imposed by enjoining any of the Challenged Provisions cannot justify disenfranchisement. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding “administrative convenience” cannot justify practices that impinge upon fundamental rights); *see also Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018) (holding increased administrative burden of “disseminating information” and “training poll managers. . . is minimal compared to the potential loss of a right to vote”); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (“The potential hardships that Georgia might experience are minor when balanced against the right to vote, a right that is essential to an effective democracy.”); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) (“Any potential hardship [to the state] imposed by providing the same opportunity . . . for [] voters pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted.”). “A state is not 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.” *Thomas*, ECF No. 7-1 at 45-46 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (quotation marks omitted)).

Here, as discussed above, the county boards of canvassers has until noon on June 13 to transmit its findings to the State Board of Canvassers, which need not begin its canvass until 15 days after the election. S.C. Code Ann. § 7-17-20; *id.* § 7-17-230. Other provisions of South Carolina law contemplate that votes would come in a few days after election day. *Id.* § 7-13-710(C)(1) (voters who cast provisional ballots without photo ID can present photo ID anytime before the county certifies the results). The administrative burden of counting these ballots cannot be any larger than going to “no-excuse” absentee voting, which the Commission recommends. In addition, the Wisconsin Elections Commission reported no problems managing a recent similar extension.⁴¹

Without question, an injunction that protects the public from more exposure to the coronavirus and avoids disenfranchisement is in the public interest. The public interest is served when “as many qualified voters as possible” can vote. *LWV*, 769 F.3d at 247-48; *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also* S.C. Code Ann. § 7-15-20 (absentee registration and voting laws “shall be liberally construed”). In addition, the public interest is plainly served when the public can avoid risking serious illness or death. *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”). That is why governments, including

⁴¹ Wis. Elections Comm’n, *Summary of April 7, 2020 Election*, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf>.

South Carolina's, have told people to stay home.⁴² The Absentee Ballot Age Restriction, Witness Requirement, and Election Day Cutoff do not meaningfully advance the state's interests in orderly elections and combating voter fraud, and any advancement is far outweighed by the burden on South Carolinians' right to vote in these unprecedented times.

CONCLUSION

As the Supreme Court recognized long ago, “[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.” *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted). For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction:

- 1) prohibiting Defendants from enforcing S.C. Code Ann. § 7-15-320 and § 7-15-310, the Absentee Ballot Age Restriction, to prevent any eligible voter, regardless of age, 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;
- 3) prohibiting Defendants from enforcing the requirement under S.C. Code Ann. § 7-15-230 that absentee ballots must be received by 7:00 p.m. on Election Day to be counted and extending the deadline to June 19, provided that the ballots were postmarked or mailed on or before June 9;
- 4) ordering the counting of ballots to begin on June 19, *see* S.C. Code Ann. § 7-13-1110, and giving county election officials until June 23 to complete the canvass and certify the results to the State Board of Canvassers, *id.* § 7-17-20;
- 5) prohibiting election officials from releasing results until after 7:00 p.m. on June 19, *see* Fed. R. Civ. P. 65;
- 6) ordering Defendants to publicly inform all South Carolina voters about the elimination of these requirements in coordination with city and county election officials; and

⁴² S.C. Exec. Order No. 2020-21, at 6; DHEC, Protect Yourself & Those Around You (COVID-19), <https://www.scdhec.gov/protect-yourself-those-around-you-covid-19> (last visited Apr. 21, 2020).

7) granting such other and further relief as the Court deems just and proper.

Dated this 7th day of May, 2020.

Respectfully submitted,

/s/ Christopher J. Bryant

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** Pro Hac Vice Applications*
Forthcoming

Exhibit 1

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

KYLON MIDDLETON; DEON TEDDER;
AMOS WELLS; CARLYLE DIXON;
TONYA WINBUSH; ERNESTINE MOORE;
SOUTH CAROLINA DEMOCRATIC
PARTY; DNC SERVICES
CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE; and DCCC,

Plaintiffs,

v.

MARCI ANDINO, in her official capacity as
Executive Director of the South Carolina State
Election Commission; JOHN WELLS, in his
official capacity as Chair of the South Carolina
State Election Commission; and CLIFFORD J.
EDLER and SCOTT MOSELEY, in their
official capacities as members of the South
Carolina State Election Commission,

Defendants.

Case No. 3:20-cv-1730-JMC

DECLARATION OF DEON TEDDER

I, Deon Tedder, make this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

1. I am 30 years old and a resident of Charleston County, South Carolina. I have lived in South Carolina since 2008 when I began attending South Carolina State University, and I registered to vote in the State soon after enrolling at the University of South Carolina School of Law in 2012.

2. I am a Democratic candidate for South Carolina State House District 109 and actively campaigning in the June 9, 2020 Democratic Party primary.

3. I take voting very seriously. I have regularly voted in elections since I first registered at age 18.

4. Though I am under 65 years old, I have previously qualified to vote absentee in South Carolina because I was traveling outside of the County or State on election day. However, because of the COVID-19 pandemic and my fear of becoming infected, I will not be leaving the County on the day of the June primary and will not qualify for absentee voting.

5. Because I am under the age of 65 and do not otherwise qualify to vote absentee, I will be required to vote in person on election day for the June primary. I want to vote during the June primary, but I am concerned that having to cast my ballot in person on election day will require me to abandon social distancing requirements, be in close contact with people who could be infected with COVID-19 for a prolonged period of time, touch common objects, and increase my exposure to the disease. Though the elderly have a greater risk of serious illness and death because of COVID-19, I know that my age does not make me immune to the disease. I am concerned about contracting COVID-19 and potentially spreading it to my loved ones and vulnerable members of my community. And as an African American, I am particularly concerned about becoming infected and spreading the disease to others, as African Americans are infected and die at a disproportionately higher rate than any other demographic group in the State.

6. Requiring most voters to cast their ballots in person on election day because they have not yet turned 65 is a barrier to their ability to vote. Without the chance to vote absentee, I and other voters must make the impossible choice between exercising our right to vote and protecting our lives and the lives of those in our communities.

7. If I had the opportunity, I would vote absentee by mail in the June primary to prevent exposure to and further spread of COVID-19.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 7th day of May, 2020



Deon Tedder

Exhibit 2

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

KYLON MIDDLETON; DEON TEDDER;
AMOS WELLS; CARLYLE DIXON;
TONYA WINBUSH; ERNESTINE MOORE;
SOUTH CAROLINA DEMOCRATIC
PARTY; DNC SERVICES
CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE; and DCCC,

Plaintiffs,

v.

MARCI ANDINO, in her official capacity as
Executive Director of the South Carolina State
Election Commission; JOHN WELLS, in his
official capacity as Chair of the South Carolina
State Election Commission; and CLIFFORD J.
EDLER and SCOTT MOSELEY, in their
official capacities as members of the South
Carolina State Election Commission,

Defendants.

Case No. 3:20-cv-1730-JMC

DECLARATION OF KYLON MIDDLETON

I, Kylon Middleton, make this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

1. I am 45 years old and a resident of Charleston County, South Carolina. I have lived and maintained a residence in South Carolina for my entire life and have been registered to vote in the State since I was 18 years old.

2. I am the senior pastor of Mount Zion AME Church in Charleston. Due to the COVID-19 pandemic and the social distancing recommendations issued by the Center for Disease Control and Prevention to slow the spread of the disease, we no longer hold church service in

person. Our congregation is predominately African American, and I am acutely aware that African Americans contract the virus and die because of COVID-19 at disproportionately higher rates than other demographic groups in South Carolina. Our congregation frequently expresses their fears about their risk of exposure to COVID-19 and the serious and potentially fatal health effects they may suffer. To prevent increased exposure among churchgoers and the community, the Mount Zion AME Church is no longer open to the public. Instead, I lead worship from my home, and we stream our church service online.

3. I am also a Democratic candidate for Charleston County Council and actively campaigning in the June 9, 2020 Democratic Party primary.

4. Voting is very important to me. I have voted in countless elections since I first registered and typically vote in person on election day. Though I am under the age of 65, I have previously voted absentee due to my employment obligations or planned vacations that prevented me from going to the polls on election day. However, due to the COVID-19 pandemic, I will no longer be able to qualify for absentee voting. I will no longer be able to rely on my employment obligations because the Mount Zion AME Church is closed to the public. And I do not plan on traveling or taking a vacation during this pandemic to prevent exposure to the disease.

5. Because I am under the age of 65 and do not otherwise qualify to vote absentee, I will be required to vote in person on election day for the June 9, 2020 primary.

6. I want to vote in the June primary election, but I am worried about having to cast my ballot in person on election day. I am concerned that having to stand in long lines for potentially hours at a time, in a confined space and in close proximity with others who may cough, sneeze, or have the disease but are asymptomatic, and touch common surfaces will put me and other voters at risk of exposure to COVID-19 and further the spread of disease throughout the community. I

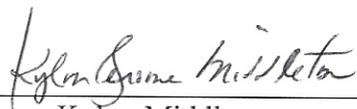
have waited in long lines in previous elections, at times for hours. As recently as the Charleston mayoral runoff election in November 2019, I waited in a line that wrapped around the building for over an hour only to enter a cramped space, sometimes standing shoulder-to-shoulder with other voters, to check-in and cast my ballot. It was clear that the county election officials did not anticipate the large turnout for the runoff and did not provide for sufficient space. I am aware of reports that for the June primary, some poll workers are refusing to work on election day due to the pandemic and the number of available polling places will shrink, meaning voters will have to wait in even longer lines.

7. I am also aware of reports that voters and poll workers in other states have been infected with COVID-19 at polling places on election day. And as an African American, I know that I am at a higher risk of infection and, potentially, death. My congregants have also openly expressed their fears of exposing themselves to COVID-19 if they are required to vote in person on election day. The June primary election is only a few weeks away, and there is no end to the pandemic in sight. The number of COVID-19 infections and deaths in South Carolina is only continuing to grow. Without expansive testing or contact tracing in the State, and with the reopening of more businesses, I am concerned that COVID-19 will only spread throughout our communities at increased rates and affect the lives of thousands more. If required to go to the polls to vote in person on election day for the June primary, I and other voters will be forced to choose between protecting our lives and the lives of those around us and exercising our right to vote.

8. I would like the opportunity to vote absentee by mail in the June primary election rather than put my life at risk by having to vote in person on election day. If I were not restricted from voting absentee because of my age, I would apply for and cast my absentee ballot by mail as soon as possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 6th day of May, 2020



Kylon Middleton