

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

MARY T. THOMAS, NEA RICHARD,)
JEREMY RUTLEDGE, THE FAMILY)
UNIT, INC., and the SOUTH CAROLINA)
STATE CONFERENCE OF THE NAACP)

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;)
JOANNE DAY, CLIFFORD J. EDLER,)
LINDA MCCALL, and SCOTT MOSELEY,)
in their official capacities as members of the)
South Carolina State Election Commission;)
and HENRY D. MCMASTER, in his official)
capacity as Governor of South Carolina,)

Defendants,)

and)

South Carolina Republican Party,)

Intervenor–Defendant.)

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

**INTERVENOR–DEFENDANT SOUTH
CAROLINA REPUBLICAN PARTY’S
MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the intervenor–defendant, South Carolina Republican Party (the SCGOP), will move before the Honorable J. Michelle Childs, United States District Judge for the District of South Carolina, ten days after service hereof, or as soon thereafter as counsel may be heard, for an Order granting summary judgment in favor of the defendants and dismissing the amended complaint, with prejudice, pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, the plaintiffs—Mary T. Thomas, Nea Richard, Jeremy Rutledge, The Family

Unit, Inc., and the South Carolina Conference of the NAACP—failed as a matter of law to prove any of their claims, and they are not entitled to a mandatory permanent injunction. The Court should therefore grant this motion and decline the plaintiffs’ invitation to fundamentally change the landscape governing absentee voting in South Carolina on the eve of the 2020 election.¹

BACKGROUND

“Integrity in elections is foundational.” Anderson v. S.C. Election Comm’n, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012) (per curiam). And “[i]t is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.” Rosario v. Rockefeller, 410 U.S. 752, 761 (1973). After all, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Storer v. Brown, 415 U.S. 724, 730 (1974).

This action in federal court nevertheless stems from the plaintiffs’ personal distaste for state law governing absentee voting in South Carolina. In the latest bout of pandemic politics, the plaintiffs—none of whom are injured or burdened by these laws—ask this Court to rewrite South Carolina’s election code by erasing certain statutory criteria to expand the State’s absentee voting privilege for the upcoming election. At bottom, the plaintiffs disagree, from a public policy standpoint, with the South Carolina General Assembly’s decision to grant a pandemic exception only for the June 2020 primary. But “[f]ederal courts resolve cases and controversies, not crusades.” Timpson ex rel. Timpson v. McMaster, 437 F. Supp. 3d 469, 472 (D.S.C. 2020).

Everyone agrees COVID-19 is serious. Over 100,000 South Carolinians have contracted the novel coronavirus, and it is reported that almost 2,000 have lost their lives to the disease. And

¹ Pursuant to Local Civil Rule 7.04, DSC, a supporting memorandum is not submitted because a full explanation of the motion is contained in this filing and a memorandum would serve no useful purpose. Unless otherwise noted below, the SCGOP relies upon and incorporates by reference the State Election Commission defendants’ legal arguments in their motion for summary judgment. See ECF No. 108-1.

it has created a number of challenges for individuals, families, businesses, and every level and branch of government. The federal courts certainly have not been immune to these challenges. Social distancing, face masks, face shields, gloves, and hand sanitizer have become the new norm. What is more, everyone agrees that the upcoming general election must be conducted in a safe manner—consistent with CDC guidelines—to protect voters and folks serving as poll workers. Fortunately, that happened in the June primary. The State Election Commission has imposed, and will continue to impose, measures at polling locations to ensure the safety of all those who choose to cast their votes in person.

Voters who choose not to vote in person, however, are eligible to vote absentee if they meet any of a host of exceptions under South Carolina law. See S.C. Code Ann. §§ 7-15-310 & -320. Although Petitioners suggest it is too burdensome to meet these requirements, the statute actually covers a huge swath of voters:

(A) Qualified electors in any of the following categories must be permitted to vote by absentee ballot in all elections when they are absent from their county of residence on election day during the hours the polls are open, to an extent that it prevents them from voting in person:

- (1) students, their spouses, and dependents residing with them;
- (2) persons serving with the American Red Cross or with the United Service Organizations (USO) who are attached to and serving with the Armed Forces of the United States, their spouses, and dependents residing with them;
- (3) governmental employees, their spouses, and dependents residing with them;
- (4) persons on vacation (who by virtue of vacation plans will be absent from their county of residence on election day); or
- (5) overseas citizens.

(B) Qualified electors in any of the following categories must be permitted to vote by absentee ballot in all elections, whether or not they are absent from their county of residence on election day:

- (1) physically disabled persons;
- (2) persons whose employment obligations require that they be at their place of employment during the hours that the polls are open and present written certification of that obligation to the county board of voter registration and elections;
- (3) 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;
- (4) persons attending sick or physically disabled persons;
- (5) persons admitted to hospitals as emergency patients on the day of an election or within a four-day period before the election;
- (6) persons with a death or funeral in the family within a three-day period before the election;
- (7) persons who will be serving as jurors in a state or federal court on election day;
- (8) persons sixty-five years of age or older;
- (9) persons confined to a jail or pretrial facility pending disposition of arrest or trial; or
- (10) 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.

If a voter falls into one of these categories, that person submits an application to the county election and voter registration office. See S.C. Code Ann. § 7-15-210. Upon receipt, the county office returns a ballot to the applicant. The applicant then votes and inserts the completed ballot

in the envelope provided by the county office.² But the applicant must first sign an oath affirming he or she is “duly qualified to vote.” S.C. Code Ann. § 7-15-220. And the applicant’s signature must be accompanied by a witness’s signature. Id. Once the applicant mails the ballot to the county election and voter registration office, that office reviews the application and ballot to ensure all requirements are met. See S.C. Code Ann. § 7-15-230. An absentee ballot is not counted if the ballot is not signed, witnessed, and returned prior to polls closing. Id.

The General Assembly crafted this statutory scheme to ensure registered voters had ample opportunities to vote via absentee ballot. In doing so, the General Assembly sought to preserve the integrity of elections by developing a scheme that ensured the reliability of our voting system and protected it from fraud. As a matter of public policy, South Carolina still prefers in-person voting. Here, despite the wide availability of absentee voting detailed above, the plaintiffs are trying to seize on the current global pandemic to change the law through the courts. The plaintiffs want the Court to excise any absentee voter requirements and rewrite the law to say the election may be conducted, in full, via mail-in absentee ballot with zero protections in place. The Supreme Court of South Carolina, however, already rejected their cohorts’ invitation to do so just a few months ago. See Bailey v. S.C. State Election Comm’n, ___ S.C. ___, 844 S.E.2d 390 (2020).

In their amended complaint, the plaintiffs ask this Court to enjoin the defendants from enforcing South Carolina law that establishes categories of “persons qualified to vote by absentee ballot” (the excuse requirement) and requires a witness signature on the absentee ballot (the witness requirement). The plaintiffs argue the Court must strike down these challenged requirements because they (1) place an unreasonable burden on the right to vote in violation of the

² Alternatively, a voter may vote absentee in person. After the voter submits an application, the county election and voter registration office then provides the voter a ballot or directs the voter to vote at a voting machine. Or the voter could drop off the absentee ballot to the office or have someone else—subject to certain limitations—do so on his or her behalf.

First and Fourteenth Amendments, (2) run afoul of Section 2 of the Voting Rights Act (the VRA), and (3) violate Title II of the Americans with Disabilities Act (the ADA). While the plaintiffs use the COVID-19 pandemic as justification to challenge these laws, this is merely a means to an end because they have been on the books for decades.

Respectfully, the plaintiffs are overplaying their hand. The SCGOP certainly agrees the current situation has created new challenges that the State Election Commission must address to safely administer the upcoming election for South Carolina’s voters and poll workers in the era of COVID-19. But changing our state’s voting laws is up to the South Carolina General Assembly. And although we are in the midst of a global pandemic, the constitution and the rule of law cannot fall by the wayside. The ends do not justify the means—even in the most emergent of times. What inevitably follows is bad law. Because their requested relief is so drastic, the plaintiffs bear a heavy burden of demonstrating entitlement to a mandatory permanent injunction. After all, if successful, this will wreak havoc on the administration of the upcoming general election.

Although the plaintiffs received a preliminary injunction only on the witness requirement, the parties have now had the opportunity to engage in discovery. And the previous injunction has no bearing on the issues now presented on a more fully developed record. This matter thus comes before the Court on the SCGOP’s motion for summary judgment.³

³ The Court should also remain mindful of the posture of the case. Here, the plaintiffs are requesting a mandatory permanent injunction—they want the Court to alter the status quo by ordering the defendants to change the law governing absentee voting on the eve of an election. “Mandatory preliminary injunctive relief in any circumstance is disfavored[] and warranted only in the most extraordinary circumstances.” De La Fuente v. S.C. Democratic Party, 164 F. Supp. 3d 794, 798 (D.S.C. 2016). Although the Court stated in its Order granting a preliminary injunction that the parties did not address the mandatory versus prohibitory distinction, see ECF No. 65 at 23 n.13, respectfully, that was not the case. The SCGOP argued the plaintiffs were seeking a mandatory preliminary injunction. See ECF No. 50 at 7–8. They were then, and they still are now—only this time, the plaintiffs want the Court to permanently rewrite the law. While they received a preliminary injunction only on the witness requirement, as the Court noted, that “does not preclude a different resolution of [the plaintiffs’] claims on a more fully developed record.” Newsom v. Albemarle Cty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003). Now that the parties have a fully developed record, the plaintiffs’ claims fail as a matter of law. And for the reasons set forth below, as well as in the SCGOP’s

STANDARD

It is well-settled that summary judgment is appropriate when no genuine issue of material fact exists in the case. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). “Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy[,] and inexpensive determination of every action.’” Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). Courts have an “obligation . . . to prevent ‘factually unsupported claims’ . . . from proceeding to trial.” Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting Celotex, 477 U.S. at 323–24).

As the Supreme Court has recognized, “a scintilla of evidence in support of the plaintiffs’ position will be insufficient [to overcome summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); see also Austin v. Clark Equip. Co., 48 F.3d 833, 836 (4th Cir. 1995) (stating a plaintiff must come forward with evidence that shows more than some “metaphysical doubt” that genuine factual issues exist). As the party opposing summary judgment, a plaintiff may not rest on mere allegations or denials. See Anderson, 477 U.S. at 248. A plaintiff must produce “significant probative evidence tending to support the complaint” or provide “specific facts showing . . . a genuine issue for trial.” Id. at 248, 249 (quoting First Nat’l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

response in opposition to the plaintiffs’ motion for preliminary injunction, they are not entitled to a permanent injunction. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (holding that, to obtain a permanent injunction, “[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction” (quoting eBay Inc. v. MercExchange, LLC., 547 U.S. 388, 391 (2006))).

ARGUMENT

Having set forth the lens through which the Court must analyze the case, the plaintiffs failed as a matter of law to shoulder their burden of proof. The Court should therefore grant summary judgment in favor of the defendants because the plaintiffs are not entitled to a mandatory permanent injunction that, at bottom, rewrites South Carolina law governing absentee voting and forces the defendants to implement those new laws in the upcoming election.

I. At the outset, the plaintiffs lack standing to bring these claims.

As a threshold matter, the Court should dismiss this action for want of jurisdiction because the plaintiffs failed to establish the critical elements of the “irreducible constitutional minimum” for standing under Article III to the U.S. Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

Article III “restricts the federal courts to the adjudication of ‘cases’ and ‘controversies.’” Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000). To satisfy Article III’s jurisdictional requirement of standing, the plaintiffs must establish “that he ‘(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.’” Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016)). “While each of the three prongs should be analyzed distinctly, their proof often overlaps. Moreover, these requirements share a common purpose—namely, to ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff’s complaint.” Friends of the Earth, Inc., 204 F.3d at 154.

For a plaintiff to establish a cognizable injury in fact, he “must show that he . . . suffered an invasion of a legally protected interest that is concrete and particularized and actual or

imminent, not conjectural or hypothetical.” Spokeo, Inc., 136 S. Ct. at 1548 (quoting Lujan, 504 U.S. at 560). The Supreme Court, of course, has “long recognized that a person’s right to vote is ‘individual and personal in nature.’” Gill, 138 S. Ct. at 1929 (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)). But to demonstrate the requisite standing, voters must allege facts sufficient to show “disadvantage to themselves as individuals.” Id. (quoting Baker, 369 U.S. at 206).

Here, the plaintiffs have not suffered an injury in fact because of the witness requirement and the excuse requirement. Thomas and Rutledge are already eligible to vote absentee in the November 3, 2020 election under existing South Carolina law, see S.C. Code Ann. §§ 7-15-320(b)(1) & (8), and both testified they have access to a witness, see Ex. A, Thomas Dep. Tr. at pp. 12, 13 & 14; Ex. B, Rutledge Dep. Tr. at p. 16. And Richard already testified she voted in person in the June primary and intends to vote in person for the general election too. See Ex. C, Richard Dep. Tr. at pp. 20 & 24. The challenged requirements therefore do not affect her at all. Accordingly, the individual plaintiffs have not suffered an injury in fact.

Turning to the organizational plaintiffs, they fare no better. The Family Unit and the South Carolina Chapter of the NAACP cannot vote, and they have failed to identify a single member of their respective organizations who has suffered an injury in fact due to the excuse and witness requirements. See Warth v. Seldin, 422 U.S. 490, 511 (1975) (recognizing “an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy,” or it “may assert the rights of its members, at least so long as the challenged infractions adversely affect its members’ associational ties”); Md. Hwys. Contractors Ass’n, Inc. v. State of Md., 933 F.2d 1246, 1250 (4th Cir. 1991) (noting “the association may have standing as the representative of its members who have been harmed” (emphasis added)).

Conclusory testimony that some unidentified members may be harmed amounts to nothing more than sheer speculation and is insufficient to survive summary judgment. See Md. Hwys. Contractors Ass’n, Inc., 933 F.2d at 1252 (holding that, given the “evidence of lack of injury to members of the Association, the passing mention of economic harm in a letter of questionable reliability was not enough evidence for a jury to find by a preponderance of the evidence that any member suffered an injury”); White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976) (holding summary judgment was proper because the plaintiff “failed to make any showing beyond mere conclusory allegations”). The organizational plaintiffs here have come forward with no evidence that any of their members have suffered an injury in fact. And the Court should not be in the business of taking jurisdiction over cases to strike down laws solely based upon a hypothetical voter who truly never interacts with any other individuals.

What is more, the plaintiffs cannot show their alleged harms are “fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Lujan, 504 U.S. at 560–61 (alteration in original). Notably, the plaintiffs failed to include the South Carolina General Assembly—the only branch of government to which the South Carolina Constitution vested plenary authority for “regulat[ing] the time, place and manner of elections” and “providing] for the administration of elections and for absentee voting,” S.C. CONST. art. II, § 10—in their legal challenge. The plaintiffs’ beef is with the General Assembly’s exercise of its constitutionally committed discretion under article II, section 10, not the actions of any of the named defendants.

“To ensure that the Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society,’ a plaintiff may not invoke federal-court jurisdiction unless he can show ‘a personal stake in the outcome of the controversy.’” Id. (quoting Allen v. Wright, 468

U.S. 737, 750 (1984); Baker v. Carr, 369 U.S. 186, 204 (1962)). After all, federal courts are “not responsible for vindicating generalized partisan preferences.” Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019) (quoting Gill, 138 S. Ct. at 1933–34).

Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.

Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011). The standing requirement “tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

Here, the plaintiffs have suffered no injury. They are merely asking the Court to invalidate laws with which they personally disagree on policy grounds. Accordingly, the Court should dismiss the complaint with prejudice for want of subject matter jurisdiction.

II. Principles of separation of powers, federalism, and comity—at a minimum—counsel this Court to proceed with caution when asked to rewrite a State’s election laws.

Next, the Court should dismiss or stay this action under the abstention doctrine. See, e.g., Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011) (holding that “[o]bjections to subject-matter jurisdiction . . . may be raised at any time”).

“Abstention is appropriate ‘in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.’” Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (quoting Cty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)). The Supreme Court has also found it “appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.” Id. “In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” Id.

The U.S. Constitution gives “States ‘broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices.’” Clingman v. Beaver, 544 U.S. 581, 586 (2005) (quoting U.S. CONST. Art. I, § 4, cl. 1, Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)). And the South Carolina Constitution vests the General Assembly with the sole authority to regulate absentee voting. See S.C. CONST. art. II, § 10 (“The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.” (emphasis added)).

As noted above, preserving “the integrity of the electoral process is a legitimate and valid state goal.” Rosario, 410 U.S. at 761. Regulating the absentee voting privilege presents “difficult

questions of state law bearing on policy problems of substantial public import,” Colo. River Water Conservation Dist., 424 U.S. at 814, that are well within the General Assembly’s discretion under both the state and federal constitutions. And if the Court were to undertake federal constitutional review of the questions presented in this case, that “would be disruptive of state efforts to establish a coherent policy with respect to” absentee voting in South Carolina. Id.

What is more, the questions may become moot in this case—whether it be via act of the General Assembly or a decision from the Supreme Court of South Carolina. See id. (finding abstention appropriate if the federal constitutional issue becomes mooted “by a state court determination of pertinent state law”). The State should be given an opportunity to address this important issue before a federal court weighs in on it. See S.C. Elec. & Gas Co. v. Whitfield, 329 F. Supp. 2d 191, 209 (D.S.C. 2018) (“Abstention is a judicially created doctrine in which federal courts may abstain from exercising jurisdiction out of respect for the independence of state governments and in the interest of facilitating the smooth working of the federal judiciary.”). As the Court knows, the General Assembly is returning to the State House to potentially address this very issue next month. That the Court and the parties have tied the timing of the hearings on these matters to this special session is telling. Indeed, this matter of public policy belongs in the legislative branch, not this Court.

But another recent development has the potential to moot this case. On July 31, 2020, two petitioners filed an action in the original jurisdiction of the Supreme Court of South Carolina against Jay Lucas, in his official capacity as Speaker of the House of Representatives; Harvey Peeler, in his official capacity as President of the Senate; and the South Carolina Election Commission. See Ex. D, Pls.’ Compl., Duggins v. Lucas, App. Case No. 2020-001042 (S.C. Sup. Ct. filed July 31, 2020). In that case, the petitioners challenge the same absentee ballot provisions

at issue in this case, arguing the General Assembly’s failure to act violates the South Carolina Constitution. See S.C. CONST. art. I, § 5; id. art. II, § 1. Our state supreme court’s ruling on the state constitutional questions could moot the federal questions raised in this case. Out of respect for the State, then, the Court should abstain and enter an Order staying this action pending resolution of the state constitutional issues in the state supreme court. See generally Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (“It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions.” (quoting Minnesota v. Nat’l Tea Co., 309 U.S. 551, 557 (1940))).

Even if the Court declines to rely upon the abstention doctrine, the Court must remain mindful of federalism, separation of powers, and comity in passing upon this intensely local policy debate. “The function of the judiciary is to apply the law, not to rewrite it to conform with the policy positions of litigants.” Mort Ranta v. Gorman, 721 F.3d 241, 253 (4th Cir. 2013). As the Supreme Court of South Carolina noted just a few months ago in a similar challenge, the plaintiffs are arguing “as to what the law should be” and asking the Court to “change the law.” Bailey, 844 S.E.2d at 394. But “whether any change should be made to the law is a political question for the [General Assembly] . . . to answer.” Id. “Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.” Badaracco v. Comm’r of Internal Revenue, 464 U.S. 386, 398 (1984).

In sum, the Court should dismiss or stay this action on abstention grounds. Alternatively, if the Court decides to weigh in on this matter, the Court should respect the Supreme Court of South Carolina’s decision to defer this policy debate to the only entity with the constitutionally committed discretion to address it—the South Carolina General Assembly.

II. The plaintiffs' Section 1983 claim arising under First and Fourteenth Amendments fails as a matter of law because neither the excuse requirement nor the witness requirement violates one's fundamental right to vote.

"It is beyond dispute that 'voting is of the most fundamental significance under our constitutional structure.'" N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (quoting Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)). "For '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" Id. at 241–42 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

The Supreme Court of South Carolina, however, has clarified that absentee voting is a "privilege," not a right. State ex rel. McLeod v. Ellisor, 259 S.C. 364, 370, 192 S.E.2d 188, 190 (1972); see also O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (referring to it as "absentee voting privileges"); Am. Party of Texas v. White, 415 U.S. 767, 795 (1974) (same); McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969) (same). After all, "the General Assembly intended to extend the absentee voting privilege only to those who are absent from the polls on election day by reason of physical infirmity." Ellisor, 259 S.C. at 370, 192 S.E.2d at 190. The State's preferred method, as a matter of public policy, is still in-person voting.

Here, the plaintiffs are complaining about South Carolina's regulation of the absentee voting privilege, not the right to vote itself. The Court therefore does not employ strict scrutiny to adjudge the constitutionality of the statutes in question. To be sure, the Supreme Court has held that "a careful examination on [its] part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." McDonald, 394 U.S. at 807. But as in

McDonald, “[s]uch an exacting approach is not necessary here” because (1) “the distinctions made by [South Carolina]’s absentee provisions are not drawn on the basis of wealth or race,” and (2) “there is nothing in the record to indicate that the [South Carolina] statutory scheme has an impact on appellants ability to exercise the fundamental right to vote. Id.

After all, “the right to vote” is not “at stake here.” Id. Instead, the plaintiffs’ argument rests on some “claimed right to receive absentee ballots.” Id. And “[d]espite [the plaintiffs’] claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [them] the exercise of the franchise.” Id. at 807–08.

Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

Id. at 808–09. In other words, the excuse requirement and witness requirement must only survive rational basis review. See id. at 809. And they do.

Although the right to vote is “fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally-suspect burdens on voters’ rights to associate or to choose among candidates.” Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). As the Supreme Court has recognized,

States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs

the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Id.

In White, the Court upheld that state’s use of a notary signature requirement, finding the parties made “little or no effort to demonstrate its impracticability or that it is unusually burdensome.” 415 U.S. at 787. So too here. Respectfully, the plaintiffs failed to allege any cognizable burden here. In their depositions, the plaintiffs conceded they had access to another individual who could sign their absentee ballot. For her part, Thomas said she regularly speaks with Susan Dunn, who represents the plaintiffs in this action, because Dunn is her landlady. Yet they filed a lawsuit and allowed counsel to tell this Court that they cannot find a witness. That is nonsense. Even if the plaintiffs are fully quarantined and have not left the house, they have to interact with someone. Indeed, all of them have. Any of those people can quickly witness their absentee ballot. The witness requirement therefore imposes no burden at all.

Further, the State has a recognized legitimate interest in enforcing the witness requirement to prevent voter fraud by having some accountability mechanisms in place. According to Lieutenant Pete Logan—who has worked as an agent with the State Law Enforcement Division (SLED) for 30 years—“[t]he witness requirement for absentee ballots provides SLED, and all criminal investigators, with a significant investigative lead to pursue in these cases because it provides another potential witness to interview.” Ex. H, Logan Decl. at ¶ 6. As Lieutenant Logan noted, he has “investigated numerous cases involving allegations of voter fraud, including various allegations of absentee-voting fraud,” and he even currently “has an ongoing investigation. Id. at ¶¶ 4 & 5.

As for the excuse requirement, the plaintiffs fare no better. It is worth noting that most of them already qualify to vote absentee under the statute as written. The excuse requirement thus does not place any burden on the plaintiffs' right to vote. Instead, it outlines qualifications to vote absentee. South Carolina law still provides for numerous other ways for voters to exercise the franchise. Because the excuse requirement only regulates the privilege of absentee voting and does not place any burden on the plaintiffs' fundamental right to vote, the plaintiffs' claim under the First and Fourteenth Amendments fails as a matter of law.

Neither the General Assembly nor the State Election Commission is trying to make it so difficult as to amount to a denial of the right to vote. To the contrary, voters have several options. They can vote in person consistent with CDC guidelines, vote absentee if they meet the requirements, and vote curbside if eligible. See S.C. Code Ann. §§ 7-13-710, -771 & -385. Importantly, under the statute, all voters over the age of sixty-five—which is the population identified by the CDC as most susceptible to contracting COVID-19—can already vote absentee. S.C. Code Ann. § 7-15-320(B)(8). So can physically disabled persons, which includes those with injuries and illnesses, and their caretakers. S.C. Code Ann. § 7-15-320(B)(1), (4); § 7-15-310(4). While voters going to cast their votes in person may need to wear a mask and gloves, that has become an inconvenient fact of life these days for any venture outside the home, whether it be to shop for groceries or pick up takeout for dinner.⁴ But this new normal certainly does not infringe

⁴ In its Order, the Court said that “[i]n-person voting, while technically still available, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease.” ECF No. 65 at 33 n.20. But out of the 767,187 votes cast in the June 2020 primary, only 174,077 came from returned absentee ballots. And that was with the temporary global pandemic excuse for absentee voting in effect. Respectfully, a choice made by nearly 78% of South Carolina's voting population is not an illusory one. Nor is it only “technically available.” Voters overwhelmingly preferred casting their votes in person during the last election. While the plaintiffs continue to draw this line in the sand, the numbers simply prove otherwise. To that end, the plaintiffs have yet to identify a single individual who purportedly contracted COVID-19 as a result of voting in person.

upon the right to vote. Thus, the plaintiffs' manufactured dilemma is insufficient to survive summary judgment on their constitutional claims.

Notwithstanding their lofty rhetoric, the criteria outlined in the statute allow numerous persons to vote absentee and do not place any meaningful burden on right to vote. The State has a compelling interest in enforcing the excuse requirement as a valid exercise of the General Assembly's plenary authority to regulate absentee voting procedures under the South Carolina Constitution while maintaining our State's preference for in-person voting. See S.C. CONST. art. II, § 10. The Court should not take the bait from the plaintiffs to adopt their proposed policy preferences. To do so would violate principles of federalism, comity, and separation of powers.

Prior to an election, a plaintiff mounting an attack on the constitutionality of an absentee ballot statute that "would invalidate the statute in all its applications" shoulders "a heavy burden of persuasion." Crawford v. Marion Cty Election Bd., 553 U.S. 181, 200 (2008) (plurality opinion). The plaintiffs wholly failed to meet that burden here. "To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." Clingman, 544 U.S. at 593. Fortunately, "[t]he Constitution does not require that result, for it is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" Id. (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

Because the plaintiffs failed as a matter of law to prove their claim that the excuse requirement and witness requirement violate the First and Fourteenth Amendments, the Court should grant summary judgment in favor of the defendants. Simply put, the plaintiffs have experienced no burden at all, and in any event, the State's interests pass rational basis review. To

the extent the Court finds rational basis is not the appropriate test, the SCGOP would rely upon and incorporate by reference the State Election Commission defendants' fine analysis of this issue under the Anderson-Burdick framework. See ECF No. 108-1 at pp. 16–23. For the sake of judicial economy, the SCGOP will not rehash those arguments here.

III. The excuse and witness requirements do not run afoul of Section 2 of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 (the VRA) prohibits any “standard, practice, or procedure . . . imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. § 10301(a).

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b) (emphasis added).

In Thornburg v. Gingles, the Supreme Court set forth the seminal test for demonstrating a Section 2 violation: (1) “the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in the single-member district,” (2) the minority group must be able to show that it is politically cohesive,” and (3) “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” 478 U.S. 30, 50–51 (1986). This case, however, does not involve the typical vote-dilution claim. Instead, the plaintiffs boldly contend the excuse and witness requirements amount to a denial of the fundamental right to vote. We therefore turn to the Fourth Circuit’s treatment of the issue.

According to the Fourth Circuit, the plaintiffs must demonstrate the following in this vote-denial case:

First, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Second, the burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014).

As the Fifth Circuit has held, the first element “inquires about the nature of the burden imposed and whether it creates a disparate effect” on the protected class. Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016); see also Ohio Democratic Party v. Husted, 834 F.3d 620, 637–38 (6th Cir. 2016) (emphasizing “that the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process”).

And the second element probes “the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both.” Veasey, 830 F.3d at 245. Under this prong, the Court must conduct an “intensely local appraisal” of the challenged provisions, Gingles, 478 U.S. at 79, taking into account the “totality of the circumstances,” 52 U.S.C. § 10301(b). Included in this inquiry is an analysis of the appropriate “Senate Factors.”⁵ Gingles, 478 U.S. at 44–45. Importantly, this “second step asks

⁵ Specifically, the Senate Factors include (1) “the history of voting-related discrimination in the State or political subdivision;” (2) “the extent to which voting in the elections of the State or political subdivision is racially polarized;” (3) “the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as

not just whether social and historical conditions ‘result in’ a disparate impact, but whether the challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions.” Husted, 834 F.3d at 638.

Here, the plaintiffs failed to meet their burden. The plaintiffs have not produced any evidence that the excuse requirement or the witness requirement “contributed to the alleged discriminatory impact.” In fact, the individual plaintiffs testified to just the opposite—each of them voted in the June primary. Thomas and Rutledge voted via absentee ballot, and Richard voted in person. Further, the Family Unit, Inc and the South Carolina State Conference of the NAACP did not identify a single person who was unable to vote due to the excuse or witness provisions of South Carolina law. Essentially, these organizational plaintiffs complain that COVID-19 has affected their manner in which they provide services to their members. Unfortunately, they are not alone. Everyone has been impacted by the coronavirus. Providing services differently due to a global pandemic, however, does not rise to a Voting Rights Act violation. A review of the Amended Complaint, as well as the evidence in the record, reveals the plaintiffs’ beef is with COVID-19, not the challenged provisions.

The Family Unit corporate representative testified she knew of only eight absentee ballots that were rejected in recent years allegedly due to the witness requirement. See Ex. E, Williams Dep. Tr. at p. 48. That is all she said. She did not say who these individuals were, when they cast their ballots, why the ballots were not accepted, or how or why the voters failed to comply with

unusually large election districts, majority vote requirements, and prohibitions against bullet voting;” (4) “the exclusion of members of the minority group from candidate slating processes;” (5) “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;” (6) “the use of overt or subtle racial appeals in political campaigns;” and (7) “the extent to which members of the minority group have been elected to public office in the jurisdiction.” Id. But the list “is neither comprehensive nor exclusive.” Id. at 45.

the witness requirement. She did not say whether the alleged voters were White or African-American. She only knew that some ballots were not signed, and one did not include the address of the witness. Respectfully, that is not good enough. This testimony, without more, is meaningless and fails to satisfy the first element.

Nor did the NAACP corporate witness provide evidence of a Section 2 violation. She testified that as part of the “get out the vote” services provided to members pre-pandemic, the NAACP offered assistance to individuals who needed to obtain witness signatures. See Ex. F, Murphy Dep. Tr. at p. 30. The NAACP testified that it would assist homebound voters who live alone in getting a witness to actually sign the absentee ballots. Id. at 31. NAACP rendered these services for constituents adhering to absentee ballot laws for years. It is disingenuous for the NAACP to now argue these same laws have a discriminatory impact on African-Americans under the guise of COVID-19.

As to the three individual plaintiffs, they presented zero evidence that the absentee voting process adversely affects them. Richard voted in person and intends to work as a poll worker at the precinct in the general election. Thomas voted absentee because she is over the age of 65 and interacts with numerous people, including her counsel of record in this case, any of whom could witness her absentee ballot. And Rutledge is White. So he lacks standing to argue the absentee voting process created a disparate effect on African-American voters. Accordingly, the plaintiffs failed to establish the first element necessary to move forward on a Section 2 claim.

Even if the plaintiffs were able to overcome this initial hurdle, they cannot establish “the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both.” Veasey, 830 F.3d at 245. While

the plaintiffs offer a smattering of historical and social conditions that produced discrimination, the plaintiffs failed as a matter of law to establish any causal link as required to prove the second element. Given that the three individual plaintiffs all voted in the June primary, they certainly were not denied the right to vote. As to the two organizational plaintiffs, they have offered no testimony or evidence on how the absentee voting process specifically harmed their members.

In an attempt to make the requisite showing, the plaintiffs offered John Ruoff to discuss the Voting Rights Act. Dr. Ruoff described “the history of racially discriminatory voting practices in South Carolina” in his purported expert report. But nowhere in his report does Ruoff even reference the absentee voting process in South Carolina. If that is not enough, take his own word for it. In his deposition, Ruoff acknowledged, “I was not asked to look at the question of absentee ballots.” Ex. G, Ruoff Dep. Tr. at p. 65. Because he did not analyze the link between potential burdens of voting by absentee ballots and the Voting Rights Act, the Court cannot undertake the “intensely local appraisal of the challenged provisions” required to meet the second prong given that Dr. Ruoff never reviewed or opined on the excuse or witness provisions. Dr. Ruoff, however, testify that the excuse and witness requirements, on their face, are race-neutral and not discriminatory.

As to Dr. Ruoff’s discussion on the history of South Carolina voting practices, he does not reference an instance over the last decade of any successful challenge to a voting practice imposed by the State of South Carolina. In fact, he goes back two cycles of redistricting, totally omitting the cycle of 2010. He fails to discuss how South Carolina’s redistricting plans for the state Senate, state House of Representatives, and Congressional districts were each approved by both chambers of the General assembly, approved by the Governor, and given preclearance under Section 5 of the Voting Rights Act by President Obama’s Department of Justice. Nor does he mention any of the

40-plus counties in South Carolina that received preclearance of their redistricting plans after the 2010 census. Nor does he mention any of the numerous municipalities or school districts that also received preclearance this last cycle. How can one opine on the history of South Carolina voting practices without mentioning any of these major successes of the state? Presumably, this information was omitted from his report because it did not fit the plaintiffs' narrative.

Dr. Ruoff states he was asked to review whether the Senate Factors, outlined in the Senate Report to the 1982 amendments to the VRA, support the plaintiffs' claims under the Voting Rights Act. These factors were used by Congress to support the amendments to the Voting Rights Act. But in Dr. Ruoff's report, he does not analyze any South Carolina voting practice since the amendments in 2011 to the South Carolina voter ID law. And as mentioned above, his report omits a huge swath of recent South Carolina history pertaining to changes in voting districts all across the state. For these reasons, the Court should disregard his report because it offers no help for the Section 2 analysis.

Finally, the plaintiffs also attempted to rely on Dr. Courtney Cogburn to support their Voting Rights Act claim. Dr. Cogburn provided data on the impact of COVID-19 on the citizens of South Carolina. But she, too, did not review South Carolina law on the absentee voting process. Without this analysis, her report fails to assist the Court in any way to determine "the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately." Veasey, 830 F.3d at 245. Accordingly, the plaintiffs failed to introduce any evidence in support of the second element of their Section 2 claim.

Indeed, a review of their claim reveals it is not even tethered to the plight of COVID-19. The General Assembly's purpose in enacting the requirements is hardly new or subject to debate. As the Supreme Court of South Carolina recognized over forty years ago, the "purpose" of the

signature requirement is to ensure “the authenticity of the absentee vote.” Gregory v. S.C. Democratic Exec. Comm., 271 S.C. 364, 375, 247 S.E.2d 439, 444 (1978). Not even COVID-19 can carry them across the finish line. The law was designed to prevent voter fraud—irrespective of political party or race or gender or any other classification—and reading anything more into the witness requirement flies in the face of a reasonable interpretation of the statute as well as its legislative history.

Because the plaintiffs’ failed as a matter of law to establish their claim under Section 2 of the VRA, the Court should grant summary judgment in favor of the defendants.

IV. The plaintiffs’ claims under Title II of the ADA are without merit.

Last, the plaintiffs’ claims that the excuse requirement and witness requirement violate Title II of the Americans with Disabilities Act (the ADA) fail as a matter of law.

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Public entity” includes state and local governments, and any department, agency, or other instrumentality of a state or local government.⁶ 42 U.S.C. § 12131(1). The term “qualified individual with a disability” means “an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). “Disability” is defined as “[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 28 CFR § 35.108(a)(1)(i).

⁶ It is far from clear whether Congress intended for public officials like the defendants here to qualify as a “public entity” under the ADA.

The Attorney General is empowered to issue regulations to implement Title II. 42 U.S.C. § 12134. In their Amended Complaint, the plaintiffs rely on two regulations. The first one provides that “[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.” 28 C.F.R. § 35.130(b)(3)(ii). And the second one states that “[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. § 35.130(b)(8)

Ultimately, “[t]o establish a prima facie case under Title II, a plaintiff must show: (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities or was otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.” Spencer v. Easter, 109 F. App'x 571, 573 (4th Cir. 2004) (citing cases).

In this case, Plaintiffs cannot establish a prima face case of discrimination under Title II of the ADA. According to the plaintiffs, “Thomas, Rutledge, Walker, members of the Family Unit, and members of the South Carolina NAACP have disabilities within the meaning of the ADA . . . including serious health conditions that make them susceptible to severe complications from COVID-19” and, as such, “are ‘qualified’ for the programs, services, and activities being challenged herein in that they meet all essential eligibility requirements to vote in South Carolina.” Compl. ¶ 162. The evidence, however, tells a different story.

First, the plaintiffs' claims fail right out the gate because there is no evidence that any of them have a "disability" as that term is defined under Title II of the ADA. Although Thomas mentioned a number of medical issues, nothing in the record indicates she has a disability. And being elderly, of course, is not a disability. See NAACP v. Phil. Bd. of Elections, No. CIV. A. 97-7085, 1998 WL 321253, at *4 (E.D. Pa. June 16, 1998) ("Being over the age of 65 is not in and of itself an impairment, although medical conditions associated with age, such as osteoporosis, can be."). Turning to Reverend Rutledge, he expressly testified he was not disabled. Last, the organizational plaintiffs have not shown any of their members are disabled within the meaning of the ADA. Accordingly, the plaintiffs' ADA claims fail as a matter of law.

Even if any of the plaintiffs had a qualifying disability, they are not being excluded from voting absentee by reason of that disability. Thomas is over the age of 65 and automatically qualifies to vote absentee. And she failed to show the witness requirement will keep her from voting. In fact, Thomas testified that opposing counsel, Susan Dunn, signed and witnessed her June primary absentee ballot.⁷ That is certainly a far cry from the representations the plaintiffs made in Court during the preliminary injunction hearing about the impossibility of getting a witness to sign their absentee ballot. Suffice it to say, Thomas has plenty of folks who can witness her absentee ballot.

Finally, to the extent the plaintiffs do not qualify to vote absentee, they cannot establish the inability to participate in absentee voting "was by reason of their disability." An insurmountable hurdle to this argument is that one of the categories of people who can vote absentee—regardless of whether they are absent from the county of residence on election day—is "physically disabled persons." It is difficult to see how the plaintiffs can argue with a straight face

⁷ While the plaintiffs appear to be trying to walk back that testimony from Thomas via a new declaration, the Court should decline to consider it.

that the State is excluding them from participation in absentee voting because of a disability when persons with disabilities are a specific category of those permitted to vote absentee under existing South Carolina law. The plaintiffs' claims are therefore specious.

Because the plaintiffs failed as a matter of law to demonstrate the witness requirement and excuse requirement violate Title II of the ADA, the Court should grant summary judgment in favor of the defendants.

CONCLUSION

Based upon the foregoing, the Court should grant the SCGOP's motion for summary judgment and decline the plaintiffs' invitation to change South Carolina's election laws on the eve of the 2020 presidential election.

Respectfully submitted,

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Columbia, South Carolina
 August 10, 2020

EXHIBIT A

Mary Thomas 7/23/2020

12

1 A. Where?

2 Q. Yes, ma'am. Where?

3 A. Oh, in the yard, at the garbage pail.

4 Q. How many times have you seen Mr. Morrison,
5 do you think, since the middle of March?

6 A. About -- maybe about three times.

7 Q. Do you ever plan to see him, or do you just
8 run into him around the building?

9 A. No, I don't -- I'm housebound, so I don't go
10 out.

11 Q. Does he come to your apartment then?

12 A. He comes to my apartment because I ask him
13 to.

14 Q. And what have you asked him to come do over
15 there?

16 A. To water plants.

17 Q. Who is Samuel Wilson?

18 A. My godson.

19 Q. Who is Caroline Wallace?

20 A. My housekeeper.

21 Q. She comes to your apartment?

22 A. Once a week. Sometimes twice.

23 Q. What day of the week does she come?

24 A. I didn't understand you.

25 Q. What day of the week does she typically

Mary Thomas 7/23/2020

13

1 come?

2 A. Sometimes she changes, but usually it's
3 Monday or Wednesday.

4 Q. Approximately how long is she there when she
5 comes?

6 A. About two and a half hours.

7 Q. What does she do when she's there?

8 A. She dusts. She mops. She sometimes --
9 well, she doesn't have to cook anything, but she
10 cleans. And this is a good-sized apartment, so it
11 takes a lot. Sometimes she waters plants.

12 Q. How long has she been coming to your
13 apartment to clean?

14 A. About two years.

15 Q. In the responses to some of our written
16 questions your lawyer sent us, you said you had gone
17 out one day in May to run some errands to a couple of
18 different places, and I think they were -- let me get
19 the list here -- Walmart, Marvin's fish mart, and Food
20 Lion.

21 A. Yes.

22 Q. Do you recall that trip?

23 A. I do.

24 Q. Is that the only time you've left your
25 apartment other than for medical reasons since March?

Mary Thomas 7/23/2020

14

1 A. Right.

2 Q. What made you take a trip out that day in
3 May?

4 A. Because I needed to pick up my eyeglasses
5 that were being tinted.

6 Q. Are those the glasses you're wearing now?

7 A. One pair. There's another pair. There were
8 two pair.

9 Q. Do you ever have any visitors other than
10 Mr. Morrison and your housekeeper? Was it
11 Ms. Wallace?

12 A. Right. No.

13 Q. Do you know anyone else in your building
14 other than Mr. Morrison?

15 A. Susan Dunn.

16 Q. Have you seen Susan in person since March?

17 A. Yes.

18 Q. Where have you seen Susan?

19 A. Usually in my home.

20 Q. She comes to visit you in your apartment?

21 A. Yes, she comes to visit me in my apartment.

22 Q. Approximately how often does she come to
23 visit?

24 A. Well, she's my landlady, and sometimes she
25 comes a couple times a week. If I need help with

EXHIBIT B

Jeremy Paul Rutledge 7/24/2020

16

1 early.

2 And I went one other time, which I
3 approximate to be about three weeks later, to retrieve
4 a number of books and things from my office because I
5 knew I wouldn't be working from the church office. I
6 was working from home. And, again, I went early to
7 avoid any people.

8 Q. You live with your wife and son; is that
9 correct?

10 A. Yes.

11 Q. Does anyone else live in your house?

12 A. No.

13 Q. Has anyone else been to your house since
14 March 13th?

15 A. Yes.

16 Q. Who's been there?

17 A. I will do my best to recall this for you,
18 and it's also recorded in the document we provided.
19 My wife and I sat down and were very thorough, so I'm
20 working from memory at this moment.

21 Who has come to my house since March 13th?
22 My mother and her housemate, Barbara Cole, have come
23 to our house. Our administrative assistant, Kathryn
24 Cullinan, has come to our house. Actually last
25 evening, our choir director, Michael Laird, and his

EXHIBIT C

Nea Richard 7/25/2020

20

1 A. Yes.

2 Q. Okay. Have you taken the poll worker
3 training since the presidential preference primary
4 this year?

5 A. Since February, no.

6 Q. Okay. Do you know whether or not the poll
7 worker training for the primaries this year added
8 training on how to implement the CDC voter safety
9 measures?

10 A. No, outside of what I've physically seen on
11 the June primary.

12 Q. Can I ask you to talk a little louder? I'm
13 sorry, I've got music across the street.

14 A. Outside of what I've physically seen on the
15 June election, that I have not done the training for
16 the June election process.

17 Q. Did you vote at Cross Hill during the
18 primary this year?

19 A. Yes.

20 Q. Did you observe the procedures that the
21 State Election Commission put in place for social
22 distancing?

23 A. Yes.

24 Q. When you voted on the machine, did you use a
25 swab or a Q-tip to vote with?

Nea Richard 7/25/2020

24

1 the community or both?

2 A. Just on campus.

3 Q. Over the time you've helped people register,
4 approximately how many people do you think you
5 registered?

6 A. We've registered at least 50 students a
7 year.

8 Q. So do you still intend to serve as a poll
9 worker in the general election?

10 A. In November?

11 Q. Yes, ma'am.

12 A. It depends on how the COVID cases look in
13 South Carolina. I can't give you a straight answer
14 right now.

15 Q. Assuming that COVID has been mitigated,
16 would your employer allow you to take off, or could
17 you take off to serve as a poll worker?

18 A. Yes.

19 Q. Okay. Are you aware of any of the poll
20 workers in the Cross Hill precinct that did not work
21 in the June 9th or June 23rd primary runoff because of
22 their fear of COVID?

23 A. I'm not sure. I didn't ask.

24 Q. Okay. Do you have any personal knowledge of
25 anyone who did not vote in either the June 9th primary

EXHIBIT D

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

In the Original Jurisdiction

Regina Duggins and Chaunta R. HamiltonPetitioners,

v.

Jay Lucas, in his capacity as Speaker of the House of Representatives and
Harvey Peeler, in his capacity as President of the Senate.....Respondents,

and

South Carolina Election Commission.....Respondent/Nominal Defendant.

**PETITION FOR ORIGINAL JURISDICTION,
EXPEDITED DISPOSITION, AND EMERGENCY RELIEF**

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REGINA DUGGINS AND
CHAUNTA R. HAMILTON

July 31, 2020
Columbia, South Carolina.

South Carolina election workers and voters are headed for calamity. The COVID-19 pandemic threatens the orderly conduct of the November general election by diminishing the number of election workers willing to expose themselves to certain harm and the number of available polling locations willing to welcome the public. According to the State’s elections chief, poll manager shortages, inexperienced poll managers, and a lack of polling places will lead to precinct consolidation, crowding, long lines, confusion, and errors such that “immediate action” is needed to ensure election officials are able to plan for and meet “the greatest challenge to our election system our state has ever seen.” Without action now, the rapidly approaching general election promises to be tumultuous and to place voters in certain high-risk cohorts—voters like Petitioners Regina Duggins and Chaunta R. Hamilton—in harm’s way when casting the only ballot they are presently allowed to under South Carolina law: an in-person ballot on election day.

The first principle of South Carolina government is that *all* political power is vested in and derived from the people and the people have the right to change their government at all times. See S.C. CONST. art. I, § 1. To that end, elections must be free and open such that every inhabitant of this State who is qualified to vote under the Constitution “*shall have* an equal right to elect officers and be elected to fill public office.” S.C. CONST. art. I, § 5 (emphasis added). “The right of suffrage, as regulated in this Constitution, *shall be* protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct.” S.C. CONST. art. II, § 1 (emphasis added). Accordingly, the General Assembly is tasked with regulating the time, place, and manner of elections and enacting other provisions necessary to the fulfillment and integrity of the election. S.C. CONST. art. II, § 10. But the simple, uncontradicted fact is that the current method of regulating elections during the COVID-19 pandemic violates individual rights, particularly those of sick and vulnerable voters. Voters with compromised health

conditions, and those simply unsure whether they would suffer a severe case of the coronavirus, will be forced to choose between safeguarding their life and health and exercising the franchise. Placing Petitioners and those with compromised conditions, whether known or unknown, in such an untenable position violates the Constitution. This action seeks to remedy that profound injustice.

This original jurisdiction petition is submitted pursuant to article V, § 5 of the Constitution, South Carolina Code § 14-3-310, and Rule 245 of the South Carolina Appellate Court Rules. It respectfully seeks (1) leave to file Petitioner's proposed complaint; (2) (if necessary) expedited discovery; (3) an expedited hearing and decision declaring a clear and present danger to free and open elections fulfilled with provisions sufficient to guarantee their integrity and secure them from tumult; and (4) an injunction instructing Nominal Defendant South Carolina Election Commission to implement the procedures it has already identified as necessary to protect election workers and voters and conduct a successful election. Respectfully, time is of the essence.

FACTUAL BACKGROUND

The relevant factual background is detailed in **Exhibit A**, Petitioners' proposed complaint.

STANDARD OF REVIEW

When appropriate, the Court will consider matters in its original jurisdiction when they cannot be considered by a lower court first without material prejudice to the rights of the parties. Rule 245(a), SCACR. "Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction." Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

GROUND FOR GRANTING THE PETITION

This Court is the only venue where voters can obtain redress for the profound constitutional injury complained of here. This case turns on two obviously true propositions.

First, the unprecedented public health crisis caused by the COVID-19 coronavirus will disenfranchise a significant number of voters unless election procedures change. As Petitioners' epidemiologist explains, a significant cohort of South Carolina voters are at high risk for severe complications or death from COVID-19 and in-person voting is a "high-risk" activity for all people. See Ex. A at Ex. 3. Moreover, the risk associated with in-person voting—a risk particularly acute to those with compromised conditions—is guaranteed to be far greater than it need be due to too few election workers assisting too many voters at too few polling locations, resulting in longer lines. This is not a matter of conjecture: it is precisely what happened during the June statewide primary and the reason the State's elections chief has *twice* pled with lawmakers to act while there is still time. See Ex. A at Exs. 4 & 6.

Second, "the right to vote is a cornerstone of our constitutional republic." Bailey v. S.C. State Election Comm'n, No. 2020-000642, 2020 WL 2745565, at *1 (S.C. May 27, 2020). Because all legitimate power of this government flows from the people's exercise of the franchise, the Court cannot abstain when the legislature fails to meet its constitutional responsibilities. Yes, the General Assembly is tasked by the Constitution with providing free and open procedures that secure the election from tumult. But, for whatever reason, current law fails to meet the moment with procedures that make voting safe to all eligible voters. That shortcoming undermines the rights of individuals and the people's very power to call the political branches to account. Accordingly, it is not a legitimate or lawful exercise of government power to sit idly on ones' hands and watch an election meltdown. It threatens constitutional republicanism itself.

The petition should be granted to address this once-in-a-generation emergency. Discovery (if necessary), briefing, and disposition should all be expedited to give election administrators what they need: time to prepare. Petitioners respectfully offer two further suggestions in support.

I. Ensuring free and open elections secure from tumult is a matter of public interest that can only be resolved by the Court.

The Court should conclude this matter warrants original jurisdiction for three reasons.

First, there is no reasonable debate about the threat posed by the coronavirus or that election procedures must be implemented now to allow officials sufficient time to prepare and avoid failed elections. This State remains in the midst of a crisis. The Governor has declared repeated states of emergency. See Ex. A ¶¶ 16–31. The Court has used emergency powers to prevent large gatherings of people both indoors and out. See id. ¶¶ 32–36. Two weeks ago, a member of the U.S. District Court aptly summarized the precarious nature of South Carolina’s situation in an order denying a federal inmate compassionate release:

COVID-19’s virulence to date has not only taken the lives of over 130,000 Americans and infected over 3 million more, but it has also wreaked havoc on all of society. Six months ago, the thought that an American citizen’s well-being would be threatened with such regularity was unfathomable. Three months ago, the notion that a person would be at a greater risk for exposure to COVID-19 in South Carolina than in a prison in New Jersey was preposterous. Yet, here we are.

United States v. Morgan, No. 2:17-cr-00727-DCN, Dkt. No. 62 at 10–11 (D.S.C. July 17, 2020) (denying motion with leave to refile “[i]f conditions at FCI Fort Dix worsen or if the circumstances in South Carolina improves”). Here we are indeed. Notably, when the Court heard argument in Bailey, it was not disputed that the coronavirus pandemic was a sufficiently serious threat to warrant original jurisdiction and consider whether persons attempting to maintain physical distance were “physically disabled” within the meaning of South Carolina Code § 7-15-320. Since that case was decided, the threat to South Carolina voters has only grown (see Ex. A ¶¶ 9–15) while current election procedures afford *fewer* opportunities to vote in-person or mail absentee.

The highly communicable nature of the coronavirus and its capacity for symptomless spread threatens a substantial portion of the State’s 3.3 million registered voters who are ineligible

to cast an absentee ballot. Whether an activity is high or low risk for COVID-19 transmission turns on four factors: people, place, time, and space. Ex. A at Ex. 3 ¶ 21. Petitioner’s epidemiologist explains, “[i]n-person voting is a high-risk activity for all people because it necessarily gathers strangers together, indoors, and for potentially long stretches of time.” Id. ¶ 22. Thus, current election procedures “will increase the risk that poll workers and voters will contract COVID-19” (see id. ¶ 18), and that threatens the State’s very ability to conduct a successful election without substantial changes in existing law. Because many election workers also fall into high-risk categories (Ex. A at Ex. 6 p. 1), there will be a severe shortage of election workers that will force election administrators to consolidate precincts, which in turn will result in more voters in longer lines at fewer polling locations, making physical distancing impossible. On this point, State and local election officials and an independent watchdog all agree. See Ex. A at ¶¶ 57–79.

But there is no reason to accept this foreseeably horrible outcome as a *fait accompli*. The South Carolina Election Commission has offered nine specific procedures which, if ordered now to allow election officials time to implement them, would alleviate many of the risks associated with a high-turnout, in-person election. Specifically, this State’s top election official has proposed a plan that includes no-excuse absenteeism, online absentee applications, no witness requirement for absentee return envelopes, drop boxes for absentee returns, additional time for election officials to count absentee ballots, designated curbside voting locations, expanding electronic ballot delivery (already used for military voters) to disabled voters and first responders, early voting, and vote-by-mail. See Ex. A at Ex. 6 p. 3. Generally, these procedures all facilitate safe, free, and open access to the franchise by spreading voter participation across a greater number of days and balloting procedures to dilute the concentration of persons casting an in-person ballot on election day. These efforts—procedures that facilitate physical distance between voters and election

workers alike—comport with guidance from public health experts as the only sure way to stop the spread of this highly infectious disease. An association of local South Carolina election officials and an independent election watchdog group agree remedial procedures are necessary to make voting safe and that time is of the essence. See Ex. A at Exs. 7 & 8. For these reasons, the extraordinary and (quite literally) unprecedented circumstances here should weigh heavily in favor of granting original jurisdiction.

Second, waiting for this case to further ripen forecloses the prospect of granting any relief. As explained by the executive director of the State election commission, election officials need clarity *now* to ensure sufficient time to implement any changes to election law. The director has repeatedly pled with Defendants to act quickly (Ex. A at Exs. 4 & 6), but those pleas have fallen on deaf ears. While precedent allows the Court to cure a constitutional violation by ordering a new election, e.g., George v. Mun. Election Comm’n of City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999) (nullifying election where procedure violated constitutional guarantee of secret ballot), that is not a workable remedy under these circumstances. For starters, there is no precedent for invalidating statewide elections. The few instances where it could not be avoided concerned county or municipal elections. Further, no one knows when the current pandemic will end, so any do-over would necessarily place voters right back in their present circumstance. Or, actually, far worse circumstances since a post-election dispute could delay timely certification of presidential contest results necessary to select electors to represent the State’s voters in the Electoral College. Post-election review also invites a parade of horrors that all good-faith actors should be eager to avoid.

As one election law commentator explains:

Allowing post-election review when pre-election review would have been relatively easy to request essentially gives a campaign the “option” whether to sue: The campaign identifying a potential election problem can sit on its hands until it sees the election results, and if it does not like the election results it can use the

problem as an excuse to get a more favorable outcome. It is far better to have a legal system that discourages such speculation and encourages preventing harm in elections that would prove difficult to undo after the fact.

Richard L. Hasan, “Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown,” 62 WASH. & LEE L. REV. 937, 994 (2005). Such a result is anathema to the notion that election integrity should be held “foundational”, see Anderson v. S.C. Election Comm’n, 397 S.C. 551, 556, 725 S.E.2d 704, 705 (2012), and the Court has power to prevent this self-inflicted catastrophe. Respectfully, it should.

Third, this is a matter of intense public interest arising from an unprecedented national emergency that implicates questions of constitutional power. It fits squarely within original jurisdiction jurisprudence. For example, original jurisdiction has been held to exist when necessary to clarify the effective date of a new constitutional amendment. See Davis v. Leatherman, 419 S.C. 44, 46, 796 S.E.2d 137, 138 (2017). It is often held to exist when necessary to resolve questions of government power, like whether a governor had power to make recess appointments, Senate v. McMaster, 425 S.C. 315, 821 S.E.2d 908 (2018), or remove a board member from a public utility. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Likewise, with matters disputing whether legislative power was constitutionality exercised. S.C. Pub. Interest Found. v. Lucas, 416 S.C. 269, 271, 786 S.E.2d 124, 125 (2016) (challenging proviso under the one subject rule). The Court has frequently granted original jurisdiction to settle election disputes, like whether a procedure for the nomination of candidates in municipal election was lawful, Mitchell v. City of Greenville, 411 S.C. 632, 770 S.E.2d 391 (2015), whether state election officials were obligated to conduct a party primary election, S.C. Libertarian Party v. S.C. State Election Comm’n, 407 S.C. 612, 757 S.E.2d 707 (2014), and whether candidates were eligible for certification to appear on the ballot. Florence Cty. Democratic Party v. Florence Cty. Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012);

Anderson, supra. This petition implicates all the weighty concerns engendered in these precedents: constitutional duty, separation of powers, and lawful election procedures. However, unlike an intradepartmental squabble, this dispute implicates free exercise of the franchise—the right on which all legitimate government action must be founded.

Accordingly, this is a grave matter of public interest that only this Court can resolve.

II. The Court should not abstain or show further comity to the legislature.

The obvious impediment to relief here is the decision in Bailey v. South Carolina State Election Commission, No. 2020-000642, 2020 WL 2745565 (S.C. May 27, 2020), where the Court was asked whether South Carolina Code § 7-15-320(B)’s inclusion of “physically disabled person[s]” as a category of voters eligible to cast an absentee ballot was broad enough to include voters attempting to maintain physical distance during the pandemic. The Court (correctly) held the claim concerning the June statewide primary was mooted by legislative action, but then cited the political question doctrine in declining to rule on claims concerning the November general election. See Bailey, 2020 WL at *2–3. Bailey poses no obstacle here for at least four reasons.

First, this case is just different from the statutory construction question presented in Bailey. Resolving statutory construction questions turns on discerning legislative intent. Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017) (collecting cases). If a statute is clear and constitutional, the Court will decline to wade into a policy dispute over its efficacy. See id. at 271–72, 281, 802 S.E.2d at 797, 802 (collecting cases, leaving policy concerns “for the legislature.”). The claim here sounds in the Constitution as Petitioners seek redress for an injury founded on the express guarantee of free and open elections secure from tumult. See S.C. CONST. art. I, § 5 & art. II, § 1. Construing the Constitution is a different task altogether. “When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry

and the General Assembly have worked to create the governing law.” State v. Long, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014). So, while the Court applies rules of construction similar to those used to construe statutes (id.), legislative power is not plenary, and the Court has the responsibility to construe the Constitution and laws of the State “without concern for political or popular opinion.” Mims Amusement Co. v. S.C. Law Enf’t Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005). For example, “[t]he Legislature may not abrogate the right to a jury trial simply by designating a proceeding as a civil action without a jury” (id.) because, unlike the code of laws, the Constitution provides a hard, non-negotiable floor for government action.

The provisions of the state constitution are not a grant but a limitation of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution.

Segars-Andrews v. Judicial Merit Selection Comm’n, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). So, while the Court was correctly concerned with legislative intent when it considered the statutory construction claim in Bailey, legislative intent only gets you so far here where the Court must consider the prerogative of a far greater power: the people’s exercise of the franchise. Here, current election procedures violate the Constitution during the COVID-19 pandemic.

Second, when the Court dismissed Bailey there was a reasonable expectation the pandemic might recede, or that the General Assembly would act to safeguard the November general election. *Neither* assumption has proven true. As Petitioners’ proposed complaint explains, the State remains in a state of emergency and the coronavirus continues to rage unimpeded across this State and much of the Nation. See Ex. A ¶¶ 9–38. Likewise, the window for meaningful legislative action has closed. On June 24, 2020, the House tabled two amendments that would have extended the same protections voters in the June statewide primary received to voters in November. Ex. A ¶¶ 84. House and Senate leadership claim they will not return until September (id. ¶¶ 85–87),

which will be too late. See id. at Ex. 6 p. 4 (urging “immediate action”). So, while the Court might have reasonably assumed when it decided Bailey on May 27, 2020 that judicial intervention was unnecessary because legislative action would soon follow, that did not and will not happen.

Third, because elections are the vehicle through which the people call the political branches to account, the Court cannot ignore an existential threat to elections or free and open participation by individual voters in them. This distinction sets this claim apart from Bailey, where, for example, the Court could have simply (and reasonably) dispensed with the statutory construction claim by answering “no”—the disability exception does not include persons attempting to maintain physical distance during the pandemic—and left it to the legislature to decide what to do with that construction. But here the individual, constitutional right to free, open, and safe elections is what is at stake and current election procedures are at odds with that right. In Callison v. Peebles, 102 S.C. 256, 86 S.E. 635 (1915), the Court said requirements during elections must be “strictly followed” and rejected the contention that the General Assembly’s failure to make provisions for the disenfranchised electors relieved the Court from hearing the case:

The contention that the act of the General Assembly made no provision for electors situate as these were is not sufficient to warrant the court in dismissing their application for protection; for the General Assembly can no more deprive them of their constitutional rights than the proponents of the new county. It makes no difference how or why they were deprived of the right, unless, of course, they themselves were responsible for it. The fact that they were deprived of the right to vote goes to the legality of the election, and its validity depends upon the determination of what part of the electorate so deprived of the right would be necessary to render the election void.

Id. at 256, 86 S.E. at 637. Likewise, current law disenfranchises voters like Petitioners; whether the General Assembly intended that be the case is immaterial to the Court’s obligation to vindicate this most important individual right. Indeed, because the right to vote is so fundamental it cannot be left abridged without disrupting our system of ordered liberty. Recently, the Court dismissed

an original jurisdiction matter on standing grounds and encouraged the plaintiffs to seek relief through legislative and executive action and, if relief was not forthcoming, to seek it “at the ballot box.” Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). But the distinction drawn here, where the risk to sick and vulnerable voters refuses them the ballot itself, threatens voters’ ability to obtain redress and call the political branches to account. These barriers to the franchise frustrate the practice of ordinary politics as an available means to settle disagreements and place this action outside the scope of many others, like Carnival Corp., where the Court might otherwise reasonably defer. Thus, the better view is that this action is simply different in kind from the statutory construction claim in Bailey.

Fourth, if necessary, the Court should conclude Bailey was wrongly decided when it said that “[a]s for elections after July 1, 2020, we hold that whether any change should be made to the law is a political question for the Legislature likewise to answer.” Bailey, 2020 WL at *3. This conclusion misapprehends the political question doctrine. “[T]he action or inaction of the General Assembly does not determine whether a question is political, and therefore, nonjusticiable.” Bailey, 2020 WL at *5 (Hearn, J, dissenting). A true “political question” is not one that touches on some aspect of politics or elections, but a dispute where the resolution is left to another branch of government. For example, whether to punish or expel a member of the legislature is a political question. See S.C. CONST. art. III, § 12 (“Each house shall choose...”). Whether the Judicial Merit Selection Commission properly evaluated a judicial candidate is a political question. S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n, 369 S.C. 139, 632 S.E.2d 277 (2006). Thus, properly understood, “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.” S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) (citing Baker v. Carr, 369 U.S. 186, 210–11 (1962)); Segars-

Andrews, 387 S.C. at 121, 691 S.E.2d at 460 (same). Applying this framework, the mere fact that legislative action has or could occur has no bearing on whether the Court should hear a case, nor does the fact that the underlying matter concerns politics or elections.

But that is precisely what the Court concluded in Bailey, which cannot be followed without causing irreparable harm to the Court's power to declare the law. The novel doctrine announced in that case will be an endless source of mischief and confusion leading to repeated claims that the pendency of this bill or that bill in the legislature is suddenly cause for the Court to cede its obligation to declare what the law presently requires. This is not to say the General Assembly cannot abrogate a decision of the Court with legislation (provided doing so does not offend the Constitution); certainly, it can. But a rule that requires abstention based solely on the possibility of legislative action is not only an unworkable standard to apply but one that diminishes the Court's power as a co-equal branch. Indeed, a better frame to explain the Court's decision in Bailey is not the political question doctrine, but the simple exercise of comity to a co-equal branch. The Court explained its decision not to construe the absentee statute by stating:

Statutory interpretation is certainly a judicial question, but when the Legislature considers the very same question—knowing it is doing so at the very same time the Court considers the question—and answers the question with clarity, we cannot give a different answer through the judicial act of statutory interpretation. We may do so only by the political act of simply disagreeing. This Court will not do it.

Bailey, 2020 WL at *3. This reasoning is correct to the extent it sought to afford the legislature the first opportunity to act. But comity is a matter of discretion, not jurisdiction. This claim seeks free and open elections secure from tumult as guaranteed under the Constitution. The Court is the ultimate guardian of that individual constitutional right. The political question doctrine is intended to preserve the separation of powers, not disrupt them. If the Court finds Bailey unavoidable here, it should not be followed as precedent.

CONCLUSION

Current election procedures will disenfranchise Petitioners alongside tens of thousands of other sick and vulnerable voters who are only eligible to cast an in-person ballot on election day in November. This will put tremendous, possibly insurmountable strain on an election system with too few workers and polls and inadequate procedures. No voter—sick or otherwise—should be forced to weigh their personal health and safety against exercise of the franchise. Nor should we accept the chaos that will ensue from the tragic maladministration caused by an overwhelmed election system unable to perform under the stresses and strains of the COVID-19 pandemic. Fortunately, there is still time to act and a clear roadmap for solving this problem that relies on the expertise of election officials.

This petition for original jurisdiction should be granted along with leave to Petitioners to file their proposed complaint. The Court should shorten Defendants' time to respond and expedite discovery (if necessary), briefing, and a decision. Declaratory and injunctive relief is warranted. The Court should hold current election procedures violate article I, § 5 and article II, § 1 of the South Carolina Constitution and then order the South Carolina Election Commission to pursue the nine remedial actions outlined in the executive director's correspondence to Defendants (Ex. A at Ex. 6) along with any such further election procedures as are feasible, necessary, just, and proper to conduct a free, and open election secure from tumult.

[signature page follows]

Respectfully submitted by,



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ATTORNEYS FOR PETITIONERS
REGINA DUGGINS AND
CHAUNTA R. HAMILTON

July 31, 2020
Columbia, South Carolina.

Duggins v. Lucas, No. 20-____ (S.C.)
Petitioners' proposed complaint

Exhibit A

(Petitioners' proposed complaint)

**IN THE ORIGINAL JURISDICTION
OF THE SOUTH CAROLINA SUPREME COURT**

Regina Duggins and Chaunta R. Hamilton,

Plaintiffs,

v.

Jay Lucas, in his capacity as Speaker of the
House of Representatives and Harvey Peeler,
in his capacity as President of the Senate,

Defendants,

And

South Carolina Election Commission,

Nominal Defendant.

No. _____

**[PROPOSED]
COMPLAINT**

Plaintiffs Regina Duggins and Chaunta R. Hamilton are citizens and voters of this State with underlying health conditions that cause them to suffer a higher risk of catching a severe case of COVID-19. They are afraid to vote during the rapidly approaching general election based on existing election procedures. They bring this action under the South Carolina Constitution for a declaration that election procedures for the general election set for Tuesday, November 3, 2020, will disenfranchise them and deny them participation in a free and open election with provisions sufficient to ensure its integrity and to secure it from the tumult caused by the raging coronavirus pandemic that threatens both the conduct of the election and individual voters forced to choose between their personal health and safety and exercise of the franchise.

Repeated warnings from election officials like Nominal Defendant South Carolina Election Commission have gone unheeded and any further delay in resolving this matter will all but ensure elections fail come November. Time is of the essence.

The first principle of this government is that *all* political power is vested in and derived from the people and the people have the right to change their government at all times. See S.C. CONST. art. I, § 1. As set forth more fully below, current election procedures threaten the very integrity of the November general election and promises that those procedures *might* change as a result of legislative action in September will be too little too late. Without intervention by the Court now there will be shortages of election workers unwilling to expose themselves to the coronavirus. Those shortages will cause election officials to consolidate precincts, thus forcing more voters into fewer polling locations, resulting in longer lines, and placing Plaintiffs and a large number of other South Carolina voters at even greater personal risk. Simply put, current law will not provide for a free and open election secure from tumult as guaranteed article I, § 5 and article II, § 1 of the South Carolina Constitution and the Court should enjoin current procedures and order a remedy to protect Petitioners' rights. Plaintiffs would respectfully show this Honorable Court as follows:

JURISDICTION

1. The Court has subject matter jurisdiction under article V, § 5 of the South Carolina Constitution and personal jurisdiction over all Defendants.

PARTIES

2. Plaintiff Regina Duggins is a citizen of the State of South Carolina, a resident of Charleston County, and a registered voter. See Duggins Aff. ¶¶ 2, 5 (**Exhibit 1**). Duggins was diagnosed with asthma as a child. Id. ¶ 6. In 2018, she was hospitalized for Aspirin Exacerbated Respiratory Disease (AERD), which she treats with three different inhalers to aid her breathing. Id. Her weight also puts her at a higher risk to suffer from severe complications were she to contract COVID-19. Id. ¶ 6. She is just 43 years old and takes extraordinary daily measures to ensure she

does not contract the virus. See id. ¶¶ 3, 7. She is fearful about participating in the November general election. Id. ¶ 9.

3. Plaintiff Chaunta R. Hamilton is a citizen of the State of South Carolina, a resident of Berkeley County, and a registered voter. See Hamilton Aff. ¶¶ 2, 5 (**Exhibit 2**). Hamilton has been diagnosed with End-Stage Renal Disease, which requires her to undergo dialysis treatment three times per week until she receives a kidney transplant. Id. ¶ 6. Accordingly, she has taken extraordinary precautions to avoid contracting COVID-19. See id. ¶ 7. Without expanded ballot access for the November general election, she will be unable to vote for fear of contracting COVID-19. See id. ¶ 9.

4. Defendant Jay Lucas is the Speaker of the House of Representatives.

5. Defendant Harvey Peeler is the President of the Senate.

6. Nominal Defendant South Carolina Election Commission (Election Commission) is an agency of the State of South Carolina responsible for planning and executing elections and assisting local election commissions in doing the same. The Election Commission has consistently and repeatedly warned of the need to act to protect election workers and voters and ensure the successful conduct of the general election during the COVID-19 pandemic. It is joined here as a party necessary to grant complete relief.

FACTS

7. Generally speaking, South Carolina voters are required to cast a ballot at the polls on election day unless they are absent from their county of residence or present but meet the criteria in an enumerated list of categories. See S.C. Code Ann. § 7-15-320. Absentee voting procedures permit either an early in-person ballot or a mail ballot. See id. § 7-15-330.

8. South Carolina remains in a state of emergency because of the COVID-19 pandemic. Without relief here, it is certain to have a deleterious effect on the free, open, and safe conduct of the November general election free of tumult by disrupting the State's ability to conduct a successful election and discouraging participation by voters concerned about lines and crowds.

**The State of South Carolina and her citizens are
in an escalating state of emergency due to the COVID-19 pandemic**

9. COVID-19 is a highly communicable respiratory disease caused by a novel coronavirus called SARS-CoV-2 that has spread across the world, including in the United States and South Carolina.

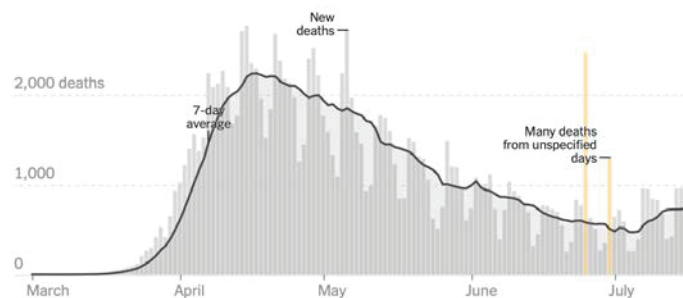
10. With few notable exceptions, the virus has spread unimpeded across the United States. For example, on July 17, 2020, the United States recorded a daily record of more than 75,000 new cases.

New reported cases by day in the United States



Note: The seven-day average is the average of a day and the previous six days of data.

New reported deaths by day in the United States



These are days with a data reporting anomaly. Read more [here](#).

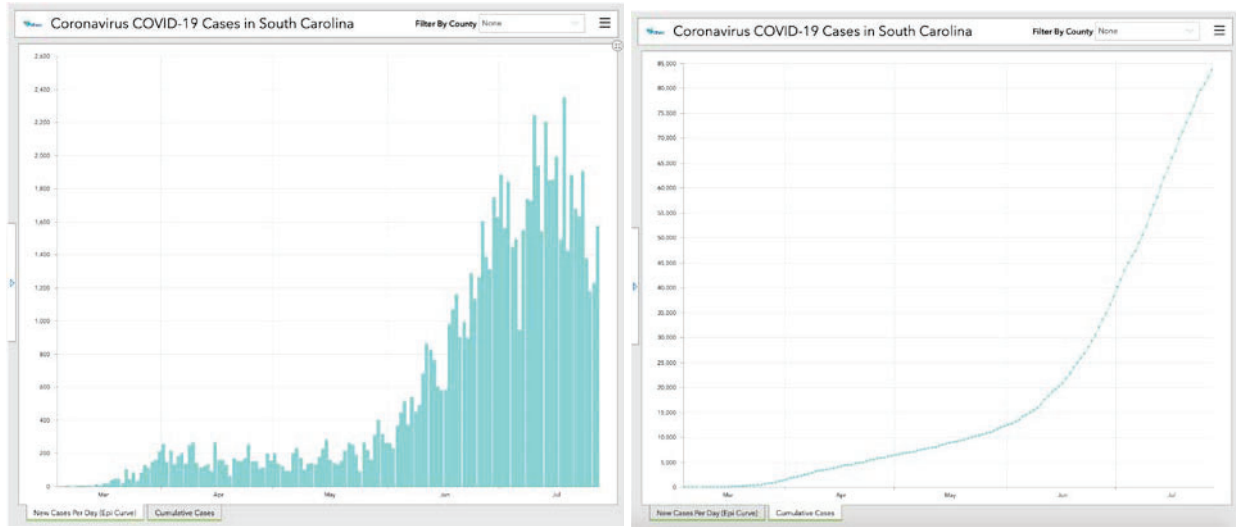
Figure 1 - "Coronavirus Live Updates: U.S. Shatters Single-Day Caseload," *N.Y. TIMES* website (July 17, 2020).

11. South Carolina is likewise posting record numbers of new cases.

12. According to the South Carolina Department of Health and Environmental Control (DHEC), 82,071 South Carolinians have been infected with the virus and 1,452 have died as of July 28, 2020. See "SC Testing Data and Projections" SCDHEC website (July 28, 2020).¹

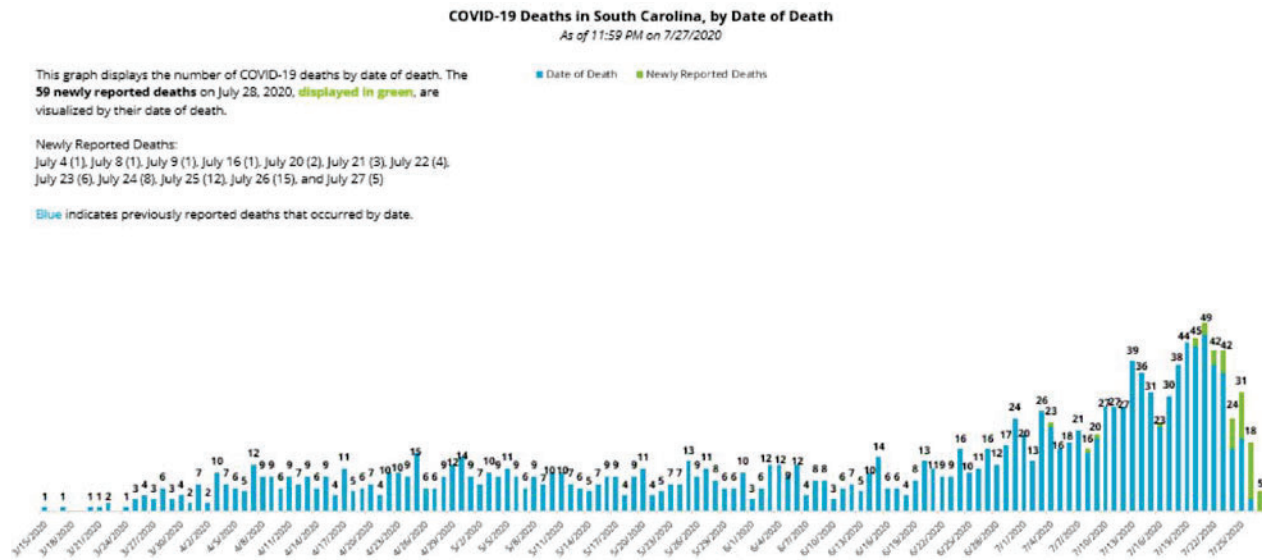
¹ Available at: <https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19>

13. South Carolina's daily and cumulative case load is growing largely unimpeded.



“SC Testing Data & Projections (COVID-19),” DHEC website (last accessed July 28, 2020).²

14. South Carolina deaths from COVID-19 have also sharply risen in recent weeks:

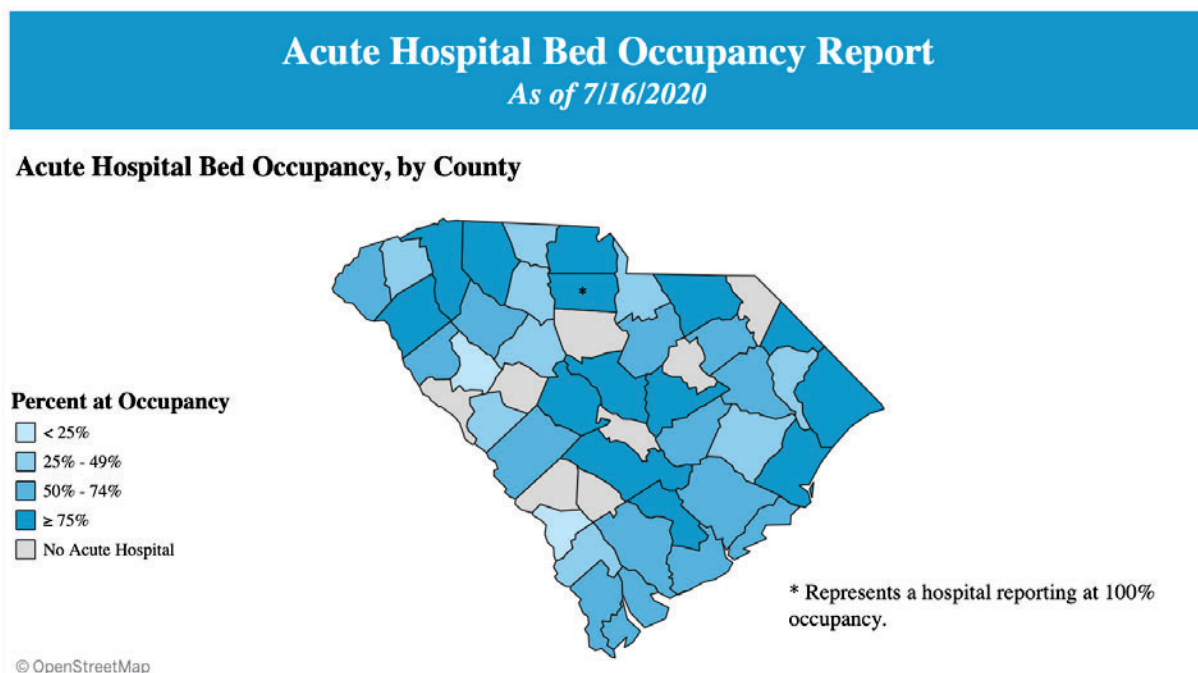


“COVID-19 Deaths in South Carolina by Date,” DHEC website (last accessed July 28, 2020).³

² Available at: <https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19>

³ Available at: <https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19>

15. Also concerning is the occupancy of South Carolina hospitals which, once overrun by coronavirus cases, will be unable to provide life-saving care to all patients in need, leading to increased death among citizens that might otherwise be saved through medical intervention. While DHEC's current hospital occupancy report suggests an improved landscape, disclaimers on the recent July 25, 2020 report indicate the agency's reporting capacity is still "transitioning" to a new federal system. The last available public report not subject to these accuracy disclaimers indicates highly populated counties with caseloads already exceeding 75% of available capacity:



"Total Hospital Bed Occupancy (COVID-19)," DHEC website (accessed July 17, 2020).⁴

The Executive and Judicial branches of State government have exercised emergency powers to marshal a response to the COVID-19 pandemic

16. Beginning on March 13, 2020 and continuing uninterrupted through the present, Governor Henry McMaster has issued 31 executive orders, including nine emergency declarations

⁴ Available at: <https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/hospital-bed-capacity-covid-19>

citing an “imminent” threat to public health or other risks posted by COVID-19 and marshaling a response using the State’s Public Health Plan Emergency Committee and South Carolina Emergency Operations Plan.

17. For example, the March 13, 2020 executive order (Ex. Order 2020-08):
 - a. Ordered DHEC to restrict visitation to nursing homes and assisted living facilities;
 - b. Closed all public schools in Kershaw and Lancaster counties;
 - c. Authorized jails and prisons to suspend visitation;
 - d. Activated the South Carolina National Guard;
 - e. Prohibited price gouging; and
 - f. And suspended certain regulations for security contractors and commercial vehicle operators.

See Ex. Order 2020-08 (citing S.C. Code Ann. §§ 1-3-420; 25-1-440; 44-4-130 & -500).

18. On March 15, 2020, the Governor issued an executive order closing all public schools for 14 days and postponing all March and April municipal elections. Ex. Order 2020-09.

19. On March 17, 2020, the Governor issued an executive order directing DHEC to use its powers under the Emergency Health Powers Act—a law that grants the department power to (1) close and decontaminate any facility deemed to pose a risk to public health; (2) ration and manage services by any health care facility; (3) test, treat, vaccinate, isolate, or quarantine individuals or groups; and (4) commandeer the assistance of in-state health care workers, among other emergency powers—to prevent transmission of the COVID-19 virus. Ex. Order 2020-10, § 2. The executive order also suspended on-premises restaurant service and prohibited public gatherings of more than 50 persons. Id. §§ 4–5.

20. March 19, 2020, the Governor issued an executive order directing non-essential State employees and staff to stay home and instructing the Department of Employment and Workforce (DEW) to prepare for and respond to the economic impact of the pandemic, among other measures. See Ex. Order 2020-11, §§ 1–2.

21. On March 27, 2020, the Governor ordered that individuals entering South Carolina from high risk areas quarantine for 14 days. See Ex. Order 2020-14, § 1.

22. On March 28, 2020, the Governor issued another emergency declaration that closed schools through April, among other directives. See Ex. Order 2020-15, § 2.

23. On March 30, 2020, the Governor used executive power to close beaches and waterways to recreation. See Ex. Order 2020-16.

24. On March 31 and April 3, 2020, the Governor issued orders closing non-essential businesses. See Ex. Order 2020-17 & -18; see also Ex. Order 2020-19 (April 3, 2020) (prohibiting lodging rentals to persons from CDC hot zones).

25. On April 6, 2020, the Governor ordered South Carolinians to restrict movement to home or work, “limit social interaction”, and “practice ‘social distancing’ in accordance with CDC guidance[.]” See Ex. Order 2020-21; see also Ex. Order 2020-22 (April 7, 2020) (instructing DEW to prepare to administer unemployment insurance program to address economic impact).

26. On April 16 and 20, 2020, the Governor modified restrictions on use of public water to facilitate outdoor recreation and exercise, while reaffirming the mandate to maintain social distance and continuing the ban on groups of three or more people. See Ex. Order 2020-25; Ex. Order 2020-28.

27. On May 3 and 8, 2020, the Governor modified the work-or-home order, rescheduled the postponed municipal elections, and lifted some of the restrictions on indoor restaurant service and boating. See Ex. Order 2020-31; Ex. Order 2020-33; Ex. Order 2020-34.

28. On May 12, 2020, the Governor issued a fifth emergency declaration and extended the closure of public schools. See Ex. Order 2020-35.

29. On May 15 and 21, 2020, the Governor lifted the close order on gyms, spas, salons, barber shops and entertainment venues while certain restrictions. See Ex. Order 2020-36; Ex. Order 2020-37.

30. On July 11, 2020, the Governor restricted the on-premises consumption of alcohol in bars and restaurants after 11:00 p.m. See Ex. Order 2020-45.

31. Starting on June 11, 2020 and again every two weeks thereafter, the Governor has issued new emergency declarations. See Ex. Order 2020-40 (sixth); Ex. Order 2020-42 (June 26, 2020) (seventh); Ex. Order 2020-44 (July 11, 2020) (eighth); Ex. Order 2020-48 (July 26, 2020) (ninth). There is no expectation the state of emergency will end anytime soon.

32. Likewise, the Judicial branch has used emergency powers to protect public health, issuing no less than 33 orders and memoranda since March 4, 2020 addressing various aspects of court operations during the pandemic. Many of these measures are specifically designed to limit the number of people gathering together indoors and out.

33. For example, on April 30, 2020, the Court lifted the moratorium on evictions and foreclosures but ordered that any in-person hearings “be staggered as not to create large gatherings of people.” In re Statewide Evictions and Foreclosures (Beatty, CJ). The Court also required “at least 30 minutes between the ending of a hearing and the beginning of another” in order to “reduce

the number of people at the court and allow any necessary cleaning of the facility.” Id. (advising, “In-person hearings are the exception not the rule.”).

34. Likewise, jury trials remain continued until further notice while circuit judges are directed to conduct virtual hearing whenever possible. See In re Operation of the Trial Courts During the Coronavirus Emergency, No 2020-000447 (amended Apr. 22, 2020); Court Operations During the Six Week Period, May 4 – June 12, 2020 (mem), (Apr. 24, 2020) (Beatty, CJ).

35. The appellate courts remain under an Order authorizing virtual oral argument, restricting the handling of paper document, and extending deadlines. See Am. Order, No. 2020-000447 (May 29, 2020).

36. On July 2, 2020, the Court issued an Order implementing mitigation measures for the South Carolina Bar Examination. Those mitigation measures, developed in consultation with DHEC, endeavor to make the indoor examination safer by (1) dramatically expanding the square footage of the facilities to ensure test takers are at least six feet apart; (2) separating test takers into four groups and staggering start and stop times; (3) ordering test takers to minimize contact and avoid public gatherings in the 14 days prior to the exam; (4) ordering test takers to wear a mask and social distance when in public; (5) ordering test takers traveling to South Carolina via plane, bus, or train to do so 14 days prior to the exam; (6) ordering test takers to wear a mask while taking the test or in common areas of the testing center; and ordering test takers to maintain social distance. In re COVID-19 Mitigation Measures for the July 2020 South Carolina Bar Examination.

37. The United States District Court for the District of South Carolina is under it third emergency order postponing jury trials, grand juries, and roster meetings. See Third Am. Standing Order, No. 3:20-mc-00326-RBH (D.S.C. July 24, 2020).

38. South Carolina's trajectory with COVID-19 is unlikely to materially change for the better in time for the November general election and could, in fact, be considerably worse.

**The pandemic threatens the health and safety
of a large number of South Carolina voters**

39. The COVID-19 coronavirus affects public health in ways that directly impact the State's ability to conduct a safe, free, and open election and the risk of harm to individual voters.

40. COVID-19 is a respiratory infection that is caused by a new coronavirus called SARS-CoV-2. Aff. E. Smith ¶ 4 (**Exhibit 3**). Symptoms range from mild to severe. Id. ¶ 6. The majority of people infected only experience a mild or moderate case, while an estimated one in five patients endure a severe case that may require hospitalization. Id.

41. The largest study to date of COVID-19 patients with severe cases admitted to an intensive care unit (ICU) in a United States hospital found that 39.5% of those patients died. Id. ¶ 7. Current estimates expect between 500–780 people per 100,000 to die from COVID-19 infections (compared to between 1 and 10 deaths per 100,000 seasonal flu infections). Id. ¶ 5.

42. Everyone is at risk of getting COVID-19, but certain people are at higher risk of severe complications if infected. Id. ¶ 8. Older adults face increased risk of severe complications, as do people with underlying medical conditions, including (1) Type 2 diabetes mellitus; (2) obesity (body mass index [BMI] of 30 or higher); (3) chronic kidney disease; (4) chronic obstructive pulmonary disease (COPD); (5) immunocompromised state (weakened immune system) from solid organ transplant; (6) serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; and (7) sickle cell disease. Id.

43. CDC recommends special precautions for other populations including people who are pregnant, disabled, and belong to racial and ethnic minority groups. Id. ¶ 9.

44. A significant portion of the population in South Carolina is at elevated risk for severe complications from COVID-19. Id. ¶ 10. According to 2017 data from DHEC, South Carolina has the fifth-highest prevalence of diabetes in the United States with more than 500,000 or 13.4% of the adult population afflicted. Id. ¶ 11. Of these, an estimated 127,000 people have diabetes but do not yet know it. Id.

45. According to CDC, more than one in three South Carolinians are obese. Id. ¶ 12.

46. According to recent data from the March of Dimes, nearly 1 million women of childbearing age (ages 15–44) live in South Carolina, and there are more than 57,000 births in the state each year. Id. ¶ 13.

47. COVID-19 is spread from persons to person in three ways: (1) droplet transmission, (2) aerosol transmission, and (3) fomite transmission. Id. ¶ 14.

48. Droplet transmission occurs when a sick person coughs or sneezes invisible, virus-filled droplets into the air and someone else inhales them. Id.

49. Aerosol transmission is virus spread through the air via saliva and mucus released during speech, coughing, or sneezing. Id. While droplets fall to the ground quickly, aerosol particles can travel farther in a room than larger droplets can and can float longer in the air. Id. A five-micron particle will travel more than 30 feet at typical indoor air velocity. Id.

50. Finally, fomite transmission occurs when droplets land on a surface and are transferred by touch to another person who then touches their mouth, nose, or eye, resulting in infection. Id. The virus can last from four to 24 hours on cardboard and up to three days on plastic and stainless-steel surfaces. Id.

51. There is clear evidence that persons infected with COVID-19 can spread the virus prior to showing symptoms—a phenomenon called pre-symptomatic transmission. Id. ¶ 15. Other

infected persons spread the disease without ever showing symptoms—a phenomenon called asymptomatic transmission. Id. ¶ 16. Pre- and asymptomatic transmission by unwitting persons makes it difficult to stop the spread of COVID-19. Id. ¶ 17.

52. According to Emily Smith, SCD MPH—an epidemiologist, Assistant Professor at the George Washington University Milken Institute of Public Health, and researcher at the Harvard T.H. Chan School of Public Health—in-person voting “will increase the risk that poll workers and voters will contract COVID-19.” Id. ¶ 18.

53. As recent CDC guidance acknowledges, “Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.” Id. ¶ 19. Accordingly, CDC recommends reducing direct contact, minimizing the number of people at polling locations, and considering alternatives to in-person voting. Id.

54. Other prophylaxes (like masks) are secondary to strategies that allow voters to maintain physical distance from one another. As Dr. Smith explains,

COVID-19 mainly spreads from person to person, and in the ways described above. So, although well-documented precautions—such as wearing face coverings, social distancing, disinfecting surfaces, and washing hands thoroughly and often—are crucial, those precautions are secondary to avoiding crowds and unnecessary contact with others.

Id. ¶ 20.

55. Whether an activity is high or low risk for COVID-19 transmission turns on four factors: people, place, time, and space. Id. ¶ 21. Dr. Smith explains, “[i]n-person voting is a high-risk activity for all people because it necessarily gathers strangers together, indoors, and for potentially long stretches of time.” Id. ¶ 22.

56. There is no short-term prospect for a vaccine that would inoculate the majority of the population or a therapy that reliably combats the virus.

The pandemic threatens free and open elections secure from tumult

57. State election officials are alarmed by the prospect that the COVID-19 pandemic will have a severe adverse impact on the November general election and warn that unless remedial action is taken now there will be insufficient time to implement those changes for November.

58. On March 30, 2020, the Executive Director of the South Carolina Election Commission (Election Commission), Marci Andino, sent correspondence to Governor McMaster, President Peeler, and Speaker Lucas urging the General Assembly to act in response to the rapidly approaching June statewide primary elections. See Ltr. Andino to McMaster et al. (**Exhibit 4**). Director Andino warned that as the coronavirus continued to spread, the Commission was “concerned about the safe conduct of the June Primaries, November General Election and all other elections scheduled for 2020.”

59. Director Andino warned that current election laws required large numbers of people to congregate at polling locations and a “large percentage” of the state’s poll managers fall into high-risk categories, such that there was likely to be a deficit in the number managers needed to staff polling locations. Id. at 1–2.

60. Director Andino asked state leaders to implement emergency changes to election procedures and offered a menu of options designed to facilitate physical distancing. See id. at 2–4 (“These potential solutions to conducting safe and secure elections in the midst of a pandemic are put forth in the spirit of identifying solutions that will enable the voters of South Carolina to continue to express their will through elections.”).

61. On April 6, 2020, the South Carolina Association of Registration and Election Officials, Inc. (SCARE) wrote the Governor and legislative leadership urging adoption of vote-by-mail procedures as the best method given the threat posed by COVID-19, the need to protect

voters and election workers, and the unavailability of sufficient polling locations and workers. See Ltr. K. Smith to H. McMaster et al. (**Exhibit 5**).

62. On May 12, 2020, the General Assembly passed Senate Bill 635, which extended no-excuse absentee voting to all South Carolina voters and provided funding to underwrite costs for protection of the health and safety of voters, poll workers, and county election officials. The legislature did not enact any remedy for the November general election.

63. The next day, the Governor signed the bill into law (Act 133) and statewide primary elections proceeded accordingly.

64. Meanwhile, two weeks prior to the June primaries, the United States District Court for the District of South Carolina suspended the witness requirement for mail-in absentee ballots for the primary and runoffs.

65. Together, these developments afforded all primary election voters the opportunity to cast a ballot while in self-isolation and quarantine.

66. On Tuesday, June 9, 2020, the State held the statewide primary election. Out of 3,329,755 registered voters, 767,187 voters cast primary ballots—a participation rate of 23 percent.

67. The election occurred in spite of an acute shortage of poll workers due principally to the fact that most poll workers are in an age or disease cohort most seriously at risk for a severe or fatal outcome were they to contract COVID-19 and were understandably unwilling willing to risk the exposure.

68. On July 17, 2020, Director Andino sent correspondence to President Peeler and Speaker Lucas again imploring action and “underscore[ing] serious concerns related to the safe and efficient conduct of the November General Election.” See Ltr. Andino to Peeler & Lucas (**Exhibit 6**).

69. After reiterating her concerns that current election procedure require large numbers of people to congregate and that many poll managers in high-risk categories may decline to serve, Director Andino explained that county election officials are also struggling to find a sufficient number of available polling locations as owners and managers decline to open their facilities to the public due to concerns over the virus. Id. at 1.

70. The Election Commission has also identified other challenges to conducting the November general election that were either not present or not present to the same degree during the June statewide primary elections. For example, voter turnout and absentee voting during a general election are significantly higher than during a primary election. Director Andino explained, “[t]urnout in non-gubernatorial statewide primaries averages 18%, while turnout in presidential elections averages 71%.” Id. at 2. For a rough comparison, absentee voting in the June primaries increased 213% compared to the 2016 primaries (61,000 to 191,000), and absentee ballots cast by mail increased 370% (27,000 to 127,000). Id. “Prior to the pandemic, 27% of absentee voters voted by mail. In the 2020 Statewide Primaries, 66% voted by mail.” Id. Applying these numbers to the November general election would mean more than 1.6 million absentee ballots are likely to be cast in November with more than 1 million of these ballots cast by mail. Id.

71. Without changes now, this volume of mail-in ballots will overwhelm the State’s election infrastructure and cripple its ability to count votes within the statutory deadline to complete the count.

72. Based on these observations, the Election Commission raised the following concerns over the conduct of the November general election:

- The absentee-by-mail process will be overwhelmed and overrun if we have in place only the same rules and provisions in place in June. The opening and counting of absentee-by-mail ballots will require substantially more time to complete, and election results will be significantly delayed.

- With significantly more voters at the polls in November, social distancing at polling places will become far more difficult, and in some places, will be impossible.
- Poll manager shortages are expected to be more extreme. More managers will be needed than in June, and with the spread of COVID-19, more managers will be unavailable to serve.
- Polling place availability may also be impacted due to the spread of COVID-19.
- The resulting polling place consolidations will have a far greater impact on voter wait times with the increase in turnout.
- Increased wait times and fear of COVID-19 will cause unqualified voters to flood the curbside voting process at polling places interfering with its intended purpose of helping voters with disabilities.

Ex. 6 at 2–3. In short, “Poll manager shortages, inexperienced poll managers and lack of polling places leads to consolidation, crowding, long lines, confusion and errors on election day.” Id. at 1.

73. As she did in March, Director Andino offered a menu of procedures that could be implemented to ensure a safe and secure election. These proposals included (1) no-excuse absenteeism, (2) allowing absentee applications to be submitted online, (3) removing the witness requirement for absentee return envelopes, (4) permitting absentee return drop boxes, (5) granting additional time to count absentee ballots, (6) designating curbside voting locations, (7) expanding electronic ballot delivery (already used for military voters) to disabled voters and first responders, (8) enacting early voting, and (9) adopting vote-by-mail. See Ex. 6 at 3.

74. The director’s letter requested “immediate action” to ensure election officials have as much time as possible “to ensure we can rise to the greatest challenge to our election system our state has ever seen.” Id. at 4.

75. To facilitate expanded absentee balloting, the Election Commission has already committed to prepay postage for absentee ballot return envelopes.

76. But other work must happen quickly if it is going to prove efficacious, like training of poll workers, identifying new polling locations, and public education to inform the public of any changes to voting procedure.

77. On or about July 28, 2020, SCARE sent letter correspondence to the Governor, Defendant Peeler, and Defendant Lucas on behalf of local election directors and officials in South Carolina with an “imperative” message urging that these officials “cannot overstate the devastating consequences if the state of South Carolina does not plan now for the November election. Ltr. Smith & Cramer to McMaster, et al. (undated) (**Exhibit 7**). Specifically, SCARE urged implementation of (1) no-excuse absentee voting, (2) removing the witness signature requirement, (3) allowing counties to begin processing absentee ballots the Friday before the election, and (4) use of absentee drop boxes. Id.

78. An independent election watchdog agrees with the recommendations of State and local election administrators. In April, the National Task Force on Election Crises issued an election guide with the goal of maximizing participation, safeguarding election integrity, and upholding public confidence in the November election. See “COVID-19 Election Guide,” National Task Force on Election Crises, p. 2, electiontaskforce.org (Apr. 17, 2020) (**Exhibit 8**). The task force recommended easing access to absentee ballots, implementing COVID-excuse absentee voting, recruiting additional temporary personnel, improving absentee ballot processing, extending deadlines to return absentee ballots, recruiting additional poll workers, expanding early voting, maximizing safe poll access, and other safe voting precautions. See id. at 4–9. These measures largely comport with the procedures requested by State and local election officials.

If the legislature acts act all, it will be too late

79. The legislative record indicates the General Assembly will not act in time to allow election officials to implement changes sufficient to make voting safe and the administration of the election successful.

80. On April 22, 2020, an action styled Bailey v. South Carolina Election Commission, No. 2020-000642, was filed in the original jurisdiction urging the South Carolina Supreme Court to construe the right of persons with a “disability” to cast an absentee ballot under South Carolina Code § 7-15-320(B) to include voters attempting to maintain physical distance during the coronavirus pandemic.

81. On May 12, 2020, the same day the Court heard argument in Bailey, the legislature met and passed legislation extending absentee voting to all voters. See Bailey, 2020 WL 2745565 at *2 (S.C. May 27, 2020); see also Act No. 133, § 2A, 2020 S.C. Acts ___. The General Assembly declined to extend those same protections to voters in November.

82. The Governor signed the bill the next day.

83. In late June, the General Assembly convened a brief session to pass a continuing resolution and appropriate coronavirus relief aid.

84. On June 24, 2020, the House of Representatives voted down two amendments that would extend the same protections afforded to voters during the June statewide primary to voters in the November general election. See S.C. House Journal (123rd Sess.) (June 24, 2020). Amendment No. 2A to H. 5202 proposed to permit a qualified elector to vote by absentee mail ballot without a witness during the 2020 general election. Amendment No. 6A proposed to allow any qualified elector to cast an absentee ballot, in person or by mail, during the 2020 general election. Both amendments were tabled.

85. At the time of the vote, a member of the South Carolina press corps reported that House leaders claimed they would consider the measures in September.

86. Similarly, on July 27, 2020, the leader of the minority party in the Senate sent correspondence to President Peeler urging him to call the Senate back in response to Director Andino's most recent letter.

87. On July 28, 2020, a member of the South Carolina press corps reported President Peeler was "sticking by" the plan to return in September.

88. This action followed.

**FOR A FIRST CAUSE OF ACTION
(Declaratory Relief)**

89. Each of the paragraphs above is incorporated here verbatim.

90. "All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in th[e] Constitution shall have an equal right to elect officers and be elected to fill public office." S.C. CONST. art. I, § 5.

91. Article II of the South Carolina Constitution guarantees South Carolina citizens of majority age the right of suffrage.

92. "The right of suffrage, as regulated in this Constitution, *shall* be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct." S.C. CONST. art. II, § 1 (emphasis added).

93. Accordingly, the Constitution tasks the General Assembly with regulating the time, place, and manner of elections and enacting other provisions necessary to the fulfillment and integrity of the election process. S.C. CONST. art. II, § 10.

94. Nevertheless, current election procedures are insufficient to secure the election from the tumult caused by the coronavirus pandemic or grant free and open access to the ballot to individual voters at the greatest risk of a severe case of COVID-19.

95. Moreover, if sick and vulnerable persons like Plaintiffs are to be granted safe, free, and open access to the ballot through the implementation of remedial election procedures, those procedures must be ordered now to ensure election officials to have sufficient time to implement them in order to conduct a successful election.

96. The Constitution does not permit the State to simply allow elections to fail.

97. Pursuant to article V, § 5 of the Constitution and the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 et seq., the Court should declare:

- a. Current election procedures are insufficient to provide for a safe, free, and open general election free of tumult;
- b. Defendants have not implemented such procedures and will not do so in time to conduct a successful election in November;
- c. Any further inaction will foreclose the possibility of any remedy by denying election officials an opportunity to plan and execute;
- d. Plaintiffs and other sick and vulnerable voters will suffer a real, cognizable, and irreparable constitutional harm if forced to choose between their personal health and safety and the right to vote; and
- e. Time is of the essence.

98. The Court should enter a final judgment declaring these rights in favor of Plaintiffs and against Defendants.

**FOR A SECOND CAUSE OF ACTION
(Injunctive Relief)**

99. Each of the paragraphs above is incorporated here verbatim.

100. This Court is a co-equal branch of the South Carolina government charged with protecting the individual rights of the People.

101. The right of suffrage is paramount and because “[a]ll political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government.” S.C. CONST. art. I, § 1.

102. Accordingly, the Court should exercise its power under article V, § 5 of the Constitution and South Carolina Code § 15-53-120, and order election procedures that guarantee a free and open election secure from the tumult being caused by the pandemic.

103. Specifically, the Court should order the plan outlined by the South Carolina Election Commission (see Ex. 6) and order it to implement and execute the following procedures: (1) no-excuse absenteeism, (2) online absentee applications, (3) eliminating the absentee witness requirement for return envelopes, (4) drop box absentee returns, (5) additional time for election officials to count absentee ballots, (6) designated curbside voting polling locations, (7) electronic ballot delivery (like the one used for military voters) to disabled voters and first responders, (8) early voting, and (9) vote-by-mail.

104. The Court should also order any such further procedures as the South Carolina Election Commission may recommend as feasible to implement and necessary to safeguard election workers and voters and conduct an orderly general election in November.

PRAYER

105. Wherefore, after an expedited hearing, the Court should grant declaratory and injunctive relief as set forth above, retain jurisdiction to ensure its orders are followed, and grant such further relief as the Court deems just and proper.

[signature page follows]

Respectfully submitted by,

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_____, 2020
Columbia, South Carolina.

EXHIBIT E

Brenda Chapman Williams, MD 7/24/2020

48

1 that person register to vote in wherever their home
2 state is; is that right?

3 A. That's right.

4 Q. Okay. You further say in the Complaint, In
5 recent years, The Family Unit members and constituents
6 have had absentee ballots rejected because of the
7 witness requirement.

8 How many times would you say that your
9 members and your constituents have had their absentee
10 ballots rejected because of the witness requirement?

11 A. There have been at least eight individuals
12 that have had their absentee ballots rejected on the
13 basis of the witness requirement.

14 Q. And why were they rejected?

15 A. Those absentee ballots were rejected because
16 of the absence of a witness signature.

17 Q. I got you.

18 A. And one ballot was rejected because the
19 address of the witness was not put on the voter's
20 envelope. The signature was there, but the witness
21 forgot to put her address, and subsequently, the
22 voter's ballot was discarded.

23 Q. Who does that? Who's rejecting the ballot?
24 That's the county election commission?

25 A. Yes.

EXHIBIT F

Brenda Murphy 7/27/2020

30

1 getting witnesses available to assist people in
2 signing their -- getting the votes signed?

3 A. That, because of COVID-19, would be an
4 issue. Because we would asking individuals to go
5 into homes that we don't know, the person may not
6 know if they've been exposed to COVID-19. The
7 individuals -- you know, there are carriers, you
8 know, people that don't know that they are carriers.
9 So the potential for exposure is significantly
10 increased.

11 Q. Let me go back, because I was just
12 asking generally about the "get out of the vote."

13 As a general rule, before COVID-19 --

14 A. Yes.

15 Q. -- did the "get out the vote" include
16 assisting individuals obtaining witness signatures?

17 A. No.

18 Q. So it is the NAACP's testimony that --

19 A. Now, what you're saying, if somebody
20 wanted to vote, do absentee balloting?

21 Q. Yes, ma'am.

22 A. Well, yes, it would be inclusive,
23 because all they needed to do is make a phone call
24 for somebody to come and sign off.

25 Q. Again, I'm asking prior to --

EXHIBIT G

RUOFF, JOHN 8/3/2020

65

1 A No.

2 Q In fact, that conclusion has nothing to
3 do with absentee ballots, correct?

4 A Well, it would certainly have to do with
5 the overall case, but I was not asked to look at
6 the question of absentee ballots.

7 Q And so do you understand -- I think when
8 Ms. Crum asked you about how you voted, and you
9 said you voted like an old person, and so I took
10 that to mean that you used the over 65?

11 A Yes.

12 Q And so are you familiar with some of the
13 criteria to vote for absentee ballot?

14 A Yes.

15 Q And there's nothing in your report about
16 any of those, correct?

17 A No.

18 Q And as to the witness requirement, are
19 you familiar with that requirement?

20 A Yes.

21 Q Is there anything in your report that has
22 anything to do with the witness requirement for
23 absentee voting?

24 A No.

25 Q So you don't make any conclusions about

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Mary T. Thomas, *et al.*,

Plaintiffs,

v.

Marci Andino, *et al.*,

Defendants.

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

Declaration of Pete Logan

I, Pete Logan, hereby declare:

1. I am Lt. Pete Logan and have worked as an agent at the South Carolina Law Enforcement Division (“SLED”) for over 30 years.
2. Prior to joining SLED, I worked as an agent with the Federal Bureau of Investigation for 28 years.
3. As part of my job at SLED, I conduct and supervise investigations into various criminal matters, including cases that involved allegations of voter fraud in South Carolina.
4. I have investigated numerous cases involving allegations of voter fraud, including various allegations of absentee-voting fraud.
5. In fact, I currently have an ongoing investigation into allegations of fraudulent absentee voting in South Carolina.
6. The witness requirement for absentee ballots provides SLED, and all criminal investigators, with a significant investigate lead to pursue in these cases because it provides another potential witness to interview on these cases.
7. The absence of the witness requirement would remove even the possibility of this investigative lead on these cases.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Lt. Pete Logan
SLED

Columbia, South Carolina
August 4, 2020