SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20486

MARY FAY, THOMAS GILMER, JUSTIN ANDERSON AND JAMES GRIFFIN
PLAINTIFFS-APPELLANTS

v.

SECRETARY OF THE STATE DENISE MERRILL
DEFENDANT-APPELLEE

APPENDIX
TO BRIEF OF THE DEFENDANT–APPELLEE DENISE MERRILL

FOR THE DEFENDANT-APPELLEE DENISE MERRILL:

WILLIAM TONG
ATTORNEY GENERAL

CLARE KINDALL
SOLICITOR GENERAL

MICHAEL K. SKOLD
MAURA MURPHY OSBORNE
ALAYNA M. STONE
ASSISTANT ATTORNEYS GENERAL
165 CAPITOL AVE., P.O. BOX 120
HARTFORD, CT 06141-0120
TEL. (860) 808-5020
FAX (860) 808-5347
william.tong@ct.gov
clare.kindall@ct.gov
michael.skold@ct.gov
maura.murphyosborne@ct.gov
alayna.stone@ct.gov

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DENISE MERILL	:	JULY 21, 2020

B E F O R E

THE HONORABLE THOMAS MOUKAWSHER, JUDGE

A P P E A R A N C E S

FOR THE PLAINTIFF:
MURTHA CULLINA LLP
280 TRUMBULL ST
HARTFORD, CT
BY: PROLOY DAS, ESQ.
MATTHEW CIARLEGLIO, ESQ.

FOR THE DEFENDANTS:
OFFICE OF THE ATTORNEY GENERAL
165 CAPITOL AVE
HARTFORD, CT
BY: MICHAEL SKOLD, AAG
MAURA MURPHY-OSBORNE, AAG

JOHN McILHONEY
COURT MONITOR

brief.

And I want to read the actual quote from the decision. Because it says, A statute will be declared unconstitutional if -- and this is the first part -- confers on one branch of government the duties which belong exclusively to another branch of government.

And here, the state constitution confers exclusively to the general assembly on the subject matter of absentee balloting. There's not a lot of areas where you have that exclusive commitment, but we do have that here.

And because of that we're not saying 29b is unconstitutional. But to interpret 29b is allowing the governor to amend constitution -- statutory provisions that are within the exclusive province of the general assembly. That would be a separate of powers problem. That would be a delegation problem under the state constitution.

So our view is that the statutes need to be read constitutionally. And the only way to do that is to say that the governor overstepped here. The governor's -- he read 29b way too broadly. It doesn't give him the authority to amend the constitution. And it doesn't give him the authority to amend statutes that are enacted pursuant to the constitution that are entrusted

is no challenge to the constitutionality of 28-9b1. And so this issue is just not before the Court. And it's not an issue that --

THE COURT: Mr. Das, do you agree that in your complaint you don't seek to invalidate that statute, do you?

ATTY. DAS: No. That's just -- that's a bigger issue. We would never try and tack on the whole statute on its own. It's only the application of that statute in this area that -- and if you applied it here that would render the statute unconstitutional.

Our case law is you do everything you can to read a statute as constitutional. So we're not trying to invalidate the whole statute, which it could -- I mean, there's obviously some delegation issues with it. But that's beyond the scope of what we're challenging.

Our view is that 28-9b has to be interpreted constitutionally. And to apply it to something that is textually committed to one branch of government already, that would be unconstitutional.

It would be the same thing as the executive branch all of a sudden deciding Supreme Court cases going up for that reason. That would be a violation of the separation-of-powers principle. And that's why, with respect to delegation to

SC 20477

MARY FAY ET AL.	:	SUPREME COURT
v.	:	STATE OF CONNECTICUT
DENISE MERRILL	:	JULY 5, 2020

AFFIDAVIT OF THEODORE E. BROMLEY

THEODORE E. BROMLEY declares as follows:

1. I submit this Declaration in support of Defendant Secretary of the State Denise Merrill ("the Secretary") in *Fay v. Merrill*, Docket No. SC 20477 (Conn. 2020). I have compiled the information in the statements below through personal knowledge, the Connecticut Secretary of the State ("SOTS") personnel who assisted me in gathering the information from our agency, or on the basis of documents I have reviewed. I also have familiarized myself with the allegations in Plaintiffs' Complaint in this case in order to understand them and how the relief sought by Plaintiffs—the recall of over 1.25 million absentee ballot applications—will impact SOTS, voters, candidates and local election officials in the administration of the 2020 primary elections.
2. I am the Director of Elections at SOTS. The Secretary is the chief election official for the State of Connecticut. SOTS is the lead agency for administering and overseeing elections in Connecticut. I have worked at SOTS since 2001 in the Legislative, Elections Administration Division, which administers statewide elections in Connecticut and advises local election officials on election matters. I was promoted to Director of Elections in August 2019, in which capacity I manage a staff of thirteen.

3. As part of my job responsibilities in 2020, I assisted in the formulation and preparation of the absentee ballot applications that are the subject of this lawsuit and which will be used in voting in the August 11, 2020 primary elections. As I discuss below, the applications have already been distributed. Between now and August 11, 2020, I will continue to work with local election officials and, to some extent, oversee the administration of the absentee ballot distribution and voting process.

4. As the Director of Elections, I am also involved in creating the state election calendar, administering ballot access for both major and minor party candidates, administering ballot preparation, and administering the programming and testing of the voting machines used in the State of Connecticut. Planning for any election begins months in advance of the actual "election day" and voting begins well before election day every year. In fact, the 2020 Primary Election is already well underway. SOTS is well into the process of both assisting and approving local officials' selection of polling locations; staffing levels; procurement of personal protective equipment; cleaning services for polling places and procuring and installing at least one absentee ballot drop boxes for each of the 169 towns.

5. This year has been an unusual election season because of the COVID-19 pandemic. The pandemic has required several aspects of Connecticut's voting and ballot access procedures to be modified. First, we moved our Presidential Preference Primary from April 28, 2020 to June 2, 2020 and then ultimately August 11, 2020. *See* Executive Order 7G and Executive Order 7BB. Then we modified our ballot access procedures on May 11, 2020 to make petitioning process easier for minor party candidates, unaffiliated candidates, and major party challengers. *See* Executive Order 7LL. Given the public health risk posed by in-person voting during the pandemic, the Governor issued

Executive Order 7QQ ("the EO") on May 20, 2020. (attached hereto as Exhibit 1). SOTS and local election officials have had to adapt to these changing circumstances while dealing with closed offices and other challenges.

6. On March 13, 2020, the Secretary issued a press release indicating that she believed that absentee ballots for the then scheduled April 28, 2020 Presidential Primary should be made available to all voters. (attached hereto as Exhibit 4). That ultimately was not necessary because the primary was moved to June. Then on March 28, 2020, in an open letter to the Governor and legislative leaders, she called on officials to make absentee balloting available for all voters in 2020. (attached hereto as Exhibit 5). On March 26, 2020, she wrote an opinion that was published in the Hartford Courant advocating the same change. (attached hereto as Exhibit 6).
7. On May 6, 2020, the Secretary exercised her authority under General Statutes § 9-3 to issue a Memorandum of Opinion ("the Opinion") interpreting how § 9-135 applies in the unique circumstance of the current pandemic and resulting states of emergency. She determined that, in this extraordinary context, the term "illness" in § 9-135 should be interpreted broadly to include pre-existing illnesses that, although they ordinarily might not prevent a person from voting in-person, do prevent the individual from doing so in this context if they put the individual at a heightened risk of serious illness or death if they were to contract COVID-19. Opinion at 2. (attached hereto as Exhibit 2). The Secretary therefore determined that registered voters who have such a pre-existing illness can vote absentee during the August primaries.
8. It has been clear since mid-March 2020 that expanded absentee balloting was being seriously considered at the highest levels of Connecticut's government. In May, 2020,

that possibility became a certainty with the Secretary's Opinion and then Executive Order 7QQ. As a result of this expansion, SOTS altered its election plan for the August 2020 primary to account for the anticipated increase in absentee balloting. That Plan has been posted on the SOTS website since at least May 6, 2020. The Plan, at page 9, makes clear that absentee balloting applications will be mailed to all registered voters. *See* "2020 Connecticut Safe Polls Plan" available at https://portal.ct.gov/-/media/SOTS/ElectionServices/2020-Voting-Plan-FINAL-DRAFT-May-2-715-PM.pdf?la=en (last viewed July 5, 2020).

9. SOTS has planned for the anticipated large increase in absentee balloting by changing the usual election plan in several significant ways for 2020. None of these modification can be easily reversed, if at all, at this late stage in the election. First, SOTS overhauled the absentee balloting process by centralizing it with a vendor retained by SOTS in 2020. This change was necessary because thousands more absentee ballot applications and absentee ballot sets must be printed in 2020. This change to was made possible by section of the EO that authorized a third party mail vendor. Second, SOTS and local election officials changed their planning for staffing the polls on election day. Third, SOTS and local election officials selected different polling locations for election day because large percentages of voters are expected to vote by absentee ballot.

10. As for the first significant change to the election plan, the use of a contractor to oversee absentee balloting. In normal years, we usually have around 3-5% of voters vote by absentee and the town clerks and registrars are able to handle the work load. This year, based on the experience of other similar jurisdictions, we are expecting between 50-80% of Connecticut voters to opt to vote by absentee ballot in the August 11, 2020 primary.

11. The absentee balloting process has two steps. First, a voter completes an application to vote by absentee ballot. (attached hereto as Exhibit 3). The local election official reviews that application and if approved by the official, he or she enters the name of the voter into the Centralized Voter Registration System (CVRS) as an absentee ballot voter. In normal years, the election official mails out the ballot to an approved applicant directly from the town hall once the ballots are printed and available 31 days before the election and 21 days before a primary. This year, the names of absentee ballot voters are going to be downloaded into a Comma Separated Value (CSV) file by SOTS directly and provided to the vendor, Cathedral Corporation, a national company with an office in Rhode Island. Those CSV files will be provided to Cathedral Corporation on a rolling basis for so they can begin printing the ballots and mailing them out immediately on July 21, 2020.
12. The first of the absentee ballot CSV files will go to Cathedral Corporation beginning on July 7 or 8, 2020 and will continue approximately every other day until close to election day, likely August 7, 2020.
13. Pursuant to the SOTS plan and Conn. Gen. Stat. § 9-140, the Secretary began mailing the Application to active registered voters on June 26, 2020 and that process was completed on July 1, 2020. Cathedral Corporation mailed 1,274,414 absentee ballot applications to active registered voters. Thousands of voters have already completed and returned their applications, and many applications have been processed by local election officials. Once voters begin receiving the absentee ballots from Cathedral Corporation, after July 21, 2020, they will begin casting their votes with those ballots and returning them to election officials.

14. Just the application printing and mailing alone cost the State $850,000. We anticipate the entire expansion of absentee ballots will cost the State $1.6 million.

15. I understand that Plaintiffs are asking that all of those applications be recalled. Practically speaking, this is impossible. All the absentee ballot applications have been mailed and in some instances filled out and returned. I do not understand why Plaintiffs delayed so long to raise these claims since they have known for months about the plans for expanded absentee balloting and definitely since May that they would be candidates. Mary Fay received the Republican Party endorsement for the 1st Congressional District on May 7, 2020. Her challenger, Plaintiff James Griffin, received the support of at least 15% of the delegates on that date to become a candidate in the August primary. Thomas Gilmer, received the Republican Party endorsement for the 2nd Congressional District on May 11, 2020. His challenger, Plaintiff Justin Anderson, received the support of at least 15% of the delegates on that date to become a candidate in the August primary. So they knew no later than May that they would be candidates and probably even before then that they objected to an expansion of absentee balloting.

16. Even if it were possible, I am not sure how SOTS and local election officials would actually go about recalling the over 1.25 million applications as Plaintiffs have requested. As I mentioned, even in normal times thousands of Connecticut voters vote by absentee ballot for a host of reasons. I presume Plaintiffs are not seeking to have those voters' rights to vote by absentee ballot infringed upon too. So, presumably, the local election officials would have to scrutinize the applications to claw back only those applications that offend Plaintiffs.

17. SOTS and local election officials would then have to figure out a way to inform the voters who have already applied for an absentee ballot that they can no longer have one because they checked the "COVID-19 box" on the application. Some of those voters probably could have checked the illness box even under Plaintiffs' interpretation of the law, or any one of the other boxes for that matter, but opted to simply check the COVID-19 box. So those voters would be eligible to apply again, this time under a different reason. There is no way for SOTS to identify who those voters are or to inform them of their rights in a timely and effective manner at this late date.

18. If Plaintiffs are granted the relief they seek, SOTS and election officials also would have to go through the tedious and expensive process of nullifying the application and creating and printing a new one. Depending on when this Court ruled for Plaintiffs, if it does, some voters may have already cast an absentee ballot. An order to nullify that ballot would require election officials to first identify the ballot, correct the official voter list to remove them as absentee voters, then notify the voter that they must now appear in person to vote. Trying to accomplish all this within thirty days of the election will result in substantial voter confusion and disenfranchisement, especially for voters who already have received an absentee ballot and cast their vote with it. Voters will be confused about whether the ballot they already applied for and cast is to be counted. In addition, election officials' ability to field inquiries from the public regarding the election has been impacted by the pandemic. So I am concerned about our ability to address widespread confusion with many offices closed or working with reduced staff.

19. Changes to absentee balloting ordered by a Court at this late stage will also impact the orderly administration of in-person voting. Election officials throughout Connecticut in

2020 have planned around a reduced in-person voter turnout. As a result, they have made different staffing choices and selected different polling places that are more appropriate during a pandemic.

20. If more people will be forced to vote in person in 2020 because of a Court order, there could be misallocation of resources to handle this unanticipated increase. Polling places that do not permit large numbers of voters to vote in a socially distant manner and reduced staffing could result in long lines, confusion for voters and poll workers. This voter confusion, frustration and fear of health risks could also diminish voter participation. To try and reduce that impact, the election officials would be forced to try and find, hire and train many more poll workers to assist on election day, many of whom will be older and thus at the highest risk from COVID-19. It is doubtful that election officials could make these additional staffing changes in the limited time that is now left before the election.

21. In some larger cities, election officials have intentionally moved polling out of traditional locations that pose a grave health risk, such as senior centers or other locations frequented by citizens vulnerable to the COVID-19 virus.

22. In selecting alternative locations, election officials have planned for more space between the voting privacy booths, to the recommended minimum of 6 feet. Whereas before, voters were within a foot or two of each other. Since fewer voters have been planned for, it was possible to select a smaller location and still space the voting stations.

23. If absentee balloting is not permitted as planned for, then election officials will have to select new polling locations. They will also have to communicate with voters about

where they now have to go to vote. By statute, election officials must give notice of the polling locations by around July 11, 2020. Conn. Gen. Stat. § 9-168.

24. Inevitably, some voters will not get the message about where to vote in time. If polling places are not changed, social distancing requirements could mean that fewer voters will be permitted into the polling location at any one time. This will lead to longer lines to vote. Often times, if voters are forced to wait extended periods to vote, they simply abandon their efforts either out of necessity, frustration, or this year, possibly genuine and rational fear for their health. This is exactly what happened recently in Atlanta, Georgia and Milwaukee, Wisconsin. We are trying to avoid a similar experience here in Connecticut.

25. As I stated above, voting in Connecticut is already underway. On or before June 26, 2020, "military ballots" were issued to all military personnel and dependents living with such personnel.

26. Also on that date or before, "absentee ballots" were sent to all registered voters temporarily residing out of the United States and dependents living with such individuals. In addition, "overseas ballots" were sent to all former United States residents who last lived in Connecticut before permanently moving outside of the United States on or before June 26, 2020.

27. Under federal and state law, absentee ballots must be available in each of our 169 municipalities by July 21, 2020. As a result of this deadline, Connecticut election officials and the vendor retained by the Secretary, Cathedral Corporation, are beginning their final preparations for the different paper ballots that are used in our elections. Cathedral Corporation has all the materials for mailing the absentee ballot sets and it is

already preparing to begin mailing them out to absentee ballot applicants from one centralized location beginning July 21, 2020. This is a change from the usual process which was made possible by Executive Order 7QQ, ¶ 4. That paragraph of the EO authorized the Secretary to contract with a third party mailing vendor. In normal times, the town clerks would mail out the absentee ballots. Because of authorization in EO 7QQ to use a centralized third party mailing vendor, town clerks are now unprepared to send out absentee ballots at all. If the Executive Order is nullified, then the contract with Cathedral Corporation will be contrary to the requirements of Conn. Gen. Stat. § 9-140, and we will have to revert back to the normal process of local officials mailing out the ballots. It would be extremely difficult if not impossible to make this change at this late juncture.

28. All of this confusion surrounding absentee balloting will also divert the attention and time of local election officials who need to prepare for the August 2020 primary. Election officials in Connecticut have a host of duties they must fulfill leading up to election day. In the weeks leading up to the election, they must prepare the final lists of voters, "test vote" voting machines and special equipment that is accessible to voters with disabilities that enables them to vote privately and independently at each polling location; they also must hire and train poll workers; register voters; enroll party members; review and process petitioning candidates filings; and plan to protect the safety and welfare of their poll workers and voters with increased sanitizing of the polling place. This year especially elections are a massive undertaking that take a tremendous amount of planning, teamwork, communication and thought.

29. Another problematic aspect of Plaintiffs' claims is that they are seeking to recall all absentee ballot applications even though they are candidates only in the Republican primary. If they are claiming that they have a right to not have their election impacted, I am not sure why they need to impact the larger election, which is the Democratic primary. While we administer both elections at the same time to save money and resources, they are two distinct primary elections. Conn. Gen. Stat. §§9-476, 9-372, 9-415, 9-416, and 9-431 all define and require that a primary for a political party is a separate event for such party.

30. Although the general statutes do allow for party primaries to be held on the same date, they are clearly conducted and administered separately by the registrar of voters of the political party holding such primary in each municipality. Indeed, there have been years when only a single party has held a Presidential Preference Primary or when only a single party has held a statewide or congressional district primary such as is the case here with the Plaintiffs. There is no Democratic Congressional District Primary in the districts in which the Plaintiffs will hold a Republican Congressional District Primary. Thus it remains unclear how the Plaintiffs as Republicans can effect the administration of any Democratic Primary in districts that are unrelated to the office for which they are running.

31. As a consequence, the relief Plaintiffs seek at this late date, against the Secretary, even if ordered today, will be extremely disruptive to the orderly administration of Connecticut's August 11, 2020 primary elections. As I mentioned, the election is already underway and there would simply be no way to implement such a dramatic, state-wide change to our election procedures at this late date without risking significant voter confusion, increasing

the chance of election official errors and confusion and, generally, undermining voters' confidence in our elections and their ability to easily and efficiently exercise their franchise. Not to mention the actual health risk posed to voters, officials and poll workers by increased in-person voting during this pandemic.

The foregoing is true and accurate to the best of my knowledge and belief.

FURTHER AFFIANT SAYTH NOT.

THEODORE BROMLEY

STATE OF CONNECTICUT)
)ss: Hebron, Connecticut
COUNTY OF TOLLAND)

Subscribed to and sworn before me via telephonic communication and electronic mail, this 6th day of July, 2020, in a manner similar to the requirements of Governor Lamont's Executive Order No. 7Q, but not recorded and retained for ten years.

/s/ Maura Murphy Osborne
Maura Murphy Osborne
Commissioner of the Superior Court

CERTIFICATION

I hereby certify that on this 6th day of July, 2020, a copy of the foregoing Affidavit of Theodore Bromley was filed electronically and served by email to all counsel of record. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Maura Murphy Osborne
Assistant Attorney General
Maura Murphy Osborne

EXHIBIT 1

STATE OF CONNECTICUT

BY HIS EXCELLENCY

NED LAMONT

EXECUTIVE ORDER NO. 7QQ

PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC AND RESPONSE – SAFE VOTING DURING STATEWIDE PRIMARY

WHEREAS, on March 10, 2020, I issued a declaration of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the State of Connecticut as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and Connecticut; and

WHEREAS, pursuant to such declaration, I have issued forty-three (43) executive orders to suspend or modify statutes and to take other actions necessary to protect public health and safety and to mitigate the effects of the COVID-19 pandemic; and

WHEREAS, COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death; and

WHEREAS, the World Health Organization has declared the COVID-19 outbreak a pandemic; and

WHEREAS, to reduce the spread of COVID-19, the United States Centers for Disease Control and Prevention (CDC) and the Connecticut Department of Public Health (DPH) recommend implementation of community mitigation strategies to slow transmission of COVID-19, including cancellation of gatherings of ten people or more and social distancing in smaller gatherings; and

WHEREAS, the risk of severe illness and death from COVID-19 is higher for individuals who are 60 or older and for those who have chronic health conditions; and

WHEREAS, public health experts have determined that it is possible to transmit COVID-19 even before a person shows symptoms and through aerosol transmission; and

WHEREAS, a statewide primary election is scheduled for August 11, 2020, to select candidates for various state offices and for the 2020 federal presidential election; and

WHEREAS, a significant portion of poll workers and volunteers are 60 or older; and

WHEREAS, because elderly registered voters consistently demonstrate the highest rate of voter turnout, providing an alternative to in-person voting could be particularly helpful in reducing the risk of transmission during voting among this population; and

WHEREAS, public health experts have indicated that persons infected with COVID-19 may not show symptoms, and transmission or "shedding" of the coronavirus that causes COVID-19 may be most virulent before a person shows any symptoms; and

WHEREAS, the CDC has recommended that people with mild symptoms consistent with COVID-19 be assumed to be infected with the disease; and

WHEREAS, public health experts have recommended that, to prevent transmission of COVID-19, and in light of the risk of asymptomatic transmission and a significant rate of false negative tests, everyone should assume they can be carrying COVID-19 even when have received a negative test result or do not have symptoms; and

WHEREAS, secure and tamper-proof drop boxes manufactured specifically for the purpose of voting offer a safe and secure way for voters to deliver absentee ballots to election officials without in-person interactions that could increase the risk of transmission of COVID-19; and

WHEREAS, absentee voting offers a proven method of secure voting that reduces the risk of transmission of COVID-19 by allowing individuals to vote by mail and by reducing the density of in-person voting at polling places; and

WHEREAS, upon a proclamation that a civil preparedness emergency exists, section 28-9(b) of the Connecticut General Statutes authorizes the modification or suspension in whole or in part by executive order of any statute or regulation or requirement or part thereof that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health; and

WHEREAS, the General Assembly is not in session, there is no announced schedule to reconvene in special session, and no committee hearings have been scheduled to take up any business; and

WHEREAS, the drafting, circulation and review of new or amended regulations is hindered by the limited access to information technology resources and source documents for state employees involved in such processes, the majority of whom continue to work from home to mitigate the transmission of COVID-19, and therefore it is not possible to both follow the requirements of the Uniform Administrative Procedures Act respond efficiently and expeditiously to the COVID-19 pandemic and mitigate its effects;

NOW, THEREFORE, I, NED LAMONT, Governor of the State of Connecticut, by virtue of the authority vested in me by the Constitution and the laws of the State of Connecticut, do hereby **ORDER AND DIRECT**:

1. **Absentee Voting Eligibility During COVID-19 Pandemic.** Section 9-135 of the Connecticut General Statutes is modified to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the August 11, 2020 primary election if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of

COVID-19. For purposes of this modification, a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the August 11, 2020 primary election, there is no federally approved and widely available vaccine for prevention of COVID-19. It shall not constitute a misrepresentation under subsection (b) of Section 9-135 of the General Statutes for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant.

2. **Notice of Modification Required on Inner Envelope.** Section 9-137 of the Connecticut General Statutes is modified to provide that it shall not constitute a false statement for an elector to represent his or her eligibility to vote by absentee ballot pursuant to the modifications of Section 9-135 in Section 1 of this order, and the inner envelope described in Section 9-137 shall contain a notice describing the modification in Section 1 of this order.

3. **Authority for Secretary of the State to Modify Absentee Ballot Applications, Envelopes, and Printed Materials Regarding Eligibility.** Notwithstanding any provision of Title 9 of the Connecticut General Statutes or any other law or regulation to the contrary, the Secretary of the State shall be authorized to modify any required notice, statement, or description of the eligibility requirements for voting by absentee ballot on any printed, recorded, or electronic material in order to provide accurate information to voters about the modifications to absentee voter eligibility and related requirements of this order.

4. **Authority to Issue Absentee Ballots.** Section 9-140(g) of the Connecticut General Statutes is modified and suspended to permit the municipal clerk to use a third party mailing vendor that has been approved and selected by Secretary of the State to fulfill the municipal clerk's duties to mail absentee voting sets for the August 11, 2020 primary election. All other requirements of Section 9-140(g) continue to apply.

5. **Modification of Requirement that Absentee Ballots be Returned by Mail or In Person.** Section 9-140b(c) of the Connecticut General Statutes is modified to provide that the term "mailed" shall include the act of depositing an absentee ballot for the August 11, 2020 primary in a secure drop box designated by the town clerk for that purpose in accordance with instructions to be provided by the Secretary of the State. All other requirements of Section 9-140b(c) continue to apply.

6. **Clarification that Commissioner Orders Issued Pursuant to the Governor's Executive Orders Are Not Regulations Subject to the UAPA.** Section 4-166(16) of the Connecticut General Statutes is modified to clarify that the definition of a regulation does not include any amendment or repeal of an existing regulation and any directive, rule, guidance, or order issued by a Commissioner or Department Head pursuant to a Governor's Executive Order during the existing civil preparedness and public health

emergency and any renewal or extension thereof. Notwithstanding Sections 4-166 to 189, inclusive, of the Connecticut General Statutes, any Commissioner or Department Head, as permitted or directed by any such Governor's executive order, may modify or suspend any regulatory requirements adopted by the Commissioner or Department Head that they deem necessary to reduce the spread of COVID-19 and to protect the public health. This section applies to all orders that have been issued since the declaration of public health and civil preparedness emergencies on March 10, 2020 and for the duration of the public health and civil preparedness emergency, including any period of renewal of such emergency declaration.

Unless otherwise specified herein, this order shall take effect immediately and remain in effect for the duration of the public health and civil preparedness emergency, unless earlier modified, extended or terminated.

Dated at Hartford, Connecticut, this 20th day of May, 2020.

Ned Lamont
Governor

By His Excellency's Command

Denise W. Merrill
Secretary of the State

EXHIBIT 2

Office of the Secretary of the State
165 Capitol Avenue
Hartford, CT 06106

MEMORANDUM OF OPINION

To: All Town Clerks and Registrars of Voters

From: Office of the Secretary of the State

Date: May 6, 2020

Re: Absentee Balloting Voting During a State of Health Emergency

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We are writing this opinion to ensure that voters are able to participate in the upcoming August 11, 2020 Republican and Democratic Primaries in the safest manner possible. More specifically, we are clarifying the definition of "Illness" for Absentee Balloting at a time when the Governor has declared a public health and civil preparedness emergency throughout the State of Connecticut.

This opinion is issued pursuant to Connecticut General Statutes §9-3 which states, "(a) The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and opinions, if in written form, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapters 155 to 158, inclusive, and shall be executed, carried out or implemented, as the case may be, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54. Any such written instruction or opinion shall be labeled as an instruction or opinion issued pursuant to this section, as applicable, and any such instruction or opinion shall cite any authority that is discussed in such instruction or opinion…."

Connecticut General Statutes §9-135 permits a voter to receive an absentee ballot if they cannot appear at their assigned polling place because of "(1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) his or her illness; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum

official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum."

Webster's dictionary defines "illness" as "an unhealthy condition of body or mind or sickness." "*Illness.*" *Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/illness. Accessed 2 May. 2020*. It is clear that this definition as well as the statutory section referenced above, does not limit the term illness to an individual who has limited mobile function or is hospitalized or confined to a bed.

In fact, the Centers for Disease Control have identified numerous **pre-existing illnesses** that put certain individuals at increased risk when exposed to the COVID-19 virus. These include, but are not limited to: (1) People of all ages with underlying medical conditions, particularly if not well controlled, including: People with chronic lung disease or moderate to severe asthma, People who have serious heart conditions, People who are immunocompromised (Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids or other immune weakening medications); (2) People with severe obesity (body mass index [BMI] of 40 or higher); (3) People with diabetes; (4) People with chronic kidney disease undergoing dialysis; (5) People with liver disease; and (6) Pregnant women.

Pursuant to Connecticut General Statutes §1-2z, "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

Looking first at the statutory language and the relationship to other statutes, "illness" cannot be limited to some affliction that leaves an individual debilitated or bed ridden. First, the statutory section itself does not define "illness" in such a way. Second, the statutory section at issue also uses the term "physical disability" which in and of itself identifies an individual with mobility issues that can be described as both an "illness" as well as a limitation on mobility. As such, it would be contrary to statutory construction to place the same or similar meaning to both phrases.

In addition, Connecticut General Statutes also provides additional methods of absentee balloting such as Supervised Absentee Balloting *see section 9-159q*, Emergency Absentee Balloting *see section 9-150c,* Permanent Absentee Balloting *see section 9-140e*, and Voting In Person After Voting By Absentee Ballot *see section 9-158n*. Given the additional meanings of "illness" or "physical disability" when used in the other sections of the General Statutes, it stands to reason that "illness" as used in Connecticut General Statutes §9-135 must have a broad definition, one that gives meaning to the special circumstances by which voters can vote using an absentee ballot.

Given the reasoning set forth above and the guidance provided by the Centers of Disease Control, the Office of the Secretary of the State has determined that any registered voter who has a **pre-existing illness** can vote by absentee ballot because that voter's illness would prevent them from appearing at their designed polling place safely because of the COVID 19 virus.

In addition, individuals who may have been in contact with a COVID-19 infected individual such as healthcare workers, first responders, individuals who are caring for someone at increased risk, as well as those that feel ill or think they are ill because of the possibility of contact with the COVID-19 virus should also be included in the category of voters that would qualify as "ill" for the purposes of absentee voting.

EXHIBIT 3

For Municipal Clerk's Use

Outer Envelope Serial No.		
Date Forms Issued		
Check ▶	**Mailed to Applicant** ☐	**Given to Applicant Personally** ☐
Pol. Subdivision	**Voting District No.**	

APPLICATION FOR ABSENTEE BALLOT

You are receiving this application for an absentee ballot because, due to COVID-19, the Secretary of the State has sent an application to every eligible voter in the state. Pursuant to Executive Order7QQ, COVID-19 may be used as a valid reason for requesting a ballot.

Section I. – Applicant's Information

Name:_____ Date of Birth_____

Home Address:_____Zip Code_____
(Number, Street, Town)

Telephone No._____ E-mail Address_____

Mailing Address: _____

_____

_____

(Use only if the mailing address is different from the address above.)

Date of Primary AUGUST 11, 2020 Republican ____ Democratic____

Section II. – Statement of Applicant

I, the undersigned applicant, believe that I am eligible to vote at the primary indicated above. Pursuant to Executive Order No. 7QQ, I expect to be unable to appear at the polling place during the hours of voting and hereby apply for an absentee ballot: *(check only one)*

☐ COVID-19 ► **All voters are able to check this box, pursuant to Executive Order 7QQ** ◄

☐ My active service in the Armed Forces of the United States

☐ My absence from the town during all of the hours of voting

☐ My illness

☐ My religious tenets forbid secular activity on the day of the election, primary or referendum

☐ My duties as a primary, election or referendum official at a polling place other than my own during all of the hours of voting

☐ My physical disability

Section III. – Applicant's Declaration

I declare, under the penalties of false statement in absentee balloting, that the above statements are true and correct, and that I am the applicant named above. *(Sign your legal name in full. If you are unable to write, you may authorize some one to write your name and the date in the spaces provided, followed by the word "by" and the signature of the authorized person. Such person must also complete section IV below.)*

Signature of Applicant:_____ Date Signed:_____

Section IV. – Declaration of person providing assistance *(Completed by any person who assists with completion of application)*

I sign this application under penalties of false statement in absentee balloting.

Signature:_____ Printed Name:_____ Tel. No:_____

Residence Address:_____

SPECIAL INSTRUCTIONS

Connecticut law allows you to receive an absentee ballot if you cannot appear at your assigned polling place on primary day because of active service in the Military, absence from the town during all of the hours of voting, illness, religious tenets forbid secular activity on the day of the primary, duties as a primary official at a polling place other than your own during all of the hours of voting, or physical disability. The State of Connecticut, via Executive Order 7QQ, as interpreted by the Secretary of the State pursuant to CGS §9-3, has determined (1) that having a pre-existing illness allows you to vote by absentee ballot because your pre-existing illness would prevent you from appearing at your designed polling place or (2) that absent a widely available vaccine, the existence of the COVID-19 virus allows you to vote by absentee ballot if you so choose for your own safety. To receive your absentee ballot please complete and sign this application (be sure to check "Illness" for reason (1) or "COVID-19" for reason (2) above) and return it to your Town Clerk using the enclosed postage prepaid envelope. Your absentee ballot will be mailed to you. If you do not receive your absentee ballot within one week contact your local Town Clerk's office.

STEP 1

MARK YOUR ABSENTEE BALLOT
Completely fill in the oval next to your choice(s) using a black pen.

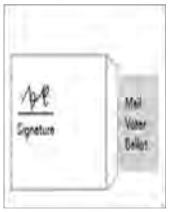
To vote for a candidate whose name is not on the ballot: Fill in the oval to the left of "Write-in" and print the name clearly in the box.

If you make a mistake while marking your ballot do not cross out. Instead call your local Town Clerk's office to make arrangements to receive a replacement ballot

STEP 2

COMPLETE THE INNER ENVELOPE
Insert the voted ballot into the inner envelope (marked B) and seal the envelope.

Sign your name and date the envelope.



STEP 3

MAIL OR HAND-DELIVER YOUR BALLOT
Place completed inner envelope into the larger mailing envelope (marked C).

Mail the envelope or hand-deliver the envelope to the Town Clerk of your city or town.

Your Town Clerk must receive your absentee ballot by 8:00 p.m. on Election Day.

NOTE: WHEN SEALING ENVELOPES PLEASE DO NOT LICK ENVELOP TO SEAL. USE AN ALTERNATIVE METHOD SUCH AS A SPONGE OR WET CLOTH TO MOISTEN THE CLOSE TAB.

- Any elector who has returned an absentee ballot and who finds he is able to vote in person shall proceed before ten o'clock a.m. on election, primary or referendum day to the municipal clerk's office and request that his ballot be withdrawn. The municipal clerk shall mark the ballot "rejected". The municipal clerk shall give the elector a signed statement directed to the moderator of the voting district in which the elector resides stating that the elector has withdrawn his absentee ballot and may vote in person.

- No absentee ballot shall be rejected as a marked ballot unless, in the opinion of the moderator, it was marked for the purpose of providing a means of identifying the voter who cast it.

- Any (1) person who executes an absentee ballot for the purpose of informing any other person how he votes, or procures any absentee ballot to be prepared for such purpose, (2) municipal clerk or moderator, elector appointed to count any absentee ballot or other person who wilfully attempts to ascertain how any elector marked his absentee ballot or how it was cast, (3) person who unlawfully opens or fills out, except as provided in section 9-140a with respect to a person unable to write, any elector's absentee ballot signed in blank, (4) person designated under section 9-140a who executes an absentee ballot contrary to the elector's wishes, or (5) person who wilfully violates any provision of chapter 145, shall be guilty of a class D felony.

- A person is guilty of false statement in absentee balloting when he intentionally makes a false written statement in or on or signs the name of another person to the application for an absentee ballot or the inner envelope accompanying any such ballot, which he does not believe to be true and which statement or signature is intended to mislead a public servant in the performance of his official function.

EXHIBIT 4

DENISE W. MERRILL
SECRETARY OF THE STATE
CONNECTICUT

03/13/2020

Guidance Issued by Secretary of the State Denise Merrill: Absentee Ballots Should be Made Available Due to Public Health Emergency

COVID-19, as a serious illness that is transmitted via direct contact, presents an inherent risk of transmission at the polling place
The CDC polling place guidelines encourage the use of absentee balloting to avoid disease transmission

HARTFORD – Secretary of the State Denise Merrill today announced that, due to the public health emergency of COVID-19 and the anticipated spread within Connecticut, absentee ballots for the April 28th Presidential Preference Primary should be available for any Connecticut voter who wants to avoid polling places due to COVID-19. Considering the threat of the spread of COVID-19 and the nature of its spread through contact, Secretary Merrill has determined that for reasons of public health, absentee ballots that are requested to avoid public gatherings at polling places are requested because of illness, and should be validly issued.

“Through surprise October snowstorms, November hurricanes, to the threat of a global pandemic – voting in Connecticut must go on,” said Secretary Merrill. “The nature of COVID-19, or the coronavirus, is such that public health experts advise minimizing crowds and direct contact with other people. In order to ensure that Connecticut voters are able to cast a ballot on April 28th, absentee ballots must be available for voters who want to follow public health advice and avoid polling places.”

Connecticut General Statutes 9-135 (a) (3) currently allows voters to get absentee ballots because of “his or her illness.” Secretary Merrill has asked Governor Lamont to issue an Executive Order that would eliminate restrictive language in the statute during this emergency. Following an executive order, 9-135 (a) (3) would allow voters to get absentee ballots because of “illness.” It is the opinion of Secretary Merrill that, under a revised statute, the current public health emergency of COVID-19 would qualify under 9-135 (a) (3) as an “illness” justification to request an absentee ballot. This opinion is narrow, and would only apply to the April 28th Presidential Preference Primary.

“Our polling places will remain open, and our hard-working local election officials and poll workers are preparing to deliver as smooth and as healthy an Election Day as is possible under the circumstances,” said Secretary Merrill. “Every town has the benefit of guidelines provided by the Centers for Disease Control and Prevention, including cleaning and disinfecting polling stations, practicing frequent hand hygiene, and encouraging curbside voting for voters who need it. Those guidelines also include encouraging absentee balloting and my office has provided local election officials with the opinion necessary to carry out those guidelines.”

The Office of the Secretary of the State is working closely with the Registrars and Town Clerks of Connecticut’s towns and cities, and has advised them to expect higher than normal demand for absentee ballots. The primary is six weeks from this coming Tuesday and absentee ballots will be available on April 7th. Towns are unable to order any ballots until after the ballot order is determined which, by statute, must take place on March 24th.

The Office has asked every town to update their Emergency Contingency Plans with our office and to make sure that they have the legally required deputies in place in their towns, and have shared the CDC guidance on polling places and COVID-19 with the local election officials (**https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html**).

Secretary Merrill and her staff are meeting on COVID-19 response planning daily, are participating in all of the Office of the Governor’s planning calls, and are in regular contact with federal authorities. The Office has also set up a working group with the leadership and membership of the Registrars’ and Town Clerks’ Associations to ensure that both state and local election officials are prepared for the upcoming primary.

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EXHIBIT 5

DENISE W. MERRILL
SECRETARY OF THE STATE
CONNECTICUT

March 28, 2020

TO: Governor Lamont, Senate President Pro Tempore Looney, Speaker Aresimowicz, Majority Leader Duff, Majority Leader Ritter, Minority Leader Fasano, and Minority Leader Klarides,
CC: Representative Fox, Senator Flexer, Representative Walker, Senator Osten, Secretary McCaw, Town Clerks Association, Registrar of Voters Association

I am writing to you to make you aware of the resources my office and our local election officials in each of our 169 towns need in order to ensure that our presidential preference primary is conducted to the high standards that Connecticut voters expect and deserve. My number one priority is ensuring that our presidential preference primary is free, fair, and safe.

Viable options for vote by mail

Most pressing is my call for an executive order removing restrictive language from CGS 9-135 to allow any voters who are fearful of entering a polling place because of the coronavirus to ask for and receive a ballot they can mail in to vote in the June 2nd presidential preference primary. No voter should have to choose between jeopardizing their health and exercising their right to vote.

As you are aware, we are in a declared public health emergency due to the coronavirus, a contagious virus that passes through direct person-to-person contact. This crisis presents unique challenges to Connecticut election administration, as an overwhelming percentage of voters, as compared to other states, vote in-person at polling places instead of via mail (in a normal election roughly 6-8% of voters statewide can be expected to cast their ballots via mail). I asked for, and Governor Lamont issued, an executive order moving our April 28th presidential preference primary to June 2nd. This gave us some time to plan for how the coronavirus will affect that June 2nd primary and act accordingly.

In talking to my colleagues across the country, many of the states that have pushed back their primaries, including our neighbors in Rhode Island, have also expanded access to voting by mail, or even outright promoting it, as the best possible scenario to allow voters to cast ballot while also protecting the health and safety of voters and poll works alike.

We are in a unique situation. I am neither asking for a policy change to mail-in voting for all elections, nor am I requesting that the June 2nd presidential preference primary be conducted entirely by mail. The executive order I am requesting is narrowly tailored: to allow voters to vote by mail if they are concerned about entering polling places on June 2nd for the presidential preference primary due to the coronavirus.

Polls must remain open, but considering the challenges that all towns are currently facing to find poll workers, and Governor Lamont's recent executive order limiting public gatherings to five people, we must as a state do something to make voting on June 2nd feasible. Loosening the restrictions on mail-in voting will alleviate the problem at the polling places by shifting votes from in-person at the polling place to mailed ballots.

The workload will be manageable as roughly forty two percent of the state's voter are registered as unaffiliated voters or in third parties and are therefore ineligible to participate in the June 2nd presidential primary. Another roughly twenty percent are only eligible to vote in a Republican primary that has seen fairly low interest, and where low turnout is expected, regardless of voting method.

Time is of the essence to issue the executive order and start planning the logistics of the June 2nd presidential preference primary. Town Clerks will make their ballot order on or around April 28th, and mail-in ballots are statutorily required to be available to voters on May 12th. It is possible that the longer we wait, the harder it will be to reserve printing services.

State match required to access federal funds

There are federal funds available to help us with this unprecedented election event. The United States Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a two trillion-dollar stimulus bill. Included in that bill is $400 million to aid election administration in the face of the coronavirus. Connecticut's share is roughly $6.46 million, which includes a mandatory twenty percent state match of roughly $1.08 million. In order to unlock $5.38 million in federal funding to combat the issues in election administration caused by the coronavirus, Connecticut must appropriate $1,076,346 in funding specifically for the coronavirus response for elections.

Ballot access for primaries and minor parties and petitioning candidates in the general election

Finally, we have an urgent need to adjust our method of allowing candidates to petition on to both the August primary election ballot and the November general election ballot. As you know, there are processes in Title 9 for candidates to gather petition signatures in order to appear on the ballot for the primary and for the general election. Both of those processes require, by law, direct person to person contact in order to collect the signatures, the signatures to be delivered to registrars or town clerks in town halls that are now largely closed, verification by local election workers who are currently largely working from home, delivery to my office, and tabulation by workers in my office who are also largely working from home. Given the nature of the coronavirus, both petitioning processes present an opportunity for the virus to spread and are not feasible on the timeline required by statute. This is also a time-sensitive issue as petitioning candidates for the November election have had access to petition papers, and have been circulating those petitions, since January, and petitions for potential candidates in the August primary will be available in May.

My recommendation is to eliminate any path to ballot access via a petition process by executive order. Instead, for challengers in primaries, lower the delegate percentage to gain primary ballot access at the conventions to 5%, apply that to both multi-town and single-town districts, and have that be the only way to get on the primary ballot aside from being the endorsed candidate at a convention.

For the general election, my recommendation is to again eliminate any path to ballot access via petitions as a minor party or petitioning candidate for the November general election ballot. Instead, grant

automatic ballot access for all races in November to any third parties that already have statewide ballot access, currently the Green Party, the Independent Party, the Libertarian Party, and the Working Families Party.

These two changes would address the public health emergency and prevent petition gatherers from going door to door and potentially spreading coronavirus, while at the same time preserving Connecticut's democratic tradition of allowing challengers access to the primary and general election ballots.

Thank you for your attention to these critically important matters. Although we are in an emergency situation, I am heartened by our ability to work together across party and state and local lines. By partnering between state and local officials, and the leadership of the legislature, we can provide Connecticut with the best possible elections under the circumstances. Thank you for all of your hard work during this stressful time.

EXHIBIT 6

https://www.courant.com/opinion/op-ed/hc-op-merrill-vote-by-mail-0329-20200329-2t5ah2guvba3joszxph2lrndei-story.html

Denise Merrill: It's time to allow voting by mail

By DENISE MERRILL | SPECIAL TO HARTFORD COURANT | MAR 26, 2020

In Connecticut, we pride ourselves on ensuring that every citizen has the opportunity to make their voice heard, whether it be in town meetings, at the ballot box, or in referenda that many towns hold every year. Despite that legacy, we have fallen behind most states in one crucial area: making it easy for registered voters to actually cast their ballots.

Forty-one states allow their voters to mail in a ballot without a reason, vote early in a polling place or both. Five states conduct all of their elections by mail, and California, Pennsylvania and others are moving in that direction by allowing permanent mail-in voting status.

Connecticut stands with Missouri, Kentucky, Mississippi, Alabama, South Carolina, New Hampshire and Rhode Island as the only states in the country that won't let voters vote before Election Day and won't let them vote by mail without an excuse. And of those states, we have the ignominious distinction of having the most restrictive absentee ballot laws in the country.

The argument for flexibility in voting methods isn't that Connecticut is behind most other states, although we are, or that it would make it more convenient for voters to vote, although it would — the argument right now is that we are in a public health emergency, and our inflexibility is threatening our democracy.

The coronavirus has laid bare the weakness at the heart of our Election Day polling place-based system. Unlike almost everywhere else in America, our elections, instead of being run by counties, are run by the hard-working local election workers in each of our 169 towns. Thousands of poll workers staff almost 800 polling places in towns across the state. For years, Connecticut towns have struggled to find enough poll workers. Now, with an aging poll worker population and fear of a contagious and deadly virus, our towns are stretched to the breaking point.

I recommended to Gov. Ned Lamont and he issued executive orders that will delay Connecticut's April 28 presidential primary until June 2. I have also asked him to use his emergency powers to remove the restrictive absentee ballot language in our statutes temporarily, so that more people are able to vote by mail when the primary is held.

These two measures would give us more time to prepare for what could be a large number of people who are either too ill to vote in person or who fear that they might be ill and don't want to go to a polling place to vote.

States that have all mail voting, like Colorado, Washington, Oregon and Michigan, are prepared for this, and states that allow mail-in voting with automatically sent ballots, like California, have the capacity to get quickly up to speed. We do not.

But there are steps we can take to both shore up our capacity to hold the Presidential Preference Primary, now set for June 2, and to anticipate a significant increase in absentee ballots for future elections.

The legislature should immediately remove the restrictive language in the absentee ballot statute so that voters can request an absentee ballot simply due to “illness” for the June 2 primary. If the legislature doesn’t act, the governor should use his emergency powers to make this change. After all, anyone who is scared to visit a polling place for fear of spreading or contracting a deadly disease should not have to choose between their health and their right to vote.

But what if we are facing similar challenges in August? What if we see a fall resurgence of COVID-19 before the general election?

First, the legislature should immediately vote for a Constitutional Amendment, like the one I proposed in 2019, that removes the restrictive absentee voting language and provides for early voting, and do it with a super-majority so voters can decide on it this November. This would not solve the short-term problem but would give us the flexibility we now need to respond to new realities.

Second, anticipating a larger number of absentee ballots means we need a significant change to our voting infrastructure, including the use of new technologies and systems to accommodate new realities. There are proposals in Congress that have broad support to require the option of voting by mail for all Americans. This change would mean hiring additional people to open, sort and feed mailed in ballots into our tabulators, and to reconsider the number of polling places we currently require. We also would have additional physical needs. Some of our bigger towns will need space to collect and store, under lock and key, an unprecedented number of mailed ballots. My office will also need the resources to quickly develop an online mechanism to request an application for mail-in ballot. To pull this off by November, the legislature would have to allocate emergency funding.

Finally, we need to recognize that we are not just in a public health emergency but a democratic emergency. The coronavirus is affecting our ability to hire poll workers, locate polling places and gather together to elect our representatives the way we have in Connecticut for 200 years. It’s affecting our very ability hold an election.

Delaying the primary does not entirely solve the underlying problem. The November general election cannot be delayed, and it surely can’t be denied. We are on the precipice of disaster but, acting together, putting aside partisanship, we can ensure that every Connecticut voter is able to safely, conveniently and fairly cast their ballot and have it counted.

Denise Merrill is Connecticut’s secretary of the state.

SC 20477

MARY FAY ET AL.	:	SUPREME COURT
v.	:	STATE OF CONNECTICUT
DENISE MERRILL	:	JULY 15, 2020

SUPPLEMENTAL AFFIDAVIT OF THEODORE E. BROMLEY

THEODORE E. BROMLEY declares as follows:

1. I submit this Declaration in support of Defendant Secretary of the State Denise Merrill ("the Secretary") in *Fay v. Merrill*, Docket No. SC 20477 (Conn. 2020) to update and supplement information in my July 5, 2020 Affidavit in this case. I am also modifying my statement in paragraph 12 of my July 5 Affidavit regarding files sent to our vendor to reflect a change in plans made at our vendor's request. The remaining paragraphs of my July 5 Affidavit are true and accurate to the best of my knowledge and belief. Like my July 5 Affidavit, I have compiled the information in the statements below through personal knowledge, the Connecticut Secretary of the State ("SOTS") personnel who assisted me in gathering the information from our agency, or on the basis of documents I have reviewed.
2. As of July 15, 2020, approximately 107,743 absentee ballot applications have been approved by local election officials.
3. Beginning on July 17, 2020, SOTS will begin sending Comma Separated Value (CSV) files to a third party mail vendor, Cathedral Corporation, ("the vendor") with

the information of the voters who have been approved by local election officials for an absentee ballot. In paragraph 12 of my July 5 Affidavit, I stated that the CSV files would be sent starting July 7 or 8 but that was not done because the vendor requested more time to prepare to receive the CSV files from SOTS.

4. The vendor began printing absentee ballot sets on June 29, 2020 so that they will be ready to mail on July 21, 2020.
5. The vendor will begin mailing the absentee ballot sets to approved voters on July 21, 2020.
6. The Democratic National convention is scheduled for August 17-20 in Milwaukee, Wisconsin. The Republican National convention is scheduled for August 24-27 in Jacksonville, Florida. The Connecticut delegates to those conventions will be voted on at the August 11, 2020 primary. A delay of the August 11, 2020 to a date after those national conventions would affect the ability of Connecticut's delegates to participate in those national conventions.
7. The relief Plaintiffs seek at this late date, against the Secretary, even if ordered today, will be extremely disruptive to the orderly administration of Connecticut's August 11, 2020 primary elections. As I mentioned in my July 5 Affidavit, the election is already underway and there would simply be no way to implement such a dramatic, state-wide change to our election procedures at this late date without risking significant voter confusion, increasing the chance of election official errors and confusion and, generally, undermining voters' confidence in our elections and their ability to easily and efficiently exercise their franchise.

The foregoing is true and accurate to the best of my knowledge and belief.

FURTHER AFFIANT SAYTH NOT.

THEODORE BROMLEY

STATE OF CONNECTICUT)
)ss: Hebron, Connecticut
COUNTY OF TOLLAND)

Subscribed to and sworn before me via telephonic communication and electronic mail, this 15th day of July, 2020, in a manner similar to the requirements of Governor Lamont's Executive Order No. 7Q, but not recorded and retained for ten years.

/s/ Maura Murphy Osborne
Maura Murphy Osborne
Commissioner of the Superior Court

CERTIFICATION

I hereby certify that on this 17th day of July, 2020, a copy of the foregoing Affidavit of Theodore Bromley was filed electronically and served by email to all counsel of record. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Maura Murphy Osborne
Assistant Attorney General
Maura Murphy Osborne

Connecticut General Statutes Annotated
Constitution of the State of Connecticut 1965 Annotated as Amended (Refs & Annos)
Article Sixth. Of the Qualifications of Electors

C.G.S.A. Const. Art. 6, § 7

§ 7. Absentee voting

Currentness

Sec. 7. The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity.

Notes of Decisions (1)

C. G. S. A. Const. Art. 6, § 7, CT CONST Art. 6, § 7
The statutes and Constitution are current with enactments of Public Act 20-1.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Connecticut General Statutes Annotated
Title 9. Elections (Refs & Annos)
Chapter 145. Absentee Voting (Refs & Annos)

C.G.S.A. § 9-135

§ 9-135. Absentee voting eligibility. Misrepresentation prohibited

Effective: June 15, 2012
Currentness

(a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if he or she is unable to appear at his or her polling place during the hours of voting for any of the following reasons: (1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) his or her illness; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum.

(b) No person shall misrepresent the eligibility requirements for voting by absentee ballot prescribed in subsection (a) of this section, to any elector or prospective absentee ballot applicant.

Credits

(1949 Rev., § 1134; 1953, Supp. § 467c; Supp. § 622d; 1963, P.A. 93, § 2; 1965, Feb.Sp.Sess., P.A. 74, § 1; 1967, P.A. 678, § 1; 1967, P.A. 831, § 6; 1969, P.A. 2, § 1, eff. Jan. 1, 1970; 1969, P.A. 69, § 2, eff. Jan. 1, 1970; 1975, P.A. 75-595, § 2, eff. Jan. 1, 1976; 1976, P.A. 76-50, § 2, eff. July 1, 1976; 1976, P.A. 76-435, § 44, eff. June 9, 1976; 1979, P.A. 79-189, § 5, eff. July 1, 1979; 1981, P.A. 81-238, § 2; 1981, P.A. 81-472, § 119, eff. July 8, 1981; 1983, P.A. 83-254, § 2, eff. July 1, 1983; 1984, P.A. 84-546, § 19, eff. June 14, 1984; 1986, P.A. 86-179, § 3, eff. Jan. 1, 1987; 1987, P.A. 87-320, § 1; 2005, P.A. 05-235, § 1, eff. July 1, 2005; 2012, P.A. 12-193, § 7, eff. June 15, 2012.)

Notes of Decisions (7)

C. G. S. A. § 9-135, CT ST § 9-135
The statutes and Constitution are current with enactments of Public Act 20-1.

End of Document

Connecticut General Statutes Annotated
Title 28. Civil Preparedness and Emergency Services
Chapter 517. Civil Preparedness, Emergency Management and Homeland Security (Refs & Annos)

C.G.S.A. § 28-9

§ 28-9. Civil preparedness or public health emergency; Governor's powers. Modification or suspension of statutes, regulations or other requirements

Effective: October 1, 2010
Currentness

(a) In the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof, the Governor may proclaim that a state of civil preparedness emergency exists, in which event the Governor may personally take direct operational control of any or all parts of the civil preparedness forces and functions in the state. Any such proclamation shall be effective upon filing with the Secretary of the State. Any such proclamation, or order issued pursuant thereto, issued by the Governor because of a disaster resulting from man-made cause may be disapproved by majority vote of a joint legislative committee consisting of the president pro tempore of the Senate, the speaker of the House of Representatives and the majority and minority leaders of both houses of the General Assembly, provided at least one of the minority leaders votes for such disapproval. Such disapproval shall not be effective unless filed with the Secretary of the State not later than seventy-two hours after the filing of the Governor's proclamation with the Secretary of the State. As soon as possible after such proclamation, if the General Assembly is not then in session, the Governor shall meet with the president pro tempore of the Senate, the speaker of the House of Representatives, and the majority and minority leaders of both houses of the General Assembly and shall confer with them on the advisability of calling a special session of the General Assembly.

(b) Upon such proclamation, the following provisions of this section and the provisions of section 28-11 shall immediately become effective and shall continue in effect until the Governor proclaims the end of the civil preparedness emergency:

(1) Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency pursuant to section 19a-131a, the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. The Governor shall specify in such order the reason or reasons therefor and any statute, regulation or requirement or part thereof to be modified or suspended and the period, not exceeding six months unless sooner revoked, during which such order shall be enforced. Any such order shall have the full force and effect of law upon the filing of the full text of such order in the office of the Secretary of the State. The Secretary of the State shall, not later than four days after receipt of the order, cause such order to be printed and published in full in at least one issue of a newspaper published in each county and having general circulation therein, but failure to publish shall not impair the validity of such order. Any statute, regulation or requirement, or part thereof, inconsistent with such order shall be inoperative for the effective period of such order. Any such order shall be communicated by the Governor at the earliest date to both houses of the General Assembly.

(2) The Governor may order into action all or any part of the department or local or joint organizations for civil preparedness mobile support units or any other civil preparedness forces.

(3) The Governor shall order and enforce such blackouts and radio silences as are authorized by the United States Army or its duly designated agency and may take any other precautionary measures reasonably necessary in the light of the emergency.

(4) The Governor may designate such vehicles and persons as shall be permitted to move and the routes which they shall follow.

(5) The Governor shall take appropriate measures for protecting the health and safety of inmates of state institutions and children in schools.

(6) The Governor may order the evacuation of all or part of the population of stricken or threatened areas and may take such steps as are necessary for the receipt and care of such evacuees.

(7) The Governor may take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action.

(8) In order to insure the automatic and effective operation of civil preparedness in the event of enemy attack, sabotage or other hostile action, or in the event of the imminence thereof, the Governor may, at the Governor's discretion, at any time prior to actual development of such conditions, issue such proclamations and executive orders as the Governor deems necessary, such proclamations and orders to become effective only under such conditions.

Credits

(1951, Supp. § 760b; 1953, Supp. § 1459c; 1955, Supp. § 1913d; 1959, P.A. 120; 1959, P.A. 333, § 2; 1973, P.A. 73-544, § 9; 1975, P.A. 75-643, § 2; 1981, P.A. 81-472, § 58, eff. July 8, 1981; 1988, P.A. 88-135, § 7; 2004, P.A. 04-219, § 19, eff. Jan. 1, 2005; 2010, P.A. 10-50, § 1.)

Notes of Decisions (2)

C. G. S. A. § 28-9, CT ST § 28-9

The statutes and Constitution are current with enactments of Public Act 20-1.

End of Document

APA-4
Revised 1/2018

CERTIFICATION OF EMERGENCY RULES
FILED WITH LEGISLATIVE SERVICES AGENCY
OTHNI LATHRAM, DIRECTOR

Pursuant to Code of Alabama 1975, §§41-22-5(b) and 41-22-6(c)(2)a. and b.

I certify that the attached emergency (amendment, new rule, new chapter, repeal or adoption by reference) is a correct copy as promulgated and adopted on the 18th day of March, 2020.

AGENCY NAME: Alabama Secretary of State

RULE NO. AND TITLE: 820-2-3-.06-.01ER Absentee Voting During State of Emergency

EFFECTIVE DATE OF RULE: March 18, 2020

EXPIRATION DATE (If less than 120 days):

NATURE OF EMERGENCY:

The Governor of Alabama declared a State of Emergency effective March 13,2020 and postponed the primary runoff election until July 14, 2020. This rule allows for voters to cast an absentee ballot due to the State of Emergency.

STATUTORY AUTHORITY: Section 17-11-3(e) *Code of Alabama*

SUBJECT OF RULE TO BE ADOPTED ON PERMANENT BASIS ____ YES __X__ NO

NAME, ADDRESS, AND TELEPHONE NUMBER OF PERSON TO CONTACT FOR COPY OF RULE:

Hugh Evans
State Capitol Suite E-201
600 Dexter Avenue, Montgomery, AL 36130
(334)353-7857

RECD & FILED
MAR 18 2020
LEGISLATIVE SVC AGENCY

J. H. Merrill
Secretary of State

MARCH 18, 2020

820-2-3-.06-.01ER Absentee Voting During State of Emergency.

(1) Pursuant to 17-11-3(e) of the *Code of Alabama*, and without limitation, due to the State of Emergency issued by the Governor of Alabama on March 13, 2020, as amended on March 18, 2020, as well as the National Emergency declared by the President of the United States on March 13, 2020 related to the 2019 Novel Coronavirus known as COVID-19, any qualified voter who determines it is impossible or unreasonable to vote at their voting place for the Primary Runoff Election of 2020 due to the declared states of emergency, shall be eligible to check the box on the absentee ballot application which reads as follows:

"I have a physical illness or infirmity which prevents my attendance at the polls. [ID REQUIRED]"

(2) Any qualified voter of this state who applies and successfully submits an application, with proper identification, for an absentee ballot pursuant to this Emergency Administrative Rule shall be eligible to vote an absentee ballot for the Primary Runoff Election of 2020.

(3) All Absentee Election Managers and any other election officials of this state are hereby directed and instructed to follow this Emergency Administrative Rule and accept all absentee ballot applications filed hereunder immediately.

Authors: David Brewer, Hugh Evans, Clay Helms, Grace Newcombe.
Statutory Authority: 17-11-3(e)
History: New Rule: Filed, March 18, 2020

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

EO 20 - 40

TO ALL TO WHOM THESE PRESENTS COME – GREETINGS:

EXECUTIVE ORDER TO AMEND EXECUTIVE ORDER 20-37 FOR THE PURPOSE OF HOLDING SPECIAL ELECTIONS IN THE STATE WHILE FOLLOWING SOCIAL DISTANCING GUIDELINES ASSOCIATED WITH COVID-19

WHEREAS: An outbreak of coronavirus disease 2019 (COVID-19) has spread throughout the world resulting in a global pandemic; and

WHEREAS: On March 11, 2020, by Executive Order 20-03, an emergency was initially declared in the state as a result of COVID-19, and that emergency has since been declared anew; and

WHEREAS: On March 20, 2020, by Executive Order 20-08, County Officials and County Boards of Election Commissioners were given the authority to consolidate polling sites and allow absentee voting to all qualified electors who timely requested an absentee ballot for the March 31, 2020, General Primary Runoff Elections; and

WHEREAS: On April 24, 2020, by Executive Order 20-23, County Officials and County Boards of Election Commissioners were given the authority to consolidate polling sites and allow absentee voting to all qualified electors who timely requested an absentee ballot for the May 12, 2020, Special Elections; and

WHEREAS: On May 7, 2020, by Executive Order 20-26, County Officials and County Boards of Election Commissioners were given the authority to consolidate polling sites and allow absentee voting to all qualified electors who timely requested an absentee ballot for the June 9, 2020, Special Elections; and

WHEREAS: On June 18, 2020, by Executive Order 20-37, I terminated the emergency declared pursuant to Executive Order 20-03 and declared the emergency anew, setting forth the Executive Orders that would be incorporated by reference as they previously amended Executive Order 20-03; and

WHEREAS: In response to COVID-19, significant targeted measures have been taken by Executive Order and Directives by the Secretary of Health to limit person-to-person contact, restrict gatherings, limit travel into the state, and suspend businesses that require significant person-to-person interaction; and

WHEREAS In light of the current public health emergency, the State of Arkansas seeks to take reasonable steps to mitigate the spread of COVID-19, while protecting the constitutional right to vote of qualified electors;

NOW, THEREFORE, I, Asa Hutchinson, Governor of the State of Arkansas, acting under the authority vested in me by Ark. Code Ann. §§ 12-75-101, *et seq.*, do hereby amend Executive Order 20-37 declaring an emergency in the State of Arkansas, and order the suspension of the following provisions of Arkansas Code for special elections held on July 7, 2020:

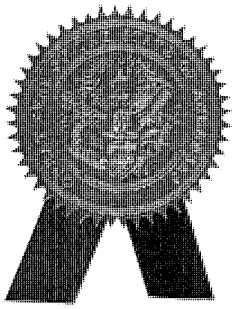
1. Suspension of Arkansas Code Annotated § 7-5-101(d)(3)(A) and 7-5-101(e)(2)(C) regarding the moving and consolidation of polling

sites, to the extent necessary, in order to allow counties to consolidate polls to no less than one (1) polling site up to three (3) days before the election so long as adequate notice of the change has been posted at polling sites that would have otherwise been used absent the emergency;

2. Provisions under Arkansas Code Annotated § 7-5-402 that require qualified electors be unavoidably absent or unable to attend an election due to illness or physical disability, so that all eligible qualified electors currently entitled to vote in the July 7, 2020 special election may request the appropriate absentee ballots from their county of residence.

3. Provisions under Arkansas Code Annotated § 7-5-404(a)(3)(A)(ii) to allow county officials to act on an application for an absentee ballot that is received within seven (7) days before the election date and subsequently mail an absentee ballot to the qualified elector who requested the ballot if the voter is otherwise entitled to vote in the election.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed this 26th day of June, in the year of our Lord 2020.



Asa Hutchinson, Governor

CHAPTER 245
FORMERLY
HOUSE BILL NO. 346
AS AMENDED BY
HOUSE AMENDMENT NO. 5

AN ACT TO AMEND TITLE 15 OF THE DELAWARE CODE RELATING TO VOTING BY MAIL FOR THE 2020 NON-PRESIDENTIAL PRIMARY, GENERAL, AND SPECIAL ELECTIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. The General Assembly finds and declares all of the following:

(1) The Centers for Disease Control ("CDC") has determined that a novel coronavirus ("COVID-19") presents a serious public health threat and has advised the public that asymptomatic individuals may be carriers of the COVID-19 virus and may unknowingly spread the virus to other individuals in close proximity, and therefore social distancing is required to help mitigate the individual exposure to and community spread of the COVID-19 virus.

(2) Governor Carney declared a State of Emergency for the State of Delaware Due to a Public Health Threat as a result of COVID-19 on March 12, 2020.

(3) A primary responsibility of the General Assembly is to protect the citizens of Delaware from a public health emergency that threatens their lives and the lives of their families.

(4) The public health threat created by COVID-19 will likely continue to create dangerous and potentially life-threatening public health conditions for Delawareans through the Summer, Fall and early Winter, 2020.

(5) COVID-19 is a highly contagious virus that spreads from person-to-person most frequently when in close contact. Evidence shows that the virus may remain viable for hours to days on surfaces.

(6) People 60 and older, those with serious chronic health conditions, people with disabilities, face greater risks for COVID-19.

(7) As of May 22, 2020, the total number of cases of COVID-19 in the United States was 1,571,617 resulting in 94,150 deaths. According to the CDC, the total number of cases increased by 20,522 in 1 day.

(8) As of May 23, 2020, the total number of cases of COVID-19 in Delaware was 8,690 resulting in 324 deaths. The total number of cases increased by 161 in 1 day.

(9) The CDC encourages that due to COVID-19, voters use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

(10) The CDC also encourages that nursing homes, long-term care facilities, and senior living residences not be used as polling places to minimize COVID-19 exposure among individuals and those with chronic medical conditions.

(11) Article V, § 4A of the Delaware Constitution permits absentee voting in limited circumstances including when an elector is in the public service of the United States, the nature of an elector's business or

occupation, or an elector's sickness, disability, or absence from the district while on vacation. The list of reasons for absentee voting is exhaustive.

(12) Pursuant to Article XVII, § I, the General Assembly, in order to insure continuity of State and local governmental operations in periods of emergency resulting from disease, shall have the power and the immediate duty to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers conferred by Article XVII, § 1, the General Assembly shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the General Assembly to do so would be impracticable or would cause undue delay.

(13) It is the judgment of the General Assembly that due to the highly contagious nature of COVID-19 and the need to protect the electors and polling workers in this State from infection of COVID-19, voting by mail is necessary and proper for insuring the continuity of governmental operations, and to conform to the requirements of Article V, § 4A, would be impracticable.

Section 2. Amend Chapter 45, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4502 Form and designation of ballots.

(d) Absentee and mail ballots may be laid out with candidate names under an office title. If this form is used, party logos shall not be used and the political party of each candidate shall be listed beside or below the name of each candidate. The candidates shall be listed in the order specified in subsection (a) of this section above. Except, that in a primary election the candidates shall be listed in alphabetic order and the political party shall be listed for each office.

§ 4503 Creating ballots.

The Department shall create the ballots to be used in the voting devices and print or cause to have printed sufficient absentee and mail ballots for any election conducted by the Department under the provisions of this title.

§ 4505 Substitution of candidate's name after creation of ballots.

Whenever a supplemental certificate of nomination is filed naming a substitute candidate, as elsewhere provided in this title, the Department shall promptly provide new absentee and mail ballots, if there is sufficient time before the election, or take other appropriate measures including to notify electors to whom absentee or mail ballots have been sent of the substitute candidate, if there is insufficient time before the election to provide new ballots.

Section 3. Amend Part IV, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

CHAPTER 56. Voting by Mail

§ 5601 Applicability.

This chapter applies to the following elections in 2020:

(1) A non-presidential primary election.

(2) A general election.

(3) A special election to fill a vacancy in a statewide office, the General Assembly, or any election held under the provisions of Chapter 73 of this title.

§5602 Persons eligible for voting by mail.

(a) Any qualified elector, duly registered, of this State may cast the qualified elector's vote by mail in the 2020 primary election, general election, special election held under the provisions of Chapter 73 of this title.

(b) Votes cast by mail pursuant to this chapter shall be counted in the total for the election district in which the elector is registered.

§ 5603 Process for Voting by Mail.

(a) The State Election Commissioner shall, no later than 60 days before any election to which this chapter applies, mail an application to receive a voting by mail ballot to every qualified, duly registered elector at the address appearing on such elector's voter registration record in order to allow electors the choice for voting by mail.

(b) A qualified, duly registered elector wishing to vote by mail must do all of the following:

(1) Complete the application for voting by mail.

(2) Sign and date the application.

(3) Mail, deliver, or cause to be mailed or delivered, the completed application to the Department by the deadline provided by the Department.

(c) Unless otherwise specified by the elector, an application to receive a voting by mail ballot applies to the 2020 primary election, general election, and any special election to fill a vacancy in a statewide office, the General Assembly, or an office covered by Chapter 73 of this title.

§5604 Distribution of ballots, envelopes, and instructions.

(a) Upon receipt of the application for voting by mail from an elector pursuant to §5603 of this title, the Department shall process the same and confirm that the elector qualifies for a mail ballot pursuant to § 5602 of this title.

(b) Not more than 30 days nor less than 4 days prior to an election, and within 3 days after the mail ballots, envelopes, and instructions therefore become available, the Department shall mail, to each elector who requested and qualified for a mail ballot pursuant to § 5602 of this title all of the following:

(1) A mail ballot for the election district in which the elector resides.

(2) Instructions for completing the mail ballot and returning it to the Department, marked "INSTRUCTIONS FOR COMPLETING AND RETURNING A MAIL BALLOT".

(3) An envelope marked "BALLOT ENVELOPE," which shall be all of the following:

a. Of the type known as a security mailing envelope, designed to securely protect the contents thereof from tampering, removal, or substitution without detection.

b. Large enough to carry the ballot envelope containing the completed mail ballot.

c. Addressed for return to the Department.

(4) Postage for all mailings made pursuant to this subsection shall be pre-paid by the Department.

(5) Nothing contained in this section shall prevent the issuance of a mail ballot to those lawfully entitled thereto when the request is made less than 4 days prior to the election.

§ 5605 Requirements for ballot envelope; numbering and coding; voter identification label; statement of eligibility.

(a) The Department shall provide to each elector to whom it sends a mail ballot an envelope which shall be all of the following:

(1) A color other than white.

(2) Large enough to hold a completed ballot.

(3) Designed to protect its contents from tampering, removal or substitution without detection.

(b) Upon each envelope provided pursuant to this section all of the following shall appear:

(1) The words "BALLOT ENVELOPE".

(2) An alphanumeric symbol and/or barcode for use in accounting for the mail ballot.

(3) Identification information for the elector receiving the mail ballot, including: the name of the county within which the elector is domiciled, the elector's name, the elector's address, the elector's election district, the elector's representative district, and such other information as the Department may require.

(4) The following oath:

"I do solemnly swear (affirm) that to the best of my knowledge I am eligible to vote in the State of Delaware and that my voting address is as it appears on the label on this envelope. I also do solemnly swear (affirm) under penalty of perjury that I have not received or accepted, or offered to receive or accept, any money or other item of value as compensation, inducement or reward for the giving or withholding of a vote at this election, nor that I am acting under duress or threat of duress or harm."

(5) The voter's signature.

§ 5606 Instructions for completing mail ballots.

The Attorney General shall prepare a list of instructions to assist an elector voting by mail ballot in properly marking and returning the elector's ballot pursuant to this chapter. These instructions shall be known and marked as "INSTRUCTIONS FOR COMPLETING AND RETURNING A MAIL BALLOT." Before each election the Attorney General shall deliver a copy of the instructions to the Department in sufficient time for the Department to have the instructions printed and delivered to each elector who requested a mail ballot for the ensuing election.

§ 5607 Voting procedure; execution of statement; return of ballot.

(a) The procedure for completing a mail ballot and returning it to the Department includes all of the following:

(1) An elector who receives a mail ballot pursuant to this chapter shall complete the ballot by marking it with the elector's selections and shall place the completed ballot in the envelope marked "BALLOT ENVELOPE."

(2) The elector shall confirm that the information about that elector on the ballot envelope is correct and then sign the self-administered oath.

(3) The elector shall then seal the ballot envelope.

(4) The elector shall return the sealed ballot envelope to the Department by any 1 of the following:

a. Depositing it, or causing it to be deposited, in a United States postal mailbox, thereby mailing it to the Department.

b. Delivering it, or causing it to be delivered, to the Department before the polls close on the day of the election.

c. Placing it, or causing it to be placed, in a secure drop-box located in the publicly accessible portion of each Department of Elections Office either before or on Election Day.

(b) Mail ballots received by the Department before Election Day may be processed and scanned but may not tabulated until Election Day.

§ 5608 Time limit for return of ballot; late ballots.

(a) The Department shall endorse the date and time of receipt on the ballot envelope of each mail ballot received thereby.

(b) For a mail ballot to be counted under this chapter, an elector voting by mail ballot shall return the elector marked ballot to the Department office of the county in which the voter resides before the polls close on the day of the election.

(c) The Department shall retain unopened any ballot envelope it receives after the polls close on the day of the election until the last day of February next after the election, or longer if directed by proper authority or required to do so by federal law.

§ 5609 Procedure on receipt of ballot envelope by Department.

(a) Upon receipt of a ballot envelope the Department, or a person authorized by the Department, shall do all of the following:

(1) Ascertain the name of each elector as it appears on the face of each ballot envelope.

(2) Ascertain from the information on the ballot envelope the election district with whose votes the ballot within it shall be tallied.

(3) Place the ballot envelope in a secure location until such time as it is opened and the ballot within it is counted.

(b) No member of the Department (the director or any other person) shall open or attempt to open the ballot envelope, or change or alter or attempt to change or alter the ballot envelope, or any writing, printing or anything whatsoever thereon.

§ 5610 Counting procedure for mail ballot envelopes.

At any time between the 30th calendar day before the election and the closing of the polls on an election day, mail election judges within each county, selected by the administrators of the Department in that county, shall count mail ballot envelopes at the Department's offices in the county as follows:

(1) A mail judge shall select the ballot envelopes in order of the election districts within the county;

(2) For each ballot envelope, the mail judges shall ascertain whether a challenge has been made pursuant to this chapter;

(3) If a challenge has been made, on election day, the BALLOT ENVELOPE shall be marked as "CHALLENGED" and shall be set aside in a secure location for consideration at a later time as provided elsewhere in this title.

(4) If no challenge has been made, the mail judges shall do all of the following:

a. Open the ballot envelopes in such a manner as not to deface or destroy the statement thereon or the mail ballot enclosed.

b. Remove the ballots from the ballot envelopes.

c. Determine whether the ballots have been properly completed and/or whether the elector's intent can be determined pursuant to § 4972 of this title.

d. Tally any mail votes that were written-in, or that must be counted by hand pursuant to § 4972 of this title, on mail vote tally sheets for the election district with whose votes the mail votes are to be counted.

e. Record the proper notations of such votes in the election records for the election district to which they apply.

f. A ballot that a team determines cannot be read by the tabulating equipment or which the tabulating equipment rejects, shall be duplicated as provided for in § 5611 of this title.

(5) Once mail votes have been recorded, a mail judge shall deposit the voted ballots, rejected ballots, and any mail vote tally sheet that may have been used, in a carrier envelope for the election district with whose votes the mail votes are counted; provided, however, that each carrier envelope shall contain mail ballots, rejected ballots, and tally sheets for no more than one election district and only one carrier envelope shall be filled at a time.

(6) Once a carrier envelope is filled, it shall be sealed by a mail judge. The mail judge shall sign the mail judge's name on each sealed carrier envelope, affirming that the mail judge sealed the envelope and that the envelope contains ballots for the election district to which the envelope is assigned. Each sealed and signed carrier envelope shall be placed in a secure location and held there until such time as it is destroyed or moved for further legal process.

(7) The results of the mail ballots shall not be extracted or reported before the polls have closed on the day of the election.

§ 5611 Preparing mail ballots for tabulation.

(a) Notwithstanding any other provision of this chapter or regulations adopted by the Department, the Department may open mail ballot envelopes in public meetings at any time between the 30th calendar day before the election and the closing of the polls on election day in order to prepare them for tabulation. The Department shall notify each party on the ballot that they may have challengers at the meetings during which the Department opens the mail ballots. The challengers may challenge ballots as provided elsewhere in this title.

(b) The Department shall appoint teams composed of an equal number of Democrats and Republicans to open and duplicate ballots.

(c) The teams shall open ballots by election district, check them off against the list of mail voters, duplicate ballots that the team determines that the tabulating equipment cannot read and then secure the opened and duplicated ballots along with the envelopes in a carrier envelope. The teams shall record the number of the carrier envelope and the election district number on a log sheet that it shall also secure in the same carrier envelope.

(d) Teams shall duplicate ballots by marking them according to the voter's intent as shown on the ballot marked by the voter. If a team cannot determine a voter's intent, they shall consult the director and deputy director for advice and guidance.

(e) When duplicating ballots, the teams shall assign the same unique identifier to the ballot that they duplicate and the duplicated ballot. After the team has duplicated ballots for an election district, the team shall put the ballots that the team duplicated in a separate envelope and put it in the carrier envelope for the election district and the team shall put the duplicated ballots with the ballots that the Department shall tabulate on the day of the election.

(f) The Department shall secure the carrier envelopes in locked cabinets until opened in a subsequent public meeting to insert additional ballots or to tabulate the ballots on the day of the election.

§ 5612 Carrier envelope specifications; carrier envelopes as ballot boxes.

(a) The Department shall purchase envelopes to be used as carrier envelopes, which shall be security mailing envelopes, designed to securely protect the contents thereof from tampering, removal, or substitution without detection and shall be large enough to accommodate multiple mail ballots cast in the election.

(b) Carrier envelopes shall do all of the following:

(1) For all purposes of this title, be considered the official ballot boxes for mail votes cast during a given election.

(2) Contain voted mail ballots from a single election district.

(3) Be labeled to reflect the election district whose mail ballots are held inside; and

(4) Ensure the security of said ballots in the event they must be moved for the purposes of certifying an election or recounting votes cast in an election.

(c) A sealed carrier envelope may be reopened only when necessary to certify an election or recount votes cast in an election.

(d) In the event the Department must move mail ballots for the purposes of certifying an election, or recounting votes cast in an election, it shall select the carrier envelopes for the affected election districts and move them, in a secure fashion, to the location where the carrier envelopes will be opened and the votes inside inspected.

(e) Upon completion of any inspection of votes pursuant to this subsection, mail ballots shall be returned to the carrier envelopes from which they were removed and the carrier envelopes shall be:

(1) Resealed in a secure manner, or shall be placed in another security envelope, for the purposes of securely protecting the contents thereof from tampering, removal, or substitution without detection; and

(2) Placed in a secure location and held there until such time as it is destroyed or moved for further legal process.

§ 5613 Envelopes in general; approval by Attorney General.

The Attorney General shall personally approve each kind or type of envelope for use pursuant to this chapter. The Department shall not purchase, use, have printed upon, mail or deliver any envelope for use pursuant to this chapter unless such type or kind of such envelope has first been approved personally by the Attorney General.

§ 5614 Challenges.

(a) The ballot of any elector choosing to vote by mail ballot may be challenged for the same causes and in the same manner as provided in this title for other voters.

(b) In addition, the vote of a mail voter may be challenged for any of the following grounds:

(1) That the statement filed by the voter in compliance with § 5603 of this title is false.

(2) That the statement in the center of the face of the ballot envelope is not signed.

(c) If a challenge is made pursuant to subsection (a) of this section, a mail judge shall return the ballot to its ballot envelope, shall mark the ballot envelope as "CHALLENGED," and shall set the envelope aside in a secure location for consideration at a later time as provided elsewhere in this title. If a challenge is made pursuant to subsection (b) of this section, a mail judge shall mark the ballot envelope as "CHALLENGED" and shall set it aside in a secure location for consideration at a later time as provided elsewhere in this title.

(d) All challenges to mail ballots voted in a particular election district must be resolved before the counting of votes in that election district may be considered complete. Any challenge not resolved by the mail judges within a reasonable time of the challenge having been made shall be referred for resolution to the county director and deputy county director of the Department in the county where such election district is located.

§ 5615 Rejected ballots.

(a) No vote shall be accepted or counted if any of the following occurs:

(1) The statement of the mail voter that appears on the front of the ballot envelope is found to have been altered or is not signed.

(2) The mail voter is not a duly registered elector in this State.

(3) The ballot envelope is open.

(4) It is evident that the ballot envelope has been opened and resealed.

(5) It is evident that the ballot envelope has been tampered with or altered.

(b) If the ballot envelope has not been opened at the time a mail judge decides that the offered ballot contained therein should not be accepted or voted for any of the reasons set forth in subsection (a) of this section, it shall not be opened but shall instead be endorsed thereon as, "REJECTED," giving the reason therefore.

(c) If the ballot envelope has been opened at the time a mail judge decides that the offered ballot contained therein should not be accepted or voted for any of the reasons set forth in subsection (a) of this section, the ballot shall be returned to its ballot envelope and the mail judge shall endorse on the ballot envelope, "REJECTED," giving the reason therefore.

(d) Whenever it is made to appear by due proof to a mail judge that any mail voter, who has marked and forwarded the mail voter's ballot, has subsequently died, the ballot envelope containing the ballot shall not be opened but shall be marked "REJECTED, DEAD," and shall be preserved and disposed of as other rejected ballots.

(e) Whenever a ballot has not been counted but has been rejected pursuant to this section, the appropriate notation shall be made on the mail ballot tally and the number of ballots so rejected shall be noted on the certificates of election.

(f) Ballots rejected pursuant to this section shall be deposited in a carrier envelope for the election district to which they apply.

§ 5616 Validity of mail voter's ballot for wrong district.

If a mail voter marks and returns a mail ballot for an election district other than the one of which the mail voter is a resident and a duly registered elector, such ballot, because thereof, shall not be adjudged invalid, but, as indicated by the marking of the ballot by the voter, shall be counted as a vote for every candidate appearing thereon who is a candidate for an office to be duly voted for in the election district.

§ 5617 File of mail voters.

(a) The Department shall maintain records providing for the prevention of fraud and to make possible the tracing and detection of any attempt to do so. Such records shall include the following entries:

(1) The name of elector.

(2) The address at which elector is registered.

(3) The address where ballot is to be mailed.

(4) The date the statement is received by the Department.

(5) The elector's election and representative district.

(6) The ballot envelope identification number.

(7) The date the ballot is mailed or delivered to the elector.

(8) The date the ballot is returned.

(b) The Department shall compile from its files a list of names and addresses of all applicants for mail ballots, and shall send current and complete copies thereof without cost to all political parties with candidates on the ballot in the forthcoming election. Such lists shall be provided no later than 2 weeks prior to the date of the election and copies of the lists must be mailed on the same date to the respective chairs of each political party involved in the election. Comparable information from the file shall also be made available to representatives of all political parties at each office of the Department during the remaining 2 weeks before the election, such information to be recorded by such representatives from the daily records of the Department with the cooperation and assistance of the employees thereof.

§ 5618 Duties of Department of Elections; political balance of mail judges; security.

(a) The Department shall ensure that each panel of mail judges selected to officiate the procedures set forth in this chapter represent a politically balanced cross section of the major political parties participating in the election for which absentee ballots are being counted.

(b) The Department shall promulgate rules to ensure the security and integrity of the procedures set forth in this chapter and that the counting process for mail ballots is not subject to improper influences.

§ 5619 Logic and accuracy testing of mail ballot tabulating equipment; authority of the State Election Commissioner.

(a) The State Election Commissioner, in consultation with the Department offices, shall promulgate rules relating to logic and accuracy testing of mail ballot tabulating machines.

(b) Rules promulgated pursuant to this section shall ensure all of the following:

(1) All machines are thoroughly tested immediately following maintenance and programming thereof to determine all of the following:

a. The voting system is properly programmed.

b. The election is correctly defined on the voting system.

c. All of the voting system input, output, and communication devices are working properly.

(2) Any machine deemed unsatisfactory shall be recoded, repaired, or replaced and shall be retested.

(3) Machines are publicly tested prior to use to ascertain that they will correctly count votes cast for all offices and all measures in the upcoming election;

(4) Public notice of public tests is given at least 7 days prior to the tests being conducted;

(5) The resetting and sealing of each publicly tested machine is witnessed by the election officials, representatives of the political parties, and any candidates or candidate representatives who were in attendance;

(6) Each publicly tested machine is secured following the test in a state of readiness until the day of the election; and

(7) Records are kept of all pre-election testing of each mail ballot tabulating machine which shall be present and available for inspection and reference during public pre-election testing of that machine by any person in attendance during such testing.

§ 5620 Emergency authority for the State Election Commissioner.

(a) In the event that a national or local emergency makes substantial compliance with the provisions of this chapter impossible or unreasonable for some of all of the citizens covered under § 5602(1) or (2) of this title, the State Election Commissioner may direct the use of special procedures to facilitate mail voting for those citizens directly affected who are eligible to vote in the State. Such an emergency may be a natural and/or humanitarian disaster; and/or armed conflict involving United States Armed Forces to include mobilized State National Guard and/or Reserve components.

(b) The State Election Commissioner shall consult with the Governor and the Federal Voting Assistance Program or its successor prior to directing the use of the special procedures cited in subsection (a) of this section.

(c) The State Election Commissioner, in collaboration with the Department, shall promulgate special procedures to be followed in the event that such a national or local emergency occurs.

§ 5621 System for voters to determine status of their mail ballots.

The State Election Commissioner, in collaboration with the Department offices, shall establish a free access system accessible via the Internet through which a person who applied for a mail ballot can determine whether or not the ballot application was received, when the ballot was transmitted, when the voted ballot was received by the Department, and whether or not the ballot was counted.

Section 4. This Act expires on January 12, 2021.

Approved July 1, 2020

ORDER NO. 2020-40
INDIANA ELECTION COMMISSION

CONCERNING EMERGENCY PROVISIONS AFFECTING THE 2020 INDIANA PRIMARY ELECTION

WHEREAS, per Executive Order 20-02, the Governor of the State of Indiana has declared a public health disaster emergency effective March 6, 2020, in response to the COVID-19 pandemic;

WHEREAS, per Executive Order 20-17, the Governor's declaration of a public health disaster emergency was renewed for an additional thirty (30) days to May 5, 2020;

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic, and, several days later, on March 13, 2020, the President of the United States declared a national emergency under Proclamation 9994 in response to the COVID-19 pandemic;

WHEREAS, Indiana Code 3-6-4.1-14 provides that the Indiana Election Commission ("the Commission") shall, in addition to other duties prescribed by law, administer Indiana election laws, and advise and exercise supervision over local election and registration officers;

WHEREAS, Indiana Code 3-6-4.1-17 permits the Commission to issue an order extending the time to perform an election related duty or file a document as the result of an emergency;

WHEREAS, Indiana Code 3-6-4.1-25 permits the Commission to issue advisory opinions to administer Indiana election law; and

WHEREAS, the Commission adopted Order 2020-37 concerning emergency provisions affecting the 2020 Indiana primary election.

NOW, THEREFORE, BE IT ORDERED BY THE INDIANA ELECTION COMMISSION:

SECTION 1. Pursuant to IC 3-6-4.1-17(b), Indiana Election Commission Order 2020-37, which expires on April 24, 2020, is readopted and extended for an additional thirty (30) days from the date Order 2020-37 is to expire, meaning until May 24, 2020.

SECTION 2.

A. Any registered voter of Indiana may be nominated as a precinct election officer by a political party chairman or appointed by a county election board or county board of elections and registration to fill a vacancy if no nomination is timely made if the individual is otherwise qualified to serve as a precinct election officer under IC 3-6-6-7.

B. Any registered voter of Indiana may be nominated as an absentee board member, absentee ballot counter, or absentee ballot courier by a political party chairman or appointed by a county election board or county board of elections and registration to fill a vacancy if no nomination is timely made if the individual is otherwise qualified to serve as an absentee board member, absentee ballot counter, or absentee ballot courier under IC 3-11.5-22.

C. Any registered voter of Indiana may be nominated as a watcher by a political party chairman or appointed by a county election board or county board of elections and registration to fill a vacancy if no nomination is timely made if the individual is otherwise qualified to serve as a watcher under IC 3-6-8 or IC 3-11.5-3 at a polling place, vote center or absentee ballot counting location.

SECTION 3. The Commission advises each county executive and county election board that under IC 3-11-8-4 all school buildings, fire stations and other public buildings shall be made available to a county to be designated as a polling location under IC 3-11-8 or vote center location under IC 3-11-18.1 for the June 2, 2020 primary election.

SECTION 4. The Secretary of State and the Indiana Election Division shall provide training guidelines to each county election board and circuit court clerk for special procedures to conduct the June 2, 2020 primary election, including CDC guidelines for handling mail and the need for and proper use of personal protective equipment (PPE). The Secretary of State and Election Division will also seek guidance from the Indiana State Department of Health when issuing these guidelines.

Each county election official shall follow the guidelines included with this Order in Appendix A, and any other supplemental guidelines issued by the Secretary of State or Indiana Election Division, which follow current CDC and state health department guidelines when conducting election functions. Any deviation from the prescribed guidelines to conduct elections in the county must be approved by the county's health officer.

SECTION 5. In accordance with Indiana law, which provides that a political subdivision (including a county) does not possess "home rule" authority to order or conduct an election (IC 36-1-3-8(a)(12)) except as expressly provided by statute, each person shall perform their responsibilities and duties in accordance with the requirements of the Indiana election code (IC 3). Except to the extent required to comply with a legally binding order, the June 2, 2020 primary election shall be conducted strictly in accordance with the provisions of the Indiana Election Code (IC 3), other relevant statutes concerning elections (IC 6-1.1 and IC 20), and any vote center plan adopted by a county.

SECTION 6. Notwithstanding any contrary provision in IC 3-11-4 or IC 3-11-10 including IC 3-11-10-26, IC 3-11-10-26.2 or IC 3-11-10-26.3 or any vote center plan adopted under IC 3-11-18.1, a voter may cast an absentee ballot before the June 2, 2020 primary at the office of the circuit court clerk, satellite office or vote center only during the following period: Beginning Tuesday, May 26, 2020, and ending at noon (prevailing local time), Monday June 1, 2020.

SECTION 7.

A. Notwithstanding any provision in IC 3-11.5, a county election board by unanimous vote of its entire membership, may adopt a resolution permitting the central counting of absentee ballots to take place at more than one (1) location, not to exceed one (1) location for every fifty thousand (50,000) active voters as of the May 4, 2020 statewide voter registration deadline. For a county that has fewer than fifty thousand (50,000) active voters as of May 4, 2020, not more than three (3) absentee central count locations may be established. However, an absentee ballot central count location established under this resolution may not perform its functions unless two (2) appointed members of the county election board or county board of elections and registration, affiliated with opposite major political parties, are present at all times during the counting or represented by a proxy appointed under IC 3-6-5-4.5, IC 3-6-5.2, IC 3-6-5.4, or IC 3-6-5.6.

B. Section 6A of 2020-37 is rescinded and replaced by the following: An absentee by mail application that was submitted on or after December 2, 2019, and not later than 11:59 p.m. Thursday, May 21, 2020, on which the voter did not indicate a qualification under IC 3-11-10-24(a) shall be accepted by a county election board if otherwise in accordance with the requirements of Indiana law. If the

application was rejected prior to this date due to the lack of stated qualification to vote by mail, it shall be accepted if otherwise in compliance with Indiana law.

SECTION 8.

A. In a vote center county, the location of a vote center used on election day may only be changed in accordance with IC 3-11-18.1, after giving the best possible notice to all voters of the county and by filing the necessary change to the vote center plan with the election division.

B. Section 13A of 2020-37 is rescinded and replaced by the following: Notwithstanding IC 3-11-18.1-6, a vote center plan of a county where the total number of active voters in the county equals at least twenty-five thousand (25,000) as of the May 4, 2020 voter registration deadline may be amended, by unanimous vote of the entire membership of the board, to provide for the following only for the election postponed by SECTION 1 of this Order:

(1) At least one (1) vote center for each twenty five thousand (25,000) active voters.
(2) In addition to the vote centers designated in subdivision (1), the plan must provide for a vote center for any fraction of twenty five thousand (25,000) active voters.

C. In a precinct based county, the location of a polling place for a precinct used on election day may only be changed in accordance with IC 3-11-8-3.2, after giving the best possible notice to all voters of the county and by filing a written notice with the election division. County election boards in a precinct based county may unanimously agree to locate the polls for a precinct at the polls for an adjoining precinct, using the precinct election board of the adjoining precinct pursuant to IC 3-11-8-4.3. By the unanimous vote of the entire membership of the county election board or board of elections and registration a non-vote center county can establish additional absentee early in person voting locations.

SECTION 9

The county election board may notify a voter that the voter's absentee ballot application or absentee ballot security envelope is defective to allow for the voter to cure the issue under current Indiana law. The Indiana Election Commission advises the uniform and non-discriminatory application of such a policy.

SECTION 10.

A. The Commission shall hold a public hearing on April 22, 2020 at 10:00 a.m. Eastern Time, to consider the methods and procedures necessary to implement a vote by mail election for the primary election that has been postponed by SECTION 1 of Order 2020-37 should the public health disaster emergency necessitate such a change in election procedures.

B. At this hearing, the Commission shall also address the timely certification of elected state convention delegates and the presidential primary preference vote to each of the major political parties so that both parties may hold their state conventions. The Commission shall also consider any other statutes that would need to be addressed as a result of the postponed primary to allow the major political parties to hold their state convention.

The Commission shall hold at least one (1) meeting in the month of May 2020, but before May 24, 2020, to consider the extension of orders IEC 2020-37 and IEC 2020-40.

SECTION 11. This Order is effective immediately.

ADOPTED THIS 17th DAY OF APRIL, 2020 BY THE INDIANA ELECTION COMMISSION:

Paul Okeson, Chair

S. Anthony Long, Vice-Chair

Suzannah Wilson Overholt, Member

Zachary E. Klutz, Member

COVID-19 Guidance for Elections Personnel

Best practices and information collected from the CDC and
other federal and state government agencies
Compiled by the Indiana Election Division

General Good Hygiene Practices

- Lather hands with soap for 20 seconds, scrubbing all hand surfaces including back of hand, backs of fingers, in between fingers, and side of palm opposite thumb. Rinse for 10 seconds in warm water.

- Cough into your elbow, a sleeve, or a tissue/handkerchief
    - Wash hands after coughing or blowing your nose

- Clean/disinfect all frequently touched surfaces on a regular schedule
    - At least once per day
      https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html
      https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html
    - EPA approved disinfectants:
      https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2

- Make sure bathrooms have plenty of supplies (soap, paper towels, etc.)

- Use hand sanitizer that contains at least 60% alcohol when hand washing is not possible

Resources:
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html
https://www.cdc.gov/handwashing/when-how-handwashing.html

Masks, Face Coverings, and Face Shields

- Use cloth face coverings or face masks when in public areas (polling location, ABS central count location, etc.) or when working in the same area as other people

- Do not touch the mask or your face while wearing
    - Continue to maintain 6 feet of distance between yourself and others

- If no masks are available, a cloth face covering may be used
    - Cloth face coverings should:
        - Fit snugly
        - Have ear loops or ties to go around head
        - Have at least 2 layers of fabric
        - Not restrict breathing
        - Be washable and able to be dried in a machine without damage
        - Be washed in between uses
        - Be tightly woven cotton, if at all possible

- Face shields may be used with cloth face coverings but are not necessary for use with masks: https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html

- Removing Face Masks
    - Remove masks without touching the front of the mask
    - Grasp the elastic over the ears or the ties behind the head
    - Use elastic or ties to remove the mask

Resources:

- Cloth Masks & DIY Cloth Mask Instructions: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html

- Cloth face covering FAQ: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html

Using Personal Protective Equipment (PPE)

- **Putting On**
    - Put on mask first; adjust to fit snugly over nose and around mouth
    - If using goggles or a face shield, put on and adjust to fit comfortably
    - Put on gloves after all other PPE, as you would normally put on gloves

- **Removing Gloves**
    - Remove gloves by grasping palm of one glove in other hand and pulling off, then balling up in that hand.
    - Slip the fingers of the now-ungloved hand into the glove on the other hand at the wrist.
    - Pull off glove from the wrist, allowing it to turn inside out so that contaminated surfaces cannot be touched.
    - Dispose of gloves in trash.
        - If your hands touch the outside of the gloves, wash your hands before proceeding.

- Removing Goggles or Face Shield
    - Remove by lifting ear pieces or band at back of head.
    - If reusable, set in a designated area to be cleaned.
    - If your hands touch the front of the goggles or face shield, wash your hands before proceeding.

- Removing Face Masks or Cloth Face Coverings
    - Remove mask over trash, by grasping ties or elastic around ears.
    - Avoid touching front of mask.
    - Move mask slowly and place in trash immediately to avoid scattering germs in air.

Wash hands immediately and thoroughly after removing all PPE

Election Specific Tasks

ABS-Mail: Special Handling Procedures for COVID 19

Create a hand-washing regimen for your employees.

- Ensure employees have access to wash stations and are washing their hands for at least 20-seconds using hand soap and are doing so at regular intervals.
- Provide hand sanitizer with at least 60% alcohol in its base to employees for use when washing hands may not always be an option.
- Post "how-to" hand washing flyers at hand washing stations (see appendix).
- Contact your voting systems vendor to determine what, if any, impact there may be handling optical scan ballot cards if hands are wet from hand-washing or using hand sanitizer.

Use gloves, letter openers, or finger cots to open and process mail, when possible. Good hand and face hygiene are still crucial, however!

Avoid touching your face at all times when processing mail. Alternatively, counties may provide face masks to staff who open and process mail.

Cover coughs and sneezes, and immediately dispose of tissue and wash hands following best practices guidelines.

Ask the public not to lick envelopes to avoid the transmission of an illness, out of an abundance of caution. However, paper and licked envelopes are not high-risk transmission vectors

When possible, purchase outer and inner security envelopes with self-stick adhesive or use a wet sponge (or equivalent) when sealing envelopes to mail absentee ballot and materials to voters.

No additional precautions are currently recommended by the CDC for storage of ballots

Resources:

https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html

(scroll to the bottom of the page)

ABS-Travel Board: Special Considerations for COVID 19

IEC Order 2020-37 set forth special procedures to better assist individuals who are not able to personally mark their own ballot and need assistance from bi-partisan absentee voter board teams, including:

- Allowing staff in in-patient or rehab health facilities to assist voters within their care, providing that two staff are present when assisting the voter or completing the voter's ballot at their request, and the ballot is delivered and returned by a bi-partisan team or other delivery method approved by the county election board;
- Allowing bi-partisan absentee voter board teams to assist voters who request travel board support to tele- or video-conference with the voter;
- Expanding the definition of a voter with disability to include individuals who are temporarily unable to leave their home due to concerns of COVID-19 so that a travel board team can stand outside of a door or other screen to communicate with a voter inside their home or health care facility, and sign the voter's name to the security envelope and mark the proper box on the affidavit found on the absentee security envelope.

Ensure absentee voter boards have cloth face masks, gloves or finger cots, hand sanitizer, and wipes to disinfect materials that may come in contact with the voter.

Avoid touching face, even when using gloves or finger cots

Schedule mutually agreeable appointments that allow for absentee voter boards to follow proper hygiene protocols

- Allow for time in the travel board team's schedule for restroom breaks to follow proper hand washing procedures

If using a direct record electronic voting system, ensure the voting system and any peripheral is disinfected as recommended by the voting system vendor

- Use a stylus or other device to press buttons; more information found in the voting system section of this document

ABS Central Count on Election Day: Special Considerations for COVID 19

Ensure county has washrooms available for staff and members of the public, and those washrooms are stocked with plenty of hand soap and towels to dry hands.

Instruct central count teams (and members of the public that may be present) to:

- follow a strict hand-washing regimen,
- avoid touching their face,
- cough or sneeze into tissue or arm and immediately through tissue away and wash hands,
- use a cloth face covering (unless health officials have discouraged the practice at the time of the event), and
- follow procedures to remove and discard any additional PPE used.

If possible, provide gloves or finger cots to central count team members when handling absentee balloting materials

Sanitize surfaces on regular intervals.

Sanitize voting systems that may be used during central count, following recommendations from voting system vendors

Ensure proper social distancing between central count teams

- For example, use a 6' table and place individuals at the head of each table and pass materials back and forth when following absentee review procedures

Post information about proper hand-washing protocols at hand washing stations

If necessary, mark 6' intervals in any area that may require individuals to line up to gather or return materials

In-Person Voting: Special Considerations for COVID 19

General Guidelines:

- Ensure poll workers and voters have access to hand-washing stations
    - Poll workers should follow strict hand washing regimen and avoid touching face.
- Sanitize surfaces often using disinfectants recommended by the EPA or local health officials.
- Sanitize voting systems using procedures recommended by your voting system vendor
- When possible, poll workers and voters should use gloves or finger cots.
    - Confirm with your voting system vendor if voters or poll workers can interact with voting equipment or ePollbooks with gloves or finger cots on.
    - Always wash hands after removing gloves or finger cots.
- Whether a poll worker or voter using gloves or finger cots, avoid touching your face
- Cloth face coverings are currently encouraged by public health officials. Consult with current Center for Disease Control or state/local health department guidelines to determine if using face masks continue to be encouraged.

Pre-Planning for In Person Voting:

- Evaluate your in-person absentee and Election Day polling locations and relocate those sites that may be at a location where vulnerable populations might interact with voters, such as a nursing home or senior center.
- Poll workers will also need to keep their distance away from voters and each other. Counties may need to secure additional resources like tables or privacy screens to ensure proper protocols.
- Voting stations should be placed at least 3' from each other, if possible, and privacy screens used when practicable.
- Election materials are often placed in large envelopes. If possible, consider purchasing self-adhesive envelopes. Alternatively, some items may be able to be stored in "Ziploc"-like bags and sealed with a labeled initialed by a bi-partisan team.
- Determine how many bathroom/washroom facilities are available to poll workers and voters. If necessary, consider renting portable wash stations for election day.

- Consider how notice can be posted to ensure proper suggested social distancing requirements. For example, a person's arm to nose is about 3', generally, so suggest voters queue up and stand at a distance at least one full arm's length away.

Voting System Use & Disinfecting:

- All voting systems and ePollbooks should be cleaned and sanitized according to the voting system vendor's requirements.
- If possible, use a stylus for the voter to press buttons on a DRE machine or ballot marking device. Talk to your voting system vendor about which styluses are recommended and if an alternative, like using the eraser end of a wooden pencil that the voter could keep, would work. Alternatively, finger cots may be a solution for absentee voter board members, staff, and voters to use to touch a voting screen, button, or ePollbook. Please check with your vendor to confirm a prophylactic like the finger cot is compatible for use with your system or for voters to sign their name.
- Sanitize a stylus used for DRE, ballot marking devices, or ePollbook as recommended by your voting system vendor. The stylus should be cleaned between uses unless there is a disposable sanitary option to place around it and disposed once a voter is done with it.
- For optical scan ballot cards and absentee applications, purchase extra ink pens and ask the voter to hold onto their pen for the duration of the visit and either take it with them as they leave or determine the best way to sanitize the item (or dispose of or recycle it).
- If possible, wipe down surfaces between each person who has contact with those surfaces
    - With ePollbooks, could have single use styluses or clean the styluses between each use
    - Eliminates need for people to touch ePollbooks directly and thus reduces need to wipe ePollbooks with cleaners
- When possible, purchase envelopes with self-stick adhesive or use a wet sponge (or equivalent) when sealing envelopes to secure voted absentee ballots.

Poll Workers & Training:

- Recruit workers from lower risk populations (under 60, low risk based on medical condition, etc.)
- If anyone is sick or feels sick, please ask them to contact the county election board team immediately.
    - On Election Day, it is particularly important to have people call well in advance of the "arrive at 5:00 AM" so that the CEB can triage the situation.
    - Identify back-up poll workers and have them on-site with the election board to dispatch on election day, if possible.
- Set a schedule for in-person absentee and Election Day poll workers to take breaks to regularly wash their hands for at least 20-seconds using hand soap and thoroughly dry them.
    - If possible, make hand sanitizer available to everyone.

- Counties are encouraged to contact their voting systems vendor to determine what, if any, impact there may be handling optical scan ballot cards if hands are wet from hand-washing or using hand sanitizer.

- Determine best way to conduct poll worker training.
  - If training sessions are generally conducted in large groups, please consider offering multiple training sessions to keep group numbers to a minimum.
  - Virtual training classes may be a possibility depending on the work assignments.
    - There are several free online conference options available, if your county does not currently subscribe to such a service, and many are compatible with a smartphone if a computer is not available to the worker.
    - While not all workers will have a computer or internet access, a virtual training class may be helpful in some circumstances.
  - Consider developing material packets that can be mailed to workers ahead of their scheduled start date might also be necessary, if in-person or virtual training is not possible.
- Educate workers on need for good hygiene practices, use of personal protective equipment (PPE)
- Emphasize a person should not work if they feel ill or have a temperature.

Line & Site Management:

- Manage lines so there are 6 feet between people
  - Consider using visual aids such as cones or painter's tape indoors
  - Outside, duct tape or sidewalk chalk could also be used

- Limit the number of people inside the voting location at a time
  - May limit based on the number of square feet in the location – 15 square feet per voter allows for 7.5 feet on each side of the voter, for instance
  - If the location has 225 square feet, 15 square feet per person would allow for 15 people to be inside at a time
    - Can then use a one person in, one person out approach to maintain limit

- If possible, consider setting up a one-way flow with one door as an entrance and one door as an exit
  - If not possible, ensure that the first spot in the line outside the door is 6 feet from the door so that voters can exit while maintaining a safe distance from others

- Set up equipment to allow enough distance between people
  - At least 6 feet between pollbooks or ePollbooks
  - At least 6 feet between voting machines or voting booths, using a privacy screen
  - At least 6 feet between optical scan ballot tabulators

- Manage interactions to maintain distance between workers and public

- If voters and workers both must handle something, ask workers to step back 6 feet while voters are handling it, and ask voter to step back before worker approaches again

- Place hand sanitizer at strategic locations for public to use before reaching workers

- Place posters with CDC guidance around polling place – LINK: https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html

- Social Distancing Recommendations
  - Limit nonessential visitors. For example, poll workers should be encouraged not to bring children, grandchildren, etc. with them as they work the polls.
  - Remind voters upon arrival to try to leave space between themselves and others. Encourage voters to stay 6 feet apart if feasible. Polling places may provide signs to help voters and workers remember this.
  - Discourage voters and workers from greeting others with physical contact (e.g., handshakes). Include this reminder on signs about social distancing.

Resources:

CDC: https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html

Indiana State Department of Health: https://coronavirus.in.gov/files/IN_COVID-19_ElectionPollingStations03.20.20.pdf

Election Equipment Disinfectant Procedures

Surfaces should be sanitized frequently, preferably between each voter during in-person absentee or Election Day voting

Voting systems should be disinfected as recommended by county's voting system vendor. Please see Appendix for information gathered by VSTOP.

Additional Links

CDC, Cleaning and Disinfecting Your Facility
https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html

CDC, Interim Guidance for Businesses and Employers
https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

CDC, Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19
https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html

CDC, How to Protect Yourself and Others
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

CDC, Handwashing Guidelines
https://www.cdc.gov/handwashing/when-how-handwashing.html

CDC recommendations for polling locations, election staff, poll workers, and absentee workers
https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html

EAC guidance including cleaning guidelines from major election equipment vendors
https://www.eac.gov/election-officials/coronavirus-covid-19-resources

Indiana State Department of Health recommendations for poll locations and workers
https://coronavirus.in.gov/files/IN_COVID-19_ElectionPollingStations03.20.20.pdf

The federal government's main page for COVID-19 facts and information
coronavirus.gov

CDC, What You Need to Know
https://www.cdc.gov/coronavirus/2019-nCoV/index.html

CDC, Mitigating Community Spread

https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf

FEMA COVID-19 Resources
https://www.fema.gov/coronavirus

FDA Action Page, including status of procuring more Personal Protective Equipment (PPE)
https://www.fda.gov/emergency-preparedness-and-response/counterterrorism-and-emerging-threats/coronavirus-disease-2019-covid-19

Department of Labor and OSHA Workplace Safety
https://www.dol.gov/coronavirus

Department of Labor COVID-19 Employee rights and requirements
https://www.dol.gov/agencies/whd/pandemic

EPA, Disinfectants for Use Against COVID-19
https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2

OSHA Publications
https://www.osha.gov/pls/publications/publication.html

CDC, DIY Cloth Face Coverings
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html

CDC, Cloth Face Covering FAQs
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html

CDC, PPE Strategy for Health Care Professionals
https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html

CDC COVID-19 Factsheets and Posters
https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-296
April 24, 2020

STATE OF EMERGENCY RELATING TO KENTUCKY ELECTIONS

Background

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

To prevent the spread of disease, the Centers for Disease Control and Prevention (CDC) and the Kentucky Department for Public Health have recommended that everyone practice social distancing, meaning staying home as much as possible and otherwise maintaining six feet of distance from other individuals, to minimize the spread of the disease. Where people congregate unnecessarily, or fail to follow adequate social distancing practices, they are spreading the disease, creating scenes of an emergency.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to suspend state statutes and regulations, and to command individuals to disperse from the scene of an emergency. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth. On March 16, 2020, pursuant to KRS 39A.100(1)(l), I issued Executive Order 202-236, which delayed the primary election scheduled for May 19, 2020, until June 23, 2020, upon the recommendation of Secretary of State Michael G. Adams.

By letter dated April 23, 2020, Secretary of State Adams has now recommended a different manner for holding the 2020 primary election now scheduled for June 23, 2020, pursuant to KRS 39A.100(1)(l). This Executive Order accepts that recommendation, to ensure that Kentuckians can exercise their right to vote while remaining healthy at home.

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-296
April 24, 2020

Order

I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of authority vested in me by the Constitution of Kentucky and KRS Chapter 39A, do hereby Order and Direct as follows:

1. All Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary election if they are able to do so.

2. The State Board of Elections shall promulgate emergency regulations to provide for such expanded absentee voting by mail. The State Board of Elections shall, among other changes, create a secure online portal that will allow voters to request that the absentee ballot be mailed to them. The State Board of Elections shall send a postcard to each registered voter informing voters of the ability, and the process, to vote absentee by mail in the June 23, 2020 primary election.

3. The State Board of Elections shall take all reasonable steps to ensure the safety of county clerks and poll workers when direct voting (not by mail) is necessary, including, but not limited to:

    a. permitting in-person absentee voting to begin June 8, 2020;

    b. directing clerks to prioritize such voters by appointment;

    c. providing adequate personal protective equipment (PPE) and materials to assist in proper sanitization to clerks and poll workers; and

    d. instructing county clerks to implement procedures that limit direct contact between individuals, whether poll workers or voters. Such procedures shall promote a method of voting, such as drive through voting, whereby poll workers do not come into contact with voters.

4. The State Board of Elections shall promulgate such additional emergency regulations as are necessary to ensure that Kentuckians can safely exercise their right to vote in the June 23, 2020 primary election, while protecting the safety of Kentucky's county clerks and poll workers. The additional regulations shall be consistent with the April 23, 2020 recommendations of Secretary of State Adams, which are incorporated by reference herein. The regulations shall be subject to further approval as required by law.

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-296
April 24, 2020

This Order is effective April 24, 2020.

ANDY BESHEAR, Governor
Commonwealth of Kentucky

MICHAEL G. ADAMS
Secretary of State

RS 18:401.3

§401.3. Emergency plan by secretary of state; gubernatorial and legislative approval

A. Due to the occurrence of a gubernatorially declared emergency or disaster occurring before or during a regularly scheduled or special election, and in order to ensure maximum citizen participation in the electoral process and provide a safe and orderly procedure for persons seeking to exercise their right to vote, minimize to whatever degree possible a person's exposure to danger during declared states of emergency, and protect the integrity of the electoral process, it is hereby declared to be necessary to provide a procedure for the development of an emergency plan for the holding of elections impaired as a result of such an emergency or disaster.

B.(1) After the issuance of an executive order by the governor declaring a state of emergency and if the secretary of state determines that such emergency impairs an election that may otherwise be held except for technical, mechanical, or logistical problems with respect to the relocation or consolidation of polling places within the parish, potential shortages of commissioners and absentee commissioners, or shortages of voting machines, the secretary of state shall certify such facts and the reasons therefor to the governor, the Senate Committee on Senate and Governmental Affairs, and the House Committee on House and Governmental Affairs. If the governor and a majority of the members of each committee concur that such an emergency plan is necessary, the secretary of state shall develop an emergency plan in writing that proposes a resolution to technical, mechanical, or logistical problems impairing the holding of the election with respect to the relocation or consolidation of polling places within the parish, potential shortages of commissioners and absentee commissioners, or shortages of voting machines.

(2) If, in addition to the resolution of the technical, mechanical, or logistical problems as provided in Paragraph (B)(1) of this Section, the secretary of state determines that it is necessary and feasible to conduct early voting in certain parishes to enable displaced voters to vote, the secretary of state may include in the emergency plan a proposal to conduct early voting at the offices of the registrars in certain parishes in the state. Any early voting authorized by the provisions of this Paragraph shall be conducted in the same manner as provided in R.S. 18:1309(A).

C. The written emergency plan shall be submitted by the secretary of state to the Senate Committee on Senate and Governmental Affairs, the House Committee on House and Governmental Affairs, and the governor as soon as practicable following their concurrence with his certification. If a majority of the members of the Senate Committee on Senate and Governmental Affairs and of the House Committee on House and Governmental Affairs approve the emergency plan, such plan shall be submitted to the members of each house of the legislature for approval by mail ballot as provided in this Section. If a majority of the members of each house of the legislature and the governor approve the emergency plan, the secretary of state shall take all steps necessary to implement the plan and all officials of the state and of any political subdivision thereof shall cooperate with and provide assistance to the secretary of state as necessary to implement the plan.

D.(1) In order to obtain the approval of a majority of the elected members of each house of the legislature, the secretary of the Senate and the clerk of the House of Representatives shall jointly prepare and transmit a ballot to each member of the legislature by certified mail with return receipt requested unless the legislature is in session and the ballots may be distributed and returned during the session as provided in this Subsection.

(2)(a) The ballot shall be uniform and the materials sent with the ballot shall include:

(i) A copy of the secretary of state's certification that the emergency impairs an election that may otherwise be held except for certain technical, mechanical, or logistical problems and the reasons therefor.

(ii) A copy of the emergency plan.

(iii) A copy of the roll call votes of the Senate Committee on Senate and Governmental Affairs and the House Committee on House and Governmental Affairs on the approval of the emergency plan.

(iv) The date and time on which the ballot may be returned to the secretary of the Senate or the clerk of the House of Representatives, as the case may be, in order for the ballot to be valid.

(b) Each ballot shall contain the name of the member to whom it is to be mailed or delivered, and the member shall sign the ballot after casting his vote.

(3) The ballots mailed to all members shall be postmarked on the same day and shall be returned to the secretary of the Senate or the clerk of the House of Representatives, as the case may be, within fifteen days after the postmarked date; or, when such ballots are delivered to the members of the legislature while in session, the ballots shall be returned to the secretary of the Senate or the clerk of the House of Representatives, as the case may be, within five days after the date the ballots were delivered to members. No ballot received after five o'clock p.m. on the fifth day after the date on which the ballots were delivered to the members during session or after five o'clock p.m. on the fifteenth day after the date on which the ballots were mailed shall be valid or counted, and the date and time received shall be marked on each such ballot and the ballot shall be marked "Invalid". Prior to five o'clock p.m. on the fifth day after the date when delivered to the members of the legislature while in session or prior to five o'clock p.m. on the fifteenth day after the postmarked date if mailed to the members of the legislature, a member may withdraw his ballot or change his vote upon his written request.

(4) At any time after the deadline for submitting the ballots as provided in Paragraph (3) of this Subsection, but prior to the eighteenth day after the date on which the ballots were mailed, or prior to the eighth day after the date on which the ballots were delivered to the members of the legislature in session, the secretary of the Senate and the clerk of the House of Representatives shall jointly open and tabulate the vote in roll call order for each house of the legislature. The clerk and the secretary shall hold such ballots unopened and shall not disclose the contents to any person until the day when such ballots are opened and tabulated. The tabulation sheet shall indicate by name each member who voted in favor of the plan, each member who voted against the plan, each member who did not return the ballot by the deadline, and each member whose ballot was invalid because it was not marked or signed by the member. The secretary of the Senate and the clerk of the House of Representatives shall each sign the tabulation sheet and cause a certified copy thereof to be transmitted to the secretary of state, the governor, and the chairmen of the Senate Committee on Senate and Governmental Affairs and House Committee on House and Governmental Affairs.

(5) The tabulation sheet shall be a public record.

(6) If regular mail service is impaired, the secretary of the Senate and the clerk of the House of Representatives shall utilize any method necessary to deliver the ballots, including commercial delivery, electronic transmission, or hand delivery, and shall keep a record of the manner of delivery utilized to deliver the ballot to each member and the date the ballot was so transmitted to each member. For the purposes of this Subsection, if such an alternative delivery method is so required, the date on which the ballot was so transmitted shall be considered to be the date postmarked.

Acts 2005, 1st Ex. Sess., No. 40, §1, eff. Dec. 6, 2005; Acts 2006, No. 403, §1, eff. June 15, 2006; Acts 2006, No. 504, §1, eff. June 22, 2006.

April 20, 2020

SECRETARY OF STATE EMERGENCY ELECTION PLAN FOR THE JULY 11, 2020 PRESIDENTIAL PREFERENCE PRIMARY AND AUGUST 15, 2020 MUNICIPAL GENERAL ELECTIONS IN THE STATE OF LOUISIANA

I. AUTHORITY

After the governor declares a statewide emergency, should the secretary of state determine that such emergency impairs an election that may otherwise be held except for technical, mechanical, or logistical problems with respect to the relocation or consolidation of polling places within the parish, potential shortages of commissioners and parish board commissioners, or shortages of voting machines, La. R.S. 18:401.3 authorizes the secretary to certify to the governor, the Senate Committee on Senate and Governmental Affairs, and the House Committee on House and Governmental Affairs that the emergency impairs the election and that an emergency election plan is necessary.

Upon concurrence by the governor and a majority of each of the two committees that such a plan is necessary, the secretary of state shall develop an emergency plan in writing that proposes a resolution to the technical, mechanical, or logistical problems that impair the election. The written emergency plan shall then be submitted to the Senate and Governmental Affairs and House and Governmental Affairs committees and the governor.

If a majority of the members of each Committee approve the emergency plan, the plan shall be submitted to the members of each house of the legislature for approval. If a majority of each house of the legislature and the governor approve the emergency plan, the secretary of state shall take all steps necessary to implement the plan and all officials of the state and of any political subdivision shall cooperate with and provide assistance to the secretary of state as necessary to implement the plan.

II. PURPOSE

On March 11, 2020, the World Health Organization designated the COVID-19 outbreak as a worldwide pandemic.

Proclamation No. 25 JBE 2020 was signed by Governor John Bel Edwards on March 11, 2020, declaring a statewide public health emergency as a result of the imminent threat posed to Louisiana citizens by COVID-19, which has created emergency conditions that threaten the lives and health of the citizens of the State. The emergency conditions created by COVID-19, as well as the efforts necessary to contain its spread, will affect all 2,988,813 of Louisiana's registered voters as well as the 3,934 precincts located at 2,058 polling places across the State.

Governor Edwards signed Proclamation No. 28 JBE 2020 on March 13, 2020, which rescheduled the April 4, 2020 presidential preference primary election to June 20, 2020 and the May 9, 2020 municipal general election to July 25, 2020. On April 14, 2020, the governor

signed Proclamation No. 46 JBE 2020 to reschedule the presidential preference primary election to July 11, 2020 and the municipal general election to August 15, 2020.

On March 22, 2020, Governor Edwards issued Proclamation No. 33 JBE 2020, imposing a general stay-at-home order on all individuals within the State and limiting all public gatherings to ten people or less in an attempt to curb the spread of COVID-19. All individuals were directed to stay home unless performing an essential activity until April 13, 2020. This order was extended to April 30, 2020 by 41 JBE 2020, signed by the governor on April 2, 2020.

The July 11, 2020 presidential preference primary election is a statewide federal election. This election also includes state and local party office races in 47 parishes, and local and municipal races and propositions in 24 parishes. The August 15, 2020 municipal general election includes local and municipal runoffs and propositions in 51 parishes. Five of the 51 parishes have no propositions on the ballot and only have potential run-offs from the July 11, 2020 primary.

COVID-19 poses unknown and unprecedented logistical problems regarding the availability of polling places, commissioners, election officials, and sanitation and safety products (like clothing, protective eyewear, masks, sanitizing products, and sterilizing services to clean facilities prior to and following the election) with respect to conducting in-person voting for the July 11, 2020 and August 15, 2020 elections.

The purpose of this emergency plan is to provide a means of conducting these elections in the wake of this unprecedented pandemic. In order to fully implement this plan, due to supply chain issues, the Department must order all equipment and material resources for both the July 11, 2020 and August 15, 2020 elections no later than April 24, 2020.

III. DUTIES OF ELECTION OFFICIALS AND PARISH GOVERNING AUTHORITIES

The secretary of state is the chief election officer of the State and administers the laws of the Election Code.

The State Board of Election Supervisors has the powers and duties granted to it by La. R.S. 18:24 to oversee Louisiana election laws. The State Board consists of the lieutenant governor, the secretary of state, the attorney general, the commissioner of elections, a representative of the Registrars of Voters Association, a representative of the Clerks of Court Association, a governor's appointee, and a representative of the Police Jury Association.

Registrars of voters have many duties to perform before and during elections, including: registering voters, processing voter registration applications, processing requests for absentee ballots, receiving absentee ballots from voters, conducting early voting in the parish, and preparing the precinct registers for election day voting.

Clerks of court are the chief election officers of each parish. For each election, the clerk of court trains the commissioners who work at the polling places on election day, takes responsibility

for delivering the voting machines to and from the polling locations, and tabulates and transmits election results on election night.

Parish boards of election supervisors supervise the preparation for and the conduct of all elections held in the parish. They are responsible for selecting election day commissioners, consolidating polling places, issuing commissions to watchers, counting absentee and early voting ballots on election day, and selecting commissioners to aid in counting the absentee and early voting ballots. The parish boards also seal the voting machines before election day, inspect the machines after the election, and conduct requested recounts.

Parish governing authorities have specific duties to perform during election cycles, including changing any polling places which are no longer available for use. Changing polling places includes giving adequate notice of the change to each voter in the affected precincts and to each candidate to be voted on at that polling place, posting a sign at the former polling place, directing voters to the new polling place, advertising the changes in the official journal of the parish and in any other newspaper of general circulation in the affected precincts, and other reasonable steps necessary or desirable to inform voters and candidates of the change in location.

IV. VOTING MACHINES

The secretary of state has sufficient voting machines to conduct early voting and election day voting for the July 11, 2020 and August 15, 2020 elections.

The voting machines used on election day are Sequoia AVC Advantage voting machines, which have a large-format printed paper ballot fastened to the front of each machine. These paper ballots have already been printed and fastened to the front of the AVC machines for the April 4, 2020 election date. Prolonged storage in the humidity and heat of the Department's un-air conditioned warehouses will cause the paper ballots to warp and curl, therefore it is recommended that paper ballots for all AVC machines used in the July 11, 2020 election be reprinted.

V. POLLING PLACES FOR IN-PERSON EARLY VOTING AND ELECTION DAY VOTING

A. Early Voting

Early voting is conducted for seven days in each parish by the registrar of voters. There are currently 102 early voting sites statewide. Most are in registrars of voters offices, but some are in voting machine warehouses, public libraries, and other public facilities.

Early voting for the July 11, 2020 election is currently scheduled for June 26 through July 4, 2020 (excluding Sunday, June 28, 2020 and Friday, July 3, 2020). Early voting for the August 15, 2020 election is currently scheduled for August 1 through August 8, 2020 (excluding Sunday, August 2, 2020).

This plan will expand the days of early voting from seven to thirteen days.

Early voting for the July 11, 2020 election will be held June 20 through July 4, 2020 (excluding Sundays, June 21, 2020 and June 28, 2020). Early voting for the August 15, 2020 election will be held July 25 through August 8, 2020 (excluding Sundays, July 26, 2020 and August 2, 2020).

Due to the extraordinary circumstances, the Department must begin all preparations for both the July 11, 2020 and August 15, 2020 elections no later than May 4, 2020.

One of the two early voting sites in Ouachita Parish is located at the West Ouachita Senior Center, 1800 North 7th Street, West Monroe. According to the Centers for Disease Control and Prevention (CDC), seniors are at higher risk of complications from COVID-19. The Department of State will choose another location for this early voting site. The Ouachita Parish Registrar of Voters will conduct early voting at the registrar's main office, 1650 Desiard Street, Suite 125, Monroe, Louisiana 71201, and at the second site (location to be determined).

If any other early voting sites become unavailable for early voting for the July 11, 2020 and August 15, 2020 elections due to conditions caused by COVID-19 or because of a proclamation or executive order issued by the governor, the Department will work with the affected parish registrar of voters and parish governing authority to relocate the early voting site. If a sufficient temporary early voting site cannot be found, the voting machine warehouses in each parish may be used for early voting.

B. Election Day Voting

Election day voting is normally conducted in 3,934 precincts located at 2,058 polling places across the state. Polling places are established for each precinct by the parish governing authority. Polling places must be equipped with proper electric current, fixtures, and outlets necessary to operate voting machines and otherwise conduct the election. The polling places must also have sufficient sanitary facilities. To the extent possible, the parish governing authority must locate multiple precincts in one polling location in public buildings. If a suitable public building is not available, precincts may be located on private property.

Due to the Governor's stay-at-home order, the limitation on gatherings of more than ten people at a time, and the rapid rise of COVID-19 cases in Louisiana, there may be limitations on the availability of polling places for the July 11, 2020 and August 15, 2020 elections. Due to the extraordinary circumstances, the Department must begin all preparations for both the July 11, 2020 and August 15, 2020 elections no later than May 4, 2020.

The Department will work with the clerks of court and parish governing authorities to relocate polling places located in senior citizen centers and nursing homes (these polling places *must* be relocated). Polling places located in the following may be relocated, depending on the facility:

- Council on aging offices;
- Residential facilities or private homes; and
- Non-public buildings if the owners do not want to hold the election on their property due to conditions caused by COVID-19.

Polling places that must be relocated will need to be identified as soon as possible. If any other election day polling places become unavailable to conduct voting for the July 11, 2020 and August 15, 2020 elections due to conditions caused by COVD-19 or because of a proclamation or executive order issued by the governor, the Department will work with the affected parish clerk of court and parish governing authority to relocate the precinct to another polling place. If a desirable temporary polling place cannot be found, the voting machine warehouses in each parish may be used as a polling place for one or more precincts.

Signs will be posted at all former polling places, updated voter registration cards will be sent to the voters reflecting their new polling place, and notice of the new polling places will be published, as time permits, to inform the voters of changes in polling places.

Currently, the secretary of state has identified the following polling places that should be relocated for the July 11, 2020 and August 15, 2020 elections:

PARISH	POLLING LOCATION	PRECINCTS	REGISTERED VOTERS
ALLEN	Oberlin Senior Citizen Building	01-03	290
AVOYELLES	Marksville Senior Citizen Building	02-07	471
	Bunkie Council on Aging	10-03A	433
BEAUREGARD	Council on Aging	00-26	936
CATAHOULA	Catahoula Council on Aging	01-02	187
IBERVILLE	St. Gabriel Community Center	9 & 10	2413
	Iberville Council on Aging	19, 19A, 20 & 23	1465
JEFFERSON	Summerville Assisted Living Center	K003	1409
	Westminster Towers	K025	1274

	Harahan Senior Citizens Center	H009	627
	Metairie Manor	70	831
	Metairie Senior Citizen Center	82, 85, 86 & 87	3505
	Dorothy B. Watson Center	104 & 108	1569
	George Edmond Activity Center	154	1304
	Marrero Senior Community Center	173, 179B & 181	2596
	Terrytown Golden Age Center	227 & 229	1976
LAFOURCHE	Wilbert Tauzin Senior Citizen Center	6/2	1289
MADISON	Madison Council on Aging	12	478
NATCHITOCHES	Natchitoches Council on Aging	01-02	1361
ORLEANS	Mater Dolorosa Church Basement	Ward 17 Pct 2-7	3574
	Woldenberg Village	15/14G	1494
	Nazareth Inn	09/44A	756
	Guste High Rise	02/04	832
OUACHITA	West Ouachita Senior Center	34/47	1046
ST. JAMES	Lutcher Senior Center	04,05,06	1669
ST. MARY	St. Mary Council Building	44	596
	Health Unit	38	499

	AARP Senior Center	45	609
ST. TAMMANY	Avanti Senior Living Center	115	1,058
VERNON	Slagle Senior Citizens Center	08/01	440
	Hornbeck Senior Citizens Center	02/03,03A	955
WASHINGTON	Bogalusa Senior Citizens Center	04/05,06,05B	1000

VI. IN-PERSON VOTING UNDER THE NURSING HOME PROGRAM

The program for in-person voting by voters residing in nursing homes, as provided in La. R.S. 18:1333, is suspended for the July 11, 2020 and August 15, 2020 elections, except for the provisions of La. R.S. 18:1333(G)(4)(a). Voters currently enrolled in the Nursing Home Program will be mailed an absentee ballot and allowed to vote the ballot according to the procedures in La. R.S. 18:1301-1319. However, if restrictions on visitation remain in place, voters enrolled in the Nursing Home Program may receive assistance from an employee of the nursing home for the July 11, 2020 and August 15, 2020 elections.

VII. ABSENTEE VOTING

Present law requires voters to have one of several listed reasons to be eligible to vote absentee. These reasons are specified in the Election Code.

A registered voter can request an absentee ballot until four days before election day and must return their ballot to the registrar of voters no later than 4:30 p.m. on the day before the election, with special exceptions for military, overseas citizens, and hospitalized or sequestered voters.

A. Voters Requesting an Absentee Ballot

The deadlines to request an absentee ballot for the July 11, 2020 election are:

- July 7, 2020 (four days before the election) for all voters *except military, overseas, and hospitalized voters;* and
- July 10, 2020 (day before the election) for military, overseas, and hospitalized voters.

The deadlines to request an absentee ballot for the August 15, 2020 election are:

- August 11, 2020 (four days before the election) for all voters *except military, overseas, and hospitalized voters;* and
- August 14, 2020 (day before the election) for military, overseas, and hospitalized voters.

All requests to vote absentee must be in writing under the voter's signature and must specify the reason for the request. Applications can be sent to the registrar of voters by mail, fax, hand delivery, or electronically through the secretary of state's website at GeauxVote.com.

This plan will expand the reasons to request an absentee ballot to registered voters who are affected by COVID-19 and are:

- At higher risk of severe illness from COVID-19 due to serious underlying medical conditions as identified by the Centers for Disease Control and Prevention (including chronic lung disease, moderate to severe asthma, hypertension and other serious heart conditions, diabetes, undergoing chemotherapy, severe obesity (BMI of 40 or higher), chronic kidney disease and undergoing dialysis, liver disease, pregnancy, or immunocompromised due to cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications);
- Subject to a medically necessary quarantine or isolation order as a result of COVID-19;
- Advised by a health care provider to self-quarantine due to COVID-19 concerns;
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- Caring for an identified individual who is subject to a medically necessary quarantine or isolation order as a result of COVID-19 or who has been advised by a health care provider to self-quarantine due to COVID-19 concerns.

All requests made under current law for absentee ballots will continue to be accepted.

All requests shall be verified by the registrar of voters by comparison with the registration records on file in the registrar's office. The secretary proposes to deputize his staff to assist the registrars, if needed, to process the increased number of absentee requests, send absentee ballots to voters, and receive absentee ballots returned by voters.

La. R.S. 18:115(F) and 115.1(F) require voters that registered by mail or electronically and who have not previously voted in their parish to vote in person the first time. This requirement will be temporarily waived for the July 11, 2020 and August 15, 2020 elections for voters who request and receive an absentee ballot based on the COVID-19 reasons for request. However, any voter subject to the provisions of La. R.S. 18:115(F) or 115.1(F) who utilizes the COVID-19 reasons to request an absentee ballot to vote in the July 11, 2020 or the August 15, 2020 shall be subject to the requirements of La. R.S. 18:115(F) and 115.1(F) in the first election the voter chooses to vote in subsequent to August 15, 2020.

This plan will require the development and use of a temporary application form for absentee ballot requests due to COVID-19. This application will be available to voters in addition to the

other absentee application forms currently in use. The information contained in a COVID-19 emergency absentee ballot application shall not be disclosed and shall remain confidential, and the application shall not be a public record even after the applicant has returned his voted ballot to the registrar.

The COVID-19 reasons for request may be submitted electronically through the GeauxVote online portal. These reasons will be temporarily added to the list of statutory reasons to request an absentee ballot currently available to submit through the online portal. Programming by the Department's IT Division will be required to add the COVID-19 reasons to the online portal and may take up to a month to implement due to time required for development, testing, and cybersecurity concerns.

Voters may otherwise submit an absentee application by mail, fax, or hand delivery.

La. R.S. 18:1307(A) currently requires voters who make a mark, or are otherwise unable to sign their name, to obtain two witness signatures on their request to vote absentee. For the July 11, 2020 and August 15, 2020 elections, this requirement will be reduced to one witness signature on absentee ballot requests submitted by voters who make a mark or are otherwise unable to sign their name.

This plan may require special training for election officials to conduct the elections under this emergency plan.

B. Voters Receiving an Absentee Ballot

Under usual circumstances, a voter submits a request to the registrar of voters to receive an absentee ballot, and the registrar of voters sends the ballot to the voter.

This plan may require the Department of State to assist the registrars of voters in carrying out the provisions of La. R.S. 18:1308 regarding absentee voting. The Department will assist the registrars, as needed, to mail an absentee ballot to a voter who timely submits a request.

The Department may contract with the United States Postal Service to create a tracking system to track all absentee ballots mailed to and from voters under this emergency plan, should cost and circumstances permit.

Voters who submit a request under this plan to receive an absentee ballot by mail must provide the address to which the absentee ballot shall be sent. If the address is within the parish, such address shall only be the voter's registration address or a mailing address on file with the registrar of voters.

In addition to receiving an absentee ballot by mail, current law also allows voters to alternatively receive an absentee ballot by:

- Fax (with waiver of right to secret ballot);
- Email (for military, overseas, and voters with physical disabilities, with waiver of right to secret ballot); or
- Hand delivery to an immediate family member of a hospitalized voter. (Voters hospitalized with COVID-19 may cause unique problems as such patients are currently not allowed visitors, nor are visitors allowed in hospitals.)

Instructions are included with the ballot on completing the certificate on the ballot envelope flap and voting the absentee ballot. The instructions also include how to return the ballot and how to request a replacement ballot for a spoiled ballot, if necessary.

All voters who received and returned an absentee ballot prior to approval of this emergency plan will receive a letter from the Department informing them that their returned ballot remains valid for the July 11, 2020 election date.

C. Voters Returning Voted Ballots

The deadlines to return a voted absentee ballot for the July 11, 2020 election are:

- July 10, 2020 at 4:30 p.m. (day before the election) for all voters *except military, overseas, and hospitalized voters;* and
- July 11, 2020 at 8:00 p.m. (day of the election) for military, overseas, and hospitalized voters

The deadlines to return a voted absentee ballot for the August 15, 2020 election are:

- August 14, 2020 at 4:30 p.m. (day before the election) for all voters *except military, overseas, and hospitalized voters;* and
- August 15, 2020 at 8:00 p.m. (day of the election) for military, overseas, and hospitalized voters

Current law allows voters to return a voted absentee ballot by hand delivery, by mail, by commercial courier, by fax (with waiver of secret ballot), or by email (for military, overseas, or emergency workers with approval of the secretary of state, with waiver of secret ballot).

For the July 11, 2020 and August 15, 2020 elections, if ballots cannot be returned in-person because registrar of voters offices remain closed to the public, voters may still return absentee ballots by mail, by commercial courier, by fax (with waiver of secret ballot), or by email (for military, overseas, or emergency workers with approval of the secretary of state, with waiver of secret ballot).

D. Receipt of Voted Ballots by Registrars of Voters

All voted ballots must be received no later than the deadlines outlined above.

When the registrar receives ballots, voter records are updated each day in ERIN to reflect which voters have returned voted ballots. The registrars verify ballots received from voters by comparison with the registration records and signatures on file in ERIN. The lists of absentee voters who have returned a voted ballot are made public daily by the registrars of voters and are also available on the Secretary of State website.

The registrars of voters will continue to accept and securely store all voted ballots returned by voters until election day.

Registrars may need to hire additional early voting commissioners or part time employees to handle the increased workload of sending and receiving absentee ballots at the same time as conducting an additional week of early voting.

E. Tabulating Ballots

The parish board of election supervisors is responsible for overseeing all elections in the parish and for preparing, verifying, tabulating, and counting absentee ballots as provided in La. R.S. 18:1313. It may utilize parish board commissioners under the provisions of La. R.S. 18:1314, and may also designate additional commissioners to assist with the duties required under La. R.S. 18:1313.

Before tabulation begins, the board must reconcile the names of voters who submitted an absentee ballot against the number of absentee ballots in hand. This may require a large number of parish board commissioners.

Larger, high speed scanners must be acquired and will be necessary to scan and tabulate the increased number of absentee ballots. Prior to use of these scanners in any election in this state, they must receive certification by the secretary of state that they meet the Department's durability, accuracy, efficiency, and capacity standards. Each individual scanner must also be acceptance tested by the Department before being delivered for use by the parishes.

The fourteen largest parishes will require additional computer stations with ERIN access, spaced at least six feet apart, for the parish boards and parish board commissioners to scan ballots. During the scanning process, additional computer stations, with at least two people per station, will be required to adjudicate ambiguous ballots to determine voter intent.

For parishes that have received 2,000 or more absentee ballots, the process of preparing and verifying the absentee ballots may begin two days before election day. These parish boards will tabulate and count the absentee ballots on election day. All other parishes will prepare, verify, tabulate, and count the absentee ballots on election day.

Parish boards will receive compensation for meetings held on additional days at the rate set forth in La. R.S. 18:423(E).

VIII. COMMISSIONERS

A. Early Voting and Election Day Commissioners

The Department will work with registrars of voters and clerks of court to assess the need for additional commissioners for early voting and for precinct voting on election day.

The secretary will assist in recruiting national guard, secretary of state employees, other possible state employees, and any other available labor sources, provided these individuals receive the minimum training necessary to serve as a commissioner. Available additional commissioners from surrounding parishes may also be used. State employees serving as commissioners will receive paid overtime. All other commissioners will be paid in accordance with law and will be reimbursed mileage and accommodations according to the state travel guidelines.

Additional funding will be required to recruit additional commissioners.

New commissioners must attend a general course of instruction to receive certification prior to serving as a commissioner. Part of the course of instruction may be conducted remotely, if possible, but hands-on training on voting machines will require part of the course to be conducted in person.

All early voting commissioners will need to receive training specific to conducting early voting for the July 11, 2020 election no later than June 4, 2020.

All election day commissioners, including those who have served as a commissioner before, must attend a pre-election school for the July 11, 2020 election not less than four days prior to election day. The pre-election school covers the procedures to be used for the federal presidential preference primary election (e.g., provisional voting and lockouts based on party affiliation).

B. Parish Board Commissioners

The Department will work with parish boards of election supervisors to train and provide the necessary number of parish board commissioners. This number will include Department staff, other state and parish employees, and members of the Louisiana National Guard, as necessary. State employees serving as commissioners will receive paid overtime. All other commissioners will be paid in accordance with law and will be reimbursed mileage and accommodations according to the state travel guidelines.

IX. ELECTION RESULTS

This plan will require the Department to establish a method as close to the current process as possible to upload election results. Absentee results are not able to be reported by precinct, as in-person election day results are.

For parishes that have received 2,000 or more absentee ballots, the process of preparing and verifying the absentee ballots may begin two days before election day. These parish boards will tabulate and count the absentee ballots on election day. All other parishes will prepare, verify, tabulate, and count the absentee ballots on election day.

X. OUTREACH

The Department will conduct a media campaign to notify the public of the deadline to return voted absentee ballots. Possible media outlets include:

1. Official parish journals, as time permits;
2. Sunday edition of major metropolitan newspapers, as time permits;
3. Secretary of State website and Geaux Vote Mobile App;
4. Social media;
5. Radio stations;
6. Press releases to statewide media outlets;
7. Posting signs at all polling locations;
8. Posting informational signs with the toll-free secretary of state telephone number in high traffic thoroughfares if necessary; and
9. Any other reasonable means of communication as determined by the Department.

This will require the Department to identify and train additional staff to man the Secretary of State 1-800 hotline to answer an anticipated high volume of calls. (After Hurricane Katrina, for example, the hotline logged over 27,000 calls for voting information.)

XI. SOCIAL DISTANCING AND PROTECTIVE SUPPLIES

To the extent possible, the Department will assist the parishes to implement the CDC Recommendations for Election Polling Locations. It is imperative to supply all phases of the entire election cycle with the appropriate preventative measures.

The Department proposes to supply all polling places, tabulation and meeting areas, and any other area related to the election process with preventative supplies, including hand sanitizer and gloves for commissioners and staff, all as recommended by the CDC. The Department will determine the number of protective gear and sanitary items (hand sanitizer, gloves, masks, etc.) necessary for the daily process of updating ballots, for ballot tabulation, and for in-person early and election day voting.

All election officials, including watchers present at polling places on election day, will follow recommendations from the CDC for wearing protective gear and for cleaning and disinfecting the room and all areas (including bathrooms) related to the election process.

Draymen will also follow all CDC recommendations for wearing protective gear and social distancing while delivering voting machines to and from polling places.

Tape, cones, protective gear, sanitary items, cleaning supplies, and all other supplies necessary to adhere to CDC cleaning and social distancing guidelines must be purchased as soon as possible.

A. Supplies for Election Day Precincts and Early Voting Sites

Each precinct and each early voting site in the state will receive a bag of sanitization supplies.

Each bag will contain the following:

1. Instructions on the setup and use of each item in the bag;
2. Hand sanitizer (for voters and election officials);
3. Gloves for commissioners;
4. Masks for commissioners;
5. Protective clothing/disposable gown for commissioners;
6. Brightly colored flat discs or cones to mark the CDC 6 feet social distancing minimum requirement for polling places;
7. Disinfectant wipes to clean each voting machine between voters;
8. Disinfectant wipes to clean pens and pencils after use by voters; and
9. For early voting, disinfectant wipes to clean voter cards after use by voters.

The supplies must be ordered, delivered, and packed in the bags no later than May 22, 2020 for the July 11, 2020 election and as soon as possible following the July 11, 2020 election for the August 15, 2020 election.

The Department will work with the parishes to implement and adhere to social distancing requirements.

XII. SPECIAL NOTES FOR THE AUGUST 15, 2020 ELECTION

A. To be held using the same process as outlined above for the July 11, 2020 election.
B. Absentee ballots must be mailed no later than 13 days before election day (La. R.S. 18:1306(B)(3)), that is, by August 2, 2020.
C. The rescheduled elections will overlap with qualifying for the November 3, 2020 presidential election. Qualifying for the November 3, 2020 election will need to be moved from July 15-17, 2020 to:
    - July 22-24, 2020 for candidates who qualify with the secretary of state, including United States Senator, United States Representative, Associate Justices of the Louisiana Supreme Court, Judges of Courts of Appeal, and Public Service Commissioners; and

- August 19-21, 2020 for candidates who qualify with clerks of court, including Judges (except for the Supreme Court and Courts of Appeal), District Attorneys, and local and municipal offices.

The department is requesting an amendment to pending legislation to move the qualifying dates for the 2020 fall elections in the manner provided above, and an emergency certification under La. R.S. 18:401.1 will also be sent to the governor, requesting a proclamation to reschedule qualifying.

R. KYLE ARDOIN
SECRETARY OF STATE

HOUSE . . . . . No. 4820

The Commonwealth of Massachusetts

The committee of conference on the disagreeing votes of the two branches with reference to the Senate amendment (striking out all after the enacting clause and inserting in place thereof the text contained in Senate document numbered 2764) of the House Bill relative to voting options in response to COVID-19 (House, No. 4778), reports recommending passage of the accompanying bill (House, No. 4820). June 30, 2020.

John J. Lawn, Jr.	Barry R. Finegold
Michael J. Moran	Cynthia Stone Creem
Bradford Hill	Ryan C. Fattman

FILED ON: 6/29/2020

HOUSE . . . . . No. 4820

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act relative to voting options in response to COVID-19.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to forthwith provide for increased voting options in response to COVID-19, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Subsection (b) of section 25B of chapter 54 of the General Laws, as appearing in the 2018 Official Edition, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence:- No application shall be deemed to be seasonably filed unless it is received in the office of the city or town clerk or registrars of voters before 5 P.M. on the fourth business day preceding the election.

SECTION 2. Said section 25B of said chapter 54, as so appearing, is hereby further amended by striking out subsection (c) and inserting in place thereof the following subsection:-

(c) The voting period for in person early voting shall run from the eleventh business day preceding the general election until the close of business on the business day preceding the business day before the election; provided, however, that if the eleventh business day before the

election falls on a legal holiday the early voting period shall begin on the first business day prior to the legal holiday. The voting period for early voting by mail shall begin as soon as all necessary early voting materials have been received by the local election official pursuant to subsection (h).

SECTION 3. Section 89 of said chapter 54, as so appearing, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:-

Any form of written communication evidencing a desire to have an absent voting ballot be sent for use for voting at an election shall be given the same effect as an application made in the form prescribed by the state secretary. No application for an absent voting ballot to be sent by mail shall be deemed to be seasonably filed unless it is received in the office of the city or town clerk or registrars of voters on or before the fourth business day preceding the election for which the ballot is being requested. No application for an absent voting ballot to be voted in person shall be deemed to be seasonably filed unless it is received in the office of the city or town clerk or registrars of voters on or before noon on the day preceding the election for which such absent voting ballot is requested; provided, however, that if the day preceding such election is a Sunday or legal holiday, then it shall be received by such clerk or registrars before 5 P.M. on the last previous day on which such office is open. An application by a voter admitted to a health care facility after noon of the seventh day before the relevant election, as provided in subsection (c) of section 91B, may be received up until the time the polls close.

SECTION 4. Section 91B of said chapter 54, as so appearing, is hereby amended by striking out, in line 21, the words "after noon of the fifth" and inserting in place thereof the following words:- on or after the seventh.

SECTION 5. Section 92 of said chapter 54, as so appearing, is hereby amended by striking out, in line 11, the words "eighty-seven, or" and inserting in place thereof the following words:- 87; via a secured municipal drop box, where provided; or.

SECTION 6. (a) As used in sections 6 to 14, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Application", an application to vote early by mail.

"Central registry", the central registry of voters established pursuant to section 47C of chapter 51 of the General Laws.

"General election" or "election", the general election scheduled for November 3, 2020.

"Primary election" or "primary", the primary election scheduled for September 1, 2020.

"Qualified voter" or "voter", a voter qualified pursuant to section 1 of chapter 51 of the General Laws.

"State secretary," the secretary of the commonwealth.

(b) Notwithstanding section 25B of chapter 54 of the General Laws or any other general or special law to the contrary, there shall be early voting by mail for the primary election and general election.

(c) The election officers and registrars of every city or town shall allow any qualified voter to cast an early ballot by mail for the primary election and general election and any city or town election held at the same time.

(d)(1) The state secretary shall, not later than July 15, 2020, mail to all registered voters who registered to vote before July 1 at their residential addresses or mailing addresses if different from their residential addresses listed in the central registry an application for said voter to be permitted to vote early by mail for the primary election; provided, however, that the state secretary shall not send an application to any voter whose previous application for an absent or early ballot for the primary election or for all elections in calendar year 2020 has been accepted.

(2) The state secretary shall, not later than September 14, 2020, mail to all registered voters who registered to vote before September 1 at their residential addresses or mailing addresses if different from their residential addresses listed in the central registry an application for said voter to be permitted to vote early by mail in the general election; provided, however, that the state secretary shall not be required to send an application to any voter whose previous application for an absent or early ballot for the general election or for all elections in calendar year 2020 has been accepted.

(3) The election officers and registrars of every city or town shall include an application for a voter to be permitted to vote early by mail with the acknowledgement notice sent to any person registering to vote or changing their voter registration address: (i) on or after July 1, 2020 and on or before August 22, 2020 for the primary election; and (ii) on or after September 1, 2020 and on or before October 24, 2020 for the general election.

(4) The applications required pursuant to this subsection shall be in a form prescribed by the state secretary in accordance with state and federal law; provided, however, that said applications shall: (i) include clear instructions for completing and returning the application; (ii)

allow a voter to designate the mailing address to which the ballot shall be sent; and (iii) be pre-addressed to the local election official with postage guaranteed.

(5)(i) Each application mailed pursuant to this subsection shall be provided in any language required by the bilingual election requirements of the federal Voting Rights Act, 52 U.S.C. § 10503.

(ii) Each application mailed to a voter in the city of Boston pursuant to this subsection shall include an option, which shall appear prominently on the application, to request a ballot printed in any language available at the voter's polling location pursuant to chapter 166 of the acts of 2014.

(6) The applications required pursuant to this subsection shall be made available on the websites of the state secretary and the election officers and registrars of every city or town.

(e)(1) A voter wishing to vote early by mail in the primary election shall complete the application to vote early by mail and shall return said application to the appropriate city or town clerk. Any form of written communication evidencing a desire to have an early voting ballot be sent for use for voting for the primary election shall be given the same effect as an application made in the form prescribed by the state secretary. Applications to vote early by mail for the primary election shall be acceptable if they are signed or submitted electronically; provided, however, that any electronic signature shall be written in substantially the same manner as a handwritten signature.

(2) No application to vote early by mail in the primary election shall be deemed to be seasonably filed unless it is received in the office of the local election official before 5 P.M. on Wednesday, August 26, 2020.

(f)(1) A voter wishing to vote early by mail in the general election shall complete the application and shall return said application to the appropriate city or town clerk. Applications to vote early by mail for the general election shall be acceptable if they are signed or submitted electronically; provided, however, that any electronic signature shall be written in substantially the same manner as a handwritten signature.

(2) No application to vote early by mail in the general election shall be deemed to be seasonably filed unless it is received in the office of the local election official before 5 P.M. on Wednesday, October 28, 2020.

(g)(1) Early voting ballots authorized pursuant to this section shall be mailed by the city or town clerk to voters as soon as such materials are available; provided, however, that said mailing shall include: (i) instructions for early voting; (ii) instructions for completing the ballot; (iii) an inner envelope where the ballot is placed after voting which contains an affidavit of compliance to be filled out by the voter; and (iv) an outer envelope that is pre-addressed to the local election official with postage guaranteed; provided, however, that a voter who has seasonably filed an application may receive an early voting ballot in person at the office of the city or town clerk. The state secretary shall seek to have included on the outer envelope with postage guaranteed required by this section a system which generates a postmark for determining the date upon which the envelope was mailed and, if such a postmark system cannot be implemented, the state secretary shall inform the clerks of the senate and house of representatives of efforts undertaken and impediments to developing such a system.

(2) Each early voting ballot authorized pursuant to this section shall be provided to the voter in the language required pursuant to paragraph (5) of subsection (d).

(h)(1) A voter in receipt of an early voting ballot for the primary election pursuant to this section may complete and return the ballot by: (i) delivering it in person to the office of the appropriate city or town clerk; (ii) dropping it in a secured municipal drop box; or (iii) mailing it to the appropriate city or town clerk.

(2) A voter in receipt of an early voting ballot for the general election pursuant to this section may complete and return the ballot by: (i) delivering it in person to the office of the appropriate city or town clerk; (ii) dropping it in a secured municipal drop box; or (iii) mailing it to the appropriate city or town clerk.

(3) All early voting ballots submitted by mail, delivered in person to the office of the city or town clerk or returned to a secured municipal drop box as provided by this section shall be received by the city or town clerk before the hour fixed for closing the polls on the day of the primary election or general election; provided, however, that an early voting ballot cast for the general election that is received not later than 5 P.M. on November 6, 2020 and mailed on or before November 3, 2020 shall be processed in accordance with the second paragraph of section 95 of chapter 54 of the General Laws. A postmark, if legible, shall be evidence of the time of mailing.

(i) A voter wishing to apply to vote early by mail in the primary or general election and who needs accommodation by reason of disability may request such accommodation from the state secretary. Upon receiving information from the voter pursuant to the application in this section either by phone or electronically, the state secretary shall grant accommodations to the voter. Accommodations shall include, but not be limited to: (i) clear and electronic accessible instructions for completion, printing and returning of the ballot; (ii) an authorized accessible

blank electronic ballot that can be filled out electronically, printed and signed; provided, however, that the accessible electronic ballot marking system the voter utilizes to access their blank electronic ballot shall not collect or store any personally identifying information obtained in the process of filling out the ballot; (iii) an envelope to return the ballot to the voter's town or city clerk; and (iv) hole punched markers in place of a wet signature required for certification. The electronic instructions and accommodations in this section shall comply with requirements contained in Title II of the federal Americans with Disabilities Act and shall conform to the Web Content Accessibility Guidelines (WCAG) 2.1 AA and the National Institute of Standards and Technology report titled "Principles and guidelines for remote ballot marking systems." Upon printing the ballot, the voter shall place the ballot in the envelope provided by the state secretary. A voter with accommodations in receipt of an early voting ballot for the primary or general election pursuant to this section may complete and return the ballot by: (i) delivering it in person to the office of the appropriate city or town clerk; (ii) dropping it in a secured municipal drop box; or (iii) mailing it to the appropriate city or town clerk.

SECTION 7. (a) Notwithstanding section 25B of chapter 54 of the General Laws or any other general or special law to the contrary, there shall be early voting in person for the primary election and the general election.

(b)(1) The election officers and registrars of every city or town shall allow any qualified voter to cast an early ballot in person for the primary election during the early voting period, which shall begin on Saturday, August 22, 2020 and end on Friday, August 28, 2020. Early voting in person shall also apply to any city or town election held at the same time.

(2) The election officers and registrars of every city or town shall allow any qualified voter to cast a ballot in person for the general election during the early voting period, which shall begin on Saturday, October 17, 2020 and end on Friday, October 30, 2020. Early voting in person shall also apply to any city or town election held at the same time.

(3) Any qualified voter wishing to vote early in person in the primary or general election may do so at the time, manner and location prescribed in this section.

(c)(1) Early voting in person for the primary election shall be conducted on Saturday, August 22, 2020 and Sunday, August 23, 2020, as follows: (i) for municipalities with fewer than 5,000 registered voters, for a period of a minimum of 2 hours each day; (ii) for municipalities with 5,000 or more registered voters but fewer than 20,000 registered voters, for a period of a minimum of 4 hours each day; (iii) for municipalities with 20,000 or more registered voters but fewer than 40,000 registered voters, for a period of a minimum of 5 hours each day; (iv) for municipalities with 40,000 or more registered voters but fewer than 75,000 registered voters, for a period of a minimum of 6 hours each day; and (v) for municipalities with 75,000 or more registered voters, for a period of a minimum of 8 hours each day. For each other day during the early voting period, early voting shall be conducted during the usual business hours of each city or town clerk. A city or town may, in its discretion, provide for additional early voting hours beyond the hours required by this paragraph.

(2) Early voting for the general election shall be conducted on Saturday, October 17, 2020, Sunday, October 18, 2020, Saturday, October 24, 2020 and Sunday, October 25, 2020 as follows: (i) for municipalities with fewer than 5,000 registered voters, for a period of a minimum of 2 hours each day; (ii) for municipalities with 5,000 or more registered voters but fewer than

20,000 registered voters, for a period of a minimum of 4 hours each day; (iii) for municipalities with 20,000 or more registered voters but fewer than 40,000 registered voters, for a period of a minimum of 5 hours each day; (iv) for municipalities with 40,000 or more registered voters but fewer than 75,000 registered voters, for a period of a minimum of 6 hours each day; and (v) for municipalities with 75,000 or more registered voters, for a period of a minimum of 8 hours each day. For each other day during the early voting period, early voting shall be conducted during the usual business hours of each city or town clerk. A city or town may, in its discretion, provide for additional early voting hours beyond the hours required by this paragraph.

(d)(1) Each city and town shall establish an early voting site for the primary election and an early voting site for the general election that shall include the election office for the city or town; provided, however, that if the city or town determines that the office is unavailable or unsuitable for early voting in either the primary election or general election, the registrars of each city or town shall identify and provide for an alternative centrally-located, suitable and convenient public building within that city or town as an early voting site. A city or town may also provide for additional early voting sites for the primary election or general election at the discretion of the registrars for that city or town. Each early voting site shall be accessible to persons with disabilities in accordance with federal law.

(2) The designation of early voting sites for the primary election shall be made not later than August 7, 2020. Not later than August 14, 2020, and at least once during the voting period, the registrars for each city or town shall post the location of the early voting sites as well as the applicable dates and hours. Notice shall be conspicuously posted: (i) in the office of the city or town clerk or on the principal official bulletin board of each city or town; (ii) on any other public

building considered necessary; (iii) on the city or town's website, if any; and (iv) on the website of the state secretary.

(3) The designation of early voting sites for the general election shall be made not later than October 2, 2020. Not later than October 9, 2020, and at least once during the voting period, the registrars for each city or town shall post the location of the early voting sites as well as the applicable dates and hours. Notice shall be conspicuously posted: (i) in the office of the city or town clerk or on the principal official bulletin board of each city or town; (ii) on any other public building considered necessary; (iii) on the city or town's website, if any; and (iv) on the website of the state secretary.

(e) A qualified voter voting early in person shall be provided with a ballot and an envelope where the ballot is placed after voting which contains an affidavit of compliance to be filled out by the voter. A qualified voter voting early in person shall complete an affidavit under the regulations promulgated pursuant to this act, which shall include a notice of penalties under section 26 of chapter 56 of the General Laws.

(f) Prior to the beginning of early voting, the registrars for each city or town shall prepare a list for the early voting sites, containing the names and residences of all persons qualified to vote at each voting site, as the names and residences appear upon the annual register, and shall reasonably transmit the applicable list to the election officers at each early voting site designated by the registrars.

(g) The registrar or presiding official at the early voting site shall cause to be placed on the voting lists opposite the name of a qualified voter who participates in early voting the letters "EV" designating an early voter.

(h) The registrars shall prepare lists of all voters casting ballots pursuant to this section or section 6 during the early voting period and update the voter list in a manner prescribed by the state secretary.

(i) A city or town may opt to detail a sufficient number of police officers or constables for each early voting site for the primary election at the expense of the city or town to preserve order, protect the election officers and supervisors from any interference with their duties and aid in enforcing the laws relating to elections.

(j)(1) The absentee or early ballot of any voter who was eligible to vote at the time the ballot was cast shall not be deemed invalid solely because the voter became ineligible to vote by reason by death after casting the ballot. For the purposes of this section, the term "cast" shall mean that the voter has: (i) deposited the absentee or early ballot in the mail for ballots mailed; (ii) returned the absentee or early ballot to the appropriate election official either by hand or by depositing in the municipal drop box, where available; or (iii) completed voting in person at the clerk's office or an early voting location.

(2) Section 100 of chapter 54 of the General Laws shall not apply to the primary election or general election or any other municipal election held at the same time.

(k) Notwithstanding any general or special law to the contrary, any absent ballot cast pursuant to section 86 of chapter 54 of the General Laws or any early voting ballot cast pursuant to this section or section 6 may be deposited into a tabulator or a ballot box in a municipality or precinct that uses paper ballots, in advance of the date of the primary or the general election. All ballots received pursuant to this section or section 6 may be opened in advance of the date of the primary or the general election, in accordance with regulations promulgated by the state

secretary; provided, however, that such ballots shall be kept secured, locked and unexamined, and that no results shall be determined or announced until after the time polls close on the date of the primary or the general election. Disclosing any such result before such time shall be punished as a violation of section 14 of chapter 56 of the General Laws. Not later than August 1, 2020, the state secretary shall promulgate emergency regulations regarding the advance depositing of ballots.

SECTION 8. (a) Not later than August 3, 2020, the state secretary shall deliver to each city or town, in quantities as the state secretary determines necessary, the following papers: (i) official absentee and early voting ballots for the primary election, similar to the official ballot to be used at the primary election; provided, however, that a sufficient quantity of such ballots are printed in the languages necessary to accommodate the selection of a bilingual ballot by voters pursuant to paragraph 5 of subsection (d) of section 6; (ii) envelopes of sufficient size to contain the ballots specified in clause (i) bearing on their reverse the voter's affidavit in compliance with the requirements of subsection (j) of section 25B of chapter 54 of the General Laws; (iii) return envelopes for any ballot requested for voting by mail pre-addressed to the local election official with postage guaranteed; and (iv) instructions for voting by mail to be sent to each voter who requests to cast a ballot by mail.

(b) Not later than October 9, 2020, the state secretary shall deliver to each city or town, in quantities as the state secretary determines necessary, the following papers: (i) official absentee and early voting ballots, for the general election, similar to the official ballot to be used at the general election; provided, however, that a sufficient quantity of such ballots are printed in the languages necessary to accommodate the selection of a bilingual ballot by voters pursuant to paragraph 5 of subsection (d) of section 6; (ii) envelopes of sufficient size to contain the ballots

specified in clause (i) bearing on their reverse the voter's affidavit in compliance with the requirements of subsection (j) of said section 25B of said chapter 54; (iii) return envelopes for any ballot requested for voting by mail pre-addressed to the local election official with postage guaranteed; and (iv) instructions for voting by mail to be sent to each voter who requests to cast a ballot by mail.

SECTION 9. (a) Sections 37 and 38 of chapter 53 of the General Laws shall apply to unenrolled voters and voters enrolled in political designations voting early in the primary election. The registrar or presiding official at the early voting site shall cause the name of the party of the ballot being voted to be recorded on the voting list. Once the party selection has been recorded on the voting list, a voter cannot request or vote on the ballot of another party.

(b) The counting of early voting ballots including, but not limited to, informing election officers and any challengers present under section 85A of chapter 54 of the General Laws shall be set by 950 C.M.R. § 47.00, so far as applicable. All envelopes referred to in this section shall be retained with the ballots cast at the primary election and shall be preserved and destroyed in the manner provided by law for the retention, preservation or destruction of official ballots.

(c) The provisions of 950 C.M.R. § 47.00 shall apply to early voting at the primary election to the extent feasible; provided, however, that the state secretary shall promulgate rules to accommodate the dates set forth herein.

SECTION 10. Notwithstanding section 25B of chapter 54 of the General Laws or any other general or special law to the contrary, the election officers and registrars of every city or town shall allow any qualified voter to vote early by mail for any city or town election held on or before December 31, 2020.

SECTION 11. Notwithstanding section 24 of chapter 54 of the General Laws or any other general or special law to the contrary, the select board, board of selectmen, town council or city council may, by recorded and public vote, change any polling place to be used at the primary election or the general election at least 20 days prior to the date of the primary election or general election if it is determined that the public convenience or public health would be better served. If the select board, board of selectmen or town council determines that the public convenience or public health would be better served, they may house all polling places in a single building within the municipality, if such building is suitably equipped; provided, however, that alcoholic beverages shall not be served or consumed in that portion of a building used as a polling place, during voting hours or while ballots are being counted therein. In cities, the city council may designate polling places in non-adjacent precincts if they determine the public convenience or public health would be better served. In making a decision to change a polling place, the select board, board of selectmen, town council or city council shall evaluate and report on whether such change would have a disparate adverse impact on access to the polls on the basis of race, national origin, disability, income or age, and not later than 3 days prior to changing a polling place, shall make publicly available on its website and at the office of the town or city clerk a report on its evaluation. When the polling places have been designated pursuant to this section, the board of registrars shall post on the municipal website and at other such places as it may determine, a description of the polling places and shall notify voters by using an electronic means, to the extent available, such as via email or reverse 911 call.

SECTION 12. Notwithstanding section 29 of chapter 53 of the General Laws and sections 11, 11B, 12 and 13 of chapter 54 of the General Laws or any other general or special law to the contrary, for the primary election and general election, if the city or town clerk

determines in writing that there is a deficiency in the number of required election officers, then the appointing authority may appoint election officers without regard to political party membership, voter status, residence in the city or town or inclusion on a list filed by a political party committee pursuant to said sections 11B and 12 of said chapter 54. If the position of the warden, clerk or inspector, or the deputy of any such officer, if any, is vacant within the 3 weeks preceding the primary or general election, the city or town clerk may fill the vacancy by appointing a competent person willing to serve, without regard to political party membership, voter status, residence in the city or town or inclusion on a list filed by a political party committee pursuant to said sections 11B and 12 of said chapter 54.

SECTION 13. Notwithstanding sections 67 and 83 of chapter 54 of the General Laws or any other general or special law to the contrary, for the primary election and general election, the city or town clerk may eliminate the requirement that a voter provide their name or residence to an election officer at the ballot box and that the election officer mark the name off a voting list before the voter may deposit the ballot in the ballot box.

SECTION 14. Notwithstanding any general or special law to the contrary, the state secretary shall implement a system to allow a qualified voter to request an early or absentee ballot on the state secretary's website, to be mailed to the qualified voter's home address or a different mailing address as designated by the voter. The system shall not require the voter's signature. The system shall apply to the November 3, 2020 general election, and, if feasible, to the September 1, 2020 state primaries, and shall in any event be operational not later than October 1, 2020.

SECTION 15. For an election held on or before December 31, 2020, any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person at a polling location.

SECTION 16. Notwithstanding sections 25B and 89 of chapter 54 of the General Laws or any other general or special law to the contrary, applications for early and absentee ballots for all elections held on or before December 31, 2020 shall be acceptable if they are signed or submitted electronically; provided, however, that any electronic signature shall be written in substantially the same manner as a handwritten signature.

SECTION 17. Notwithstanding any other general or special law to the contrary, subsection (c) of section 91B of chapter 54 of the General Laws shall apply to voters who have been instructed by a medical professional or a local or state health official to self-quarantine in their home beginning after noon on the seventh day before the any election held on or before December 31, 2020.

SECTION 18. Notwithstanding sections 26 and 28 of chapter 51 of the General Laws or any other general or special law to the contrary, the last day to register to vote for any election taking place on or before December 31, 2020 shall be 10 days before the date of such election; provided, however, that the board of registrars shall hold a registration session on that date not less than from 2:00 P.M. to 4:00 P.M. and from 7:00 P.M. to 8:00 P.M. The voting list to be used for any such election shall include all eligible voters registered as of that date.

SECTION 19. The state secretary shall promulgate emergency regulations for the administration and enforcement of this act including, after consulting with the commissioner of

the department of public health, regulations requiring public health safeguards at early voting sites and polling places, including required distancing of voters and election officers, frequent use of sanitizers, personal protective equipment and use of marking pens.

SECTION 20. Not later than July 15, 2020, the state secretary shall: (i) promulgate regulations for electronic poll books required by section 33I of chapter 54 of the General Laws; and (ii) certify 1 or more types of electronic poll books in time to be used in the 2020 state primary and the general elections, and all future elections, under said section 33I of said chapter 54.

SECTION 21. The state secretary shall report to the house and senate committees on ways and means and the joint committee on election laws not later than July 1, 2021 on the costs to implement this act, including, but not limited to: (i) the number of ballot applications with postage guaranteed mailed to voters; (ii) the number of ballot applications with postage guaranteed returned requesting a ballot; (iii) the total number of ballots cast by mail; and (iv) total cost and amounts paid for using federal funds.

SECTION 22. The state secretary shall report to the house and senate committees on ways and means and the joint committee on election laws not later than 12 months after the enactment of this act on how the state secretary can make voting more accessible for voters with disabilities, specifically through online voting options.

SECTION 23. Section 109A of chapter 54 of the General Laws shall apply to ballots cast in the November 3, 2020 general election.

SECTION 24. The state secretary shall conduct a public awareness campaign to inform voters throughout the commonwealth of the provisions of this act, including, but not limited to,

measures to promote public awareness of expanded early voting options in the 2020 primary and general elections and the requirements and procedures for early voting by mail, including, but not limited to, information related to the ability of a voter who requests but does not return an early voting by mail ballot to vote in person on election day.

2020 Mo. Legis. Serv. S.B. 631 (VERNON'S) (West's No. 3)

MISSOURI 2020 LEGISLATIVE SERVICE

One-Hundredth General Assembly, Second Regular Session

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

S.B. No. 631

West's No. 3

AN ACT to repeal sections 36.155, 105.485, 115.277, 115.283, 115.285, 115.291, 115.357, 115.621, 115.642, 115.652, 115.761, 347.740, 351.127, 355.023, 356.233, 359.653, 400.9–528, and 417.018, RSMo, and to enact in lieu thereof nineteen new sections relating to elections, with an emergency clause for certain sections and existing penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 36.155, 105.485, 115.277, 115.283, 115.285, 115.291, 115.357, 115.621, 115.642, 115.652, 115.761, 347.740, 351.127, 355.023, 356.233, 359.653, 400.9–528, and 417.018, RSMo, are repealed and nineteen new sections enacted in lieu thereof, to be known as sections 36.155, 105.485, 115.277, 115.283, 115.285, 115.291, 115.302, 115.357, 115.621, 115.642, 115.652, 115.761, 347.740, 351.127, 355.023, 356.233, 359.653, 400.9–528, and 417.018, to read as follows:

<< MO ST 36.155 >>

36.155. 1. An employee may take part in the activities of political parties and political campaigns.

2. An employee may not:

(1) Use the employee's official authority or influence for the purpose of interfering with the results of an election;

(2) Knowingly solicit, accept or receive a political contribution from any person who is a subordinate employee of the employee;

(3) Run for the nomination, or as a candidate for election, to a partisan political office; or

(4) Knowingly solicit or discourage the participation in any political activity of any person who has an application for any compensation, grant, contract, ruling, license, permit or certificate pending before the employing department of such employee or is the subject of, or a participant in, an ongoing audit, investigation or enforcement action being carried out by the employing department of such employee.

3. An employee retains the right to vote as the employee chooses and to express the employee's opinion on political subjects and candidates.

4. Notwithstanding the provisions of subsection 2 of this section to the contrary, any employee that is not subject to the provisions of subsection 1 of section 36.030 or section 36.031 may run for the nomination, or as a candidate for election, to a partisan political office.

<< MO ST 105.485 >>

105.485. 1. Each financial interest statement required by sections 105.483 to 105.492 shall be on a form prescribed by the commission and shall be signed and verified by a written declaration that it is made under penalties of perjury; provided, however, the form shall not seek information which is not specifically required by sections 105.483 to 105.492.

2. Each person required to file a financial interest statement pursuant to subdivisions (1) to (12) of section 105.483 shall file the following information for himself **or herself**, his **or her** spouse and dependent children at any time during the period covered by the statement, whether singularly or collectively; provided, however, that said person, if he **or she** does not know and his **or her** spouse will not divulge any information required to be reported by this section concerning the financial interest of his **or her** spouse, shall state on his **or her** financial interest statement that he **or she** has disclosed that information known to him **or her** and that his **or her** spouse has refused or failed to provide other information upon his **or her** bona fide request, and such statement shall be deemed to satisfy the requirements of this section for such financial interest of his **or her** spouse; and provided further if the spouse of any person required to file a financial interest statement is also required by section 105.483 to file a financial interest statement, the financial interest statement filed by each need not disclose the financial interest of the other, provided that each financial interest statement shall state that the spouse of the person has filed a separate financial interest statement and the name under which the statement was filed:

(1) The name and address of each of the employers of such person from whom income of one thousand dollars or more was received during the year covered by the statement;

(2) The name and address of each sole proprietorship which he **or she** owned; the name, address and the general nature of the business conducted of each general partnership and joint venture in which he **or she** was a partner or participant; the name and address of each partner or coparticipant for each partnership or joint venture unless such names and addresses are filed by the partnership or joint venture with the secretary of state; the name, address and general nature of the business conducted of any closely held corporation or limited partnership in which the person owned ten percent or more of any class of the outstanding stock or limited partners' units; and the name of any publicly traded corporation or limited partnership which is listed on a regulated stock exchange or automated quotation system in which the person owned two percent or more of any class of outstanding stock, limited partnership units or other equity interests;

(3) The name and address of any other source not reported pursuant to subdivisions (1) and (2) and subdivisions (4) to (9) of this subsection from which such person received one thousand dollars or more of income during the year covered by the statement, including, but not limited to, any income otherwise required to be reported on any tax return such person is required by law to file; except that only the name of any publicly traded corporation or limited partnership which is listed on a regulated stock exchange or automated quotation system need be reported pursuant to this subdivision;

(4) The location by county, the subclassification for property tax assessment purposes, the approximate size and a description of the major improvements and use for each parcel of real property in the state, other than the individual's personal residence, having a fair market value of ten thousand dollars or more in which such person held a vested interest including a leasehold for a term of ten years or longer, and, if the property was transferred during the year covered by the statement, the name and address of the persons furnishing or receiving consideration for such transfer;

(5) The name and address of each entity in which such person owned stock, bonds or other equity interest with a value in excess of ten thousand dollars; except that, if the entity is a corporation listed on a regulated stock exchange, only the name of the corporation need be listed; and provided that any member of any board or commission of the state or any political subdivision who does not receive any compensation for his **or her** services to the state or political subdivision other than reimbursement for his **or her** actual expenses or a per diem allowance as prescribed by law for each day of such service need not report interests in publicly traded corporations or limited partnerships which are listed on a regulated stock exchange or automated quotation

system pursuant to this subdivision; and provided further that the provisions of this subdivision shall not require reporting of any interest in any qualified plan or annuity pursuant to the Employees' Retirement Income Security Act;

(6) The name and address of each corporation for which such person served in the capacity of a director, officer or receiver;

(7) The name and address of each not-for-profit corporation and each association, organization, or union, whether incorporated or not, except not-for-profit corporations formed to provide church services, fraternal organizations or service clubs from which the officer or employee draws no remuneration, in which such person was an officer, director, employee or trustee at any time during the year covered by the statement, and for each such organization, a general description of the nature and purpose of the organization;

(8) The name and address of each source from which such person received a gift or gifts, or honorarium or honoraria in excess of two hundred dollars in value per source during the year covered by the statement other than gifts from persons within the third degree of consanguinity or affinity of the person filing the financial interest statement. For the purposes of this section, a "gift" shall not be construed to mean political contributions otherwise required to be reported by law or hospitality such as food, beverages or admissions to social, art, or sporting events or the like, or informational material. For the purposes of this section, a **"gift"** shall include gifts to or by creditors of the individual for the purpose of cancelling, reducing or otherwise forgiving the indebtedness of the individual to that creditor;

(9) The lodging and travel expenses provided by any third person for expenses incurred outside the state of Missouri whether by gift or in relation to the duties of office of such official, except that such statement shall not include travel or lodging expenses:

(a) Paid in the ordinary course of business for businesses described in subdivisions (1), (2), (5) and (6) of this subsection which are related to the duties of office of such official; or

(b) For which the official may be reimbursed as provided by law; or

(c) Paid by persons related by the third degree of consanguinity or affinity to the person filing the statement; or

(d) Expenses which are reported by the campaign committee or candidate committee of the person filing the statement pursuant to the provisions of chapter 130; or

(e) Paid for purely personal purposes which are not related to the person's official duties by a third person who is not a lobbyist, a lobbyist principal or member, or officer or director of a member, of any association or entity which employs a lobbyist. The statement shall include the name and address of such person who paid the expenses, the date such expenses were incurred, the amount incurred, the location of the travel and lodging, and the nature of the services rendered or reason for the expenses;

(10) The assets in any revocable trust of which the individual is the settlor if such assets would otherwise be required to be reported under this section;

(11) The name, position and relationship of any relative within the first degree of consanguinity or affinity to any other person who:

(a) Is employed by the state of Missouri, by a political subdivision of the state or special district, as defined in section 115.013, of the state of Missouri;

(b) Is a lobbyist; or

(c) Is a fee agent of the department of revenue;

(12) The name and address of each campaign committee, political committee, candidate committee, or continuing committee for which such person or any corporation listed on such person's financial interest statement received payment; and

(13) For members of the general assembly or any statewide elected public official, their spouses, and their dependent children, whether any state tax credits were claimed on the member's, spouse's, or dependent child's most recent state income tax return.

3. For the purposes of subdivisions (1), (2) and (3) of subsection 2 of this section, an individual shall be deemed to have received a salary from his **or her** employer or income from any source at the time when he **or she** shall receive a negotiable instrument whether or not payable at a later date and at the time when under the practice of his **or her** employer or the terms of an agreement he **or she** has earned or is entitled to anything of actual value whether or not delivery of the value is deferred or right to it has vested. The term income as used in this section shall have the same meaning as provided in the Internal Revenue Code of 1986, and amendments thereto, as the same may be or becomes effective, at any time or from time to time for the taxable year, provided that income shall not be considered received or earned for purposes of this section from a partnership or sole proprietorship until such income is converted from business to personal use.

4. Each official, officer or employee or candidate of any political subdivision described in subdivision (11) of section 105.483 shall be required to file a financial interest statement as required by subsection 2 of this section, unless the political subdivision biennially adopts an ordinance, order or resolution at an open meeting by September fifteenth of the preceding year, which establishes and makes public its own method of disclosing potential conflicts of interest and substantial interests and therefore excludes the political subdivision or district and its officers and employees from the requirements of subsection 2 of this section. A certified copy of the ordinance, order or resolution shall be sent to the commission within ten days of its adoption. The commission shall assist any political subdivision in developing forms to complete the requirements of this subsection. The ordinance, order or resolution shall contain, at a minimum, the following requirements with respect to disclosure of substantial interests:

(1) Disclosure in writing of the following described transactions, if any such transactions were engaged in during the calendar year:

(a) For such person, and all persons within the first degree of consanguinity or affinity of such person, the date and the identities of the parties to each transaction with a total value in excess of five hundred dollars, if any, that such person had with the political subdivision, other than compensation received as an employee or payment of any tax, fee or penalty due to the political subdivision, and other than transfers for no consideration to the political subdivision;

(b) The date and the identities of the parties to each transaction known to the person with a total value in excess of five hundred dollars, if any, that any business entity in which such person had a substantial interest, had with the political subdivision, other than payment of any tax, fee or penalty due to the political subdivision or transactions involving payment for providing utility service to the political subdivision, and other than transfers for no consideration to the political subdivision;

(2) The chief administrative officer and chief purchasing officer of such political subdivision shall disclose in writing the information described in subdivisions (1), (2) and (6) of subsection 2 of this section;

(3) Disclosure of such other financial interests applicable to officials, officers and employees of the political subdivision, as may be required by the ordinance or resolution;

(4) Duplicate disclosure reports made pursuant to this subsection shall be filed with the commission and the governing body of the political subdivision. The clerk of such governing body shall maintain such disclosure reports available for public inspection and copying during normal business hours.

5. The name and employer of dependent children under twenty-one years of age of each person required to file a financial interest form under this section shall be redacted and not made publicly available, upon the written request of such person to the commission.

6. Nothing in subsection 5 of this section shall be construed to abate the responsibility of reporting the names and employers of dependent children of each person required to file a fiuancial interest form.

<< MO ST 115.277 >>

115.277. 1. Except as provided in subsections 2, 3, 4, and 5 of this section, any registered voter of this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to:

(1) Absence on election day from the jurisdiction of the election authority in which such voter is registered to vote;

(2) Incapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability;

(3) Religious belief or practice;

(4) Employment as an election authority, as a member of an election authority, or by an election authority at a location other than such voter's polling place;

(5) Incarceration, provided all qualifications for voting are retained;

(6) Certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns; **or**

(7) For an election that occurs during the year 2020, the voter has contracted or is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2. This subdivision shall expire on December 31, 2020.

2. Any covered voter~~, as defined in section 115.275,~~ who is eligible to register and vote in this state may vote in any election for federal office, statewide office, state legislative office, or statewide ballot initiatives by submitting a federal postcard application to apply to vote by absentee ballot or by submitting a federal postcard application at the polling place even though the person is not registered. A federal postcard application submitted by a covered voter pursuant to this subsection shall also serve as a voter registration application under section 115.908 and the election authority shall, if satisfied that the applicant is entitled to register, place the voter's name on the voter registration file. Each covered voter may vote by absentee ballot or, upon submitting an affidavit that the person is qualified to vote in the election, may vote at the person's polling place.

3. Any interstate former resident~~, as defined in section 115.275,~~ may vote by absentee ballot for presidential and vice presidential electors.

4. Any intrastate new resident~~, as defined in section 115.275,~~ may vote by absentee ballot at the election for presidential and vice presidential electors, United States senator, representative in Congress, statewide elected officials and statewide questions, propositions and amendments from such resident's new jurisdiction of residence after registering to vote in such resident's new jurisdiction of residence.

5. Any new resident~~, as defined in section 115.275,~~ may vote by absentee ballot for presidential and vice presidential electors after registering to vote in such resident's new jurisdiction of residence.

6. For purposes of this section, the voters who are in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2 are voters who:

(1) Are sixty-five years of age or older;

(2) Live in a long-term care facility licensed under chapter 198;

(3) Have chronic lung disease or moderate to severe asthma;

(4) Have serious heart conditions;

(5) Are immunocompromised;

(6) Have diabetes;

(7) Have chronic kidney disease and are undergoing dialysis; or

(8) Have liver disease.

<< MO ST 115.283 >>

115.283. 1. Each ballot envelope shall bear a statement on which the voter shall state the voter's name, the voter's voting address, the voter's mailing address and the voter's reason for voting an absentee ballot. If the reason for the voter voting absentee is due to the reasons established under subdivision (6) of subsection 1 of section 115.277, the voter shall state the voter's identification information provided by the address confidentiality program in lieu of the applicant's name, voting address, and mailing address. On the form, the voter shall also state under penalties of perjury that the voter is qualified to vote in the election, that the voter has not previously voted and will not vote again in the election, that the voter has personally marked the voter's ballot in secret or supervised the marking of the voter's ballot if the voter is unable to mark it, that the ballot has been placed in the ballot envelope and sealed by the voter or under the voter's supervision if the voter is unable to seal it, and that all information contained in the statement is true. In addition, any person providing assistance to the absentee voter shall include a statement on the envelope identifying the person providing assistance under penalties of perjury. Persons authorized to vote only for federal and statewide officers shall also state their former Missouri residence.

2. The statement for persons voting absentee ballots who are registered voters shall be in substantially the following form:

State of Missouri

County (City) of _____

I, _____ (print name), a registered voter of _____ County (City of St. Louis, Kansas City), declare under the penalties of perjury that I expect to be prevented from going to the polls on election day due to (check one):

..... absence on election day from the jurisdiction of the election authority in which I am registered;

..... incapacity or confinement due to illness or physical disability, including caring for a person who is incapacitated or confined due to illness or disability;

..... religious belief or practice;

..... employment as an election authority or by an election authority at a location other than my polling place;

..... incarceration, although I have retained all the necessary qualifications for voting;

..... certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns.

I hereby state under penalties of perjury that I am qualified to vote at this election; I have not voted and will not vote other than by this ballot at this election. I further state that I marked the enclosed ballot in secret or that I am blind, unable to read or write English, or physically incapable of marking the ballot, and the person of my choosing indicated below marked the ballot at my direction; all of the information on this statement is, to the best of my knowledge and belief, true.

.....	.....
Signature of Voter	Signature of Person Assisting Voter (if applicable)
Signed _____	Subscribed and sworn
Signed _____	to before me this
Address of Voter	_____ day of _____, _____
.....	.....
.....	.....
Mailing addresses (if different)	Signature of notary or other officer authorized to administer oaths

3. The statement for persons voting absentee ballots pursuant to the provisions of subsection 2, 3, 4, or 5 of section 115.277 without being registered shall be in substantially the following form:

State of Missouri

County (City) of _____

I, _____ (print name), declare under the penalties of perjury that I am a citizen of the United States and eighteen years of age or older. I am not adjudged incapacitated by any court of law, and if I have been convicted of a felony or of a misdemeanor connected with the right of suffrage, I have had the voting disabilities resulting from such conviction removed pursuant to law. I hereby state under penalties of perjury that I am qualified to vote at this election.

I am (check one):

..... a resident of the state of Missouri and a registered voter in _____ County and moved from that county to _____ County, Missouri, after the last day to register to vote in this election.

..... an interstate former resident of Missouri and authorized to vote for presidential and vice presidential electors.

I further state under penalties of perjury that I have not voted and will not vote other than by this ballot at this election; I marked the enclosed ballot in secret or am blind, unable to read or write English, or physically incapable of marking the ballot, and the person of my choosing indicated below marked the ballot at my direction; all of the information on this statement is, to the best of my knowledge and belief, true.

.....	Subscribed to and
Signature of Voter	sworn before me this _____ day of _____, _____
.....	
.....	.....
Address of Voter	Signature of notary or other officer authorized to administer oaths
.....	.....
Mailing Address (if different)	.....
	.....
.....	.....
Signature of Person Assisting Voter	Address of Last Missouri Residence (if applicable)

4. The statement for persons voting absentee ballots who are entitled to vote at the election pursuant to the provisions of subsection 2 of section 115.137 shall be in substantially the following form:

State of Missouri

County (City) of _____

I, _____ (print name), declare under the penalties of perjury that I expect to be prevented from going to the polls on election day due to (check one):

..... absence on election day from the jurisdiction of the election authority in which I am directed to vote;

..... incapacity or confinement due to illness or physical disability, including caring for a person who is incapacitated or confined due to illness or disability;

..... religious belief or practice;

..... employment as an election authority or by an election authority at a location other than my polling place;

..... incarceration, although I have retained all the necessary qualifications of voting;

..... certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns.

I hereby state under penalties of perjury that I own property in the _____ district and am qualified to vote at this election; I have not voted and will not vote other than by this ballot at this election. I further state that I marked the enclosed ballot in secret or that I am blind, unable to read and write English, or physically incapable of marking the ballot, and the person of my choosing indicated below marked the ballot at my direction; all of the information on this statement is, to the best of my knowledge and belief, true.

..... Subscribed and sworn

Signature of Voter to before me this _____ day of _____, _____

.....

....

Address Signature of notary or other officer authorized to administer oaths

.....

Signature of Person

Assisting Voter

(if applicable)

5. The statement for persons providing assistance to absentee voters shall be in substantially the following form:

The voter needed assistance in marking the ballot and signing above, because of blindness, other physical disability, or inability to read or to read English. I marked the ballot enclosed in this envelope at the voter's direction, when I was alone with the voter, and I had no other communication with the voter as to how he or she was to vote. The voter swore or affirmed the voter affidavit above and I then signed the voter's name and completed the other voter information above. Signed under the penalties of perjury.

Reason why voter needed assistance: _____

ASSISTING PERSON SIGN HERE

1. _____ (signature of assisting person)

2. _____ (assisting person's name printed)

3. _____ (assisting person's residence)

4. _____ (assisting person's home city or town).

6. **The election authority shall, for an election held during 2020, adjust the forms described in this section to account for voters voting absentee due to the reason established pursuant to subdivision (7) of subsection 1 of section 115.277.**

7. Notwithstanding any other provision of this section, any covered voter as defined in section 115.902 or persons who have declared themselves to be permanently disabled pursuant to section 115.284, otherwise entitled to vote, shall not be required to obtain a notary seal or signature on his or her absentee ballot.

~~7.~~ **8.** Notwithstanding any other provision of this section or section 115.291 to the contrary, the subscription, signature and seal of a notary or other officer authorized to administer oaths shall not be required on any ballot, ballot envelope, or statement required by this section if the reason for the voter voting absentee is due to the reasons established pursuant to subdivision (2) **or (7)** of subsection 1 of section 115.277.

~~8.~~ **9.** No notary shall charge or collect a fee for notarizing the signature on any absentee ballot or absentee voter registration.

~~9.~~ **10.** A notary public who charges more than the maximum fee specified or who charges or collects a fee for notarizing the signature on any absentee ballot or absentee voter registration is guilty of official misconduct.

<< MO ST 115.285 >>

115.285. The secretary of state may prescribe uniform regulations with respect to the printing of ballot envelopes and mailing envelopes, which shall comply with standards established by federal law or postal regulations. Mailing envelopes for use in returning ballots shall be printed with business reply permits so that any ballot returned by mail does not require postage. All fees and costs for establishing and maintaining the business reply and postage-free mail for all ballots cast shall be paid by the secretary of state through state appropriations. **Notwithstanding any provision of law to the contrary, a ballot envelope used under section 115.302 shall be the same ballot envelope used for absentee ballots, provided an option shall be listed on the envelope to clearly indicate whether the voter is casting an absentee ballot or a mail-in ballot.**

<< MO ST 115.291 >>

115.291. 1. Upon receiving an absentee ballot by mail, the voter shall mark the ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the statement on the ballot envelope. The affidavit of each person voting an absentee ballot shall be subscribed and sworn to before the election official receiving the ballot, a notary public or other officer authorized by law to administer oaths, unless the voter is voting absentee due to incapacity or confinement due to the provisions of section 115.284, illness or physical disability, **for an election that occurs during the year 2020, the voter has contracted or is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2, as defined in section 115.277,** or the voter is a covered voter as defined in section 115.902. If the voter is blind, unable to read or write the English language, or physically incapable of voting the ballot, the voter may be assisted by a person of the voter's own choosing. Any person assisting a voter who is not entitled to such assistance, and any person who assists a voter and in any manner coerces or initiates a request or a suggestion that the voter vote for or against or refrain from voting on any question, ticket or candidate, shall be guilty of a class one election offense. If, upon counting, challenge or election contest, it is ascertained that any absentee ballot was voted with unlawful assistance, the ballot shall be rejected. **For purposes of this subsection, the voters who are in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2 are voters who:**

(1) Sixty-five years of age or older;

(2) Live in a long-term care facility licensed under chapter 198;

(3) Have chronic lung disease or moderate to severe asthma;

(4) Have serious heart conditions;

(5) Are immunocompromised;

(6) Have diabetes;

(7) Have chronic kidney disease and are undergoing dialysis; or

(8) Have liver disease.

2. Except as provided in subsection 4 of this section, each absentee ballot that is not cast by the voter in person in the office of the election authority shall be returned to the election authority in the ballot envelope and shall only be returned by the voter in person, or in person by a relative of the voter who is within the second degree of consanguinity or affinity, by mail or registered carrier or by a team of deputy election authorities; except that covered voters, when sent from a location determined by the secretary of state to be inaccessible on election day, shall be allowed to return their absentee ballots cast by use of facsimile transmission or under a program approved by the Department of Defense for electronic transmission of election materials.

3. In cases of an emergency declared by the President of the United States or the governor of this state where the conduct of an election may be affected, the secretary of state may provide for the delivery and return of absentee ballots by use of a facsimile transmission device or system. Any rule promulgated pursuant to this subsection shall apply to a class or classes of voters as provided for by the secretary of state.

4. No election authority shall refuse to accept and process any otherwise valid marked absentee ballot submitted in any manner by a covered voter solely on the basis of restrictions on envelope type.

<< MO ST 115.302 >>

115.302. 1. Any registered voter of this state may cast a mail-in ballot as provided in this section. Nothing in this section shall prevent a voter from casting an absentee ballot, provided such person has not cast a ballot pursuant to this section. Application for a mail-in-ballot may be made by the applicant in person, or by United States mail, or on behalf of the applicant by his or her guardian or relative within the second degree of consanguinity or affinity.

2. Each application for a mail-in-ballot shall be made to the election authority of the jurisdiction in which the person is registered. Each application shall be in writing and shall state the applicant's name, address at which he or she is registered, the address to which the ballot is to be mailed.

3. All applications for mail-in-ballots received prior to the sixth Tuesday before an election shall be stored at the office of the election authority until such time as the applications are processed under section 115.281. No application for a mail-in-ballot received in the office of the election authority after 5:00 p.m. on the second Wednesday immediately prior to the election shall be accepted by any election authority.

4. Each application for a mail-in-ballot shall be signed by the applicant or, if the application is made by a guardian or relative under this section, the application shall be signed by the guardian or relative, who shall note on the application his or her relationship to the applicant. If an applicant, guardian, or relative is blind, unable to read or write the English language, or physically incapable of signing the application, he or she shall sign by mark that is witnessed by the signature of an election official or person of his or her choice. Knowingly making, delivering, or mailing a fraudulent mail-in-ballot application is a class one election offense.

5. Not later than the sixth Tuesday prior to each election, or within fourteen days after candidate names or questions are certified under section 115.125, the election authority shall cause to have printed and made available a sufficient quantity of ballots, ballot envelopes, and mailing envelopes. As soon as possible after a proper official calls a special state or county election, the election authority shall cause to have printed and made available a sufficient quantity of mail-in ballots, ballot envelopes, and mailing envelopes.

6. Each ballot envelope shall bear a statement in substantially the same form described in subsection 9 of this section. In addition, any person providing assistance to the mail-in voter shall include a signature on the envelope identifying the person providing such assistance under penalties of perjury. Persons authorized to vote only for federal and statewide offices shall also state their former Missouri residence.

7. The statement for persons voting mail-in ballots who are registered voters shall be in substantially the following form:

State of Missouri

County (City) of _____

I, _____(print name), a registered voter of _____ County (City of St. Louis, Kansas City), declare under the penalties of perjury that: I am qualified to vote at this election; I have not voted and will not vote other than by this ballot at this election. I further state that I marked the enclosed ballot in secret or that I am blind, unable to read or write English, or physically incapable of marking the ballot, and the person of my choosing indicated below marked the ballot at my direction; all of the information on this statement is, to the best of my knowledge and belief, true.

....

Signature of Voter Signature of Person

Assisting Voter

(If applicable)

Subscribed and sworn to before me this _____ day of _____, _____.

.....

Signature of notary or other officer authorized to administer oaths.

.....

.....

Mailing Addresses

(If different)

8. Upon receipt of a signed application for a mail-in ballot and if satisfied that the applicant is entitled to vote by mail-in ballot, the election authority shall, within three working days after receiving the application, or, if mail-in ballots are not available at the time the application is received, within five working days after such ballots become available, deliver to the voter a mail-in ballot, ballot envelope and such instructions as are necessary for the applicant to vote. If the election authority is not satisfied that any applicant is entitled to vote by mail-in ballot, the authority shall not deliver a mail-in ballot to the applicant. Within three working days of receiving such an application, the election authority shall notify

the applicant and state the reason he or she is not entitled to vote by mail-in ballot. The applicant may file a complaint with the elections division of the secretary of state's office under section 115.219.

9. On the mailing and ballot envelopes for each covered voter, the election authority shall stamp the words "ELECTION BALLOT, STATE OF MISSOURI" and "U.S. Postage Paid, 39 U.S.C. Section 3406".

10. No information which encourages a vote for or against a candidate or issue shall be provided to any voter with a mail-in ballot.

11. Upon receiving a mail-in ballot by mail, the voter shall mark the ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the statement on the ballot envelope. The statement required under subsection 7 of this section shall be subscribed and sworn to before a notary public or other officer authorized by law to administer oaths. If the voter is blind, unable to read or write the English language, or physically incapable of voting the ballot, the voter may be assisted by a person of the voter's own choosing. Any person who assists a voter and in any manner coerces or initiates a request or suggestion that the voter vote for or against, or refrain from voting on, any question or candidate, shall be guilty of a class one election offense. If, upon counting, challenge, or election contest, it is ascertained that any mail-in ballot was voted with unlawful assistance, the ballot shall be rejected.

12. Each mail-in ballot shall be returned to the election authority in the ballot envelope and shall only be returned by the voter by United States mail.

13. The secretary of state may prescribe uniform regulations with respect to the printing of ballot envelopes and mailing envelopes, which shall comply with standards established by federal law or postal regulations. Mailing envelopes for use in returning ballots shall be printed with business reply permits so that any ballot returned by mail does not require postage. All fees and costs for establishing and maintaining the business reply and postage-free mail for all ballots cast shall be paid by the secretary of state through state appropriations.

14. All votes on each mail-in ballot received by an election authority at or before the time fixed by law for the closing of the polls on election day shall be counted. No votes on any mail-in ballot received by an election authority after the time fixed by law for the closing of the polls on election day shall be counted.

15. If sufficient evidence is shown to an election authority that any mail-in voter has died prior to the opening of the polls on election day, the ballot of the deceased voter shall be rejected if it is still sealed in the ballot envelope. Any such rejected ballot, still sealed in its ballot envelope, shall be sealed with the application and any other papers connected therewith in an envelope marked "Rejected ballot of _____ , a mail-in voter of _____ voting district". The reason for rejection shall be noted on the envelope, which shall be kept by the election authority with the other ballots from the election until the ballots are destroyed according to law.

16. As each mail-in ballot is received by the election authority, the election authority shall indicate its receipt on the list.

17. All mail-in ballot envelopes received by the election authority shall be kept together in a safe place and shall not be opened except as provided under this chapter.

18. Mail-in ballots shall be counted using the procedures set out in sections 115.297, 115.299, 115.300, and 115.303.

19. The false execution of a mail-in ballot is a class one election offense. The attorney general or any prosecuting or circuit attorney shall have the authority to prosecute such offense either in the county of residence of the person or in the circuit court of Cole County.

20. The provisions of this section shall apply only to an election that occurs during the year 2020, to avoid the risk of contracting or transmitting severe acute respiratory syndrome coronavirus 2.

21. The provisions of this section terminate and shall be repealed on December 31, 2020, and shall not apply to any election conducted after that date.

<< MO ST 115.357 >>

115.357. 1. Except as provided in subsections 3 and 4 of this section, each candidate for federal, state or county office shall, before filing his **or her** declaration of candidacy, pay to the treasurer of the state or county committee of the political party upon whose ticket he **or she** seeks nomination a certain sum of money as follows:

(1) To the treasurer of the state central committee, ~~two~~ **five** hundred dollars if he or she is a candidate for statewide office or for United States senator, ~~one~~ **three** hundred dollars if he or she is a candidate for representative in Congress, circuit judge or state senator, and **one hundred** fifty dollars if he or she is a candidate for state representative;

(2) To the treasurer of the county central committee, ~~fifty~~ **one hundred** dollars if he or she is a candidate for county office.

2. The required sum may be submitted by the candidate to the official accepting his **or her** declaration of candidacy**, except that a candidate required to file his or her declaration of candidacy with the secretary of state shall pay the required sum directly to the treasurer of the appropriate party committee**. All sums ~~so~~ submitted **to the official accepting the candidate's declaration of candidacy** shall be forwarded promptly by the official to the treasurer of the appropriate party committee.

3. Any person who cannot pay the fee required to file as a candidate may have the fee waived by filing a declaration of inability to pay and a petition with his declaration of candidacy. Each such declaration shall be in substantially the following form:

DECLARATION OF INABILITY TO PAY FILING FEE

I, _____, do hereby swear that I am financially unable to pay the fee of _____ (amount of fee) to file as a candidate for nomination to the office of _____ at the primary election to be held on the _____ day of _____, 20_____.

.....

Signature of candidate

Subscribed and sworn to before me this _____ day of _____, 20_____.

.....

Residence address

.....

Signature of election official or officer authorized to administer oaths

If the candidate's declaration of candidacy is to be filed in person, the declaration of inability to pay shall be subscribed and sworn to by the candidate before the election official who witnesses the candidate's declaration of candidacy. If his declaration of candidacy is to be filed by certified mail pursuant to subsection 2 of section 115.355, the declaration of inability to pay shall be subscribed and sworn to by the candidate before the notary or other officer who witnesses the candidate's declaration of candidacy. With his declaration of inability to pay, the candidate shall submit a petition endorsing his candidacy. Except for the number of signatures required, each such petition shall, insofar as practicable, be in the form provided in sections 115.321

and 115.325. If the person filing declaration of indigence is to be a candidate for statewide office, his petition shall be signed by the number of registered voters in the state equal to at least one-half of one percent of the total number of votes cast in the state for the office at the last election in which a candidate ran for the office. If the person filing a declaration of indigence is to be a candidate for any other office, the petition shall be signed by the number of registered voters in the district or political subdivision which is equal to at least one percent of the total number of votes cast for the office at the last election in which a candidate ran for the office. The candidate's declaration of inability to pay and the petition shall be filed at the same time and in the same manner as his declaration of candidacy is filed. The petition shall be checked and its sufficiency determined in the same manner as new party and independent candidate petitions.
4. No filing fee shall be required of any person who proposes to be an independent candidate, the candidate of a new party or a candidate for presidential elector.

5. Except as provided in subsections 3 and 4 of this section, no candidate's name shall be printed on any official ballot until the required fee has been paid.

<< MO ST 115.621 >>

115.621. 1. Notwithstanding any other provision of this section to the contrary, any legislative, senatorial, or judicial district committee that is wholly contained within a county or a city not within a county may choose to meet on the same day as the respective county or city committee. All other committees shall meet as otherwise prescribed in this section.

2. The members of each county committee shall meet at the county seat not earlier than two weeks after each primary election but in no event later than the third Saturday after each primary election, at the discretion of the chairman at the committee. In each city not within a county, the city committee shall meet on the same day at the city hall. In all counties of the first, second, and third classification, the county courthouse shall be made available for such meetings and any other county political party meeting at no charge to the party committees. In all cities not within a county, the city hall shall be made available for such meetings and any other city political party meeting at no charge to the party committees. At the meeting, each committee shall organize by electing two of its members, a man and a woman, as chair and vice chair, and a man and a woman who may or may not be members of the committee as secretary and treasurer.

3. The members of each congressional district committee shall meet at some place and time within the district, to be designated by the current chair of the committee, not earlier than five weeks after each primary election but in no event later than the sixth Saturday after each primary election. The county courthouse in counties of the first, second and third classification in which the meeting is to take place, as designated by the chair, shall be made available for such meeting and any other congressional district political party committee meeting at no charge to the committee. At the meeting, the committee shall organize by electing one of its members as chair and one of its members as vice chair, one of whom shall be a woman and one of whom shall be a man, and a secretary and a treasurer, one of whom shall be a woman and one of whom shall be a man, who may or may not be members of the committee.

4. The members of each legislative district committee shall meet at some place and date within the legislative district or within one of the counties in which the legislative district exists, to be designated by the current chair of the committee, not earlier than three weeks after each primary election but in no event later than the fourth Saturday after each primary election. The county courthouse in counties of the first, second and third classification in which the meeting is to take place, as designated by the chair, shall be made available for such meeting and any other legislative district political party committee meeting at no charge to the committee. At the meeting, the committee shall organize by electing two of its members, a man and a woman, as chair and vice chair, and a man and a woman who may or may not be members of the committee as secretary and treasurer.

5. The members of each senatorial district committee shall meet at some place and date within the district, to be designated by the current chair of the committee, if there is one, and if not, by the chair of the congressional district in which the senatorial district is principally located, not earlier than four weeks after each primary election but in no event later than the fifth Saturday

after each primary election. The county courthouse in counties of the first, second and third classification in which the meeting is to take place, as so designated pursuant to this subsection, shall be made available for such meeting and any other senatorial district political party committee meeting at no charge to the committee. At the meeting, the committee shall organize by electing one of its members as chair and one of its members as vice chair, one of whom shall be a woman and one of whom shall be a man, and a secretary and a treasurer, one of whom shall be a woman and one of whom shall be a man, who may or may not be members of the committee.

6. The members of each senatorial district shall also meet at some place within the district, to be designated by the current chair of the committee, if there is one, and if not, by the chair of the congressional district in which the senatorial district is principally located, on the Saturday after each general election **or concurrently with the election of senatorial officers, if designated or not objected to by the chair of the congressional district where the senatorial district is principally located.** At the meeting, the committee shall proceed to elect two registered voters of the district, one man and one woman, as members of the party's state committee.

7. The members of each judicial district may meet at some place and date within the judicial district or within one of the counties in which the judicial district exists, to be designated by the current chair of the committee or the chair of the congressional district committee, not earlier than six weeks after each primary election but in no event later than the seventh Saturday after each primary election. The county courthouse in counties of the first, second and third classification in which the meeting is to take place, as so designated pursuant to this subsection, shall be made available for such meeting and any other judicial district political party committee meeting at no charge to the committee. At the meeting, the committee shall organize by electing two of its members, a man and a woman, as chair and vice chair, and a man and a woman who may or may not be members of the committee as secretary and treasurer.

<< MO ST 115.642 >>

115.642. 1. Any person may file a complaint with the secretary of state stating the name of any person who has violated any of the provisions of sections 115.629 to 115.646 and stating the facts of the alleged offense, sworn to, under penalty of perjury.

2. Within thirty days of receiving a complaint, the secretary of state shall notify the person filing the complaint whether or not the secretary has dismissed the complaint or will commence an investigation. The secretary of state shall dismiss frivolous complaints. For purposes of this subsection, **"frivolous complaint"** shall mean an allegation clearly lacking any basis in fact or law. Any person who makes a frivolous complaint pursuant to this section shall be liable for actual and compensatory damages to the alleged violator for holding the alleged violator before the public in a false light. If reasonable grounds appear that the alleged offense was committed, the secretary of state may issue a probable cause statement. If the secretary of state issues a probable cause statement, he or she may refer the offense to the appropriate prosecuting attorney.

3. Notwithstanding the provisions of section 27.060, 56.060, or 56.430 to the contrary, when requested by the prosecuting attorney or circuit attorney, the secretary of state or his or her authorized representatives may aid any prosecuting attorney or circuit attorney in the commencement and prosecution of election offenses as provided in sections 115.629 to 115.646.

4. **(1)** The secretary of state may investigate any suspected violation of any of the provisions of sections 115.629 to 115.646.

(2)(a) The secretary of state or an authorized representative of the secretary of state shall have the power to require the production of books, papers, correspondence, memoranda, contracts, agreements, and other records by subpoena or otherwise when necessary to conduct an investigation under this section. Such powers shall be exercised only at the specific written direction of the secretary of state or his or her chief deputy.

(b) If any person refuses to comply with a subpoena issued under this subsection, the secretary of state may seek to enforce the subpoena before a court of competent jurisdiction to require the production of books, papers, correspondence,

memoranda, contracts, agreements, and other records. The court may issue an order requiring the person to produce records relating to the matter under investigation or in question. Any person who fails to comply with the order may be held in contempt of court.

(c) The provisions of this subdivision shall expire on August 28, 2025.

<< MO ST 115.652 >>

115.652. **1.** An election shall not be conducted under sections 115.650 to 115.660 unless:

(1) The officer or agency calling the election submits a written request that the election be conducted by mail. Such request shall be submitted not later than the date specified in section 115.125 for submission of the notice of election and sample ballot;

(2) The election authority responsible for conducting the election authorizes the use of mailed ballots for the election;

(3) The election is nonpartisan;

(4) The election is not one at which any candidate is elected, retained or recalled; and

(5) The election is an issue election at which all of the qualified voters of any one political subdivision are the only voters eligible to vote.

2. Notwithstanding the provisions of subsection 1 of this section or any other provision of law to the contrary, an election may be conducted by mail as authorized under section 115.302, during the year 2020, to avoid the risk of contracting or transmitting severe acute respiratory syndrome coronavirus 2. This subsection shall expire December 31, 2020.

<< MO ST 115.761 >>

115.761. 1. The official list of presidential candidates for each established political party shall include the names of all constitutionally qualified candidates for whom, on or after 8:00 a.m. on the fifteenth Tuesday prior to the presidential primary, and on or before 5:00 p.m., on the eleventh Tuesday prior to the presidential primary, a written request to be included on the presidential primary ballot is filed with the secretary of state along with:

(1) Receipt of payment to the state committee of the established political party on whose ballot the candidate wishes to appear of a filing fee of ~~one~~ **five** thousand dollars; or

(2) A written statement, sworn to before an officer authorized by law to administer oaths, that the candidate is unable to pay the filing fee and does not have funds in a campaign fund or committee to pay the filing fee and a petition signed by not less than five thousand registered Missouri voters, as determined by the secretary of state, that the candidate's name be placed on the ballot of the specified established political party for the presidential preference primary. The request to be included on the presidential primary ballot shall include each signer's printed name, registered address and signature and shall be in substantially the following form:

I (We) the undersigned, do hereby request that the name of _____ be placed upon the February _____, _____, presidential primary ballot as candidate for nomination as the nominee for President of the United States on the _____ party ticket.

2. The state or national party organization of an established political party that adopts rules imposing signature requirements to be met before a candidate can be listed as an official candidate shall notify the secretary of state by October first of the year preceding the presidential primary.

3. Any candidate or such candidate's authorized representative may have such candidate's name stricken from the presidential primary ballot by filing with the secretary of state on or before 5:00 p.m. on the eleventh Tuesday prior to the presidential primary election a written statement, sworn to before an officer authorized by law to administer oaths, requesting that such candidate's name not be printed on the official primary ballot. Thereafter, the secretary of state shall not include the name of that candidate in the official list announced pursuant to section 115.758 or in the certified list of candidates transmitted pursuant to section 115.765.

4. The filing times set out in this section shall only apply to presidential preference primaries, and are in lieu of those established in section 115.349.

<< MO ST 347.740 >>

347.740. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 351.127 >>

351.127. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter, provided that the secretary of state may collect an additional fee of ten dollars on each corporate registration report fee filed under section 351.122. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 355.023 >>

355.023. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 356.233 >>

356.233. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 359.653 >>

359.653. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 400.9–528 >>

400.9–528. The secretary of state may collect an additional fee of five dollars on each and every fee paid to the secretary of state as required in chapter 400.9. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

<< MO ST 417.018 >>

417.018. The secretary of state may collect an additional fee of five dollars on each and every fee required in this chapter. All fees collected as provided in this section shall be deposited in the state treasury and credited to the secretary of state's technology trust fund account. The provisions of this section shall expire on December 31, ~~2021~~ **2026**.

Section B. Because immediate action is necessary to ensure citizens can safely exercise the right to vote in the 2020 election, the enactment of section 115.302 and the repeal and reenactment of sections 115.277, 115.283, 115.285, 115.291, and 115.652 of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and the enactment of section 115.302 and the repeal and reenactment of sections 115.277, 115.283, 115.285, 115.291, and 115.652 of this act shall be in full force and effect upon its passage and approval.

Approved June 04, 2020.
Effective August 28, 2020.

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STATE OF NEW HAMPSHIRE

MEMORANDUM

TO: New Hampshire Election Officials

FROM: William M. Gardner, Secretary of State
Gordon J. MacDonald, Attorney General

RE: Elections Operations During the State of Emergency

DATE: April 10, 2020

On April 3, 2020, Governor Sununu issued Executive Order 2020-05 continuing the State of Emergency relating to the outbreak of Novel Coronavirus 2019 (COVID-19). As we confront the many challenges posed by this public health crisis, it is important that we take steps to ensure that the fundamental right to vote is protected and that we work together to ensure that New Hampshire continues its long tradition of conducting fair and well-run elections.

As clerks, moderators, and other local election officials, you provide critical services to your local communities. Our offices remain open and are available to assist you. Please do not hesitate to contact us if we can be of assistance.

Secretary of State: (603) 271-3242 Elections Division: (800) 540-5954 / (603) 271-8241
elections@ sos.nh.gov; nhvotes@sos.nh.gov

Attorney General: (866) 868-3703 / (603) 271-3658
electionlaw@doj.nh.gov

In response to questions from local election officials and others prompted by the ongoing public health emergency, we provide the following guidance with respect to absentee ballots.

Absentee Ballots

1. Municipal Elections to be held in 2020

With respect to any upcoming municipal elections, we offer the following guidance as to who is eligible to vote by absentee ballot in light of the current public health crisis. As explained below, in light of the current public health state of emergency, Emergency Orders #16 and #26, and current public health guidance on social distancing and avoiding being in public in groups of 10 or more, all voters have a reasonable ground to conclude that a "physical disability" exists within the meaning of RSA 657:1. Therefore, all voters may request an absentee ballot on that basis.

2. Analysis

Under existing New Hampshire law, RSA 657:1, a voter may vote by absentee ballot when the voter:

- Will be absent on the day of the election;
  - Absence is defined to include:
    - Being physically absent from the city, town, or incorporated place where domiciled;
    - Being unable to appear at the polling place because of an employment obligation;
    - Employment obligation includes:
      - Where scheduled work hours, including commuting time leave the voter unable to vote in person during polling hours.
        - This applies even where the person's employment is in the town or ward where the voter is domiciled;
      - The care of children or infirm adults, with or without compensation.
        - This would include a voter caring for a person quarantined for COVID-19, including self-quarantine based on general medical advice issued to the public by health officials.

- Cannot appear in public on Election Day because of his or her observation of a religious commitment; or

- Cannot vote in-person by reason of disability.
  - This would include any medical condition where medical advice is that the voter not go out in public.
  - This includes a voter who is quarantined, including self-quarantine, for any reason due to COVID-19. Compliance with general medical advice issued to the public by health officials is sufficient, individualized advice from the voter's personal physician is not required. Current general medical advice is that all household members of a person self-quarantined for cause, also self-quarantine.

Given this broad interpretation of the term "disability" with respect to absentee voting, it is worth noting that the term's above-described application can occur outside emergencies as well. Absentee voting is permitted in any circumstance where the voter is under medical advice – whether it is individualized advice or general advice to the public – to avoid being in places like a polling place.

In light of the current public health advisories related to COVID-19, any voter who in the voter's judgment is being advised by medical authorities to avoid going out in public, or to self-quarantine, would qualify to vote by absentee ballot. This applies equally to voters who are experiencing symptoms of COVID-19 or any other severe communicable flu, and those who are self-quarantining as a preventative measure. As the law does not define the term "disability" for

the purpose of absentee voting, particularly in light of this guidance, any voter's reasonable determination that he or she qualifies satisfies the law.

3. Procedure

As a result, voters with either a disability, as construed above, or an employment obligation, including caring for another, are entitled to mark the absentee ballot application form indicating

- "I am unable to vote in person due to a disability;" or
- "I cannot appear at any time during polling hours at my polling place because of an employment obligation. For the purposes of this application, the term "employment shall include the care of children and infirm adults, with or without compensation."

RSA 657:1; RSA 657:4.

Similarly, these voters are entitled to sign the Absentee Voter Affidavit envelope indicating:

> a) Absence from City or Town. A person voting by absentee ballot because of absence from the city or town in which he or she is entitled to vote shall fill out and sign the following certificate:
>
> I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of _____, New Hampshire, in ward _____; that I will be unable to appear at any time during polling hours at my polling place because I will be working on election day, or I am voting on the Monday immediately prior to the election, the National Weather Service has issued a winter storm warning, blizzard warning, or ice storm warning, and I am elderly or infirm, have a physical disability, or have to care for children or infirm adults, or I will be otherwise absent on election day from said city or town and will be unable to vote in person; that I have carefully read (or had read to me because I am blind) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (or had assistance in marking the ballot and sealing it in this envelope because I am blind). For the purposes of this certification, the term "working" shall include the care of children and infirm adults, with or without compensation.
> (Signature) _____

Or

(b) Absence Because of Religious Observance or Physical Disability. A person voting by absentee ballot because of religious observance or physical disability shall fill out and sign the following certificate:

I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of _____, New Hampshire, in ward _____; that I will be observing a religious commitment which prevents me from voting in person or that on account of physical disability I am unable to vote in person; that I have carefully read (or had read to me because I am blind) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (or had assistance in marking the ballot and sealing it in this envelope because I am blind).
(Signature) _____

RSA 657:7.

4. September 8, 2020 Primary and November 3, 2020 General Elections

It is impossible to predict the course of the COVID-19 public health crisis or how it might be affecting our state in September and November 2020 when the Primary and General Elections will be held. Nonetheless, it is important for election officials, voters, and candidates to have a clear understanding now about how public-health related concerns will be addressed.

It is reasonable to anticipate that voters may feel apprehension about voting in person in the September 2020 Primary and November 2020 General Elections. Voters should not have to choose between their health and exercising their constitutional right to vote. Thus, any voter who is unable to vote in person in the September 8, 2020 Primary Election or the November 3, 2020 General Election because of illness from COVID-19 or who fears that voting in person may expose himself/herself or others to COVID-19 will be deemed to come within the definition of "disability" for purposes of obtaining an absentee ballot. Any voter may request an absentee ballot for the September 2020 Primary and November 2020 General Elections based on concerns regarding COVID-19. We anticipate providing further guidance to election officials about planning for and accommodating what could be a significant increase in absentee ballots.

5. Enforcement

Suspicion or evidence that a person is trying to vote by absentee ballot, when not entitled by law to do so, is **never** a legal ground for rejecting an absentee ballot. As a general matter, beyond reporting suspected violations to the Attorney General, local election officials do not have a role in determining the legitimacy of an absentee voter's claim to absence or disability.

Local officials must cast and count absentee ballots that are otherwise lawfully submitted, even if there is a suspicion the person did not qualify to vote absentee.

RSA 657:24 establishes enforcement authority for "misusing absentee ballots." No voter whose conduct is consistent with the guidance in this Memorandum will be prosecuted under the second sentence of that statute.

State of New York

Executive Chamber

No. 202.23

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

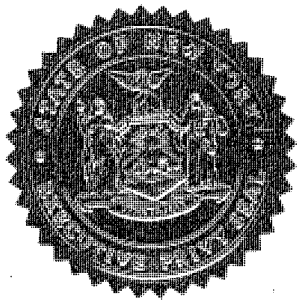
NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through May 24, 2020 the following:

- Section 8-400 and any provision of Article 9 of the Election Law in order to provide that every voter that is in active and inactive status and is eligible to vote in a primary or special election to be held on June 23, 2020 shall be sent an absentee ballot application form with a postage paid return option for such application. This shall be in addition to any other means of requesting an absentee ballot available, and any voter shall continue to be able to request such a ballot via phone or internet or electronically. Any ballot which was requested or received for any previously re-scheduled election, or for the primary election to be held on June 23, 2020 shall continue to be valid and shall be counted by the Board of Elections if it shall be returned to them.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through May 24, 2020:

- The Commissioner of Health is authorized to suspend or revoke the operating certificate of any skilled nursing facility or adult care facility if it is determined that such facility has not adhered to any regulations or directives issued by the Commissioner of Health, and if determined to not be in compliance notwithstanding any law to the contrary the Commissioner may appoint a receiver to continue the operations on 24 hours' notice to the current operator, in order to preserve the life, health and safety of the people of the State of New York.

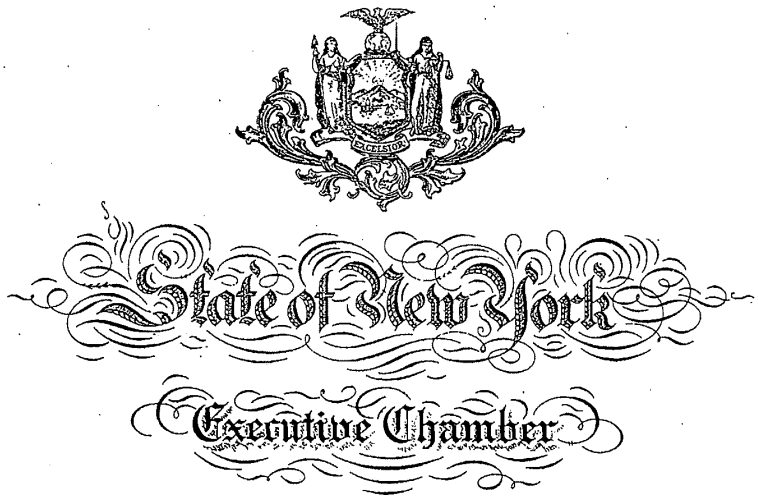
- The state assembly and state senate special elections, which are otherwise scheduled to be held on June 23, 2020 are hereby cancelled and such offices shall be filled at the general election. The special election to be held for the office of Queens Borough President is hereby cancelled, and such office shall be filled at the general election.



GIVEN under my hand and the Privy Seal of the State in the City of Albany this twenty-fourth day of April in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor



No. 202.28

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law, do hereby continue the suspensions and modifications of law, and any directives, not superseded by a subsequent directive, made by Executive Order 202 and each successor Executive Order up to and including Executive Order 202.14, for thirty days until June 6, 2020, except as modified below:

- The suspension or modification of the following statutes and regulations are not continued, and such statutes, codes and regulations are in full force and effect as of May 8, 2020:
    - 10 NYCRR 405.9, except to the limited extent that it would allow a practitioner to practice in a facility where they are not credentialed or have privileges, which shall continue to be suspended; 10 NYCRR 400.9; 10 NYCRR 400.11, 10 NYCRR 405; 10 NYCRR 403.3; 10 NYCRR 403.5; 10 NYCRR 800.3, except to the extent that subparagraphs (d) and (u) could otherwise limit the scope of care by paramedics to prohibit the provision of medical service or extended service to COVID-19 or suspected COVID-19 patients; 10 NYCRR 400.12; 10 NYCRR 415.11; 10 NYCRR 415.15; 10 NYCRR 415.26; 14 NYCRR 620; 14 NYCRR 633.12; 14 NYCRR 636-1; 14 NYCRR 686.3; and 14 NYCRR 517;
    - Mental Hygiene Law Sections 41.34; 29.11; and 29.15;
    - Public Health Law Sections 3002, 3002-a, 3003, and 3004-a to the extent it would have allowed the Commissioner to make determination without approval by a regional or state EMS board;
    - Subdivision (2) of section 6527, Section 6545, and Subdivision (1) of Section 6909 of the Education Law; as well as subdivision 32 of Section 6530 of the Education Law, paragraph (3) of Subdivision (a) of Section 29.2 of Title 8 of the NYCRR, and sections 58-1.11, 405.10, and 415.22 of Title 10 of the NYCRR;
    - All codes related to construction, energy conservation, or other building code, and all state and local laws, ordinances, and regulations which would have otherwise been superseded, upon approval by the Commissioner of OPWDD, as applicable only for temporary changes to physical plant, bed capacities, and services provided; for facilities under the Commissioners jurisdiction.

IN ADDITION, I hereby temporarily suspend or modify the following if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, for the period from the date of this Executive Order through June 6, 2020:

- Sections 7-103, 7-107 and 7-108 of the General Obligations Law to the extent necessary to provide that:

    - Landlords and tenants or licensees of residential properties may, upon the consent of the tenant or licensee, enter into a written agreement by which the security deposit and any interest accrued thereof, shall be used to pay rent that is in arrears or will become due. If the amount of the deposit represents less than a full month rent payment, this consent does not constitute a waiver of the remaining rent due and owing for that month. Execution in counterpart by email will constitute sufficient execution for consent;
    - Landlords shall provide such relief to tenants or licensees who so request it that are eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic;
    - It shall be at the tenant or licensee's option to enter into such an agreement and landlords shall not harass, threaten or engage in any harmful act to compel such agreement;
    - Any security deposit used as a payment of rent shall be replenished by the tenant or licensee, to be paid at the rate of 1/12 the amount used as rent per month. The payments to replenish the security deposit shall become due and owing no less than 90 days from the date of the usage of the security deposit as rent. The tenant or licensee may, at their sole option, retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment, which the landlord, must accept such insurance as replenishment.

- Subdivision 2 of section 238-a of the Real Property Law to provide that no landlord, lessor, sub-lessor or grantor shall demand or be entitled to any payment, fee or charge for late payment of rent occurring during the time period from March 20, 2020, through August 20, 2020; and

- Section 8-400 of the Election Law is modified to the extent necessary to require that to the any absentee application mailed by a board of elections due to a temporary illness based on the COVID-19 public health emergency may be drafted and printed in such a way to limit the selection of elections to which the absentee ballot application is only applicable to any primary or special election occurring on June 23, 2020, provided further that for all absentee ballot applications already mailed or completed that purported to select a ballot for the general election or to request a permanent absentee ballot shall in all cases only be valid to provide an absentee ballot for any primary or special election occurring on June 23, 2020. All Boards of Elections must provide instructions to voters and post prominently on the website, instructions for completing the application in conformity with this directive.

- The suspension of the provisions of any time limitations contained in the Criminal Procedure Law contained in Executive Order 202.8 is modified as follows:

    - Section 182.30 of the Criminal Procedure Law, to the extent that it would prohibit the use of electronic appearances for certain pleas;
    - Section 180.60 of the Criminal Procedure Law to provide that (i) all parties' appearances at the hearing, including that of the defendant, may be by means of an electronic appearance; (ii) the Court may, for good cause shown, withhold the identity, obscure or withhold the image of, and/or disguise the voice of any witness testifying at the hearing pursuant to a motion under Section 245.70 of the Criminal Procedure law—provided that the Court is afforded a means to judge the demeanor of a witness;
    - Section 180.80 of the Criminal Procedure Law, to the extent that a court must satisfy itself that good cause has been shown within one hundred and forty-four hours from May 8, 2020 that a defendant should continue to be held on a felony complaint due to the inability to empanel a grand jury due to COVID-19, which may constitute such good cause pursuant to subdivision three of such section; and
    - Section 190.80 of the Criminal Procedure Law, to the extent that to the extent that a court must satisfy itself that good cause has been shown that a defendant should continue to be held on a felony complaint beyond forty-five days due to the inability to empanel a grand jury due to COVID-19, which may constitute such good cause pursuant to subdivision b of such section provided that such defendant has been provided a preliminary hearing as provided in section 180.80.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through June 6, 2020:

- There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

- Executive Order 202.18, which extended the directive contained in Executive Orders 202.14 and 202.4 as amended by Executive Order 202.11 related to the closure of schools statewide, is hereby continued to provide that all schools shall remain closed through the remainder of the school year. School districts must continue plans for alternative instructional options, distribution and availability of meals, and child care, with an emphasis on serving children of essential workers.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this seventh of May in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

No. 202.15

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through May 9, 2020 the following:

- Paragraph (4) of subdivision (a) of Section 5-6.12 of Title 10 of the NYCRR, governing bottled or bulk water products sold or distributed in New York, to allow bottled and bulk water product facilities currently certified in in New York to temporarily, if their stock of regularly used labels has been depleted, distribute bottled or bulk water products without an assigned New York State Department of Health certificate number shown on the product label and use labels authorized in any other state. Once labels showing the assigned certificate number have been obtained, their use must be resumed;

- Section 6808 of the Education Law and any regulations promulgated thereunder, to the extent necessary to permit a manufacturer, repacker, or wholesaler of prescription drugs or devices, physically located outside of New York and not registered in New York, but licensed and/or registered in any other state, may deliver into New York, prescription drugs or devices;

- Section 6808 of the Education Law, Article 137 of the NYCRR to the extent necessary to allow that a New York-licensed pharmacy may receive drugs and medical supplies or devices from an unlicensed pharmacy, wholesaler, or third-party logistics provider located in another state to alleviate a temporary shortage of a drug or device that could result in the denial of health care under the following conditions:
  - The unlicensed location is appropriately licensed in its home state, and documentation of the license verification can be maintained by the New York pharmacy.
  - The pharmacy maintains documentation of the temporary shortage of any drug or device received from any pharmacy, wholesaler, or third-party logistics provider not licensed in New York.
  - The pharmacy complies with all record-keeping requirements for each drug and device received from any pharmacy, wholesaler, or third-party logistics provider not licensed in New York.
  - All documentation and records required above shall be maintained and readily retrievable for three years following the end of the declared emergency.
  - The drug or device was produced by an authorized FDA registered drug manufacturer;

- Sections 6512 through 6516, and 6524 of the Education Law and Part 60 of Title 8 of the NYCRR, to the extent necessary to allow individuals, who graduated from registered or accredited medical programs located in New York State in 2020, to practice medicine in New York State, without the need to obtain a license and without civil or criminal penalty related to lack of licensure, provided that the practice of medicine by such graduates shall in all cases be supervised by a physician licensed and registered to practice medicine in the State of New York;

- Subparagraphs (ii) and (iii) of paragraph (b) and paragraph (c) of subdivision (4) of section 2801-a of the Public Health Law, and subparagraph (ii) of paragraph (c) of subdivision (1) and paragraph (c) of subdivision (2) of section 3611-a of the Public Health Law, to the extent necessary to limit the Department of Health's review functions to essential matters during the pendency of the COVID-19 health crisis, and to toll any statutory time limits for transfer notices pertaining to operators of Article 28 and Article 36 licensed entities for the duration of this declaration of disaster emergency, and any subsequent continuation thereof;

- Sections 43 and 45 of the Religious Corporations Law to the extent necessary to allow Protestant Episcopal parishes to postpone any annual election and notice to the parish of such election during the state disaster emergency absent formal resolution and ratification by meeting;

- Environmental Conservation Law Articles 3, 8, 9, 13, 15, 17, 19, 23, 24, 25, 27, 33, 34, 35, 37, and 75, and 6 NYCRR Parts 552 , 550, 601, and 609 to the extent necessary to suspend the requirement that public hearings are required, provided that public comments shall still be accepted either electronically or by mail, to satisfy public participation requirements;

- State Administrative Procedures Act Section 202(2)(a) to the extent necessary to extend the expiration date of notices of proposed rulemakings until 90 calendar days after this Executive Order, as it may be continued, terminates;

- Environmental Conservation Law Article 70, as implemented by 6 NYCRR Parts 621 and 624, and Environmental Conservation Law Article 17, as implemented by 6 NYCRR Parts 704 and 750 for processing permit applications, to the extent necessary to suspend public hearings provided that public comments may be accepted as written submissions, either electronically or by mail, or that any required appearances may be done so by teleconferencing or other electronic means;

- 6 NYCRR Part 375 and Environmental Conservation Law Article 27 to the extent necessary to suspend for the duration of this Executive Order public meetings prior to a selection of a final remedy at inactive hazardous waste disposal sites and public meetings at certain brownfield cleanup program sites, provided that written comments on proposed remedies may be continue to be submitted and will be evaluated in remedial decision;

- Section 3635 of the Education law, to the extent necessary to delay the April 1 requirement that parents must file transportation requests with their school district in order to obtain transportation for their children for the following school year;

- Sections 6512 through 6516 and 8510 of the Education Law and 8 NYCRR Subpart 79-4 to the extent necessary to allow respiratory therapy technicians licensed and in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure;

- Sections 6512 through 6516, 8402, 8403, 8404, 8405 of the Education Law and 8 NYCRR Sub Parts 79-9, 79-10, 79-11 and 79-12 to the extent necessary to allow mental health counselors, marriage and family therapists, creative arts therapists and psychanalysts licensed and in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure;

- Sections 3400, 3420 through 3423, and 3450 through 3457 of the Public Health Law, to the extent necessary to permit funeral directors licensed and in good standing in any state or territory of the United States to practice as a funeral director in New York State upon the approval of, and pursuant to such conditions as may be imposed by, the Commissioner of Health, without civil or criminal penalty related to lack of licensure in New York State, provided that such funeral director shall practice under the supervision of a funeral director licensed and registered in New York State;

- Section 3428 of the Public Health Law to the extent necessary to permit a funeral director licensed in New York State, but not registered in New York State, to practice in New York State upon the approval of, and pursuant to such conditions as may be imposed by, the Commissioner of Health, without civil or criminal penalty related to lack of registration in New York State,

provided that such funeral director shall practice under the supervision of a funeral director licensed and registered in New York State;

- Section 1517 of the Not for Profit Corporation Law, Sections 203.3, 203.6 and 203.13 of Title 19 of the NYCRR and Section 77.7(a)(1) of Title 10 of the NYCRR, to the extent necessary to allow persons deputized by the Commissioner of Health to be agents authorized by a funeral director or undertaker to be present and personally supervise and arrange for removal or transfer of each dead human body;

- Section 1517 of the Not for Profit Corporation Law, Sections 203.3, 203.6 and 203.13 of Title 19 of the NYCRR and Section 77.7(a)(4) of Title 10 of the NYCRR, to the extent necessary to allow persons deputized by the Commissioner of Health to be agents authorized by a funeral director or undertaker, or a county coroner, coroner physician and/or medical director for those deceased human bodies within their supervision, to personally supervise and arrange the delivery of a deceased person to the cemetery, crematory or a common carrier, with a copy of the filed death certificate;

- Sections 4140 and 4144 of the Public Health Law, Sections 1502, 1517 of the Not for Profit Corporation Law and Sections 203.1, 203.4, 203.8 and 203.13 of Title 19 of the NYCRR and Section 13.1 of Title 10 of the NYCRR, to the extent necessary to permit the State Registrar to register death certificates and issue burial and removal permits, upon the request of a local registrar and upon approval of the Commissioner of Health;

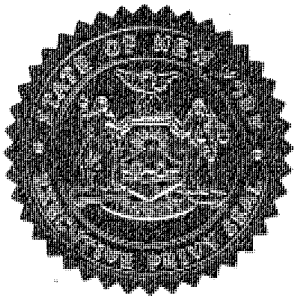
IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through May 9, 2020:

- Any local official, state official or local government or school, which, by virtue of any law has a public hearing scheduled or otherwise required to take place in April or May of 2020 shall be postponed, until June 1, 2020, without prejudice, however such hearing may continue if the convening public body or official is able to hold the public hearing remotely, through use of telephone conference, video conference, and/or other similar service.

- For the period from the date of this Executive Order through May 9, 2020, the Department of Taxation and Finance is authorized to accept digital signatures in lieu of handwritten signatures on documents related to the determination or collection of tax liability. The Commissioner of Taxation and Finance shall determine which documents this directive shall apply to and shall further define the requirements for accepted digital signatures.

- Section 8-400 of the Election Law is temporarily suspended and hereby modified to provide that due to the prevalence and community spread of COVID-19, an absentee ballot can be granted based on temporary illness and shall include the potential for contraction of the COVID-19 virus for any election held on or before June 23, 2020.

- Solely for any election held on or before June 23, 2020, Section 8-400 of the Election Law is hereby modified to allow for electronic application, with no requirement for in-person signature or appearance to be able to access an absentee ballot.



GIVEN under my hand and the Privy Seal of the State in the City of Albany this ninth day of April in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

South Carolina General Assembly
123rd Session, 2019-2020

A133, R138, S635

STATUS INFORMATION

General Bill
Sponsors: Senator Young
Document Path: l:\s-res\try\024driv.kmm.try.docx

Introduced in the Senate on March 12, 2019
Introduced in the House on May 8, 2019
Last Amended on May 12, 2020
Passed by the General Assembly on May 12, 2020
Governor's Action: May 13, 2020, Signed

Summary: Absentee ballot provisions for June 2020 primary

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/12/2019	Senate	Introduced and read first time (Senate Journal-page 8)
3/12/2019	Senate	Referred to Committee on **Transportation** (Senate Journal-page 8)
4/24/2019	Senate	Committee report: Favorable **Transportation** (Senate Journal-page 7)
5/7/2019	Senate	Read second time (Senate Journal-page 32)
5/7/2019	Senate	Roll call Ayes-43 Nays-0 (Senate Journal-page 32)
5/8/2019	Senate	Read third time and sent to House (Senate Journal-page 50)
5/8/2019	House	Introduced and read first time (House Journal-page 89)
5/8/2019	House	Referred to Committee on **Education and Public Works** (House Journal-page 89)
2/27/2020	House	Committee report: Favorable with amendment **Education and Public Works** (House Journal-page 6)
3/4/2020	House	Amended (House Journal-page 27)
3/4/2020	House	Read second time (House Journal-page 27)
3/4/2020	House	Roll call Yeas-106 Nays-2 (House Journal-page 29)
3/5/2020	House	Read third time and returned to Senate with amendments (House Journal-page 14)
3/11/2020		House amendment amended (Senate Journal-page 27)
3/11/2020	Senate	Roll call Ayes-40 Nays-0 (Senate Journal-page 27)
3/11/2020	Senate	Returned to House with amendments (Senate Journal-page 27)
5/12/2020	House	Non-concurrence in Senate amendment
5/12/2020	House	Roll call Yeas-10 Nays-106
5/12/2020	Senate	Senate insists upon amendment and conference committee appointed Campsen, Hutto, and Massey (Senate Journal-page 24)
5/12/2020	House	Conference committee appointed Simrill, Clary, Rutherford
5/12/2020	Senate	Free conference powers granted (Senate Journal-page 25)
5/12/2020	Senate	Free conference committee appointed Campsen, Hutto, Massey (Senate Journal-page 25)
5/12/2020	Senate	Free conference report received and adopted (Senate Journal-page 25)
5/12/2020	Senate	Roll call Ayes-37 Nays-0 (Senate Journal-page 25)
5/12/2020	House	Free conference powers granted
5/12/2020	House	Roll call Yeas-97 Nays-15
5/12/2020	House	Free conference committee appointed Simrill, Clary, Rutherford
5/12/2020	House	Free conference report adopted

5/12/2020	House	Roll call Yeas-108 Nays-0
5/12/2020	House	Ordered enrolled for ratification
5/12/2020		Ratified R 138
5/13/2020		Signed By Governor
5/14/2020		Act No. 133

View the latest legislative information at the website

VERSIONS OF THIS BILL

3/12/2019
4/24/2019
2/27/2020
3/4/2020
3/11/2020
5/12/2020

(A133, R138, S635)

AN ACT TO AMEND SECTION 7-13-35, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE NOTICE OF GENERAL, MUNICIPAL, SPECIAL, AND PRIMARY ELECTIONS, SO AS TO REQUIRE THE NOTICE TO STATE THAT THE PROCESS OF EXAMINING THE RETURN-ADDRESSED ENVELOPES CONTAINING THE ABSENTEE BALLOTS MAY BEGIN AT 9:00 A.M. ON THE CALENDAR DAY IMMEDIATELY PRECEDING ELECTION DAY; TO AMEND SECTION 7-15-420, RELATING TO THE RECEIPT, TABULATION, AND REPORTING OF ABSENTEE BALLOTS, SO AS TO PROVIDE THAT THE PROCESS OF EXAMINING THE RETURN-ADDRESSED ENVELOPES THAT HAVE BEEN RECEIVED BY THE COUNTY BOARD OF VOTER REGISTRATION AND ELECTIONS MAY BEGIN AT 9:00 A.M. ON THE CALENDAR DAY IMMEDIATELY PRECEDING ELECTION DAY; TO AMEND SECTION 7-15-470, RELATING TO ABSENTEE BALLOTS OTHER THAN PAPER BALLOTS, SO AS TO MODIFY THE REQUIREMENTS NEEDED TO OBTAIN THE STATE ELECTION COMMISSION CERTIFICATION BEFORE USING A NONPAPER-BASED VOTING MACHINE OR VOTING SYSTEM FOR IN-PERSON ABSENTEE VOTING; TO REQUIRE THE STATE ELECTION COMMISSION TO IMPLEMENT A SOFTWARE UPDATE TO ITS ELECTRONIC VOTING MACHINES TO ALLOW FOR CHALLENGES TO ABSENTEE VOTES CAST USING THE MACHINES IN AN EQUIVALENT MANNER TO CHALLENGES TO ABSENTEE VOTES CAST ON ELECTRONIC VOTING MACHINES IN THE 2018 GENERAL ELECTION; TO AMEND SECTION 7-15-330, RELATING TO THE TIME OF APPLICATION FOR ABSENTEE BALLOTS AND APPLICATIONS IN PERSON, SO AS TO REQUIRE THE BOARD OF VOTER REGISTRATION AND ELECTIONS TO KEEP A RECORD OF THE DATE AND METHOD UPON WHICH THE ABSENTEE BALLOT IS RETURNED; TO AMEND SECTION 7-15-440, RELATING TO THE LIST OF PERSONS ISSUED AND WHO MAY CAST ABSENTEE BALLOTS, SO AS TO CLARIFY THAT THE LIST IS IN ADDITION TO THE INFORMATION PROVIDED PURSUANT TO SECTION 7-15-330; BY ADDING SECTION 7-13-825 SO AS TO PROVIDE THAT THE STATE ELECTION COMMISSION AND EACH COUNTY BOARD OF VOTER REGISTRATION AND

ELECTIONS MUST POST THE REQUIREMENTS TO CHALLENGE A BALLOT IN A CONSPICUOUS LOCATION IN THEIR RESPECTIVE OFFICES AND WEBSITES; TO REPEAL CERTAIN SUBSECTIONS OF SECTION 1 OF THE ACT ON DECEMBER 31, 2021; AND TO PROVIDE THAT A QUALIFIED ELECTOR MUST BE PERMITTED TO VOTE BY ABSENTEE BALLOT IN AN ELECTION IF THE QUALIFIED ELECTOR'S PLACE OF RESIDENCE OR POLLING PLACE IS LOCATED IN AN AREA SUBJECT TO A STATE OF EMERGENCY DECLARED BY THE GOVERNOR AND THERE ARE FEWER THAN FORTY-SIX DAYS REMAINING UNTIL THE DATE OF THE ELECTION AND PROVIDE THAT THIS PROVISION EXPIRES ON JULY 1, 2020.

Be it enacted by the General Assembly of the State of South Carolina:

Elections, absentee ballots, examination of absentee ballots

SECTION 1.A. Section 7-13-35 of the 1976 Code is amended to read:

"Section 7-13-35. The authority charged by law with conducting an election must publish two notices of general, municipal, special, and primary elections held in the county in a newspaper of general circulation in the county or municipality, as appropriate. Included in each notice must be a reminder of the last day persons may register to be eligible to vote in the election for which notice is given, notification of the date, time, and location of the hearing on ballots challenged in the election, a list of the precincts involved in the election, the location of the polling places in each of the precincts, and notification that the process of examining the return-addressed envelopes containing absentee ballots may begin at 9:00 a.m. on the calendar day immediately preceding election day at a place designated in the notice by the authority charged with conducting the election. The first notice must appear no later than sixty days before the election and the second notice must appear no later than two weeks after the first notice."

B. Section 7-15-420 of the 1976 Code is amended to read:

"Section 7-15-420. (A) The county board of voter registration and elections, municipal election commission, or executive committee of each municipal party in the case of municipal primary elections is responsible for the tabulation and reporting of absentee ballots.

(B) At 9:00 a.m. on the calendar day immediately preceding election day, the managers appointed pursuant to Section 7-5-10, and in the presence of any watchers who have been appointed pursuant to Section 7-13-860, may begin the process of examining the return-addressed envelopes that have been received by the county board of voter registration and elections making certain that each oath has been properly signed and witnessed and includes the address of the witness. All return-addressed envelopes received by the county board of voter registration and elections before the time for closing the polls must be examined in this manner. A ballot may not be counted unless the oath is properly signed and witnessed nor may any ballot be counted which is received by the county board of voter registration and elections after time for closing of the polls. The printed instructions required by Section 7-15-370(2) to be sent each absentee ballot applicant must notify him that his vote will not be counted in either of these events. If a ballot is not challenged, the sealed return-addressed envelope must be opened by the managers, and the enclosed envelope marked 'Ballot Herein' removed and placed in a locked box or boxes.

(C) After all return-addressed envelopes have been emptied, but no earlier than 9:00 a.m. on election day, the managers shall remove the ballots contained in the envelopes marked 'Ballot Herein', placing each one in the ballot box provided for the applicable contest.

(D) Beginning at 9:00 a.m. on election day, the absentee ballots may be tabulated, including any absentee ballots received on election day before the polls are closed. If any ballot is challenged, the return-addressed envelope must not be opened, but must be put aside and the procedure set forth in Section 7-13-830 must be utilized; but the absentee voter must be given reasonable notice of the challenged ballot. Results of the tabulation must not be publicly reported until after the polls are closed."

C. Section 7-15-470 of the 1976 Code is amended to read:

"Section 7-15-470. (A) Notwithstanding the provisions of this chapter, a county board of voter registration and elections may use other methods of voting by absentee ballot instead of by paper ballot. No voting machine or voting system, other than a paper-based system, may be used for in-person absentee voting that has not received written certification from the State Election Commission that:

(1) the voting machine or voting system meets all statutory requirements for use in the State;

(2) the voting machine or voting system can be secured against voting at times other than business hours of the county board of voter registration and elections; and

(3) the results of elections can be held secure from release until the time for counting ballots at any polling place.

(B) The State Election Commission must develop standards and guidelines for these purposes."

D. The State Election Commission is directed to implement a software update to its electronic voting machines to allow for challenges to absentee votes cast using the machines in an equivalent manner to challenges to absentee votes cast on electronic voting machines in the 2018 General Election.

E. Section 7-15-330 of the 1976 Code is amended to read:

"Section 7-15-330. To vote by absentee ballot, a qualified elector or a member of his immediate family must request an application to vote by absentee ballot in person, by telephone, or by mail from the county board of voter registration and elections, or at an extension office of the board of voter registration and elections as established by the county governing body, for the county of the voter's residence. A person requesting an application for a qualified elector as the qualified elector's authorized representative must request an application to vote by absentee ballot in person or by mail only and must himself be a registered voter and must sign an oath to the effect that he fits the statutory definition of a representative. This signed oath must be kept on file with the board of voter registration and elections until the end of the calendar year or until all contests concerning a particular election have been finally determined, whichever is later. A candidate or a member of a candidate's paid campaign staff, including volunteers reimbursed for time expended on campaign activity, is not allowed to request applications for absentee voting for any person designated in this section unless the person is a member of the immediate family. A request for an application to vote by absentee ballot may be made anytime during the calendar year in which the election in which the qualified elector desires to be permitted to vote by absentee ballot is being held. However, completed applications must be returned to the county board of voter registration and elections in person or by mail before 5:00 p.m. on the fourth day before the day of the election. Applications must be accepted by the county board of voter registration and elections until 5:00 p.m. on the day immediately preceding the election for those who appear in person and are qualified to vote absentee pursuant to Section 7-15-320. A member of the

immediate family of a person who is admitted to a hospital as an emergency patient on the day of an election or within a four-day period before the election may obtain an application from the board on the day of an election, complete it, receive the ballot, deliver it personally to the patient who shall vote, and personally carry the ballot back to the board of voter registration and elections. The board of voter registration and elections shall serially number each absentee ballot application form and keep a record book in which must be recorded the number of the form, the name, home address, and absentee mailing address of the person for whom the absentee ballot application form is requested; the name, address, voter registration number, and relationship of the person requesting the form, if other than the applicant; the date upon which the form is requested; the date upon which the form is issued; and the date and method upon which the absentee ballot is returned. This information becomes a public record at 9:00 a.m. on the day immediately preceding the election, except that forms issued for emergency hospital patients must be made public by 9:00 a.m. on the day following an election. A person who violates the provisions of this section is subject to the penalties provided in Section 7-25-170."

F. Section 7-15-440 of the 1976 Code is amended to read:

"Section 7-15-440. The county board of voter registration and elections shall, after each election, prepare a list of all persons to whom absentee ballots were issued and all persons who cast absentee ballots. The list so compiled shall be made available for public inspection upon request. This list is in addition to the information provided pursuant to Section 7-15-330."

G. Article 7, Chapter 13, Title 7 of the 1976 Code is amended by adding:

"Section 7-13-825. The State Election Commission and each county board of voter registration and elections must post the requirements to challenge a ballot pursuant to the provisions of Section 7-13-810 in a conspicuous location in their respective offices and on their respective websites."

H. The amendments contained in subsections A., B., and C. of this SECTION are repealed on December 31, 2021, and the text of these code sections therefore shall revert back to the language as contained in the South Carolina Code of Laws as of January 23, 2020.

Elections, absentee ballots during the state of emergency, expiring on July 1, 2020

SECTION 2. A. A qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency declared by the Governor and there are fewer than forty-six days remaining until the date of the election.

B. This SECTION takes effect upon approval by the Governor and expires on July 1, 2020.

Time effective

SECTION 3. This act takes effect upon approval by the Governor.

Ratified the 12th day of May, 2020.

Approved the 13th day of May, 2020.

Eligibility for Absentee Voting In West Virginia

An absentee voter is a voter who is eligible to vote and cannot make it to the polls during Early Voting or on Election Day. This document details the eligibility for absentee voting by-mail.

Absentee by Mail Eligibility
Voters not able to vote in person during Early Voting or Election Day due to one of the following circumstances may vote a regular absentee ballot by mail:

- Illness, injury or other medical reason **(due to concerns of COVID-19, all voters may apply to vote absentee in the 2020 Primary Election because of "medical reason")**
- Disability or advanced age
- Incarceration or home detention (does not include individuals convicted of any felony, treason, or election bribery)
- Work hours and distance from county seat
- Inaccessible early voting site and polling place
- Personal or business travel*
- Attendance at college or other place of education or training*
- Temporary residence outside of the county*
- Service as an elected or appointed state or federal official*

"*" indicates that the voter must receive ballot at an address outside of the county.

Electronic Absentee for Voters with Physical Disabilities

- Voters with physical disabilities that prevent them from voting in person and from voting paper ballots without assistance may request to receive their ballots electronically. View our Electronic Absentee Informational Flyer.

Military and Overseas (UOCAVA) Voters Eligibility
The following voters are covered by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA):

- Members of the United States uniformed services and Merchant Marines on active duty
- Their spouses and dependents
- United States citizens temporarily or permanently residing outside the country

Special Absentee Voting List Eligibility
Voters may apply and receive a ballot in every election for one of the reasons below:

- Participation in the Address Confidentiality Program (ACP)
- A permanent, physical disability prevents voter from going to the polling place

Emergency Absentee Voting Eligibility
Voters in the hospital on Election Day and last-minute replacement poll workers may call the County Clerk to have an application and ballot delivered to them.

The County Commission may adopt a policy before each election to extend emergency absentee voting to the following individuals:

- Voters who have resided in a nursing home within the county for less than thirty days
- Voters who are in a hospital or other duly licensed health care facility within an adjacent county or within thirty-five miles of the county seat
- Voters who become confined, on or after the seventh day preceding an election, to a specific location within the county because of illness, injury, physical disability, immobility due to advanced age, or another medical reason.

Revised 4/1/2020

1992 WL 310622

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New Haven, at New Haven.

Janette PARKER

v.

Andrea Jackson BROOKS, et al.

No. CV 92 0338661S.

Oct. 20, 1992.

MEMORANDUM OF DECISION

VERTEFEVILLE, Judge.

*1 On September 15, 1992, a Democratic primary was held in New Haven to determine the Democratic candidate for the 95th Representative District of the Connecticut General Assembly. The two candidates were the plaintiff Janette Parker, the incumbent State Representative for the 95th District, and the defendant Andrea Jackson Brooks, who was the Democratic endorsed candidate for the 95th District. After the votes on the voting machine were tallied, the plaintiff Janette Parker appeared to be the winner. However, after the absentee ballots were counted and the total vote from both the machines and the absentee ballots was tallied, the defendant Brooks was the winner by thirty-nine votes. Parker has brought this action pursuant to Conn.Gen.Stat. § 9-329a alleging that certain laws relating to primary elections and the casting of absentee ballots were violated. The principal relief she seeks is an order from the court that a new primary be held. In addition to Brooks, the defendants include the Democratic registrar of voters, the New Haven town clerk and individuals who are alleged to have acted improperly with respect to the primary.

Conn.Gen.Stat. § 9-329a provides that an action may be brought by any candidate who is "aggrieved" by a ruling of an election official, by any mistake in the count of the votes or by any violation of certain statutes relating to the primary or the casting of absentee ballots. The court finds that the plaintiff is aggrieved. She has alleged violations of the stated statutes, improper rulings by election officials and a mistake in the vote count, as a result of which she has been deprived of the Democratic nomination for the 95th District. The value of the Democratic nomination in a city with an overwhelming Democratic voter enrollment cannot be minimized. The plaintiff has established aggrievement.

The 95th District has within its boundaries several buildings limited in occupancy to the elderly and the handicapped. One, at 49 Union Avenue, has ninety-five apartments and is owned and operated by the New Haven Housing Authority. A second such complex is Tower One and Tower East, which are privately owned but subsidized under the § 8 program of the Department of Housing and Urban Development. The "Towers", as they are called, contain hundreds of units. Many residents of 49 Union Avenue and the Towers voted in the primary by absentee ballot. These absentee ballots are the subject of several claims of impropriety by the plaintiff.

In order to vote by absentee ballot, a voter must complete and file an application for an absentee ballot. Conn.Gen.Stat. § 9-140. The Brooks campaign appointed Louis Aceto as its absentee ballot coordinator, charged with the responsibility to ensure that voters who wanted to vote by absentee ballot properly did so. Through the assistance of tenants who lived at the Towers and 49 Union Avenue, Aceto distributed applications for absentee ballots. A record was obtained which identified the tenants who had voted by absentee ballot in previous elections. Then an application for absentee ballot was prepared for each such tenant. Jacqueline Harrison, a Brooks supporter, and Milton Naiman, an officer of the Towers' Tenants Association who later voted for Parker, distributed the applications at the Towers. Evelyn Mikos, a Brooks supporter, distributed the applications at 49 Union Avenue. They filled in the tenant's name and address at the top of the form and also designated that the ballot should be mailed to the tenant at his or her mailing address, which the worker also filled in. The worker would then take the application to the tenant so the tenant could sign it. In addition, the worker would check the box indicating the tenant's reason for voting by absentee ballot. The most common reason was physical disability or illness. After the tenant signed the application, the worker would take the application from the tenant and return it to Aceto for filing with the town clerk. In many cases Aceto would check the application to make sure it was fully complete. If the application lacked the date of the primary or other information related to the election, Aceto would insert the missing information before filing the application.

*2 The purpose of this absentee ballot assistance was to facilitate voting by the elderly and handicapped who resided in the Towers and at 49 Union Avenue. Almost one hundred votes were cast by absentee ballot in Ward 6B, where both complexes were located. This was the largest number of absentee ballots cast in any ward in the 95th District, and over sixty percent of the absentee votes were cast for Brooks.

It is important to note that this process was used for the application for the absentee ballot only, and not for the absentee ballots themselves. Although Aceto tried to have someone follow up with tenants to make sure they filled out and mailed their actual ballots, the effort in that regard was far less organized. Despite the concerted effort with respect to the absentee ballot applications, there was no evidence that the tenants applying for an absentee ballot were told for whom to vote. Although there were errors or misunderstandings with respect to a few of the absentee ballot applications, the vast majority of the applications were filled out correctly as the tenant wanted it. Each application was in fact signed by the tenant and there were no improprieties in that respect.

The plaintiffs' first claim with respect to these absentee ballots is that many of the tenants who cast the ballots did not qualify to do so because they were not "unable to appear" at a polling place during voting hours because of physical disability or illness. Conn.Gen.Stat. § 9-135. To substantiate that claim, the plaintiff issued subpoenas to many of the tenants who filed absentee ballot applications, summoning them to testify at trial. Many of the tenants came to court to testify during the trial and plaintiff's counsel questioned them about their claimed disabilities or illnesses. Almost all of the tenants who came to court testified that they suffered from health problems, which included diabetes, high blood pressure, cataracts and other vision problems, arthritis and other orthopedic problems, and heart problems. Several of them were in their 80's and several used canes for assistance in walking. Most of the tenants testified that they were capable of going out of their apartments, although several testified that some days they feel well and other days they do not.

The plaintiff asks the court to interpret "unable to appear" at the polling place quite literally and to find that most of the absentee voters were in fact able to go to the polling place, in which case they had no right to vote by absentee ballot. The plaintiff argues that voting at the polls is the preferred method of voting because an election is defined as a "meeting" of the electors. Furthermore, there are protections for voters at the polls which do not exist with absentee voting: a prohibition of electioneering within seventy-five feet of the polls, the presence of sworn election officials and the privacy of the curtained voting machine. Moreover, she points out, state law now requires the polls to be handicap-accessible for the convenience of elderly or disabled voters. The plaintiff acknowledges having no authority in support of her request for strict interpretation of the statute.

*3 The court finds no merit to the interpretation urged by the plaintiff for several reasons. First, it must be noted that absentee voting laws should be liberally construed. "In most jurisdictions absentee voting laws have been liberally construed so as to further their evident purpose of protecting and furthering the right of suffrage." "Construction and effect of Absentee voters' laws," 97 ALR 2d 243, 266. Connecticut shares in this view of liberal construction of voting statutes. " '[N]o voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor.' " *Wrinn v. Dunleavy,* 186 Conn. 125, 142 (1982). The construction of "unable to go to the polls" which is urged by the plaintiff is not consistent with a liberal interpretation designed to further the right of suffrage. The court has had the opportunity to observe the tenant-absentee voters as they testified in this matter. Although not bedridden or limited to the confines of their apartments, many of them are frail and walk or move about only with difficulty. If they were deprived of the right to cast absentee ballots, many of them would not vote at all rather than going to the polls. A liberal construction of the absentee voting statute is necessary to preserve their right to vote.

A second reason to uphold the absentee votes is the nature of the representation made in the application. When a tenant signed an application for absentee ballot, he or she was declaring under the penalties of false statement that he or she "expected" to be unable to appear at the polling place during the primary. In a case very similar on the facts with the pending case, a New York court found that the issue was "not whether a voter was actually disabled but whether the application was made in good faith that the voter would be disabled." *Cristiano v. Otsego County Board of Elections,* 581 N.Y.S.2d 872, 873 (1992). The issue, said the court, "is not the voter's physical capabilities on the day of the election, but rather the voter's expectations at the time of applying for an absentee ballot." Id. Given the various health problems of the absentee voters who testified, the court finds that virtually all of the absentee vote applicants who testified

at trial reasonably expected in good faith that they would be unable to vote at the polls on the date of the primary.

A third reason for upholding the absentee votes is found in the nature of Connecticut's absentee voting laws. Some states have adopted absentee voting laws which require the submission of a physician's certificate to establish a voter's illness or physical disability. In one such state, a court found that one certificate which stated that the voter suffered from physical senility and had difficulty moving around and a second certificate which stated that the voter had glaucoma with poor vision, were sufficient to establish that the voters could not go to the polls. *Application of Moore,* 57 N.J.Super. 244, 154 A.2d 631 (1959). The legislature in this state has chosen not to require a physician's certificate to establish eligibility for absentee voting. As a result of that choice, it is the voter who subjectively determines in the first instance whether he or she is "unable" to go to the polls. Relying on *Application of Moore,* Connecticut voters who have difficulty moving or poor vision are eligible for absentee voting.

***4** The plaintiff's second claim with respect to the absentee ballots is that the distribution of absentee ballots at the Towers and 49 Union Avenue constitutes a violation of Conn.Gen.Stat. § 9-364 by influencing or attempting to influence voters to stay away from the election. The plaintiff concedes that there is no statutory prohibition which directly prohibits the distribution, completion and filing of applications for absentee ballots in the manner in which it was done here. Conn.Gen.Stat. § 9-140 requires only that the applicant sign the absentee ballot application under the penalties of false statement. That was done for each application at issue here. Nor does plaintiff claim that the campaign workers verbally told voters not to go to the polls. Plaintiff claims instead that the effort to facilitate the use of absentee ballots in the manner in which it was done here constitutes an attempt to influence electors to stay away from the election. This claim fails on the facts and as a matter of law.

The evidence at trial showed that most of the voters who voted by absentee ballot in the primary had voted by absentee ballot at least once previously because of illness or physical disability. Many of them had voted absentee for several years. Even before they were approached by campaign workers with the absentee ballot applications, most of these voters were already inclined to vote by absentee ballot. There was no evidence that the distribution of absentee ballot applications was done with the intention of keeping these voters away from the polls. Instead, the evidence showed that those who assisted the voters with the absentee ballot applications were motivated by the desire to encourage people to vote. In fact, several tenants of the Towers and 49 Union Avenue testified that they voted at the polls on primary day despite having obtained absentee ballots because they felt well enough to vote at the polls that day. The plaintiff has conceded that she must prove her allegations of election law violations by clear and convincing evidence, a higher burden of proof than the customary fair preponderance of the evidence. *Wilks v. Mouton,* 229 Cal.Rptr. 1, 3 (1986). Based on the evidence presented, the court cannot find that there is clear and convincing evidence that one or more of the defendants influenced or attempted to influence voters to stay away from the election.

The court also questions whether a violation of Conn.Gen.Stat. § 9-364 can be established with evidence of a campaign to provide absentee voter applications and assistance to voters who believe they qualify to vote by absentee ballot. As plaintiff has conceded, the process used does not violate the statutory provisions which set forth in great detail the procedures for applying for and voting by absentee ballot. Plaintiff has offered no precedent for her claim. The court is not persuaded that the legislature intended that the absentee vote application process used here should be found in violation of the general provision of Conn.Gen.Stat. § 9-364 despite the legislature's failure to adopt statutory provisions specifically prohibiting this type of conduct. In 1987, the legislature considered but rejected a proposal which would have prevented campaign workers from distributing absentee ballot applications. Although concerned about the possible abuses of the absentee ballot process, members of the legislature were also very concerned that the right to vote by absentee ballot not be unduly restricted. See transcript of public hearing of Government Administration and Elections Committee, February 9, 1987. The court cannot find any basis for holding that the distribution of absentee ballot applications is a violation of Conn.Gen.Stat. § 9-364.

***5** The plaintiff also argues that the absentee ballot application process used here violated Conn.Gen.Stat. § 9-355 in that it constitutes a neglect of performance with respect to election and primary laws. This claim, which was not clearly formulated, must be rejected on the same basis as the claim under § 9-364. The legislature has rejected provisions which would prohibit campaign workers from distributing absentee ballot applications. There is no

precedent nor any factual basis for finding a violation of § 9-355.

The plaintiff's final claim with respect to the absentee ballots is that Conn.Gen.Stat. § 9-159r was violated in that the registrar of voters failed to supervise the absentee ballot voting at the Towers and 49 Union Avenue. Section 9-159r requires the registrars of voters to supervise absentee ballot voting at any "institution" where twenty or more of the "patients" are electors. "Institution" is to be construed as defined in Conn.Gen.Stat. § 9-159q, which provides for supervision of absentee ballot voting on the request of the administrator of an institution where there are less than twenty electors. "Institution" is defined as "a veterans' health care facility, home for the aged, health care facility for the handicapped, nursing home, rest home, mental health facility, alcohol or drug treatment facility or an infirmary operated by an educational institution for the care of its students, faculty and employees." Although no other statute is incorporated into the definition by reference, the plaintiff argues that the Towers and 49 Union Avenue are "homes for the aged" as defined in Conn.Gen.Stat. § 19a-490. However, § 19a-490 provides that the definition of home for the aged in that section is "[a]s used in this chapter," a chapter of the statutes concerning the licensing and regulation of health care institutions. Even if the definition were applicable to the chapter for election laws, plaintiff has not proven that either the Towers or 49 Union Avenue provides laundry services. Nor is there evidence that the Housing Authority provides any food service at 49 Union Avenue.

Both the Towers and 49 Union Avenue are housing complexes for the elderly and handicapped. Each facility has apartments and/or efficiency units for rental to the elderly and handicapped. Each unit which is rented has its own kitchen and bathroom facilities, although a meal plan is required at one of the two Towers buildings. The units are designed for independent living and the tenants take care of themselves. Although recreational programs and some social services are available, neither facility offers any medical services to its tenants. Neither of these facilities is an "institution" as defined in § 9-159q because no medical services are provided. Section 9-159q emphasizes the medical services by refering to the electors as "patients." In 1987, a proposal was discussed in the legislature for adding public housing complexes to the statute. See public hearing transcript of February 9, 1987, supra, pp. 83, 85. However, that proposal was not adopted and the supervised voting requirement as enacted is intended to apply to "institutions such as nursing homes." Proceedings in the House of Representatives, June 1, 1987, p. 430. The claim that § 9-159r applies to the Towers and 49 Union Avenue is without merit.

***6** The plaintiff's remaining claims arise out of alleged statutory violations apart from the absentee voting. The first of the claims is that the town clerk failed to publish notice of the location of the polling place for the sixth ward, which is part of the 95th District. Conn.Gen.Stat. § 9-435 requires the town clerk to publish notice of the primary, including the location of the polls, in a newspaper with general circulation in the town. On August 21, 1992, the New Haven town clerk published notice of the primary in the legal advertisements of the New Haven Register. The polling place for the sixth ward was shown as Mildin School. After the notice was published, however, the Democratic and Republican registrars decided to change the polling place to West Hills Middle School. The Democratic registrar did not give notice of the change to the town clerk so no corrected notice was published.

To ensure that sixth ward voters had notice of the polling place, the Democratic registrar sent individual notices by mail to each household in the sixth ward. The notice, which was sent approximately one week before the primary, advised sixth ward voters of the location of their polling place and the date and hours of the primary. In addition to this notice, the New Haven Register carried a story on the primary on September 14, 1992, the day before the primary, and included a list of all of the polling places, including the polling place for ward six. The listing was prominently displayed on the upper half of page 4.

The plaintiff contends that the lack of formal notice of the correct polling place in the sixth ward is a jurisdictional defect analogous to the failure to give notice of a zoning meeting. She has cited no precedent for such a claim. The standard, however, for statutory violations in election cases is that of substantial compliance. Where the legislature has adopted mandatory election requirements, at least substantial compliance with the statutes is necessary. *Dombkowski v. Messier,* 164 Conn. 204, 209 (1972); *Wrinn v. Dunleavy,* supra at 149.

The court finds that there was substantial compliance with the statutory notice requirement through written notice mailed to the household of all Democratic voters in the sixth ward. In addition, the September 14, 1992 edition of the New Haven Register provided additional notice of the sixth ward polling date. Moreover, the plaintiff did not produce evidence that

any sixth ward voter was confused about the correct voting location and failed to vote. There was substantial compliance with the statutory notice requirement.

The plaintiff did prove several violations of applicable election statutes. Most of the violations concern the personnel chosen to officiate at the polls. Because of a shortage of election officials, one of the moderators, who was quite experienced, did not have a current certification from the secretary of the state; several voting districts did not have assistant registrars, with the moderator therefore appointed to act also as assistant registrar; election officials were appointed from outside the 95th District; and there was not equal representation of the competing parties in the selection of absentee ballot counters. In addition, one of the moderators, who was pressed into service because of the shortage, had to leave the polls for approximately two hours for an important meeting. (When he did so, he appointed the official checker to act as moderator in his absence.) The plaintiff failed to show, however, that any of these violations had or might have had any impact whatsoever on the results of the primary. A new primary therefore cannot be ordered based on such violations.

*7 The plaintiff's final claim is that two voters were improperly allowed to vote on paper ballots. In the fourth ward both voting machines were inoperable for approximately fifteen to twenty minutes before they could be repaired. During the time when the machines could not be used, two voters appeared at the polls, wanted very much to vote, but could not wait for the machines to be repaired. The moderator therefore permitted the voters to vote by paper ballot, as authorized by Conn.Gen.Stat. § 9-263, which requires that emergency paper ballots be "immediately" permitted. The court finds no merit to the plaintiff's claim.

In light of the court's findings, it is not necessary to address the defendants' special defenses. Judgment is entered for the defendants.

All Citations

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United States District Court, W.D. Virginia,
Lynchburg Division.

LEAGUE OF WOMEN VOTERS OF VIRGINIA, et al., Plaintiffs,
v.
VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Case No. 6:20-CV-00024
|
Signed 05/05/2020

Synopsis

Background: Civic organization and voters brought action against Virginia State Board of Elections and state officials alleging that Virginia's witness signature requirement for absentee ballots was unconstitutional burden on right to vote as applied during COVID-19 pandemic. Political party intervened. Plaintiffs and state defendants moved for approval of consent decree that would enjoin enforcement of witness signature requirement for forthcoming Virginia's primaries.

[Holding:] The District Court, Norman K. Moon, Senior District Judge, held that approval of proposed consent decree was warranted.

Motion granted.

West Headnotes (15)

[1] **Federal Civil Procedure** ⇦ On Consent

Consent decrees have dual nature, carrying elements of both judgment and contract.

[2] **Federal Civil Procedure** ⇦ Form and requisites; validity

Court must scrutinize proposed consent decree's terms in order to determine whether such agreement is fair, adequate, and reasonable, and also ensure that, in approving and issuing consent judgment, court does not stamp its imprimatur upon agreement that is illegal, product of collusion, or against public interest.

[3] **Federal Civil Procedure** ⇦ Approval hearing; entry

In considering whether to enter proposed consent decree, court should be guided by general principle that settlements are encouraged, but should not blindly accept proposed settlement's terms.

[4] **Federal Civil Procedure** ⇦ Approval hearing; entry

In considering whether to enter proposed consent decree, court must assess strength of plaintiff's case, and while this assessment does not require court to conduct trial or rehearsal of trial, court must take necessary steps to ensure that it is able to reach informed, just and reasoned decision; in particular, court should consider extent of discovery that has taken place, stage of proceedings, want of collusion in settlement, and experience of plaintiffs' counsel who negotiated settlement.

[5] **Federal Civil Procedure** ⇦ Approval hearing; entry

In considering whether to enter proposed consent decree, when settlement has been negotiated by specially equipped agency, presumption in favor of settlement is particularly strong.

[6] **Federal Civil Procedure** ⇦ Form and requisites; validity

Approval of proposed consent decree was warranted in action alleging that Virginia's witness signature requirement for absentee ballots was unconstitutional burden on right to vote as applied during COVID-19 pandemic,

even though parties had engaged in little discovery or adversarial activity, where agreement was limited to single primary election, primary was only seven weeks away, plaintiffs gave up their ability to seek attorney fees leading up to that point in litigation, pandemic was likely to pose threat during primary election, substantial burden caused by pandemic on right to vote was not justified by countervailing, demonstrated interests in witness requirement, proposed consent decree was not illegal nor against public interest, proposed consent decree was not product of collusion, and there was no evidence that elimination of witness requirement would meaningfully increase risk of voter fraud. Va. Code Ann. § 24.2-707; 1 Va. Admin. Code § 20-70-20(B).

2 Cases that cite this headnote

[7] **Federal Civil Procedure** ⇦ Approval hearing; entry

In considering whether to enter proposed consent decree, so long as record before court is adequate to reach intelligent and objective opinion of probabilities of ultimate success should claim be litigated and all other factors relevant to full and fair assessment of wisdom of proposed compromise, it is sufficient.

[8] **Constitutional Law** ⇦ Voting rights and suffrage in general

Like other fundamental constitutional rights, right to vote is subject to regulation.

[9] **Election Law** ⇦ Constitutionality and validity

Where burden posed by regulation on right to vote can be characterized as severe, challenged restriction must be narrowly drawn to advance state interest of compelling importance.

[10] **Election Law** ⇦ Constitutionality and validity

Where challenged election regulation imposes only reasonable, nondiscriminatory restrictions upon constitutional rights, it may generally be justified by state's important regulatory interests.

[11] **Federal Civil Procedure** ⇦ Approval hearing; entry

In considering whether to enter proposed consent decree, absent evidence to contrary, court may presume that settlement negotiations were conducted in good faith and that resulting agreement was reached without collusion.

[12] **Federal Courts** ⇦ Rights and interests at stake; adverseness

There is no case or controversy within meaning of Article III when both litigants desire precisely same result. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** ⇦ Approval hearing; entry

While intervenor is entitled to present evidence and have its objections heard at hearings on whether to approve consent decree, it does not have power to block decree merely by withholding its consent.

[14] **Compromise and Settlement** ⇦ Nature and Requisites

Two parties who come to settlement may not dispose of third-party's claims or impose duties or obligations on third party without that party's agreement.

[15] **Federal Civil Procedure** ⇦ Form and requisites; validity

Consent decrees can alter state law rights of third parties where change is necessary to remedy violation of federal law.

West Codenotes

Validity Called into Doubt
Va. Code Ann. § 24.2-707

Attorneys and Law Firms

Davin McKay Rosborough, American Civil Liberties Union Foundation, New York, NY, Vishal Mahendra Agraharkar, American Civil Liberties Union of Virginia Foundation, Richmond, VA, for Plaintiffs.

MEMORANDUM OPINION

NORMAN K. MOON, SENIOR UNITED STATES DISTRICT JUDGE

***1** In this action, League of Women Voters of Virginia and several voters have sued the Virginia State Board of Elections, and a number of state officials, arguing that Virginia's witness signature requirement for absentee ballots is an unconstitutional burden on the right to vote as applied during the COVID-19 pandemic. The parties later reached a partial settlement, and jointly sought approval of a consent decree that would enjoin enforcement of the witness signature requirement for Virginia's primaries on June 23, 2020, for voters who believe they may not safely have a witness present while completing their ballot.

Plaintiffs' case alleges a probable violation of federal law —that is, applying the witness requirement during this pandemic would impose a serious burden on the right to vote, particularly among the elderly, immunocompromised, and other at-risk populations. Weighed against those risks, the present record reflects the likelihood that the burden would not be justified by the witness requirement's purpose as an anti-fraud measure. Thus, the Court finds that the partial settlement in the proposed consent decree is fair, adequate, and reasonable given the strength of the Plaintiffs' case, and that entering it is not against the public interest, illegal, or the product of collusion. The Court will grant the motion, approving the agreement, which has no bearing on Virginia's local elections on May 19, nor does it address future elections.

I. BACKGROUND

A. Factual Background

1. *The COVID-19 Pandemic*

On March 12, 2020, Virginia Governor Ralph Northam declared a state of emergency in response to the public health threat posed by COVID-19, pursuant to Executive Order 51. Dkt. 63 at ¶ 8. Approximately three weeks later, he directed all residents to remain in their homes, subject to limited exceptions, pursuant to Executive Order 53, and later extended that order's restrictions until June 10, 2020, pursuant to Executive Order 55. Dkt. 63 at ¶¶ 9-10. Executive Order 55 directs residents "to practice social-distancing by, among other things, staying at least 'six feet' apart." Dkt. 63 at ¶ 10; *see* Dkt. 1 at ¶ 3. In addition, the federal government has issued guidelines through the Centers for Disease Control and Prevention ("CDC") directing individuals to "stay home as much as possible" [1] and to "put distance between yourself and other people." Dkt. 35-1 at ¶ 6.[2] The CDC has also instructed individuals to "use voting methods that minimize direct contact." *Id.* [3]

***2** On April 24, 2020, Governor Northam released his administration's plan for relaxing the restrictions Virginia has imposed in response to the COVID-19 pandemic. Dkt. 35-1 at ¶ 7.[4] The first phase of this plan will not begin until there have been fourteen days of consistent decline in the in the percentage of positive cases reported each day. *Id.* As of May 5, 2020, data from the Virginia Department of Health demonstrate that this goal has not yet been met.[5] However, on May 4, 2020, Governor Northam announced that restrictions on commercial activities may be eased starting on May 15, 2020, but he reiterated that Virginians-especially those with increased vulnerability to COVID-19-should continue to isolate at home.[6] Regardless of these restrictions, Virginia will still permit in-person voting, along with absentee voting, for the June 23 primary election.[7] Dkt. 63 at ¶ 12.

There is no dispute that, based on the Census Bureau's 2018 Current Population Survey, over twenty-five percent of Virginians over the age of eighteen live alone. Dkt. 1 at ¶ 78.[8] Nor do the parties dispute that some at-risk populations are more likely to live alone, such as Virginians over the age of sixty-five. *Id.* While "[p]eople of every age can and have contracted COVID-19, including severe cases ... geriatric patients are at the greatest risk of severe cases, long-term impairment, and death." Dkt. 16-1 (Declaration of Dr. Arthur L. Reingold) at ¶ 7. This is also true of those "with immunologic conditions and with other pre-existing conditions, such as hypertension, certain heart conditions,

lung diseases ... diabetes mellitus, obesity, and chronic kidney disease." *Id.*

To date, the Virginia Department of Health has calculated over 20,000 confirmed or probable cases of COVID-19, over 2,700 hospitalizations, and over 700 deaths attributed to the disease.[9] The data likely undercount the actual number of positive cases, because of the Commonwealth's limitations with regard to testing capacity. Dkt. 64-4 (Declaration of M. Norman Oliver, Virginia Health Commissioner) at ¶ 12.

2. *Virginia's Absentee Voting Scheme*

Va. Code § 24.2-612 requires that absentee ballots be made available forty-five days prior to the June 23, 2020 primary election-Saturday, May 9, 2020. Dkt. 35-1 at ¶ 8; Dkt. 64-3 (Declaration of Christopher E. Piper) at ¶ 5. Or, in localities whose general registrar is closed on that day, ballots must be made available on Friday, May 8, 2020. *Id.*

***3** General registrars maintain lists of voters who have requested and returned absentee ballots, and absentee ballots are only accepted from voters whose names are on that list. Dkt. 64-3 at ¶ 7. Upon receiving a valid request for an absentee ballot and confirming that the applicant is a registered voter in the jurisdiction, the registrar provides an absentee voter's package which includes the following: a sealed envelope containing the ballot and a second envelope containing printed instructions as well as a "Statement of Voter" form, which the absentee voter is required to sign, attesting to their identity, residency status, and that they "marked the ballot(s) in the presence of [a] witness, without assistance or knowledge on the part of anyone as to the manner in which [the voter] marked it" and that they the voter has "not voted and will not vote in this election at any other time or place." Va. Code § 24.2-706; *see* Dkt. 1 at ¶ 66; Dkt. 63 at ¶ 2. Pertinent here, Va. Code § 24.2-706 and Va. Code § 24.2-707-the provision Plaintiffs challenge as unconstitutional-requires that the absentee voter "mark[ ] the ballot(s) in the presence of [a] witness, without assistance or knowledge on the part of anyone as to the manner in which [the voter] marked it" and that the voter personally attest to the ballot being so witnessed. *See* Dkt. 1 at ¶ 67; Dkt. 63 at ¶ 3. Individuals who make a willfully false material statement or entry on an absentee ballot are at the risk of being charged with a Class 5 felony. Va. Code § 24.2-1012. Those who would sign the name of another qualified voter are at risk of being charged with a Class 4 felony. Va. Code § 24.2-1012.

A voter's failure to obtain a witness signature on their absentee ballot is an omission that is "always material" that renders the ballot invalid. *See* 1 Va. Admin. Code 20-70-20(B); Dkt. 1 at ¶ 70. However, "[t]he illegibility of a voter's or witness's signature ... shall not be considered an omission or error." 1 Va. Admin. Code 20-70-20(C)(10); *see* Dkt. 1 at ¶ 71.

B. Procedural History

On April 17, 2020, the League of Women Voters of Virginia and three individual voters—Katherine D. Crowley, Erikka Goff, and Seijra Toogood—("Plaintiffs") sued the Virginia State Board of Elections and, in their official capacities, its Chairman (Robert H. Brink), Vice-Chair (John O'Bannon), and Secretary (Jamilah D. LeCruise), as well as the Commissioner of the Virginia Department of Elections (Christopher E. Piper) ("State Defendants"), seeking to enjoin enforcement of Va. Code § 24.2-707(A), which mandates that all absentee ballots be signed by a witness before submission. Dkt. 1. ¶¶ 1-2. Given the public health crisis spawned by the COVID-19 pandemic, Plaintiffs argue that the requirement unduly burdens their right to vote. As evidence, Plaintiffs cite Governor Ralph Northam's stay-at-home order presently in effect through June 10, 2020, as well as state and federal government social distancing guidelines. Dkt. 1 ¶¶ 2-3; *see* Va. Executive Order No. 2020-55. Social distancing measures are expected to remain in place until there is a treatment or vaccine for COVID-19. Dkt. 1 at ¶ 35.

On April 21, 2020, Plaintiffs moved for a preliminary injunction that: (1) prohibits State Defendants from enforcing the aforementioned witness requirement for all Virginia voters for the June 23, 2020 primaries and for any and all subsequent elections in Virginia until such time as in-person interactions required by compliance with the witness requirement no longer pose a risk to public health and personal safety; (2) orders State Defendants to issue guidance instructing city and county election officials to count otherwise validly cast absentee ballots that are missing a witness signature for Virginia's June 23 primary elections; and (3) orders State Defendants to conduct a public information campaign informing Virginia voters about the elimination of this requirement, in coordination with city and county election officials. Dkt. 16.

On April 23, 2020, two days after Plaintiffs filed their motion for a preliminary injunction, a group of three voters (Sheila DeLappe Ferguson, Sandy Burchett, and Diane Crickenberger) filed a motion to intervene in this case. Dkt. 22. The next day, the Republican Party of Virginia ("RPV")

together with another three voters (Vincent E. Falter, Mildred H. Scott, and Thomas N. Turner, Jr.) also filed a motion to intervene in this case. Dkt. 28. The Court held a status conference that day with the Plaintiffs, State Defendants, and the proposed intervening parties in order to develop an expedited briefing schedule and entertain the litigants' preliminary views on a variety of other topics. After the motions to intervene were fully briefed, the Court denied both motions to intervene as they related to the six voters, and it permitted the RPV to intervene as a defendant in the suit. Dkts. 55, 57.

*4 On April 27, 2020, Plaintiffs and State Defendants filed their "Joint Motion for Entry of Partial Consent Judgment and Decree," Dkt. 35, which would resolve these parties' dispute over the application of the witness signature requirement for only the upcoming June election. The Court held a second status conference on April 29, 2020, to preliminarily discuss the impact of the joint motion for a partial consent decree on this case. Dkt. 39. On April 30, 2020, the Court received the RPV's brief in opposition to the approval of the consent decree. Dkt. 58. The next day, Plaintiffs and State Defendants filed their reply briefs in support of their proposed agreement. Dkts. 62, 64. That week, the Court also accepted two amicus briefs in this case: one from the Public Interest Legal Foundation ("PILF") and Landmark Legal Foundation, Dkt. 48, and another from The Honest Elections Project, Dkt. 50. It also construed the rejected voter intervenors Sheila DeLappe Ferguson, Sandy Burchett, and Diane Crickenberger's brief in opposition to Plaintiffs' motion for a preliminary injunction as a brief of amicus curiae. Dkt. 55 at 1 n.1.

On May 4, 2020, the Court heard oral argument from Plaintiffs, State Defendants, and Intervenor-Defendant on the merits of both the pending motion for a preliminary injunction, Dkt. 16, and the motion for approval of the consent decree, Dkt. 35. This Memorandum Opinion addresses only the approval of the latter motion. Plaintiffs' motion for a preliminary injunction remains pending. [10]

C. Proposed Settlement Agreement

On April 27, 2020, Plaintiffs and the State Defendants filed their "Joint Motion for Entry of Partial Consent Judgment and Decree," Dkt. 35, which would resolve these parties' dispute over the application of the witness signature requirement for only the upcoming June primary election. The proposed partial consent judgment and decree provides in part:

> Defendants shall issue updated instructions to include with all absentee ballots as provided in Va. Code § 24.2-706—or issue guidance instructing all relevant city and county election officials to modify or amend the printed instructions accompanying each absentee ballot—to inform voters that any absentee ballot cast in the June Primary without a witness signature will not be rejected on that basis and specifically informing voters in bold print that they may disregard the witness signature line on the absentee ballot envelope if they believe they may not safely have a witness present while completing their ballot.

Dkt. 35-1 at 6. The Commissioner of the Virginia Department of Elections would also be required under this agreement to undertake "additional reasonable steps to inform the public that the witness requirement will not be enforced for those absentee voters who believe they may not safely have a witness present while completing their ballot, and issue guidance instructing all relevant city and county election officials to do the same." *Id.* Plaintiffs would then withdraw their motion for a preliminary injunction and waive any entitlement to attorneys' fees and costs that have accrued up to the date the agreement is approved by the Court. *Id.*

To be clear—this agreement only resolves the most pressing matter in dispute between Plaintiffs and State Defendants: the absentee ballot voting requirements for the June 23, 2020 primary election before the ballots are made available on May 8, 2020. It does not affect the requirements for Virginia's local elections held on May 19, 2020, nor any future election. The parties have made clear that this proposed consent decree does not resolve Plaintiffs' claims as to other elections affected by COVID-19 that are scheduled to occur after the June 23, 2020 primaries. Dkt. 36 at 6.

II. LEGAL STANDARD

[1] [2] [3] [4] [5] Consent decrees have a dual nature, carrying elements "of both judgment and contract."

Szaller v. Am. Nat. Red Cross, 293 F.3d 148, 152 (4th Cir. 2002). As such, the Fourth Circuit has instructed courts to scrutinize their terms in order to first determine whether such agreements are "fair, adequate, and reasonable" and also to ensure that in approving and issuing a consent judgment, that a court does not stamp its imprimatur upon an agreement that is "illegal, a product of collusion, or against the public interest." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *see Ohio Valley Envt'l Coalition v. Pocahontas Land Corp.*, No. 2:15-cv-15515, 2017 WL 988115, at *2 (S.D. W. Va. Mar. 14, 2017). In all this, courts should "be guided by the general principle that settlements are encouraged ... [but] should not blindly accept the terms of a proposed settlement." *United States v. North Carolina*, 180 F.3d at 581. Toward these efforts, the Court must assess "the strength of the plaintiff's case," *id.* (citing *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)), and

> ***5** [w]hile this assessment does not require the court to conduct "a trial or a rehearsal of the trial," the court must take the necessary steps to ensure that it is able to reach "an informed, just and reasoned decision." *Id.* (internal quotation marks omitted.) In particular, the "court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement."

Id. (quoting *Carson v. American Brands, Inc.*, 606 F.2d 420, 430 (4th Cir. 1979) (en banc) (Winter, Circuit Judge, dissenting), *adopted by Carson v. Am. Brands, Inc.*, 654 F.2d 300, 301 (4th Cir. 1981) (en banc) (per curiam)); *see United States v. E.J. du Pont de Nemours & Co.*, No. 5:16-cv-00082, 2017 WL 3220449, at *11 (W.D. Va. July 28, 2017). As in this case, "when a settlement has been negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong." *Md. Dept. of Env't v. GenOn Ash Mgmt., LLC*, Nos. 11-cv-1209, 12-cv-3755, 2013 WL 2637475, at *1 (D. Md. June 11, 2013) (citing *U.S. v. City of Welch*, No. 1:11-00647, 2012 WL 385489, at *2 (S.D. W. Va. Feb. 6, 2012)).

III. ANALYSIS

[6] The Court has scrutinized the terms of the proposed settlement agreement, Dkt. 35-1, and all other submissions in the record. As the following analysis explains, the Court has determined that, based on the strength of Plaintiffs' case and the quality of the counsel representing the parties to the agreement, as well as the factors for consideration, the proposed consent decree is "fair, adequate, and reasonable." Further, the Court finds that that this agreement is in the public interest, and that it is not unlawful or the product of collusion between the drafting parties.

A. Fair, Adequate, and Reasonable

In analyzing whether an agreement is fair, adequate, and reasonable, the Court must examine the strength of the plaintiff's case. *United States v. North Carolina*, 180 F.3d at 581 (citing *Flinn*, 528 F.2d at 1172-73). The Fourth Circuit has further directed courts to consider "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who adopted the settlement." *United States v. North Carolina*, 180 F.3d at 581.

The Court begins by considering the experience of counsel who proposed the settlement, *see id.*, and finds that the American Civil Liberties Union and American Civil Liberties Union of Virginia have provided fair and adequate legal counsel in representing Plaintiffs in the adoption of the partial settlement agreement. *See Carcano v. Cooper*, No. 1:16-cv-236, 2019 WL 3302208, at *6 (M.D.N.C. July 23, 2019) (assessing fairness and adequacy of proposed settlement and determining that the plaintiffs were "well-represented" by the American Civil Liberties Union of North Carolina). The same can be said for the representation provided to the State Defendants in this case by the Virginia Office of the Attorney General.

Next, as to the "stage of the proceedings," *United States v. North Carolina*, 180 F.3d at 581, given the unusually expedited nature of these proceedings, the parties have not engaged in any discovery to be sure. In fact, given that Plaintiffs' complaint was filed just over two weeks ago, the time for State Defendants to file a responsive pleading has not yet even passed. However, there is little indication this is a case for which the length or amount of discovery, or indeed any discovery at all *from defendants* will be particularly relevant to the strength of Plaintiffs' case. Unlike many other lawsuits, many of the documents necessary to prove Plaintiffs' case are not uniquely in the State Defendants' possession. Rather, Plaintiffs would presumably rely, as they have thus far in this action, on government reports, state and federal public health policies and orders, as well as the declarations of experts in order to demonstrate that the witness signature requirement has impermissibly burdened a segment of the electorate. As such, the lack of discovery

from State Defendants in this case is not as relevant of a consideration as it might otherwise be.

*6 The Republican Party of Virginia, or "RPV," cites the opinion of one of our sister courts in this Circuit for the proposition that "[w]here there has been little adversarial activity, a federal court must be especially discerning when presented with a proposal in which elected state officials seek to bind their successors as to a matter about which there is substantial political disagreement." Dkt. 58 at 17 (quoting *Carcano*, 2019 WL 3302208, at *6). Given the expedited nature of the case and consequently the limited opportunities for adversarial testing to date, this Court agrees with the RPV that it should be particularly discerning in determining whether the agreement is fair, adequate, and reasonable. However, weighing in Plaintiffs' and State Defendants' favor is the fact that this partial settlement agreement is expressly short term. It applies to only the June 23, 2020 primary election, which is no more than seven weeks away. In no reasonable terms does the record point to a conclusion that the agreement will bind successors in office in any way. *Horne v. Flores*, 557 U.S. 433, 449, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009); *Carcano*, 2019 WL 3302208, at *6 (stating that "where there has been little adversarial activity, a federal court must be especially discerning when presented with a proposal in which elected state officials seek to bind their successors").

The Court also finds that the limited nature of the settlement agreement's relief weighs in favor of a finding that it is "fair, adequate, and reasonable." *See United States v. North Carolina*, 180 F.3d at 581. The parties have agreed to a settlement that does not address their entire dispute, nor does it provide all the relief Plaintiffs sought in their motion for preliminary injunction, which would have applied to elections beyond the June 23, 2020 primary election. Rather, the proposed agreement deals with only the most pressing issue in this litigation: the requirements to vote in the June 23, 2020 primary election. Dkt. 36 at 6 (joint brief supporting partial consent judgment) ("Plaintiffs will continue to seek [relief for elections beyond the June Primary affected by COVID-19] as this litigation moves forward."). Nor can the relief be said to be wholly one-sided. Plaintiffs have given up their ability to seek attorneys' fees leading up to this point in the litigation. Dkt. 35-1 at ¶ 14. Given the number of extensive briefs filed to date, the Court expects that is not an insignificant sum Plaintiffs have agreed to take off the table. The RPV argues that the first of these compromises is illusory, because any suit related to the November election is not yet ripe. But given the evidence in the record that the COVID-19 pandemic will likely pose a threat during that election, whether that claim is ripe for adjudication is a legal question for which an answer is far from clear. *See* Dkt. 17-1 at ¶¶ 12-15 (stating that disease transmission will continue until a vaccine has been developed and placed into wide use or herd immunity is obtained, neither of which are expected in 2020); 35-1 at ¶ 3 (suggesting continued community transmission through the summer and into the fall of 2020). Limiting the relief sought by Plaintiffs to just this election is not an "illusory" promise.

[7] It is also significant to the Court that Plaintiffs have pleaded a probable violation of federal law. *See Kasper v. Bd. of Election Comm'rs of the City of Chi.*, 814 F.2d 332, 342 (concluding the district court was right to insist "on a demonstration of at least a probable violation of that law as a condition to the entry of this decree" that would enjoin a state statute). Indeed, the existence of a probable violation of federal law further speaks to the strength of Plaintiffs' case against the State Defendants. *See United States v. North Carolina*, 180 F.3d at 581 ("While this assessment does not require the court to conduct 'a trial or a rehearsal of the trial,' the court must take the necessary steps to ensure that it is able to reach 'an informed, just and reasoned decision.' "); *Flinn*, 528 F.2d at 1172 (stating that "the most important factor to be considered in determining whether there has been such a clear abuse of discretion [in approving a settlement] is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits"). Thus, while the Court need not decide whether Plaintiffs had established their claim "to a legal certainty," nor need it reach "any dispositive conclusions on ... unsettled legal issues in the case," *Flinn*, 528 F.2d at 1172-73 (internal quotations omitted), it is appropriate and necessary to examine the merits of Plaintiffs' settled claims in order to determine whether success was at least probable, *cf. Kasper*, 814 F.2d at 342. "So long as the record before it is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated ... and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Flinn*, 528 F.2d at 1173.

*7 In their complaint, Plaintiffs allege that the witness signature requirement places a severe burden on those Virginia voters who live alone, and especially those who have a preexisting health condition or are immunocompromised. This is because, as Plaintiffs allege, the requirement forces them to interact with another individual, risking COVID-19 transmission, in order to exercise their right to vote. Each of the individual Plaintiffs, who all live alone, have alleged that

they do not feel safe interacting with a witness in order to fulfill the requirement. And so, despite their desire to vote in upcoming elections, they feel they must refrain from voting. Plaintiff League of Women Voters of Virginia ("the League") has "nearly 2,000 members across Virginia, some of whom live alone and are vulnerable to becoming severely ill from COVID-19 because they are elderly and/or have underlying health conditions." Dkt. 1 at 7. The League claims that some amount of these members will be unable to comply with the witness requirement on absentee voting "without placing their own health at risk." *Id.*

[8] Like other fundamental constitutional rights, the right to vote is subject to regulation. At least with regard to federal elections, the Elections Clause of the Constitution anticipates this: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...." U.S. Const. art. I, § 4, cl. 1.

[9] **[10]** When evaluating a purportedly unconstitutional burden on the right to vote, courts resort to the framework that the U.S. Supreme Court set forward in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), which has become known as the *Anderson-Burdick* balancing test. This inquiry's rigorousness depends on the severity of the constitutional burden posed by the challenged regulation. *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 175 (4th Cir. 2017). Where the burden posed by the regulation can be characterized as "severe," the challenged restriction must "be narrowly drawn to advance a state interest of compelling importance," *id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)), otherwise known as strict scrutiny, *see Fusaro v. Cogan*, 930 F.3d 241, 257-58 (4th Cir. 2019) (quoting *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995)). The class of state election laws that are subject to strict scrutiny is "limited." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016). However, where the challenged election regulation "imposes only reasonable, nondiscriminatory restrictions" upon constitutional rights, it may generally be justified by "the State's important regulatory interests." *Marcellus*, 849 F.3d at 175 (quoting *Norman*, 502 U.S. at 289, 112 S.Ct. 698). The *Anderson-Burdick* balancing test requires the court to measure "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden." *Anderson*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547; *Democratic Nat'l Comm. v. Bostelmann*, —— F.Supp.3d ——, ——, 2020 WL 1638374, at *11 (W.D. Wisc. Apr. 2, 2020) (applying *Anderson-Burdick* test in evaluating a similar witness signature requirement); *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 948 (W.D. Va. 2018).

The Supreme Court has made clear that it has not identified any "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford v. Marion Cty. Election Bd.*, 553, U.S. 181, 191 (2008). Rather, "however slight that burden may appear" the reviewing court must find that it is "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 288-89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) ("We believe that a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.").

***8** In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing-where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household-the burden is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become "both too restrictive and not restrictive enough to effectively prevent voter fraud." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016).

On the one hand, the measure is too restrictive in that it will force a large class of Virginians to face the choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right-and, indeed, their civic duty-to vote in an election. The Constitution does not permit a state to force such a choice on its electorate. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

The RPV argues that concerns of the health risks associated with the witness requirement are either overblown or can be mitigated if, for example, the absentee voter asks the witness to "observe the act of voting the ballot from more

than six feet away" and then sign as witness later "from a safe distance," accompanied by handwashing. *See* Dkt. 63 at 6 (¶ 17); *see* May 4, 2020 Hr'g Draft Tr. at 37-38 (arguing that employing "practices employed by people throughout the Commonwealth" like "wearing masks," or other "common sense" steps, can sufficiently mitigate risks). And, to be sure, those voting absentee with a witness would be well-advised to practice social distancing.

But for many—especially the elderly, immunocompromised, and others at greatest risk of medical complications or death if they contract the virus—such measures come up far short. Indeed, evidence in the record reflects that that the virus can be transmitted with "ease"—including by droplet transmission when an infected individual sneezes, coughs, and the like; and potentially also through "tiny droplets containing the virus remain in the air and can be inhaled"- and further, individuals who are infected with the virus can transmit the virus before they develop any symptoms. Dkt. 16-1 (Declaration of Dr. Arthur L. Reingold) ¶¶ 8, 10, Dkt. 17-1. *Id.* ¶¶ 8, 10; *see also* CDC, How COVID-19 Spreads ("The virus that causes COVID-19 is spreading very easily and sustainably between people."). [11] Evidence in the record also reflects that "the only ways to limit [COVID-19's] spread are self-isolation, social distancing, frequent handwashing, and disinfecting surfaces"; that "[s]elf-isolation involves not physically interacting with those outside one's home"; and that social distancing involves "maintaining at least six feet of distance between individuals." Dkt. 16-1 at ¶ 10; Dkt. 17-1. Substantially similar advice is being given by federal, state, and local health officials-to keep distance with others outside the home whenever possible. Notwithstanding the proffered steps which could be taken to mitigate the risks to health in having somebody witness one's absentee ballot, many would be dissuaded from exercising their vote both on account of the remaining health risks and required steps to mitigate them-again, especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus. That substantial burden on the right to vote has not been justified by countervailing, demonstrated interests in the witness requirement.

*9 Indeed, the witness signature requirement is not restrictive enough in that the record does not demonstrate that it is especially effective in preventing voter fraud. [12] Although it is nowhere near dispositive of the issue, at the Court's hearing on May 4, 2020, counsel for the RPV conceded that he was unaware of any quantitative data "one way or the other" on the witness signature requirement's efficacy. The Court does find persuasive, however, the enforcement weaknesses apparent in the statute. For example, the witness need not print their name or the date below their signature-in fact, the Commonwealth does not require that the witness be identified in any way whatsoever. What is more, the illegibility of the witness signature is not grounds for rejecting the ballot. 1 Va. Admin. Code 20-70-20(B). [13]

And, while at least one amicus brief in the record has put forward research which it argues documents the incidence of voter fraud in the Commonwealth, Dkt. 48 (amicus brief of PILF and Landmark Legal Foundation) (providing research that it claims demonstrates portions of Virginia's voter roll could be matched to individuals with a "verifiable record of death"), there is no evidence in the record at this time that even suggests that permitting some voters to opt-out of the witness signature requirement would increase voter fraud in a meaningful way. *See* Dkt. 64-3 (Declaration of Christopher Piper, Commissioner of Virginia Department of Elections) ("Voter list maintenance is entirely unrelated to the witness requirement."). This is particularly true when considering all of the other means of combatting voter fraud integrated into the absentee-voting system. For example, in addition to risking serious felony charges for absentee voting malfeasance, general registrars maintain a separate list of voters, aside from the general voter rolls, who have requested and returned absentee ballots, and absentee ballots are only accepted from voters whose names are on that list. Dkt. 64-3 at ¶ 7. For the fraudster who would dare to sign the name of another qualified voter at the risk of being charged with Class 4 and Class 5 felonies, Va. Code § 24.2-1012 & 1016, writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle—at least based on the record before the Court.

Because of the compromises the parties reached during settlement, experience of the counsel in this case, and the clear strength of the Plaintiffs' case against the State Defendants, the Court concludes that the proposed partial settlement agreement is fair, adequate, and reasonable. *See United States v. North Carolina*, 180 F.3d at 581.

B. Settlement's Relationship to the Public Interest

The RPV argues that the public interest is served "by respecting state control over electoral processes" and so it contends that this Court cannot enter a consent decree without first making a finding that the state law to be enjoined by the consent decree violates federal law. At the outset, the Court

notes that it is unsurprising the parties did not agree that the witness requirement is deficient in the eyes of the federal Constitution. The proposed consent decree only partially settles the dispute between them, and the remaining claims as to later elections hinge on the same constitutional question at issue in the settled claim: whether the witness signature requirement passes constitutional muster. Unless the parties were to settle the entire suit, it would be imprudent for any lawyer to make such a sweeping concession. Nor would it matter much if it did. The Court could not accept on the basis of a state executive's mere agreement that a state statute was constitutionally infirm. The ability to make such a finding is unique to the judicial branch. *See Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 286-87 (1st Cir. 1986) (holding that the district court could not enter a declarative judgment declaring a state statute invalid merely based on the "agreement of the parties").

***10** The parties vigorously debate how the Seventh Circuit's reasoning in *Kasper v. Board of Election Commissioners of the City of Chicago*, 814 F.2d 332 (7th Cir. 1987) (Easterbrook, J.), applies to this case. *See, e.g.*, Dkt. 58 at 18; Dkt. 62, at 8; Dkt. 64 at 3. In particular, the RPV points to that court's articulation that "[a]n alteration of the [state] statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law." Dkt. 58 at 18 (quoting *Kasper*, 814 F.2d at 342). That principle makes a great deal of sense. As the *Kasper* court stated, "The Board may not 'consent' to a higher budget or a new organic statute. Its Commissioners could not 'consent' to be free of the threat of removal by the circuit court; it is equally outside the power of the Board to agree to violate state law in other ways." *Id.*; *see Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993) (en banc) (stating that "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law. Unless there is such a claim, the consent decree is no more than a contract, whose enforcement cannot be supported by the diversity jurisdiction and that has in court no more force than it would have outside of court").

The Seventh Circuit concluded that it was therefore appropriate for the district court to insist "on a demonstration of at least a probable violation of that law as a condition to the entry of this decree." *Id.* (finding that the consent decree could not be entered because plaintiffs' complaint did not allege a violation of federal law). At bottom, the *Kasper* court's reasoning speaks to the nature of a consent decree as both a contract and a judgment. *Szaller v. Am. Nat. Red Cross*, 293 F.3d 148, 152 (4th Cir. 2002). Just as a state party could not contract away an obligation to act in accordance with the law, a district court cannot ratify such an agreement through a consent decree. *Kasper*, 814 F.2d 332 ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them.").

The RPV's concern that the executive branch of Virginia might seek the shield of a federal judgment in order to provide it free reign to ignore acts of the legislature would be more concerning to this Court, however, if Plaintiffs' case did not actually demonstrate a probable violation of federal law, but that is not the case here. *See supra* Part III.A (evaluating strength of Plaintiffs' federal constitutional claim). A consent decree, like the one before this Court, that permits the State Defendants to avoid the likely unconstitutional application of a state law-at least with regard to the June primary election —is neither unlawful, nor against the public interest. *See Common Cause Jnd. v. Marion Cty. Election Bd.*, No. 1:17-cv-01388, 2018 WL 3770134, at *2 (S.D. Ind. Aug. 9, 2018) (holding that intervening party the State of Indiana's objection to a consent decree governing early in-person voting that "was necessary to remedy a probable violation of federal law" was not compelling because it only argued that "it is not in the public interest for a federal court to enter, enforce, and monitor a consent decree that dictates the operation of state-run elections"). While the RPV argues that the public interest is served "by respecting state control over electoral processes," it is better served when parties come to a settlement agreement over an electoral process that is likely being applied unconstitutionally. *Id.* ("The State's lawyers may entertain what preferences they will, but violations of federal rights justify the imposition of federal remedies."). This is particularly true in the context of this agreement, which takes place during the worst pandemic this state, country, and planet has seen in over a century. The public health implications have been vast and unprecedented in the modern era, with no one left untouched by the risk of transmission. The evidence in the record points to the conclusion that adherence to the witness signature requirement in June would only increase that risk. *See, e.g.*, Dkt. 35-1 at ¶ 3 (citing research from University of Virginia researchers predicting that if current restrictions remain in place through June 10, 2020, "COVID-19 cases in Virginia will likely not peak until approximately August."); Dkt. 16-1 (Declaration of Dr. Arthur L. Reingold) at ¶ 16.

*11 For these reasons, the Court also concludes that the proposed consent decree is not illegal nor against the public interest. *See United States v. North Carolina*, 180 F.3d at 581.

C. Product of Collusion

[11] "Absent evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *McCurley v. Flowers Foods, Jnc.*, No. 5:16-cv-00194, 2018 WL 6650138, at *2 (D.S.C. Sept. 10, 2018) (internal quotations omitted)); *Funkhouser v. City of Portsmouth*, No. 2:13-cv-520, 2015 WL 12765639, at *3 (E.D. Va. May 14, 2015) ("In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred.").

[12] Intervenor-Defendant RPV argues that the proposed consent agreement carries "too many hallmarks of collusion" in order to pass the Court's muster. Principally, the RPV points to how the State Defendants "have so far failed to defend the absentee ballot witness statute." Dkt. 58 at 17. Rather, the RPV contends that their decision to "almost immediately ... enter into the Consent Decree to enjoin its use, [to] issue[ ] a press release touting their deal" and to oppose the RPV's intervention in this suit, "which would leave the statute having no defender in [c]ourt," provides strong circumstantial evidence of collusion. *Id.* The RPV correctly states that

> a judgment entered into by non-adverse parties "is no judgment of the court. It is a nullity ...." *Lord v. Veazie*, 49 U.S. 251, 256[, 8 How. 251], 12 L.Ed. 1067 (1850). Put another way, there is "no case or controversy within the meaning of Art. III of the Constitution" when "both litigants desire precisely the same result ...." *Moore v. Charlotte-Mecklenburg Bd. of [Educ.]*, 402 U.S. 47, 47-48, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971).

Dkt. 58. But that is not the case before this Court. Rather, as the parties have made express both during the status conference on April 29, 2020, the proposed settlement does not resolve all of the issues in this case. *See, e.g.*, Dkt. 36 at 6 (joint brief supporting partial consent judgment) ("Plaintiffs will continue to seek [relief for elections beyond the June Primary affected by COVID-19] as this litigation moves forward."). Rather, this *partial* consent decree resolves the dispute between them only as to the June 23, 2020 primary election.

Although the Court notes that State Defendants have not filed a brief in opposition to Plaintiffs' preliminary injunction, nor have they entered a responsive pleading to Plaintiffs' complaint, State Defendants' litigation posture is fully consistent with an arms-length negotiation among opposing parties to seek a negotiated solution to a narrow, immediate dispute rather than collusion. For example, pursuant to their proposed settlement, Plaintiffs have agreed to retract their preliminary injunction. And, given that Plaintiffs' complaint was filed a little over two weeks ago, the deadline for State Defendants to file their responsive pleading has not yet passed. That State Defendants would oppose intervening parties-even one attempting to intervene as defendants in this suit, as the RPV has done—after negotiating a settlement agreement with the Plaintiffs is neither a surprise nor a hallmark of collusion.

*12 Moreover, as Plaintiffs and State Defendants highlight, the cases that the RPV cites that had found collusion do not remotely resemble the situation presented by this case. For example, in *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 47-48, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971), the Supreme Court stated that "at the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that order of the district court adopting the [plan] should be set aside." Because the Court was "confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional," it held that there was no case or controversy as required under Article III of the U.S. Constitution. The Supreme Court's opinion in *United States v. Johnson* presents perhaps the most extraordinary facts of the cases that the RVP cited. In that case, the Supreme Court found that

> [t]he affidavit of the plaintiff, submitted by the Government on its motion to dismiss the suit as collusive, shows without contradiction that he brought the present proceeding in a fictitious name; that it was instituted as a 'friendly suit' at appellee's request; that the plaintiff did not employ, pay, or even meet, the attorney who appeared of record in his behalf; that he had no knowledge who paid the $15 filing fee in the district court, but was assured by appellee that as plaintiff he would incur no expense in bringing the suit; that he did not

> read the complaint which was filed in his name as plaintiff; that in his conferences with the appellee and appellee's attorney of record, nothing was said concerning treble damages and he had no knowledge of the amount of the judgment prayed until he read of it in a local newspaper. Appellee's counter-affidavit did not deny these allegations.

319 U.S. 302, 303-04, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). In comparison, the facts presented by *Lord v. Veazie*, which the RVP also cites, are far 'tamer,' given the Supreme Court merely found that "a number of affidavits were filed ... [that] proved that none of the persons whose interest was adverse to that of the plaintiff and defendant had any knowledge of these proceedings, until after the case was removed to this court." 49 U.S. 251, 253, 8 How. 251, 12 L.Ed. 1067 (1850).

Similar to this case, the Middle District of North Carolina recently encountered in *Carcano v. Cooper*, 2019 WL 3302208, an intervenor-defendant who claimed that the plaintiffs and the state defendants in the case "were not in reality opposed to each another and, therefore, that any proposed consent decree is necessarily collusive." *Id.* at *6. That court found that the state executive branch defendants "certainly had little interest in litigating [the] case," failing to file a responsive pleading or pre-answer motion, such as a motion to dismiss, to the plaintiff's fourth amended complaint in the nearly two years after it had been filed. What is more, the defendants in that case failed to "evince any support for [the intervenor-defendants'] attempts to obtain dismissal on their behalf, despite the fact that-as the court's ruling on [intervenor-defendant's] motion to dismiss explains-the majority of [plaintiffs'] claims have been found to lack merit." *Id.* The Court at least suggested that the lack of interest in litigating the case may have been the result of the change in the executive administration. *Jd.* ("It is certainly true that, unlike their immediate predecessors, the Executive Branch Defendants have shown little interest in litigating this case."). Despite the want of a thoroughly adversarial process at that point of the litigation, the court in that case approved the proposed consent decree, because it found that it was still fair, adequate, reasonable, and was not against the public interest, unlawful, or a product of collusion. In comparison, the State Defendants in the instant case have similarly failed to file any motion to dismiss or a responsive pleading, but the comparisons end there. Indeed, rather than letting nearly two years pass, the State Defendants still have several days to timely make such filings. Further, Plaintiffs' claim, at least as to the June election, has significant merit. *See supra* Part II.B. Given these considerations, this Court has even more reason than the *Carcano* court to look beyond such adversarial deficiencies.

*13 And, unlike in the cases that the RPV has cited, there is nothing in the record that points to any collusion between Plaintiffs and State Defendants in filing this lawsuit and coming to their proposed settlement agreement. Rather, Plaintiffs formally provided notice to the State Defendants of their intent to sue on April 15, 2020, Dkt. 62-1 at 1, two days before they filed their suit and twelve days after the proposed partial settlement was filed with the Court, Dkt. 35. That they came to at least a partial agreement so swiftly might be more remarkable in a case that moved at an average pace. But given the obvious interest in obtaining a resolution in this case before absentee ballot packages for the June primary are prepared and made available to registered absentee voters beginning on May 8, 2020-so as to limit voter confusion over any necessary change in the witness signature requirement and conserve resources in preparing the ballots and printing ballot instructions-the swift timing of an agreement nearly two months in advance of the June 23, 2020 primary is not altogether remarkable.

Lastly, while the parties would have done far better to have remained silent as to the prospects of a settlement agreement that had not yet been approved, it is far from unusual for counsel to refer to a settlement agreement that they negotiated as a "win" for their clients, even defendants. Because the RPV can point to no more than speculation, the Court finds that the record does not support a finding that the agreement was the product of collusion. *See Funkhouser*, 2015 WL 12765639, at *3 (E.D. Va. May 14, 2015) ("In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred."). Accordingly, the Court finds the proposed consent decree is not a product of collusion. *See United States v. North Carolina*, 180 F.3d at 581.

D. Burdens on Third-Party Obligations, Rights, or Duties

[13] The U.S. Supreme Court in its opinion in *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), speaks to the situation before this Court:

> A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party-whether an original party, a party that was joined later, or an intervenor-could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to. Block the decree merely by withholding its consent.

See Sierra Club v. North Dakota, 868 F.3d 1062, 1067 (9th Cir. 2017) ("The Supreme Court adopted this approach for good reason; otherwise, one party could hold the other parties hostage in ongoing litigation, and a global settlement or judgment would be the only option."). As the Ninth Circuit has remarked, the rule is "especially applicable" where the intervenor, among other things, participates in the hearing on the proposed consent decree and briefs the proposed remedy. *Sierra Club*, 868 F.3d at 1067 ("The notion that the Consent Decree breezed through without the [intervenors'] input or due consideration by the district court is belied by the record.").

[14] The *Local No. 93* Court went on to explain that two parties who come to a settlement may not of course dispose of a third-party's claims or impose "duties or obligations on a third party, without that party's agreement." *Local No. 93*, 478 U.S. at 529, 106 S.Ct. 3063. The RPV argues that the proposed agreement before the Court does just that. It claims that its "statutory and constitutionally protected interest in the conduct of its own primary" is impacted by the elimination of the witness signature requirement for the contests held on June 23, 2020. Dkt. 58 at 11. Specifically, the RPV claims that the requirement's elimination would force it to "[a]ccept a risk of fraudulent or otherwise unauthorized voting in that primary" and that it endangers its interest, both for itself and its members, "in preventing voter fraud and enhancing public confidence in the integrity of elections." *Id.*

*14 This Court is not convinced. While the record does contain some information on the incidence of voter fraud, including its higher incidence in absentee voting, Dkt. 63 at ¶ 31; *see also* Dkt. 48 (amicus brief of PILF and Landmark Legal Foundation) (providing research that it claims demonstrates portions of Virginia's voter roll could be matched to individuals with a "verifiable record of death"), there is nothing in the record that would permit the Court to draw the conclusion that elimination of the witness requirement as it is currently enforced would do anything to meaningfully increase that risk. *See* Dkt. 64-3 (Declaration of Christopher Piper, Commissioner of Virginia Department of Elections) ("Voter list maintenance is entirely unrelated to the witness requirement."). In fact, as the Court has already explained, *supra* Part II.B, this is particularly true when considering all of the other means of combatting voter fraud integrated into the absentee-voting system. Even assuming that the elimination of the requirement did increase voter fraud in a meaningful way, the proposed consent decree does bind the RPV to take or not to take any action. *Local No. 93*, 478 U.S. at 529-30, 106 S.Ct. 3063. In fact, it does not reference the RPV or any other political party whatsoever. "It imposes no legal duties or obligations" on the RPV and "only the parties to the decree can be held in contempt of court for failure to comply with its terms." *Id.* And, lastly, the consent decree does not purport to resolve or otherwise extinguish any claims that the RPV might have. *Id.*

[15] Rather, this consent decree's scope is quite limited: it affects one of several verification requirements that the Commonwealth must accept for a single election's absentee ballots. In doing so, it does not involve any of the RPV's statutory functions or rights in providing for the nomination of its candidates. Va. Code § 24.2-508. Even still, "consent decrees can alter the state law rights of third parties ... where the change is necessary to remedy a violation of federal law." *State v. City of Chicago*, 912 F.3d 979, 988 (7th Cir. 2019) (internal citations and quotations omitted). Accordingly, even if the RPV had or needed standing to raise its objections, such objections would not warrant rejection of the proposed agreement.

IV. CONCLUSION

For the foregoing reasons, the Court will approve the proposed settlement agreement, Dkt. 35-1. It finds that the agreement is fair, adequate, and reasonable and, further,

it is not the product of collusion, illegal, or against the public interest. Lastly, the agreement does not purport to extinguish the claims of any third party, nor does it impose any obligations or duties on any third party.

All Citations

--- F.Supp.3d ----, 2020 WL 2158249

Footnotes

1 quoting Centers for Disease Control and Prevention, *Coronavirus Disease 2019: What You Can Do*, available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/what-you-can-do.html (last accessed May 4, 2020).

2 quoting Centers for Disease Control and Prevention, *Coronavirus Disease 2019: How to Protect Yourself*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last accessed May 4, 2020).

3 quoting Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations*, available at https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last accessed May 5, 2020).

4 citing Virginia Governor, *Forward Virginia: A Blueprint for Easing Public Health Restrictions*, April 24, 2020 available at https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Slide-Deck-4-24-2020-.pdf (last accessed May 5, 2020).

5 Virginia Department of Health, *COVID-19 & You*, available at https://www.vdh.virginia.gov/coronavirus/ (last accessed May 4, 2020).

6 Virginia Governor, *Governor Outlines Phased Plan to Safely, Gradually Ease Restrictions*, May 4, 2020, available at https://www.governor.virginia.gov//media/governorvirginiagov/governor-of-virginia/pdf/Forward-Virginia-Presentation-5.4.pdf.

7 The June 23 primary features several intraparty races for U.S. House of Representative seats, Democratic primaries for five local elections, and a Republican primary for the U.S. Senate Seat currently held by Sen. Mark Warner. *See* Va. Dept. of Elections, *Certified Candidates in Ballot Order for June 23, 2020 Primary Elections*, available at www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-(4)-1.pdf (last accessed May 5, 2020).

8 citing 2018 Current Population Survey, U.S. Census Bureau, statistics accessed by using the Census Bureau Current Population Survey Table Creator tool at https://www.census.gov/cps/data/cpstablecreator.html.

9 Virginia Department of Health, *COVID-19 & You*, available at https://www.vdh.virginia.gov/coronavirus/ (last accessed May 5, 2020).

10 Although the Court notes that, pursuant to the proposed consent agreement, Plaintiffs have agreed to withdraw their motion for a preliminary injunction upon approval of the agreement. Dkt. 35-1 at ¶ 12.

11 https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

12 None of the parties dispute that this is the state's justification for the requirement.

13 Indeed, although a witness requirement is seemingly easy to implement, a significant majority of the states have chosen other means to combat voter fraud. The Commonwealth is only one of eleven states that has a witness or notarization requirement. Dkt. 17 at 22 (citing Chart, "Verifying Authenticity of Absentee/Mailed Ballots," Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Nat'l Conf. of State Legislatures (Apr. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx and collecting state statutes).

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2020 WL 2617329
Only the Westlaw citation is currently available.
United States District Court, D. South Carolina, Columbia Division.

Mary T. THOMAS, Nea Richard, Jeremy Rutledge, Trena Walker, Dr. Brenda Williams, and The Family Unit, Inc., Plaintiffs,
v.
Marci ANDINO, as Executive Director of the State Election Commission, John Wells in his official capacity as Chair of SC State Election Commission, Clifford J. Edler 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.
Kylon Middleton; Deon Tedder; Amos Wells; Carylye Dixon; Tonya Winbush; Ernestine Moore; South Carolina Democratic Party; DNC Services Corporation/Democratic National Committee and DCCC, Plaintiffs,
v.
Marci Andino, in her official capacity as Executive Director of the South Carolina State Election Commission, John Wells in his official capacity as Chair of South Carolina State Election Commission, and Clifford J. Edler and Scott Moseley, in their official capacities as members of the South Carolina State Election Commission, Defendants.

Civil Action No. 3:20-cv-01552-JMC,
Civil Action No. 3:20-cv-01730-JMC
|
Signed 05/25/2020

Synopsis

Background: Voters registered in South Carolina and non-profit corporations brought related actions seeking declaratory and injunctive relief against Governor of South Carolina, officials of South Carolina State Election Commission (SCEC) and other related officials, alleging specified state laws regarding voting by absentee ballot violated fundamental right to vote under First and Fourteenth Amendment and the Voting Rights Act due to health risks caused by COVID-19 pandemic. Plaintiffs moved for preliminary injunction enjoining voting requirements under specified laws during primary election.

Holdings: The District Court, J. Michelle Childs, J., held that:

[1] plaintiffs possessed Article III standing to bring actions;

[2] voters and corporation were likely to prevail on the merits of their claim that South Carolina's statutory requirement that a witness be present when a voter signed their absentee ballot violated voting rights, as required for entry of preliminary injunction enjoining requirement during primary election due to COVID-19 pandemic;

[3] voters and corporation were likely to sustain irreparable injury, due to requirement, absent entry of preliminary injunction;

[4] balance of equities and public interest factors weighed in favor of entry of preliminary injunction enjoining requirement;

[5] it was appropriate to waive posting of bond in connection with entry of preliminary injunction;

[6] voters and corporations were not entitled to entry of preliminary injunction enjoining voting deadline requirement and effectively extending deadline for 10 days due to COVID-19 pandemic; and

[7] voters and corporation were not entitled to preliminary injunction enjoining statutory requirement that a witness be present when a voter signed their absentee ballot on basis that requirement violated provision of Voting Rights Act prohibiting use of "test or device" to prove qualifications for voting.

Motion granted in part and denied in part.

West Headnotes (37)

[1] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure ⇦ Causation; redressability

To possess the requisite standing under Article III to assert a claim, plaintiff must meet three requirements: (1) it has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[2] **Federal Courts** ⇦ Presumptions and burden of proof

The party attempting to invoke federal jurisdiction bears the burden of establishing Article III standing to bring a claim. U.S. Const. art. 3, § 2, cl. 1.

[3] **Federal Civil Procedure** ⇦ In general; injury or interest

For an injury in fact to be "particularized," as required for plaintiff to possess Article III standing to bring claim, the injury must affect the plaintiff in a personal and individual way; there must be some connection between plaintiff and defendant that differentiates plaintiff so his or her injury is not common to all members of the public. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** ⇦ Rights of third parties or public

The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance for purposes of Article III standing, as long as each individual suffers a particularized harm. U.S. Const. art. 3, § 2, cl. 1.

[5] **Election Law** ⇦ Persons entitled to bring contest

Voters who allege facts showing disadvantage to themselves as individuals have Article III standing to sue. U.S. Const. art. 3, § 2, cl. 1.

[6] **Corporations and Business Organizations** ⇦ Civil Actions

Declaratory Judgment ⇦ Subjects of relief in general

Injunction ⇦ Persons entitled to apply; standing

Voters registered in South Carolina and non-profit corporation possessed Article III standing to bring related actions seeking declaratory and injunctive relief against Governor of South Carolina, officials of South Carolina State Election Commission (SCEC) and other related officials, alleging specified state laws regarding voting by absentee ballot violated fundamental right to vote under First and Fourteenth Amendment and the Voting Rights Act due to health risks caused by COVID-19 pandemic; each plaintiff was integrally connected to electoral process and alleged concrete injuries that would arise if laws were not relaxed due to pandemic. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 14; Voting Rights Act of 1965, § 2 et seq., 52 U.S.C.A. § 10301 et seq.

[7] **Election Law** ⇦ Nature and source of right

Election Law ⇦ Determination and Declaration of Result

The right to vote and have that vote counted is a fundamental matter in a free and democratic society.

[8] **Injunction** ⇦ Extraordinary or unusual nature of remedy

A preliminary injunction arises from governing Federal Rule of Civil Procedure, and it is an extraordinary remedy never awarded as of right. Fed. R. Civ. P. 65.

[9] **Injunction** ⇦ Grounds in general; multiple factors

A party seeking a preliminary injunction must establish: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) an injunction is in the public interest.

[10] **Injunction** ⇦ Preservation of status quo

Injunction ⇦ Irreparable injury

The traditional purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of the lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.

[11] **Injunction** ⇦ Likelihood of success on merits

Injunction ⇦ Clear showing or proof

Plaintiffs seeking preliminary injunctions must demonstrate they are likely to succeed on the merits; although this inquiry requires plaintiffs seeking injunctions to make a clear showing they are likely to succeed at trial, plaintiffs need not show a certainty of success.

[12] **Constitutional Law** ⇦ Elections in general

If a challenged election law imposes only reasonable, non-discriminatory restrictions on First and Fourteenth Amendment rights, then the State's important regulatory interests are generally sufficient to justify the restrictions. U.S. Const. Amends. 1, 14.

[13] **Election Law** ⇦ Absentee Ballots

Under South Carolina law, absentee voting is a privilege, not a right to vote itself.

[14] **Injunction** ⇦ Nature, Form, and Scope of Remedy

District courts may grant temporary injunctive relief without deciding federal constitutional questions prematurely, without forecasting what the exact final decision will be on the ultimate claim, without creating an unseemly conflict between sovereigns and without impairing any state function.

[15] **Injunction** ⇦ Injunctions Against Enforcement of Laws and Regulations

While no court should lightly or carelessly enjoin enforcement of a statute, even temporarily, it is right and proper to do so when it appears there is no other available method by which the rights of a citizen, including the right to litigate rights in the courts, may be protected.

[16] **Constitutional Law** ⇦ Voting rights and suffrage in general

Once burdens are identified, a court evaluating a constitutional challenge to an election regulation must weigh the asserted burdens to the right to vote against the precise interest put forward by the State as justifications for the burden imposed by its rule.

[17] **Civil Rights** ⇦ Preliminary Injunction

When determining whether plaintiffs were likely to prevail on merits of constitutional claim for purposes of preliminary injunctive relief, courts are not to blindly accept a state's assertion its interests are enough to outweigh a burden; instead, a court must find it is justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.

[18] **Election Law** ⇦ Power to Confer and Regulate

While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent evidence such an interest made it necessary to burden voters' rights.

[19] **Civil Rights** ⇨ Preliminary Injunction

When determining whether plaintiffs were likely to prevail on merits of constitutional claim for purposes of preliminary injunctive relief, the court must determine the legitimacy and strength of state's interests, and must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

[20] **Injunction** ⇨ Conduct of elections

Voters registered in South Carolina and non-profit corporation were likely to prevail on the merits of their claim that South Carolina's statutory requirement that a witness be present when a voter signed their absentee ballot violated voting rights under First and Fourteenth Amendments, as required for entry of preliminary injunction enjoining requirement during primary election due to COVID-19 pandemic; character and magnitude of burdens imposed on voters and entity during pandemic likely outweighed the extent to which the requirement advanced the State's interests of voter fraud and integrity. U.S. Const. Amends. 1, 14; S.C. Code Ann. § 7-15-380.

[21] **Injunction** ⇨ Irreparable injury

The irreparable harm to be prevented through issuance of preliminary injunction must be of an immediate nature and not simply a remote possibility.

[22] **Civil Rights** ⇨ Preliminary Injunction

The threatened loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury required for issuance of preliminary injunctive relief. U.S. Const. Amend. 1.

[23] **Injunction** ⇨ Irreparable injury

Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough to establish requisite irreparable harm for issuance of preliminary injunction, because the possibility exists adequate compensatory or other corrective relief will be available at a later date.

[24] **Injunction** ⇨ Recovery of damages

A preliminary injunction is not normally available where the harm at issue can be remedied by money damages.

[25] **Injunction** ⇨ Recovery of damages

The presumption against issuing preliminary injunctions where a harm suffered can be remedied by money damages at judgment stems from real concerns the issuance of a preliminary injunction remedy raises, which include the fact that in issuing a preliminary injunction order, a district court is required, based on an incomplete record, to order a party to act in a certain way.

[26] **Injunction** ⇨ Conduct of elections

Voters registered in South Carolina and non-profit corporation were likely to sustain irreparable injury as result of South Carolina's statutory requirement that a witness be present when a voter signed their absentee ballot, as required for entry of preliminary injunction enjoining requirement during primary election due to COVID-19 pandemic; claim of infringement of voters' right to vote under First and Fourteenth Amendments could not be redressed by money damages or other traditional legal remedies. U.S. Const. Amends. 1, 14; S.C. Code Ann. § 7-15-380.

[27] **Injunction** ⇨ Balancing or weighing hardship or injury

A court considering whether to grant a preliminary injunction must balance the competing claims of injury and must consider

the effect on each party of the granting or withholding of the requested relief.

[28] **Injunction** ⇦ Public interest considerations

Injunction ⇦ Balancing or weighing hardship or injury

The court must consider the balance of hardships between the litigants and the impact on the public at large prior to issuing a preliminary injunction.

[29] **Injunction** ⇦ On ground of invalidity

A government is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional; if anything, the system is improved by such an injunction.

[30] **Injunction** ⇦ Conduct of elections

Balance of equities and public interest factors weighed in favor of entry of preliminary injunction enjoining South Carolina's statutory requirement during primary election that a witness be present when a voter signed their absentee ballot, due to COVID-19 pandemic; injunction promoted public interest in safeguarding public health in the context of the worst pandemic in over a century, as adherence to requirement would only increase the risk for contracting COVID-19 for members of public with underlying medical conditions, people with disabilities, and racial and ethnic minorities, and public interest favored permitting as many qualified voters to vote as possible. S.C. Code Ann. § 7-15-380.

[31] **Injunction** ⇦ Discretion of court

Injunction ⇦ Amount

When issuing preliminary injunction or temporary restraining order (TRO), the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement. Fed. R. Civ. P. 65(c).

[32] **Injunction** ⇦ Particular cases

It was appropriate to waive posting of bond in connection with entry of preliminary injunction enjoining South Carolina's statutory requirement that a witness be present when a voter signed their absentee ballot during primary election due to COVID-19 pandemic, given the significance of matter of local, national, and international public concern resulting from pandemic, which garnered response from all levels of government. Fed. R. Civ. P. 65(c); S.C. Code Ann. § 7-15-380.

[33] **Injunction** ⇦ Conduct of elections

Voters registered in South Carolina and non-profit corporations could not establish they were likely to prevail on the merits of their claim that South Carolina's statutory requirement that absentee ballots must be received by time certain on date of primary election violated voting rights under First and Fourteenth Amendments and, thus, plaintiffs were not entitled to entry of preliminary injunction enjoining requirement and effectively extending deadline for ten days due to COVID-19 pandemic, provided that ballots were postmarked or mailed on or before date of primary election; deadline imposed only minimal burden, if any, on voting rights, as voters who failed to get their vote in early could only blame their own failure to take timely steps to effect their enrollment, and setting specific election deadlines was part and parcel of a state's generalized interest in orderly administration of elections. U.S. Const. Amends. I, 14; S.C. Code Ann. § 7-15-230.

[34] **Constitutional Law** ⇦ Voting rights and suffrage in general

When a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions. U.S. Const. Amends. 1, 14.

[35] **Statutes** ⇐ Validity

A facial challenge to a statute is an attack on a statute itself, as opposed to a particular application.

[36] **Statutes** ⇐ Validity

A facial attack to a statute does not raise questions of fact related to the enforcement of the statute in a particular instance.

[37] **Injunction** ⇐ Conduct of elections

Voters registered in South Carolina and non-profit corporation could not establish clear showing of likely success on the merits of their claim that South Carolina's statutory requirement that a witness be present when a voter signed their absentee ballot violated provision of Voting Rights Act prohibiting use of "test or device," including any requirement that person prove his or her qualifications for voting and, thus, were not entitled to entry of preliminary injunction enjoining requirement due to violation of Act; requirement was not "test or device" as it did not mandate the witness to "vouch" or "prove" the voter was qualified to vote but, instead, was simply required to witness the oath taken by the voter. Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; S.C. Code Ann. § 7-15-420.

Attorneys and Law Firms

Christopher James Bryant, Bruce V. Spiva, Pro Hac Vice, Marc Erik Elias, Pro Hac Vice, Perkins Coie LLP, Washington, DC, for Plaintiffs.

Jane W. Trinkley, Mary Elizabeth Crum, William Grayson Lambert, Burr and Forman LLP, Harrison David Brant, Office of the State Treasurer, Karl S. Bowers, Jr., Bowers Law Office, J. Robert Bolchoz, Columbia, SC, for Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND OPINION GRANTING IN PART MOTION FOR PRELIMINARY INJUNCTION

J. MICHELLE CHILDS, United States District Judge

I. INTRODUCTION

*1 In the first of two related actions, Plaintiffs Mary T. Thomas, Nea Richard, Jeremy Rutledge, Trena Walker, Dr. Brenda Williams, and The Family Unit, Inc. (collectively "Thomas Plaintiffs") filed a Complaint for Injunctive and Declaratory Relief against Defendants Marci Andino, John Wells, Clifford J. Edler, and Scott Moseley, in their official capacities as Commissioners of the South Carolina State Election Commission ("SCEC"), and Governor Henry D. McMaster of South Carolina (collectively "Defendants"), seeking to enjoin specified laws promulgated by the State of South Carolina regarding voting by absentee ballot. *Thomas v. Andino*, C/A No.: 3:20-cv-01552-JMC, 2020 WL 1941462, ECF No. 1 (D.S.C. Apr. 22, 2020) (hereinafter "*Thomas*"). Specifically, due to alleged vulnerabilities to COVID-19, Thomas Plaintiffs challenge (1) "the requirement setting forth exclusive categories of '[p]ersons qualified to vote by absentee ballot,' in South Carolina (the 'Excuse Requirement')[,] S.C. Code Ann. § 7-15-320" (West 2020), and (2) South Carolina's requirement that a witness be present when a voter signs their ballot pursuant to S.C. Code Ann. § 7-15-380 (West 2020) (the "Witness Requirement"). (ECF No. 1 at 2 ¶ 3, 3 ¶ 4, 40 ¶ 104, 41 ¶ 107.)

In the second action, Plaintiffs Kylon Middleton, Deon Tedder, Amos Wells, Carylye Dixon, Tonya Winbush, Ernestine Moore, the South Carolina Democratic Party ("SCDP"), DNC Services Corporation/Democratic National Committee ("DNC"), and DCCC (collectively "Middleton Plaintiffs") filed a Complaint against Defendants Andino, Wells, Edler, and Moseley (grouped together as the "SCEC Defendants") also seeking to enjoin specified laws promulgated by the State of South Carolina regarding voting by absentee ballot. *Middleton v. Andino*, C/A No.: 3:20-cv-01730-JMC, ECF No. 29 at 4 (refencing ECF No. 1) (D.S.C. May 13, 2020) (hereinafter "*Middleton*"). Middleton Plaintiffs challenge the following: (1) the Witness Requirement; (2) that "South Carolina does not provide pre-paid postage on its mail-in absentee ballots, requiring voters to independently secure postage for their ballot to be counted

(the 'Postage Tax')"; (3) that "South Carolina rejects all mail-in absentee ballots not received by the county by 7:00 p.m. on Election Day (the 'Election Day Cutoff')[,]" S.C. Code Ann. § 7-15-230 (West 2020); and (4) that "South Carolina makes it a felony for a candidate or paid campaign staff to assist voters with returning their voted absentee ballots to elections officials (the 'Absentee Assistance Ban')[,]" S.C. Code Ann. § 7-15-385 (West 2020). (ECF No. 1 at 3–4 ¶¶ 5–8 (*Middleton*).)

This matter is before the court on separate Motions for Preliminary Injunction filed by Thomas Plaintiffs and Middleton Plaintiffs.[1] (ECF No. 7 (*Thomas*); ECF No. 13 (*Middleton*).) Thomas Plaintiffs' Motion for Preliminary Injunction is centered on enjoining (1) the Excuse Requirement and (2) the Witness Requirement before the June 2020[2] primaries in South Carolina.[3] (ECF No. 7 at 1 (*Thomas*).) In their Motion for Preliminary Injunction, Middleton Plaintiffs focus on (1) "the categorical prohibition on all ages under 65 from casting a mail-in absentee ballot unless they fall into narrow and limited categories such as disabled or confined in jail ('Absentee Ballot Age Restriction'), S.C. Code Ann. § 7-15-320(B)(8)"; (2) the Witness Requirement; and (3) the Election Day Cutoff. (ECF No. 13 at 7 (*Middleton*).) For the reasons set forth below, the court **GRANTS IN PART AND DENIES IN PART** Thomas Plaintiffs' Motion for Preliminary Injunction (ECF No. 7) and **GRANTS IN PART AND DENIES IN PART** Middleton Plaintiffs' Motion for Preliminary Injunction (ECF No. 13).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Coronavirus Pandemic and Highly Contagious Nature of COVID-19

i. *The COVID-19 Virus Generally*

***2** 1. "The COVID-19 pandemic, also known as the coronavirus pandemic, is an ongoing pandemic of coronavirus disease 2019 ('COVID-19') caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)." *COVID-19 pandemic*, https://en.wikipedia.org/wiki/COVID-19_pandemic#cite_note-auto-5 (last visited May 24, 2020).[4]

2. "COVID-19 is caused by a new coronavirus." *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html?CDCAA_refVal=https% 3A% 2F% 2Fwww.cdc.gov% 2Fcoronavirus% 2F2019-ncov% 2Fsummary.html (last visited May 24, 2020). "Coronaviruses are a large family of viruses that are common in people and many different species of animals, ..." *Id.* The new coronavirus causes illness ranging "from very mild (including some people with no reported symptoms) to severe, including illness resulting in death." *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#severity (last visited May 24, 2020).[5]

3. Persons with COVID-19 may exhibit the following symptoms: cough; shortness of breath or difficulty breathing; fever; chills; muscle pain; sore throat; new loss of taste or smell; nausea; vomiting; or diarrhea. *Symptoms of Coronavirus*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html?CDC_AA_refVal=https% 3A% 2F% 2Fwww.cdc.gov% 2Fcoronavirus% 2F2019-ncov % 2Fabout% 2Fsymptoms.html (last visited May 24, 2020).

4. The COVID-19 virus is primarily spread "from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks." *WHO*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses (last visited May 24, 2020).

5. People may also become infected by touching a contaminated surface and then touching their eyes, nose, or mouth. *Id.*

6. The COVID-19 virus is most contagious "within the first 3 days from the onset of symptoms," although spread may be possible before symptoms appear[6] and in later stages of the disease. *Id.* at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4 (last visited May 24, 2020).

***3** 7. Research suggests that COVID-19 transmission "cannot be accounted for solely by transmission from symptomatic persons." *CDC Emerging Infectious Diseases*, https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last visited May 24, 2020).

8. The Centers for Disease Control and Prevention ("CDC") has opined that "[b]ased on currently available information and clinical expertise, older adults and

people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19."*CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited May 24, 2020). The CDC further believes that the following persons are "at high-risk for severe illness from COVID-19":

> People 65 years and older; People who live in a nursing home or long-term care facility; People of all ages with underlying medical conditions, particularly if not well controlled, including: People with chronic lung disease or moderate to severe asthma; People who have serious heart conditions; People who are immunocompromised; ... People with severe obesity (body mass index [BMI] of 40] or higher); People with diabetes; People with chronic kidney disease undergoing dialysis; and People with liver disease.

Id.

9. The CDC has also determined that pregnant women, persons with disabilities, people experiencing homelessness, and racial and ethnic minority groups may be at a higher risk of infection or severe illness because of their underlying health condition, have an increased ability to develop respiratory conditions, may live in congregate settings, or are more affected by health disparities as a result of economic or social conditions. *See id.* at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations.html (last visited May 24, 2020).

10. "The effects of COVID-19 on the health of racial and ethnic minority groups is still emerging; however, current data suggests a disproportionate burden of illness and death among racial and ethnic minority groups." *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html (last visited May 24, 2020). "Compared to whites, black Americans experience higher death rates, and higher prevalence rates of chronic conditions." *Id.*

11. As to voting, the CDC has issued recommendations for voters in advance of election day, to include: encouraging voters "to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations"; using mail-in methods, early voting, drive-up voting, voting at off-peak times, social distancing measures to protect individuals as they vote, etc. *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last visited May 24, 2020).

12. In its suggestions for slowing the spread of COVID-19, the CDC advocates that persons practice the following tips:

> Follow guidance from authorities where you live; [i]f you need to shop for food or medicine at the grocery store or pharmacy, stay at least 6 feet away from others, [a]lso consider other options: [u]se mail-order for medications, if possible, [c]onsider a grocery delivery service; [c]over your mouth and nose with a cloth face covering when around others, including when you have to go out in public, for example to the grocery store; [c]loth face coverings should NOT be placed on children under age 2, anyone who has trouble breathing, or is unconscious, incapacitated, or otherwise unable to remove the mask without assistance; [k]eep at least 6 feet between yourself and others, even when you wear a face covering; [a]void gatherings of any size outside your household, such as a friend's house, parks, restaurants, shops, or any other place, [t]his advice applies to people of any age, including teens and younger adults, [c]hildren should not have in-person playdates while school is out, [t]o help maintain social connections while social distancing, learn tips to keep children healthy while school's out; [w]ork from

> home when possible; ... [a]void using any kind of public transportation, ridesharing, or taxis, if possible; [and] [i]f you are a student or parent, talk to your school about options for digital/ distance learning.

*4 *Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited May 24, 2020).

ii. *National and International Response*

13. On January 30, 2020, the World Health Organization ("WHO") declared that an outbreak of COVID-19 was a Public Health Emergency of International Concern and further declared it was a pandemic on March 11, 2020. *WHO*, https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) (last visited May 24, 2020); *id.* at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited May 24, 2020).

14. On March 13, 2020, the President of the United States declared "the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia, pursuant to section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207." *FEMA COVID-19 Emergency Declaration*, https://www.fema.gov/news-release/2020/03/13/covid-19-emergency-declaration (last visited May 24, 2020). The President further declared the pandemic a national emergency, pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.*, and consistent with Section 1135 of the Social Security Act, 42 U.S.C. § 1320b-5, as amended, retroactive to March 1, 2020. *White House Proclamations*, https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited May 24, 2020).

15. On March 27, 2020, the President approved a major disaster declaration for the State of South Carolina. *White House Statements and Releases*, https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-south-carolina-disaster-declaration-5/ (last visited May 24, 2020).

16. As of May 24, 2020, there are more than 1.6 million reported cases in the United States and more than 5.38 million reported cases of COVID-19 worldwide, resulting in more than 344,000 deaths in over 215 countries. *COVID-19 Dashboard by the Ctr. for Syss. Sci. & Eng'g at Johns Hopkins Univ.*, https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited May 24, 2020).

17. As the fall approaches, COVID-19 cases are expected to continue to rise nationwide. *E.g.*, *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html (last visited May 22, 2020).

iii. *Local Response*

18. As early as January 29, 2020, the South Carolina Department of Health and Environmental Control ("DHEC") announced that it began monitoring "developments concerning cases of the 2019 novel coronavirus."[7] *DHEC News Releases*, https://www.scdhec.gov/news-releases/dhec-statement-2019-novel-coronavirus-preparations-activities-south-carolina (last visited May 24, 2020).

*5 19. On or about March 6, 2020, DHEC learned of its first 2 possible cases of coronavirus, which were later confirmed as positive, and thereafter, the cases in South Carolina began to climb as a result of community spread. *Id.* at https://www.scdhec.gov/news-releases/dhec-investigating-two-possible-cases-2019-novel-coronavirus-south-carolina (last visited May 24, 2020).

20. On March 13, 2020, Thomas Defendant Governor McMaster issued Executive Order No. 2020-08, declaring a state of emergency for South Carolina based on a determination that COVID-19 posed an imminent public health emergency. *Executive Order No. 2020-08 State of Emergency*, https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-13% 20FINAL% 20Executive% 20Order% 20No.% 202020-08%

20% 20State% 20*of*% Emergency% 20Due% 20to% 20Coronavirus.pdf (last visited May 24, 2020).

21. The State of South Carolina reported its first COVID-19 related death on March 16, 2020. *DHEC News Release*, https://www.scdhec.gov/news-releases/state-south-carolina-reports-first-covid-19-related-death (last visited May 24, 2020).

22. On March 30, 2020, Defendant Andino, in her capacity as the Executive Director of the SCEC, wrote to several elected officials, including Defendant Governor McMaster, to relay the SCEC's "concern[ ] about the safe conduct of the June Primaries, November General Election and all other elections scheduled for 2020." (ECF No. 1-2 at 1 (*Thomas*).) As a result, the SCEC urged consideration of "emergency changes to [the] election process" to protect the "more than three million voters and election workers during or following a pandemic." (*Id.* at 2.) Andino suggested certain options that represent "proven methods used in other states to conduct elections", including removing the witness requirement on ballot return envelopes. (*Id.*) In her letter, Defendant Andino also recommended "no excuse absentee voting." (*Id.*)

23. On April 6, 2020, Defendant Governor McMaster issued Executive Order No. 2020-21, a mandatory statewide "Home or Work" order requiring "[a]ll South Carolinians [to] remain at home or work unless visiting family, exercising, or obtaining goods or services." *Executive Order No. 2020-21*, https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-06% 20FILED % 20Executive% 20Order% 20No.% 202020-21% 20-% 20Stay% 20at% 20Home% 20*or*% 20Work% 20Order % 20Due% 20to% 20COVID-19.pdf (last visited May 24, 2020). Executive Order No. 2020-21 further instructs residents of the State to "limit social interaction, practice 'social distancing' ... and take every possible precaution to avoid potential exposure to" viral infection, and all individuals to "take reasonable steps to maintain six (6) feet of separation from any other person." *See id.*

24. In further response to the COVID-19 public health crisis, Defendant Governor McMaster issued several more Executive Orders regarding restrictions on personal and business interests to mitigate this crisis. [8]

*6 25. On May 12, 2020, to protect the health, safety, and welfare of the people of South Carolina, Defendant Governor McMaster issued Executive Order No. 2020-35 requiring the closure of all public schools for the remainder of the 2019-20 school year, the completion of education at the collegiate level through distance and virtual learning, and the promotion of effective social distancing practices in accordance with CDC guidance. *Executive Order 2020-35 Official (PDF)*, https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-05-12% 20eFILED % 20Executive% 20Order% 20No.% 202020-35% 20-% 20State% 20*of*% 20Emergency% 20to% 20Facilitate % 20COVID-19% 20Pandemic% 20Response% 2C% 20Testing% 2C% 20% 26% 20Other% 20Measures.pdf (last visited May 24, 2020). Executive Order No. 2020-35 shall remain in effect until May 27, 2020, unless otherwise noted. *Id.*

26. On May 12, 2020, the South Carolina General Assembly passed legislation allowing all qualified voters to vote absentee ballot for the June 9, 2020 primary and the June 23, 2020 runoff election due to the current state of emergency. S.J. Res. 635, 123rd Gen. Assemb. (S.C. 2020). The pertinent portion of the bill states, as follows, in Section 2(A):

> **Elections, absentee ballots, during the state of emergency, expiring on July 1, 2020.** Section 2. A. A qualified elector must be permitted to vote by absentee ballot if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency and there are fewer than forty-six days remaining until the date of the election.

S.J. Res. 635, 123rd Gen. Assemb. (emphasis in original).

27. On May 13, 2020, Governor McMaster signed S.635 into law. (*E.g.*, ECF No. 56 (*Thomas*).)

28. Executive Order No. 2020-36, filed on May 15, 2020, is one of Thomas Defendant Governor McMaster's latest declarations regarding the state of emergency for South Carolina. Executive Order No. 2020-36 authorizes businesses "previously deemed 'non-essential' " to re-open. *Executive Order 2020-36 Official (PDF)*, https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-05-15% 20FILED % 20Executive% 20Order% 20No.% 202020-36% 20-

% 20Additional% 20Incremental% 20Modification% 20of % 20Non-Essential% 20Business% 20Closures.pdf (last visited May 24, 2020). And on May 21, 2020, Executive Order No. 2020-37 was filed and allows additional "non-essential" businesses to re-open, but did not lift the recommended social distancing practices. *Executive Order 2020-37 Official (PDF)*, https://governor.sc.gov/sites/default/files/Documents/2020-05-21% 20eFILED% 20Executive% 20Order% 20No.% 202020-37% 20-% 20Additional% 20Modification% 20of% 20Non-Essential% 20Business% 20Closures.pdf (last visited May 24, 2020).

29. As of May 22, 2020, at least 46% of reported COVID-19 cases are in South Carolina's racial minority groups. *DHEC SC Demographic Data (COVID-19)*, https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-demographic-data-covid-19 (last visited May 24, 2020.) Nineteen percent of South Carolinians were hospitalized at the time of illness. *Id.* Approximately, 87.8% of reported deaths in South Carolina are aged 61 or older. *Id.* Racial minority groups represent at least 54% of COVID-19 deaths statewide. *Id.*

30. South Carolina's COVID-19 statistics track with national statistics showing that "45% of individuals for whom race or ethnicity data was available were white, compared to 55% of individuals in the surrounding community." *CDC Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html (last visited May 24, 2020). "However, 33% of hospitalized patients were black compared to 18% in the community ... [t]hese data suggest an overrepresentation of blacks among hospitalized patients." *Id.*

*7 31. On May 20, 2020, DHEC announced 125 new cases of the novel coronavirus COVID-19 and 8 additional deaths, all of which "occurred in elderly individuals." *DHEC News Releases*, https://scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-may-20-2020 (last visited May 24, 2020).

32. On May 21, 2020, DHEC announced 199 new cases of the novel coronavirus COVID-19 and 9 additional deaths, 6 of which "occurred in elderly individuals." *DHEC News Releases*, https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-may-21-2020 (last visited May 24, 2020).

33. On May 22, 2020, DHEC announced 245 new cases of the novel coronavirus COVID-19 and 3 additional deaths, all of which "occurred in elderly individuals." *DHEC News Releases*, https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-may-22-2020 (last visited May 24, 2020).

34. On May 23, 2020, DHEC announced 248 new cases of the novel coronavirus COVID-19 and 6 additional deaths, 5 of which "occurred in elderly individuals." *DHEC News Releases*, https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-may-23-2020 (last visited May 24, 2020).

35. On May 24, 2020, DHEC announced 209 new cases of the novel coronavirus COVID-19 and 10 additional deaths, 9 of which "occurred in elderly individuals." *DHEC News Releases*, https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-may-24-2020 (last visited May 24, 2020).

36. As of May 24, 2020, there are 10,096 reported cases of COVID-19 in the State of South Carolina, resulting in 435 deaths. *Id.*

B. Absentee Ballot Voting in South Carolina Generally

37. Absentee ballot voting has already begun in South Carolina. (ECF No. 46-2 at 4 ¶ 5 (*Thomas*).) County election officials have already received significantly more absentee ballot applications than in previous years for statewide primaries. (*Id.*)

38. "Upon receiving an application for an absentee ballot by mail, and verifying the voter's eligibility to vote absentee, county boards are required to mail" such ballots to the voter as soon as possible. (*Id.* at 4–5 ¶ 7 (*Thomas*).) The ballot includes printed instructions as to the proper return of the ballot, to include signing the oath, having a witness' signature and address, and timely return of the ballot. (*Id.*)

39. All records and papers relating to absentee ballot applications are retained for 22 months, pursuant to federal law, and 24 months for state law. (*Id.* at 5 ¶ 8 (*Thomas*).)

40. Absentee ballots are not counted if there is no voter or witness signature or witness address, or is returned late, but still must be accounted for and retained. (*Id.* at 5–6 ¶ 9 (*Thomas*).)

41. Until the recent passage of S.635 to allow absentee voting for all South Carolina registered voters, the vast majority of South Carolina voters would have appeared in person at the poll on election day in order to exercise their right to vote.

42. At the May 15, 2020 hearing SCEC Defendants' Counsel informed the court that the South Carolina Election Commission would be awarded $ 7.6 million from federal and state authorities to assist with additional voting precautions during this pandemic.

C. The Thomas Lawsuit Generally

43. Plaintiffs Thomas, Richard, Rutledge, Walker, and Williams are all persons registered to vote in the State of South Carolina. (ECF Nos. 7-18 at 2 ¶ 2, 7-19 at 2 ¶ 2, 7-20 at 2 ¶ 2, 7-21 at 2 ¶ 1, 7-22 at 2 ¶ 2 (*Thomas*).)

*8 44. Plaintiff The Family Unit, Inc. is a non-profit entity incorporated in the State of South Carolina since August 29, 2008. *Bus. Entities Online*, https://businessfilings.sc.gov/BusinessFiling/Entity/Search (last visited May 24, 2020).

45. Defendants are Andino, Wells, Edler, and Moseley, in their official capacities as Commissioners of the SCEC, and Governor Henry D. McMaster. (*See* ECF No. 44 at 8 ¶ 18–10 ¶ 20; ECF No. 51 at 7 ¶ 20 (*Thomas*).) During the COVID-19 pandemic, the SCEC has taken "precautions and preventative measures for the health and safety of voters, county election officials and poll workers during the June primaries." (ECF No. 46-2 at 3 ¶ 4 (*Thomas*).) Such measures include special training for county election officials, staff, and poll workers, related to COVID-19 issues, providing personal protective equipment and other preventative supplies for polling locations and county election offices, adhering to social distancing recommendations for workers and voters, cleaning and disinfecting at county election offices. (*Id.*)

46. On April 22, 2020, Thomas Plaintiffs filed their Complaint for Injunctive and Declaratory Relief. (ECF No. 1 (*Thomas*).) In their Complaint, Thomas Plaintiffs plead claims for violation of the fundamental right to vote, 42 U.S.C. § 1983, First and Fourteenth Amendments to the United States Constitution; violations of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; and violations of Sections 3 and 201 of the Voting Rights Act, 52 U.S.C. §§ 10302, 10501. (ECF No. 1 (*Thomas*).)

47. On April 28, 2020, Thomas Plaintiffs filed a Motion for Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure seeking to enjoin "Defendants ... and all persons acting in concert with each or any of them, from enforcing" the Witness Requirement and/or the Excuse Requirement. (ECF No. 7 at 1 (*Thomas*).) Thomas Plaintiffs assert that "[i]f the Challenged Requirements are not enjoined, they will pose significant risks to voters seeking to exercise their right to vote in the June 9, 2020 primary election amid the current COVID-19 crisis." [9] (*Id.* at 2 (*Thomas*).)

48. Thomas Plaintiffs seek a preliminary injunction that: (1) prohibits Defendants from enforcing the Excuse Requirement [10] to prevent any eligible voter, regardless of age or physical condition, to request, receive, and have counted an absentee ballot for the June 9 primary; (2) prohibits Defendants from enforcing the Witness Requirement for all voters for the June 9 primary election; and (3) orders Defendants to conduct a public information campaign informing South Carolina voters about the elimination of the Challenged Requirements, in coordination with city and county election officials. (ECF No. 7 at 3 (*Thomas*).)

*9 49. In support of their Motion for Preliminary Injunction, Thomas Plaintiffs primarily rely on their Memorandum of Law (ECF No. 7-1 (*Thomas*)), as well as supporting attachments (ECF Nos. 7-2 through 7-23, 35 (*Thomas*)), and their Reply Memorandum (ECF No. 55 (*Thomas*).)

50. On May 1, 2020, the South Carolina Republican Party ("SCRP") filed a Motion to Intervene. (ECF No. 11 (*Thomas*).) On May 5, 2020, *Thomas* Plaintiffs filed a Response in Opposition to the Motion to Intervene (ECF No. 22 (*Thomas*)), to which the SCRP filed a Reply on May 6, 2020 (ECF No. 28 (*Thomas*)). On May 8, 2020, the court granted the SCRP's Motion to Intervene. (ECF No. 39 (*Thomas*).)

51. On May 6, 2020, the court entered Orders (ECF Nos. 31, 32 (*Thomas*)) granting Motions for Leave to File Amicus Brief filed by South Carolina Attorney General Alan Wilson (ECF No. 29 (*Thomas*)) and Protection and Advocacy for the People with Disabilities, Inc. ("P&A") (ECF No. 19 (*Thomas*)). P&A filed its amicus brief on May 6, 2020 (ECF No. 34 (*Thomas*)). Attorney General Wilson filed his amicus brief on May 12, 2020 (ECF No. 53 (*Thomas*)).

52. On May 11, 2020, Defendants and the SCRP filed their respective Answers to Thomas Plaintiffs' Complaint (ECF Nos. 44, 49, 51 (*Thomas*)), and their Responses in Opposition

to Thomas Plaintiffs' Motion for Preliminary Injunction (ECF Nos. 46, 50, 52 (*Thomas*)).

53. In opposition to Thomas Plaintiffs' Motion for Preliminary Injunction, SCEC Defendants rely on their Memorandum of Law (ECF No. 46 (*Thomas*)), as well as supporting attachments (ECF Nos. 46-1 through 46-8 (*Thomas*)).

54. In opposition to Thomas Plaintiffs' Motion for Preliminary Injunction, Defendant Governor McMaster relies on his Memorandum of Law (ECF No. 52 (*Thomas*)).

55. In opposition to Thomas Plaintiffs' Motion for Preliminary Injunction, the SCRP relies on its Memorandum of Law (ECF No. 50 (*Thomas*)).

56. In support of Thomas Plaintiffs' Motion for Preliminary Injunction, P&A relies on its Amicus Brief (ECF No. 34 (*Thomas*)).

57. In opposition to the Motion for Preliminary Injunction, Attorney General Wilson relies on his Amicus Brief (ECF No. 53 (*Thomas*)).

58. Additionally, on May 11, 2020, the United States Government filed a Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act. (ECF No. 47 (*Thomas*).)

59. In response to the absentee ballot bill passed by the South Carolina General Assembly on May 12, 2020, and signed into law by Defendant Governor McMaster on May 13, 2020, the court requested that the parties submit in writing the issues that they still intended to present at a hearing on the Motions for Preliminary Injunction. (ECF No. 56 (*Thomas*).)

60. Thomas Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction on May 13, 2020. (ECF No. 55 (*Thomas*).)

61. On May 14, 2020, Thomas Plaintiffs conveyed that they desired to only address at the motions hearing their claims for preliminary relief with respect to the Witness Requirement for absentee voting under the United States Constitution and the Voting Rights Act. (ECF No. 57 (*Thomas*).)

D. The Middleton Lawsuit Generally

62. Plaintiffs Wells, Dixon, Winbush, and Moore are all persons allegedly registered to vote in the State of South Carolina. (*See* ECF No. 1 at 7 ¶ 15–8 ¶ 18 (*Middleton*).) Plaintiffs Tedder and Middleton are registered to vote in the State of South Carolina. (ECF Nos. 13-1 at 2 ¶ 1, 13-2 at 2 ¶ 1.)

***10** 63. Middleton Plaintiffs allege that Wells is African-American and over 65 years of age, thereby in the category of persons at a high risk for contracting COVID-19. (*Id.* at 7 ¶ 15.)

64. Middleton Plaintiffs allege that Dixon is African-American, over 65 years of age, and has underlying medical conditions, thereby in the category of persons at a high risk for contracting COVID-19. (*Id.* ¶ 16.)

65. Middleton Plaintiffs allege that Winbush is African-American and has expressed concern about herself and other voters being able to practice social distancing in the upcoming elections. (*Id.* at 8 ¶ 17.)

66. Middleton Plaintiffs allege that Moore is African-American, over 65 years of age, and lives alone, thereby in the category of persons at a high risk for contracting COVID-19. (*Id.* ¶ 18.)

67. Plaintiff SCDP is allegedly a political party within the meaning of S.C. Code Ann. § 7-1-20 (West 2020) and is the South Carolina state party committee of the national Democratic Party. (ECF No. 1 at 8–10 ¶ 19 (*Middleton*).) The SCDP allegedly acts on behalf of itself and its members, is a political party that actively supports candidates, and mobilizes and assists voters during election cycles. (*Id.*)

68. Plaintiff DNC is allegedly the national committee of the Democratic Party, as defined by 52 U.S.C. § 30101(14). (ECF No. 1 at 10–11 ¶ 20 (*Middleton*).) The DNC allegedly assists with the election of candidates of its party to public office, including South Carolina, and mobilizes voters to vote for its candidates and causes. (*Id.*)

69. Plaintiff DCCC is allegedly the national congressional committee of the Democratic Party as defined by 52 U.S.C. § 30101(14). (ECF No. 1 at 11–12 ¶ 21.) The DCCC allegedly assists with the election of candidates of its party to the U.S. House of Representatives, including South Carolina, and mobilizes and registers voters to support their candidates. (*Id.*)

70. Defendants in *Middleton* are the above-referenced SCEC Defendants. (*See* ECF No. 32 (*Middleton*).)

71. On May 1, 2020, Middleton Plaintiffs filed their Complaint for Injunctive and Declaratory Relief. (ECF No. 1.) In their Complaint, Middleton Plaintiffs plead claims for Denial or Abridgement of the Right to Vote on Account of Age under the Twenty-Sixth Amendment of the United States Constitution and 42 U.S.C. § 1983*(Absentee Ballot Age Restriction)*; Undue Burden on the Right to Vote under the First Amendment and Equal Protection Clause of the United States Constitution and 42 U.S.C. § 1983*(Absentee Ballot Age Restriction, Postage Tax, Witness Requirement, Absentee Assistance Ban)*; the Imposition of a Poll Tax under the Fourteenth Amendment and Twenty-Fourth Amendment of the United States Constitution and 42 U.S.C. § 1983; Vote Denial under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301*(Postage Tax, Witness Requirement, Election Day Cutoff, Absentee Ballot Age Restriction, and Absentee Assistance Ban)*; Freedom of Speech and Infringement of Speech under the First Amendment and Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983*(Absentee Assistance Ban)*; and Violation of Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508 Preemption *(Absentee Assistance Ban)*. (ECF No. 1 (*Middleton*).)

*11 72. On May 7, 2020, Middleton Plaintiffs filed their Motion and Incorporated Brief in Support of Motion for Preliminary Injunction, (ECF No. 13 (*Middleton*)), pursuant to Federal Rule of Civil Procedure 65 to address, *inter alia*, the immediate and severe effects the coronavirus pandemic is having on the primary election scheduled for June 9, 2020, and the run-off election following thereafter. Middleton Plaintiffs focus their Motion on 3 requirements that threaten South Carolinians' right to vote during the COVID-19 pandemic: (1) Absentee Ballot Age Restriction; (2) the Witness Requirement; and (3) the Election Day Cutoff (collectively, the "Challenged Provisions").

73. Middleton Plaintiffs seek a preliminary injunction that: (1) prohibits SCEC Defendants from enforcing the Absentee Ballot Age Restriction,[11] to prevent any eligible voter, regardless of age, to request, receive, and have counted an absentee ballot for the June 9 primary; (2) prohibits SCEC Defendants from enforcing the Witness Requirement for all voters for South Carolina's June 9 primary; (3) prohibits SCEC Defendants from enforcing the requirement that absentee ballots must be received by 7:00 p.m. on Election Day to be counted and extending the deadline to June 19, provided that the ballots were postmarked or mailed on or before June 9; (4) orders the counting of ballots to begin on June 19, 2020, and giving county election officials until June 23, 2020, to complete the canvass and certify the results to the State Board of Canvassers; (5) prohibits election officials from releasing results until after 7:00 p.m. on June 19, *see*Fed. R. Civ. P. 65[12]; and (6) orders SCEC Defendants to publicly inform all South Carolina voters about the elimination of these requirements in coordination with city and county election officials. (ECF No. 13 at 32 (*Middleton*).)

74. In support of their Motion for Preliminary Injunction, Middleton Plaintiffs primarily rely on their Memorandum of Law (ECF No. 13 at 7–33 (*Middleton*)), as well as supporting attachments (ECF Nos. 13-1, 13-2 (*Middleton*)).

75. On May 7, 2020, the court entered an Order (ECF No. 12 (*Middleton*)) granting Attorney General Wilson's Motion for Leave to File Amicus Brief (ECF No. 11 (*Middleton*)), which he filed on May 13, 2020. (*See* ECF No. 29 (*Middleton*)).

76. On May 12, 2020, the court entered an Order (ECF No. 27 (*Middleton*)) granting the SCRP's Motion to Intervene. (ECF No. 22 (*Middleton*).)

77. Given the passage of S.635, Middleton Plaintiffs agreed the Excuse Requirement and Absentee Ballot Age Requirement are moot but only for the purposes of the June primaries. (ECF No. 31 (*Middleton*).) Despite this assertion, the court determined that the Middleton Plaintiffs had only sought relief related to the June primaries and therefore limited the hearing to the remaining issues related to those primaries. (ECF No. 35 (*Middleton*).)

78. On May 14, 2020, SCEC Defendants and the intervenor-Defendant SCRP respectively filed Opposition to the Motion for Preliminary Injunction. (ECF Nos. 32, 33 (*Middleton*).)

79. In opposing Middleton Plaintiffs' Motion for Preliminary Injunction, SCEC Defendants rely on their Memorandum of Law (ECF No. 32 (*Middleton*)) and supporting attachments (ECF Nos. 32-1 through 32-3 (*Middleton*)).

*12 80. In opposing Middleton Plaintiffs' Motion for Preliminary Injunction, the SCRP relies on its Memorandum of Law (ECF No. 33 (*Middleton*)) and supporting attachment (ECF No. 33-1 (*Middleton*)).

E. Motion Hearing on Pending Preliminary Injunction Motions

81. The instant matters before the court for review are a Motion for a Preliminary Injunction (ECF No. 7 (*Thomas*)) by Thomas Plaintiffs, filed on April 28, 2020, and a Motion for Preliminary Injunction (ECF No. 13 (*Middleton*)) by the Middleton Plaintiffs, filed on May 7, 2020. [13]

82. On May 15, 2020, the court held a consolidated hearing on the pending Motions for Preliminary Injunction. (*See* ECF No. 64 (*Thomas*); ECF No. 36 (*Middleton*).) In addition to reviewing the parties' submissions, amici briefs, and statement of interest, the court heard oral argument from the parties' counsel. (*Id.*)

III. FINDINGS OF FACT [14]

A. The *Thomas* Lawsuit

1. The individual Thomas Plaintiffs are lawfully registered voters and have individual characteristics or conditions that are regarded by the CDC as placing them at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection), being disabled, and/or being African-American. (ECF Nos. 7-17 at 2 ¶ 2; 7-18 at 2 ¶ 2, 2–3 ¶ 7; 7-19 at 2 ¶ 2; 7-20 at 2 ¶ 6–3 ¶ 8; 7-21 at 3 ¶¶ 7, 8 (*Thomas*).) In addition to being at a higher risk for contracting COVID-19, (*E.g.*, ECF No. 7-21 at 3 ¶ 8), one of the individual Thomas Plaintiffs allegedly already has COVID-19. (*See* ECF No. 7-22 at 4 ¶ 8.)

***13** 2. As a result of these characteristics or conditions, many have self-quarantined at home and/or live alone. (*Id.* at 7-18 at 3 ¶ 8; 7-20 at 3 ¶ 8; 7-21 at 3 ¶ 6 (*Thomas*).)

3. Some of the individual Thomas Plaintiffs also serve in positions that serve the disenfranchised or economically disadvantaged voters that have been substantially impacted by the COVID-19 pandemic and the Witness Requirement further burdens them from exercising their right to vote by absentee ballot by requiring them to expose themselves to other people in contravention of maintaining safe social distancing practices. (*See* ECF Nos. 7-17 at 2 ¶ 5–4 ¶ 12; 7-19 at 3 ¶ 7–4 ¶ 10 (*Thomas*).)

4. Plaintiff The Family Unit, which serves mostly African-Americans and/or economically disadvantaged persons, has assisted voters in navigating the absentee voting process. (*See* ECF No. 7-22 at 2–3 ¶ 3 (*Thomas*).) Because of the COVID-19 pandemic, its members and constituents have had difficulty meeting the Witness Requirement. (*Id.* at 3 ¶¶ 4–6 (*Thomas*).) Such challenges include the necessity of having close, personal meetings with senior citizens, the marginally educated, and pretrial inmates to explain the absentee ballot process and thus does not afford the opportunity to assist with either in-person voting or absentee ballot voting. (*Id.* at 3 ¶ 11–4 ¶ 12 (*Thomas*).)

5. The mission of the SCEC is "to ensure every eligible citizen has the opportunity to register to vote and participate in fair and impartial elections with the assurance that every vote will count." *SCEC About Us*, https://www.scvotes.org/about-sec (last visited May 22, 2020).

6. In her Declaration (ECF No. 7-15) submitted in support of Thomas Plaintiffs' Motion for Preliminary Injunction, Dr. Courtney D. Cogburn ("Dr. Cogburn") discussed the impact of COVID-19 on minority communities in South Carolina and made specific assertions regarding the health consequences of voting laws that require a person to break social distancing guidelines. [15]

***14** 7. As the Executive Director of the South Carolina Election Commission, Defendant Andino is the chief administrative officer for the State Election Commission. S.C. Code Ann. § 7-3-20 (A) (West 2020). She is required to supervise the conduct of elections and the voter registration process by all persons involved in the election process, S.C. Code Ann. § 7-3-20 (C)(1) (West 2020), and conduct post-election analysis of such activities. S.C. Code Ann. § 7-3-20 (C)(2) (West 2020).

8. As the Governor of South Carolina, Defendant McMaster is vested with the "supreme executive authority" of the State. *See*S.C. Const. Art. IV, § 1. He has the authority to declare a public health emergency, as defined in S.C. Code Ann. § 44-4-130 (West 2020). S.C. Code Ann. § 1-3-420 (West 2020). Upon such declaration, he may issue such proclamations to "order and direct any person or group of persons to refrain from doing any act or thing which would, in his opinion, endanger life, limb or property ... by use of all appropriate available means to enforce such order or proclamation" S.C. Code Ann. § 1-3-430 (West 2020).

B. The *Middleton* Lawsuit

9. Plaintiffs Middleton and Tedder are registered voters in South Carolina. (ECF Nos. 13-1 at 2 ¶ 1, 13-2 at 2 ¶ 1 (*Middleton*).) They are both African-American and candidates in the June 9, 2020 primary. (ECF No. 13-1 at 2 ¶ 2 (*Middleton*).) They both present concerns about potential voters fearing to vote in person as a result of COVID-19. (*See* ECF Nos. 13-1 at 3 ¶¶ 4–6, 13-2 at 2 ¶ 2–4 ¶ 8 (*Middleton*).)

IV. CONCLUSIONS OF LAW

1. The parties make a plethora of arguments regarding the meritorious value of Thomas/Middleton Plaintiffs' claims. This court finds that Thomas/Middleton Plaintiffs have met their burden under the standard the Supreme Court set out in *Winter*[16] for preliminary injunctions as to the Witness Requirement. The court addresses below the vitality of Thomas/Middleton Plaintiffs' assertions under the requirements set forth in *Winter* and reiterated by the Fourth Circuit in *Real Truth*.[17]

A. The Court's Jurisdiction

2. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 based on Thomas/Middleton Plaintiffs' claims against Defendants under 42 U.S.C. § 1983, which permits an injured party to bring a civil action against a person who, acting under color of state law, ordinance, regulation, or custom, causes the injured party to be deprived of "any rights, privileges, or immunities secured by the Constitution and laws." *Id.* Specifically, Thomas/Middleton Plaintiffs allege violations of their rights protected by the First and Fourteenth Amendments to the United States Constitution and the Voting Rights Act of 1965, 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (formerly 42 U.S.C. §§ 1973–1973bb).

B. Standing of Thomas/Middleton Plaintiffs to Bring Their Actions

[1] 3. Standing implicates the court's subject matter jurisdiction and is governed by Rule 12(b)(1). *Crumbling v. Miyabi Murrells Inlet, LLC*, 192 F.Supp.3d 640, 643 (D.S.C. 2016). "It is well established that standing is a threshold jurisdictional issue that must be determined first because '[w]ithout jurisdiction the court cannot proceed at all in any cause.' " *Covenant Media of N.C., LLC v. City of Monroe, N.C.*, 285 F. App'x 30, 34 (4th Cir. 2008) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). "To possess the constitutional component of standing, a party must meet three requirements: (1) [the party] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *McBurney v. Cuccinelli*, 616 F.3d 393, 410 (4th Cir. 2010) (citing, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

*15 **[2]** 4. "The party attempting to invoke federal jurisdiction bears the burden of establishing standing." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (citation omitted).

[3] **[4]** 5. "To establish Article III standing, an injury must be 'concrete, particularized and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.' " *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010)). To be particularized, an injury "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "There must be some connection between the plaintiff and the defendant that '[ ]differentiate[s]' the plaintiff so that his injury is not 'common to all members of the public.' " *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019) (quoting *United States v. Richardson*, 418 U.S. 166, 177, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974)). "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance," as long as "each individual suffers a particularized harm." *Spokeo, Inc.*, 136 S. Ct. at 1548 n.7.

[5] 6. "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[6] 7. Accepting as true the allegations in Thomas Plaintiffs' and Middleton Plaintiffs' Complaint, all Plaintiffs have shown that they are registered voters in the State of South Carolina and/or integrally connected to the electoral process

and have alleged concrete injuries. (*See* ECF No. 1 at 5 ¶ 11–10 ¶ 16 (*Thomas*); ECF No. 1 at 5 ¶ 12 – 12 ¶ 23 (*Middleton*).)

8. Therefore, the court finds that Thomas/Middleton Plaintiffs have standing to bring their lawsuits.

C. Voting

[7] 9. The right to vote and have that vote counted is "a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In this regard, "[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted." *Seeid.* at 554, 84 S.Ct. 1362.

D. Preliminary Injunctions Generally

[8] **[9]** 10. A preliminary injunction arises from Rule 65, but "it is an extraordinary remedy never awarded as of right." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A party seeking a preliminary injunction must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.*; *TheReal Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010).

11. The Fourth Circuit no longer recognizes a "flexible interplay among the four criteria for a preliminary injunction." *Real Truth*, 575 F.3d at 347. Each of these requirements "must be fulfilled as articulated." *De la Fuente v. S.C. Dem. Party*, 164 F.Supp.3d 794, 798 (D.S.C. 2016).

*16 **[10]** 12. "The traditional purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of the lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *De La Fuente*, 164 F.Supp.3d at 798.

13. Thomas/Middleton Plaintiffs' claims can be divided into two main categories. First, they assert that the statutes referred to herein infringe upon special rights secured to voters under the United States Constitution. Thomas/Middleton Plaintiffs challenge these claims as-applied to the June 2020 primaries and only during the COVID-19 pandemic. For the sake of convenience, this category of claims will be referred to as the "Constitutional claims." Thomas/Middleton Plaintiffs have two remaining Constitutional claims, which challenge: (1) the "Witness Requirement" and (2) the "the Election Day Cutoff."

14. Second, Thomas/Middleton Plaintiffs contend that the "Witness Requirement" *per se* violates Section 201 of the Voting Rights Act of 1965 and Thomas/Middleton Plaintiffs, therefore, facially attack any application of the Witness Requirement under this theory. This claim will be referred to as the "VRA claims."

E. Clear Showing of Likely Success on the Merits

[11] 15. "[P]laintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (citing *Winter*, 555 U.S. at 20, 129 S.Ct. 365). "Although this inquiry requires plaintiffs seeking injunctions to make a 'clear showing' that they are likely to succeed at trial, *Real Truth*, 575 F.3d at 345, plaintiffs need not show a certainty of success." *See*11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.3 (2d ed. 1995); *Pashby*, 709 F.3d at 321.

i. *Thomas/Middleton Plaintiffs can Establish a Clear Showing of Likely Success as to the Merits of Their Constitutional Challenge to the Witness Requirement.* [18]

16. Thomas/Middleton Plaintiffs contend that they are substantially likely to succeed on the merits of their claim that Defendants' enforcement of the Witness Requirement, combined with the unique risks presented by the COVID-19 pandemic, violates the First and Fourteenth Amendment as-applied to Plaintiffs during this state of emergency. [19]

17. The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

18. The United States Constitution also provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Supreme Court has therefore, "recogniz[ed] [that States retain the power to regulate their own elections."

Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (citing *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)).

***17** 19. The Supreme Court has articulated a "flexible standard" to address "a [First and Fourteenth Amendment] challenge to a state election law." *SeeBurdick*, 504 U.S. at 434, 112 S.Ct. 2059. As the Supreme Court first explained in *Anderson v. Celebrezze*, the practical need for "substantial regulation of elections" means that "[c]onstitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus-paper test.' " *See*460 U.S. 780, 788–89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)).

20. Instead, to properly accommodate the "state's important regulatory interests" while vindicating individual constitutional rights, *Anderson* instructed the courts to carefully balance those interests:

> [A Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 460 U.S. at 789, 103 S.Ct. 1564.

[12] 21. The Supreme Court refined that test in *Burdick v. Takushi*, explaining that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *See*504 U.S. at 434, 112 S.Ct. 2059. Thus, a "severe" restriction on those rights triggers strict scrutiny. *Id.* But if the challenged election law "imposes only 'reasonable, non-discriminatory restrictions' " on First and Fourteenth Amendment rights, then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564).

22. The Fourth Circuit has summarized the combined *Anderson-Burdick* inquiry as follows:

> In short, election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, **a court must first determine whether protected rights** are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that "order, rather than chaos, is to accompany the democratic processes."

Fusaro v. Cogan, 930 F.3d 241, 257–58 (4th Cir. 2019) (quoting *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995)) (emphasis added).

23. Inherent in the rule is that the challenge only applies to protected rights. Thomas/Middleton Plaintiffs and Defendants vigorously debate whether absentee voting is a right or a privilege.[20]

***18 [13]** 24. Defendants are correct that under South Carolina law, absentee voting is a "privilege," not a right to vote itself. (ECF No. 50 at 9 (citing *State ex rel. McLeod v. Ellisor*, 259 S.C. 364, 192 S.E.2d 188, 190 (1972); *O'Brien v. Skinner*, 414 U.S. 524, 530, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974) (referring to it as "absentee voting privileges"); *Am. Party of Tex. v. White*, 415 U.S. 767, 795, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969)).) However, while this court agrees that the right to an absentee ballot is not guaranteed by the First Amendment, that does not mean that absentee voting is *per se* unprotected under the First Amendment. For example, much like absentee voting, there is "no fundamental right to run for elective office," and yet the Supreme Court has recognized laws restricting candidates' access to the ballot implicate the First Amendment because they " 'place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' " *Esshaki*

v. Whitmer, No. 20-1336, —— F.Supp.3d ——, 2020 WL 2185553 (6th Cir. May 5, 2020) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)) (Sixth Circuit upholding the core of the district court's preliminary injunction enjoining Michigan from enforcing the statutory ballot-access provisions for political candidates in advance of Michigan's upcoming primary election under the framework established in *Anderson-Burdick*.).

25. Additionally, akin to the court in *Price v. N.Y. State Bd. of Elections*, this court is faced with an unusual fact pattern, which is a function of unusual times:

> [t]he fact pattern here is unusual, and our holding in this case is necessarily narrow. We do not hold that there is a general constitutional right to obtain absentee ballots. Nor do we hold that there is a constitutional right to obtain absentee ballots in all county committee races in New York State. Instead, after applying a deferential standard of review, and after examining the record in this as[-]applied challenge, we conclude that the arguments proffered by the State are so extraordinarily weak that they cannot justify the burdens imposed by [the restriction].

540 F.3d 101, 112 (2d Cir. 2008).

26. Accordingly, and in the context of the as-applied challenge before the court concerning a privilege that so intimately effects the fundamental right to vote, the court must determine that Thomas/Middleton Plaintiffs' Witness Requirement challenge is to be examined under a normative constitutional rights framework—an as-applied challenge.

[14] 27. Thomas/Middleton Plaintiffs and Defendants also vigorously debate whether the court is to apply a strict scrutiny standard or a lesser level of scrutiny under the *Anderson/Burdick* balancing test. However, at this juncture, the court need not reach that decision. District courts may grant temporary relief without deciding federal constitutional questions prematurely, without forecasting what the exact final decision will be on the ultimate claim, without creating an unseemly conflict between sovereigns and without impairing any state function. *See, e.g.*, *Pocahontas Fuel Co. v. Early*, 13 F. Supp. 605, 608 (W.D. Va. 1935) ("The purpose of this suit is to restrain the enforcement of an act of Congress alleged to be unconstitutional. Whether the act be unconstitutional and, if so, whether the plaintiff is entitled to a permanent injunction restraining its enforcement, must await the maturity of the cause ... at the present the sole question is whether or not there should be awarded an ... injunction preserving the rights of the plaintiff until a hearing upon the merits can be had, an injunction which, upon a complete and final hearing, may be dissolved or may be succeeded by a permanent injunction.")

[15] 28. "While no court should lightly or carelessly enjoin enforcement of a statute, even temporarily, it is equally true that it is right and proper to do so when it appears that there is no other available method by which the rights of a citizen may be protected. One of such rights is the opportunity to litigate his rights in the courts." *Pocahontas Fuel Co. v. Early*, 13 F. Supp. 605, 608 (W.D. Va. 1935).

***19** 29. Assuming, without deciding, that the *Anderson/Burdick* balancing test applies as opposed to strict scrutiny, the court determines that, at this juncture, Plaintiffs have identified burdens inflicted by the Witness Requirement, which are at least of sufficient magnitude to warrant the injunction. *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564 (instructing that courts must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate").

30. Thomas Plaintiffs assert that the Witness Requirement "impose[s] particularly severe burdens given the loss of life, toll of sickness from COVID-19, and the risk that violating social distancing protocols pose to Plaintiffs and their communities." (ECF No. 7 at 21 (*Thomas*).)

31. In terms of other burdens, the individual Thomas Plaintiffs, have individual characteristics or conditions that are regarded by the CDC as placing them, at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection), being disabled, and/or being African-American. (ECF Nos. 7-17 at 2 ¶ 2; 7-18 at 2 ¶ 2, 2–3 ¶ 7; 7-19 at 2 ¶ 2; 7-20 at 2 ¶ 6–3 ¶ 8; 7-21 at 3 ¶¶ 7, 8 (*Thomas*).) As a result of these characteristics

or conditions, many have or plan to self-quarantine. (*Id.* at 7-18 at 3 ¶ 8; 7-20 at 3 ¶ 8; 7-21 at 3 ¶ 6 (*Thomas*).)

32. Some of the individual Thomas Plaintiffs also serve in positions that serve the disenfranchised or economically disadvantaged voters that have been substantially impacted by the COVID-19 pandemic and the Witness Requirement further burdens them from exercising their right to vote by absentee ballot by requiring them to expose themselves to other people in contravention of maintaining safe social distancing practices. (*See* ECF Nos. 7-17 at 2 ¶ 5–4 ¶ 12; 7-19 at 3 ¶ 7–4 ¶ 10 (*Thomas*).)

[16] 33. Once burdens are identified, a court evaluating a constitutional challenge to an election regulation must weigh the asserted burdens to the right to vote against the "precise interest put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 424, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

34. The Supreme Court has made clear that it has not identified any "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). Rather, "**however slight that burden may appear**" the reviewing court must find that it is "**justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'**" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)) (emphasis added).

35. Here, SCEC Defendants assert that the Witness Requirement is justified because it is intended "to (1) preserve the integrity of elections by developing a scheme that ensure[s] the reliability of our voting system and (2) protect[ ] it from fraud." (ECF No. 50 at 5.)

[17] 36. However, courts are not to blindly accept a state's assertion that its interests are enough to outweigh a burden, instead a court must find that it is "**justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'**" *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (emphasis added).

37. In applying this standard, the court observes that Defendants' assertion that the Witness Requirement is necessary to combat voter fraud is undermined by SCEC Defendants Andino, Elder, Wells, and Moseley. Specifically, Defendant Andino, the Executive Director of the SCEC, sent a letter to Defendant Governor McMaster and other elected officials on March 30, 2020, whereby Executive Director Andino stated:

> ***20** Absentee voting also requires voters to have another person witness their signature when returning their ballot. **While election officials check the voter's signature, the witness signature offers no benefit to election officials as they have no ability to verify the witness signature.** Removing the requirement for a witness signature would remove a barrier many voters would likely encounter while in self-isolation.

(ECF No. 1-2 at 3 (*Thomas*) (emphasis added).)

38. SCEC Defendants attempt to clarify this statement through Executive Director Andino's Declaration (ECF No. 46-2 (*Thomas*)), which states her "letter was not intended as ... an endorsement or recommendation of any particular voting method or requirements not permitted in this state, nor of any legal position regarding the current state law requirements." Nonetheless, in the same Declaration, Executive Director Andino affirms that the purpose of the letter was to provide "useful, relevant information for policymakers to consider when determining what action to take, if any, with regards to the safe conduct of elections in light of concerns regarding COVID-19" (*id.* at 6 ¶ 10), in her role as a "liaison between the S[ ]C[EC] and public officials ..., other government entities and the voting public." (*Id.*) Because Andino is the Chief Administrative Officer of the SCEC, the court places emphasis on both her prior letter and her Declaration.

[18] 39. While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent "evidence that such an interest made it necessary to burden voters' rights." *Fish v. Schwab*, 957 F.3d 1105, 1133, (10th Cir. 2020) (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration).

[19] 40. "In passing judgment, the court must ... determine the legitimacy and strength of each of those interests [and] it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564.

41. Here, Defendants have not offered any evidence of voter fraud in South Carolina[21] other than SCEC's fleeting mention, during the May 15, 2020 hearing, of a voter-buying scandal from the 1980s. *Cf. United States v. Carmichael*, 685 F.2d 903, 907 (4th Cir. 1982).

*21 42. While the court also considers SCEC Defendants' asserted interest of voter integrity, Director Andino's letter stating that the Witness Requirement "offers no benefit" also undermines, but does not completely dissolve, the "legitimacy" of this interest as well. (*See* ECF No. 1-2 at 3 (*Thomas*).)

[20] 43. Thomas/Middleton Plaintiffs have shown strong likelihood that the burdens placed upon them by the Witness Requirement far outweigh the imprecise, and (as admitted by SCEC Defendants) ineffective, state interests of combating voter fraud and protecting voting integrity.[22] *See e.g. Paher v. Cegavske*, No. 320CV00243, — F.Supp.3d ——, ——, 2020 WL 2089813, at *2 (D. Nev. Apr. 30, 2020) (interest in maintaining "a high level of access to the ballot, while protecting the safety of voters and poll workers—who belong to groups who are at high risks for severe illness from COVID-19" outweighed concern for voter fraud).

44. Therefore, Thomas/Middleton Plaintiffs are likely to prevail on their constitutional challenge to the Witness Requirement under the *Anderson-Burdick* balancing test because the character and magnitude of the burdens imposed on Thomas/Middleton Plaintiffs in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity. *See e.g. Libertarian Party of Ill. v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (court determining that a signature requirement for potential candidate eligibility on ballot presented "insurmountable hurdle" during COVID-19 pandemic and enjoining enforcement of portions of said requirement).

F. Likelihood of Suffering Irreparable Harm Absent an Injunction

[21] 45. *Winter* requires that the party requesting injunctive relief demonstrates that it is likely it will suffer irreparable harm absent the preliminary injunction. 555 U.S. at 22–23, 129 S.Ct. 365. The harm to be prevented must be of an immediate nature and not simply a remote possibility. *Am. Whitewater v. Tidwell*, No. 8:09-cv-02665-JMC, 2010 WL 5019879, at *11 (D.S.C. Dec. 2, 2010) (citing *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)).

i. Thomas/Middleton Plaintiffs Have Established Irreparable Harm.

[22] 46. The threatened "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520–21 (4th Cir. 2002); *see alsoPreston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury").

[23] 47. To demonstrate a need for injunctive relief, a plaintiff must show how the harm suffered is such that other forms of damages available in the normal course of litigation are not enough. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough," because "the possibility that adequate compensatory or other corrective relief will be available at a later date." *Hughes Network Sys. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994). This "weighs heavily against a claim of irreparable harm." *Id.*

*22 [24] [25] 48. "A preliminary injunction is not normally available where the harm at issue can be remedied by money damages." *Bethesda Softworks, LLC v. Interplay Entm't Corp.*, 452 F. App'x 351, 353 (4th Cir. 2011).[23]

[26] 49. Claims of infringement of a citizen's constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies would be inadequate in this case. *SeeLeague of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.")

50. Accordingly, to the extent that Thomas/Middleton Plaintiffs have a likely constitutional violation, Thomas/

Middleton Plaintiffs have satisfied their initial showing of irreparable harm.

G. The Balance of Equities and the Public Interest Factors

51. The third and fourth elements of the preliminary injunction test require Thomas/Middleton Plaintiffs to establish clearly that the balance of equities tips in their favor and that an injunction also is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365.

52. In cases involving significant public interest, courts may "consider the balance of the equities and the public interest factors together." As the Fourth Circuit has explained:

> Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' " *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552, 57 S. Ct. 592, 81 L. Ed. 789 (1937)).

Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 602 (4th Cir. 2017).

[27] 53. A court considering whether to grant a preliminary injunction must therefore "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)).

***23 [28]** 54. "The court must also consider the balance of hardships between the litigants **and the impact on the public at large prior to issuing an injunction.**" *Uhlig, LLC v. Shirley*, C/A No. 6:08-cv-01208-JMC, 2012 WL 2458062, at *4 (D.S.C. June 27, 2012) (emphasis added).

i. *Thomas/Middleton Plaintiffs Have Established that a Preliminary Injunction of the "Witness Requirement" Tips Towards Their Favor and is in the Public Interest.*

55. Regarding the final two factors—balance of the equities and the consideration of the public interest—the Fourth Circuit has also found these factors established when there is a likely First Amendment violation. *Giovani Carandola*, 303 F.3d at 521 ("upholding constitutional rights surely serves the public interest").

[29] 56. Above, the court found that Thomas/Middleton Plaintiffs will suffer irreparable harm without an injunction of the Witness Requirement. Alternatively, there is no evidence that Defendants will suffer any harm if Thomas/Middleton Plaintiffs' Motions are granted. Indeed, a government is "in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola*, 303 F.3d at 521; *accordNewsom v. Albemarle Cnty. School Bd.*, 354 F.3d at 261 (4th Cir. 2003).

[30] 57. Temporarily enjoining the Witness Requirement promotes "the public interest in ... safeguarding public health." *Pashby*, 709 F.3d at 331. "The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease." *Diretto v. Country Inn & Suites by Carlson*, No. 16-cv-1037, 2016 WL 4400498, at *4 (E.D. Va. Aug. 18, 2016).

58. This is particularly true in the context of the "worst pandemic this state, country, and planet has seen in over a century." *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, —— F.Supp.3d ——, ——, 2020 WL 2158249, at *10 (W.D. Va. May 5, 2020). To conclude otherwise would be non-sensical during a time where social distancing and isolation has been encouraged by the CDC. [24]

59. Were it not for the current pandemic, then this element *may* have cut the other way. But the court's decision is to be guided by "the ramifications of granting or denying the preliminary injunction on nonparties to the litigation." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008) (citing *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). Considering the ramifications of the injunction during a pandemic, the public interest is served. *See, e.g., Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 924–25 (6th Cir. 2020) ("Were there no public health crisis, then, the analysis would

be relatively straightforward ... but, of course, we are not living in normal times; we are living in pandemic times.").

*24 60. The evidence in the record points to the conclusion that adherence to the Witness Requirement in June would only increase the risk for contracting COVID-19 for members of the public with underlying medical conditions, the disabled, and racial and ethnic minorities.

61. Strikingly, the Witness Requirement would still apply to voters who have already contracted COVID-19, therefore affirmatively mandating that an infected individual go "find" someone to witness their absentee ballot and risk exposing the witness (and whoever comes in contact with the witness) to the virus. The asymptomatic COVID-19 voter would unknowingly place potential witnesses at risk and the symptomatic COVID-19 voter would be hard-pressed to find a willing witness. Defendants are also hard-pressed to convince this court, at least, that this predicament created by strict enforcement of the Witness Requirement is in the best interests of the public during a pandemic of this nature.

62. Finally, the public interest "favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012).

63. Accordingly, the court finds that granting Thomas/Middleton Plaintiffs injunctive relief is in the public interest.

H. Required Posting of Bond

65. Rule 65 provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).

[31] 66. The district court "retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 332 (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995)).

[32] 67. After considering the circumstances alleged in the instant Motions, and given the significance of this matter of local, national, and international public concern resulting from this unprecedented pandemic, which has garnered a response from all levels of government, the court deems it appropriate to waive bond for Thomas/Middleton Plaintiffs. *SeeHoechst Diafoil Co.*, 174 F.3d at 421 (acknowledging the requirement that a district court set an injunction bond and also acknowledging that the court can set the bond "in such sum as the court deems proper").

1. Extension of Deadline for Receipt of Absentee Ballots

i. *Middleton Plaintiffs Cannot Establish a Clear Showing of Likely Success as to the Merits of Their Constitutional Claim for an Extended Deadline.*

68. Middleton Plaintiffs request that this court enjoin Defendants "from enforcing the requirement under S.C. Code Ann. § 7-15-230 that absentee ballots must be received by 7:00 p.m. on Election Day [June 9] to be counted" and wants the court to effectively "extend the deadline [of absentee ballot receipt by an additional ten (10) days] to June 19, provided that the ballots were postmarked or mailed on or before June 9." (ECF No. 13 at 32.)

69. S.C. Code Ann. § 7-15-230 provides, in pertinent part:

> No ballot shall be counted unless the oath is properly signed and enclosed therewith **nor shall any ballot be counted which is received by the board of voter registration and elections or other officials charged with the conduct of the election after time for closing of the polls** ...

*25 *Id.* (emphasis added).

70. Middleton Plaintiffs contend that "South Carolina's Election Day Cutoff law ... threatens to disenfranchise thousands of voters whose ballots do not arrive by the election day deadline—a threat that is substantially exacerbated by an influx of requests to vote by absentee ballot and delays in mail service" and "is "unconstitutional under the current circumstances." (ECF No. 13 at 25, 29 (*Middleton*).)

71. Middleton Plaintiffs also contend that they are "likely to succeed on their claim that South Carolina's rejection of mailed absentee ballots not received by the Election Day Cutoff is unconstitutional under the current circumstances" because ... (1) "[f]irst-time absentee voters are more likely

to mail their ballots later since they are also likely to be less familiar with voting by mail, including the Election Day Cutoff; (2) the "influx of requests is likely to create scenarios where voters who lawfully request absentee ballots by 5:00 p.m. on June 5 do not even receive them by June 9, the election day deadline"; and (3) "extending the Election Day Cutoff does not impede the State's interest in orderly elections." (ECF No. 13 at 29, 28 (*Middleton*).)

[33] 72. While the reasons undergirding Middleton Plaintiffs' request for an extended deadline may be true and are, at best, significant debate-worthy policy considerations, the court arrives at a different conclusion as to whether these reasons support a finding that Middleton Plaintiffs have a strong likelihood of success on the merits of their, constitutionally-based, Deadline challenge.[25] To the contrary, the court finds that Middleton Plaintiffs are unlikely to succeed on their constitutional challenge to the June 9, 2020 deadline.

***26** 73. Unlike the Witness Requirement, the most significant obstacles to Middleton Plaintiffs' ability to meet the June 9, 2020 deadline are principally unrelated to the COVID-19 pandemic's *health risks* and the burdens, if any, imposed by the deadline are minimal.[26]

74. South Carolina's generally applicable deadline for receipt of absentee ballots is constitutional because it imposes only a minimal burden, if any, on Middleton Plaintiffs' right to vote.

[34] 75. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564).

76. Any voter may request and submit an absentee ballot, so long as that ballot is received by the Election Commission by the time the polls close on Election Day. S.C. Code § 7-15-230 (West 2020).

77. Standing alone, South Carolina's deadline of 7:00 p.m. on Election Day is nondiscriminatory. "A state's generally applicable registration cutoff imposes only a minimal burden on the right to vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). While the specific challenge here is to the ballot receipt date and not to the registration deadline, the principle still applies.

78. Of course, voters who fail to get their vote in early cannot blame South Carolina law for their inability to vote; they must blame "their own failure to take timely steps to effect their enrollment." *Rosario*, 410 U.S. at 758, 93 S.Ct. 1245; *see alsoBurdick*, 504 U.S. at 436–37, 112 S.Ct. 2059 ("[A]ny burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary."). This notion was recently underscored by the Supreme Court in *Republican Nat'l Comm. v. Democratic Nat'l Comm.* when the high Court commented, "even in ordinary elections, voters who request an absentee ballot at the deadline for requesting ballots, will usually receive their ballots on the day before the election or day of the election ... voters here would [not] be in a substantially different position from late-requesting voters in other [ ] elections with respect to the timing of their receipt of absentee ballots."). —— U.S. ——, 140 S. Ct. 1205, 1207, —— L.Ed.2d —— (2020).

79. In terms of the state's interests: setting specific election deadlines is part and parcel of a state's generalized interest in the orderly administration of elections. *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020).

80. SCEC Defendants assert that the state's interest is "ensuring a smooth process for [voters] to cast ballots and officials to count those ballots." (ECF No. 10.)

***27** 81. During the May 2020 hearing, SCEC Defendants represented that the state has an additional interest in maintaining the June 9, 2020 deadline because it ensures that the Secretary of State and his staff have sufficient time to canvass votes in a timely fashion and meet the ballot certification deadline, which triggers final preparations for ballot preparation for the June 23, 2020 run-off elections. As a result, SCEC Defendants contend that an extension until June 19, 2020 would hinder and frustrate the state's goal of certifying the results to the State Board by the June 13, 2020 deadline in time for the June 23, 2020 run-off elections.

82. The court determines that the state's enforcement of the Election Day cutoff to absentee ballot receipt does not severely burden or disenfranchise Middleton Plaintiffs.

83. Accordingly, the court denies Middleton Plaintiffs' request to extend the absentee deadline by an additional 10 days, or even an additional 6 days.[27]

J. Likelihood of Suffering Irreparable Harm Absent an Injunction, The Balance of Equities and the Public Interest Factors

84. Generally, in determining whether to grant a motion for injunctive relief, "[t]he court must also consider the balance of hardships between the litigants and the impact on the public at large prior to issuing an injunction." *Uhlig, LLC v. Shirley*, C/A No. 6:08-cv-01208-JMC, 2012 WL 2458062, at *4 (D.S.C. June 27, 2012).

85. However, Middleton Plaintiffs have not made a clear showing that they will likely succeed on the merits of their deadline challenge because the law on the questions at the heart of the dispute does not favor their position. Therefore, because Middleton Plaintiffs cannot show a likelihood of success on the merits, this court need not address the other necessary elements for preliminary injunctive relief. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 225 (5th Cir. 2010) ("Because we have determined that Plaintiffs cannot show a substantial likelihood of success on the merits, we need not address FEMA's additional arguments regarding the other necessary elements for preliminary injunctive relief. The holding on the initial element is sufficient to vacate the injunction."); *Coleman v. Chase Bank*, C/A No. 3:14-cv-101, 2014 WL 2533400, at *3 (E.D. Va. June 5, 2014) ("Because Plaintiffs cannot show a likelihood of success on the merits, the Court need not address the remaining factors.").

K. Section 201 Voting Rights Act Challenge

i. Thomas Plaintiffs Cannot Establish a Clear Showing of Likely Success as to the Merits of Their Section 201 Voting Rights Act Claim.

***28** 86. Section 201 of the Voting Rights Act of 1965 prohibits the use of "any test or device" including "any requirement that a person as a prerequisite for voting ... prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(a).

87. S.C. Code Ann. § 7-15-420 (West 2020) states that an absentee "ballot may not be counted unless the oath is properly signed and witnessed ...."

88. Thomas Plaintiffs assert that, based on the aforementioned language in § 7-15-420, the Witness Requirement is "*per se* illegal" and violative of Section 201 "insofar as [the Witness Requirement] is a 'prerequisite for voting' that asks a voter to 'prove his qualifications by the voucher of registered voters or members of any other class.' " (ECF No. 7-1 at 43 (*Thomas*).)

[35] **[36]** 89. As they have brought a *per se* challenge, Thomas Plaintiffs are facially attacking the validity of the Witness Requirement as opposed to attacking the Witness Requirement on an as-applied basis. [28]

90. As a threshold issue, the court takes notice of the United States Government's Statement of Interest Concerning Section 201 of the Voting Rights Act (ECF No. 47) (*Thomas*), wherein the Government claims that "this [c]ourt as constituted cannot address Plaintiffs' Section 201 claim, which the Voting Rights Act provides may only be heard by a three-judge court." (ECF No. 47 at 2 (*Thomas*).)

91. While SCEC Defendants did not raise or brief this issue, SCEC Defendants represented to the court during the May 15, 2020 hearing that it adopts the Government's position that this court cannot address the Section 201 claim absent a three-Judge panel. [29]

***29** 92. Defendants are correct that Section 1973aa–2 provides that any "action under this subsection shall be heard and determined by a court of three judges." However, Section 1973aa–2, **by its express terms**, only applies this requirement **to suits by the Attorney General**. *Id.* (stating, in relevant part, that "[w]henever the Attorney General has reason to believe" that Sections 1973aa, 1973aa–I, or 1973aa–1a are being violated, "he may institute for the United States, or in the name of the United States, an action in a district court of the United States") (emphasis added).

93. As is clear from Thomas Plaintiffs' Complaint, this case is not brought by the Attorney General. Rather, it is brought by private parties under Section 201. Therefore, this provision is inapplicable to the present case and this court has authority, as presently constituted, to address Thomas Plaintiffs' Section 201 claim. *See e.g.Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 215 F. Supp. 3d 1201, 1217 (D. Utah 2016).

[37] 94. Addressing Thomas Plaintiffs' Section 201 claim, the court finds that Plaintiffs are unlikely to succeed on the merits of this claim because the Witness Requirement is not a "test or device" as defined under the plain language of the statute.

95. 52 U.S.C. § 10501 states:

> (a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

Id. at § 10501(a).

96. More pertinently, section (b) states, "[a]s used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or **(4) prove his qualifications by the voucher of registered voters or members of any other class.**" 52 U.S.C. § 10501(b) (emphasis added).

97. The Witness Requirement is not a "test or device" as defined under Section 201 because the requirement does not mandate the witness to "vouch" or "prove" that the voter is qualified to vote, but instead is simply required to witness the oath taken by the voter. *Gregory v. S.C. Democratic Exec. Comm.*, 271 S.C. 364, 247 S.E.2d 439, 444 (1978) ("as its purpose of the assurance of the authenticity of the absentee vote ..."). This is further confirmed after a review of a similar signature scheme, which came under a facial attack in *Howlette v. City of Richmond, Va.*; in that case, "the sole question for decision [was] whether enforcement of the City Charter requirement that each signature on a petition seeking a referendum be individually notarized is violative of the VRA and the constitution." 485 F. Supp. 17, 22 (E.D. Va.), aff'd, 580 F.2d 704 (4th Cir. 1978).

98. The court noted that, "the notary merely administers an oath; he or she in no way vouches that the signer is a registered voter or requires the [voter] to produce proof [to the witness] that he is a registered voter." *Howlette,* 485 F. Supp. 17 at 22.

99. Further, the court also examined the Congressional purpose of Section 201 of the Voting Rights Act and determined that:

> Thus, both the Congress and the Supreme Court have viewed the prohibition against vouchers as an attack on a specific, racially discriminatory voting registration requirement. The individual notarization requirement at issue in the instant case in no way resembles the voucher requirements prohibited by s 1973b(c)(4). The Court therefore is satisfied that the individual notarization requirement of the Richmond City Charter is not a "test or device" prohibited under the Voting Rights Act of 1965.

***30** *Howlette*, 485 F. Supp. at 24

100. Here, as in *Howlette*, a witness is not required to confirm that the voter is registered to vote or "qualified" in any way. Instead, the witness is only standing in to confirm that the voter completes the voter's oath and signs the document. Indeed, a voter's eligibility has already been verified by the SCEC according to the absentee procedure. (ECF No. 46-2 at 5 ¶ 7 (*Thomas*)) ("upon receiving an application for an absentee ballot by mail, and verifying the voter's eligibility to vote absentee, county boards are required to mail ... such ballots to the voter as soon as possible."). There would be no need to, and the Witness Requirement does not, require the *witness*, who may or may not know the voter, to sign upon the witness line for the purpose of verifying that the voter is registered or "qualified" to vote.

101. As further indication of the failing nature of this claim, the court focuses on the second portion of Section 201 prohibition, which emphasizes the *who.* To constitute a "test or device," the voucher must be a "registered voter or members of any other class," which is not the case here.

102. The Witness Requirement does not specify who must witness the oath and certainly does not limit a witness to another qualified voter. The Witness Requirement allows for a myriad of competent individuals to witness the oath whether the witness themselves are registered to vote or not.

103. Similarly, the Witness Requirement does not require the witness to be a part of a particular "member of any class" or subset of society. *CompareLibertarian Party v. Judd*, 718 F.3d 308, 310–12, 316–19 (4th Cir. 2013); *Lerman v. Bd. of Elections*, 232 F.3d 135, 150 & n.14 (2d Cir. 2000); *Nader v. Brewer*, 531 F.3d 1028, 1031–32, 1035–38 (9th Cir. 2008) (cases either striking down or seriously calling into question the validity of ballot-access laws that restricted *who* may qualify as signatory—*i.e.*, specific members of a geographic or residential area).

104. For the aforementioned reasons, the court finds that the Witness Requirement is not a "test or device" prohibited under Section 201 of the Voting Rights Act of 1965.

105. Thomas Plaintiffs have not made a clear showing that they will likely succeed on the merits of their Section 201 challenge because the law on the questions at the heart of the dispute does not favor their position. Therefore, because Thomas Plaintiffs cannot show a likelihood of success on the merits, this court need not address the other necessary elements for preliminary injunctive relief. *La Union Del Pueblo Entero*, 608 F.3d at 225.

V. CONCLUSION

For the foregoing reasons and after careful consideration of the entire record, the court **GRANTS IN PART AND DENIES IN PART** Thomas Plaintiffs' Motion for Preliminary Injunction (ECF No. 7 (*Thomas*)) and **GRANTS IN PART AND DENIES IN PART** Middleton Plaintiffs' Motion for Preliminary Injunction (ECF No. 13 (*Middleton*)). More specifically, the court **GRANTS** the pending Motions for Preliminary Injunction as to the Witness Requirement and **ENJOINS** Defendants, their respective agents, officers, employees, successors, and all persons acting in concert with each or any of them, from enforcing the Witness Requirement set forth in S.C. Code Ann. § 7-15-380, and from enforcing the Witness Requirement set forth in any other South Carolina statutes, on registered absentee voters *only* during the June 2020 primaries and resulting runoff elections occurring in the State of South Carolina. The court further **ORDERS** Defendants to **immediately and publicly** inform South Carolina voters about the elimination of the Witness Requirement for absentee voting, in coordination with city and county election officials, and county boards. Such public campaign shall include providing updated information regarding the instant injunction on all relevant websites and social media outlets (*i.e.*, Facebook, Instagram, Twitter, etc.) as appropriate. The court hereby **DENIES** all remaining claims made by *Thomas*/Middleton Plaintiffs in their Motions for Preliminary Injunction. [30]

***31 IT IS SO ORDERED.**

All Citations

--- F.Supp.3d ----, 2020 WL 2617329

Footnotes

1 Rule 52 of the Federal Rules of Civil Procedure requires the court to "state the findings and conclusions that support" the "granting or refusing [of] an interlocutory injunction." Fed. R. Civ. P. 52(a)(2). In further adherence to Rule 52(a)(1), this Order "finds [ ] facts specially and state[s] its conclusions of law separately" in numbered paragraphs. The court observes that Rule 52 does not require a discussion of every issue argued and/or presented. *E.g.*, *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir. 1993) ("But Rule 52(a) exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness. It simply require[s] findings that are explicit and detailed enough to enable us to review them under the applicable standard." (internal and external citations and quotation marks omitted)). *See alsoPaleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. DE C.V.*, 188 F. Supp. 3d 22, 34–35 (D.D.C. 2016), *aff'd*, 743 F. App'x 457 (D.C. Cir. 2018)("[t]he Court is neither "require[d]" nor "encourage[d]" "to assert the negative of each rejected contention as well as the affirmative of [all] those which they find to be correct.").

2 South Carolina is scheduled to hold statewide Democratic and Republic primaries on June 9, 2020, and primary runoffs on June 23, 2020. *E.g.*, *SCIWAY*, https://www.sciway.net/sc-elections/ (last visited May 24, 2020).

3 The court observes that while the relevant Witness Requirement statute, S.C. Code Ann. § 7-15-380, has been in existence for many years, Thomas/Middleton Plaintiffs challenge the Witness Requirement only as a result of the ongoing COVID-19 pandemic having immediate and severe effects on the June 2020 primary elections.

4 The court observes that for purposes of document formatting, the links to internet websites cited throughout the Order may have space(s) in the website URL where there should not be a space(s). To this point, if the link is copied and pasted in a website browser, an error may result from the space in the website URL.

5 Under the Federal Rules of Evidence, the court is permitted to "take judicial notice on its own." Fed. R. Evid. 201(c). Moreover, the court may take judicial notice of a fact "that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). The court has taken judicial notice of several facts and statistics throughout the order from the Center for Disease Control's ("CDC") website, the South Carolina Department of Health and Environmental Control's ("DHEC") website, the South Carolina Election Commission's website, and other websites that the court deems pertinent to the matters before the court.

6 The CDC has explained the asymptomatic spread of COVID-19 as follows:

> Two models attempted to estimate the number of infections caused by asymptomatic, presymptomatic, or mildly symptomatic infected persons. These models varied widely; 1 model suggested that up to half of infections were transmitted from infected persons who were pre symptomatic, and another suggested that up to four fifths of infections were transmitted by persons with no symptoms or mild symptoms. Both models suggested that a large number of persons with asymptomatic or mildly symptomatic infections were not detected by the health system and that these persons meaningfully contributed to ongoing community transmission. Although models are highly dependent on the assumptions built into them, these models suggest that the speed and extent of SARS-CoV-2 [COVID-19] transmission cannot be accounted for solely by transmission from symptomatic persons.

CDC Emerging Infectious Diseases, https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article#r30 (last visited May 24, 2020).

7 DHEC's priority was "to prevent[ ] the spread of the disease and to protect[ ] public health." *DHEC News Release*, https://www.scdhec.gov/news-releases/dhec-announces-seventh-possible-case-2019-novel-coronavirus-south-carolina (last visited May 21, 2020).

8 *See Executive Order No. 2020-09* (Mar. 15, 2020) (closing public schools, postponing certain elections, and urging rescheduling and cancellation of public events with over 100 persons); *Executive Order No. 2020-10* (Mar. 17, 2020) (prohibiting restaurants from providing certain on-premises consumption); *Executive Order No. 2020-12* (Mar. 20, 2020) (facilitating "social distancing" measures); *Executive Order No. 2020-13* (Mar. 23, 2020) (prohibiting or dispersing gatherings of three or more unless authorized or in the home); *Executive Order No. 2020-15* (Mar. 28, 2020) (declaring a new state of emergency based on COVID-19); *Executive Order No. 2020-17*, (Mar. 31, 2020) (closure of non-essential businesses, venues, facilities, services and activities for public use directing that non-essential businesses be closed); *Executive Order No. 2020-18* (Apr. 3, 2020) (closure of additional non-essential businesses); *Executive Order No. 2020-23* (Apr. 12, 2020) (declaring an additional state of emergency based on accelerated spread of COVID-19); *Executive Order No. 2020-29* (Apr. 27, 2020) (declaring new state of emergency for 15 days). These Executive Orders can be found at https://governor.sc.gov/executive-branch/executive-orders.

9 In light of this assertion and Thomas Plaintiffs' subsequently filed Motion for Expedited Briefing Schedule on their Motion for Preliminary Injunction (ECF No. 8 (*Thomas*)), the court entered an Order setting forth an expedited schedule for this case. (ECF No. 27 (*Thomas*).)

10 Thomas Plaintiffs' initial Motion sought to "prohibit Defendants from enforcing the 'Excuse Requirement,' S.C. Code Ann. § 7-15-320 and § 7-15-310 (West 2020), to prevent any eligible voter, regardless of age or physical condition, to request, receive, and have counted an absentee ballot for the June 9 primary." (ECF No. 7 at 47.) However, on May 12, 2020, the South Carolina General Assembly unanimously passed Senate Bill 635, which permits all "qualified elector[s] to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency declared by the Governor and there are fewer than forty-six days remaining until the date of the election." S.J. Res. 635, 123rd Gen. Assemb. (S.C. 2020). On May 13, 2020, the Governor of South Carolina signed Senate Bill 635 into law. S.C. Act 133 (S.C. 2020). In response, the court found that, as-applied to the June 2020 Primaries, Plaintiffs' challenges to the "Excuse Requirement" and "Age Ballot Requirements" are no longer rooted in a live case or controversy as it relates to the instant Motion and determined that those claims were moot. (ECF No. 56.) *See, e.g.*, *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) ("mootness can arise at any stage of litigation."). However, Thomas Plaintiffs reserve the right to challenge these requirements on the merits as to future elections. Due to this determination, the court will focus this Order on the remaining challenges to the "Witness Requirement" and the "Deadline Challenge" for the June 2020 primaries.

11 *See* Footnote 7.

12 During the May 15, 2020 hearing, Middleton Plaintiffs withdrew their request of "giving county election officials until June 23 to complete the canvass and certify the results to the State Board of Canvassers" and also withdrew their request (5) prohibiting election officials from releasing results until after 7:00 p.m. on June 19."

13 The parties do not offer argument as to whether Thomas/Middleton Plaintiffs are seeking prohibitory or mandatory injunctive relief and, as such, which standard is to be applied. *SeeLeague of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235–36 (4th Cir. 2014) ("A preliminary injunction may be characterized as being either prohibitory or mandatory. ... [w]hereas mandatory injunctions alter the status quo, prohibitory injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." (internal and external citations omitted)); *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." (citations omitted)). Upon its review, the court observes that it cannot clearly resolve this issue because the resolution depends on subjective presumptions specific to the parties, *i.e.*, Thomas/Middleton Plaintiffs allege they are trying to prevent irreparable harm while Defendants presumably would contend that Thomas/Middleton Plaintiffs are seeking to alter the status quo as to absentee ballots.

14 To the extent any findings of fact constitute conclusions of law, they are adopted as such; to the extent any conclusions of law constitute findings of fact, they are so adopted. Moreover, as this is a preliminary injunction, any facts identified "are not final determinations of disputed matters." *EZ Gard Indus., Inc. v. XO Athletic Co.*, No. 07-CV-4769 (JMR/FLN), 2008 WL 1827490, at *1 n.1 (D. Minn. Apr. 23, 2008).

15 According to Dr. Cogburn:

> [Minorities'] risk [of] COVID-19 infection is tied to pre-existing and evolving inequities in structural systems and social conditions. As a result, any voting requirement requiring them to break social distancing protocols would place them at higher risk for infection and also threatens public health of the Black community more broadly. We will not be able to immediately address the deeply entrenched social and structural factors contributing to the significantly elevated risk to COVID-19 related infection and mortality among [minorities]. We can, however, acknowledge the significance of these factors and take immediate steps to minimize exposure for groups most gravely threatened by exposure to COVID-19 ...

(ECF No. 7-15 at 8.)

> In support of the aforementioned conclusion, Dr. Cogburn relies on:
>
> Early data for COVID-19 infection and mortality in South Carolina [which is] consistent with national patterns and are highly concerning. The rate of infection and death for Black residents far exceeds their representation in the general population as well as overall levels for White citizens. Specifically, Black people living in South Carolina comprise 27% of the population but 57% of COVID-19 related deaths, making them 5 times more likely than Whites to die from the infection. The racial disparities in COVID-19 infection rates and deaths in South Carolina are among the most startling in the country ...

(ECF No. 7-15 at 6.) (internal citations omitted).

16 *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

17 *TheReal Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010).

18 Of course, this determination, "like any ruling on a preliminary injunction, does not preclude a different resolution of [ ] [Thomas/Middleton Plaintiffs'] claims on a more fully developed record." *Newsom v. Albemarle Cnty. School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

19 Thomas/Middleton Plaintiffs do not lodge a facial attack on the statute, but instead pursue an as-applied challenge to the statute during the COVID-19 pandemic.

20 Relying on *McDonald v. Board of Election Commissioners*, SCEC Defendants imply that absentee voting is not constitutionally protected here because the Witness Requirement, like "the state's absentee rules in *McDonald*" do not "impact [the inmate [voters']] ability to exercise the fundamental right to vote," but rather only their "right to receive absentee ballots." 394 U.S. 802, 808, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). SCEC Defendants also assert that "these same things are true of the ... Witness Requirement because, in SCEC Defendants' view, like the record in *McDonald*, "[t]here [is] nothing in the record to show that [Plaintiffs] are in fact absolutely prohibited from voting by the State." (ECF No. 46 at 11.) While the court agrees with SCEC's conclusion that Defendants here have not, in the very literal sense, "absolutely prohibited" Plaintiffs from voting, the court disagrees with the way in which SCEC Defendants have framed the issue. To be clear, the standard does not require this court to find that the state has "absolutely prohibited voting" in order to find that absentee voting impacts Plaintiffs' ability to exercise their fundamental right to vote." Indeed, as the Supreme Court pointed out in *O'Brien v. Skinner*, the *McDonald* Court's ultimate determination that "the right to vote [was not] at stake" was premised on the fact that the burden to absentee voting was a "relatively trivial inconvenience encountered by

a voter ... when other means of exercising the right to vote [were easily] available." *O'Brien v. Skinner,* 414 U.S. 524, 532, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974) (discussing *McDonald*). But here, "other means of exercising the right" to vote are not easily available. In-person voting, while still technically an available option, 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. As the court observes, every aspect of the "normal" way of life, including the realm of voting, has necessarily changed due to something that was not present in 1969 when *McDonald* was decided: an on-going pandemic. If faced with burdensome restrictions to absentee voting, as Thomas/Middleton Plaintiffs allege, those burdens are certainly more than a "trivial inconvenience" that could easily be remedied by voting in person. In fact, it is relatively difficult to vote in person without risking the possibility of infection, especially for those who are more susceptible to the ravaging harms of COVID-19. In other words, during this pandemic, absentee voting is the safest tool through which voters can use *to effectuate* their fundamental right to vote. To the extent that access to that tool is unduly burdened, then no matter the label, "denial of the absentee ballot is effectively an absolute denial of the franchise [and fundamental right to vote]." *O'Brien*, 414 U.S. at 533, 94 S.Ct. 740 (Justice Marshall concurring). As such, in these circumstances, absentee voting impacts voters' fundamental right to vote.

21 According to the Brennan Center for Justice, which is a nonpartisan law and policy institute, more than 31 million Americans cast ballots by mail in 2018. *Brennan Center for Justice*, https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud (last visited May 20, 2020). Despite this dramatic increase in mail voting over time, fraud rates "remained infinitesimally small." *Id.* Additionally, "none of the five states that hold their elections primarily by mail has had any voter fraud scandals since making that change." *Id.* For example, Oregon sent out more than 100 million mail-in ballots since 2000, and has documented only about a dozen cases of proven fraud." *Id.* "Rounded to the seventh decimal point, that's 0.0000001 percent of all votes cast." *Id.* Moreover, according to a sampling research conducted by the Heritage Foundation—an organization invested in "[p]reventing, deterring, and prosecuting election fraud", there have only been 1,285 proven instances of voter fraud nationwide. *A Sampling of Recent Election Fraud Cases from Across the United States*, https://www.heritage.org/voterfraud (last visited May 22, 2020).

22 The court agrees that these are legitimate state interests, but they are still served by other means (i.e. requiring absentee ballot applications to include identifying information, etc.).

23 The presumption against issuing preliminary injunctions where a harm suffered can be remedied by money damages at judgment stems from real concerns the issuance of a preliminary injunction remedy raises. These concerns include, for example, the fact that in issuing a preliminary injunction order, a district court is required, based on an incomplete record, to order a party to act in a certain way. *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994). Issuing an injunction further risks repetitive litigation, that which carries significant costs for both parties. *Id.* Thus, there are only "extraordinary circumstances" that are "quite narrow" in application, where preliminary injunction is appropriate notwithstanding monetary damages. *Id.* (discussing a plaintiff's business not being able to survive as an example of such circumstances.) The COVID-19 pandemic is one such extraordinary circumstance.

24 In its suggestions for slowing the spread of COVID-19, the CDC advocates for "limiting face-to-face contact with others" by "[s]tay[ing] at least 6 feet (about 2 arms' length) from other people." *Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html(last visited May 20, 2020).

25 Addressing Middleton Plaintiff's first two reasons for an extended deadline: as Defendants accurately point out, "[e]very citizen is presumed to know the law." *Georgia v. Public.Resource.Org, Inc.*, —— U.S. ——, 140 S. Ct. 1498, 1507, —— L.Ed.2d —— (2020); *see alsoState v. Adams*, 409 S.C. 641, 763 S.E.2d 341, 348 (2014) ("ignorance of the law is no excuse"). It is reasonable to expect a voter, who is voting by absentee ballot, no matter the reason, to familiarize themselves with the rules governing that procedure—especially when those procedures are provided. Information regarding expanded absentee voting in South Carolina has been available to every South Carolina voter since May 13, 2020. *See* https://www.scvotes.org/all-voters-can-now-vote-absentee-june-primaries-runoffs *All Voters Can Now Vote Absentee in June Primaries Release May 13, 2020* (Last visited May 22, 2020) ("every voter in South Carolina is now qualified to vote absentee in the June Primaries and runoffs. Governor McMaster today signed into law legislation passed yesterday by the General Assembly that authorizes any voter to vote absentee in any election in June 2020.") Similarly, while the court understands Middleton Plaintiffs' concerns that "the Postal Service faces unprecedented challenges from the pandemic and budgetary constraints", (ECF No. 13 at 26), this concern does not impact the constitutional inquiry before the court.

26 Additionally, Middleton Plaintiffs state that "those who do not receive their ballots on time to mail them back will be faced with the same untenable choice: risk serious illness/death or not vote." (ECF No. 29 at 13.) While this may be true for some people who wait until near the June 9 deadline to request an absentee ballot, the opportunity to request a ballot

has been open to all South Carolina voters since May 13, 2020, nearly a whole three weeks before the June 5, 2020 absentee ballot application deadline. The court finds this to be ample time to request an absentee ballot and timely submit it to the SCEC well before Election Day.

27 During the May 15, 2020 hearing, Middleton Plaintiffs suggested that the court should consider a six-day extension of the deadline consistent with a Wisconsin district court's order which "was affirmed by the Supreme Court" and "extended the deadline by six days." *SeeDemocratic Nat'l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, —— F.Supp.3d ——, ——, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020), *clarified*, ECF No. 122 (W.D. Wis. Apr. 3, 2020), *stayed in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, —— U.S. ——, 140 S. Ct. 1205, —— L.Ed.2d —— (2020). The court determines that the specific facts of the Wisconsin case as it related to an absentee ballot deadline do not apply to the facts of this case. Additionally, the Supreme Court's decision was "narrow" and "should not be viewed as expressing an opinion on the broader question of whether modifications to election procedures in light of COVID-19 are appropriate." *Republican Nat'l Comm.*, 140 S.Ct. 1205 at 1207. As the most significant contrast, the Wisconsin Commissioners "no longer object[ed]" to the Wisconsin Plaintiffs' six-day extension request and consented to the deadline extension. 2020 WL 1638374, at *16. Here, SCEC Defendants vehemently object to an extension of any kind.

28 Unlike the Thomas/Middleton Plaintiffs' "as-applied" challenge to the Witness Requirement under the First and Fourteenth Amendments, Thomas Plaintiffs' challenge to the Witness Requirement under § 201 of the Voting Rights Act is a facial attack on the South Carolina statutes mandating the Witness Requirement. The distinction is quite significant here. "A facial challenge is an attack on a statute itself as opposed to a particular application." *Doe v. City of SanDiego*, 313 F. Supp. 3d 1212, 1217 (S.D. Cal. 2018) (citing *City of Los Angeles v. Patel,* 576 U.S. 409, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015)). Accordingly, "a facial attack does not raise questions of fact related to the enforcement of the statute in a particular instance." *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 133 n.10, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) ("Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision"). As this court has recognized before, "facial challenges are generally disfavored because they 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.' " *Greenville Cty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 662 (D.S.C. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). This "Witness Requirement" challenge based on the VRA, then, does not depend on the COVID-19 pandemic or the specific obstacles faced by Thomas Plaintiffs related to the specific burdens caused by the coronavirus. As such, the court analyzes the § 201 "Witness Requirement" challenge independently of the facts surrounding the current pandemic.

29 The court also acknowledges that intervenor-Defendant SCRP also briefed this argument in its Response in Opposition to Plaintiffs' Motion for Preliminary Injunction (ECF No. 50) (*Thomas*). Specifically, intervenor-Defendant SCRP states that the claim "fails right out the gate because [Thomas Plaintiffs] failed to affirmatively request a three-judge court ...." (ECF No. 50 at 13.)

30 **The court denies or moots the following requested relief**:

1) prohibiting Defendants from enforcing S.C. Code Ann. § 7-15-320 and § 7-15-310, the Absentee Ballot Age Restriction, to prevent any eligible voter, regardless of age, to request, receive, and have counted an absentee ballot for the June 9 primary (MOOTED)

2) prohibiting Defendants from enforcing the Excuse Requirement, S.C. Code Ann. § 7-15-320 and § 7-15-310, to prevent any eligible voter, regardless of age or physical condition, to request, receive, and have counted an absentee ballot for the June 9 primary (MOOTED)

3) prohibiting Defendants from enforcing the requirement under S.C. Code Ann. § 7-15-230 that absentee ballots must be received by 7:00 p.m. on Election Day to be counted and extending the deadline to June 19, provided that the ballots were postmarked or mailed on or before June 9 (DENIED)

4) ordering the counting of ballots to begin on June 19, *see*S.C. Code Ann. § 7-13-1110, and giving county election officials until June 23 to complete the canvass and certify the results to the State Board of Canvassers, *id.* § 7-17-20 (MOOTED AS WITHDRAWN)

5) prohibiting election officials from releasing results until after 7:00 p.m. on June 19, *see*Fed. R. Civ. P. 65 (MOOTED AS WITHDRAWN)

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2020 WL 3207824
Only the Westlaw citation is currently available.
United States District Court, N.D.
Alabama, Southern Division.

PEOPLE FIRST OF ALABAMA , et al., Plaintiffs,
v.
John MERRILL , et al., Defendants.

Civil Action Number 2:20-cv-00619-AKK
|
Signed 06/15/2020

Synopsis

Background: Four registered voters in Alabama, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, filed action against Alabama, Governor, Secretary of State, county absentee ballot manager, and county circuit clerks serving as absentee election managers (AEMs), challenging election laws requiring witnesses and photo identification for absentee voting, and de facto banning curbside voting, as violating the First and Fourteenth Amendments, the Americans with Disabilities Act (ADA), or the Voting Rights Act (VRA), and plaintiffs moved for preliminary injunction enjoining enforcement of those laws.

Holdings: The District Court, Abdul K. Kallon, J., held that:

[1] voters demonstrated particularized injury necessary to establish standing to challenge laws;

[2] AEMs were not entitled to sovereign immunity;

[3] plaintiffs had substantial likelihood of success on merits of claim that election laws were unconstitutional;

[4] plaintiffs did not have substantial likelihood of success on merits of claim that witness requirement violated ADA;

[5] plaintiffs' demonstrated substantial likelihood of success on merits of claim that photo identification requirement violated ADA;

[6] plaintiffs did not demonstrate likelihood of success on VRA claim;

[7] plaintiffs would likely suffer irreparable harm in absence of preliminary injunction; and

[8] balance of equities and public interest tipped in favor of preliminary injunction.

Motion granted in part.

West Headnotes (73)

[1] **Injunction** ⇦ Persons entitled to apply; standing

The party seeking a preliminary injunction bears the burden of establishing the elements of standing that they have (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.

[2] **Federal Civil Procedure** ⇦ In general; injury or interest

To establish an injury in fact, as an element of standing, a plaintiff must show an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

[3] **Federal Civil Procedure** ⇦ In general; injury or interest

In multiple-plaintiff cases, at least one plaintiff must have standing to seek each form of relief requested in the complaint, and if there is one plaintiff who has demonstrated standing to assert these rights as his own, the court need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.

[4] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, had particularized injury necessary to demonstrate injury in fact for standing to challenge Alabama election law requiring that absentee voters submit copy of their photo identification as burdening their right to vote in upcoming runoff election in violation of the First and Fourteenth Amendments and ADA, even if voters had a copy of their photo identifications available; photo identification requirement placed burden on exercise of right to vote, and while all absentee voters were required to comply with photo identification requirement and all voters faced risk of contracting COVID-19, injury was particularized, as each voter was required to comply with the photo identification requirement. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code § 17-9-30(b).

[5] **Election Law** ⇦ Identification of voter

When plaintiffs are required to obtain photo identification before they can vote, the imposition of that burden is an injury sufficient to confer standing to challenge that requirement regardless of whether the plaintiffs are able to obtain photo identification.

[6] **Election Law** ⇦ Persons entitled to bring contest

A voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote.

[7] **Federal Civil Procedure** ⇦ In general; injury or interest

For an injury to be particularized, as required for standing, it must affect the plaintiff in a personal and individual way.

[8] **Federal Civil Procedure** ⇦ In general; injury or interest

Federal Civil Procedure ⇦ Rights of third parties or public

The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance, and thus, for purposes of standing, it does not matter that the injury is widely shared, so long as the plaintiff suffers a particularized harm.

[9] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Injury to two registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, from burden on right to vote in runoff election that was approximately one-month away by having to comply with Alabama election law requiring that absentee voters submit copy of their photo identification was actual or imminent, and not speculative, as required to demonstrate injury in fact necessary for standing to challenge law as violating the First and Fourteenth Amendments and ADA, though State defendants asserted that it was unknown how serious a risk COVID-19 would present at time of runoff election, where voters intended to vote in runoff election. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code § 17-9-30(b).

[10] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Election Law ⇦ Parties; standing

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, established injury in fact for standing to challenge Alabama election law requiring that absentee ballot be accompanied by affidavit witnessed by notary public or two adult witnesses as burdening their right to vote in runoff election that was approximately one-month away in violation of the First and Fourteenth Amendments, ADA, and VRA; voters claimed that the witness requirement burdened their right to vote, voters intended to vote in runoff election, and each voter had to comply with witness requirement. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code § 17-11-7(b).

[11] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Alabama Secretary of State effectively implemented ban on curbside voting, as would support finding that registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, established injury in fact necessary for standing to challenge ban on curbside voting as burdening their right to vote in upcoming runoff election in violation of the First and Fourteenth Amendments and ADA, though no state statute specifically prohibited curbside voting; Secretary professed view that curbside voting did not comply with Alabama law, and Secretary demonstrated power to shut down any county's attempt to establish a curbside voting operation. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[12] **Federal Civil Procedure** ⇦ Causation; redressability

To establish traceability, as required for standing, the plaintiff must show a causal connection between her injury and the challenged action of the defendant—i.e., the injury must be fairly traceable to the defendant's conduct, as opposed to the action of an absent third party.

[13] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Election Law ⇦ Parties; standing

Alabama, not COVID-19 virus, caused alleged injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, by requiring them to comply with state election laws requiring photo identification, witnesses, and de facto ban on curbside voting in upcoming runoff election, for purposes of determining whether voters suffered injury that was fairly traceable to conduct of State defendants, as required for standing to challenge validity of laws under First and Fourteenth Amendments, the ADA, or the VRA; while virus might make the injury severe because complying with voting requirements might expose voters to serious health risks, virus did not cause the legal injury regarding voting requirements. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-9-30(b), 17-11-7(b).

[14] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, in complying with Alabama election law requiring that absentee voters submit copy of their photo identification for upcoming runoff election was traceable to absentee election managers (AEMs) under state law, as required for voters to have standing to challenge requirement as violating

the First and Fourteenth Amendments and the ADA; AEMs were charged with enforcing the photo identification requirement, as they interpreted the relevant laws, decided whether a photo identification was needed, and screened the absentee ballot applications to see if the voter had provided the photo identification. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code §§ 17-9-30(b, c), 17-10-2(c)(1), 17-11-9.

[15] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Election Law ⇦ Parties; standing

Injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, in complying with Alabama election law requiring that absentee ballot be accompanied by affidavit witnessed by notary public or two adult witnesses for upcoming runoff election, was traceable to absentee election managers (AEMs) under state law, as required for voters to have standing to challenge requirement as violating the First and Fourteenth Amendments, the ADA, and the VRA, even if local poll workers participated in process of counting ballots; AEMs were officials in charge of the absentee voting process who oversaw the counting of absentee ballots. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-11-2, 17-11-7(b), 17-11-9, 17-11-10.

[16] **Civil Rights** ⇦ Injury and Causation

Constitutional Law ⇦ Particular Constitutional Provisions in General

Constitutional Law ⇦ Elections

Injury from any de facto ban on curbside voting in upcoming runoff election was traceable to Alabama Secretary of State, as required for registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, to have standing to challenge ban as violating the First and Fourteenth Amendments and the ADA, though state law did not prohibit curbside voting; on at least two occasions, Secretary shut down county efforts to establish curbside voting operation based on belief that such operations did not comply with other election laws. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[17] **Federal Civil Procedure** ⇦ Causation; redressability

To establish redressability, as required for standing, a decision in the plaintiffs' favor must significantly increase the likelihood that the plaintiffs' injury will be redressed.

[18] **Federal Civil Procedure** ⇦ Causation; redressability

To establish redressability requirement for standing, it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly.

[19] **Civil Rights** ⇦ Injury and Causation

Injunction ⇦ Persons entitled to apply; standing

Injunction ordering absentee election managers (AEMs) not to enforce Alabama law requiring that absentee voters submit copy of their photo identification in upcoming runoff election would likely successfully allow registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, to vote absentee without presenting photo identification, and thus voters established redressability requirement for standing to challenge photo identification requirement as violating the First and Fourteenth Amendments and the ADA. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202,

42 U.S.C.A. § 12132.; Ala. Code §§ 17-11-7(b), 17-11-9.

[20] **Civil Rights** ⇦ Injury and Causation

Injunction ⇦ Persons entitled to apply; standing

Injunction ordering Alabama Secretary of State not to enforce law requiring that absentee ballot be accompanied by affidavit witnessed by notary public or two adult witnesses during upcoming runoff election would not redress injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, from complying with that law, and thus voters did not establish redressability requirement for standing to challenge the witness requirement as violating the First and Fourteenth Amendments, the ADA, and the VRA on that ground, though Secretary was the chief election official of the state; absentee election managers (AEMs) for counties, not Secretary, were in charge of absentee voting process. Ala. Code § 17-1-3(a).

[21] **Civil Rights** ⇦ Injury and Causation

Injunction ⇦ Persons entitled to apply; standing

Injunction ordering absentee election managers (AEMs) for counties not to enforce Alabama law requiring that absentee ballot be accompanied by affidavit witnessed by notary public or two adult witnesses during upcoming runoff election would likely redress injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, from complying with that law, and thus voters established redressability requirement for standing to challenge the law as violating the First and Fourteenth Amendments, the ADA, or the VRA; AEMs oversaw absentee ballot process by receiving the ballots, delivering them to absentee election officials, and counting the ballots in conjunction with those other local officials, such that unwitnessed absentee ballots would be counted if injunction were entered. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-11-7(b), 17-11-9, 17-11-10.

[22] **Civil Rights** ⇦ Injury and Causation

Injunction ⇦ Persons entitled to apply; standing

Injunction prohibiting Alabama Secretary of State from banning otherwise lawful curbside voting operations for upcoming runoff election would redress injury to registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, by lifting ban on curbside voting, and thus voters established redressability requirement for standing to challenge state's de facto curbside voting ban as violating the First and Fourteenth Amendments and the ADA; if Secretary was enjoined from banning otherwise lawful curbside voting, counties would be free to provide them, if they were so inclined, and ban would be lifted. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[23] **Federal Courts** ⇦ Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts ⇦ Agencies, officers, and public employees

Doctrine of state sovereign immunity prohibits suits against state officials where the state is, in fact, the real party in interest; however, there is an exception for suits against state officers seeking prospective equitable relief to end continuing violations of federal law. U.S. Const. Amend. 11.

[24] **Federal Courts** ⇦ Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts ⇦ Agencies, officers, and public employees

The *Ex parte Young* doctrine permits the exercise of the judicial power of the United States, as an exception to sovereign immunity, where a plaintiff seeks to compel a state officer to comply with federal law, but the *Ex parte Young* doctrine does not apply unless the state officer has some responsibility to enforce the statute or provision at issue. U.S. Const. Amend. 11.

[25] **Federal Courts** ⇦ Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts ⇦ Agencies, officers, and public employees

Analysis for whether a state official has some connection to the challenged statute, as required to satisfy the *Ex parte Young* doctrine as an exception to sovereign immunity, is similar to the analysis for whether a state official is a proper defendant for the purposes of traceability and redressability requirements of standing, but they are still separate issues. U.S. Const. Amend. 11.

[26] **Federal Courts** ⇦ Other particular entities and individuals

Absentee election managers (AEMs) were sufficiently connected to the Alabama laws requiring that absentee voters submit copy of their photo identification and that absentee ballots be accompanied by affidavits witnessed by notary public or two adult witnesses to satisfy *Ex parte Young* doctrine, and thus AEMs were not entitled to sovereign immunity in action by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, challenging laws as violating the First and Fourteenth Amendments, the ADA, or the VRA; AEMs were closely connected to enforcement of witness and photo identification requirements for absentee voting. U.S. Const. Amends. 1, 11, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-9-30(b), 17-11-7(b), 17-11-9, 17-11-10.

[27] **Federal Courts** ⇦ Other particular entities and individuals

Alabama Secretary of State was sufficiently connected election laws requiring that notary or two witnesses sign affidavit for absentee ballots, requiring that absentee voters submit copy of their photo identification, and de facto banning curbside voting, to satisfy *Ex parte Young* doctrine, and thus Secretary was not entitled to sovereign immunity in action by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, challenging laws as violating the First and Fourteenth Amendments, the ADA, or the VRA; Secretary was required to provide uniform guidance on election law, adopt standards relevant to voting, inform voters of photo identification requirement, and adopt rules indicating to absentee election managers (AEMs) whether photo identification was required. U.S. Const. Amends. 1, 11, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code §§ 17-1-3(a), 17-2-4(f), 17-9-30(b, n), 17-11-5, 17-11-7(b).

[28] **Federal Courts** ⇦ Other particular entities and individuals

A governor's general executive power is not a basis for jurisdiction under *Ex parte Young*, as an exception to sovereign immunity, in most circumstances in which a state statute has been challenged; similarly, a governor's emergency powers do not supply the requisite connection to the challenged statute. U.S. Const. Amend. 11.

[29] **Federal Courts** ⇦ Civil rights and discrimination in general

States' sovereign immunity is abrogated for claims brought under the VRA and the ADA. U.S. Const. Amend. 11; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Voting Rights Act of 1965, § 2 et seq., 52 U.S.C.A. § 10301 et seq.

[30] **Constitutional Law** ⇨ Mootness

Federal Courts ⇨ Civil rights and discrimination in general

County circuit clerk's decision to decline to serve as absentee election manager (AEM), under Alabama statute providing that county circuit clerk would serve as AEM unless he or she declined, in which case the appointing board would select a replacement, did not render moot claims by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, that election laws requiring photo identification and witnesses for absentee voting, and banning curbside voting, violated the First and Fourteenth Amendments, the ADA, or the VRA; voters sued clerk in her official capacity through which she was presumptively serving as county AEM, and when appointing party selected a replacement AEM, the successor AEM for county would automatically be substituted. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-9-30(b), 17-11-2, 17-11-7(b); Fed. R. Civ. P. 25(d).

[31] **Constitutional Law** ⇨ Elections

Federal Courts ⇨ Civil rights and discrimination in general

Claims by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, that Alabama election laws requiring photo identification and witnesses for absentee voting, and banning curbside voting, violated the First and Fourteenth Amendments, the ADA, or the VRA, and seeking preliminary injunction enjoining enforcement of those laws in upcoming runoff election, were justiciable, notwithstanding state defendants' arguments that claims raised non-justiciable political questions; standards for resolving claims were familiar and manageable, and federal courts routinely entertained suits to vindicate voting rights. U.S. Const. Amends. 1, 14; Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-9-30(b), 17-11-7(b).

[32] **Injunction** ⇨ Extraordinary or unusual nature of remedy

Injunction ⇨ Irreparable injury

A "preliminary injunction" is an extraordinary remedy designed to prevent irreparable harm to the parties during the pendency of a lawsuit.

[33] **Injunction** ⇨ Grounds in general; multiple factors

A district court may issue a preliminary injunction only if the plaintiffs establish: (1) a substantial likelihood of success on the merits, (2) a likelihood of suffering irreparable harm in the absence of relief, (3) that the balance of equities weigh in their favor, and (4) that the injunction serves the public interest.

[34] **Federal Courts** ⇨ Preliminary injunction; temporary restraining order

Injunction ⇨ Discretionary Nature of Remedy

Determination of whether the plaintiffs have satisfied their burden for issuance of a preliminary injunction is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion.

[35] **Injunction** ⇨ Likelihood of success on merits

Injunction ⇨ Irreparable injury

First two factors of the preliminary injunction standard, i.e., the substantial likelihood of success on the merits and the likelihood of irreparable harm, are the most critical.

[36] **Election Law** ⇨ Nature and source of right

Election Law ⇨ Power to Restrict or Extend Suffrage

An individual's right to vote is sacrosanct, and any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

[37] **Constitutional Law** ⇦ Elections in general

When deciding a constitutional challenge to state election laws, district courts apply the flexible standard of the *Anderson-Burdick* balancing test, under which the court must weigh the character and magnitude of the burden the State's rule imposes on First and Fourteenth Amendment rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. U.S. Const. Amends. 1, 14.

[38] **Constitutional Law** ⇦ Elections in general

Constitutional Law ⇦ Voting rights and suffrage in general

Rigorousness of the court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights; if the challenged law severely restricts the right to vote, then strict scrutiny applies, meaning the law must be narrowly drawn to serve a compelling state interest, but if the challenged law imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. U.S. Const. Amends. 1, 14.

[39] **Constitutional Law** ⇦ Voting rights and suffrage in general

Even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden under the First and Fourteenth Amendments. U.S. Const. Amends. 1, 14.

[40] **Constitutional Law** ⇦ Voting rights and suffrage in general

Requirement under Alabama law that all absentee ballots include an affidavit witnessed by a notary public or two adult witnesses did not impose a burden on the right to vote that was severe enough to trigger strict scrutiny under the First and Fourteenth Amendments, but rather State's legitimate interests of sufficient weight were required to justify the burden, in action challenging constitutionality of law by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members; while witness requirement increased absentee voters' exposure to deadly virus, which was a significant burden to some voters, it was possible for many voters to obtain required signatures without violating social-distancing guidelines. U.S. Const. Amends. 1, 14; Ala. Code §§ 17-11-7(b), 17-11-9, 17-11-10.

[41] **Constitutional Law** ⇦ Elections, voting, and political rights

Election Law ⇦ Property

Right to vote cannot be made to depend on an individual's financial resources, and a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the payment of any fee an electoral standard. U.S. Const. Amend. 14.

[42] **Injunction** ⇦ Conduct of elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, seeking preliminary injunction enjoining enforcement of Alabama laws that all absentee ballots include an affidavit signed by the voter and witnessed by a notary public or two adult witnesses, had substantial likelihood of success on merits of claim that law violated First and Fourteenth Amendments as to vulnerable voters in upcoming runoff election who could not safely satisfy requirement in

light of COVID-19; while state had legitimate and strong interest in preventing voter fraud, effectiveness of law in preventing fraud appeared to be limited, and other laws, including criminal penalties, protected election integrity. U.S. Const. Amends. 1, 14; Ala. Code §§ 17-11-4, 17-11-7(b), 17-11-9, 17-11-10(c), 17-17-24(a).

[43] **Constitutional Law** ⇦ Voting rights and suffrage in general

Requirement under Alabama law that, with certain exceptions, absentee voters provide a copy of their photo identification did not impose burden on right to vote that was severe enough to trigger strict scrutiny under the First and Fourteenth Amendments, but rather state's legitimate interests of sufficient weight were required to justify the burden, in action by registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, challenging law as applied to similarly situated elderly or disabled voters in COVID-19 pandemic; burden on vulnerable voters to find person willing to help them obtain copy of photo identification at risk of potential exposure to COVID-19 was not severe. U.S. Const. Amends. 1, 14; Ala. Code §§ 17-9-30(b, d), 17-11-9.

[44] **Injunction** ⇦ Conduct of elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, seeking preliminary injunction enjoining enforcement of Alabama law requiring, with limited exceptions, that absentee voters provide copy of their photo identification, had substantial likelihood of success on merits of claim that law violated First and Fourteenth Amendments as to vulnerable voters in upcoming runoff election who could not safely satisfy requirement in light of COVID-19; while State had legitimate interest preventing voter fraud, exemption could be extended to those who could not safely obtain copy of photo identification, and there were other measures available to prevent voter fraud. U.S. Const. Amends. 1, 14; Ala. Code §§ 17-9-30(b, d), 17-11-4, 17-11-9; Ala. Admin. Code r. 820-2-9-.12(3).

[45] **Injunction** ⇦ Conduct of elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, seeking preliminary injunction enjoining Alabama from prohibiting local election officials from providing curbside voting, had substantial likelihood of success on merits of claim that ban on curbside voting in upcoming runoff election violated First and Fourteenth Amendments; state identified no fraud-prevention interest that complied with relevant election laws, and there was no indication that curbside voting would conflict with election laws requiring voters to sign poll lists and ballots to be kept secret, given laws allowing election officials to write voter's name on poll list if needed due to physical disability and to provide voting assistance. U.S. Const. Amends. 1, 14; Ala. Code §§ 17-9-11, 17-9-13.

[46] **Civil Rights** ⇦ Handicap, Disability, or Illness

ADA must be broadly construed. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[47] **Civil Rights** ⇦ Who Is Disabled; What Is Disability

While the rules, policies, and practices of a program provided by a public entity may be subject to reasonable modification, the essential eligibility requirements for the program are not, for purposes of determining whether a plaintiff meets the essential eligibility requirements, as required to be a qualified individual with a disability under Title II of the ADA. Americans with Disabilities Act of 1990 § 201, 42 U.S.C.A. § 12131(2).

[48] **Civil Rights** ⇦ Who Is Disabled; What Is Disability

When an individual cannot meet an essential eligibility requirement for a program provided by a public entity, the only possible accommodation is to waive the essential requirement itself, but waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the program at issue in a challenge under Title II of the ADA; therefore, a plaintiff who does not meet an essential eligibility requirement is not qualified to state a claim under the ADA. Americans with Disabilities Act of 1990 § 201, 42 U.S.C.A. § 12131(2).

[49] **Civil Rights** ⇦ Who Is Disabled; What Is Disability

Whether an eligibility requirement of a program offered by a public entity is essential is determined by consulting the importance of the requirement to the program in question, for purposes of determining whether a plaintiff meets the essential eligibility requirements, as required to be a qualified plaintiff under Title II of the ADA. Americans with Disabilities Act of 1990 § 201, 42 U.S.C.A. § 12131(2).

[50] **Civil Rights** ⇦ Who Is Disabled; What Is Disability

A public entity cannot merely state that the discriminatory requirement is essential to the fundamental nature of the activity at issue—it must provide evidence that the procedural requirement is necessary to the substantive purpose undergirding the requirement to constitute an essential eligibility requirement that a plaintiff must meet to be a qualified individual entitled to state a claim under Title II of the ADA. Americans with Disabilities Act of 1990 § 201, 42 U.S.C.A. § 12131(2).

[51] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

A public entity violates Title II of the ADA not just when a disabled person is completely prevented from enjoying a service, program, or activity, but rather when such an offering is not readily accessible. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.150.

[52] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

Mere difficulty in accessing a benefit provided by a public entity is not, by itself, a violation of Title II of the ADA; instead, a plaintiff must show that the failure to accommodate created an injury. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.150.

[53] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

If a plaintiff makes a prima facie case of discrimination in the provision of services by a public entity under Title II of the ADA, she must then propose a reasonable modification to the challenged requirement or provision; this remedy should be a proportionate and reasonable modification of a service that is already provided, and it should not change the nature of the service. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[54] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

A successful claim under Title II of the ADA requires plaintiffs to propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[55] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

To show the accommodation sought relating to a public offering is reasonable, a plaintiff asserting a claim for discrimination under Title

II of the ADA need only demonstrate a facially reasonable request—or one that seems reasonable in the run of cases; this burden is not a heavy one, and it is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[56] **Civil Rights** ⇦ Presumptions, Inferences, and Burdens of Proof

If the plaintiffs raising a discrimination claim under Title II of the ADA can make the showing that the proposed modification to the challenged program that will allow them meaningful access is reasonable, the burden of non-persuasion shifts to the defendants. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[57] **Civil Rights** ⇦ Courts and judicial proceedings

A public entity need not employ any and all means to make judicial services accessible to persons with disabilities under Title II of the ADA; rather, the entity must make reasonable modifications that would not fundamentally alter the nature of the service provided or impose an undue financial or administrative burden. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[58] **Civil Rights** ⇦ Defenses in General

Without evidence that a proposed modification to make public services accessible to persons with disabilities is unreasonable or incompatible with the state's program, a defendant cannot succeed in the affirmative defense to a discrimination claim under Title II of the ADA. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.164.

[59] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

The reasonable-modification inquiry in Title II-ADA cases in which plaintiffs have proposed a modification to make public services accessible to persons with disabilities is a highly fact-specific inquiry and terms like "reasonable" are relative to the particular circumstances of the case. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.164.

[60] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

Reasonable-modification inquiry in Title II-ADA cases in which plaintiffs have proposed a modification to make public services accessible to persons with disabilities entails assessing whether the proposed modification would eliminate an essential aspect of the program or simply inconvenience it, keeping in mind the basic purpose of the program, and weighing the benefits to the plaintiff against the burdens on the defendant. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.164.

[61] **Civil Rights** ⇦ Discrimination by reason of handicap, disability, or illness

A modification to a program that provides an exception to a peripheral rule in the provision of public services without impairing its purpose cannot be said to fundamentally alter the activity, as would support it being considered a reasonable modification under Title II of the ADA. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.164.

[62] **Civil Rights** ⇦ Preliminary Injunction

Registered voters, who had ADA-eligible disabilities that rendered them highly vulnerable to COVID-19, and organizations with similarly situated members, seeking preliminary injunction enjoining enforcement of Alabama laws requiring that all absentee ballots include an affidavit signed by the voter and witnessed by a notary public or two adult witnesses in upcoming runoff election, did not have

substantial likelihood of success on merits of claim that law violated the ADA; while plaintiffs asserted that witness requirement was not essential eligibility requirement, it had been deemed a condition precedent to eligibility under state law, and essential eligibility requirements were not subject to reasonable modifications. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code §§ 17-11-7; 17-11-9; 17-11-10(b).

[63] **Civil Rights** ⇦ Preliminary Injunction

Registered voters, who had ADA-eligible disabilities that rendered them highly vulnerable to COVID-19, and organizations with similarly situated members, seeking preliminary injunction prohibiting enforcement of Alabama law requiring that absentee voters submit copy of their photo identification in upcoming runoff election had substantial likelihood of success on merits of claim that law violated Title II of the ADA as applied in COVID-19 pandemic; individual plaintiffs were disabled, Alabama did not designate photo identification requirement as essential, certain voters lacked capability to copy their identification in their home, requiring voter to forego social-distancing practices presented nearly insurmountable hurdle, and plaintiffs' proposed reasonable modification of expanding existing exemption. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; Ala. Code §§ 17-9-30(b), 17-11-9; 28 C.F.R. § 35.150.

[64] **Civil Rights** ⇦ Preliminary Injunction

Registered voters, who had ADA-eligible disabilities that rendered them highly vulnerable to COVID-19, and organizations with similarly situated members, seeking preliminary injunction enjoining Alabama Secretary of State's prohibition on curbside voting in upcoming runoff election demonstrated likelihood of success on merits of the claim that prohibition violated Title II of the ADA; plaintiffs were qualified individuals with disabilities who were excluded from participation in voting by prohibition, plaintiffs proposed reasonable modification that state refrain from blocking counties that chose to offer the election, there was no indication that prohibition was essential nor that curbside voting would result in fundamental alteration to state elections, and plaintiffs demonstrated that they would utilize curbside voting. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.150(b).

[65] **Injunction** ⇦ Conduct of elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, seeking preliminary injunction prohibiting enforcement of Alabama laws requiring that all absentee ballots include an affidavit witnessed by a notary public or two adult witnesses in upcoming runoff election, did not have substantial likelihood of success on merits of claim that law violated VRA by imposing impermissible "test or device" by forcing the absentee voter to prove his qualifications by the voucher of registered voters or members of any other class as a prerequisite for voting; witnesses were not required to vouch for voter's identity or that voter met qualifications for voting, and while notary might vouch for qualifications, plaintiffs did not make that argument. Ala. Const. art. 8, § 177; Voting Rights Act of 1965 § 201, 52 U.S.C.A. § 10501; Ala. Code §§ 17-11-7(b), 17-11-9, 17-11-10.

[66] **Election Law** ⇦ Parties; standing

Federal Courts ⇦ Elections and reapportionment

District court could consider claim brought by registered voters who were at higher risk from COVID-19 and organizations with similarly situated members that Alabama laws requiring that all absentee ballots include an affidavit witnessed by a notary public or two adult witnesses violated VRA by imposing impermissible "test or device," though state defendants asserted that such claims could only

be brought by United States Attorney General and had to be decided by three-judge district court panel; VRA's reference to a proceeding instituted by "an aggrieved person" challenging a "test or device," contemplated that private plaintiffs could bring an action challenging a state practice as an impermissible test or device, and three-judge panel only applied when Attorney General initiated the suit. Voting Rights Act of 1965 §§ 3, 201, 204, 52 U.S.C.A. §§ 10302(b), 10501, 10504; Ala. Code §§ 17-11-7(b), 17-11-9, 17-11-10.

[67] **Injunction** ⇦ Conduct of elections

Registered voters, who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions, and organizations with similarly situated members, would likely suffer irreparable harm in the absence of a preliminary injunction prohibiting enforcement of Alabama election laws requiring that absentee ballots include affidavit witnessed by notary public or two adult witnesses, requiring that absentee voters submit copy of their photo identification, and de facto banning curbside voting in upcoming runoff election; if election laws were not enjoined, vulnerable voters could likely face a painful and difficult choice between exercising their fundamental right to vote and safeguarding their health, which could prevent them from casting a vote in upcoming election. Ala. Code §§ 17-9-30(b), 17-11-7(b), 17-11-9, 17-11-10.

[68] **Injunction** ⇦ Voters, registration, and eligibility

The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm supporting the grant of a preliminary injunction.

[69] **Injunction** ⇦ Conduct of elections

Balance of equities and public interest tipped in favor of preliminary injunction prohibiting enforcement of Alabama election laws requiring that notary public or two witnesses sign affidavit for absentee ballots, requiring that absentee voters submit copy of their photo identification, and de facto banning curbside voting, for upcoming runoff election for voters in high-risk groups during COVID-19 pandemic based on being over the age of 65, underlying medical conditions, or disability; irreparable injury to vulnerable voters in foregoing their right to vote outweighed burden on state to communicate changes related to photo identification and witnesses to local election officials and voters, which could be done without causing confusion, and prohibiting interference with any curbside voting imposed no burden on state. Ala. Code §§ 17-9-30(b), 17-11-7(b), 17-11-9, 17-11-10.

[70] **Injunction** ⇦ Voters, registration, and eligibility

All voters have a strong interest in exercising the fundamental political right to vote, and therefore, in considering a preliminary injunction, the public interest favors permitting as many qualified voters to vote as possible.

[71] **Injunction** ⇦ Discretionary Nature of Remedy

Crafting a preliminary injunction is an exercise of discretion and judgment.

[72] **Injunction** ⇦ Public interest considerations

In executing its duties in crafting a preliminary injunction, the court must pay particular attention to the public consequences of any preliminary relief it orders.

[73] **Injunction** ⇦ Scope and duration of relief

A court crafting a preliminary injunction need not grant the total relief sought by the plaintiffs but may mold its decree to meet the exigencies of the particular case.

West Codenotes

Validity Called into Doubt
Ala. Code §§ 17-9-30(b), 17-11-7(b), 17-11-9, 17-11-10

Attorneys and Law Firms

Caren Elaine Short, Southern Poverty Law Center, Decatur, GA, Jenny R. Ryan, William Van Der Pol, Jr., Alabama Disabilities Advocacy Program, Tuscaloosa, AL, Sara M. Zampierin, Southern Poverty Law Center, Montgomery, AL, Deuel Ross, Pro Hac Vice, Liliana Zaragoza, Pro Hac Vice, Natasha Merle, Pro Hac Vice, Steven Lance, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., New York, NY, Mahogane D. Reed, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., Washington, DC, Nancy G. Abudu, Pro Hac Vice, Southern Poverty Law Center, Decatur, AL, for Plaintiffs People First of Alabama, Howard Porter, Jr., Annie Carolyn Thompson, Greater Birmingham Ministries, Alabama State Conference of the NAACP.

Caren Elaine Short, Southern Poverty Law Center, Decatur, GA, Jenny R. Ryan, William Van Der Pol, Jr., Alabama Disabilities Advocacy Program, Tuscaloosa, AL, Sara M. Zampierin, Southern Poverty Law Center, Montgomery, AL, Deuel Ross, Pro Hac Vice, Natasha Merle, Pro Hac Vice, Steven Lance, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., New York, NY, Mahogane D. Reed, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., Washington, DC, Nancy G. Abudu, Pro Hac Vice, Southern Poverty Law Center, Decatur, AL, for Plaintiff Robert Clopton.

Caren Elaine Short, Southern Poverty Law Center, Decatur, GA, Jenny R. Ryan, William Van Der Pol, Jr., Alabama Disabilities Advocacy Program, Tuscaloosa, AL, Sara M. Zampierin, Southern Poverty Law Center, Montgomery, AL, Deuel Ross, Steven Lance, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., New York, NY, Mahogane D. Reed, Pro Hac Vice, NAACP Legal Defense and Educational Fund Inc., Washington, DC, Nancy G. Abudu, Pro Hac Vice, Southern Poverty Law Center, Decatur, AL, for Plaintiff Eric Peebles.

James W. Davis, Winfield J. Sinclair, Misty Shawn Fairbanks Messick, Brenton Merrill Smith, Jeremy Stone Weber, Office of the Attorney General, Montgomery, AL, for Defendants John Merrill, Kay Ivey.

James W. Davis, Misty Shawn Fairbanks Messick, Brenton Merrill Smith, Jeremy Stone Weber, Office of the Attorney General, Montgomery, AL, for Defendant State of Alabama (The).

Jay M. Ross, Aubrey Patrick Dungan, Adams and Reese LLP, Mobile, AL, Todd David Engelhardt, Robert F. Dyar, Adams and Reese, LLP, Birmingham, AL, for Defendant Alleen Barnett.

Donald McKinley Carroll, Theodore A. Lawson, II, Jefferson County Attorney's Office, Birmingham, AL, for Defendants Jacqueline Anderson-Smith, Karen Dunn Burks.

Brandon Keith Essig, Robert Jackson Sewell, Lightfoot Franklin & White LLC, Birmingham, AL, for Defendant Mary B. Roberson.

MEMORANDUM OPINION

ABDUL K. KALLON , UNITED STATES DISTRICT JUDGE

*1 "Voting is the beating heart of democracy. It is a fundamental political right, because it is preservative of all rights." [1] One group that consistently exercises this right at higher rates of participation is persons 65 or older. [2] It is also a group that is at substantially higher risk during the current COVID-19 pandemic. The individual plaintiffs in this case are generally over 65, [3] have underlying medical conditions, and qualify as individuals with disabilities under the Americans with Disabilities Act. The plaintiffs assert that Alabama's election laws—specifically, the requirement that a notary or two witnesses must sign absentee ballots, the requirement that absentee voters must submit a copy of their photo ID, and the state's de facto ban on curbside voting—run afoul of the fundamental right to vote and violate federal law in light of the COVID-19 pandemic. To ensure that the individual plaintiffs and those similarly situated to them can continue to exercise their fundamental political right to vote without jeopardizing their health during this pandemic, the plaintiffs filed this lawsuit on May 1 seeking relief.

COVID-19 is a novel respiratory disease that can cause severe complications, including respiratory failure and death, and it has spread rapidly around the world, resulting in more than 115,000 deaths in the United States alone and leading to numerous restrictions ordered by states to try

to curb this extraordinary public health crisis. Although COVID-19 presents risks to the entire population, people who have underlying medical conditions, such as diabetes or hypertension, or who are over 65, African-American, or disabled have substantially higher risk of developing severe cases or dying of COVID-19. The individual plaintiffs are in those high-risk groups, and to protect their health, these plaintiffs have complied with relevant public health guidelines by self-isolating or limiting their interactions with others to reduce their exposure to COVID-19. The plaintiffs contend that the challenged election laws force them and similarly-situated voters to choose between jeopardizing their health by leaving their homes and engaging in person-to-person contact they would not otherwise have or sacrificing their right to vote during the COVID-19 pandemic. And, because we are in the middle of a pandemic that, at least at this juncture, has no end in sight, the plaintiffs seek a preliminary injunction barring the defendants from enforcing these requirements so that they can exercise their right to vote by absentee ballot or by curbside voting from the safety of their cars in those jurisdictions, if any, that are willing to implement this practice.

*2 On the other hand, the defendants contend that the challenged laws are necessary to preserve the legitimacy of upcoming elections by preventing voter fraud and safeguarding voter confidence. But, the plaintiffs have shown that Alabama has other election law provisions that are effective at preventing fraud and safeguarding voter confidence, including laws requiring all absentee voters to identify themselves by providing a driver's license number or the last four digits of their social security number and to submit an affidavit signed under penalty of perjury verifying their identity. And, Alabama already waives the photo ID requirement for absentee voters 65 or older who also have a physical infirmity that renders them unable to access their assigned polling place. As to the photo ID requirement, the individual plaintiffs who are 65 or older or who suffer from a disabling condition seek only to be included in this exemption and to allow them to vote by absentee ballot without providing a copy of their photo ID with their absentee ballot applications.

The plaintiffs seek relief that the state already affords to certain individuals (waiver of the photo ID requirement), or, as the defendants acknowledge, is not prohibited by state law (barring enforcement of the de facto ban on curbside voting), or that, in light of other provisions of state election law, will not undermine the state's interest in preventing voter fraud (waiver of the witness requirement). Therefore, because the plaintiffs have shown that the challenged laws will likely dissuade some citizens from voting and "even one disenfranchised voter ... is too many,"[4] the court finds that the burdens imposed by the challenged election laws on voters at high risk of severe complications or death from COVID-19 are not justified by the state's interests in enforcing the laws.

As a result, and for the reasons explained below, the court will grant the plaintiffs' motion for a preliminary injunction in part, and, as to the July 14 runoff election, the court will enjoin: (1) the witness requirement for absentee ballots for voters who cannot safely obtain the signatures of two witnesses or a notary public due to the COVID-19 pandemic; (2) the photo ID requirement for absentee voters who are over the age of 65 or disabled and who cannot safely obtain a copy of their photo ID due to the COVID-19 pandemic; and (3) the state's de facto ban on curbside voting to permit jurisdictions willing to implement such a practice, if any, to do so.

This opinion is divided as follows. Part I briefly outlines the impact of COVID-19 and the plaintiffs' claims. Part II addresses the defendants' contentions related to standing, sovereign immunity, mootness, and justiciability. After determining that the issue is properly before the court, Part III turns to the plaintiffs' motion for a preliminary injunction and addresses the plaintiffs' likelihood of success on the merits of each of their claims. In Part IV, the court addresses the remaining requirements for an injunction. Finally, Part V concludes and describes the injunctive relief the court will grant at this juncture.

I.

Alabama has seen over 25,000 confirmed cases, and more than 700 deaths, from COVID-19. Doc. 16-4 at 3; *Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html, (last visited June 15, 2020). "At this time, there is no known cure, no effective treatment, and no vaccine." *S. Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 140 S. Ct. 1613, —— L.Ed.2d —— (2020) (Roberts, C.J., concurring).

All persons are susceptible to contracting the virus, and people of all demographics have endured severe cases, but some groups have a substantially higher risk of developing complications and dying from COVID-19. Doc. 16-4 at 3–

4. Older patients "are at the greatest risk" of experiencing "severe cases, long-term impairment, and death" from the virus. *Id.* at 3. Additionally, those with pre-existing conditions, such as hypertension, certain heart conditions, lung diseases, diabetes, and obesity, "are at high risk of a life-threatening COVID-19 illness."[5] *Id.* at 4. Available evidence also shows that, if infected, "racial and ethnic minority populations, especially African-Americans, are at a substantially elevated risk of developing life-threatening COVID-19 illnesses" and dying. *Id.*

***3** The virus spreads easily. *Id.* It spreads "through droplet transmission; that is, when an infected individual speaks, coughs, sneezes, and the like, they expel droplets which can transmit the virus to others in their proximity." *Id.* In a "closed, stagnant air environment"—*i.e.*, indoors—these droplets can linger in the air for up to 14 minutes. Doc. 46-1 at 32. The virus can also be spread through contact with a contaminated surface. *Id.* Some people who are infected with the virus do not show any symptoms, appearing to themselves and to everyone else to be perfectly healthy, rendering them particularly potent agents of transmission. *Id.* at 5. Even those infected individuals who are symptomatic can be contagious for days before developing any symptoms. *Id.*

Without a vaccine, the only ways to limit the spread of the virus are "self-isolation, social distancing, frequent handwashing, and disinfecting surfaces." *Id.* at 4–5. "Self-isolation involves not physically interacting with those outside one's household." *Id.* at 5. Social distancing means "maintaining at least six feet of distance between individuals." *Id.* The Centers for Disease Control ("CDC") also recommends that people cover their mouth and nose with a cloth mask when they go out in public. *Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html, (last visited June 15, 2020). Given how easily the virus can spread, the CDC, public health officials, and Alabama Governor Kay Ivey have all emphasized the importance of staying home as much as possible and maintaining at least a six-foot distance with others when outside of the home to minimize the risk of exposure to the virus. Docs. 16-4 at 5-6; 16-8 at 4; 16-9 at 2.

In light of the dangers posed by COVID-19, Governor Ivey declared a state public health emergency on March 13, 2020. Doc. 16-15. Alabama's State Health Officer subsequently issued a series of health orders encouraging Alabamians to practice social distancing, and requiring or prohibiting certain actions to slow the spread of the disease. Docs. 16-16; 16-17; 16-18; 16-19; 16-20; 16-21; 34-15. The current "safer at home" order, which expires on July 3, 2020, encourages all individuals in Alabama, and especially people over the age of 65 or with underlying health conditions, to "[m]inimiz[e] travel outside the home." Doc. 34-15 at 3. The order prohibits "non-work related gatherings of any size ... that cannot maintain a consistent six-foot distance between persons from different households." *Id.* In spite of these efforts, the number of COVID-19 cases throughout Alabama continues to increase. *Daily Confirmed New Cases*, https://coronavirus.jhu.edu/data/new-cases-50-states/alabama, (last visited June 15, 2020); *Daily and Cumulative Case Counts*, https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7, (last visited June 15, 2020).

Alabama has also taken a number of actions in response to COVID-19 regarding the upcoming primary runoff election. First, invoking her emergency powers, Governor Ivey moved the runoff election from March 31 to July 14, 2020. Docs. 16-31 at 2; 34-1 at 8. Alabama's Secretary of State John Merrill also promulgated an emergency regulation providing that in light of the state of emergency caused by the COVID-19 pandemic, "any qualified voter who determines it is impossible or unreasonable to vote at their polling place for the Primary Runoff Election of 2020 ... shall be eligible to" apply for an absentee ballot. Doc. 34-1 at 60. The regulation further instructs "[a]ll Absentee Election Managers and any other election officials of this state" to "accept all absentee ballot applications filed" pursuant to the new rule. *Id.* In effect, for the runoff election in July only, the emergency regulation allows any voter who does not wish to vote in person because of COVID-19 to vote absentee.

***4** But Alabama still requires voters to comply with existing rules for casting absentee ballots. For example, the emergency regulation maintains the requirement that voters must submit a copy of their photo ID with their absentee ballot application. *See* doc. 34-1 at 60; Ala. Code § 17-9-30(b).[6] And, for their votes to be counted, all absentee voters must return with their absentee ballot an affidavit that is signed by a notary public or two adult witnesses who witnessed the voter sign the affidavit. Ala. Code § 17-11-7(b). However, because "person-to-person contact increases the risk of transmitting COVID-19," Governor Ivey issued a rule permitting notaries to witness the signing of absentee affidavits through videoconferencing. Doc. 16-17 at 2-3.

The plaintiffs in this lawsuit include four individual plaintiffs —Robert Clopton, Eric Peebles, Howard Porter, and Annie Carolyn Thompson. Doc. 1 at 9–12. All four are at higher risk of contracting a severe case of the virus due to their age, race, or underlying medical conditions, and for that reason each plaintiff has thus far exercised great lengths to self-isolate and limit his or her exposure to the virus. *Id.* at 9–12. Though each plaintiff is registered and intends to vote, the plaintiffs maintain that complying with Alabama's election laws would force them to increase their exposure to the virus. *Id.*

The individual plaintiffs all say they would prefer to vote absentee. But Clopton, Peebles, and Thompson allege that they cannot comply with the witness requirement without leaving their home or bringing in someone outside of their household. Doc. 16-45 at 2–10, 17–21. And Thompson tells the court that she cannot comply with the photo ID requirement without going to a business to make a copy of her ID. Doc. 16-45 at 12–21. All four individual plaintiffs allege that, if they cannot vote absentee, they would prefer to utilize a curbside voting method, rather than enter a polling place. Doc. 16-45 at 2–21. Alabama does not officially prohibit curbside voting, but Secretary Merrill has "on at least two occasions," shut down attempts by counties to establish curbside voting operations because they were not, in his view, complying with the law. Doc. 34-1 at 21.

The plaintiffs in this lawsuit also include three organizations: People First of Alabama, Greater Birmingham Ministries ("GBM"), and the Alabama State Conference of the National Association for the Advancement of Colored People ("Alabama NAACP"). Doc. 1 at 8, 12–14. People First is "a group of people with developmental disabilities," and the organization "assists its members in accessing ... full citizenship with equal rights," including "securing access to full and equal voting rights." *Id.* at 8. GBM, which has about 5,000 members, is "a multi-faith, multi-racial membership organization" that "actively opposes state laws, policies, and practices that result in the exclusion of vulnerable groups or individuals from the democratic process." *Id.* at 12–13. The Alabama NAACP "works to ensure the political, educational, social, and economic equality of African-Americans and all other Americans." *Id.* at 14. "Two central goals of the Alabama NAACP are to eliminate racial discrimination in the democratic process, and to enforce federal laws and constitutional provisions securing voting rights." *Id.*

***5** The organizational plaintiffs allege that they have many members who are in the same predicament as the individual plaintiffs—they are eligible to vote and would like to, but they are afraid that complying with Alabama's witness and photo ID requirements would force them to violate social-distancing protocol. *Id.* at 8, 12–14. These members would also prefer to vote curbside, rather than inside the polling place, if they cannot vote absentee. *Id.* The organizational plaintiffs further allege that given the heightened interest in absentee voting due to expanded eligibility and fear of viral exposure at polling places, Alabama's election laws are forcing them to divert resources away from their usual get-out-the-vote expenditures and towards educating their members about and helping them to comply with absentee voting procedures. *Id.*

Based on these allegations, the individual and organizational plaintiffs move the court to enjoin three election practices in Alabama—the witness requirement, the photo ID requirement, and the state's de facto ban on curbside voting. Doc. 15. The plaintiffs allege that these election practices violate (1) the individual plaintiffs' and the organizational plaintiffs' members' right to vote under the First and Fourteenth Amendments, (2) Title II of the Americans with Disabilities Act ("ADA"), and (3) for the witness requirement only, § 201 of the Voting Rights Act ("VRA"). *Id.* The plaintiffs bring these claims against the following defendants in their official capacity: Governor Kay Ivey; Secretary of State John Merrill; Alleen Barnett, the absentee ballot manager for Mobile County; Jacqueline Anderson-Smith, the Circuit Clerk of Jefferson County; Karen Dunn Burks, the Deputy Circuit Clerk of the Bessemer Division of Jefferson County; and Mary B. Roberson, the Circuit Clerk of Lee County. Doc. 1 at 15–16. The plaintiffs also bring the ADA and VRA claims against the State of Alabama.

The plaintiffs ask the court to enjoin the challenged practices for all the coming 2020 elections: the primary runoff on July 14, the special primary election on August 4, and the general election on November 3. Though the state has announced emergency measures for the July election—namely, permitting any voter "who determines it is impossible or unreasonable to vote" in person because of COVID-19 to vote absentee, doc. 16-32—the state has not yet said whether these measures will apply for the elections in August and November. Whether these measures are in place could change the outcome of the analysis. For this reason, it is premature for the court to consider a preliminary injunction for the elections in August and November. At this time, the court considers only whether to grant the preliminary injunction for the election on July 14, but the plaintiffs are free to move for a separate preliminary injunction regarding the other elections.

II.

The defendants run the gamut in challenging the justiciability of this case. They maintain that the plaintiffs do not have standing to pursue their claims, that the defendants are entitled to state sovereign immunity, that the claims against Defendant Roberson are moot, and that the case presents non-justiciable political questions. With the exception of Governor's Ivey claim to immunity, the court rejects the defendants' arguments.

A.

[1] *6 To properly invoke the jurisdiction of the federal courts, the litigants must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing consists of three elements: "[t]he plaintiff must have (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." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). As the party seeking the preliminary injunction, the plaintiffs bear the burden of establishing these elements, *id.*, which the court addresses in turn.

1.

[2] [3] To establish an injury in fact, a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 . In multiple-plaintiff cases like this, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester v. Laroe Estates, Inc.*, —— U.S. ——, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). And if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In this case, the plaintiffs seek three injunctions: (1) to suspend the enforcement of the photo ID requirement for absentee voters; (2) to suspend the enforcement of the witness requirement; and (3) to lift the ban on curbside voting. The court will thus consider whether the plaintiffs have established an injury for each form of relief sought.

a.

[4] [5] [6] For the photo ID requirement, Plaintiffs Porter and Thompson, both registered voters who intend to vote in the runoff election on July 14, claim that the requirement burdens their right to vote. Docs. 16-45 at 12–20. Their injury is a given and should not be challenged. After all, it is settled law that when plaintiffs "are required to obtain photo identification before they can vote, [t]he imposition of that burden is an injury sufficient to confer standing regardless of whether [the plaintiffs] are able to obtain photo identification." *Common Cause v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009). In fact, even if Porter and Thompson already had a copy of their IDs available, they would still have standing to challenge the requirement. The Eleventh Circuit explained why:

> Even if [the plaintiffs] possessed an acceptable form of photo identification, they would still have standing to challenge the statute that required them to produce photo identification to cast an in-person ballot.... Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing. The inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting, and the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person.

Id. at 1351–52 (citations omitted). Simply put, a voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote.

[7] [8] Notwithstanding this settled law, the defendants argue there is no injury adequate to confer standing,

because all absentee voters must comply with the photo ID requirement (except for those voters exempted by federal law, *see* Ala. Code 17-9-30(c)), and all voters face the risk of contracting COVID-19. The defendants misunderstand the "particularized" requirement for standing. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (citation omitted). "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Id.* at 1548 n.7. Thus, it does not matter that the injury is "widely shared," so long as the plaintiff "suffers a particularized harm." *Id.* Both Porter's and Thompson's injury is particularized, because each must comply with the photo ID requirement.

[9] *7 The defendants next argue that the injury is speculative, rather than actual or imminent, because it is unknown how serious a risk COVID-19 will present in mid-July.[7] This argument mischaracterizes the alleged injury. The injury is not that Porter or Thompson will contract COVID-19, or even that they will be forced to take a serious risk of contracting COVID-19. The injury is that they will have to comply with the state's photo ID requirement in order to vote absentee. This injury is not speculative; it is "certainly impending," since they intend to vote in the election on July 14. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

b.

[10] The injury analysis for the witness requirement is the same. Plaintiffs Clopton and Thompson claim that the witness requirement burdens their right to vote. Docs. 16-45 at 2–5, 17–20. As registered voters who intend to vote in the runoff election on July 14, *id.*, they have standing to challenge the witness requirement. The requirement that these plaintiffs must find two adult witnesses or a notary public in order to vote absentee is itself an injury sufficient to confer standing. *See Common Cause*, 554 F.3d at 1351. The defendants' arguments that the injury is too speculative and not particularized enough to confer standing are rejected for the same reasons explained above.

c.

[11] For the ban on curbside voting, each of the four individual plaintiffs, claims that the ban burdens his or her right to vote. Docs. 16-45 at 1–20. If there is a ban on curbside voting, it would likely constitute an injury sufficient to confer standing. But the defendants deny that there is a ban on curbside voting.

As the defendants acknowledge, "no Alabama statute specifically prohibits curbside voting." Doc. 36 at 9. However, "on at least two occasions," when a county established a curbside voting operation, Secretary Merrill shut it down. Doc. 34-1 at 21. He "contacted the counties in question and advised them that they were conducting an election in violation of State law." *Id.* Secretary Merrill did so because, in his view, the curbside voting operations did "not legally comply with Alabama laws," including "the voter personally signing the poll list, ballot secrecy, and ballot placement in tabulation machines." *Id.* Secretary Merrill maintains that it "would be completely unfeasible" to implement curbside voting and otherwise comply with Alabama election law. *Id.* at 22. Given Secretary Merrill's professed view that curbside voting does not comply with Alabama law, and his demonstrated power to shut down any county's attempt to establish a curbside voting operation, the court finds that Secretary Merrill has effectively implemented a ban on curbside voting in Alabama.

To summarize, the individual plaintiffs have suffered an injury for standing purposes for each form of relief sought.[8] The court thus proceeds to the second element of standing: traceability.

2.

[12] *8 To establish traceability, the plaintiff must show "a causal connection between her injury and the challenged action of the defendant—*i.e.*, the injury must be fairly traceable to the defendant's conduct, as opposed to the action of an absent third party." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc) (citations omitted).

[13] Before evaluating traceability for the claims discretely, the court first responds briefly to the defendants' general argument that the plaintiffs' injury is caused by the virus, not the state. This argument again mischaracterizes the injury. The injury alleged is the state's decision to force the individual plaintiffs to comply with the complained-of requirements for voting. The virus might make the injury severe—because complying with the requirements might expose the plaintiffs to serious health risks—but it does not

cause the legal injury. With that said, the court will consider whether the alleged injury can be traced to a defendant for each claim, starting with the photo ID requirement.

a.

[14] The court finds that the individual plaintiffs' injury of complying with the photo ID requirement is traceable to the defendants serving as absentee election managers ("AEMs"). Alabama law provides that AEMs "shall determine whether an applicant for an absentee ballot is obligated to produce identification." Ala. Code § 17-11-9. Furthermore, when a voter submits an application to vote by absentee ballot, the AEM "shall determine whether identification has been properly provided." Ala. Code § 17-10-2(c)(1). If identification has not been properly provided with the application, the AEM issues a provisional ballot and notifies the voter. *Id.* In other words, the AEM interprets the law and decides whether a photo ID is required, and screens the absentee ballot applications to see if the voter has provided the photo ID. These duties clearly show that AEMs are charged with enforcing the photo ID requirement for absentee voters. [9]

b.

[15] Likewise, the injury of complying with the witness requirement is traceable to the AEMs. AEMs are charged with administering absentee voting in their respective county. *See* Ala. Code § 17-11-2 ("In each county there shall be an 'absentee election manager,' who shall fulfill the duties assigned by this chapter."). In this capacity, the AEMs "conduct or oversee the absentee ballot process." Doc. 34-1 at 2. For this reason, the affidavit that the witnesses are required to sign is addressed and delivered to the AEM. Ala. Code § 17-11-9. After the AEM receives the absentee ballots, he or she turns them over to the local election officials for tallying. Ala. Code § 17-11-10.

The defendants attempt to dodge traceability by focusing on the local officials who count the absentee ballots, contending that it is these individuals who check for witness signatures. Here is how the process works: On election day, the AEM delivers the absentee ballots to absentee election officials, who "shall examine each affidavit envelope to determine if the signature of the voter has been appropriately witnessed." Ala. Code § 17-11-10(b). For those that are appropriately witnessed, "the election officials shall ... open [the] affidavit envelope and deposit the ballot envelope ... into a sealed ballot box." *Id.* Absentee ballots that are not appropriately witnessed are not counted. *Id.*

*9 The defendants' argument turns standing into a shell game. It strains credulity to suggest that the plaintiffs should have brought their claim against the local poll workers who count the ballots. There are hundreds of these officials, [10] and they are not even selected until 15 to 20 days before the election. [11] Furthermore, according to the state, the AEMs also count the absentee ballots "in conjunction with other local officials." Doc. 34-1 at 2. Based on that representation, it appears that the AEMs may also check the absentee ballots for witness signatures.

In the end, the court is satisfied that the AEMs—as the officials in charge of the absentee voting process who oversee the counting of absentee ballots—are proper defendants for a claim challenging the requirement that an absentee ballot must be witnessed to be counted.

c.

[16] The ban on curbside voting can easily be traced to Secretary Merrill. As the defendants acknowledge, state law does not prohibit curbside voting. Instead, Secretary Merrill took it upon himself, "on at least two occasions," to shut down county efforts to establish curbside voting operations, because he believes such operations do not comply with other election laws. Doc. 34-1 at 21. To the extent a ban exists, it exists because of Secretary Merrill, and the injury can thus be fairly traced to him.

3.

[17] [18] Finally, to establish redressability, a decision in the plaintiffs' favor must "significantly increase the likelihood" that the plaintiffs' injury will be redressed. *Lewis*, 944 F.3d at 1296 (citation omitted). Furthermore, "it must be the effect of the court's judgment on the defendant —not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Id.* (citation omitted). Accordingly, for each claim, the court considers whether it can supply relief that redresses the plaintiffs' injury.

a.

[19] For the photo ID requirement, the question is whether an injunction ordering the defendants not to enforce the requirement for absentee voters would successfully allow the plaintiffs to vote absentee without presenting photo ID. The court finds that, at the very least, an injunction directed to the defendant AEMs would provide redress. The AEMs determine whether a photo ID is required for each absentee ballot received. Ala. Code § 17-11-9. If the court ordered the AEMs not to enforce the photo ID requirement, the AEMs would simply note for each absentee ballot that a photo ID was not required, and the ballot could be counted without issue. Thus, because an injunction directed to the defendant AEMs would likely redress their injury, the plaintiffs have established standing to pursue the photo ID claim. [12]

b.

[20] Regarding the witness requirement, the plaintiffs first argue that the court could redress their injury by ordering Secretary Merrill not to enforce the witness requirement for absentee voters. It is tempting to agree that an injunction directed to Secretary Merrill would significantly increase the likelihood of relief for the plaintiffs. Secretary Merrill is "the chief elections official in the state." Ala. Code § 17-1-3(a). As such, he has the authority, and indeed the obligation, to tell election officials how to implement election laws. [13] This authority empowers Secretary Merrill to instruct election officials to ignore the witness requirement, so that ordering Secretary Merrill not to enforce the witness requirement would redress the plaintiffs' injury. [14]

*10 In fact, the Fifth Circuit, in almost precisely the same context, adopted this theory of redressability. [15] However, the Eleventh Circuit—which this court is of course bound to follow—recently rejected a similar theory. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1207–12 (11th Cir. 2020). In *Jacobson* , the plaintiffs challenged "the order in which candidates appear on the ballot in Florida's general elections." *Id.* at 1197. The court determined that the plaintiffs alleged injury "is neither fairly traceable to [Florida's Secretary of State] nor redressable by a judgment against her because she does not enforce the challenged law." *Id.* at 1198. Instead, "Florida law tasks" the local Supervisor of Elections for each of Florida's 67 counties "with placing candidates on the ballot in the correct order." *Id.* at 1199. These supervisors are independent of the Secretary. *Id.* at 1207. Thus, "[a]n injunction ordering the Secretary not to follow the ballot statute's instructions for ordering candidates cannot provide redress, for neither she nor her agents control the order in which candidates appear on the ballot." *Id.* at 1208. And any judgment the court issued would not be binding against the supervisors who actually enforced the provision, since they were not parties to the suit. *Id.*

The Eleventh Circuit rejected the idea that "the Secretary's position as the chief election officer of the state" established standing, because nothing connected the Secretary specifically to the order of candidates on the ballot. *Id.* (citation omitted). The court also rejected the argument "that the Secretary's authority to prescribe rules about ballot layout, and to provide written direction to the Supervisors," establishes standing. *Id.* at 1211. The Secretary's "power to prescribe rules and issue directives about ballot order, which the Supervisors might well be obliged to follow, says nothing about whether she possesses authority to *enforce* the complained-of provision." *Id.* at 1211 (citations omitted) (emphasis in original). And the court indicated that "an injunction ordering the Secretary to promulgate a rule requiring the Supervisors to place candidates on the ballot in an order contrary to the ballot statute ... would have raised serious federalism concerns, and it is doubtful that a federal court would have authority to order it." *Id.* at 1211–12.

Based on this precedent, the court is compelled to find that an injunction against Secretary Merrill would not redress the plaintiffs' injury. In *Jacobson* , the court found that the plaintiffs "should have sued the Supervisors of Elections instead of the Secretary of State." *Id.* at 1212. Here, unlike in *Jacobson* , the plaintiffs did what the Eleventh Circuit suggested—they sued the local officials in charge of the absentee voting process: the AEMs.

[21] Consistent with *Jacobson* , the court finds that an injunction ordering the defendant AEMs not to enforce the witness requirement would likely redress the plaintiffs' injury. The AEMs receive the absentee ballots, Ala. Code § 17-11-9, deliver them to the absentee election officials, § 17-11-10, and count the ballots "in conjunction with [these] other local officials," doc. 34-1 at 2. Given the AEMs role in overseeing the absentee ballot process, if the court ordered the AEMs not to enforce the witness requirement, it is likely that unwitnessed absentee ballots would be counted.

c.

[22] For redressability of the curbside voting claim, the question is whether a judgment would redress the plaintiffs' injury by lifting the ban on curbside voting. To be clear, the plaintiffs are not asking the court to implement curbside voting across Alabama. [16] Instead, the plaintiffs' request is merely to enjoin Secretary Merrill from prohibiting counties from establishing curbside voting operations. *See* docs. 20-1 at 9–10; doc. 46 at 2. As the defendants acknowledge, "no Alabama statute specifically prohibits curbside voting." Doc. 36 at 9. The practice is only prohibited because Secretary Merrill has acted to shut down curbside voting operations when counties have attempted to provide them. Doc. 34-1 at 21. Thus, if the court enjoined Secretary Merrill from banning otherwise lawful curbside voting operations, counties would be free to provide them, if they are so inclined, and the ban would be lifted.

*11

* * *

In conclusion, the plaintiffs have demonstrated that they likely have standing to pursue each of their claims. The court thus proceeds to the defendants' other arguments regarding the case's justiciability.

B.

[23] [24] The defendants assert that they are each entitled to sovereign immunity. The doctrine of state sovereign immunity "prohibits suits against state officials where the state is, in fact, the real party in interest." *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). However, there is an exception for "suits against state officers seeking prospective equitable relief to end continuing violations of federal law." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). The *Young* doctrine thus permits "the exercise of the judicial power of the United States where a plaintiff seeks to compel a state officer to comply with federal law." *Id.* But the *Young* doctrine does not apply "unless the state officer has some responsibility to enforce the statute or provision at issue." *Id.* at 1341; *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441 ("[I]t is plain that such officer must have some connection with the enforcement of the act.").

[25] The analysis for whether a state official has "some connection" to the challenged statute is similar to the analysis for whether a state official is a proper defendant for the purposes of traceability and redressability. *See Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013). But they are still "separate issues." *Jacobson*, 957 F.3d at 1210. The Eleventh Circuit suggested that the standard for qualifying as a proper defendant under *Ex parte Young* is less exacting:

> To be a proper defendant under *Ex parte Young* —and so avoid an Eleventh Amendment bar to suit—a state official need only have 'some connection' with the enforcement of the challenged law. In contrast, Article III standing requires that the plaintiff's injury be 'fairly traceable' to the defendant's actions and redressable by relief against *that* defendant.

Id. (citations omitted). Thus, a state official could be a proper defendant under *Ex parte Young* , but not a proper defendant for the purposes of standing. *See id.* (observing that just because "the Florida Secretary of State was a proper defendant under *Ex parte Young* ," did not mean the Secretary was a proper defendant under Article III).

[26] With that said, the court finds that the defendant AEMs —assuming that they are state officials—are not entitled to sovereign immunity. For the reasons explained above, the AEMs are closely connected to the enforcement of the witness and photo ID requirements for absentee voting. If the AEMs are sufficiently connected to the challenged provisions to establish traceability and redressability, they are necessarily sufficiently connected to satisfy the *Young* doctrine.

[27] For the same reason, Secretary Merrill is sufficiently connected to the ban on curbside voting to satisfy the *Young* doctrine. The court also finds that Secretary Merrill is sufficiently connected to the witness and photo ID requirements. As noted previously, Secretary Merrill is tasked with "provid[ing] uniform guidance" on the administration of election law. Ala. Code § 17-1-3(a). He is also charged with adopting standards "that define what constitutes a vote and what will be counted as a vote." Ala. Code § 17-2-4(f). With regard to the photo ID requirement specifically, Secretary Merrill is required to inform the public about the requirement,

Ala. Code § 17-9-30(n), and to adopt rules indicating to AEMs whether a photo ID is required, Ala. Code § 17-11-5. In the court's view, these and other provisions establish "some connection" between Secretary Merrill and the enforcement of the challenged provisions. Accordingly, he is not entitled to sovereign immunity.

[28] *12 However, the court finds that Governor Kay Ivey is entitled to sovereign immunity. To establish the requisite connection, the plaintiffs rely on the Governor's general executive power to enforce the laws, as well as her emergency powers, with which she could suspend the challenged provisions. A governor's "general executive power is not a basis for jurisdiction in most circumstances. If a governor's general executive power provided a sufficient connection to a state law to permit jurisdiction over [her], any state statute could be challenged simply by naming the governor as a defendant." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003).[17] Similarly, the Governor's emergency powers do not supply the requisite connection. Otherwise, the Governor would be a proper defendant in virtually every suit challenging a state statute. Accordingly, Governor Ivey is due to be dismissed from the case.

[29] The plaintiffs also named the state as a defendant. The only claims the plaintiffs bring against the state are under the VRA and the ADA. Because Congress validly abrogated states' sovereign immunity for claims brought under the VRA and the ADA, the state is not entitled to sovereign immunity. *Ala. State Conference of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020) (finding that the VRA abrogated state's sovereign immunity); *Nat'l Ass'n of the Deaf v. Florida*, 945 F.3d 1339, 1351 (11th Cir. 2020) (finding that the ADA abrogated state's sovereign immunity).

C.

[30] Defendant Roberson, the Circuit Clerk for Lee County, argues that the claims against her are moot because she no longer serves as the AEM for Lee County. In a nutshell, the circuit clerk of each county serves as the AEM unless he or she declines, in which case the appointing board selects a replacement. Ala. Code § 17-11-2. Here, after learning of this suit, Roberson opted to decline to serve as AEM, doc. 41 at 1–2, and promptly argued that the claims against her are moot as a result. But the plaintiffs sued Roberson in her official capacity as circuit clerk through which she was presumptively serving as the AEM of Lee County. And, when a party sued in her official capacity resigns, the official's "successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). Accordingly, when the appointing board selects a replacement AEM, the successor AEM for Lee County will automatically be substituted. The claim is not moot.

D.

[31] Finally, in a footnote, the defendants urge the court to dismiss the claims as non-justiciable political questions. Doc. 36 at 21 n.16. Doing so would result in the court abdicating from its role to address disputes that arise under the Constitution or federal statutes. This is precisely what the plaintiffs seek in this case—*i.e.*, they ask the court to decide whether the challenged provisions run afoul of the Constitution, the VRA, or the ADA. The court agrees with the Fifth Circuit, which easily dismissed the contention that a similar claim was a non-justiciable political question by noting that the "standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights." *Texas Democratic Party*, 961 F.3d 389 (5th Cir. 2020). The plaintiff's claims are justiciable, and the court can thus proceed to consider the merits of the motion for a preliminary injunction.

III.

[32] [33] [34] [35] A preliminary injunction is an "extraordinary remedy" designed to prevent irreparable harm to the parties during the pendency of a lawsuit. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The court may issue a preliminary injunction only if the plaintiffs establish: (1) a substantial likelihood of success on the merits, (2) a likelihood of suffering irreparable harm in the absence of relief, (3) that the balance of equities weigh in their favor, and (4) that the injunction serves the public interest. *Id.* at 20, 129 S.Ct. 365 ; *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020). The determination of whether the plaintiffs have satisfied their burden "is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion." *Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1246 (11th Cir. 2002) (citation omitted). The first two factors of the preliminary injunction standard are "the most critical." *Lee*, 915 F.3d at 1317. The court thus begins with whether the plaintiffs have shown a substantial likelihood of success on the merits of each of

their claims. In doing so, because the plaintiffs bring claims under the First and Fourteenth Amendments of the U.S. Constitution, the ADA, and the VRA, the court will address separately whether the plaintiffs have established a substantial likelihood of success for each of these categories of claims, beginning with the constitutional claims.

A.

[36] *13 States have an interest in the orderly administration of elections and retain the power to regulate elections. *See* U.S. Const. Art. 1, § 4, cl.1; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). Still, an individual's right to vote is sacrosanct, and "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

[37] [38] [39] When deciding a constitutional challenge to state election laws, district courts apply a flexible standard outlined by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Under the *Anderson - Burdick* balancing test, the court must "weigh the character and magnitude of the burden the State's rule imposes on [First and Fourteenth Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (citation omitted). "[T]he rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 . If the challenged law severely restricts the right to vote, then strict scrutiny applies, meaning the law must be narrowly drawn to serve a compelling state interest. *Id.* (citation omitted). If the challenged law "imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (citation omitted). But, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Lee*, 915 F.3d at 1318–19 (citation omitted).

1.

The first election requirement that the plaintiffs' challenge is the requirement under Alabama law that all absentee ballots include an affidavit signed by the voter and witnessed by a notary public or two adult witnesses. Ala. Code §§ 17-11-7; 17-11-9; 17-11-10. According to the plaintiffs, this requirement, as applied during the COVID-19 pandemic, imposes a severe burden on their individual right or the right of their members to vote, thereby triggering strict scrutiny. Docs. 1 at 44; 20-1 at 22–23. Allegedly, voters who live alone or with only one other adult and who wish to cast an absentee ballot must choose between adhering to health guidelines regarding social distancing and voting in upcoming elections.[18] *Id.* And, the plaintiffs contend that the witness requirement is not narrowly tailored to serve a compelling state interest. *See* doc. 20-1 at 25–28. Thus, the plaintiffs ask the court to enjoin this requirement for all voters. Doc. 1 at 44; 20-1 at 9.

a.

[40] *14 To evaluate the plaintiffs' likelihood of success on this claim, the court must first decide whether the witness requirement imposes a burden on the right to vote that is severe enough to trigger strict scrutiny. *See Lee*, 915 F.3d at 1319. First of all, there is no doubt that the witness requirement imposes some burden on the right to vote. After all, when Governor Ivey issued the emergency rule allowing notaries to witness affidavits by videoconference, she explained that the rule was necessary because "person-to-person contact increases the risk of transmitting COVID-19," effectively acknowledging that the witness requirement increases absentee voters' exposure to the virus. Doc. 16-17 at 2–3. Exposure to a deadly virus is a burden.

To show that the witness requirement severely burdens the right to vote, the plaintiffs point to evidence that approximately 1.3 million adults in Alabama live with only one other person, and more than 555,000 Alabamians live alone, including approximately 215,000 who are 65 or older and 186,000 black Alabamians, who are at higher risk of COVID-19 complications. Docs. 20-1 at 22–23; 16-37 at 4–5. The court accepts that the COVID-19 pandemic and resulting social-distancing recommendations will undoubtedly make it more difficult for many of these individuals to satisfy the witness requirement to vote absentee. But, the demographic

evidence does not establish that the witness requirement imposes a severe burden on the right to vote sufficient to trigger strict scrutiny. The demographic statistics do not indicate whether voters living alone or with only one other person regularly interact with individuals outside of their household who could serve as witnesses. Moreover, it is possible for a voter to obtain the required witness signatures without violating the CDC's social-distancing guidelines. For example, the voter and witnesses could wear masks and gloves and remain more than six feet apart outdoors, or be physically separated from one another by a window or open doorway. To be sure, observing social-distancing guidelines does not eliminate the risk of contracting COVID-19, but it does substantially mitigate the risk. The ability of many voters to comply with social-distancing protocol and to satisfy the witness requirement lessens the severity of the burden on voters' right to vote.

Even so, satisfying the witness requirement could impose a more significant burden on some voters who live alone and who are at heightened risk of severe COVID-19 complications due to age, disability, pre-existing conditions, and race. *See* doc. 16-4 at 8. For example, Peebles lives alone and has been self-isolating since mid-March because he is at high risk of complications from COVID-19 due to spastic cerebral palsy. *See* doc. 16-45 at 7–9. Peeble's only contact has been with his four caregivers, but obtaining the signatures from them is not an option because their shifts do not overlap, and he only interacts with one caregiver at a time. *Id.* [19]

Another plaintiff, Clopton, lives with only his wife. *Id.* at 4. Since mid-March, Clopton has left his home only for a medical appointment and to shop for groceries during "senior hours" because he is at high risk from COVID-19 due to his age, underlying conditions, medical history, and race. *Id.* at 3-4. The Cloptons have not allowed visitors into their home since mid-March, with the exception of Mrs. Clopton's sister who has been in their home's entryway on two occasions. *Id.* at 4. And, Clopton is not comfortable with the risk of inviting a second witness to his home even if the witness remains outside. *Id.* at 4-5.

***15** Finally, People First, GBM, and the Alabama NAACP have members who live alone, are at high risk from COVID-19 complications, and prefer to vote by absentee ballot to minimize their risk from exposure to the virus. *Id.* at 24-25, 31, 36. These plaintiffs maintain that their affected members will not be able to comply with the witness requirement without risking their health by engaging in person-to-person contact in contravention of current health guidelines. *Id.* at 24–26, 31.

Based on the record, it is clear that the plaintiffs are rightly concerned about the risk of COVID-19 and minimizing their potential exposure to the virus. However, even if the witness requirement imposes a significant burden on some individual plaintiffs and members of the organizational plaintiffs, that is not sufficient at this juncture to establish that strict scrutiny applies. *See Crawford*, 553 U.S. at 206, 128 S.Ct. 1610 (J. Scalia, concurring) (nothing that when determining whether strict scrutiny applies, the Court has looked at the burden on voters "categorically and di not consider the peculiar circumstances of individual voters or candidates") (citations omitted).

[41] This finding does not end the analysis, however. The plaintiffs have shown that satisfying the witness requirement presents some risk of COVID-19 exposure to voters who do not regularly come into contact with at least two adults simultaneously, even if these voters follow social-distancing guidelines. *See* doc. 16-4 at 4–5, 8. And, this burden is not "exceedingly light" as the defendants suggest. *See* doc. 36 at 22.[20] Moreover, even if the requirement imposes only a slight burden on the right to vote, this burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (citation omitted). Thus, the court turns to the "precise interests put forward by the State as justifications for the burden imposed by its rule ...." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (citation omitted).

b.

[42] According to Alabama law, the witness requirement "goes to the integrity and sanctity of the ballot and election." Ala. Code § 17-11-10(c). The defendants contend that requiring witnesses helps prevent voter fraud by ensuring that the voter completing the ballot is the person identified on the ballot. Doc. 36 at 26. Although voter fraud, including absentee voter fraud, is not common,[21] Alabama has a legitimate and strong interest in preventing such fraud. *Lee*, 915 F.3d at 1322 (citing *Common Cause*, 554 F.3d at 1353-54); *see also Crawford*, 553 U.S. at 196, 128 S.Ct. 1610 . But, while the state's determination that the witness requirement helps deter fraud may be reasonable, the *Anderson-Burdick* balancing test still requires the court to " 'determine the legitimacy and strength of [ ] [the State's]

interests,' while also considering 'the extent to which those interests make it necessary to burden the Plaintiff[s'] rights.' " *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014) (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

***16** As to those issues, the plaintiffs contend that the witness requirement is not necessary because it does not protect the integrity of an absentee ballot in a meaningful way. The plaintiffs have a point. First of all, the substance of the witnesses' role in helping to prevent voter fraud is underwhelming. The witness certifies only that they watched the individual sign the affidavit envelope. *See* Ala. Code 17-11-7(b). The witness does not even attest that the voter is who she says she is. For this reason, as the defendants point out, doc. 34-1 at 20, the witness could be a total stranger, such as a mail or grocery delivery person. Nor do the witnesses have to watch the voter complete the ballot, presumably to preserve the voter's right to a secret ballot. Thus, all that the witnesses certify is that they watched this person—who may or may not be known to them, and who may or may not be the same person who completed the ballot—sign the affidavit. This is hardly a foolproof fraud prevention measure.

The plaintiffs also assert that the requirement is not effective because witnesses do not have to identify themselves by legibly printing their names, and election officials do not confirm the identity or age of the witnesses. Doc. 20-1 at 26 (citing Ala. Code §§ 17-11-7; 17-11-9; 17-11-10). But, while Alabama does not expressly require witnesses to print legibly, the state requires witnesses to print their names and address after signing an absentee voter affidavit. *See* Ala. Code § 17-11-7(b). In theory, the state can use this information to confirm the identify or age of the witnesses if necessary in a potential election contest or investigation of voter fraud. Additionally, whatever the requirement's practical value, it could help to increase the perception of the absentee ballot's legitimacy.[22] In the end, the effectiveness of the witness requirement in preventing fraud may be limited, but it is not meaningless.

Next, the plaintiffs argue that the witness requirement is not necessary to help prevent voter fraud because other laws sufficiently protect election integrity. Doc. 20-1 at 26–27. Indeed, under relevant Alabama law, a voter casting an absentee ballot must complete an application containing "sufficient information to identify the applicant," including either the applicant's driver's license number or the last four digits of the applicant's social security number. Ala. Code § 17-11-4; doc. 16-46 at 19. Furthermore, with certain limited exceptions, a voter must submit a copy of his or her photo ID with an absentee ballot application.[23] Doc. 16-46 at 19. Finally, the affidavit submitted with absentee ballots requires absentee voters to swear that the information in the affidavit is true, and, as printed on the absentee ballot applications, falsifying absentee ballot applications or verification documents is a felony. Ala. Code §§ 17-11-7; 17-17-24(a); doc. 16-46 at 19.

The defendants do not dispute that these laws and requirements provide an effective deterrent to voter fraud. *See* doc. 36. In fact, Secretary Merrill has acknowledged that a bill proposing to eliminate the witness requirement for absentee ballots and add a photo ID requirement would strengthen absentee voting laws in Alabama. *See* doc. 16-46 at 23–24.[24] In light of the state's current photo ID requirement for absentee voter applications—which will remain in place for most absentee voters, *see* note 25, *supra*—Secretary Merrill's statement undermines the legitimacy of the State's interest in maintaining the witness requirement to prevent fraud. In addition, the defendants' acknowledgement that persons who are essentially unknown to a voter, such as a "mail delivery person, grocery or food delivery person, police officer or sheriff's deputy," can serve as witnesses, doc. 34-1 at 20, also undermines the legitimacy of the witness requirement as an effective means of deterring fraud. Moreover, as the Western District of Virginia recently observed, "[f]or the fraudster who would dare to sign the name of another qualified voter at the risk of being charged with [a] felon[y] [ ], writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle—at least on the record before the [c]ourt." *League of Women Voters of Va. v. Va. State Bd. of Elections*, —— F.Supp.3d ——, ——, 2020 WL 2158249, at *9 (W.D. Va. May 5, 2020). While the state has a legitimate interest in preventing voter fraud, based on the record before the court, as it relates to the witness signature requirement, that interest does not necessitate the burdens imposed by the witness requirement during the COVID-19 pandemic, especially in light of other laws designed to prevent voter fraud in Alabama.

***17** As a result, because some voters at risk of severe complications from COVID-19 who do not regularly come into contact with at least two adults simultaneously will likely be dissuaded from voting due to the health risks associated with complying with the witness requirement and the steps necessary to mitigate those risks, the plaintiffs are likely to show that the burdens imposed on those voters outweigh the

state's interest in enforcing the witness requirement. Thus, on the record before the court, the plaintiffs have shown a likelihood of success on the merits of their claim that the witness requirement is unconstitutional as to vulnerable voters who cannot safely satisfy the requirement in light of the COVID-19 pandemic.

2.

With exceptions for voters entitled to vote absentee under federal law, including the Voting Accessibility for the Elderly and Handicapped Act, Alabama requires absentee voters to provide a copy of their photo identification with their absentee ballot application and certain absentee ballots.[25] Ala. Code §§ 17-9-30(b), (d); 17-11-9. The plaintiffs assert that the photo ID requirement is unconstitutional as applied to People First's members, Porter, Thompson, and similarly-situated elderly or disabled voters in the COVID-19 pandemic. Doc. 1 at 44. The plaintiffs seek an order enjoining enforcement of the photo ID requirement, as to those voters. Docs. 15 at 3; 20-1 at 9.

a.

[43] First, the court must determine whether the photo ID requirement imposes a burden on the right to vote that is severe enough to warrant strict scrutiny. According to the plaintiffs, Alabama's photo ID requirement presents a severe burden on elderly and disabled voters who are most vulnerable to COVID-19 because complying with the requirement could require those voters to leave their homes and risk exposure to the virus.[26] Doc. 20-1 at 32. The plaintiffs point to Thompson and some members of People First as examples of vulnerable voters who cannot make copies of their IDs at home, and therefore must risk exposure to the virus to obtain a copy of their ID. Docs. 20-1 at 18–19; 32.[27] Indeed, Secretary Merrill has indicated that voters without a printer at home may need to go to "Walmart or Kinko's" to make a copy of their IDs in order to apply for an absentee ballot. *See* doc. 16-33 at 3.

***18** The defendants contend that the photo ID requirement does not present a severe burden to Thompson and People First's members because there is no evidence that any of these plaintiffs lack access to a person who could help them obtain a copy of their ID.[28] Doc. 36 at 25. True enough. Yet, there is no guarantee that each of those plaintiffs will be able to find a person to help make a copy for them, and requiring a vulnerable voter to find a person willing to help at the risk of potential exposure to COVID-19 is itself a burden. This burden is not sufficient, however, to establish that strict scrutiny applies. *See Crawford*, 553 U.S. at 206, 128 S.Ct. 1610 (J. Scalia, concurring).[29] Still, even if the burden is not severe, "relevant and legitimate interests of sufficient weight" must justify the burden imposed on vulnerable voters by the photo ID law. *Lee*, 915 F.3d at 1318–19 (citation omitted).

b.

[44] As with the witness requirement, the defendants assert that the photo ID requirement serves the State's interests in deterring voter fraud and safeguarding voter confidence. Doc. 36 at 23; *see also* doc. 34-5 at 3. It is settled law that he state has a legitimate interest in preventing voter fraud, and that a photo ID requirement advances that interest. *Crawford*, 553 U.S. at 196–97, 128 S.Ct. 1610 ; *Common Cause*, 554 F.3d at 1353–54; *see also Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277 (N.D. Ala. 2018). That said, the plaintiffs do not ask the court to enjoin the photo ID requirement for all absentee voters. Instead, they ask the court to enjoin the photo ID requirement only for those voters who are 65 or older or disabled, and who feel it is impossible or unreasonable to comply with the photo ID requirement because of COVID-19.

The weightiness of the state's interest in preserving the photo ID requirement for this limited subset of voters is less clear. As previously noted, the state already provides an exception to the photo ID requirement for voters who are 65 or older or disabled, and who are unable to access the polls due to a physical infirmity. Ala. Admin. Code R. 820-2-9-.12(3). Effectively, the plaintiffs merely ask the state to construe the last part of the existing exception to apply to those who are afraid to go to the polls because of COVID-19. Doc. 20-1 at 32–34. The state has not explained why, consistent with its interest in preventing voter fraud, it can exempt voters who are 65 or older or disabled and cannot access the polls, but it cannot exempt voters who are 65 or older or disabled and cannot safely obtain a copy of their photo ID because of the pandemic. *See* doc. 36.

Furthermore, there are other measures to prevent voter fraud. The state can establish the identity of an absentee voter through the existing requirement that a voter provide his

driver's license number or the last four digits of his social security number with an absentee ballot application. *See* Ala. Code § 17-11-4; doc. 16-46 at 19. This is information that is generally available only to the individual himself, and it is information the state already requires and could verify. To the extent that a fraudster could get her hands on this information to submit a fraudulent absentee ballot, it is doubtful that insisting on the submission of a copy of a photo ID would deter that individual. In sum, based on the record before the court, the state's interest in requiring this limited class of voters to comply with the photo ID requirement is fairly minimal.

***19** Weighed against this interest, the burden on that group of voters is significant. The defendants do not dispute the plaintiffs' evidence that some members of People First cannot make copies at home and cannot safely leave their homes during the COVID-19 pandemic because of their heightened risk of complications from this virus. *See* docs. 16-45 at 25; 26. The defendants instead suggest that those members and other voters in the same predicament could find others to make a copy for them. Even assuming that is a viable option for all of these voters, finding a willing individual to assume the risk of exposure to COVID-19 is itself a burden, and does not completely eliminate the risk of exposure to the voter. Thus, the photo ID requirement could present some elderly and disabled voters who wish to vote absentee with the burden of choosing between exercising their right to vote and protecting themselves from the virus, which could dissuade them from voting.

"[E]ven one disenfranchised voter ... is too many." *Lee*, 915 F.3d at 1321 (citation omitted). At this juncture, the plaintiffs have shown that the state's interest in enforcing the photo ID requirement does not justify the burden on voters who are 65 or older or disabled and who cannot safely obtain a copy of their photo ID. Thus, the plaintiffs have shown a substantial likelihood of success on this claim. [30]

3.

[45] The CDC recommends that election officials encourage curbside voting for eligible voters if allowed in a jurisdiction to minimize the risk of COVID-19 exposure. Doc. 16-2 at 2. The plaintiffs assert that the individual plaintiffs and People First's members would utilize curbside voting if that option was available to them. Docs. 1 at 9–11; 16-45 at 5, 9, 14, 19. Although Alabama law does not expressly prohibit curbside voting, *see* docs. 20-1 at 16; 36 at 26, Secretary Merrill bars local elections officials from utilizing curbside voting to assist voters with disabilities, *see* doc. 16-41 at 15–16.

According to the plaintiffs, some voters with disabilities, including some members of People First, must vote in person, rather than by absentee ballot, in order to receive assistance at the polls, and curbside voting would minimize the risk of exposure to COVID-19 for those voters. Doc. 20-1 at 35–36. The plaintiffs contend that Secretary Merrill's prohibition on curbside voting may deprive those voters of their right to vote by forcing them to choose between foregoing their right to vote and risking their health by going inside a polling place. Doc. 1 at 44–45.

The defendants do not directly dispute that contention, but instead state that "every voter in Alabama can vote absentee." *See* doc. 36 at 27. And, the defendants contend that "mandating curbside voting raises a host of practical concerns," including how the state could find enough poll workers to cover inside and curbside voting at almost 2,000 polling places, control lines of traffic at the polls, and preserve the privacy of ballots. *Id.* at 36 at 9, 26–27. But, this contention misunderstands the plaintiffs' claim, and the defendants' concerns do not address the issue at hand.

The plaintiffs seek an order preventing the state from prohibiting local election officials from providing curbside voting—not an order requiring the state to provide curbside voting. Docs. 1; 20-1 at 35–37. The defendants identify no fraud-prevention interest that justifies prohibiting local election officials from providing curbside voting that complies with all relevant election laws. *See* doc. 36. And, the defendants do not dispute that other states permit curbside voting, or present evidence indicating that curbside voting that complies with state election law is prone to fraud. *See* docs. 16-42 at 24; 16-43 at 5, 9; 36. The defendants suggest that curbside voting would conflict with laws requiring voters to sign a poll list and ballots to be kept secret. *See* docs. 36 at 27; 34-1 at 21. But, contrary to the defendants suggestion otherwise, *see* doc. 34-1 at 21, Alabama law expressly allows an election official to write a voter's name on a poll list if the voter "because of a physical disability, is unable to write his or her own name," Ala. Code § 17-9-11, and provides that voters who wish to have assistance voting may receive it from poll workers, Ala. Code § 17-9-13. Because the defendants have not proffered any legitimate justification for the burden imposed by Secretary Merrill's prohibition on curbside voting, the plaintiffs have shown a substantial

likelihood of success on their claim that the prohibition violates the Constitution.

B.

[46] *20 Next, the court determines whether the plaintiffs have shown a substantial likelihood of success on their claims under the ADA. Congress enacted the ADA to address the "pervasive unequal treatment" of people living with disabilities. *Nat'l Ass'n of the Deaf v. Fla.*, 945 F.3d 1339, 1347 (11th Cir. 2020) (citing *Tennessee v. Lane*, 541 U.S. 509, 517, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004)). The ADA serves as a safeguard to ensure the dignity of these people in many areas of public life, including voting. 42 U.S.C. § 12101(a)(1)–(3). *See also Am. Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011) ("[D]isabled citizens must be able to participate in the [State]'s voting program."). Because of this lofty purpose, the ADA "must be broadly construed." *Kornblau v. Dade County*, 86 F.3d 193, 194 (1996).

To state a claim under Title II, a plaintiff must demonstrate: "(1) that [s]he is a 'qualified individual with a disability;' (2) that [s]he was 'excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;' (3) 'by reason of such disability.' " *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132). A "public entity" is "any State or local government [or] any department, agency ... or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). The final clause of § 12132 "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007).

[47] [48] [49] [50] A plaintiff is a qualified individual if she "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity ... with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services." *United States v. Georgia*, 546 U.S. 151, 153–54, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (quoting 42 U.S.C. § 12131(2)). While "rules, policies, [and] practices" may be subject to reasonable modification, "essential eligibility requirements" are not. *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 159 (2d Cir. 2013) (citing 42 U.S.C. § 12131(2)).[31] When an individual cannot meet an essential eligibility requirement, "the only possible accommodation is to waive the essential requirement itself ... [but] [w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the ... program [at issue]." *Pottgen v. Missouri State High School Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).[32] Therefore, a plaintiff who does not meet an essential eligibility requirement is not qualified to state a claim under the ADA. The question then becomes: is the requirement essential for eligibility in the program? "[W]hether an eligibility requirement is essential is determined by consulting the importance of the requirement to the program in question." *Mary Jo C.*, 707 F.3d at 159.[33] A public entity cannot merely state that the discriminatory requirement is essential to the fundamental nature of the activity at issue—it must provide evidence that the procedural requirement is necessary to the substantive purpose undergirding the requirement. *See Schaw v. Habitat for Humanity*, 938 F.3d 1259, 1266–67 (11th Cir. 2019) ("Whether a particular aspect of an activity is 'essential' will turn on the facts of the case.").[34]

[51] [52] *21 Moving beyond the qualification stage, exclusions under Title II need not be absolute: a public entity violates Title II not just when "a disabled person is completely prevented from enjoying a service, program, or activity," but rather when such an offering is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150).[35] However, mere difficulty in accessing a benefit is not, by itself, a violation of the ADA. *See Bircoll*, 480 F.3d at 1088. Instead, a plaintiff must show that the failure to accommodate created an injury. *Id.*

[53] [54] [55] [56] If a plaintiff makes a prima facie case of discrimination, she must then propose a reasonable modification to the challenged requirement or provision. This remedy should be a "proportionate and reasonable modification of a service that is already provided, and it [should] not change the nature of the service." *Nat'l Ass'n of the Deaf v. Fla.*, 945 F.3d 1339, 1351 (11th Cir. 2020). Certain public offerings cannot be made meaningfully accessible, while others would demand prohibitively high cost and effort. Accordingly, a successful ADA claim requires plaintiffs to "propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016). To show the accommodation sought

is reasonable, "a plaintiff need only demonstrate a facially reasonable request—or one that seems reasonable in 'the run of cases.' " *Schaw*, 938 F.3d at 1267. This burden is "not a heavy one ... [i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003). If the plaintiffs can make this showing, the burden of non-persuasion shifts to the defendants. *Schaw*, 938 F.3d at 1267.

[57] [58] [59] [60] [61] A public entity need not "employ any and all means to make judicial services accessible to persons with disabilities." *Lane*, 541 U.S. at 531–32, 124 S.Ct. 1978 . Rather, the entity must make "reasonable modifications that would not fundamentally alter the nature of the service provided ... [or] impose an undue financial or administrative burden." *Id.* (citations omitted). A "public entity has the burden of proving that compliance with this subpart would result in a 'fundamental' alteration." *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017) (citing 28 C.F.R. § 35.164); *see also Schaw*, 938 F.3d at 1267. Without evidence that the proposed modification is "unreasonable or incompatible" with the state's program, a defendant cannot succeed in the affirmative defense. *Hindel*, 875 F.3d at 348. The reasonable-modification inquiry in Title II–ADA cases is "a highly fact-specific inquiry [and] terms like reasonable are relative to the particular circumstances of the case." *Bircoll*, 480 F.3d at 1085. This inquiry entails assessing whether the proposed modification "would eliminate an essential aspect of the ... program or simply inconvenience it, keeping in mind the basic purpose of the ... program ..., and weighing the benefits to the plaintiff against the burdens on the defendant." *Schaw*, 938 F.3d at 1267. "A modification that provides an exception to a peripheral ... rule without impairing its purpose cannot be said to 'fundamentally alter' the [activity]." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001).

***22** The plaintiffs contend that each of the challenged provisions violate the ADA and submit recommendations for purportedly reasonable modifications. Docs. 1; 20-1. The defendants dispute the plaintiffs' prima facie case and assert that the challenged provisions are essential eligibility requirements for participation in Alabama elections. Doc. 36. The court addresses the parties' respective contentions regarding each of these provisions in turn.

1.

As stated previously, Alabama law requires that all absentee ballots include an affidavit signed by the voter and witnessed by a notary public or two adult witnesses. Ala. Code §§ 17-11-7; 17-11-9; 17-11-10. The plaintiffs claim that this provision forces voters who live alone or with only one other adult and who wish to cast an absentee ballot to choose between adhering to health guidelines regarding social distancing and voting in upcoming elections. Docs. 1 at 44; 20-1 at 22–23. They propose modifying the witness requirement to allow voters to submit self-executed affidavits affirming their identity. Doc. 20-1 at 28, 31.

[62] The first part of the analysis is to determine whether the plaintiffs make out a prima facie case that the witness requirement violates the ADA. To support their burden, the individual plaintiffs assert that they are "eligible to vote and would do so with reasonable accommodation[, but] [a]bsent a modification" to the witness requirement, they will be "prevented from voting and completely denied their 'right to participate in the democratic process.' " Doc. 20-1 at 31 (citing *Nat'l Ass'n of the Deaf*, 945 F.3d at 1349).

The individual plaintiffs' eligibility is not in contention. All four are registered voters in Alabama and plan to vote in the 2020 elections. Doc. 16-45 at 2–20. And, all four have ADA-eligible disabilities that render them highly vulnerable to COVID-19, and Clopton, Porter, and Thompson are eligible to vote in the runoff election on July 14, 2020. *Id.*

Each of the individual plaintiffs usually votes in person, but each intends to vote absentee in 2020 to avoid exposure to COVID-19. *Id.* All four contend that the witness requirement serves to exclude them from voting absentee based on their disabilities because they live alone or with only one other person and do not generally interact with at least two adults simultaneously. In addition, the organizational plaintiffs contend they have members who live alone and will not be able to comply with the witness requirement without risking their health because doing so would require person-to-person contact in contravention of current health guidelines. Doc. 16-45 at 24–26, 31.

At this stage, the defendants do not dispute "that the individual Plaintiffs' allegations each meet the ADA's definition of disability." Doc. 36 at 22 n.26. Their quarrels with the plaintiffs' prima facie case are three-fold: (1) that the

plaintiffs are not "qualified individuals because the witness requirement is an essential eligibility requirement of having an absentee ballot," doc. 36 at 28, (2) that the plaintiffs are not excluded because the witness requirement does not present a "concrete barrier," *id.* at 29, and (3) that any exclusion the plaintiffs face is not a result of their disabilities, but rather "stem[s] from [their] own choices," *id.* The court respectfully disagrees with the defendants' second and third contentions.[36] However, the court agrees that at this stage, the plaintiffs have not shown a likelihood of success that they can meet the essential eligibility requirements of the Alabama voting regime.

***23** The defendants assert that the witness requirement is an essential eligibility requirement because it "goes to the integrity and sanctity of the ballot and election." *Id.* (citing Ala. Code § 17-11-10(b)).[37] The plaintiffs counter that the witness requirement "does not meaningfully protect the integrity of the absentee ballot," noting that (1) the current regulations do little to ensure the integrity of the requirement, and (2) several other provisions of Alabama law sufficiently protect election integrity. Doc. 20-1 at 26–28. But even if the witness requirement is functionally useless in securing the "integrity and sanctity of the ballot and election," Ala. Code § 17-11-10(b), and other extant measures may be sufficient to confirm absentee voter identity, *see* Ala. Code §§ 17-11-4; 17-11-7; 17-17-24(a); doc. 16-46 at 18–20, the court cannot find the waiver requirement nonessential at this stage. The plaintiffs are generally correct that the defendants' bald assertion of the requirement's essential nature is insufficient to block the plaintiffs' claim. Doc. 46 at 8. The defendants are not alone in asserting this point, however; both the Alabama legislature and the Alabama Supreme Court have clearly indicated that the requirement is essential under Alabama law.[38] *See Eubanks v. Hale*, 752 So. 2d 1113, 1157–58 (Ala. 1999) (citing Ala. Code § 17-11-10); *Compare Mary Jo C.*, 707 F.3d at 160 (finding the challenged provision non-essential where the state regularly granted waivers and extensions of the provision). Because the witness requirement is deemed a condition precedent to eligibility under state law, and essential eligibility requirements are not subject to reasonable modifications, the plaintiffs cannot state an ADA claim against the witness requirement based on the current record.

2.

Alabama requires citizens voting absentee to submit a paper copy of their photo ID along with their absentee ballot application and certain mail-in ballots. Ala. Code §§ 17-9-30(b), (d); 17-11-9.[39] By Secretary Merrill's own admission, voters who lack the means to photocopy their IDs at home will be forced to leave their homes to secure a copy from an outside printing vendor. Doc. 16-33 at 3. The plaintiffs propose that the defendants expand their interpretation of the photo ID exemption to include those who are at heightened risk from COVID-19. Doc. 20-1 at 15. As the individual plaintiffs put it, because they are protected by the ADA, the defendants "must interpret the photo ID requirement in a manner that protects their right to vote." Doc. 20-1 at 35.[40]

[63] ***24** Based on the current record, the plaintiffs state a prima facie case of disability discrimination relating to the photo ID requirement as applied in the COVID-19 pandemic. The defendants do not dispute that the individual plaintiffs are disabled, doc. 36 at 22 n.26, nor do they make a serious effort to demonstrate that the photo ID requirement is an essential eligibility requirement,[41] *id.* at 31 n.35. More importantly, Alabama does not designate the photo ID requirement as essential, allowing the individual plaintiffs a clearer path to establishing their qualifications. *See generally* Ala. Code § 17-9-30.

Turning next to the "excluded ... by reason of ... disability" elements of the prima facie case, *see* 42 U.S.C. § 12132, the court finds the plaintiffs succeed here as well. The defendants again claim that the individual plaintiffs are not excluded because the photo ID requirement does not present a "concrete barrier," doc. 36 at 29, and that any exclusion they face is the result of their "own decisions," *id.* The court sees no persuasive value in this point. The Eleventh Circuit has recognized that plaintiffs are excluded when an offering is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150). Physical barriers are not the only means by which to impede accessibility. The plaintiffs have provided evidence that Thompson and some members of People First who are at risk of severe complications from COVID-19 do not have the capability to copy their IDs in their homes. Docs. 20-1 at 18–19, 32. As Secretary Merrill has indicated, voters may need to go to "Walmart or Kinko's" to make a copy of their IDs in order to apply for an absentee ballot. *See* doc. 16-33 at 3. Alternatively, the defendants suggest that the individual plaintiffs could find a person who could help them obtain a copy of their ID. *See* doc. 36 at 25. But this would entail requiring a vulnerable voter to find a

person willing to help at the risk of potential exposure to COVID-19. As discussed above, a public entity violates Title II not just when "a disabled person is completely prevented from enjoying a service, program, or activity," but also when such an offering is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150). Although the interplay between the COVID-19 public health emergency and voting requirements is novel, district courts who have considered the issue have found that requiring a voter to risk her health by foregoing social distancing guidelines presents a "nearly insurmountable hurdle." *Libertarian Party of Illinois v. Pritzker*, —— F.Supp.3d ——, ——, 2020 WL 1951687, at *4 (N.D. Ill. April 23, 2020). Requiring a voter to ask another person to clear this hurdle on their behalf, even if this request proves successful, could easily dissuade them from voting. Because the photo ID requirement is not readily accessible to the plaintiffs, they meet their burden of demonstrating their exclusion.

The defendants' third contention that the plaintiffs' "difficulties stem from [their] own choices and not from the requirements imposed by Defendants," doc. 36 at 30,[42] is similarly problematic. The defendants assert that "it is [the plaintiffs'] subjective fear of contracting COVID-19—not their disabilities ... that causes their alleged exclusion." Doc. 36 at 30. To support this contention, the defendants first cite an unpublished Fifth Circuit case finding a Title II claimant was not excluded in the meaning of the ADA because her exclusion "appear[ed] to be, at least in part, a product of [their] own choices." *Id.* (citing *Greer v. Richardson Independent School Dist.*, 472 F. App'x 287, 295 (5th Cir. 2012)). In *Greer*, the court dismissed the plaintiff's complaint that her seating location at an entertainment venue was subpar because the plaintiff did not ask to be reseated. *Greer*, 472 F. App'x at 295. In this case, the plaintiffs are presented with the option of braving exposure to an illness from which they are at high risk of severe complications or dying, or foregoing their right to vote. To the extent that the plaintiffs' trepidation to risk their health is a choice, it is not a meaningful one. And, in any event, unlike the *Greer* plaintiff, these plaintiffs are asking to be reseated, *i.e.*, that the defendants waive the requirement.

***25** The defendants next cite to *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013), for the proposition that any injury the plaintiffs suffer due to their subjective fears of COVID-19 are self-inflicted. In that case, the Supreme Court contemplated justiciability questions regarding plaintiffs asserting that the Foreign Intelligence Surveillance Act violated their constitutional rights. *Clapper*, 568 U.S. at 398, 133 S.Ct. 1138 . As explained in part II, *supra*, the claims presented in this case are justiciable. Moreover, the individual plaintiffs' fear of serious complications of contracting COVID-19 are hardly subjective.[43]

Finally, the defendants' implication that the plaintiffs are barred from making a claim against the state because they have already "compromise[ed] the strict isolation they claim prevents them from complying" with the photo ID requirement, *see* doc. 36 at 30, is unavailing. It is not clear from the record that the plaintiffs have in fact compromised their strict isolation, *see* doc. 16-45 at 8, 18, but even assuming that they had, this purportedly imperfect compliance does not absolve the defendants of ADA violations. The ADA does not require the plaintiffs to prove that they are completely unable to "enjoy[ ] a service, program, or activity," but rather that such participation is not "readily accessible." *Shotz*, 256 F.3d at 1080 (citing 28 C.F.R. § 35.150). Demanding that the plaintiffs expose themselves to COVID-19 when they otherwise would not impedes their ability to readily access the state's voting program. That the plaintiffs have some ability to interface with others for medical appointments, grocery runs, and sporadic interactions with their children and grandchildren or in-home care workers, *see* doc. 16-45 at 8, 18, does not permit the defendants to condition the plaintiffs' exercise of their voting rights on violating self-isolation guidelines.

Turning now to the reasonable modification inquiry, the court finds the plaintiffs' proposed modification is facially reasonable. *See Schaw*, 938 F.3d at 1267. The plaintiffs' request is merely to extend an existing exemption to the photo ID requirement to a limited group of voters. *See* doc. 20-1 at 15. The defendants assert that the proposed expansion is "at odds with its purpose to preserve the sanctity and integrity of the ballot and election" and therefore "would be a fundamental alteration to Alabama elections," doc. 36 at 31–32, but they provide no evidence to establish this claim, *see generally id.* This statement alone is insufficient to show that the photo ID requirement is essential and would therefore fundamentally alter Alabama's voting program. *See Schaw*, 938 F.3d at 1267. Having performed a "highly fact-specific" inquiry into the proposed modification, *Bircoll*, 480 F.3d at 1085, the court find that the facts here belie the defendants' assertion. Unlike the witness requirement, the Alabama legislature provides no language indicating the photo ID requirement is essential. *See* Ala. Code § 17-9-30.

In fact, the law provides multiple exemptions to the photo ID requirement.[44] Moreover, insofar as the purpose of the photo ID requirement is to "preserve the sanctity and integrity of the ballot and election," doc. 36 at 31–32, other Alabama laws serve this purpose by protecting against voter fraud. For example, as discussed previously, a voter casting an absentee ballot must provide her driver's license number or the last four digits of her social security number in her absentee ballot application. Ala. Code § 17-11-4; doc. 16-46 at 19. Absentee voters also must submit an affidavit identifying themselves and swearing that the information in their affidavit is true. Ala. Code §§ 17-11-7; 17-17-24(a); doc. 16-46 at 19. The defendants do not dispute that these laws provide effective deterrents to voter fraud. *See* doc. 36. Based on these facts, the court finds the plaintiffs' modification does not fundamentally alter the Alabama voting program.[45] Accordingly, the plaintiffs have shown a likelihood of success on the merits of their ADA claim challenging the photo ID requirement.

3.

[64] ***26** Finally, the plaintiffs contend that Secretary Merrill's prohibition on curbside voting violates the ADA by denying "delivery of services at alternate accessible sites." Doc. 20-1 at 37 (citing 28 C.F.R. § 35.150(b)). The plaintiffs state a prima facie case[46] and have proposed a reasonable modification. As stated previously, the defendants seem to misunderstand the plaintiffs' case. *See* doc. 36 at 32. The plaintiffs are not requesting that the defendants "implement[ ] curbside voting at 1,980 voting sites in fewer than 50 days," *id.*, but rather they are asking that the defendants refrain from blocking counties that choose to offer the accommodation, *see* docs. 1; 20-1 at 35–37. Beyond this misunderstanding, the only argument the defendants present against the modification is their contention that "mandated curbside voting would likely also be a fundamental alteration to Alabama elections." Doc. 36 at 32. But there is no evidence that curbside voting—mandated or otherwise—would fundamentally alter Alabama law. In fact, the defendants' witness identified methods for making the offering feasible.[47] The defendants' contention that such a disruption is "likely," *id.*, is insufficient to rebut the plaintiffs' proposed modification. Here again, the plaintiffs have demonstrated their likelihood of success on the merits of their ADA claim regarding curbside voting.

C.

[65] Finally, the court evaluates whether the plaintiffs have shown a substantial likelihood of success on their claim that the witness requirement violates § 201 of the Voting Rights Act, codified at 52 U.S.C. § 10501.[48] The plaintiffs maintain that the witness requirement is an impermissible "test or device" under the statute. The court notes that, unlike the plaintiffs' other claims, the VRA claim contends that the witness requirement is a facial violation of § 201, rather than as applied in the context of the COVID-19 pandemic. At this juncture, the plaintiffs have not demonstrated that they are likely to prevail on this claim.

[66] ***27** As an initial matter, the defendants contend that this claim is not properly before the court. In their view, claims under § 201 may be brought only by the Attorney General of the United States, and they must be before a three-judge district court panel. The defendants are correct that the statute allows the Attorney General to initiate a civil action "[w]henever the Attorney General has reason to believe that a State or political subdivision ... has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of" § 201, and that when the Attorney General brings such an action, it "shall be heard and determined by a court of three judges" in federal district court. 52 U.S.C. § 10504. However, the statute also contemplates that private plaintiffs may bring an action challenging a state practice as an impermissible test or device. *See* 52 U.S.C. § 10302(b) ("If in a proceeding instituted by the Attorney General *or an aggrieved person* ... the court finds that a test or device has been used ... it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate[.]") (emphasis added). And the requirement for a three-judge panel only applies when the Attorney General initiates the suit. *See* 52 U.S.C. § 10504. Consequently, this court may consider the plaintiffs' claim under § 201.

Section 201 provides that "[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State." 52 U.S.C. § 10501(a). The term "test or device" includes:

> any requirement that a person as a prerequisite for voting or registration

> for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

52 U.S.C. § 10501(b). Alabama's witness requirement does not qualify as a "test or device" under the statute's first three provisions, as it is not a literary test, it is not an educational test, and it is not a moral character requirement. The issue is whether the witness requirement forces an absentee voter to "prove his qualifications by the voucher of registered voters or members of any other class ... as a prerequisite for voting." *Id.*

Congress included the voucher requirement as a "test or device" in response to election practices used to discriminate against African-Americans. For example, in at least one county in Alabama, in order to register to vote, an applicant had to produce a "supporting witness" who "must affirm that he is acquainted with the applicant, knows that the applicant is a bona fide resident of the county, and is aware of no reason why the applicant would be disqualified from registering." *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965); *see also* S. Rep. No. 89-162, 1965 U.S.C.C.A.N. 2508, 2549–50 (1965) (citing the *Logue* case as justification for the inclusion of the "voucher requirement" in the Voting Rights Act of 1965). [49]

Alabama's current witness requirement is less onerous. It requires only that an absentee voter "have a notary public (or other officer authorized to acknowledge oaths) or two witnesses witness his or her signature to the [absentee voting] affidavit." Ala. Code § 17-11-9. The notary or witnesses must then sign the affidavit and list their address. *See* Ala. Code § 17-11-7(b). The notary also "certif[ies] that the affiant is known (or made known) to me to be the identical party he or she claims to be." *Id.*

The plaintiffs argue that Alabama's witness requirement qualifies as a prohibited voucher requirement, because it mandates that "[w]itnesses must vouch for a voter's identity." Doc. 20-1 at 28. But that is not the case. As a copy of the affidavit form makes clear, only the notary must vouch for the voter's identity by "certify[ing] that the affiant is known (or made known) to me to be the identical party he or she claims to be." *Compare* Ala. Code § 17-11-7(b), *with* doc. 39-1. The witnesses do not vouch that the voter is over 18, that she is a citizen, that she is a resident of the state, or that she is not disqualified from voting as a convicted felon or for any other reason. *Cf.* Ala. Const. art. VIII, § 177 (noting qualifications for voting). The witnesses' signature indicates only that they observed the voter sign the affidavit. *See* Ala. Code § 17-11-9. As such, the witnesses do not vouch for the voter's "qualifications." 52 U.S.C. § 10501(b).

***28** Arguably, because the notary certifies that the voter is who she says she is, the notary does vouch for the voter's qualifications in violation of § 201. This argument turns on whether the voter's identify is a "qualification" for the purposes of the statute. 52 U.S.C. § 10501(b). A qualification is defined as the "possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible ... to perform a public duty or function." Qualification, Black's Law Dictionary (11th ed. 2019); *see also* Qualification, Oxford English Dictionary (2d ed. 1989) ("A necessary condition, imposed by law or custom, which must be fulfilled or complied with before a certain right can be acquired or exercised, an office held, or the like."). It seems to the court that it is "inherently or legally necessary" to vote that a voter be who she says she is. [50]

Anticipating this argument, the United States contends, in a statement of interest, that the notary's certification of the voter's identity is not a voucher "requirement," because absentee voters have the option of using witnesses instead. Doc. 39 at 9 n.3. Another judge on this court recently accepted a similar argument that the option for an in-person voter to prove her identity by being "positively identified" by two election officials was not a "requirement" but rather a "failsafe" for those who forgot or did not have a photo ID. *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1281–83. That case is currently pending on appeal. *Greater Birmingham Ministries v. Sec'y of State of Ala.*, No. 18-10151 (11th Cir. argued July 28, 2018). For its part, this court is concerned about the consequences of a rule that so long as the state offers one method of voting that passes statutory muster, the state is free to offer another method that violates the statute.

In this case, however, the plaintiffs do not make any arguments about whether the notary-specific certification, as opposed to the witness requirement generally, is a prohibited

voucher requirement under § 201. For this reason, the plaintiffs have not established that they are likely to succeed on the merits of their VRA claim at this time.

IV.

[67] [68] In addition to showing a likelihood of success on the merits, the plaintiffs must also show a likelihood of irreparable harm in the absence of relief, that the balance of equities weigh in their favor, and that an injunction serves the public interest. *See Winter*, 555 U.S. at 20, 129 S.Ct. 365 . In this case, if the challenged election laws are not enjoined, the individual plaintiffs and similarly-situated voters could likely face a painful and difficult choice between exercising their fundamental right to vote and safeguarding their health, which could prevent them from casting a vote in upcoming elections. "The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm." *Jones*, 950 F.3d at 828. Thus, the plaintiffs have shown a likelihood of irreparable harm in the absence of relief. *See Id.* (citations omitted); *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

[69] The balance of equities and the public interest also tip in the plaintiffs' favor. While an order enjoining the witness and photo ID requirements results in some burden to the defendants, who will have to quickly communicate the changed rules to local election officials and voters, those burdens do not outweigh the irreparable injury the individual plaintiffs and similarly-situated voters could incur by foregoing their right to vote. The court appreciates the defendants' concern that changes to election rules could cause confusion, *see* doc. 36 at 34, and that "federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, — U.S. —, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020). But, the singular circumstances presented by the COVID-19 pandemic are far from ordinary, and, while the burden of communicating election rule changes is not minimal, the defendants have time to clearly and succinctly communicate the changes prior to the July 14 run-off election without causing chaos and confusion. In addition, prohibiting the state from interfering with local election officials, if any, who choose to provide curbside voting that complies with state election laws imposes no burden on the defendants, while the prohibition could burden vulnerable voters who need to minimize their risk of exposure to COVID-19 and who need assistance at the polls. Thus, the burdens imposed on voters in high-risk groups who wish to vote absentee or by curbside voting during the COVID-19 pandemic outweighs the competing burden on the defendants.

[70] *29 Next, all voters have a "strong interest in exercising the 'fundamental political right' to vote.' " *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (citation omitted). "The public interest therefore favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437. As a result, the court finds that granting injunctive relief in this case is in the public interest, and that the plaintiffs have established they are entitled to a preliminary injunction.

V.

[71] [72] [73] "Crafting a preliminary injunction is an exercise of discretion and judgment." *Trump v. Int'l Refugee Assistance Project*, — U.S. —, 137 S. Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (citation omitted). "In executing its duties, the court must pay particular attention to the public consequences of any preliminary relief it orders." *Lee* at 1327 (citing *Winter*, 555 U.S. at 24, 129 S.Ct. 365). In addition, "a court 'need not grant the total relief sought by [the plaintiffs] but may mold its decree to meet the exigencies of the particular case.' " *Trump*, 137 S. Ct. at 2087 (citation omitted).

Thus, for the foregoing reasons and after careful consideration of the record, the court will grant in part the plaintiffs' motion for a preliminary injunction, doc. 15, and will order defendants: (1) not to enforce the witness requirement for the July 14 runoff election for absentee voters who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19; (2) not to enforce the photo ID requirement for the July 14 runoff election for absentee voters who are over the age of 65 or disabled who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she is 65 or older or has a disability; and (3) not to

enforce the state's de facto prohibition on curbside voting. A separate order will be issued.

DONE the 15th day of June, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 3207824

Footnotes

1 *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019) (citation omitted).

2 *Voting Rates by Age*, https://www.census.gov/library/visualizations/2017/comm/voting-rates-age.html, (last visited June 15, 2020).

3 One individual plaintiff, Eric Peebles, is under 65 and has cerebral palsy. *See* doc. 16-45 at 7.

4 *Lee*, 915 F.3d at 1321 (citation omitted)

5 These conditions are especially prevalent in Alabama. *See Hypertension Mortality by State*, https://www.cdc.gov/nchs/pressroom/sosmap/hypertension_mortality/hypertension.htm, (last visited June 15, 2020); *Heart Disease Mortality by State*, https://www.cdc.gov/nchs/pressroom/sosmap/heart_disease_mortality/heart_disease.htm, (last visited June 15, 2020); *Chronic Lower Respiratory Disease Mortality by State*, https://www.cdc.gov/nchs/pressroom/sosmap/lung_disease_mortality/lung_disease.htm, (last visited June 15, 2020); *Diabetes Mortality by State*, https://www.cdc.gov/nchs/pressroom/sosmap/diabetes_mortality/diabetes.htm, (last visited June 15, 2020); *Adult Obesity Maps*, https://www.cdc.gov/obesity/data/prevalence-maps.html, (last visited June 15, 2020).

6 There are exceptions to the photo ID requirement. Relevant here, voters eligible to vote absentee under the Voting Accessibility for the Elderly and Handicapped Act do not have to submit a copy of their photo ID to receive an absentee ballot. *See* Ala. Code § 17-9-30(d). This exception applies to voters who are either disabled or 65 or older and are "unable to access his or her assigned polling place." Ala. Admin. Code R. 820-2-9-.12(3).

7 The data, which continues to show an increase of cases in Alabama, belies this contention. *See Daily Confirmed New Cases*, https://coronavirus.jhu.edu/data/new-cases-50-states/alabama, (last visited June 15, 2020); *Daily and Cumulative Case Counts*, https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7, (last visited June 15, 2020).

8 Because the court has identified a plaintiff with standing for each form of relief sought, the court need not address the defendants' arguments about whether the organizational plaintiffs lack standing. But the organizational plaintiffs likely do have standing under existing precedent. *See Common Cause*, 554 F.3d at 1350–51 (finding that the NAACP had standing to challenge Georgia's photo ID requirement because it would have to divert resources to educate and assist voters with complying); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (finding that organizational plaintiffs had standing to sue on behalf of their members).

9 The fact that the board of registrars, in conjunction with the canvassing board, is responsible for counting the *provisional* ballots, *see* Ala. Code § 17-10-2(g)–(f), does not somehow negate the AEMs role in screening the ballots in the first instance.

10 *See* Ala. Code § 17-11-11(a) (specifying that absentee election officials shall consist of one inspector and at least three clerks for each absentee precinct).

11 *See* Ala. Code § 17-8-1 (providing that absentee election officials shall be appointed by the appointing board "not more than 20 nor less than 15 days before the holding of any election").

12 To be sure, an injunction directed to the AEMs would provide relief only in the counties where the defendant AEMs serve —*i.e.*, Jefferson County, Baldwin County, and Lee County. To provide statewide relief, an injunction against Secretary Merrill would have to be effective. Based on the Eleventh Circuit's precedent in *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), the court does not believe it can rely on an injunction directed to Secretary Merrill to establish standing.

13 *See* Ala. Code 17-1-3(a) ("The Secretary of State ... shall provide uniform guidance for election activities."); Ala. Code § 17-2-4(f) ("The Secretary of State ... shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the state.").

14 *See Lewis*, 944 F.3d at 1301 (noting that it is sufficient for a judgment to redress a plaintiff's injury "indirectly").

15 *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) (holding that because "the Secretary of State has the duty to obtain and maintain uniformity in the application, operation, and interpretation of Texas's election laws," claims seeking to expand access to absentee voting in Texas were traceable to and redressable by the Secretary of State)

(citation omitted); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (holding that the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by ... its Secretary of State, who serves as the chief election officer of the state") (citation omitted).

16 Nor would such an order supply standing, since (1) county commissions are responsible for "designat[ing] the places of holding elections," Ala. Code § 17-6-4(a); (2) the county commissions are not defendants in this case; and (3) "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury," *Lewis*, 944 F.3d at 1296 (citation omitted).

17 The Supreme Court long-ago reached the same conclusion. *See Fitts v. McGhee*, 172 U.S. 516, 529–30, 19 S.Ct. 269, 43 L.Ed. 535 (1899).

18 The plaintiffs also contend that strict scrutiny applies because the burden imposed by the witness requirement falls more heavily on black voters, the elderly, and voters with disabilities. Doc. 20-1 at 22. But, the case the plaintiffs cite involved an equal protection challenge to a Florida law that restored voting rights to ex-felons who had completed all terms of their sentence, including the payment of all fines, fees, and restitution. *Jones*, 950 F.3d at 800. Here, the plaintiffs do not explicitly assert an equal protection claim, *see* doc. 1, or argue that the challenged provisions violate the Equal Protection Clause, *see* doc. 20-1. And, the plaintiffs do not cite any binding authority applying strict scrutiny in the context of a claim that a state election law violates First and Fourteenth Amendment associational rights because an otherwise non-discriminatory law imposes a heavier burden on a protected class of voters. *See id.*

19 Similarly, Thompson lives alone and is at high risk for complications from COVID-19 due to underlying medical conditions, age, and race. Doc. 16-45 at 17–18. Thompson began self-isolating at home on April 1, and since that time, she has only had contact with her daughter and granddaughter who bring her groceries and check on her. *Id.* at 18. The plaintiffs contend that the witness requirement is a significant barrier to Thompson's right to vote, doc. 20-1 at 24, but they do not provide any evidence suggesting that Thompson's daughter and granddaughter, who Thompson has regular contact with, could not witness her affidavit.

20 The defendants also assert that the witness requirement does not impose a severe burden because "[m]any voters will be able to take advantage of the ability to have documents notarized over videoconferencing." Doc. 36 at 26. But videoconferencing is not free. It requires internet access at a minimum, which is a service that may be an unaffordable luxury for many. Moreover, a notary is entitled to a $5.00 fee for notarizing a document. Ala. Code § 36-20-74. The right to vote "cannot be made to depend on an individual's financial resources," *Johnson v. Governor of State of Fla*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005), and " 'a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the ... payment of any fee an electoral standard,' " *Jones v. Governor of Fla.*, 950 F.3d 795, 821 (11th Cir. 2020) (quoting *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667-68, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)). Therefore, the defendants cannot rely upon the option to have an affidavit notarized by videoconferencing, even for persons who can afford internet service, to establish that the witness requirement does not burden the right to vote.

21 *See* doc. 16-46 at 4–7; *Crawford*, 553 U.S. at 194, 128 S.Ct. 1610 ("There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election.") (citation omitted).

22 *See Crawford*, 553 U.S. at 197, 128 S.Ct. 1610 (finding that a state has an interest in safeguarding voter confidence and noting that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters") (citation omitted).

23 To be sure, the plaintiffs seek to enjoin the photo ID requirement. But the plaintiffs would enjoin the requirement only for those voters who are 65 or older or disabled, who are not already entitled to a waiver of the requirement under the state's existing exemption, and who feel it is impossible or unreasonable to comply with the requirement because of COVID-19. *See* docs. 15 at 3; 20-1 at 34. For everyone else, the photo ID requirement would still apply and would still serve as a fraud deterrent.

24 The bill, introduced by state Senator Rodger Smitherman, would have eliminated the requirement that voters give a reason to vote absentee and the witness requirement for absentee voters, and would have added a requirement that absentee voters include a copy of a photo ID with their application for an absentee ballot. Doc. 16-46 at 23. According to an article about the bill, Secretary Merrill's office suggested that Sen. Smitherman propose the changes in the absentee ballot law, and Secretary Merrill "said he believed it would strengthen the absentee voting law." *Id.* at 23–24.

25 Alabama interprets the Voting Accessibility for the Elderly and Handicapped Act to exempt from the photo ID requirement any voter who is over the age of 65 or has a disability and who is "unable to access his or her assigned polling place due to a neurological, musculoskeletal, respiratory (including speech organs), cardiovascular, or other life-altering disorder that affects the voter's ability to perform manual tasks, stand for any length of time, walk unassisted, see, hear, or speak ...." *See* Ala. Admin. Code R. 820-2-9-.12(3); doc. 16-46 at 19. The court notes that any voter over the age of 65 or with a

disability who has a symptomatic case of COVID-19, *i.e.*, a respiratory disorder, would almost certainly qualify for this exception to the photo ID requirement.

26 The plaintiffs do not cite any evidence regarding the number of voters, or any specific voters, who lack a photo ID, *see* doc. 20-1, and they base their challenge to the photo ID requirement primarily on the burden certain voters may face to obtain a copy of their photo IDs, *see id.* at 32-34; doc. 46. As evidence of that burden, plaintiffs state that 200,000 households in Alabama lack computers needed to copy a photo ID. Doc. 20-1 at 33. However, this fact does not show how many of those households include elderly and disabled voters who wish to vote absentee.

27 The plaintiffs also contend that complying with the photo ID requirement severely burdens Porter's right to vote. Doc. 20-1 at 32. But the record before the court reveals that Porter currently has the capability to copy his ID at home, and he is concerned only about his ability to afford the ink and paper needed to print a copy of his ID for the July 14 and November elections. Doc. 16-45 at 14–15. Because the record contains no indication that Porter could not print copies of his ID now in anticipation of the elections, the plaintiffs have not shown that the photo ID requirement imposes a severe burden on Porter's right to vote.

28 The defendants also contend that the photo ID requirement is not a severe burden because 87% of Alabama households have a computer in the home. Doc. 36 at 25. This statistic gives no meaningful information about the burden imposed by the requirement because making a copy of a photo ID requires a printer or copier in addition to a computer.

29 The plaintiffs contend that Judge Eleanor Ross's well-reasoned decision in *Georgia Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018), supports a finding that strict scrutiny applies when the effects of a facially non-discriminatory election provision have a disparate impact on a protected class of voters. *See* doc. 20-1 at 22. The court is not persuaded because the defendants in that case did not respond to the plaintiffs' arguments on disparate impact, and *Kemp* does not cite any authority applying strict scrutiny review because a facially non-discriminatory election law has a disparate impact on a protected class of voters. *See* 347 F. Supp. 3d at 1264.

30 Even if the defendants are correct that the plaintiffs have not shown a likelihood of success on their constitutional challenge to the photo ID requirement as applied to voters who are 65 or older or disabled and who cannot comply with the requirement during the COVID-19 pandemic, the individual plaintiffs and similarly-situated disabled voters are still entitled to relief from the requirement under the ADA claim. *See* part III.B, *infra.*

31 The court finds the analysis in *Mary Jo C.* instructive. There, the Second Circuit construed the "essential eligibility requirement" language found in 42 U.S.C. § 12131(2) "distinguish[ed] between two categories of requirements: (1) rules, policies, or practices ... and (2) essential eligibility requirements." *Mary Jo C.*, 707 F.3d at 157. The Circuit acknowledged the interplay between the essential eligibility requirement inquiry at the prima facie stage and the later assessment of whether a proposed modification fundamentally alters the challenged provision: "[t]he regulations indicate that 'essential eligibility requirements' are those requirements without which the 'nature' of the program would be 'fundamentally alter[ed].' " *Id.* at 158 (quoting 28 C.F.R. § 35.130(b)(7)). *See also Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 850 (7th Cir. 1999) (finding the essentialness inquiry should be "whether waiver of the rule ... would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change). Drawing from the Supreme Court's analysis in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001), the Circuit read the ADA to require analysis of "the importance of an eligibility requirement for a public program or benefit, rather than to defer automatically to whatever "formal legal eligibility requirements" may exist, no matter how unimportant for the program in question they may be." *Id.* at 159.

32 The Eighth Circuit in *Pottgen* considered Title III of the ADA. Courts have read the requirements of Title II and Title III as being consistent with each other:

> The House Committee on Education and Labor indicated that Title II's prohibitions are to be "identical to those set out in the applicable provisions of titles I and III of this legislation." H.R.Rep. No. 101–485(II), at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. More specifically, the House Report on the ADA states that the prohibitions of discrimination on the basis of association from Titles I and III should be incorporated in the regulations implementing Title II. *Id.* ; H.R.Rep. No. 485(III), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 474; *see also Kinney v. Yerusalim*, 9 F.3d 1067, 1073 n.6 (3d Cir. 1993) (legislative history indicates that Titles II and III are to be read consistently).

Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 47 (2d Cir. 1997) , *recognized as superseded on other grounds by Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). *See Mary Jo C.*, 707 F.3d at 159 (finding cases interpreting Title III to be instructive in Title II analysis). "Congress clearly did not intend to give public entities more latitude than private parties to discriminate against the disabled." *Theriault v. Flynn*, 162 F.3d 46, 53 n.10 (1st Cir. 1998).

33 *See also Pottgen*, 40 F.3d at 930 ("[T]o determine whether [the plaintiff] is a 'qualified individual' under [Title II of] the ADA, we must first determine whether the [challenged provision] is an essential eligibility requirement by reviewing the importance of the requirement to the ... program [at issue].")

34 Though *Schaw* addressed the Fair Housing Amendments Act, the Eleventh Circuit acknowledged that it drew its reasonable accommodation analysis from precedent concerning the ADA. *See* 938 F.3d at 1265 n.2 ("Congress imported the reasonable-accommodation concept from case law interpreting the Americans with Disabilities Act and the Rehabilitation Act ... Because we have applied these reasonable-accommodation requirements on numerous occasions, we can look to case law under the ADA and RA for guidance on what is reasonable under the Fair Housing Amendments Act.") (citations omitted).

35 *See* H.R. REP. 101-485, 105, 1990 U.S.C.C.A.N. 303, 388 ("It would also be a violation of this title to adopt policies which impose additional requirements or burdens upon people with disabilities that are not applied to other persons .. In addition, this subsection prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept ... makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation."); *see also Bircoll*, 480 F.3d at 1082 n.13 (11th Cir. 2007) ("Because [the defendant] has not challenged the validity of the DOJ's regulations for Title II, we likewise interpret and apply the regulations but with the caveat that we do not here determine their validity."); *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 751 n.10 (7th Cir. 2006) ("The Supreme Court never has decided whether these regulations are entitled to the degree of deference described in *Chevron, U.S.A. Inc. v. Nat ur al Resource s Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). Nevertheless, the Court has said that, '[b]ecause the Department of Justice is the agency directed by Congress to issue regulations implementing Title II ... its views warrant respect.' *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597–98, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (internal citations omitted).").

36 *See* part III.B.a.2, *supra.*

37 The relevant section reads:

> No poll worker or other election official shall open an affidavit envelope if the voter's affidavit signature or mark is not witnessed by the signatures of two witnesses or a notary public, or other officer, including a military commissioned officer, authorized to acknowledge oaths, and no ballot envelope or ballot therein may be removed or counted. The provision for witnessing of the voter's affidavit signature or mark in Section 17-11-7 goes to the integrity and sanctity of the ballot and election. No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature or mark is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public, or other officer, including a military commissioned officer, authorized to acknowledge oaths, prior to being delivered or mailed to the absentee election manager.

Ala. Code § 17-11-10.

38 While the Alabama Supreme Court has recognized that "substantial compliance with the essential requirements of the absentee voting law is sufficient ... so long [the] irregularities in the voting process do not adversely affect the sanctity of the ballot and the integrity of the election," it has also held that the state intended the witness requirement to be an essential eligibility requirement. *Eubanks v. Hale*, 752 So. 2d 1113, 1157–58 (Ala. 1999) ("An irregularity with regard to that requirement, therefore, would require that the ballot be excluded.").

39 As previously noted, Alabama provides exceptions for voters entitled to vote absentee under federal law, including the Voting Accessibility for the Elderly and Handicapped Act. Ala. Code §§ 17-9-30(b), (d); 17-11-9.

40 The defendants assert that because the plaintiffs employ only one sentence to specifically assert their ADA claim at to the photo ID requirement, *see* doc. 20-1 at 35, the plaintiffs fail to meet their burden of demonstrating that they are likely to succeed on the merits of this claim. Doc. 36 at 29 n.28. The court disagrees. It is true that the plaintiffs must "clearly carr[y] the burden of persuasion" that they are likely to succeed on the merits of their photo ID claim. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983). But while the plaintiffs do not devote a separate section of their brief to this claim, they make the requisite prima facie case and propose a reasonable modification through their broader discussion of the requirement.

41 As explained previously, the prima facie essential eligibility inquiry and the later fundamental alteration analysis overlap. *See Mary Jo. C.*, 707 F.3d at 158 ("The regulations indicate that 'essential eligibility requirements' are those requirements without which the 'nature' of the program would be 'fundamentally alter[ed].' ") (quoting 28 C.F.R. § 35.130(b)(7)). For this reason, the court considers whether the photo ID can reasonably be deemed essential in its discussion of the plaintiffs' proposed modification.

42 The defendants expand on this argument in their counterargument to the plaintiffs' witness requirement case. *See* doc. 36 at 30. To the extent that they intended to include these contentions for the photo ID requirement, the court considers them as well.

43 The currently available information from the scientific community establishes an objective basis for the plaintiffs' fear of contracting COVID-19. Based on their respective ages and disabilities, *see generally* doc. 16-45, each of the individual plaintiffs is highly vulnerable to the virus, doc. 16-4 at 3–4. Moreover, COVID-19 is "readily spread through respiratory transmission," and touching contaminated surfaces. *Id.* at 4. Infected individuals may transmit the disease without showing any symptoms, *id.* at 5, and "the only ways to limit its spread is self-isolation, social distancing, frequent handwashing, and disinfecting surfaces," *id.* at 3–4. Were the plaintiffs to contract COVID-19, they would be at high risk of dying from the disease. Their fear is not subjective.

44 *See* Ala. Code § 17-9-30(d) (exempting from the photo ID requirement voters who are eligible to vote absentee pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act; or any other federal law); *id.* at § 17-9-30(f) (permitting an individual to vote without a photo ID if two election officials identify her as an eligible voter on the poll list and sign a sworn affidavit to that effect).

45 *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1225 (11th Cir. 2008) (allowing short-term recovery homes to operate in multi-family zones was not the "fundamental alteration" that it would in single-family zones). *Compare Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (requiring a nursing school to waive all clinical requirements for a deaf applicant would fundamentally alter the nature of the nursing program), *with Anderson v. City of Blue Ash*, 798 F.3d 338, 363 (6th Cir. 2015) (allowing a miniature therapy horse to reside in disabled girl's backyard would not necessarily fundamentally alter the nature of single-family neighborhoods). *See also Mary Jo C.*, 707 F.3d 144, 160 (2d Cir. 2013) ("The fact that the State itself waives the deadline in the enumerated circumstances strongly suggests that the filing deadline is not 'essential.' "); *Martin*, 532 U.S. at 685, 121 S.Ct. 1879 ("[T]he walking rule is not an indispensable feature of tournament golf either. [The PGA] permits golf carts to be used [by non-disabled golfers] in [several of its tournaments other than the one in question].").

46 The defendants do not contest the plaintiffs' prima facie case for their curbside voting claim. *See* doc. 36. Alabama law does not prohibit curbside voting, *see* docs. 20-1 at 16; 36 at 26, and the plaintiffs merely request that the state not prohibit counties from implementing it, *see* docs. 1; 20-1 at 35–37. No evidence suggests that the prohibition is essential nor that an allowance of curbside voting would fundamentally alter Alabama law. Moreover, the plaintiffs have provided evidence that while they would vote in person if curbside voting were available, the state's prohibition prevents them from doing so, doc. 16-45. The ADA is not so narrow that the plaintiffs' rights only extend to voting "at some time and in some way." *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014). The plaintiffs have the right to "fully participate in [Alabama's] voting program[,]" *id.*, including by casting a vote in person. The plaintiffs demonstrate that by prohibiting curbside voting, the state excludes them from voting in person based on their disability, thereby "fail[ing] to 'provide[ ] [them] with meaningful access to the benefit that [it] offers.' " *Id.* (citing *Alexander v. Choate*, 469 U.S. 287, 301 , 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)).

47 The defendants submitted with their response the declaration of Clay Helms, the Deputy Chief of Staff and Director of Elections for the Alabama Secretary of State's office. Doc. 34-1. Helms explained that curbside voting would require the use of e-poll books or alternatively the transport of polling lists from inside the polling place to the curb, additional tabulation machines to preserve ballot secrecy, and additional poll workers to staff the curbside voting stations. *Id.* at 22–23. Helms expressed concerns that these procedures would compromise the privacy of the curbside voters, inconvenience candidates wishing to campaign 30 feet from the polling site, and create parking and traffic flow problems around the site. *Id.* at 23–24. Presumably, those jurisdictions that opt to implement curbside voting will utilize procedures that address these concerns.

48 The plaintiffs plead that the witness requirement also violates §§ 2 and 3 of the VRA, codified at 52 U.S.C. §§ 10301, 10302. And they claim that the ban on curbside voting violates §§ 3 and 201 of the VRA, codified at 52 U.S.C §§ 10302, 10501. However, the plaintiffs did not move for a preliminary injunction on these claims.

49 Originally, the "test or device" ban applied only to jurisdictions subject to preclearance, *see* 52 U.S.C. § 10303(b), but Congress extended the ban to apply nationwide in 1970, *see* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315 (1970), and it made the ban permanent in 1975, *see* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (1975).

50 The VRA prohibits a test or device that requires a voter to "prove his qualifications by the voucher of registered voters *or members of any other class.*" 52 U.S.C. § 10501(b) (emphasis added). The United States argues that adults do not qualify as a class. *See* Ala. Code § 17-11-10(b) (requiring that witnesses be "18 years of age or older"). The court need

not address this issue. But surely "notar[ies] public (or other officer[s] authorized to acknowledge oaths)" qualify as a class under the statute. Ala. Code § 17-11-9.

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

HUNTER DEMSTER, EARLE J. FISHER, JULIA HILTONSMITH, GINGER BULLARD, JEFF BULLARD, ALLISON DONALD, and #UPTHEVOTE901,	)	
Plaintiffs,	)	
vs.	)	No. 20-0435-I(III)
TRE HARGETT, MARK GOINS, WILLIAM LEE, and HERBERT SLATERY III, each in his official capacity of the State of Tennessee,	)	
Respondents	)	

AND

BENJAMIN WILLIAM LAY, CAROLE JOY GREENAWALT, and SOPHIA LUANGRATH,	)	
Plaintiffs,	)	
vs.	)	No. 20-453-IV(III)
MARK GOINS, TRE HARGETT, and WILLIAM LEE, each in his official capacity for the State of Tennessee,	)	
Defendants.	)	

MEMORANDUM AND ORDER GRANTING TEMPORARY INJUNCTION TO ALLOW ANY TENNESSEE REGISTERED VOTER TO APPLY FOR A BALLOT TO VOTE BY MAIL DUE TO COVID-19

In this time of the worldwide COVID-19 pandemic and its contagion in gatherings of people, almost all states – both Republican and Democrat – are providing their citizens the health protection of a voting by mail option. This includes southern states such as Alabama, South Carolina and Arkansas, and Tennessee's neighboring state of Kentucky and nearby West Virginia. The governors, state officials and legislators in those states have spearheaded efforts to expand access to voting by mail to protect the health of their citizens during the pandemic.

The Plaintiffs in Case No. 20-453 include some Tennessee registered voters who have or who reside with persons who have autoimmune conditions or other heightened susceptibility to the COVID-19 virus. The Plaintiffs in Case No. 20-435 are all Tennessee registered voters, except for Jeff Bullard. The Plaintiffs in case No. 20-435 do not allege personal conditions of heightened susceptibility. They do allege that they have determined that it is impossible or unreasonable for them to vote in-person at a polling place in upcoming elections due to the risk of contracting or transmitting the COVID-19 virus. None of these Plaintiffs, in either case, qualifies to vote by mail under the Defendant State Officials' interpretation and application of Tennessee's law, Tennessee Code Annotated section 2-6-201. Therefore, in upcoming elections, as the pandemic continues, these Plaintiffs must go to a polling place and vote in-person to exercise their right to vote. They are not eligible to vote by mail.

With situations such as those presented by the Plaintiffs, the Defendant State Officials (hereinafter referred to as the "State") have been asked to implement measures,

like the majority of states, to temporarily suspend, in upcoming elections, restrictive construction and application of voting by mail law to take into account the pandemic. To be clear, the Plaintiffs do not seek for the State to permanently switch to universal and automatic vote by mail in Tennessee. The Plaintiffs instead seek a temporary easing off on the restrictions of voting by mail limited to the time of the pandemic. The State has refused. It is maintaining the requirements for in-person voting. The State's response to the pandemic is to provide social distancing and sanitation measures at polling places. Significantly, however, one of the most prominent features of social distancing—wearing masks—cannot be compelled of voters, but only encouraged, at polling places. Thus persons who choose not to wear masks cannot be denied access to the polling place and present exposure to others.

Having met with refusal by the State, the Plaintiffs have filed these separate lawsuits to obtain during the pandemic access to voting by mail in upcoming elections.

The Plaintiffs rest their case on Article I, section 5 and Article IV, section 1 of the Tennessee Constitution which is more explicit in guaranteeing Tennesseans the right to vote than the counterpart federal Constitution. The Tennessee Constitution provides that, "the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto . . . ."

The State's position is unapologetic. It claims that unlike the can-do approach of two-thirds of the U.S. States who have for years allowed any voter to vote by mail and eleven more states that have relaxed voting by mail restrictions for the 2020 elections due

to the pandemic, it is impossible for the State of Tennessee, in a state of emergency, to expand access to voting by mail on a temporary basis. The State provides scenarios and calculations of lack of money, personnel and equipment for increased voting by mail, and they cite to their fear of increased voter fraud from voting by mail.

The issue, then, for this Court is whether, in this time of the pandemic, the States' construction and application of Tennessee law constitutes an unreasonable and discriminatory burden on the fundamental right to vote vigorously guaranteed by the Tennessee Constitution.

The Plaintiffs are presently before the Court on applications for a temporary injunction. They seek for the Court to enjoin the States' restrictive application of the law and for a mandate that the State must provide the Plaintiffs access to voting by mail.

On June 3, 2020, a hearing was conducted on the temporary injunction applications based upon evidence filed by all parties and oral argument of Counsel. At the conclusion of the hearing the Court took the matter under advisement.

After studying the evidence and the law, and considering argument of Counsel, the Court finds that the evidence does not support the State's claims that it is impossible for it to provide expanded access to voting by mail. Respectfully, the evidence is that the assumptions the State has employed in its fiscal and resource calculations are oddly skewed and not in accordance with the methodology of its own expert and industry standards. When, however, normal industry-recognized assumptions are used, the

evidence establishes that the resources are there to provide temporary expanded access to voting by mail in Tennessee during the pandemic if the State provides the leadership and motivation as other states have done.[1] As to voter fraud, the State's own expert debunks and rejects that as a reason for not expanding access to voting by mail.

From this evidence and upon using the legal standard of *Anderson-Burdick*,[2] the Court concludes that the State's restrictive interpretation and application of Tennessee's voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution. Accordingly the Plaintiffs are entitled to issuance of a temporary injunction.

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[1] *See*, for example, websites in Alabama and West Virginia where banners on absentee voting during the pandemic are displayed with informative links and instructions.

[2] The Tennessee Supreme Court has explained the *Anderson-Burdick* doctrine as follows:

> Notably, however, the United States Supreme Court has rejected the notion that strict scrutiny applies to every statute imposing a burden on the right to vote under the United States Constitution. Instead, addressing claims arising under the First and Fourteenth Amendments, the Court has adopted a "more flexible standard," pursuant to which a showing of important governmental regulatory interests may justify lesser restrictions on the right to vote, whereas strict scrutiny is reserved for laws that impose "'severe' restrictions." *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Norman v. Reed,* 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)); *see also Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion) (holding that any burden upon the right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation' " (quoting *Norman,* 502 U.S. at 288–89, 112 S.Ct. 698)); *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

City of Memphis v. Hargett, 414 S.W.3d 88, 102 (Tenn. 2013).

It is therefore ORDERED that the Plaintiffs' motion for a temporary injunction is granted to the extent that, until further order of the Court, the Defendants are enjoined from:

— enforcing their current construction of the "excuse requirement" for absentee voting stated in Tennessee Code Annotated section 2-6-201(5)(C) and (D), and

are mandated to:

— provide any eligible Tennessee voter, who applies to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot in upcoming elections during the pendency of pandemic circumstances; and

— implement the construction and application of Tennessee Code Annotated section 2-6-201(5)(C) and (D) that any qualified voter who determines it is impossible or unreasonable to vote in-person at a polling place due to the COVID-19 situation shall be eligible to check the box on the absentee ballot application that, "the person is hospitalized, ill or physically disabled and because of such condition, the person is unable to appear at the person's polling place on election day; or the person is a caretaker of a hospitalized, ill or physically disabled, person," and have that absentee voting request duly processed by the State in accordance with Tennessee law.[3]

In addition it is ORDERED that the Defendants are mandated to:

— prominently post on their websites and disseminate to County Election Officials that voters who do not wish to vote in-person due to the COVID-19 virus situation are eligible to request an absentee ballot by mail or that such voters still have the option to vote in-person during Early voting or on Election Day.

Not ordered herein is a requirement that the State must automatically mail absentee ballots to all Tennessee registered voters, a practice being implemented in some states

[3] This wording is derived from election instructions posted on the State of Alabama and West Virginia's websites.

before and in response to the pandemic. The difference is that the injunction issued above keeps in place and tracks the requirement of Tennessee law that to obtain a mail-in ballot, a voter must first apply for one so that it is only voters who apply to vote by mail that the State must print and mail absentee ballots to as the applications come in.

Also not granted herein is the alternative request for relief in Case No. 20-453 for a Tennessee licensed physician to certify the entire population of a county to be "medically unable to vote" because of the pandemic.

In addition, it is ORDERED that no bond is required to secure this temporary injunction.

The findings of fact and conclusions of law on which this decision is based are as follows.

Tennessee Voting Law

The Tennessee Constitution is more explicit than the federal constitution in guaranteeing Tennesseans the right to vote. Article I, section 5 and Article IV, section 1 of the Tennessee Constitution expressly guarantee the right to vote in federal, state and local elections to all adult persons duly registered in a county district and precinct. As quoted above and requoted herein, the Tennessee Constitution contains the vigorous guarantee that, "The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto . . . ." Under the

provisions of the Tennessee Constitution, voting is a fundamental right. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 901 (Tenn. 1987).

The Legislature has enacted laws to allow for the fundamental right to vote to be exercised by mail-in/absentee ballot, but only for a limited set of circumstances. Tennessee Code Annotated section 2-6-201 provides for voting by mail for nine categories of persons. An otherwise eligible voter who does not fall into one of these enumerated categories as construed by State is not permitted to "vote by mail absentee" and must instead cast their ballot in person. The pertinent category in this case is 5, quoted as follows.

> (5) PERSONS OVER 60--PERSONS HOSPITALIZED, ILL OR DISABLED.
>
> > (A) A person sixty (60) years of age or older when the person requests to vote absentee;
> >
> > (B) The person is a voter with a disability as defined in § 2-3-109, and the voter's polling place is inaccessible;
> >
> > (C) The person is hospitalized, ill or physically disabled, and because of such condition, the person is unable to appear at the person's polling place on election day; or
> >
> > (D) The person is a caretaker of a hospitalized, ill or disabled person;

State's Interpretation and Application of Section 2-6-201(5)(C) and (D)

With respect to the pandemic, it is the State's construction and application of section 2-6-201(5)(C) and (D) that only individuals who have "quarantined because of a

potential exposure [to COVID-19] or who ha[ve] tested positive [for] COVID-19" are considered "ill" for the purposes of "vot[ing] by mail absentee." Steiner Decl. Ex. 63, Tenn. Sec. of State, *Tennessee Election COVID-19 Contingency Plan*, (April 23, 2020), https://bit.ly/3g7WrUN.

Putting aside the ambiguity of the State's construction of "quarantining" (self-quarantine vs. contact tracing), the issue for the Plaintiffs in this case is the following. Even voters, who are at higher risk of contracting COVID-19 and/or at a higher risk of severe complications should they contract the illness and voters who live with individuals who have pre-existing medical conditions that place them at higher risk for severe complications should they contract COVID-19, such as the Plaintiffs in Case No. 20-453, do not have the option to "vote by mail absentee." Further rendered ineligible for voting by mail are Tennesseans, like the Plaintiffs in Case No. 20-435, who have determined that it is impossible or unreasonable to vote in-person at a polling place due to the risk of contracting or transmitting the COVID-19 virus. Thus all of the Plaintiffs in the cases before the Court are ineligible to vote by mail during the pandemic based upon the State's application of Tennessee law.

State's Justification for Denying Expanded Access to Voting by Mail

The reasons the State has refused to allow more access to voting by mail during the pandemic are (1) that it is not fiscally nor logistically feasible for the State to do so and (2) voter fraud. But the evidence presented to the Court does not support these reasons.

The evidence shows that it is feasible for the State to provide registered voters a vote by mail option and that increased voter fraud is not a material concern. The following are the findings of fact made by the Court based upon the record developed thus far for the temporary injunction.[4]

Evidence on Feasibility

1. Quick Expansion of Voting by Mail in 10 States—Within a timeframe of just a few months, ten states have expanded an "excuse required" statute, like Tennessee's to "no excuse" absentee rules. These include the neighboring states of: Alabama, Arkansas, South Carolina, Kentucky and Virginia. Three states: Kentucky, Virginia and Indiana have provided this option in a shorter timeframe than is present in this case.

   Several of the remaining minority of states that, under normal circumstances, require an excuse to vote by mail have interpreted their disability or illness basis for absentee voting broadly during the ongoing COVID-19 pandemic. For example, West Virginia now permits all registered voters to vote absentee in forthcoming elections due to "[i]llness, injury or other medical reason which keeps [the voter] confined," defining "other medical reason" as "any threat to a person's health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters." W. Va. Code R. §§ 153-53-2–153-53-3. {{Steiner Decl. Ex. 69, W. Va. Sec'y of State Mac Warner, Admin. Law Div., Notice Of An Emergency Rule (Mar. 20, 2020), https://bit.ly/2zbwRO3.}} Further, West Virginia construes "confined" as being "restricted to a specific location for reasons beyond that person's control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons." W. Va. Code R. § 153-53-2. Per issued rules, West Virginia's action "cannot violate or alter clear statutory requirements" but rather, simply construes existing state law "in favor of enfranchisement, not disenfranchisement." W. Va. Code R. § 153-53-1. Similarly, Alabama has allowed "any qualified voter who determines it is impossible or unreasonable to vote at their voting place" as a result of COVID-19 to vote by mail in primary runoff elections being held in July by reason that "a physical illness or infirmity [] prevents [the voter's] attendance at the polls." {{Steiner

[4] The findings of fact made herein are preliminary for purposes of issuance of the temporary injunction and are not binding as ultimate findings of fact. Those will be determined in the trial of the case. This is because as the case progresses the parties will develop a complete factual record.

Decl. Ex. 3, Ala. Leg. Servs. Agency, Absentee Voting During State of Emergency, 17-11-3(e) (Mar. 18, 2020), https://bit.ly/3cUhOqN; *see also* Steiner Decl. Ex. 4, Press Release, Alabama Secretary of State, 100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election (Mar. 31, 2020), https://bit.ly/2ygoArG; see also Ala. Code § 17-11-3(a)(2).}} And, because of COVID-19, Arkansas has determined that Ark. Code Ann. §§ 7-5-402, which only allows absentee voting for people who are "absent or unable to attend an election due to illness or physical disability," should be read "so that all eligible qualified electors currently entitled to vote in the March 31, 2020 election may request the appropriate absentee ballots from their county of residence." {{Steiner Decl. Ex. 6, Governor of Arkansas, Exec. Order No. 20-08, (Mar. 20, 2020), https://bit.ly/2TheWwc. }}

Virginia, Delaware, and Massachusetts have likewise clarified that all registered voters in their respective states can use existing reasons related to illness and physical disability to vote by mail in the upcoming elections. {{*See* Steiner Decl. Ex. 68, *Absentee Voting*, Va. Dep't of Elections, https://bit.ly/3dU4YbW (last visited May 18, 2020) (Virginia Department of Elections statement clarifying that "[v]oters may choose reason '2A My disability or illness'" to vote absentee in upcoming elections due to COVID-19); Steiner Decl. Ex. 23, Governor of Delaware, Exec. Dep't, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), https://bit.ly/3bKVfTM (Delaware executive order providing that for upcoming primary and special elections "the qualification of 'sick or physically disabled' [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19 . . . and who herself or himself freely chooses to use such qualification to vote by absentee ballot.); Steiner Decl. Ex. 5, An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19, ch. 45 (2020), https://bit.ly/2LFSZTc (new Massachusetts law clarifying that "any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person," which is one of the reasons set forth in the state constitution that permits a Massachusetts voter to vote by mail).}} And New Hampshire has interpreted its "physical disability provision to "appl[y] equally to voters who are experiencing symptoms of COVID-19 . . . and those who are self-quarantining as a preventative measure." {{Steiner Decl. Ex. 28, Memorandum from the Sec'y of State and Att'y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), https://bit.ly/2ZdZ8xV.}}

2. Sufficient Ballots Are Ready— The Tennessee Secretary of State's Division of Elections has already accounted for increased mail-in voting for eligible voters (*Goins Declaration*, May 22, 2020, ¶¶ 3-4). The State is already printing 1.4 million ballots for the August 2020 election, and it has on hand four million of the three envelope sets necessary to process these ballots through the mail. (*Goins Decl* ¶ 11).

   Thus, even if turnout increased 17% from August 2018, and 100% of voters chose to case absentee ballots, the State has enough ballots right now.

   The facts are that a total of 1.23 million Tennessean—30% of the 4.16 million registered voters in Tennessee—voted in the August 2018 election. Tenn. Sec'y of State, *Statistical Analysis of Voter Turnout for the Nov. 6, 2018 Election as Submitted by the Counties*, available at https://sos-tn-govfiles.tnsosfiles.com/2018%20November.pdf (last visited May 22, 2020). This was the highest August turnout in 15 years (Tenn. Sec'y of State *Election Statistics*, available at https://sos.tn.gov/products/elections/election-statistics (last visited May 22, 2020)). Conditions which are likely to decrease voting turnout in 2020 are the pandemic and, unlike the August 2018 elections, the August 2020 generally lacks county general elections. Historically, according to Coordinator of Elections Goins, "less than 2.5% of Tennessee voters have voted using the absentee by-mail voting process." However, as admitted by Coordinator Goins, the State is presently prepared for 1.4 million Tennesseans to vote by mail which represents 36% of the total registered voters.

   The situation is little different for November. In the last November presidential election, 2.5 million persons voted, for a turnout of 62%. Tennessee Secretary of State website, *Statistical Analysis of Voter Turnout for the Nov. 8, 2016 Election as Submitted by the Counties*, available at https://sos-tn-gov-files.s3.amazonaws.com/2016_November_PPP_Turnout.pdf (last visited May 22, 2020). If Tennessee prints a total of 4 million ballots, as it has already done for August, *see* Goins Decl. ¶¶ 11-12, it will have enough ballots for every single current active Tennessee voter to vote absentee, assuming 100% turnout and 100% of voters choosing to vote by mail. *See* Goins Decl. ¶ 5 (3,930,381 active Tennessee voters).

3. $1 Million is Available—The State has received $10 million in federal funds dedicated to 2020 election costs (*Goins Decl.*, May 22, 2020, ¶ 19), and has $1 million of that remaining and available to provide expanded access to voting by mail.

4. Measures Already in Place in Some Counties for Expanded Voting by Mail—Some counties have already implemented measure for an increased mail-in vote.

Rutherford County plans to hire two extra full-time and four extra part-time workers solely dedicated to processing absentee ballot requests and prestuffing 50,000 absentee ballot envelopes (*Goins Decl.* May 22, 2020, ¶ 16).

State's Scenarios and Calculations Not Supported by the Evidence

In support of their position that providing expanded access to voting by mail is impossible in Tennessee, the State provided the Declarations of:

— five Election Officials across rural and urban Tennessee,
— Mark Goins, Coordinator of Elections for the State of Tennessee, and
— Kim Wyman, Secretary of State of Washington State.

The State assert these Declarations prove their proposition that the State of Tennessee does not have the money, personnel or equipment to expand voting by mail in Tennessee, and that the only measures that are feasible in Tennessee are to stick to in-person voting and provide social distancing and sanitation at polling places.

This position is not supported by the evidence. That is because the State provided incredible assumptions to the Declarants which assumptions are not supported by the historical voting patterns and turnout in Tennessee, and which do not comport with industry standards on planning for elections. These faulty facts and assumptions are as follows.

— Each of the five Tennessee County Election Officials was told to assume in stating feasibility in their counties that 100% of all registered voters in their county will vote. This has never happened in the entire history of Tennessee voting. The turnout in the Nov. 2018 elections was high and it was 54% of all registered voters. The percentage of turnout for the 2016 presidential election (Trump/Clinton) was 61%. This same unprecedented number of 100% turnout of all Tennessee registered voters was also used by Defendant Goins. Such an extreme assumption carries no weight as evidence. Moreover this skewed assumption so permeates and

underlies the State's calculations that the assumption substantially detracts from the weight of State's entire evidence on lack of feasibility.

— The kind of voting by mail Secretary of State Wyman was told to address is a model where the State initiates the process and automatically sends all registered voters absentee ballots. This is not the model ordered herein. The model used in the above temporary injunction requires the voter to initiate the process. The voter must take the first step to print off a request form and submit it to County Election Officials to be provided a mail-in ballot. This is the model currently in place under Tennessee Code Annotated section 2-6-201. The Plaintiffs are not seeking a permanent change to automatic, universal voting by mail as is the case in Washington State and is addressed in the Wyman Declaration. This distinction is material.

Requiring a voter to request an absentee ballot eliminates many of the change of address or faulty address problems Secretary of State Wyman mentions. Also, requiring a voter to request an absentee ballot saves the State time and money in sending out request forms to all registered voters and provides some governor on demand for absentee ballots.

The difference in the absentee voting model Secretary of State Wyman addresses and the one contemplated by the Plaintiffs and ordered herein is so material that the Wyman opinions on feasibility are not weighty evidence.

The flaws in the State's calculations are well explained by Plaintiffs' Counsel, quoting as follows, and are adopted by the Court.

> The fundamental assumption underlying all of the State's arguments that relief in this case would be expensive and impractical is its insistence that it must print enough ballots, and hire enough staff, to accommodate 100% of its voters choosing to vote by mail, and also assuming that 100% of its registered voters participate in each election. *See* Defs.' Resp. at 13; Pls.' Reply, at 27 & n.37 (citing to affidavits attached to State's initial Response). But the State points to no legal requirement for this. And indeed, they acknowledge that they have not been doing it in past elections. Their plan to be ready for all eligible over-60 registered is a new one made in response to the Pandemic. *See* Resp. at 2-3 (acknowledging the Plan

contemplates a "dramatic increase" in absentee voters). This is an entirely discretionary decision that is no less novel than the Virus.

The State says it would be "reckless" to estimate need based on past electoral performance. Sur-Reply 13. But this is precisely what Kim Wyman now advocates, albeit using dubious projections. *See* Supp. Wyman Decl., ¶11. She estimates the "requested absentee ballot rate" to be between 23% and 60% should an injunction be granted, and she recommends that "[p]lanning and operations for the mail preparation *should be based upon these percentages*." Wyman Supp. Decl. ¶ 11(emphasis added). It appears that Coordinator Goins's extreme devotion to over-preparedness is not only just as novel as—[sic]

Even more important, the State's expert now recommends that "the return ballot processing *should be based upon the projected voter turnout in the August and November elections*." Wyman Supp. Decl. ¶ 11 (emphasis added); *see also id.* ("For the success of these operations, *it is critical to estimate this turnout*...") (emphasis added). This is precisely what Plaintiffs have been arguing all along. On this point (basing cost and feasibility estimates based on projected turnout), Plaintiffs' experts agree. *See* Supp. McReynolds Decl., ¶ 6.

Based on any reasonable estimate of turnout using historical data, the 1.4 million ballots Tennessee *has already printed* are enough to cover the August election. *See* Plaintiffs' Reply, at 27-29. And if the State prints a total of 4 million ballots for November (as it has already done for August), that would be enough for all voters to vote absentee, *even assuming (absurdly high) 100% turnout. Id.* Similarly, the State is staffing up to handle 1.4 million absentee votes this August, so staffing will be sufficient as well. *See* Plaintiffs' Reply, at 30.

Other logistical overstatements are also influenced by this unwarranted "100%" approach. The State makes much of change-of-address issues, citing Davidson County's rate of 10% of notifications of polling location changes being returned as undeliverable. Sur-Reply 11–12. But location-change mailings go out to all voters registered within a certain geographical subset of the county. *See also* Roberts Decl. ¶7 (describing address problem as "Mailing an absentee ballot request form *to every registered voter* . . . would result in a significant amount of undeliverable mail") (emphasis added). Tennessee's election-specific absentee-ballot application process would obviate concerns of undeliverable mail: individual voters apply to vote absentee using their

> current addresses. This is not the case for absentee voting in Washington State, nor for mass mailings in Davidson County, where the address information relied on may be several years' out of date.
>
> This distinction—between an absentee-application system like Tennessee's and a pure "by-mail voting" system like Washington's—also explains the various allegedly contradictory statements Plaintiffs' expert Amber McReynolds has made. In these statements, she was referring to a pure "vote by mail" system, in which each voter is automatically mailed a ballot, not the "no excuse" system sought by Plaintiffs.
>
> The same flawed assumption colors the State's inflated cost estimates, when it cries budgetary constraints as an excuse to curtail a fundamental right and put voters at risk of their health. Sur-Reply at 14–15. Coordinator Goins estimates a cost of $34.5 million to implement relief, then acknowledges that assumes "100 percent of registered voters vote by-mail." Goins Supp. Decl. ¶3. But the State fails to acknowledge that it currently has *$55 million* in available federal funds dedicated to election costs which could be drawn upon to pay whatever costs the State incurs (above and beyond what it has already spent to be ready for 117% of August 2018's record-high turnout, *see* Reply at 29). The State has publicly acknowledged that it has portions of this $55 million amount unencumbered, but wishes to reserve it for later elections.

Plaintiffs' Surreply in Support of Their Application for Temporary Injunction, June 2, 2020, Case No. 20-435, pp. 8-10.

Thus, the evidences does not support the State's claims and calculations that expanded voting by mail is not feasible in Tennessee. To the contrary, Tennessee's track record of voting turnout and the preparations already in place and the $1 million of available federal funds establish temporarily expanding voting by mail during the pandemic is feasible in Tennessee

Voter Fraud

The evidence established that voter fraud is not a material reason to refuse to expand voting by mail during the pandemic on several bases.

First, many safeguards are already in place. Election officials check to make sure an absentee ballot application is made on behalf of a registered voter at the proper address. Tenn. Code Ann. § 2-6-202(d). They verify that the voter's signature on file matches both the signature on each absentee ballot request, § 2-6-202(b), which must be signed under penalty of perjury, as well as the absentee ballot itself, § 2-6-202(g). To guard against "ballot harvesting," only election-commission employees may distribute absentee ballots, or furnish an unsolicited absentee ballot application, to any person, § 2-6-202(c), and election officials routinely visit nursing homes to personally collect ballots from vulnerable elderly voters, § 2-6-601. In addition, there are numerous criminal laws against various types of voter fraud. *See* Tenn. Code Ann. §§ 2-19-104 through 2-19-117.

Further, the State's expert witness, Washington Secretary of State Wyman answered explicitly in a recent national news article that she is confident that voter fraud is not a material concern with expanded absentee voting, "Doesn't vote by mail and absentee voting lead to more fraud? I am confident that the answer is no."

There is also the consideration that Tennessee's in-person voting requires showing a picture ID at polling locations to verify identity. Yet the COVID-19 plan for polling locations, promulgated by the State, requires that if a voter is wearing a face covering to mitigate COVID exposure and contagion those face coverings should not be removed in

public. These conditions obscure identity and undercut the defense that in-person voting during the pandemic poses less of a threat of voter fraud.

The Pandemic and In-Person Voting

As to the effect of the pandemic on in-person voting at polling places, the Court makes the following findings of fact based upon the record developed thus far for the temporary injunction.[5]

1. Mail-in voting methods are encouraged by the Centers for Disease Control and Prevention ("CDC") to "minimize direct contact with other people and reduce crowd size at polling stations" where mail-in voting is allowed in the jurisdiction (Recommendations for Election Polling Locations, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/electionpolling-locations.html (last visited May 7, 2020)).

2. The duration of in-person voting in Tennessee is a two week early voting period, and a twelve hour election day.

3. Requiring in-person voters to remain at least six feet apart will elongate lines.

4. Providing broader access to mail-in voting will lessen the number of persons gathering for in-person voting.

5. Other State institutions are using remote participation options to avoid in-person gatherings. The Tennessee State Senate is not assembling. The Tennessee Secretary of State's customer counter is closed to the public (Tenn. Sec'y of State, https://sos.tn.gov/ (last visited May 26, 2020)). The State Attorney General is accepting service of process by mail. The State Election Commission is holding meeting by telephone (Tennessee Sec'y of State, *State Election Commission Meetings*, https://sos.tn.gov/products/elections/state-election-commission-meetings (last visited May 19, 2020)).

[5] As stated in an above footnote, the findings of fact made herein are preliminary for purposes of issuance of the temporary injunction and are not binding as ultimate findings of fact. Those will be determined in the trial of the case. This is because as the case progresses the parties will develop a complete factual record.

6. The Pandemic has so far killed over 340 Tennesseans and hospitalized over 1600.[6] The state experiences over 300 new cases every day. The virus continues to spread. As of May 21, 2020, the State had 18,961 confirmed cases. (Steiner Decl. Ex. 34, *Tenn. Dep't of Health, Coronavirus Disease (COVID-19)*, https://bit.ly/36ba80L (last visited May 21, 2020)). As has been the case nationally, Tennesseans of all ages have tested positive for and died from COVID-19. Members of all age groups have contracted the disease.

7. The Court finds the testimony of the following physicians weighty. Dr. Sandra Arnold is Director of the Infectious Disease Department at LeBonheur Hospital in Memphis and on the faculty of the University of Tennessee Health Sciences Center. Arnold Decl. ¶ 2. Dr. James Gurney is an epidemiologist and Dean of the University of Memphis' College of Public Health. Gurney Decl. ¶ 1. Dr. Michael Threlkeld is an infectious-disease specialist and former director of the Infection Control and Employee Health at Baptist, St. Francis, and St. Joseph Hospitals in Memphis. Threlkeld Decl. ¶¶ 1, 2. Dr. Jeff Warren is a general practitioner with several decades' experience who currently serves on the Memphis City Council and the Memphis-Shelby County Coronavirus Response Task Force. Warren Aff. ¶¶ 2, 3. Drs. Arnold and Threlkeld's testimony has guided courts, juries, or both in the past. *See* Arnold Decl. ¶ 6; Thelkeld Decl. ¶ 3.

   All of these doctors support Plaintiffs' requests for temporary and permanent injunctive relief. These doctors maintain that continued enforcement of the excuse requirement during the Pandemic would be "medically inadvisable," Threlkeld ¶ 6; Warren ¶ 6, "would create significant, unwarranted risks to individuals and communities," Arnold Decl. ¶¶ 11, 14, or alternatively, that "it is prudent from a public health perspective to reduce unnecessary gatherings and allow all registered voters to mail ballots . . . if they so choose," Gurney Decl. ¶ 9. All of them conclude that while plexiglass screens, hand sanitizers, instructions to stay six feet apart, and the like may help contain poll-site transmission of the Virus, these measures will not abate the significant, objective medical risk posed by the Virus enough to make voting in person medically reasonable. *See* Arnold Decl. ¶ 13; Gurney Decl. ¶ 10; Threlkeld Decl. ¶¶ 6, 7; Warren Decl. ¶¶ 6, 8.

   These experts opine that although Tennessee is starting to reopen, the Pandemic is still with us, and its severity will persist through the summer, as well as the fall. Dr. Gurney states:

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[6] Tenn. Dep't of Health, *Coronavirus Disease (COVID-19)*, https://www.tn.gov/health/cedep /ncov.html (last visited May 26, 2020).

> I want to emphasize that the public health situation today is essentially the same as it was in mid-March . . . the [Virus] is still highly virulent and circulating unencumbered through the State's population . . . . [D]iagnostic testing is now adequate for those with symptoms or known exposure but not adequate for reaching the general population or for repeat population testing; thus we do not know the true infection rate . . . we do not have a vaccine . . . and we do not yet have an effective treatment for curing those with serious disease symptoms.
>
> . . . .
>
> Unfortunately, *there is little reason to believe that any of the above circumstances* that characterize the severe outbreak in Tennessee, or our ability to combat it, *will change by August when primary voting will occur*. We also *do not expect the COVID-19 pandemic to be resolved by November* when the general elections will take place.

Gurney Decl. ¶¶ 4-6 (emphasis added). *See also* Threlkeld Decl. ¶ 4 ("The [V]irus continues to spread here in Tennessee, requiring ongoing efforts to protect people from exposure. This situation is likely to continue through July and the first week of August."); Warren Decl. ¶5 ("[T]he threat from COVID-19 continues and is serious. In my opinion, the threat will continue through August of 2020. It is likely there will be a resurgence this fall.").

The only medical opinion submitted to the Court by the State is the opinion of Dr. Tim Jones who is employed by the State of Tennessee. His testimony is not accorded weight by the Court based upon the following analysis of Plaintiffs' Counsel which is adopted by the Court.

> Only one medical opinion, of the five now before this Court, says that voting in person during the Pandemic will be safe. Only one these five opinions says that the precautions set forth in the State's COVID-19 Election Contingency Plan (the "Plan"), Goins Decl. Ex. 2, are acceptable precautions, sufficient to protect voters from exposure to the novel coronavirus (the "Virus"). This is the opinion of Dr. Tim Jones, who reports and owes his position to one or more of the named Defendants in this case. An independent opinion would be more persuasive.
>
> Jones opines that because restrictions are being lifted, preventive measures are going unenforced, and many people are not wearing

> masks or social distancing, general "congregate environments" may be riskier than polling sites abiding by the Plan's safeguards. Jones Decl. ¶ 8. This observation may be true, as far it goes. But it is hardly responsive here, because polling places are still unacceptably dangerous from a medical standpoint. *See* Gurney Supp. Decl. ¶ 3; Arnold Supp. Decl. ¶ 3. Tennesseans have the right to increase their risk of exposure to the Virus if they so choose. All Plaintiffs maintain in this suit is that they also have the right to self-isolate and abide by recommended preventive measures, and that they should not have to abandon these medically recommended guidelines in order to exercise a fundamental right.
>
> Jones also relies on the fact that the CDC has updated its guidance to suggest that contracting COVID by touching a surface or object "isn't thought to be the main way the virus spreads," even though such things are still "possible" vectors. Jones Decl. ¶ 7. But airborne infection at the polling place seems more likely than ever, Supp. Arnold Decl. ¶4, especially in light of recent studies [footnote omitted].
>
> And, while correlation is not necessarily causation, correlative epidemiological evidence is still probative. *See* Supp. Arnold Decl. ¶5. This includes the most recent epidemiological study of the April 2020 Wisconsin election. Here again, what Dr. Jones's words may strictly be true, but they are beside the point: the Wisconsin study considered more than "one outbreak" which "happens to be associated with a polling site." *See* Jones Decl. ¶8. The study involved the measurement of multiple case trajectories throughout the State of Wisconsin, by county, cross-referenced with the rate of absentee voting, and density of polling places, by county [footnote omitted].

Plaintiffs' Surreply, June 2, 2020, Case No. 20-435 at 2-3.

8. COVID-19 can severely damage lung tissue, cause a permanent loss of respiratory capacity, and also damage tissues in the kidney, heart, and liver. (Steiner Decl. Ex. 15, *Ctrs. for Disease Control & Prevention, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, https://bit.ly/3cDvlCN (last visited May 18, 2020)). COVID-19 also poses greater risks for people with preexisting heart and respiratory conditions, diabetes, individuals with compromised immune systems, and those with many other

conditions. (Steiner Decl. Ex. 12, *Ctrs. for Disease Control & Prevention, Groups at Higher Risk of Severe Illness*, https://bit.ly/2zKcqrw (last visited May 18, 2020)).

9. The health consequences of in-person voting are plainly evident after recent primaries. *See, e.g.* Reingold Decl. ¶ 18. During Florida's recent primary, two Broward County poll workers tested positive for COVID-19, one of whom was handling driver's licenses as part of the identification verification process. (Steiner Decl. Ex. 65, Anthony Man, *Two Broward poll workers, including one who handled voters' driver licenses, test positive for coronavirus*, S. FLA. SUN SENTINEL (Mar. 26, 2020), https://bit.ly/2AGGnZZ). And on April 13, Chicago officials reported that a poll worker for the city's March 17 election died of COVID-19, prompting officials to send letters notifying voters, poll workers, field investigators, and cartage companies who were present at the same polling site. (*See* Steiner Decl. Ex. 32, *Mary Ann Ahern, Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC CHICAGO (Apr. 13, 2020), https://bit.ly/3dXsxk9). Likewise, elections held on April 7 in Wisconsin saw multi-hour waits and lines stretching blocks upon blocks in places like Milwaukee and Green Bay. (*See, e.g.*, Steiner Decl. Ex. 24, *Kati Anderson, Green Bay Voters wait in line past midnight to cast ballot in primary election*, WBAY-TV (Apr. 7, 2020), https://bit.ly/369FVit). By April 29, health officials in Wisconsin had identified more than 52 people "who voted in person or worked the polls during the state's presidential primary" who "tested positive [for COVID-19] in the two weeks after the election." (Steiner Decl. Ex. 1, *Scott Bauer, 52 Who Worked or Voted in Wisconsin Election Have COVID-19*, WUWM (Apr. 29, 2020), https://bit.ly/3bHdBoI). On May 5, the Milwaukee County COVID-19 Epidemiology Intel Team issued a report stating they were able to identify 54 county residents who had voted curbside, voted in-person, or who had worked at a polling site during the April 7 primary election who "ha[d] symptom onset or lab report confirmation dates indicating that they could have been infectious or infected at the time of voting." (Steiner Decl. Ex. 29, *Milwaukee County COVID-19 Epidemiology Intel Team, Descriptive Analysis of COVID-19 Infections in Milwaukee County after the Wisconsin Election and Easter/Passover Holidays*, 4 (May 5, 2020), https://bit.ly/2Zf2IYQ). And of those individuals, 29 "did not have any other known potential exposures to COVID-19." (*Id.* at 5).

From the foregoing, the Court finds that for persons with an autoimmune disease or other conditions or who reside with someone with these conditions, such as the Plaintiffs in Case No. 20-453, they are more susceptible to contracting the virus. For all persons, such

as the Plaintiffs in Case No. 20-435, there are the risks of the higher level of contagion of the virus as compared to others viruses or flu, and that contagion is exacerbated indoors where there are gatherings of individuals. Lastly, for all persons there are various consequences of contracting the virus including fatality or long-term health issues.

The Court therefore concludes that for persons with heightened susceptibility to COVID-19, such as the Plaintiffs in Case No. 20-453, the burden placed on them by the State not providing them the mail-in option is severe. For persons who do not fit into this more susceptible category, including the Plaintiffs in Case No. 20-435, the burden placed on them by the State is in the category of somewhat severe to moderate.

Standing, Justiciability, Ripeness

The Court finds that, with the exception of Jeff Bullard (Case No. 20-435-III) and Joy Greenawalt (Case No. 20-453-III), all the Plaintiffs are registered voters who do not fit within one of the categories of Tennessee Code Annotated section 2-6-201 to qualify to vote by absentee ballot. Thus, all, except Jeff Bullard and Joy Greenawalt, have standing to bring these lawsuits.

In addition, the Plaintiffs' claims are ripe and present a justiciable controversy. The fact that, as testified to by Commissioner Goins, elaborate and lengthy plans have been prepared by the State of Tennessee to mitigate the spread and contraction of the COVID-19 virus at polling places establishes that this is not a hypothetical circumstance. In addition, under the State's COVID-19 plan, these Plaintiffs would currently not be eligible to vote

by mail. Also, the evidence of record is that the majority of states, the CDC, and the National conference of State Legislatures are encouraging and advising absentee voting for the elections in 2020.

There is, then, ample evidence in the record for finding all the Plaintiffs, except Mr. Bullard and Ms. Greenawalt, have standing, and that their lawsuits present ripe, justiciable controversies to proceed in this Court.

Application of *Anderson-Burdick* Test

The Tennessee Supreme Court has not yet ruled on whether courts must apply strict scrutiny to restrictions placed on voting where the State must use the least intrusive means to further its interest. *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 (Tenn. 2013). If there are less restrictive, comparably effective means, the law fails strict scrutiny. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987).

Because the Tennessee Supreme Court has not yet ruled that the standard this Court is to apply is a strict scrutiny analysis, the Court has not done so to avoid error on appeal. The Court has instead applied the more flexible *Anderson-Burdick* test (which in part also involves strict scrutiny) as stated by the Tennessee Supreme Court in *City of Memphis v. Hargett*, which provides,

> Notably, however, the United States Supreme Court has rejected the notion that strict scrutiny applies to every statute imposing a burden on the right to vote under the United States Constitution. Instead, addressing claims arising under the First and Fourteenth Amendments, the Court has adopted a "more flexible standard," pursuant to which a showing of important governmental regulatory interests may justify lesser restrictions on the right to vote,

> whereas strict scrutiny is reserved for laws that impose "'severe' restrictions." *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Norman v. Reed,* 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)); *see also Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion) (holding that any burden upon the right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation'" (quoting *Norman,* 502 U.S. at 288–89, 112 S.Ct. 698)); *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

414 S.W.3d 88, 102 (Tenn. 2013). This doctrine also provides where the burden on the right to vote is moderate, the court applies an intermediate level of scrutiny weighing the moderate burden against "the precise interests put forward by the State as justification for the burden," taking into consideration how "necessary" the burden is. *Id.* at 113.

Under *Anderson-Burdick*, the burdens are weighed against the State's justifications for imposing the burden of in-person voting. Those justifications were shown in this case in the above analysis of the evidence not to exist. The evidence demonstrated that providing a vote by mail option is fiscally and logistically feasible, and that voter fraud is not a material threat. Thus, under these circumstances the State's actions of requiring in-person voting during the time of the pandemic and not providing an option to vote by mail are an unreasonable burden on the right to vote in violation of the Tennessee Constitution.

Application of Tennessee Injunction Law

In determining whether to issue a temporary injunction courts are instructed to evaluate whether the applicant has demonstrated the following:

(1) a substantial likelihood of success on the merits;

(2) immediate and irreparable harm before final judgment can be entered;

(3) that the equities balance in favor of the applicant; and

(4) the issuance of the injunction is in the public interest.

South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (quoting Robert F. Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 4-3(l) (1999)). *See also, Union Planters' Bank & Trust Co. v. Memphis Hotel Co.*, 139 S.W. 715, 718-19 (Tenn. 1911); *Butts v. S. Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977) (citing *Wilson v. Louisville & Nashville L.R. Co.*, 12 Tenn. App. 327 (Tenn. Ct. App. 1930)); *Henry County v. Summers*, 547 S.W.2d 247, 251 (Tenn. Ct. App. 1976) (citing *King v. Elrod*, 268 S.W.2d 103 (Tenn. 1953)); *Kaset v. Combs*, 434 S.W.2d 838, 841 (Tenn. Ct. App. 1968) (citing *Greene County Tire & Supply, Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960), *Herbert v. W.G. Bush & Co.*, 298 S.W.2d 747 (Tenn. Ct. App. 1956)).

The above findings of fact and conclusions of law establish that the Plaintiffs prevail over the State on every one of these injunction factors. The Plaintiffs therefore are entitled to issuance of a temporary injunction.

No Injunction Bond Required

In concluding that there should be no injunction bond required in this case, the Court is guided by the federal court's interpretation of the bond requirement under Rule 65 of the Federal Rules of Civil Procedure. "[W]hen interpreting our own rules of civil

procedure, we consult and are guided by the interpretation that has been applied to comparable federal rules of procedure." *Turner v. Turner*, 473 S.W.3d 257, 268–69 (Tenn. 2015) (citations omitted); *see also Huntington Nat. Bank v. Hooker*, 840 S.W.2d 916, 921 (Tenn. Ct. App. 1991) ("It is proper that Tennessee courts look to the interpretation given comparable federal rules by the federal courts. The appellate courts of Tennessee do look to the federal courts for guidance when the federal courts have interpreted a rule that has not been interpreted by the Tennessee courts.") (citation omitted).

Federal Courts, including the Sixth Circuit, have held that the bond requirement under Rule 65 is discretionary and may be waived under certain limited circumstances such as where a plaintiff alleges the infringement of a fundamental constitutional right or when the litigation is in the public interest. *See, e.g., Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176, 1995 WL 326573 (6th Cir. 1995) ("While we recognize that the language of Rule 65(c) appears to be mandatory, and that many circuits have so interpreted it, the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security."); *Pharm. Soc. of State of New York, Inc. v. New York State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995) ("Rule 65(c) of the Federal Rules of Civil Procedure provides in part that '[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper.' Although the rule speaks in mandatory terms, an exception to the bond requirement has been crafted for, *inter alia,* cases involving the enforcement of 'public

interests" arising out of "comprehensive federal health and welfare statutes.' This exception was relied upon in *Temple University v. White,* 941 F.2d 201 (3rd Cir.1991), where the court upheld the waiver of the bond requirement in a case in which a hospital had brought suit to ensure that Pennsylvania complied with the Medicaid Act. The court there noted that the hospital had 'pursued a course of litigation clearly in the public interest, i.e., it seeks to preserve its role as a community hospital serving a disproportionate share of low income patients.') (citations omitted); *Adams & Boyle, P.C. v. Slatery*, No. 3:15-CV-00705, 2020 WL 1905147, at *7 (M.D. Tenn. Apr. 17, 2020), *aff'd as modified,* 956 F.3d 913, 2020 WL 1982210 (6th Cir. 2020), and *modified,* No. 3:15-CV-00705, 2020 WL 2026986 (M.D. Tenn. Apr. 27, 2020) ("However, "the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security," *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (internal citation omitted), and "a court has no mandatory duty to impose a bond as a condition for issuance of injunctive relief." *Stooksbury v. Ross*, No. 3:09-CV-498, 2012 WL 12841901, at *6 (E.D. Tenn. Aug. 1, 2012) (citing *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 952 (6th Cir. 2007)). "When determining whether to require the party seeking an injunction to give security, courts have considered factors such as the strength of the movant's case and whether a strong public interest is present." *I Love Juice Bar Franchising, LLC*, 2019 WL 6050283, at *14 (citing *Moltan Co.*, 55 F.3d at 1176)."); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017) ("Despite the mandatory nature of the language in the Rule,

trial courts have "wide discretion under Rule 65(c) in determining whether to require security." This preliminary injunction enforces fundamental constitutional rights against the government. Waiving the security requirement best accomplishes the purposes of Rule 65(c).") (footnotes omitted));*Bruner v. Zawacki*, No. CIV.A. 3:12-57-DCR, 2013 WL 2903241, at *4 (E.D. Ky. June 13, 2013) ("The Sixth Circuit has long held that a district court "possesses discretion over whether to require the posting of security." *Moltan Co. v. Eagle. Picher Indus., Inc.,* 55 F.3d 1171, 1176 (6th Cir.1995). The security requirement has been waived where an injunction is not likely to result in harm to the party enjoined, where the exercise of constitutional rights is at issue, and where a suit is brought in the public interest. 13 *Moore's Federal Practice,* § 65.52 (3d Ed.). In addition, other circuits have held that in public-interest litigation, the district court has the discretion to dispense with the security requirement or to require nominal security if requiring security would, in effect, deny access to judicial review. *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1126 (9th Cir.2005)."); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.") (citation omitted); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 129 (D. Mass. 2003) ("Lastly, the First Circuit has recognized an exception to the security bond requirement in Fed.R.Civ.P. 65(c) in 'suits to enforce important federal rights or public interests.'") (citation omitted); *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 831 (Ohio Com. Pl. 2018) ("While Ohio R. Civ. P. 65(C)

appears to require the fixing of a bond in order to effectuate a preliminary injunction, state courts have followed the lead of federal courts holding that the setting of the amount of an injunctive bond is within the discretion of the Court and this includes the discretion to require no bond at all.").

Based on the foregoing law, the Court concludes that no injunction bond is required to be posted in this case because in issue is the fundamental constitutional right to vote.

Rulings on Motions in Limine

With respect to motions in limine filed by the parties, the Court rules as follows.

***Demster v. Hargett* (20-435-III)**

- May 27, 2020—*Defendants' Motion in Limine*—**Denied**
- June 3, 2020—*Plaintiffs' Motion in Limine to Admit Expert Testimony of Alex Padilla and Allison McReynolds*—**Granted**

***Lay v. Goins* (20-453-III)**

- June 2, 2020—*Plaintiffs' Motion to Strike Pursuant to Tenn. R. Civ. P. 12.06*—**Denied**
- June 3, 2020—Defendants' Oral Motion to Exclude Plaintiffs' June 2, 2020 *Reply Brief in Support of Motion for Temporary Injunction* and any supplemental supporting evidence submitted in reply—**Denied**

Conclusion

As stated in the State's brief, the COVID-19 virus has upended almost all aspects of life—and voting is no exception. The overwhelming response of other states has been to make adjustments in their voting by mail protocol. The Defendants, however, have refused to do this. The effect of the State's failure to adapt and expand the excuse

requirements for mail-in voting is that it places a severe burden in Case No. 20-453 on the Plaintiffs with heightened susceptibility to the COVID-19 virus and a somewhat severe to moderate burden on all other Plaintiffs, including those in Case No. 20-435. Yet, the State's justifications, for not providing an expansion of voting by mail during the pandemic, are not reasonable, necessary and/or do not exist. Thus, the State's restrictive interpretation and application of Tennessee's voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution. Accordingly the Plaintiffs are entitled to issuance of a temporary injunction.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the *Twentieth Judicial District of the State of Tennessee In Re: COVID-19 Pandemic Revised Comprehensive Plan* as approved on May 22, 2020 by the Tennessee Supreme Court, through June 30, 2020, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

For those who do not have an email address on file with the Court, your envelope will be hand-addressed and mailed with the court document enclosed, but if you have an email address it would be very helpful if you would provide that to the Docket Clerk by calling 615-862-5719.

Jacob Webster Brown
Melody Dernocoeur
Bruce S. Kramer
Steven J. Mulroy
Attorneys for the Plaintiffs in Case No. 20-435

Alexander S. Rieger
Janet M. Kleinfelter
Steven A. Hart
Matthew D. Cloutier
Kelley L. Groover
Attorneys for the Defendants in Case No. 20-435 and Case No. 20-453

Thomas H. Castelli
Neil A. Steiner
Tharuni A. Jayaraman
Dale E. Ho
Sophia Lin Lakin
Angela M. Liu
Attorneys for the Plaintiffs in Case No. 20-453

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Supreme Court of South Carolina.

Rhodes BAILEY, Robert Wehrman, South Carolina Democratic Party, and DCCC, Plaintiffs-Petitioners,

v.

SOUTH CAROLINA STATE ELECTION COMMISSION and Marci Andino as Executive Director of the State Election Commission, Defendants-Respondents,

and South Carolina Republican Party, Intervenor.

Appellate Case No. 2020-000642
|
Opinion No. 27975
|
Heard May 12, 2020
|
Filed May 27, 2020

Synopsis

Background: Candidates in Democratic primary sought to invoke Supreme Court's original jurisdiction to contend that COVID-19 pandemic allowed all registered voters to vote by absentee ballot in primary and general elections. State Republican party was allowed to intervene.

Holdings: The Supreme Court, Kittredge, Few, and James, JJ., held that:

[1] candidates' action regarding the primary election was rendered moot;

[2] absentee voting statute does not allow all general election voters to vote absentee; and

[3] whether law should allow all general election voters to vote absentee was a political question.

Case dismissed.

Hearn, J., concurred in part, dissented in part, and filed separate opinion in which Beatty, C.J., joined.

West Headnotes (6)

[1] **Appeal and Error** ⇦ Want of Actual Controversy

The Supreme Court will dismiss any case that does not present a justiciable controversy.

[2] **Election Law** ⇦ Judicial resolution of contest in general

Primary candidates' action contending that COVID-19 pandemic allowed all registered voters to vote by absentee ballot was rendered moot, as to primary election, where Governor signed into law bill that allowed all electors to vote by absentee ballot in election if residence or polling place was in area subject to state of emergency fewer than 46 days remaining until election, and entire state was under state of emergency fewer than 46 days before primary election. S.C. Code Ann. § 7-15-320(B)(1).

[3] **Election Law** ⇦ Grounds for absence

Absentee voting statute, which allows physically disabled persons to vote by absentee ballot, does not allow all voters to vote absentee in the face of the COVID-19 pandemic. S.C. Code Ann. § 7-15-320(B)(1).

[4] **Constitutional Law** ⇦ Making, Interpretation, and Application of Statutes

Statutes ⇦ Judicial construction; role, authority, and duty of courts

Statutory interpretation is a judicial question, but when the Legislature considers the very same question—knowing it is doing so at the very same time the Supreme Court considers the question—and answers the question with clarity, the Supreme Court cannot give a different answer through the judicial act of statutory interpretation.

[5] **Constitutional Law** ⇦ Elections

Whether law should allow all general election voters to vote absentee in face of COVID-19 pandemic was political question, and thus would be resolved by Legislature rather than Supreme Court, where Legislature passed temporary law allowing voters in state to vote absentee in primary election, and Legislature jointly resolved to return to session to consider whether law should be changed for general election. S.C. Const. art. 1, § 8; S.C. Code Ann. § 7-15-320(B)(1).

[6] **Election Law** ⇦ State legislatures

The Legislature bears the constitutional obligation to ensure that elections are carried out in such a manner as to allow all citizens the right to vote. S.C. Const. art. 2, § 10.

ORIGINAL JURISDICTION

Attorneys and Law Firms

Christopher James Bryant and Bruce V. Spiva, both of Perkins Coie, LLP, of Washington, D.C., for Plaintiffs-Petitioners.

William Grayson Lambert and Mary Elizabeth Crum, of Burr & Forman, LLP; Karl Smith Bowers Jr., of Bowers Law Office; J. Robert Bolchoz, of Robert Bolchoz, LLC; and Harrison D. Brant, of the South Carolina Election Commission, all of Columbia, for Defendants-Respondents.

Robert E. Tyson, Jr. and Vordman Carlisle Traywick III, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Intervenors.

Attorney General Alan McCrory Wilson, Deputy Solicitor General J. Emory Smith Jr., and Assistant Attorney General Harley Kirkland, all of the South Carolina Attorney General's Office, of Columbia, for Amicus Curiae.

Opinion

JUSTICES KITTREDGE, FEW, JAMES:

*1 Plaintiffs [1] contend in this lawsuit that—in the face of the COVID-19 pandemic—existing South Carolina law permits all South Carolina registered voters to vote by absentee ballot in the June 9, 2020 primary election and November 3, 2020 general election. Plaintiffs implicitly contend that if existing law does not permit this, it should. Plaintiffs ask that we hear this case in our original jurisdiction. *See Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (only if an extraordinary reason exists, such as a question of significant public interest or an emergency, will the Court hear a case in its original jurisdiction). We allowed the South Carolina Republican Party (SCGOP) to intervene. The SCGOP filed a motion to dismiss. We granted the Attorney General permission to submit an *amicus curiae* memorandum.

We grant the request to hear the case in our original jurisdiction. We respectfully decline to dismiss the case on any of the grounds argued in the SCGOP motion. As we will explain, however, we dismiss the case on the ground that it does not present a justiciable controversy.

I.

Although this case does not present a constitutional challenge, [2] we begin with the unassailable proposition which all participants acknowledge: the right to vote is a cornerstone of our constitutional republic. *See Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230, 241 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964) ("No 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."); *see also* S.C. Const. art. I, § 5 ("All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office."); S.C. Const. art. II, § 1 ("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, § 2 ("No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State."); *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009) ("The right to vote is a fundamental right protected by heightened scrutiny under

the Equal Protection Clause. Restrictions on the right to vote on grounds other than residence, age, and citizenship generally violate the Equal Protection Clause and cannot stand unless such restrictions promote a compelling state interest." (internal citations omitted)); *City of Charleston v. Masi*, 362 S.C. 505, 509, 609 S.E.2d 301, 304 (2005) (noting the critical importance of ensuring voters are not improperly denied their right to vote in a particular election). As we stated in another election case in which this Court issued a declaratory judgment in its original jurisdiction, "This is a matter of great public importance. Integrity in elections is foundational." *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012).

*2 The voting laws implicated in this case are South Carolina statutes governing absentee voting. Pursuant to subsection 7-15-320(A) of the South Carolina Code (2019), absentee ballots may be used by certain voters who are unable to vote in person because they are absent from their county of residence on election day during the hours the polls are open. Subsection 7-15-320(B) allows voters to cast absentee ballots when they are not absent from the county, but only if they fit into one of the listed categories of people eligible to vote by absentee ballot. One of these categories is "physically disabled persons." § 7-15-320(B)(1).[3] Subsection 7-15-310(4) of the South Carolina Code (2019) defines "physically disabled person" as "a person who, because of injury or illness, cannot be present in person at his voting place on election day." Plaintiffs ask the Court to construe the term "physically disabled person" to include those practicing social distancing to avoid contracting or spreading the illness COVID-19. Plaintiffs contend these voters, "because of ... illness, cannot be present in person" at the voting place on election day under subsection 7-15-310(4), and thus are "physically disabled persons" under subsection 7-15-320(B)(1). This construction of the term "physically disabled person," Plaintiffs argue, permits all registered voters to vote by absentee ballot if they choose.

II.

[1] We will dismiss any case that does not present a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). On Tuesday, May 12—the day this Court heard oral argument on Plaintiffs' request that we construe the term "physically disabled person" to include any voter practicing social distancing to avoid contracting or spreading COVID-19—our Legislature met to consider whether it should make any changes to our election law in light of the COVID-19 pandemic. Both the House and the Senate enacted legislation to temporarily change the law. The bill provides,

> A qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency declared by the Governor and there are fewer than forty-six days remaining until the date of the election.

Act No. 133, § 2A, 2020 S.C. Acts ——.

The next day—May 13—the Governor signed the bill into law. Because the entire State is currently under a "state of emergency as declared by the Governor," S.C. Exec. Order No. 20-35 at 9 (May 12, 2020), and "there are fewer than forty-six days" between now and the June primary, all South Carolina voters are permitted to vote in the primary by absentee ballot, if they choose. This action by our Legislature and Governor enacted into law the precise relief Plaintiffs request—as to the primary election. By its terms, however, the legislation expires on July 1, 2020. Act No. 133, § 2B.

[2] Act 133 has two effects relating to whether the case before us presents a justiciable question. First, Plaintiffs' claim that all voters should be permitted to vote by absentee ballot in the June 9 primary election is now moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating a "court will not pass on moot ... questions").

[3] Second, though the new law expires on July 1, and thus does not moot Plaintiffs' claim as to any election after that date, the fact the Legislature changed the law to permit every voter to vote in the primary by absentee ballot is a clear indication the absentee voting statutes did not already permit that. To explain, if existing law already permitted all voters to vote by absentee in the face of a pandemic, it would have been unnecessary for the Legislature to change the law. In addition, by providing the new law "expires," the Legislature essentially reenacted the old law as of July 1. This makes clear the Legislature's intent that—under the old law reenacted—all voters may not vote by absentee ballot in the face of a pandemic. The question Plaintiffs raise is

whether existing law permits all voters to vote by absentee ballot. The Legislature answered that question, "No"; it took a change in the law for that to be true. The change in the law means the answer is now, "Yes." But the law expires, by which the Legislature deliberately changed the answer back to, "No," after July 1. There is no way to interpret these changes other than as a legislative determination that subsection 7-15-320(B)(1) does not permit all voters to vote absentee in the face of a pandemic. Therefore, the only voters who may vote by absentee ballot after July 1 are those who fit into one of the listed categories in subsection 7-15-320(A) or (B). If there were any doubt that subsection 7-15-320(B)(1) does not permit what Plaintiffs claim it does, that doubt was removed by the Legislature's effective reenactment of the subsection with the clear intention of repealing the temporary provision that allowed all voters to vote absentee.

*3 The dissent argues that Plaintiffs' claim relating to elections after July 1—in addition to the constitutional question—presents a question of statutory interpretation, not a political question. We certainly agree statutory interpretation is within the province of this Court. In fact, what we articulated in the previous paragraph is our construction of subsection 7-15-320(B)(1) as the Legislature intends it after July 1, not based on its plain language or the canons of construction, but based on the Legislature's political act of reenacting the subsection after temporarily changing the law. We hold the question is now a political question because the Legislature answered the question of statutory interpretation with absolute clarity when it changed the law to permit all voters to vote absentee, and then sunset the new law for elections held after July 1.

[4] 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.

[5] [6] Plaintiffs are left, therefore, only with their implicit argument as to what the law should be, that is, that this Court should change the law. As for the June primary election, the Legislature has determined that all voters may vote absentee. As 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. *See S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142-44, 632 S.E.2d 277, 278-79 (2006) (explaining that this Court will not answer political questions). To consider this political question, the House and Senate by joint resolution Tuesday, May 12 set September 15, 2020 (or earlier at the call of the Senate President or House Speaker) to resume the legislative session. *See* S. Con. Res. 1194, 123d Gen. Assemb., 2d Reg. Sess. (S.C. 2020). The joint resolution specifically contemplates the Legislature may consider "introduction, receipt, and consideration of legislation concerning COVID-19 and related matters" at any time up to November 8, 2020. S. Con. Res. 1194 §§ (D)(10), (E)(6). This provision of the joint resolution keeps us mindful that it is the Legislature which bears the constitutional obligation to ensure that elections are carried out in such a manner as to allow all citizens the right to vote. "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." S.C. Const. art. II, § 10.

Pursuant to that constitutional obligation, the Legislature has determined that subsection 7-15-320(B)(1) does not permit all voters to vote absentee, and the Legislature has jointly resolved to return to session in September to consider whether that law should be changed—again—for the November election. There is no way for this Court to grant Plaintiffs the relief they seek without disagreeing with the Legislature on this political question. If conditions in the Fall warrant another change in our election law, and if the will of the people as expressed through their legislative representatives is that such a change be made, the Legislature may change the law. This Court, however, will not. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

III.

We grant the motion to hear this case in our original jurisdiction. Having carefully reviewed the matter, we dismiss the case.

*4 **DISMISSED.**

KITTREDGE, FEW, and JAMES, J.J., concur. HEARN, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN:

I agree with the majority's decision to grant Plaintiffs' request to hear this case in our original jurisdiction, decline to dismiss the case on the grounds argued in the SCGOP's motion, and dismiss Plaintiffs' complaint as moot with respect to the June primary. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, this Court only considers cases presenting a justiciable controversy."); *Id.* at 26, 630 S.E.2d at 477 ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (internal citation omitted)).

However, I part company with the majority in its haste to dismiss the action with finality as it relates to the general election on the theory that a political question is presented.[4] I view the issue before us not as a political question but rather a question of statutory interpretation, which is clearly within the province of this Court. *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is."); *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163-64 (2014) ("This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws."); 82 C.J.S. *Statutes* § 368 (2009) (noting the interpretation and construction of statutory language presents a question of law for the court to decide). The General Assembly, in enacting the legislation, rendered the question before us moot with respect to the June primary, but it did not settle the ultimate issue at hand—the statutory construction of "physically disabled persons" in the absentee voting statutes consonant with the constitutional mandate for free and open elections. S.C. Const. art. 1, § 5 ("All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers ...."). While it is the responsibility of the General Assembly to "provide for the administration of elections and for absentee voting," it remains the duty of this Court to ensure that statutes enacted by the Legislature are constitutionally valid. S.C. Const. art. II, § 10; *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen ...."); *Peoples Nat'l Bank of Greenville v. S.C. Tax Comm'n*, 250 S.C. 187, 192, 156 S.E.2d 769, 772 (1967) (noting this Court has a duty to adopt a statutory construction which conforms to constitutional requirements); *Moseley v. Welch*, 209 S.C. 19, 27, 39 S.E.2d 133, 137 (1946) ("[T]he provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution."). I reject the majority's assertion that I have reframed or recast the issue as a constitutional challenge but instead explain that this Court cannot ignore the constitutional ramifications of the statutory construction question presented. Although I agree with the premise that we generally answer only the questions specifically posited to us, we do not construe statutes in a vacuum, but rather in the shadow of the Constitution. Indeed, were this Court able to address the question of statutory construction raised here, we would inevitably have to determine whether our interpretation is consistent with the free and open elections clause of our Constitution, as both Plaintiffs and the SCGOP acknowledged at oral argument.[5]

***5** My review of our jurisprudence does not support the majority's reliance on the political question doctrine. In *Alexander v. Houston*, 403 S.C. 615, 619, 744 S.E.2d 517, 520 (2013), we rejected the trial court's determination that a legal challenge under our Constitution's dual office holding provision was a nonjusticiable political question. Instead, we held the question presented a "bona fide legal challenge" that was proper for judicial resolution. *Id.* We further stated "this Court is duty bound to review the actions of the Legislature...." *Id.* at 619, 744 S.E.2d at 519-20. Similarly, in *Abbeville County School District v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999), we reversed the trial court's decision to rely on the political question doctrine as the basis for declining to interpret a constitutional provision. Finally, in *Sloan v. Hardee*, 371 S.C. 495, 500, 640 S.E.2d 457, 459-60 (2007), we held that the interpretation of the phrase "more than one consecutive term" in section 57-1-320(B) to determine whether the statute had been violated was not a political question and "clearly within the prerogative of this Court." Indeed, these decisions demonstrate our reluctance to relinquish our judicial authority to decide "bona fide legal challenges" and to interpret statutory and constitutional provisions, unless a political question is clearly presented. *See Alexander*, 403 S.C. at 619, 744 S.E.2d at 519 ("[T]he

political question doctrine is one of political questions, not one of political cases." (internal quotation marks omitted)).

Moreover, the action or inaction of the General Assembly does not determine whether a question is political, and therefore, nonjusticiable. *See Doran v. Robertson*, 203 S.C. 434, 445, 27 S.E.2d 714, 718 (1943) ("The Legislature cannot finally determine the limits of its power under the Constitution; that is a fundamental function of the courts. But it is so high a prerogative that it should be exercised with utmost care and circumspection." (internal citation omitted)). Rather, it is the responsibility of this Court to decide on a case-by-case basis whether a nonjusticiable political question is presented. *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 122, 691 S.E.2d 453, 460 (2010) ("In determining whether a question is political and nonjusticiable, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55, 59 S.Ct. 972, 83 L.Ed. 1385 (1939)); *Id.* ("[C]onsideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." (quoting *Baker*, 369 U.S. at 198, 82 S.Ct. 691)). While I acknowledge that whether the political question doctrine applies is a threshold question for this Court, none of the parties to the litigation have briefed or had the opportunity to orally argue this specific issue. Therefore, I believe it would be most prudent to reserve judgment.

Further, in my view, the General Assembly's action in passing the temporary legislation does not necessarily resolve the issue of whether persons practicing social distancing to avoid contracting or spreading this serious, highly communicable disease are included within the plain and ordinary meaning of "physically disabled persons," as defined in Section 7-15-310(4) of the South Carolina Code of Laws (2019) and allowed to vote by absentee ballot pursuant to section 7-15-320(B)(1). *See Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) ("[W]hen an amendment alters, even 'significantly alters,' the original statutory language, this does 'not necessarily' indicate that the amendment institutes a change in the law."). *See also Baldwin v. City of Greensboro*, 714 F.3d 828, 837 (4th Cir. 2013). Indeed, the recent legislation simply provides that "[a] qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency ...." Act No. 133, § 2A (S.C. 2020). It did not *amend* section 7-15-310(4) or 7-15-320(B)(1) to temporarily allow all registered voters, in light of the COVID-19 pandemic, to vote by absentee ballot under the "physically disabled persons" provision. Accordingly, the legislation does not directly address the question of statutory interpretation before the Court, and I would decline to dismiss the suit on this basis. Instead, I would dismiss the complaint on the ground that the matter involving the general election is not yet ripe for judicial consideration, which would not foreclose a future suit requesting interpretation of the provision for the general election. *S. Bank & Tr. Co. v. Harrison Sales Co., Inc.*, 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985) ("A declaratory judgment action must involve an actual, justiciable controversy."); *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) ("We have explained ripeness by defining what is not ripe, stating an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." (quoting *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)); *Park v. Safeco Ins. Co. of Am.*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968) ("The courts generally decline to pronounce a declaration in a suit wherein the rights of the plaintiff are contingent upon the happening of some event which cannot be forecast and which may never take place."). For these reasons, I concur in part and dissent in part.

BEATTY, C.J., concurs.

All Citations

--- S.E.2d ----, 2020 WL 2745565

Footnotes

1 Plaintiffs Bailey and Wehrman are candidates in the Democratic primary.

2 As much as the dissent may wish otherwise, Plaintiffs' Complaint presents only a question of statutory construction. Plaintiffs' counsel confirmed at oral argument that Plaintiffs do not challenge the constitutionality of South Carolina's absentee voting statutes. We respectfully reject the dissent's effort to recast this lawsuit. In any event, we are not persuaded that the dissent's reframing of the question presented to the Court would permit the result the dissent desires.

3 Among the other categories of voters eligible under the statute to vote absentee without a requirement of absence from the county are persons attending sick or physically disabled persons; persons admitted to hospitals as emergency patients on the day of an election or within a four-day period before the election; persons with a death or funeral in the family within a three-day period before the election; and persons sixty-five years of age or older. S.C. Code Ann. § 7-15-320(B)(4), (5), (6), and (8).

4 While none of the parties specifically argued the applicability of the political question doctrine in this case, I recognize this doctrine falls under the umbrella of Article I, Section 8 separation of powers generally. *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

5 Although Plaintiffs did not specifically plead a cause of action challenging the constitutionality of the absentee voting statute, they nevertheless explained at oral argument that the canon of constitutional avoidance requires this Court to interpret the statute in such a manner so as not to raise constitutional concerns. *Boumediene v. Bush*, 553 U.S. 723, 787, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (holding the Supreme Court has an obligation to construe a statute to avoid constitutional problems "if it is fairly possible to do so"). Counsel further argued that if we were to find that people practicing social distancing were not included in the term "physically disabled persons," such an interpretation would run afoul of the free and open elections clause of our Constitution. The SCGOP's counsel also conceded this Court undoubtedly must construe the statute in light of the free and open elections clause.

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2020 WL 2759629
Supreme Court of Texas.

IN RE STATE of Texas

NO. 20-0394
|
Argued May 20, 2020
|
Opinion delivered: May 27, 2020

Synopsis

Background: State petitioned for writ of mandamus, alleging that county clerks and county election administrators were encouraging voters to apply for voting by mail by claiming that fear of contracting COVID-19 at polling place constituted a "disability" under the Texas Election Code.

[Holding:] The Supreme Court, Hecht, C.J., held that a prospective voter's lack of immunity to COVID-19, without more, is not a "disability" the meaning of the Election Code, as would provide basis for obtaining mail-in ballot.

Issuance of writ declined.

Guzman, J., filed a concurring opinion, in which Lehrmann and Busby, JJ., joined.

Boyd, J., filed an opinion concurring in the judgment.

Bland, J., filed an opinion concurring in the judgment.

West Headnotes (3)

[1] **Election Law** ⇨ Grounds for absence

A prospective voter's lack of immunity to COVID-19, without more, is not a "disability" as defined by the Texas Election Code, under which qualified voters are eligible to vote by mail if they have a disability, i.e., a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health. Tex. Elec. Code Ann. § 82.002(a).

1 Cases that cite this headnote

[2] **Election Law** ⇨ Application and delivery

The Election Code does not require election clerks to investigate each applicant's disability, when an applicant seeks a mail-in ballot based on a disability; elected officials have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition. Tex. Elec. Code Ann. § 82.002.

1 Cases that cite this headnote

[3] **Mandamus** ⇨ Elections and Proceedings Relating Thereto

Election clerks do not have a ministerial duty, reviewable by mandamus, to look beyond an application to vote by mail, in which the applicant checks a box indicating that the reason for seeking a ballot by mail is a disability, by investigating each applicant's disability. Tex. Elec. Code Ann. §§ 82.002, 273.061.

1 Cases that cite this headnote

ON PETITION FOR MANDAMUS

Opinion

Chief Justice Hecht delivered the opinion of the Court, in which Justice Green , Justice Guzman , Justice Lehrmann , Justice Devine , Justice Blacklock , and Justice Busby joined.

*1 Under the Texas Election Code, qualified voters are eligible to vote by mail only in five specific circumstances. [1] One is if the voter has a "disability" as defined by statute. [2] In this original proceeding, amidst the COVID-19 pandemic, and with elections upcoming in July and November, the parties ask us to determine whether a voter's lack of immunity from the disease and concern about contracting it at a polling place is a "disability" within the meaning of the statute. [3] Petitioner, the State of Texas, argues that the answer is no and seeks mandamus relief prohibiting respondents, five

county clerks and election administrators (the Clerks),[4] from misinforming the public to the contrary and improperly approving applications for mail-in ballots. The Clerks deny that they have misinterpreted or misapplied the law, either because the State's position is incorrect or because they have taken no position to the contrary.

Limitations on voting by mail have long been a subject of intense political debate, in this State and throughout the country. We, of course, take no side in that debate, which we leave to legislators and others. The question before us is not whether voting by mail is better policy or worse, but what the Legislature has enacted. It is purely a question of law. Our authority and responsibility are to interpret the statutory text and give effect to the Legislature's intent. We agree with the State that a voter's lack of immunity to COVID-19, without more, is not a "disability" as defined by the Election Code. But the State acknowledges that election officials have no responsibility to question or investigate a ballot application that is valid on its face. The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of "disability". Because we are confident that the Clerks and all election officials will comply with the law in good faith, we deny the State's petition for writ of mandamus.

I

A

The first week of this year, China reported a novel coronavirus in Wuhan, Hubei Province. The first reported case in the United States of COVID-19, the disease caused by the virus, was on January 20 in the State of Washington, and the first reported case in Texas was on March 4 in Fort Bend County.[5] To date, the Texas Department of State Health Services reports 56,560 confirmed COVID-19 cases in Texas: 36,375 recoveries, 22,446 active cases, and 1,536 fatalities.[6] Indications are that people who are over 65 years old or that have pre-existing medical conditions are at a higher risk of being very sick from the disease.[7] In some cases, symptoms are extremely severe, and a sufferer is hospitalized on a ventilator in an ICU for weeks. In others, symptoms are relatively mild and extend only a few days. A person may carry and spread the virus before exhibiting symptoms of the disease.

*2 On March 13, the Governor declared a state of disaster in response to the immediate threat of a COVID-19 pandemic.[8] Federal, state, and local government orders and advisories closed businesses and other activities and cautioned against leaving home, ignoring personal distancing, and gathering in large groups. The Governor's March 31 order imposed restrictions "to reduce the spread of COVID-19" in Texas.[9] On April 27, the Governor announced phase one of a plan to reopen Texas businesses and other activities.[10] On May 18, he announced phase two.[11] Many are concerned that the reopening is too fast and too soon; for others it is too slow and not soon enough.

There is much uncertainty about the disease and about the future. There are reports that the disease will weaken in the heat of summer, or not; that there may be a second wave later in the year, or not; and that a vaccine could be available as soon as the fall, or not. Some traditional gatherings have been canceled. The Texas Democratic Party has announced that its convention this year will be online. Others are forging ahead. The Republican Party of Texas still plans an in-person convention mid-July.

B

All of this is occurring in an election year.

On March 7, 2020, the Texas Democratic Party (TDP), its Chairman, and two voters sued the Secretary of State and the Travis County Clerk in Travis County District Court seeking a declaration that § 82.002 of the Election Code allows any voter who believes social distancing is necessary to hinder the spread of the virus to obtain a mail-in ballot. Plaintiffs also sought a mandatory injunction requiring defendants to accept and tabulate ballots from voters who applied to vote by mail under the disability provision by virtue of a belief in the necessity of social distancing. TDP nonsuited the Secretary of State, but the State intervened as a defendant and filed a plea to the jurisdiction. Several advocacy groups[12] and an additional voter also intervened as plaintiffs supporting TDP.

On April 17, after a hearing, the trial court issued a temporary injunction declaring

> that the plaintiffs were "reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring

> [a voter's] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

The court enjoined Travis County from rejecting ballots that claimed a disability due to the presence of COVID-19. The defendants, including the State, were also enjoined from "issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic".

*3 The State immediately appealed. Travis County did not.

The Attorney General published a letter addressed to county judges and county election officials explaining: "Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail." [13] The letter further prescribed that any "third parties" who advised voters to apply for mail-in ballots due to a fear of COVID-19 could be prosecuted under the Election Code. The letter stated that the Travis County court's order was stayed by virtue of the appeal. The letter was accompanied by a press release, stating: "Several county officials throughout the State, including the Harris County judge and clerk, are misleading the public about their ability to vote by mail, telling citizens that in light of COVID-19, anyone can claim a 'disability' that makes them eligible for ballot by mail." [14]

Appellees responded by filing an emergency motion in the court of appeals, seeking to enforce the trial court's injunction against the State. On May 14, the court of appeals granted the motion and reinstated the temporary injunction. The State filed an emergency mandamus petition in this Court, and we stayed the court of appeals' order pending review of the mandamus petition. The trial court's order remains superseded.

Parallel to this state-court litigation, on April 7, the TDP and three voters also sued state officials, the Travis County Clerk, and the Bexar County Elections Administrator in the United States District Court for the Western District of Texas. TDP alleged that the State's interpretation of the Election Code (1) violates the Twenty-Sixth Amendment as applied, (2) discriminates on the basis of age and race in violation of the Equal Protection Clause as applied, (3) violates the First Amendment, and (4) is void for vagueness. [15] The plaintiffs also accuse the Attorney General of voter intimidation. [16] After a hearing, on May 19 the court concluded that the plaintiffs were likely to prevail on their claims and issued a preliminary injunction. [17] The court concluded that "lack of immunity from COVID-19 is indeed a physical condition" [18] and declared that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in [the] upcoming elections during the pendency of pandemic circumstances." [19] The order enjoined the State from "issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order." [20] The State appealed, and on May 20 the United States Court of Appeals for the Fifth Circuit stayed that order. [21]

C

*4 The State initiated this original proceeding on May 13, naming the Clerks as respondents. The State asks the Court to use the power granted by the Election Code "to compel the performance of any duty imposed by law in connection with the holding of an election". [22] The State complains that the Clerks have defined "disability" as a "generalized fear common to all voters of contracting disease." According to the State, the Clerks are encouraging voters to apply to vote by mail, "regardless of whether they have any 'disability,' as the Legislature defined that term" and accepting invalid applications under their own faulty definition of "disability." Furthermore, the State argues, by failing to apply the correct definition of disability, the Clerks are ignoring the oath they took to " 'preserve, protect, and defend ... the laws of' the State of Texas and 'faithfully execute [their] duties' accordingly." The State's assertions with respect to each county official are detailed below. The State asks for relief within 14 days of filing the petition because election officials will soon begin mailing out ballots for elections held in July.

On May 15, the plaintiffs and intervenor-plaintiffs from the Travis County litigation moved to intervene in this proceeding. They argued that the relief sought by the State is a collateral attack on the temporary injunction that they had won, which is still pending appeal, and that they should

be allowed to intervene as interested parties. Moreover, the issues in this proceeding mirror those decided by the Travis County litigation. The State opposed the motion to intervene, arguing that the Texas Rules of Appellate Procedure do not provide for an intervention in a mandamus proceeding. Before the Court had ruled on the motion to intervene, the movants filed a joint response to the State's petition for writ of mandamus.

The response argued that:

- the State has failed to show that respondents ignored a ministerial duty because the State cannot show that the election administrators have a duty to reject some voters who apply to vote by mail by virtue of a disability;
- the State is seeking an injunction, not mandamus relief, which, under the Election Code, lies only to correct an act that has already been performed;
- the mandamus petition is an impermissible attack on the temporary injunction;
- there is an adequate remedy on appeal;
- the record is insufficient to decide whether voters without COVID-19 immunity are eligible to vote by mail because the issue involves a review of medical evidence not present in the record, which the Travis County trial court heard before issuing its ruling;
- the State's interpretation of § 82.002 is refuted by the plain language of the statute, as well as prior opinions from the Attorney General;
- the statute should be read to "maximize Texans' ability to exercise their right to vote"; and
- the State's reference to voter fraud is extraneous to the legal problems posed by the petition.

The Court denied the motion to intervene, noting that it would consider the intervenors as amici and review their filings as such.

We set out the State's assertion regarding each Clerk as follows.

1

The State alleges that "Harris County's early voting clerk ... (along with other Harris County officials)" filed an amicus brief in the Travis County litigation advocating for a finding that a healthy person who fears infection should be able to vote and that therefore all voters should be able to vote by mail. The State alleges that the Clerk was quoted as saying that her office would not challenge any voter applying to vote by mail. Further, she asked the Harris County commissioners court for sufficient funds to "to provide an absentee ballot to every voter in Harris County" and promised to conduct a widespread voter information campaign "promoting voting by mail." Therefore, the State contends, she is "overriding the Legislature's policy decisions". The County also filed an amicus brief in the Fifth Circuit Court of Appeals taking the same position it took in Travis County.

The Harris County Clerk responded that she has only proposed that voters "for whom voting in person presents a

likelihood of injury to the voter's health" are eligible to vote by mail. "Election officials ... have advised [voters] to vote by mail if they do not have immunity to a highly contagious disease that is likely to injure their health."

*5 The County took the position in the Travis County court that the County "and its Election Administrator Need Immediate Clarity." The only references to the Clerk at all, in the amicus filed at the time of the mandamus petition, are two references to the need for clarity on the law. It is not clear why the State ascribes all the statements in the brief to the Clerk. The brief explained that clarity was required to effectively run polling locations and protect election workers. In the County's amicus brief in the Fifth Circuit, the County Attorney again, not the Clerk stated that "Harris County wishes to increase the ratio of VBM as a practical not a partisan matter because doing so will enable less crowded conditions during in-person voting and thus better social distancing." In the same brief, the County stated that it was not advocating for universal voting by mail, but only preparing for what promises to be "the most challenging election in American history." The brief notes that "[e]lection administrators naturally thought this broad definition would include those who could contract COVID-19 by voting in-person as polling places tend to be crowded with no room to socially distance. But clear guidance was not forthcoming."

The brief does argue that because of the seriousness of COVID-19 infection, and "because no one is known to be immune to COVID-19, all voters should be free to VBM in the July 14 run-off and the November election." The brief also reported that mail-in ballot applications have already started to accrue; so far about 2.9% of applications make a claim for a mail-in ballot under the disability provision. Of these, only a very small number have further noted that the purported disability is related to the pandemic. Once again, the brief's only references to the Clerk cite the election administrators' need "to know clear rules for conducting elections during the pandemic as soon as possible so they may plan accordingly."

In her statements before the Harris County commissioners court, the agenda reflects a "[r]equest by the County Clerk for potential expansion of voting by mail due to COVID-19 including a review of budget requirements for such a program." On the same page of the agenda, the County Attorney is noted to have requested a discussion of "the effect of COVID-19 pandemic on elections," and a "filing by the County Attorney of a friend of court brief in state litigation seeking to allow all eligible voters to vote by mail during the pandemic, and authorization to file similar briefs in federal court and other similar litigation."

Further, in a letter to the commissioners court, the Clerk reviewed budget concerns raised by an "expanded Mail Ballot Program." The letter states: "The County Clerk's Office is preparing to scale up the mail program and now are providing the Court a cost estimate list of items in order to expand the vote by mail program for the July 14, 2020 primary runoff election with the early voting period from July 6-10." The letter proceeds to discuss the added expenses of increased voting by mail at escalating levels of mail-in ballots. The letter also states that the office is engaging in a "robust Voter Outreach campaign," "encourag[ing] eligible voters to vote by mail," and "expand[ing] vote by mail infrastructure."

The Clerk is reported to have said that "her office is planning for any outcome in a lawsuit filed by Democrats and voting rights advocates seeking to force the Texas secretary of state to allow any resident to request a mail ballot."[23] She is quoted as saying her office "can't turn on a dime"; preparation for any eventuality is necessary.[24] She described the added costs of providing mail-in ballots, from an additional 700,000 mail-in ballots to the cost if the full population voted by mail.[25] The article also states, "Trautman on April 13 said her office would not challenge any voter's request for a mail ballot, effectively opening the accommodation to anyone."[26]

2

*6 The State argues that the Travis County Clerk declared on her website that she would "provide a mail-in ballot to any voter who claims 'disability' because of fear of exposure to the novel coronavirus". Further: "Based on the Travis County Trial Court's recent order, mail-in-ballots are a legal alternative to in-person voting for many voters while COVID-19 is in general circulation." She also neither "opposed nor appealed the Travis County District Court's temporary injunction". The State complains that the Clerk stated that "[i]f the voter swears [to be disabled], I believe the voter."

Travis County responded that the statements on the website were an accurate reflection of the law, and the State neglected to add that the website also referred interested voters to read the trial court's injunction, with a link to the order. Moreover, the Clerk is required by law to believe a voter who swears to

be disabled. In effect, the State is complaining that the Clerk is following the plain language of § 82.002. And, "the State's argument that [the Clerk] is advocating or advising voters to violate the law is factually baseless."

3

The State argues that the Cameron County Elections Administrator's website published a reference to the state trial court's order, which explained, "In light of this temporary judgement and its underlying reasoning, the Cameron County Elections Department will not reject any voter's request for a mail-in ballot based on the eligibility category of disability."

The Cameron County Elections Administrator responded that he updated the website each time a court spoke on the issue, including after this Court stayed the district court and the court of appeals' order. The website was later revised to reflect that, "the Texas Supreme Court is temporarily not allowing voters to use the coronavirus as a 'disability' to request a mail-in ballot. The Court is anticipated to issue guidance on this issue in the near future." The website further states that "[o]ur office has no legal authority to administratively require voters to substantiate their disability at the time the application is submitted." In an affidavit to the Court, the Administrator explained: "In no way have I ever expanded or attempted to expand the Legislature's determination of who is eligible to vote by mail. Disability, under the Code, does mean a sickness or physical condition. I have not defined the word to mean a generalized fear common to all voters of contracting disease." [27]

4

The State alleges that the Dallas County commissioners court issued a resolution stating that due to the threat of COVID-19, any voter who wanted a mail-in ballot could check the box indicating a disability. The Elections Administrator presented the Attorney General's May 1 letter to the commissioners but explained that "however ... we do not investigate the reason or require further explanation for the disability if the application is marked disability."

The Administrator responded that she is not a member of the commissioners court "and did not sponsor nor weigh in regarding the resolution." Moreover, the State has cited to only a proposed version of the resolution, not the one that was adopted. The Administrator's presentation of the Attorney General's letter was only accompanied by a description of her practice, which is consistent with the Election Code. That is, Administrators cannot investigate the reason why the disability box is marked on an application. There is no evidence that she took a position contrary to the law, or even that she advocated for expanding the availability of mail-in ballots.

5

*7 The State alleges that the El Paso Elections Administrator "told the El Paso County Commissioners Court that she plans to provide mail-in ballots to any voter who requests one due to the COVID-19 pandemic unless the Travis County temporary injunction is reversed." The El Paso commissioners court then voted to file an amicus brief in the Travis County litigation supporting the plaintiffs' interpretation of § 82.002.

The Administrator responded that she "recognized a potential problem in carrying out her duties: the Travis County order might cause an increase in the number of applications for mail-in ballots, which would increase her office's expenses, like postage, staffing, and supplies." Thus she worked with the commissioners court in anticipation of potential budgetary problems. Moreover, the Administrator contends that the State's description of her comments is inaccurate. Instead, she explained the litigation and informed the commissioners that it was not clear how § 82.002 would be interpreted at the time of the November elections. She also noted that because there is no requirement that a voter describe her disability, the disability is taken "at face value." Thus she summarized the pending litigation and accurately described how a mail-in ballot should be considered, according to both the Attorney General and Secretary of State: "evaluate a ballot by mail application for completeness and issue a ballot if the application is complete."

D

The Clerks join the State in requesting the Court to interpret § 82.002. The Election Code provides that the "supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election". [28] The Harris County Clerk agrees with the State that because of imminence of the July

elections, filing first in this Court is justified.[29] This case also presents questions of state-wide importance.[30]

II

Eligibility for voting by mail is provided by Chapter 82. Section 82.002(a), entitled "Disability", provides that "[a] qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health."[31] The County Clerk of Harris County[32] argues that a lack of immunity to COVID-19 is a "physical condition" that is, a physical state and that "likelihood" does not mean a probability. Thus, a voter without immunity has a "disability" under the statute. The State contends that lack of immunity in an otherwise healthy person is not a "physical condition" because it does not distinguish the person from the general populace. "No one can be immune to all possible diseases." What does distinguish people without immunity, the State argues, is at most a fear of contracting COVID-19, and fear is not a "physical condition". The State argues that because a lack of immunity is not a "physical condition", whether "likelihood" can mean something less than a probability need not be decided.

A

*8 The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail. When it has permitted absentee voting based on a voter's bodily state, it has always been in terms of a physical disability.

Voting before election day was first permitted by statute in Texas in 1917. A voter who expected to be absent from his county of residence on election day an "absentee" could appear beforehand in person before the county clerk and mark his ballot, which the clerk retained to be counted with all the votes cast.[33] In 1921, the absentee could also make an affidavit before a notary public, who would then request a ballot from the county clerk.[34] When the voter had marked the ballot in the notary's presence under oath, the notary would mail it to the county clerk.[35] In 1933, the option of voting before a notary was discarded, but an absentee could apply to the county clerk for a ballot by mail, and after receiving and marking it, return it by mail to the county clerk.[36] This was the first use of voting by mail.

In 1935, absentee voting was expanded to a voter "who because of sickness or physical disability cannot appear at the poll place" on election day.[37] The voter was required to submit a sworn application accompanied by "a certificate of a duly licensed physician certifying as to such sickness or physical disability".[38] The provisions were codified as § 37 of the Election Code enacted in 1951.[39] A 1963 amendment to § 37 provided that "[e]xpected or likely confinement for childbirth on election day shall be sufficient to entitle a voter to vote absentee on the ground of sickness or physical disability" but was also required to be supported by a physician's certificate "that because of pregnancy and possible delivery she will be or may be unable to appear at the polling place on election day."[40]

In 1969, absentee voting was extended to voters who could not appear at a polling place for "religious belief".[41] A 1975 amendment extended absentee voting to voters 65 years of age or older on election day and those who could not appear at a polling place because of confinement in jail.[42] In 1981, the requirement of a physician's certificate accompanying an application to vote absentee based on sickness or physical disability was dropped.[43] In 1991, religious belief was dropped as a reason to vote absentee.[44] In 2007, participation in the address confidentiality program administered by the attorney general was added.[45]

*9 From 1935 to 1985, absentee voting was permitted for voters with "sickness" or "physical disability". That formulation was changed with the recodification of the Election Code in 1985. The provision, § 82.002(a), was entitled "Disability", retaining that concept as the general requirement, and stated: "A qualified voter is eligible to vote absentee by personal appearance or by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring his health."[46]

B

The Legislature has very deliberately limited voting by mail to voters in specific, defined categories: those who will be absent from their county of residence during an election period,[47] who have a "disability",[48] who are over 65 years of age,[49] who are incarcerated,[50] or who are participating in the address confidentiality program administered by the Attorney General.[51] "Disability" is defined as a sickness or physical condition preventing in-person voting without a likelihood of harm to the voter's health,[52] and as "[e]xpected or likely confinement for childbirth on election day".[53] The ordinary meaning of "physical" is "of or relating to the body".[54] The parties agree that this excludes mental or emotional states, including a generalized fear of a disease. "Condition" can mean "a state of being".[55] But if "physical condition" as used in § 82.002(a) meant "physical state of being", it would swallow the other categories of voters eligible for mail-in voting. A voter's location during an election period is certainly a physical state of being. So are age, incarceration, sickness, and childbirth, even participation in a program. To give "physical condition" so broad a meaning would render the other mail-in voting categories surplusage. Further, such an interpretation would encompass the various physical states of the entire electorate. Being too tired to drive to a polling place would be a physical condition. The phrase cannot be interpreted so broadly consistent with the Legislature's historical and textual intent to limit mail-in voting.[56]

Another dictionary definition of "condition" is "the physical status of the body as a whole or of one of its parts usually used to indicate abnormality",[57] as for example a heart condition. The idea of condition as an abnormal or at least distinguishing state of being is consistent with the other statutory categories. A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition.

Section 82.002 describes the physical condition that entitles a voter to vote by mail as a "disability".[58] It is the same word the Legislature has used consistently since 1935. "Disabled" normally means "incapacitated by or as if by illness, injury, or wounds". The phrase, "physical condition", must be read in this light. In no sense can a lack of immunity be said to be such an incapacity.

[1] *10 Accordingly, we conclude that a lack of immunity to COVID-19 is not itself a "physical condition" for being eligible to vote by mail within the meaning of § 82.002(a).

C

JUSTICE BOYD and JUSTICE BLAND would hold that a lack of immunity to COVID-19 is a "physical condition" under § 82.002(a), though a voter would not be entitled to vote by mail without a "likelihood" that voting in person would injure the voter's health. We all agree that "likelihood" means a probability. But for the population overall, contracting COVID-19 in general is highly improbable. This is not to say that the risk is not greater for certain persons or in certain situations, as we have noted. Indeed, that improbability has justified the efforts throughout the state to reopen business and activities in a gradual return to normalcy. In addition, as the State highlights, authorities planning elections are working in earnest to ensure adherence to social distancing, limits on the number of people in one place, and constant sanitation of facilities. By any measure, a lack of immunity alone could not be a likely cause of injury to health from voting in person. We read the opinions of JUSTICE BOYD and JUSTICE BLAND as concluding otherwise.

We agree, of course, that a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability. We disagree that lack of immunity, by itself, is one of them. As we have said, the decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of "disability".

III

The State asks the Court to order the Clerks to refrain from misapplying election law by "misleading the public and providing absentee ballots to unqualified voters." The State complains that the Clerks have "misrepresented" the nature of the § 82.002 disability provision by advocating for the position that anyone without immunity to COVID-19 may vote by mail. The State points to amicus briefs filed by the Clerks in litigation concerning mail-in ballots and to comments made to commissioners courts as evidence of misrepresentation. The State also complains that some of the Clerks have described a court order stating that anyone without COVID-19 immunity may apply for a mail-in ballot. In addition, the State vaguely alleges that the Clerks are accepting invalid applications to vote by mail.

The Clerks contend, in part, that they lack a duty to "police an individual voter's claimed disability." [59] The Clerks also defend their speech before the commissioners courts as accurate attempts to convey information about rapid changing electoral conditions. [60] The Clerks argue that the State has failed to identify ministerial duties that the Clerks have ignored.

The Election Code provides that "[t]he early voting clerk shall review each application for a ballot to be voted by mail." [61] "If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant as provided by this chapter." [62] Further, "if the applicant is not entitled to vote by mail, the clerk shall reject the application". [63]

[2] [3] *11 The State has conceded that "Respondents have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly." The State acknowledges that the Election Code does not require election clerks to "investigate each applicant's disability." [64] Indeed, the Legislature rejected the requirement of a physician's proof of disability for mail-in voting applications when it amended the Election Code in 1981. [65] And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason for seeking a ballot by mail is a disability. [66] The voter is not instructed to declare the nature of the underlying disability. [67] The elected officials have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition. The respondents do not have a ministerial duty, reviewable by mandamus, to look beyond the application to vote by mail. Moreover, while the State has alleged that the Clerks are accepting "improper application[s]," there is no evidence in the record that any has accepted a faulty application.

The Clerks have assured us that they will fully discharge their duty to follow the law. We are confident that they will follow the guidance we have provided here. Accordingly, we conclude that issuing the writ of mandamus to compel them to do so is unwarranted.

* * * * *

We agree with the State that a lack of immunity to COVID-19 is not itself a "physical condition" that renders a voter eligible to vote by mail within the meaning of § 82.002(a). Confident that election officials will comply, we decline to issue the writ of mandamus.

Justice Guzman filed a concurring opinion, in which Justice Lehrmann and Justice Busby joined.

Justice Boyd and Justice Bland issued opinions concurring in the judgment.

Justice Guzman , joined by Justice Lehrmann and Justice Busby , concurring.

The Texas Election Code permits qualified voters to vote by mail if the voter has a "disability," which the Legislature defines as "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." [1] The parties dispute whether lack of immunity to the COVID-19 virus, by itself, constitutes a "disability" that enables all Texas voters without such immunity to vote by mail. Today, the Court unanimously answers that question "no." [2] The legal reasoning may differ among the writings, [3] but the Court is unified in holding that: (1) vote by mail is not available based solely on lack of immunity to COVID-19; [4] (2) fear of contracting a disease is not a physical condition; [5] (3) "likelihood" of "injuring the voter's health" means injury is probable; [6] and (4) voters can take their health and health history into consideration in determining whether to request a vote-by-mail ballot. [7] In the final analysis, every member of the Court reaches the same result for essentially the same reason: lack of immunity to the COVID-19 virus, in and of itself, does not constitute a disability under section 82.002(a) of the Election Code; rather, whether a voter is eligible to vote by mail ultimately depends on the voter's own assessment of his or her individual health status. Though we disagree over how the legislatively enacted eligibility provisions may be construed, [8] our discourse and debate here, as in every case, reflects the importance of the rights at issue [9] and "diligent and honest efforts" to resolve "hard and fine questions of law." [10]

*12 With the salient points distilled and clarified—and with full confidence that voters and the State's elected officials

will comply with the law—I join the Court's opinion denying mandamus relief. [11]

Justice Boyd , concurring.

I agree with the Court that "a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code." Ante at ——. But I reach that result for different reasons. Reading the phrase "physical condition" within its statutory context, I conclude that it refers to a bodily state of being that limits, restricts, or reduces a person's physical abilities. Under this reading, a person's lack of immunity to COVID-19 can constitute a "physical condition" as the statute uses that phrase. But even when it does, the voter is not eligible to vote early by mail unless, because of the voter's physical condition, voting in person will probably injure the voter's health. We cannot decide on this record whether any particular voter is eligible for mail-in voting under that standard. Fully expecting that the state's election officials and voters will apply the eligibility statute as the Court construes it, I join the Court's judgment denying the State's petition for writ of mandamus.

* * *

The Texas Election Code permits a qualified voter who has a "disability" to vote early by mail. TEX. ELEC. CODE § 82.002. Section 82.002 includes two subsections, each providing a different description of "disability." Under subsection (a), the voter must satisfy two requirements: (1) the voter must have "a sickness or physical condition," and (2) that sickness or physical condition must "prevent[ ] the voter from appearing at the polling place on election day without a likelihood of ... injuring the voter's health." Id. § 82.002(a). Under subsection (b), "[e]xpected or likely confinement for childbirth on election day is sufficient" to qualify as a disability, without regard to subsection (a)'s requirements. Id. § 82.002(b). The parties focus in this case on subsection (a).

A. Physical condition

The parties dispute whether a voter's lack of immunity to COVID-19 constitutes a "physical condition" that satisfies subsection (a)'s first requirement. The Court holds it does not because the phrase "physical condition" means not just a "physical state of being," but a physical state of being that is "abnormal" or "distinguishing" and rises to the level of "incapacity." Ante at ——. Because a lack of immunity to COVID-19 is not "abnormal," "distinguishing," or an "incapacity," the Court concludes it cannot qualify as a "physical condition" under section 82.002(a). Ante at ——.

I reach a different conclusion on the meaning of "physical condition." Because the Code does not define that phrase, we must apply its common, ordinary meaning unless the statutory context indicates that the statute uses the phrase to communicate a different meaning. *City of Fort Worth v. Rylie*, No. 18-1231, —— S.W.3d ——, —— n.19, 2020 WL 2311941, at *6 n.19 (Tex. May 8, 2020) ("When, as here, a statute does not define a term, we typically apply the term's common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute's language."). Although "physical condition" might ordinarily refer generally to one's bodily state of being, we must consider whether the statutory context requires a different meaning here. *Id.* [1]

**13 The textual context of the phrase "physical condition" in section 82.002(a) is both clear and illuminating. As indicated in its title, section 82.002 provides eligibility for mail-in voting to those who have a "disability." TEX. ELEC. CODE § 82.002. Subsection (a) first requires that the voter have either a "sickness" or a "physical condition." Id. § 82.002(a). It then requires that the sickness or physical condition "prevents" the voter from voting in person without a likelihood of injury to the voter's health. *Id.* And subsection (b)'s alternative form of "disability" requires an expected or likely "confinement" for childbirth on election day. Id. § 82.002(b). Within this statutory context—defining "disability" to mean a "sickness" or "physical condition" that "prevents" or "confines"—I would hold that a "physical condition" under section 82.002(a) is not just any bodily state of being, but a bodily state that limits, restricts, or reduces the person's physical abilities. [2]

The Court also rejects the idea that every bodily state of being qualifies as a "physical condition" under section 82.002(a). Ante at ——. In this respect, the Court and I disagree with JUSTICE BLAND, who would broadly construe "physical condition" to mean any "state of health or physical fitness" or "physical state of the body." Post at ——. In my view, that construction applies the phrase's common, ordinary meaning without considering whether the phrase carries a different meaning in light of its statutory context. Under JUSTICE BLAND'S construction, lacking immunity would always constitute a "physical condition," but so would having immunity, as they both describe a "physical state of the body."

Then, of course, everyone would have a "physical condition," and subsection (a)'s first requirement would actually require nothing at all. We could delete subsection (a)'s requirement (a "sickness or physical condition") and retain its second requirement (a likelihood of injury to health) and the statute's meaning would not change.

After properly rejecting that construction, however, the Court relies on an alternative dictionary definition to conclude that section 82.002(a) requires a physical condition that is "abnormal" or "distinguishing." Ante at ——. I find nothing in the statutory context to suggest or support this meaning. In light of the statutory context, this construction is over-inclusive because it encompasses conditions that have nothing to do with "disabilities" that "prevent" or "confine" a person's activities. A person with a lengthy handle-bar mustache, for example, might have an "abnormal" and "distinguishing" physical condition, but not the type that fits within the context of conditions that prevent or confine a person's physical abilities.

At the same time, the Court's construction is also under-inclusive because it excludes physical conditions that prevent or confine a person's abilities merely because other people have the same physical condition. If, for example, the world had been struck with a virus far more contagious and aggressive than COVID-19, such that ninety-nine percent of all Texans were infected and adversely affected, they would all suffer from a "sickness," even if the sickness was not then abnormal or distinguishing. In the same way, ninety-nine percent of the voting population may have a "physical condition" under the statute, even though that condition is not abnormal or distinguishing. Contextually, the phrase "physical condition" speaks to conditions that involve a lack of ability that prevents and confines, not to normality, numbers, or percentages.

Relying on the dictionary definition of "disability," the Court concludes that a physical condition under section 82.002(a) must be an "incapacity," as well as abnormal or distinguishing. Ante at ——. But if the legislature wanted to require an "incapacity," it could have just said the voter must have a "disability" since, according to the Court, the common, ordinary meaning of "disability" is "incapacity." Ante at ——. Instead, the legislature described two specific types of qualifying "disabilities"; the phrase "physical condition" serves as just the first requirement for one of those types. *See* TEX. ELEC. CODE § 82.002(a), (b). The second requirement for that type of disability is that the person's physical condition "prevents the voter from appearing at the polling place on election day without a likelihood of ... injuring the voter's health." Id. § 82.002(a). Subsection (a)'s second requirement describes the required nature or level of limitation (which falls far short of "incapacity," as the Court uses that term), while its first requirement (a "sickness or physical condition") describes what must cause that limitation.

*14 Construing the phrase within its statutory context, I would hold that a "physical condition" under section 82.002(a) is a bodily state of being that limits, restricts, or reduces a person's abilities. It does not include every bodily state of being, but it includes more than just abnormal or distinguishing conditions that incapacitate a person. Under this construction—to use the Court's example—being "too tired to drive to a polling place," ante at ——, could qualify as a "physical condition" under section 82.002(a) because that physical condition could limit, restrict, or reduce the person's physical abilities. And for the same reason, so could a lack of immunity to COVID-19. But even when it does, the person satisfies only the first requirement for claiming a disability that makes the person eligible to vote early by mail.

B. Likelihood of injury to health

Because section 82.002(a) includes a second requirement, merely having a sickness or physical condition does not constitute a "disability" that makes a person eligible for early mail-in voting. Subsection (a) also requires that the person's physical condition be so severe or substantial that it creates a "likelihood" that voting in person would require personal assistance or would injure the voter's health. The Court is incorrect to read my opinion as concluding that "a lack of immunity alone could ... be a likely cause of injury to health from voting in person." Ante at ——. Subsection (a) requires not just a sickness or physical condition, but also circumstances that create a likelihood that, in light of that sickness or physical condition, voting in person would injure the person's health.

Consistent with our precedent, I would hold that the term "likelihood" refers to a "probability," as opposed to a mere "possibility." *See JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018) (explaining that a court's error in excluding evidence is "likely harmful" if "it probably caused the rendition of an improper judgment"); *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (" 'Likelihood' connotes more

than mere possibility or conjecture and is synonymous with 'probability.' "). And the Court agrees. *See ante* at ——.

But the Court suggests that voters who lack immunity to COVID-19 but have no other "sickness or physical condition" could never satisfy section 82.002(a)'s second requirement because "contracting COVID-19 in general is highly improbable." *Ante* at ——. Although it may be true that, statistically, any particular person "in general" is not likely to contract COVID-19, section 82.002(a) does not consider such generalities. Under section 82.002(a), the question is whether a voter who has a sickness or physical condition faces a likelihood of injury to health at a specific particular place and time—"the polling place on election day." TEX. ELEC. CODE § 82.002(a). Whether a person's sickness or physical condition creates a "likelihood" that voting in person "at the polling place on election day" will cause injury to the person's health depends on innumerable factors, including the nature of the person's sickness or physical condition, the person's health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises.

This limited record is simply insufficient to answer that question as to any particular voter.[3] Even if I could consider the many conflicting scientific studies and anecdotal reports I have read or read about, I simply don't know whether any particular person's lack of COVID-19 immunity would prevent that person from voting in person at the polling place on election day without facing the probability that doing so will injury the person's health. Nor do I know whether or how the safety and sanitation measures our state's election authorities are implementing will affect that level of risk. We simply cannot answer those questions on this limited record.

***15** We can confirm, however, that merely having a physical condition, including a lack of immunity to COVID-19, does not constitute a disability or make one eligible to vote early by mail under section 82.002(a). Instead, subsection (a) requires that the person's physical condition create a probability that voting in person will injure the person's health. The law leaves it to the voters to make that determination for themselves, *see ante* at ——, but they must make that determination based on the statute's requirements.

C. Mandamus relief

Finally, I agree with the Court's denial of the State's request for mandamus relief. Up to this point, the State and the Respondents (and others) have engaged in a legitimate disagreement over the meaning of section 82.002(a). Now that the Court has resolved that issue, Respondents, like the voters and other election officials, must accept and abide by the statute's restrictions as the Court construes it. Voters who claim to have a disability under section 82.002(a) merely because they lack immunity to COVID-19 or have a fear or concern about contracting the virus would do so in violation of the statute. And although, as the State acknowledges, election officials have no responsibility to question or investigate a ballot application that is valid on its face, they are not free to advise or instruct voters to ignore or violate the statute's requirements. But because I share the Court's confidence that Respondents will "comply with the law in good faith," ante at ——, I join its judgment denying the State's petition.

Justice Bland , concurring.

The Texas Election Code does not permit all Texas voters who lack immunity to the COVID-19 virus to vote by mail. Lack of immunity to the COVID-19 virus will not, for all voters, create a likelihood that in-person voting will injure their health. But a lack of immunity to disease is a physical condition. And a voter who lacks COVID-19 immunity may be disabled under the Election Code if the voter's lack of immunity, together with that voter's health history and the local voting environment, causes a likelihood that in-person voting will injure the voter's health. Accordingly, I disagree with the Court that a "physical condition" under the Election Code excludes a lack of immunity to COVID-19. I otherwise join the Court's opinion denying relief.

I

Voting-by-mail has existed in Texas for nearly 100 years.[1] Since 1935, Texas has permitted an eligible voter who is disabled, as the statute defines it, to request a mail-in ballot.[2] Originally, vote-by-mail applications based on disability required a physician's certificate.[3] But the Legislature eliminated that requirement in 1981.[4] It again declined to require proof of disability when it recodified the Election Code in 1985.[5]

*16 The current Election Code provides that an eligible voter may request a mail-in ballot for five reasons: absence from the voter's county of residence, disability, reaching age 65, confinement in jail, or participation in a confidentiality program.[6] To receive a mail-in ballot, the voter must sign an application containing "an indication of the ground of eligibility" to vote absentee.[7] The law requires no further explanation, but it is a crime to falsify information on an application.[8]

To request a mail-in ballot based on disability, the voter must have "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of ... injuring the voter's health."[9] These requirements appear in Texas Election Code section 82.002:

> DISABILITY. (a) A qualified voter is eligible for early voting by mail if the voter has a sickness or *physical condition* that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.
>
> (b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).[10]

The State maintains, among other grounds for requesting relief, that a lack of COVID-19 immunity is not a "physical condition" under section 82.002, and thus no voter is entitled to vote by mail on that basis. The Harris County Clerk takes the polar opposite position—that all Harris County voters are "disabled" on Election Day.[11] To resolve this dispute, we must determine the meaning of a "physical condition" and its place in the overall definition of disability.

II

A

Because the Election Code does not define "physical condition," we look to its "common, ordinary meaning."[12] The parties do not dispute that "physical" means "of or relating to the body."[13] "Condition" means "*the state of something*, especially with regard to its appearance, quality, or working order."[14] In particular, it means "a person's or animal's state of health or physical fitness."[15] The reasonable reading of these definitions—analyzed individually and in connection with one another—is that a lack of immunity, dealing as it does with the *state* of a person's immune system (part of the *physical body*) is a "physical condition."

*17 Reading "physical condition" to exclude a lack of immunity to disease is too narrow a construction. The Legislature could have left the definition of disability at "sickness" or qualified "physical condition"; it did not.[16] It could have used "physical limitation" or "physical defect" or "physical ailment"; it did not. Section 82.002 subsection (b) instructs that "expected or likely confinement for childbirth" qualifies as a disability under subsection (a).[17] Expecting a child is not an "unusually defective state of health"—one can be healthy and pregnant. Instead, subsection (b)'s inclusion of a "non-limiting example," *see* Tex. Att'y Gen. Op. No. KP-0009 2 (2015), indicates that the Legislature intended for "physical condition" to mean something broader than a defective physical state. We should not read "physical condition" to exclude lack of immunity to COVID-19 when the term's plain meaning indicates otherwise.[18]

The State relies on a tertiary dictionary definition of "condition" to mean an "illness or medical problem," and posits that a lack of immunity is neither. The more common definition, however, is not limited—the term more commonly means "a person's or animal's state of health or physical fitness."[19] Here, the Legislature provides no indication in the Election Code that a "physical condition" is limited to any particular physical attribute that creates the likelihood of injury to the voter's health from voting in-person.[20] Understanding "physical condition" to mean simply "an illness or medical problem," gives the term a meaning akin to sickness, rendering it, inappropriately, "mere surplusage."[21]

The term is better understood according to its usual definition: a physical state of the body, but in this context only one that creates a likelihood of injury from in-person voting. [22]

*18 And that physical state is not the same for any two individuals. In that sense, we are all atypical, with widely variable abilities to combat disease. "Physical condition" covers those physical attributes that determine a person's state of health. We interpret the words the Legislature has chosen, and we assume they have chosen the words with care. [23] Applying those words, a lack of immunity is a "physical condition" under the Election Code.

B

Including a lack of immunity as a physical condition does not mean that all Texas voters who lack immunity to COVID-19 are disabled and eligible for mail-in ballots. The Court suggests that the statute must provide some limit on what qualifies as a disability; otherwise, the Legislature would have afforded mail-in ballots to all voters, and no other mail-in category is needed. And, of course, the statute provides substantial limits. First, the statutory definition eliminates anything *not* physical from consideration—thus, a generalized fear of contracting COVID-19 or some non-physical reason does not entitle a voter to apply for a mail-in ballot based on a disability. Second, the statute requires that the voter's "physical condition" cause a "likelihood" of injury to the voter's health from in-person voting. [24] Without that likelihood, a person is not disabled and not eligible to vote-by-mail for that reason.

A local community containing a high number of people with active infection of a contagious virus presents a health risk for some voters—specifically, those who lack immunity and have health histories or physical attributes that make them susceptible to the worst effects of the disease. But not all areas of Texas are affected—or are affected to the same degree—and the Secretary of State has prepared plans so that voters may vote safely. The level of active infection and protective measures affect the voting environment and, in turn, affect whether any "likelihood" of injury to one's health by in-person voting exists. When coupled with the voter's health history and the level of active infection in the voter's community, a lack of immunity may or may not lead the voter to conclude that in-person voting is likely to injure the voter's health.

The Court acknowledges that other health deficits might qualify as physical conditions but that a lack of immunity "without more" is not a physical condition. This ignores typical physical states and past medical history that are not ailments or defects but may be contributing factors for an individual voter (age, gender, past lung ailments, smoking history, and weight, to name a few). [25] In any event, the "more" does not transform a lack of immunity into a condition; rather, it affects the risk level associated with having that condition. A lack of immunity may present no likelihood at all that in-person voting will injure a voter. But that same lack of immunity might place a voter at risk based on the voter's innumerable other physical characteristics and the voting environment—the physical condition does not change; it is the risk associated with that condition that changes.

*19 The Election Code does not define likelihood. The State suggests that "likelihood" means "probably," and we have defined it that way. [26] Determining the "likelihood" of injury from a lack of immunity depends entirely on an individual voter's overall physical condition, voting environment, and health history. We cannot predict—and neither can election officials— whether the likelihood of contracting COVID-19 is probable, or whether "a lack of immunity alone" could likely cause injury from voting in person." The Election Code does not suggest that such a probability is for a county election official or a court to determine.

Rather, the plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a "physical condition" will cause a "likelihood" that voting in person will injure the voter's health. The respondent county clerks have a ministerial duty to approve a voter's properly completed application for a mail-in ballot based on a "disability." [27] They have no duty—or right—to inquire into a voter's health history or to instruct a voter as to whether the voter has a disability. [28] Election officials are not health care providers. Government officials do not inquire into the health of a citizen in connection with that citizen's exercising the right to vote. [29]

Thus, under the Election Code, an election official may neither dictate that a voter without immunity is disabled, nor dictate the opposite conclusion. No such mandate is present in the statute. Recognizing this, the Texas Secretary of State's office has informed local election officials that they

may not deny a ballot to voters who claim to be disabled, because local election officials "do not have any authority to police that." [30] Instead, the Legislature left it to the voter to make that determination. It is not the place of election officials to categorically determine whether lack of immunity to COVID-19 is, or is not, a "physical condition that prevents [a] voter from appearing at the polling place on election day without a likelihood ... of injuring the voter's health." [31]

Finally, the State observes that voting by mail presents particular challenges to ensuring the integrity of the state's elections. The majority of voting fraud cases prosecuted in the last decade were based on mail-in ballot schemes in which ballots were obtained and marked by people other than an eligible voter. A fraudulent application for a mail-in ballot should lead to prosecution against the person perpetrating the fraud. [32] But the possibility of fraud does not allow for the disenfranchisement of eligible voters who complete an application for a mail-in ballot according to the Election Code. [33]

* * *

***20** In defining a "physical condition," the Legislature did not parse out which physical attributes qualify. The Legislature, in choosing the text that it did, placed that decision in the hands of the voter. As a limitation, however, it added a second (and higher) hurdle: whatever the physical condition, that condition must create not a fear, but instead a "likelihood," that in-person voting will injure the voter's health. Election officials and courts should not supplant the voter's role in making that determination. Because we should not define a "physical condition" to except a lack of immunity to disease, I respectfully concur in the Court's judgment.

All Citations

--- S.W.3d ----, 2020 WL 2759629, 63 Tex. Sup. Ct. J. 1193

Footnotes

1 TEX. ELEC. CODE §§ 82.001 (absence from county of residence), 82.002 (disability), 82.003 (age), 82.004 (confinement in jail), and 82.007 (participation in address confidentiality program).

2 *Id.* § 82.002.

3 While respondents oppose mandamus relief, they join petitioner in asking that we answer this question.

4 Respondents are the County Clerks of Harris and Travis Counties, and the Election Administrators of Dallas, Cameron, and El Paso Counties. They have all appeared separately, and their positions here appear to differ somewhat, but we will refer to them collectively where possible.

5 News Release, Tex. Dep't. of State Health Servs., DSHS Announces First Case of COVID-19 in Texas (Mar. 4, 2020), https://www.dshs.texas.gov/news/releases/2020/20200304.aspx.

6 *Texas Case Counts*, TEX. DEP'T. OF STATE HEALTH SERVS., https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83 (last visited on May 27, 2020).

7 *Coronavirus Disease 2019 (COVID 19)*, TEX. DEP'T OF STATE HEALTH SERVS., https://www.dshs.texas.gov/coronavirus/ (last visited May 26, 2020).

8 The Governor of the State of Tex., Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2094 (2020).

9 The Governor of the State of Tex., Exec. Order GA-14, 45 Tex. Reg. 2361, 2369 (2020).

10 Press Release, Office of the Tex. Governor, Governor Abbott Announces Phase One To Open Texas, Establishes Statewide Minimum Standard Health Protocols (April 27, 2020), https://gov.texas.gov/news/post/governorabbott-announces-phase-one-to-open-texas-establishes-statewide-minimum-standard-health-protocols.

11 Press Release, Office of the Tex. Governor, Governor Abbott Announces Phase Two To Open Texas (May 18, 2020), https://gov.texas.gov/news/post/governor-abbott-announces-phase-two-to-reopen-texas.

12 These included the League of Women Voters of Texas, League of Women Voters Austin Area, MOVE Texas Action Fund, and Workers Defense Action Fund.

13 Tex. Att'y Gen., Guidance Letter on Ballot by Mail Based on Disability (May 1, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in% 20Ballot% 20Guidance% 20Letter05012020.pdf.

14 Press Release, Tex. Att'y Gen., AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws (May 1, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-advises-county-officialsavoid-misleading-public-vote-mail-laws.

15 *Tex. Democratic Party v. Abbott*, No. SA-20-CA-438-FB, —— F.Supp.3d ——, ——, 2020 WL 2541971, at *13 (W.D. Tex. May 19, 2020).

16 *Id.*

17 *Id.* at —— – ——, 2020 WL 2541971, at *28–32.

18 *Id.* at ——, 2020 WL 2541971, at *5.

19 *Id.* at ——, 2020 WL 2541971, at *6.

20 *Id.* at ——, 2020 WL 2541971, at *7.

21 *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080 (5th Cir. May 20, 2020).

22 TEX. ELEC. CODE § 273.061.

23 Zach Despart, *Harris County OKs up to $12M for mail ballots amid corona virus concerns*, HOUST. CHRON. (Apr. 28, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-OKs-up-to-12Mfor-mail-ballots-15232775.php.

24 *Id.*

25 *Id.*

26 *Id.*

27 Supp. MR at 13.

28 TEX. ELEC. CODE § 273.061.

29 *See* TEX. R. APP. P. 52.3(e).

30 *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001).

31 TEX. ELEC. CODE § 82.002(a).

32 The position of the County Clerk of Harris County is clearest. The El Paso County Election Administrator joins the Harris County Clerk's "textual analysis" of § 82.002 in passing. El Paso Br. at 23. The County Clerk of Travis County contends that the district court's temporary injunction properly defined "disability." Travis Br. at 16–17. According to the Clerk, lack of immunity to COVID-19 is a disability given the disease's extremely contagious nature and the lack of knowledge about the virus.

33 Act of May 26, 1917, 35th Leg., 1st C.S., ch. 40, § 1, 1917 Tex. Gen. Laws 62, 63–64.

34 Act of Mar. 12, 1921, 37th Leg., R.S., ch. 113, § 1, 1921 Tex. Gen. Laws 217, 218.

35 *Id.* at 219.

36 Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 Tex. Gen.. Laws 5, 5–6.

37 Act of May 17, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700.

38 *Id.* § 2, at 701–702.

39 Act of May 30, 1951, 52nd Leg., R.S., ch. 492, § 1, 1951 Tex. Gen. Laws 1097, 1109–1113.

40 Act of May 24, 1963, 58th Leg., R.S., ch. 424, § 14, 1963 Tex. Gen. Laws 1017, 1034.

41 Act of Mar. 27, 1969, 61st Leg., R.S., ch. 82, § 1, 1969 Tex. Gen. Laws 202, 203.

42 Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082.

43 Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 855.

44 Act of May 21, 1991, 72nd Leg., R.S., ch. 1234, § 1.02, Tex. Gen. Laws 831, 831.

45 Act of May 25, 2007, 80th Leg., R.S., ch. 1295, § 7, 2007 Tex. Gen. Laws 4354, 4360.

46 Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802, 897.

47 TEX. ELEC. CODE § 82.001.

48 *Id.* § 82.002.

49 *Id.* § 82.003.

50 *Id.* § 82.004.

51 *Id.* § 82.007; *see* TEX. CODE CRIM. PROC. arts. 56.81–56.93.

52 TEX. ELEC. CODE § 82.002(a).

53 *Id.* § 82.002(b).

54 *Physical*, MERRIAM-WEBSTER ONLINE (2020).

55 *Condition*, MERRIAM-WEBSTER ONLINE (2020).

56 *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) ("While we must consider the specific statutory language at issue, we must do so while looking to the statute as a whole, rather than as 'isolated provisions.' " (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)).

57 *Condition*, MERRIAM-WEBSTER UNABRIDGED (2020).

58 The Harris County Clerk argues that this heading of the statute cannot "limit or expand the meaning of a statute", per § 311.024 of the Texas Government Code. But here, "disability" is not merely a heading; it is the determinative word the absentee voting statutes used for fifty years. Nothing in the statutory history of absentee voting or the 1985 recodification suggests that "disability" does not continue to define the statutory categories described.

59 *See* El Paso Resp. Br. at 14.

60 *See id.* at 10.

61 TEX. ELEC. CODE § 86.001(a).

62 *Id.* at § 86.001(b).

63 *Id.* at § 86.001(c).

64 Post-Sub. Br. at 9.

65 Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 855.

66 APPLICATION FOR A BALLOT BY MAIL, TEXAS SECRETARY OF STATE, https://webservices.sos.state.tx.us/forms/5-15f.pdf.

67 *Id.*

1 TEX. ELEC. CODE § 82.002(a). The Code also provides that "[e]xpected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote [by mail] under Subsection (a)," *id.* § 82.002(b), but that provision is not at issue in this mandamus proceeding.

2 *Ante* at —— & —— ("[L]ack of immunity to COVID-19 is not itself a 'physical condition' that renders a voter eligible to vote by mail within the meaning of § 82.002(a)."); *post* at —— (Boyd, J., concurring) ("[A] person's lack of immunity to COVID-19 can constitute a 'physical condition' .... But even when it does, the voter is not eligible to vote early by mail unless, because of the voter's physical condition, voting in person will probably injure the voter's health."); *post* at —— (Bland, J., concurring) ("The Texas Election Code does not permit all Texas voters who lack immunity to the COVID-19 virus to vote by mail.").

3 *See ante* at —— – —— (lack of COVID-19 immunity is not a physical condition under the statute because it is not "an abnormal or at least distinguishing state of being"); *post* at —— (Boyd, J., concurring) (under section 82.002(a) a "physical condition" means a "bodily state of being that limits, restricts, or reduces a person's physical abilities," which may include lack of immunity, but such condition is a "disability" only to the extent injury is probable based on that condition and other factors); *post* at ——, —— – —— (Bland, J., concurring) (lack of immunity to COVID-19 is a "physical condition" under the statute but whether it is a "disability" under the Election Code requires a probability that the condition would result in injury, depending on health and environmental circumstances unique to each individual).

4 *Ante* at —— ("We agree ... that a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code."); *post* at —— – —— & —— (Boyd, J., concurring) (lack of immunity to COVID-19 may, but does not necessarily, constitute a "physical condition" or give rise to a "likelihood" of injury; accordingly, "[v]oters who claim to have a disability under section 82.002(a) *merely* because they lack immunity to COVID-19 or have a fear or concern about contracting the virus would do so in violation of the statute"); *post* at —— (Bland, J., concurring) ("Lack of immunity to the COVID-19 virus will not, for all voters, create a likelihood that in-person voting will injure their health.").

5 *Ante* at —— ("The parties agree that this excludes mental or emotional states, including a generalized fear of a disease."); *post* at —— n.2 (Boyd, J., concurring) ("Because a 'physical condition' must be *physical*, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition."); *post* at —— (Bland, J., concurring) ("[T]he statutory definition eliminates anything *not* physical from consideration—thus, a generalized fear of contracting COVID-19 or some non-physical reason does not entitle a voter to apply for a mail-in ballot based on a disability.").

6 *Ante* at —— (observing "that 'likelihood' means a probability"); *post* at —— (Boyd, J., concurring) ("[T]he term 'likelihood' refers to a 'probability,' as opposed to mere 'possibility.' " (citing *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018), and *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010)); *post* at —— (Bland, J., concurring) (observing the Court has defined "likelihood" as meaning "probably" (citing *K.E.W.*, 315 S.W.3d at 23)).

7 *Ante* at ——, —— ("The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability[.]' "; "We agree ... a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability. We disagree that lack of immunity, by itself, is one of them."; and "[E]lection officials have no responsibility to question or investigate a ballot application that is valid on its face."); *post* at —— (Boyd, J., concurring) ("Whether a person's sickness or physical condition creates a 'likelihood' that voting in person 'at the polling place on election day' will cause injury to the person's health depends on innumerable factors, including the nature of the person's sickness or physical condition, the person's health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises."); *post* at —— & —— (Bland, J., concurring) ("When coupled with the voters' health history and the level of active infection in the voter's community, a lack of immunity may or may not lead the voter to conclude that in-person voting is likely to injure the voter's health. ... [T]he plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a 'physical condition' will cause a 'likelihood' that voting in person will injure the voter's health.").

8 *See Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019) ("[R]easonable minds often disagree about how a statute may reasonably be construed.").

9 Alexander Hamilton, *The Papers of Alexander Hamilton*, Vol III, pp. 544-45, Harold C. Syrett, ed. (New York, Columbia Univ. Press, 1962) ("A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.").

10 *See* Hon. Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y, 743, 752-53 (2014).

11 *Ante* at —— – ——.

1 *See also Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014) ("[O]ur text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence."); *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (plurality op.) ("We thus begin our analysis with the statute's words and then consider the apparent meaning of those words within their context.").

2 Because a "physical condition" must be physical, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition under section 82.002(a).

3 A group of healthcare professionals and institutions that submitted an amicus curiae brief asserts that "the rate of transmission likely to result from a mass congregation cannot be quantified precisely." They also submitted the declaration of a medical doctor, however, who asserts that voters will in "reasonable medical probability" face "a likelihood of injuring their health, if they appear at a polling place on Election Day," creating a "likelihood of injuring their own health at an open polling place where people congregate, even with all, good faith attempts to control massing." Even if we accepted this declaration as undisputed fact, however, it does not and cannot speak to the specific circumstances any particular voter will experience at the polling place on election day.

1 *See ante* ——, (explaining that voting before election day has been permitted by statute in Texas since 1917 and vote-by-mail since 1933) (first citing Act of May 26, 1917, 35th Leg. 1st C.S., ch. 40, § 1, 1917 Tex. Gen. Laws 62, 63–64; then citing Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 Tex. Gen. Laws 5, 5-6).

2 *See* Act of May 10, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700–01.

3 *See id.*, 1935 Tex. Gen. Laws at 701.

4 *See* Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 854–55 (striking this requirement from Texas law).

5 Act of May 24, 1985, 69th Leg., R.S., ch. 211, § 1, secs. 82.002, 84.001, 1985 Tex. Gen. Laws 802, 897, 901 (codified at TEX. ELEC. CODE §§ 82.002, 84.001–.002).

6 TEX. ELEC. CODE §§ 82.001, .002, .003, .004, .007.

7 *Id.* § 84.002(a)(6).

8 *Id.* § 84.0041(a) ("A person commits an offense if the person: (1) knowingly provides false information on an application for ballot by mail; (2) intentionally causes false information to be provided on an application for ballot by mail; (3) knowingly submits an application for ballot by mail without the knowledge and authorization of the voter; or (4) knowingly and without the voter's authorization alters information provided by the voter on an application for ballot by mail."). An offense under section 84 "is a state jail felony." *Id.* § 84.0041(b).

9 *Id.* § 82.002(a).

10 *Id.* (emphasis added).

11 According to the Harris County Clerk, "all voters should be free to vote by mail in the July 14 run-off and the November election."

12 *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality opinion) ("When a statute uses a word that it does not define, our task is to determine and apply the word's common, ordinary meaning."); *see also BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 87 (Tex. 2017) ("We must rely on the words of the statute, rather than rewrite those words to achieve an unstated purpose." (quoting *Jaster*, 438 S.W.3d at 571)).

13 *Physical*, AMERICAN HERITAGE DICTIONARY (5th ed. 2020); *Physical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/physical (last visited May 25, 2020); *see also Physical*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining "physical" as "relating to the body as opposed to the mind ...."). The Court analyzes undefined words by reviewing dictionary definitions. *Jaster*, 438 S.W.3d at 563 (citing *Epps v. Fowler*, 351 S.W.3d 862, 873 (Tex. 2011) (Hecht, J., dissenting) ("The place to look for the ordinary meaning of words is ... a dictionary.")).

14 *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (emphasis added); *see also Condition*, AMERICAN HERITAGE DICTIONARY (5th ed. 2020) (defining "condition" as "[a] mode or state of being"); *Condition*, MERRIAM-WEBSTER, https://www merriam-webster.com/dictionary/condition (last visited May 25, 2020) (defining "condition" as "a state of being").

15 *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). The New Oxford American Dictionary's first definition ("subsense") under the main definition ("core sense") is "a person's or animal's state of health or physical fitness." *Id.* "[A]n illness or other medical problem" follows only after that. *Id.* And, in using that dictionary as a reference, "readers can be confident that the first definition they see is the one most likely to be used by people today ...." NEW OXFORD AMERICAN DICTIONARY, https://www.oxfordreference.com/view/10.1093/acref/9780195392883.001.0001/acref-9780195392883 (last visited May 25, 2020). *See also* OXFORD ENGLISH DICTIONARY (3d ed. 2000) (privileging the definition "[a] particular mode of being of a person or thing; state of being" over the definition "[a] state of health, esp. one which is poor or abnormal; a malady or sickness").

16 We have said that "by not reading language into the statute when the legislature did not put it there ... we build upon the principle that 'ordinary citizens [should be] able to rely on the plain language of a statute to mean what it says.' " *City of Rockwall v. Hughes*, 246 S.W.3d 621, 628 (Tex. 2008) (alteration in original) (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)).

17 TEX. ELEC. CODE § 82.002(b) ("Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).").

18 Further, titles do not inform the meaning of a statute. "The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." TEX. GOV'T CODE § 311.024; *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 47 n.4 (Tex. 2015) ("When the plain meaning of a statute controls, ... the title of the section carries no weight, as a heading does not limit or expand the meaning of a statute." (quotation marks omitted)). Replacing the Legislature's definition of disability with a different one is unwarranted.

19 *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

20 *See Tex. Dep't of Criminal Justice v. Rangel*, 595 S.W.3d 198, 210 (Tex. 2020) (observing that we " 'may not impose [our] own judicial meaning on a statute by adding words not contained in the statute's language,' and we presume that 'the Legislature purposefully omitted words it did not include' " (alteration in original) (quoting *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019))).

21 *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) ("Our objective is to ascertain and give effect to the Legislature's intent as expressed in the statute's language. In doing so, we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage." (footnote omitted)). The State defines sickness as the "state of being ill" or "having a particular type of illness or disease."

22 TEX. ELEC. CODE § 82.002.

23 *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325–26 (Tex. 2017) ("We presume the Legislature 'chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.' " (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011))).

24 TEX. ELEC. CODE § 82.002.

25 *See* CDC COVID-19 RESPONSE TEAM, MORBIDITY & MORTALITY WEEKLY REPORT, PRELIMINARY ESTIMATES OF THE PREVALENCE OF SELECTED UNDERLYING HEALTH CONDITIONS AMONG PATIENTS WITH CORONAVIRUS DISEASE 2019 — UNITED STATES, FEBRUARY 12–MARCH 28, 2020, at 383–85 (Mar. 31, 2020), http://dx.doi.org/10.15585/mmwr.mm6913e2.

26 *See State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (recognizing that "reasonable probability" is synonymous with "likelihood' ").

27 TEX. ELEC. CODE § 86.001(a)–(b).

28 The State concedes that election clerks "have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly." To be entitled to vote-by-mail, a person must complete an application, stating the ground of eligibility. TEX. ELEC. CODE § 84.001(a). A voter is "entitled" to vote by mail based on the application the voter submits to the state. Chapter 86 includes no authorization to reject an application based on an election clerk's determination of its veracity. *Compare* Act of May 24, 1985, 69th Leg., R.S., ch. 211, § 1, secs. 82.002, 84.001, 1985 Tex. Gen. Laws 802, 897, 901 (codified at TEX. ELEC. CODE §§ 82.002, 84.001), *with* Act of May 10, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700–01. The Attorney General has opined that no proof of disability is required in prior guidance. Tex. Att'y Gen. Op. No. KP-0009 2 n.2 (2015).

29 *See* TEX. ELEC. CODE § 86.001.

30 The Texas Secretary of State is the State's chief election officer. *See id.* § 31.003 ("The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code.").

31 *Id.* § 82.002(a).

32 *See id.* §§ 84.0041, 273.021, 273.022.

33 The right to vote is the "preservative of all rights." *Shelby County v. Holder*, 570 U.S. 529, 566, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)).

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United States District Court, D. Nevada.

Stanley William PAHER, et al., Plaintiffs,
v.
Barbara CEGAVSKE, in her official capacity as Nevada Secretary of State, et al., Defendants.

Case No. 3:20-cv-00243-MMD-WGC
|
Signed 05/27/2020

Attorneys and Law Firms

James Bopp, Jr., Pro Hac Vice, Richard E. Coleson, Pro Hac Vice, Amanda Narog, Pro Hac Vice, Corrine Youngs, Pro Hac Vice, The Bopp Law Firm PC, Terre Haute, IN, David C. O'Mara, The O'Mara Law Firm, P.C., Reno, NV, for Plaintiffs Stanley William Paher, Terresa Monroe-Hamilton, Garry Hamilton.

Amanda Narog, Terre Haute, IN, David C. O'Mara, The O'Mara Law Firm, P.C., Reno, NV, for Plaintiffs Daryl Bryon DeShaw, Mark Ecker, Gary Gladwill, Linda Barnett, Nevada Right to Life.

Gregory Louis Zunino, Nevada State Attorney General's Office, Craig A. Newby, Office of the Attorney General, Carson City, NV, for Defendant Barbara Cegavske.

Herbert B. Kaplan, Reno, NV, for Defendant Deanna Spikula.

Mary-Anne M. Miller, Clark County District Attorney, Las Vegas, NV, for Defendant Clark County Registrar of Voters.

ORDER

MIRANDA M. DU, CHIEF UNITED STATES DISTRICT JUDGE

I. SUMMARY

*1 The Court has already ruled in this case. *See Paher et al. v. Cegavske, et al.*, No. 3:20-cv-00243-MMD-WGC, —— F. Supp. 3d ——, 2020 WL 2089813 (D. Nev. Apr. 30, 2020). But Plaintiffs then amended their complaint ("AC") (ECF No. 64) and brought a new motion for preliminary injunction ("Second PI Motion") (ECF No. 65). The AC consists of four claims and materially rehashes the original complaint except for the addition of more Plaintiffs and a new claim against a new Defendant—Joseph P. Gloria in his official capacity as the Registrar of Voters for Clark County ("Clark Registrar"). (*Compare* ECF No. 1 *with* ECF No. 64.) The Second PI Motion is in gist largely a motion for reconsideration; albeit, it glaringly repackages old arguments to achieve a different disposition without necessary justification. Plaintiffs' decision to bring the AC at this late hour, as opposed to seeking expedited appellate review of the Court's order ("PI Order") regarding their original motion for preliminary injunction ("First PI Motion") (ECF No. 57), is confounding and contrary to their position that a quick disposition of this matter is needed due to the impending June 9, 2020 Nevada primary election ("June Primary") (*see* ECF Nos. 1, 2, 3, 4). Ultimately, Plaintiffs' second proverbial bite at the apple is no more fruitful than the first. And the new fourth claim challenging Clark County essentially making mail-in ballots more accessible to registered voters is legally tenuous because Defendants are not constitutionally prohibited from making voting easier. The Court will deny the Second PI Motion for the reasons below. [1]

II. BACKGROUND

The facts of this case have been largely recited in the Court's PI Order (ECF No. 57). The Court will not repeat the facts as previously stated here. Additional facts are taken from the AC (ECF No. 64) and exhibits attached thereto as well as other evidence submitted concerning the Second PI Motion.

A. The Parties

As relevant to the Second PI Motion, the field of Plaintiffs and Defendants have expanded. As a reminder, the original Plaintiffs are William Paher, Gary Hamilton, and Terresa Monroe-Hamilton. They previously sued only Nevada's Secretary of State Barbara Cegavske (the "Secretary") and Deanna Spikula—Registrar of Voters for Washoe County ("Washoe Registrar").

The new individual plaintiffs are Daryl Byron DeShaw, Jeff Ecker, Gary Gladwill, and Linda Barnett. All are eligible-registered voters. DeShaw and Ecker intend to vote in person while Gladwill and Barnet have already voted by mail. Gladwill, who is a resident of Lyon County, is also a candidate for county commissioner in that county. In addition to the new individual plaintiffs, the entity Nevada Right to Life ("NVRTL") is also included as a plaintiff. NVRTL advocates "for life in all of its stages and all ages" and have members,

who are eligible-registered voters "who intend to vote in the coming primary but fear disenfranchisement." (ECF No. 64 at 4.)

*2 These Plaintiffs collectively sue the Secretary, the Washoe Registrar and the Clark Registrar (collectively, "Defendants"). (*Id.* at 4–5.) Like the Washoe Registrar in Washoe County, the Clark Registrar is responsible for implementing the state's election laws in Clark County. (*Id.*)

B. Relevant Facts

As provided in the PI Order, the impetus for Plaintiffs' lawsuit is to enjoin the implementation of the all-mail election for the June Primary ("the Plan"). The Secretary developed the Plan in partnership with Nevada's 17 county election officials to diminish the spread of the novel coronavirus disease 2019 ("COVID-19") pandemic. In the PI Order, the Court summed up the original Plaintiffs' claims as largely contending that the Plan was inconsistent with Nevada law and violated the United States Constitution because it is not "chosen" by Nevada's Legislature, and that an all-mail election strips voter-fraud-prevention safeguards and unconstitutionally violates Plaintiffs' right to vote due to purported vote dilution resulting in disenfranchisement. (*See* ECF Nos. 1, 57.)

In the PI Order, the Court concluded as a threshold matter that Plaintiffs lacked standing because they had not established an injury particularized to them. (ECF No. 57 at 2, 8–10.) The Court additionally found that Plaintiffs were unlikely to succeed on the merits of any of their claims chiefly because: (1) Nevada's interests in protecting the health and safety of Nevada's voters and to safeguard the voting franchise are compelling and longstanding interests that outweighed what amounts to Plaintiffs' preference for in-person voting under the *Anderson-Burdick* balancing test[2]; and (2) the Plan is consistent with Nevada law because the Secretary has been vested with the authority to implement it. (*Id.* at 10–22.) The Court also concluded that a balancing of the equities and the public interest weigh against the granting of an injunction. (*Id.* at 22–24.)

In the AC, Plaintiffs assert the following four claims: (1) the Plan violates the fundamental right to vote by direct disenfranchisement in violation of the First and Fourteenth Amendments of the United States Constitution; (2) the Plan violates the fundamental right to vote by vote-dilution disenfranchisement in violation of the same; (3) the Plan violates Article I, Section 4, Clause 1 of the Constitution; and (4) Clark County's plan to send mail-in ballots to all registered voters and to allow for the collection of ballots ("Clark County's Plan" or "CC Plan") violates the Fourteenth Amendment's Equal Protection Clause.[3] (ECF No. 64 at 20–25.) As to the CC Plan, Plaintiffs particularly highlight Clark County's plan to: (i) send absent ballots to inactive registered voters and, as reported, "allow a bipartisan group of deputized 'field registrars' to collect sealed ballots from voters"; and (ii) create more vote centers than other Nevada counties. (ECF No. 64 at 2.)

The AC and the Second PI Motion, particularly as to the first three claims, are brought under the theory that the threats surrounding the spread of COVID-19 have diminished and that current social distancing measures are adequate to respond to concerns about public health such that enjoining the Plan is now merited. (*See id.* at 14–17; ECF No. 65 at 2–3.) In so contending, Plaintiffs rely heavily on articles and/or information concerning other states—not Nevada—reopening, deciding not to allow vote by mail, and about COVID-19 cases allegedly having not spiked two weeks after the infamous Wisconsin primary.[4] (*Id.*)

*3 But not much has changed in Nevada since the Court issued the PI Order. COVID-19 continues to present a threat to public health. It is undisputed that the state continues to grapple with protecting the public from COVID-19 and remains under a declaration of state emergency.[5] Nevada is still in the initial stage of reopening—phase one—with a recent announcement for phase two to start on May 29, 2020.[6] *See id.* Under Nevada's phase one guidelines, most business and entities remain closed and/or subject to significant restrictions and local government and businesses are empowered to take even stricter social distancing guidelines than the statewide standards.[7] Moreover, Nevada's Governor, Steve Sisolak, continues to direct and "strongly encourage[ ]" Nevadans to stay home "[r]ecognizing that COVID-19 is still present in Nevada and highly contagious."[8] "Nevadans are advised that they are safer at home and should avoid interpersonal contact with persons not residing in their households to the extent practicable."[9] Public gatherings of individuals not of the same household are limited to no more than ten, though the limit will be increased to 50 in phase two.[10] And Governor Sisolak has repeatedly cautioned that phased lifting of restrictions depends on Nevada achieving established virus

containment benchmarks, the failure of which may lead to restrictions being imposed again as needed.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 governs preliminary injunctions. " 'An injunction is a matter of equitable discretion' and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.' " *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 32 (2008)). This relief is "never awarded as of right." *Alliance for the Wild Rockies v. Cottrell ("Alliance")*, 623 F.3d 1127, 1131 (9th Cir. 2011). To qualify for a preliminary injunction, a plaintiff must satisfy four requirements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public interest. *See Winter*, 555 U.S. at 20. A plaintiff may also satisfy the first and third prongs by showing serious questions going to the merits of the case and that a balancing of hardships tips sharply in plaintiff's favor. *Alliance*, 632 F.3d at 1135 (holding that the Ninth Circuit's "sliding scale" approach continues to be valid following the *Winter* decision).

On the merits-success prong, "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *see also id.* at 428 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

IV. DISCUSSION

Beyond the merits of the AC, the Court will deny the Second PI Motion for three reasons: (1) lack of standing; (2) based on laches; and (3) under the *Purcell* [11] principle.

A. Standing

The Court finds that Plaintiffs have not remedied their lack of standing, which based on the PI Order and the Court's conclusions *infra* most directly concerns the instant first three claims. "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The party invoking federal jurisdiction must show that it has standing for each type of relief sought. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

***4** A party may cure a standing defect by adding parties, removing parties, or supplementing the facts of a complaint under Fed. R. Civ. P. 15. *See, e.g., Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044–48 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015), *In re Schugg*, 688 F. App'x 477, 479–80 (9th Cir. 2017); *cf. Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005) ("The initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended.") (citations omitted). However, Plaintiffs' AC suffers from the same failure to establish standing as the original complaint—Plaintiffs have again failed to allege a particularized injury.

As with the original complaint, the claims in the AC are materially grounded on ostensible election fraud that may be conceivably raised *by any Nevada voter.* Thus, Plaintiffs' claims amount to general grievances that cannot support a finding of particularized injury as to Plaintiffs. *See, e.g., Lujan*, 504 U.S. at 573–74 (explaining that U.S. Supreme Court's case law has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy").

Plaintiffs essentially seek to have the Court reconsider its finding as to standing, arguing that they do not merely assert "citizen" standing and that harm is specific to them as registered, eligible voters, who actually vote. (*See* ECF No. 65 at 19–21.) But even if the Court were to find that Plaintiffs state a particularized injury, and even if they had argued the reconsideration standard, Plaintiffs face an additional obstacle. As the Court concluded in the PI Order, Plaintiffs fail to show a nexus between the alleged violations and their claimed injury. (*See* ECF No. 57 at 10 n.7.) Here, Plaintiffs again fail to more than speculatively connect the specific conduct they challenge—that mail-in ballots are sent to Nevada voters without request for an absentee ballot—and the claimed injury—direct voter disenfranchisement or disenfranchisement through vote dilution (in sum, disenfranchisement). [12]

*5 Accordingly, Plaintiffs have failed to overcome the Court's original finding that they lack standing, thereby precluding them from seeking to enjoin the Plan—at least via the first three claims.

B. Laches

The Secretary argues that the doctrine of laches further bars Plaintiffs from obtaining equitable relief after unreasonable delay in filing the AC and the Second PI Motion. (ECF No. 78 at 8–9.) The Court agrees.

"Laches is an equitable defense." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950 (9th Cir. 2001). It precludes a plaintiff who, "with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights." *Id.* at 950–51 (quotations and citations omitted). A defendant is entitled to relief under the doctrine where the defendant proves "both an unreasonable delay by the plaintiff and prejudice to itself." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000). The Court finds, as the Secretary argues, that both factors are satisfied here.

With the following considerations, the Court agrees Plaintiffs have unreasonably delayed seeking preliminary injunctive relief. Plaintiffs brought this case in its initial form on April 21, 2020 (ECF No. 1). They requested and were granted expedited briefing and an expedited hearing (ECF Nos. 3, 14). Recognizing the urgency with which Plaintiffs indicated they brought this case and the finality that was needed, the Court issued its decision on the First PI Motion—the PI Order—two days after extensive briefing closed, on April 30, 2020. (*Compare* ECF No. 43 *with* ECF No. 57.) Plaintiffs waited 14 days after the PI Order was issued and only 26 days before the June Primary to file the AC and bring the Second PI Motion. (*See* ECF Nos. 64, 65.) In doing so, Plaintiffs again sought expedited relief. (ECF No. 66.)

Except the specific claim based on the CC Plan, the AC materially asserts no claim that could not have been raised—or that was not raised—the first time around. To be sure, Plaintiffs did not seek reconsideration of the Court's PI Order. Nor did Plaintiffs file an appeal. Moreover, the AC also indicates that Plaintiffs had notice of the CC Plan, upon which the fourth claim is grounded, by at least May 4, 2020. (ECF No. 64 at 8.) Therefore, it is inexplicable that Plaintiffs would delay bringing the AC and Second PI Motion for another nine days in light of their claimed urgency. Plaintiffs surely have not acted with the alacrity that they claim this case necessitates.

Plaintiffs' failure to seek legal relief and finality has certainly prejudiced Defendants. As noted, the June Primary was only 26 days away when Plaintiffs brought the AC and Second PI Motion. Even with expedited briefing, Plaintiffs could have anticipated that any foreseeable briefing schedule would result in a decision being issued, at minimum, several days closer to the election. Notably, since this Court issued the PI Order, mail-in ballots have been sent to Nevada voters and a substantial number of eligible voters, including Plaintiffs Gladwill and Barnett, have already sent in their mail-in ballots. (*See, e.g.*, ECF No. 74-2 at 5–6 ("By the end of April, the actual mail ballots were mailed to all active registered voters in Washoe County. Upon information and belief, all ballots for all Nevada voters have been mailed ...."); *see also id.* at 7 ("The mail-in primary election plan is in full swing ... Many voters have already completed their ballots and returned the same via mail or by dropping them off at my office."); ECF No. 64 at 9 ("Mail ballots to active, registered voters went out on May 6, 2020.").) The state has also made significant monetary investments and efforts to implement the Plan and on media and marketing campaigns to inform Nevada voters of how to exercise their right to vote via mail (ECF No. 74-1 at 4–6, ECF No. 74-3).

*6 The Court finds that Plaintiffs' second request for preliminary injunctive relief is therefore unreasonable and inequitable in seeking to undo the votes already casted by Nevadans and would result in squandering the state's investment for the sake of an unestablished specter of voter fraud. This conclusion is particularly merited where the AC and Second PI Motion are largely repetitive of the original complaint and motion. Even if the additional claim—the fourth claim based on the CC Plan—was meritorious, it would not entitle Plaintiffs to the wholesale relief of voiding the Plan, which is ultimately what Plaintiffs seek here. Even if Plaintiffs' preliminary injunction request was on firmer grounds, the Court cannot foresee any viable manner of undoing the Plan or stopping its further implementation without increasing the risks to the health and safety of Nevadans and putting the integrity of the election at risk—particularly without sufficient time to prepare an adequate alternative. (*See, e.g.*, ECF No. 74-2 at 7–9) (discussing the adverse consequences for Nevada in changing the method and processes of voting in the June Primary at this juncture). For all these reasons, the Court finds that the doctrine of laches bars Plaintiffs' second request for preliminary injunctive relief and the Court will likewise deny the request on this additional basis.

C. *Purcell*

The *Purcell* principle is yet another barrier to the grant of preliminary injunctive relief here. Of course Plaintiffs are no stranger to *Purcell*. They argued in the First PI Motion that *Purcell* bars the implementation of the Plan so close to the June Primary. (ECF No. 2 at 16–17.) The irony of Plaintiffs' argument was not lost on the Court. The Court disagreed with Plaintiffs' contention as to the state and noted that *Purcell* counseled against considering the First PI Motion. The Secretary, Washoe Registrar and Intervenor-Defendants here argue that *Purcell* is ever more relevant now where Plaintiffs seek to change the state's Plan governing the June Primary because the election is days away and Nevadans are already exercising their right to vote. (*See* ECF No. 72 at 15–16; ECF No. 74 at 4, 30–33; ECF No. 78 at 2, 9.) The Court agrees.

The *Purcell* principle provides that near an impending election court orders themselves risk debasement and dilution of the right to vote because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. at 4–5. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm. ("RNC")*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*; *Frank v. Walker*, 574 U.S. 929 (2014); and *Veasey v. Perry*, 574 U. S. ——, 135 S. Ct. 9 (2014)); *see also Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 405 (E.D. Pa. 2016) ("Federal intervention at this late hour risks 'a disruption in the state electoral process [which] is not to be taken lightly.' 'This important equitable consideration goes to the heart of our notions of federalism.' ") (alteration in original) (citation and quotation omitted). This principle is particularly pertinent where plaintiffs ask courts to "impose large-scale changes to the election process." *Bryan v. Fawkes*, 61 V.I. 416, 469 (2014) (collecting cases).

The Court will follow the *Purcell* principle and declines to take any action to alter the Plan at this late hour. The Court is reassured that such is the right course in light of the exceptional relief that Plaintiffs request in the AC, which would completely upend the June Primary. Among other things, Plaintiffs seek injunctive relief ordering Defendants to disregard the mail ballots that have already been sent to voters and to notify voters that their mailed in ballots will not be counted; to undertake a counter media public information campaign to notify "every registered voter" of the changes Plaintiffs seek; and to undo the CC Plan. (*See* ECF No. 64 at 25–26.) Going along with Plaintiffs' request would surely cause great disruption and confusion for Nevada voters. Plaintiffs' request is therefore in many ways more injurious to Nevada voters at this juncture than the very grounds underlying the AC, particularly given the speculative claimed of voter disenfranchisement. The Court therefore also denies a grant of preliminary injunctive relief based on *Purcell*.

D. Touching Upon the Merits

*7 Touching upon the merits, it is also clear that Plaintiffs' claims should be plainly rejected.

Plaintiffs' second and third claims are foreclosed by the PI Order because they are materially the same as the second and third claims alleged in the original complaint. (*Compare* ECF No. 1 *with* ECF No. 64.) Plaintiffs effectively seek reconsideration of these claims without establishing the requirements of Fed. R. Civ. P. 60, which governs a motion for reconsideration. (*See generally* ECF No. 65 (providing no Rule 60 arguments).) [13] The Court therefore adopts its rulings from the PI Order and likewise find that Plaintiffs are unlikely to succeed on the merits of these claims. [14]

Plaintiffs' first claim, despite discretely alleging direct disenfranchisement, in many ways echoes Plaintiffs' second and third claims. The crux of this claim is Plaintiffs' assertion that "[d]ue to ... widespread disenfranchisement caused by not abiding by the legislature's law, the Plan violates the right to vote by direct disenfranchisement." (ECF No. 64 at 22.) The first claim therefore also seeks to avoid the Court's ruling in the PI Order, where the Court concluded that the Plan is consistent with Nevada law and within the authority conferred upon the Secretary. (*See* ECF No. 57 at 16–20.) Moreover, as already discussed here and in the PI Order, Plaintiffs' claims of voter disenfranchisement are speculative at best. Accordingly, Plaintiffs are also unlikely to succeed on the merits of this claim.

While Plaintiffs' fourth and last claim is entirely new, it is of no greater avail for Plaintiffs even assuming Plaintiffs have standing. [15] This claim is in gist that Clark County's plan to mail ballots to all registered voters, including inactive voters, and to allow for assistance in returning ballots will result in more votes coming out of Clark County because the CC Plan makes it easier to vote in Clark County than any other county,

resulting in an Equal Protection violation. (ECF No. 64 at 24–25.) The Washoe and Clark Registrars and Intervenor Defendants point out that this claim is undermined by the Ninth Circuit's decision in *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018). (ECF No. 72 at 11–12; ECF No. 74 at 24–25; ECF No. 75 at 4.) Plaintiffs reply that *Short* does not apply because Plaintiffs allege that the violation is that Clark County will have greater voter strength in the June Primary in violation of the one person, one vote principle [16] (ECF No. 80 at 8–9; *see also* ECF No. 65 at 21–23; ECF No. 64 at 24–25). The Court disagrees with Plaintiffs.

*8 Plaintiffs essentially speculate that beyond the size of Clark County's voter base relative to other counties, the CC Plan will ensure that Clark County voters' vote carry greater weight solely because ballots are also mailed to inactive registered voters and county deputized election workers are allowed to collect ballots. (*See id.*; *cf.* ECF No. 75 at 3, 12.) To be sure, Plaintiffs expressly disavow any challenge to the provisions of the CC Plan allowing for more polling places in Clark County. (ECF No. 80 at 8–9.)

Further, Plaintiffs do not address the Clark Registrar's contention that it is anticipated that "most" of the ballots sent to inactive voters "will come back undeliverable because we had previously sent election notifications to those addresses and the notifications were returned as undeliverable or we received notification by the USPS that the voter had moved out of town." (ECF No. 75 at 12.) The Clark Registrar's unchallenged contention accepted as true significantly diminishes Plaintiffs' contention that also sending ballots to Clark County inactive voters will result in greater voting strength for voters in that county. Plaintiffs' argument necessarily presupposes that inactive voters in Clark County would not alternatively go to the polling sites to vote in the June Primary. (*See id.* (noting the inactive voters are eligible to vote in the June Primary at a polling site).) [17]

Additionally, the Court is convinced that deputized staff members of the Clark Registrar picking up ballots does not add to Plaintiffs' contention of Clark County voters having a greater voter strength than other counties. Plaintiffs do not challenge the Clark Registrar's representation that this service is based upon request, that the county has not received much requests for this service, and that it is provided as an alternative particularly for those with disabilities who would rather not send their ballots by mail or deliver to a drop-off site (*see* ECF No. 75 at 12). Notably, these individuals would have already voted. (*Id.*) Therefore, it is unlikely that the mere act of the alternative of picking up an already voted ballot, for which there is also an option to drop off or mail-in with postage provided (*see id.*), would result in greater voting strength. For these reasons, the Court concludes that Plaintiffs have not supported the contention that the CC Plan leads to greater voter strength for Clark County voters.

It also appears to the Court that Plaintiffs' chief concern (if not purported harm) is that the CC Plan will result "in the most populous county of a certain persuasion ... garner[ing] many more votes of the dominant political persuasion in that county." (*E.g.*, ECF No. 80 at 10.) It is not clear to the Court why this concern is even relevant to the June Primary. As the Washoe Registrar notes, Nevada is a closed primary, therefore only members of a party can vote for candidates for that party (*see* ECF No. 74 at 6). *See* NRS § 293.257(3) ("A registered voter may cast a primary ballot for a major political party at a primary election only if the registered voter designated on his or her application to register to vote an affiliation with that major political party."). Thus, Plaintiffs' concern of more votes for a certain political persuasion appears reaching at best and materially does not support their Equal Protection claim, if at all, particularly in the primary context.

*9 The Court further concludes that the Equal Protection claim fails under *Short*, which the Court finds applicable to the claim. In *Short*, the appellants challenged California's Voter's Choice Act ("VCA"), claiming it violated the Equal Protection Clause because it permitted voters in some counties to receive a mail ballot automatically while voters in other counties had to apply for a mail ballot. *Id.* at 677–79. The Ninth Circuit Court of Appeals concluded that there was no constitutional violation because there was no evidence that "the VCA [would] prevent anyone from voting." *Id.* at 677. The appellate court specifically noted that the appellants had failed to cite "any authority explaining how a law that makes it easier to vote would violate the Constitution." *Id.* at 677–78.

As in *Short*, Clark County's Plan may make it easier or more convenient to vote in Clark County, but does not have any adverse effects on the ability of voters in other counties to vote. Plaintiffs are unlikely to succeed on their claim of an Equal Protection violation where they provide no evidence—and cannot provide any—that the CC Plan makes it harder for voters in other counties to vote. Nor is there any allegation that under the CC Plan representation is differently allocated between Clark County and other counties or that the CC Plan operates to discriminate based on a suspect classification. If it did, it would be subject to heightened scrutiny requiring

compelling justification under the *Anderson-Burdick* test. [18] *See Id.* at 677–79. However, "[c]ounty of residence is not a suspect classification warranting heightened scrutiny." *Id.* at 679. Applying a lesser level of scrutiny, it cannot be contested that Clark County, which contains most of Nevada's population—and likewise voters (69% of all registered voters (*see* ECF No. 75 at 12))—is differently situated than other counties. Acknowledging this as a matter of generally known (or judicially noticeable) fact and commonsense makes it more than rational for Clark County to provide additional accommodations to assist eligible voters. Moreover, there is no contention that under the Plan, other counties could not have similarly adopted further accommodations for their residents. Thus, like their other claims, Plaintiffs' fourth claim of an Equal Protection violation falls flat.

In sum, the Court finds that Plaintiffs are not likely to succeed on the merits of any claim asserted in the AC. The Court also adopts its conclusion from the PI Order that a balancing of the equities and the public interest weigh against granting an injunction to Plaintiffs.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that Plaintiffs' second motion for preliminary injunction (ECF No. 65) is denied for the reasons provided herein.

It is further ordered that Plaintiffs' motion to consolidate hearing on the second motion for preliminary injunction with a hearing on the merits (ECF No. 67) is denied as moot.

It is further ordered that Plaintiffs' supplemental brief (ECF No. 82) is stricken as improperly submitted without leave of court.

All Citations

Slip Copy, 2020 WL 2748301

Footnotes

1 In addition to the Second PI Motion, the Court has considered the various responses (ECF Nos. 72, 74, 75, 78) and Plaintiffs' reply (ECF No. 80). Plaintiff filed "Supplemental Authority" without seeking leave of court as required by LR 7-2(g). (ECF No. 243.) The document provides two references—a recent Sixth Circuit decision and a 1969 Supreme Court decision. While Plaintiffs' failure to cite to the former is apparent since the decision was issued on May 26, 2020, Plaintiffs' reference to the latter is clearly an attempt to improperly augment their arguments after briefing has completed. Regardless, the Court will strike the improper supplement.

2 *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983) & *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

3 The header of the fourth claim broadly asserts that the Plan violates the Equal Protection Clause, but the substance of the allegation is specifically concerned with Clark County and the CC Plan. (*See* ECF No. 64 at 24–25.)

4 *See, e.g.*, D. Chen & J. Diedrich, *Two weeks after election, COVID-19 cases have not spiked in Wisconsin but experts urge caution about conclusions*, Milwaukee J. Sentinel, Apr. 22, 2020, https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsinelection-experts-urge-caution/2997394001/

5 *See* the Official State of Nevada Website, Emergency Orders and Regulations, http://gov.nv.gov/News/Emergency_Orders/Emergency_Orders/ (last visited May 25, 2020).

6 *See id.*; James DeHaven, *May 29 marks start of Phase 2 in Nevada. Sisolak says 'we'll remain cautious.'*, Reno Gazette Journal, May 26, 2020, https://www.rgj.com/story/news/2020/05/26/sisolak-nevadas-phase-2-reopening-begin-friday-bars-gyms-more/5264546002/.

7 Steve Sisolak, *Roadmap to Recovery for Nevada, Guidelines and Protocols for Individuals and Businesses*, http://gov.nv.gov/uploadedFiles/govnewnvgov/Content/News/Emergency_Orders/2020/0 18-Roadmap-to-Recovery-Phase-One-Initial-Guidance.pdf (last visited May 26, 2020).

8 *See* the Official State of Nevada Website, *Emergency Orders and Regulations*, Declaration of Emergency Directive 018, http://gov.nv.gov/News/Emergency_Orders/2020/2020-05-07_-_COVID-19_Declaration_of_Emergency_Directive_018_-_Phase_One_Reopening_(Attachments)/ (last visited May 26, 2020).

9 *Id.*

10 *Id.*; DeHaven *supra.*

11 *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

12 Plaintiffs rely on numerous articles and studies to support their contentions that voting by mail leads to voter fraud. (*See* ECF No. 65 at 6–8.) The articles and studies are simply insufficient to establish that sending mail-in ballots to Nevada voters will result in voter fraud that particularly disenfranchises Plaintiffs as voters. Said differently, they do not meaningfully improve Plaintiffs' burden to concretely establish voter fraud that harms them. Plaintiffs' contention that issues with mail delivery to and from voters will lead to disenfranchisement based on what allegedly happened in Ohio and Wisconsin (*id.* at 8–9) is equally unpersuasive as to Nevada. As the Washoe Registrar notes, for example, the situation with respect to "timing and preparation" of the June Primary is quite different in Nevada than it was for Wisconsin, (*See* ECF No. 74-2 at 5.) Moreover, as the Court noted in the PI Order, the material safeguards against voter fraud are maintained under the Plan. (ECF No. 57 at 14; *see also* ECF No. 74-2 at 9 ("The all mail primary election provides all of the voter fraud safeguards that exist in statute.").)

13 A motion to reconsider must set forth "some valid reason why the court should reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003). "A motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled." *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005). A district court may decline to consider claims and issues that were not raised until a motion for reconsideration. *Hopkins v. Andaya*, 958 F.2d 881, 889 n.5 (9th Cir. 1992), *impliedly overruled on other grounds in Federman v. County of Kern*, 61 F. App'x 438, 440 (9th Cir. 2003). It is not an abuse of discretion to refuse to consider new arguments in a reconsideration motion even though "dire consequences" might result. *Schanen v. United States Dept. of Justice*, 762 F.2d 805, 807–08 (9th Cir. 1985).

14 To the extent Plaintiffs challenge the Court's finding that the Washoe Register complied with the notice requirements (ECF No. 57 at 19–20; *see* ECF. No 65 at 4–6), Plaintiffs fail to meaningfully contest the Court's conclusion that the notice issue does not arise to the level of a constitutional violation—necessary to void the Plan—even if technically inconsistent with Nevada law.

15 The Secretary notes that she gave deference to the Clark Registrar regarding his decision to send ballots to inactive registered voters under the CC Plan because "NRS § 293.345(1) is silent on whether ballots may be mailed to inactive voters as well as active voters" (ECF No. 78 at 7). *See* NRS § 293.345(1) (providing that "the county clerk shall cause to be mailed to each *registered voter* in each mailing precinct and in each absent ballot mailing precinct an official mailing ballot, and accompanying supplies, as specified in NRS 293.350") (emphasis added). Plaintiffs do not directly challenge the Secretary's statement. Instead, Plaintiffs for the first time in their reply argue NAC § 293.412(4) is a relevant regulation barring sending ballots to inactive voters (ECF No. 80 at 9–10). Even if the Court agreed, the Court does not consider the newly raised argument/legal provision asserted for the first time in Plaintiffs' reply. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). Moreover, to the extent the Secretary deferred to Clark County in implementing the CC Plan, the discretion of the Secretary to do so would also likely fall under the provisions cited in the PI Order as being the basis of the Secretary's authority in the electoral process. *See* NRS §§ 293.124, 293.213(4) and 293.247.

16 Plaintiffs rely on *Bush v. Gore*, 531 U.S. 98 (2000) as their basis for applying the doctrine to this case. (*E.g.*, ECF No. 64 at 24.) However, *Bush v. Gore*, is not directly on point where the concern there was that the various Florida counties used different standards in a recount to assess what votes should be counted in a presidential election. *See id.* at 107. The facts of Plaintiffs' Equal Protection claim here are completely different because Plaintiffs cannot support a claim that under the Plan or the CC Plan votes will be counted differently, or what constitutes a valid vote would differ as among the counties. Moreover, in the context of the Equal Protection Clause, the one person, one vote principle ordinarily concerns requiring states to design both congressional and state legislative districts with equal populations and must regularly reapportion districts to prevent malapportionment. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1123–24 (2016).

17 *See* NAC § 293.412(5) ("An inactive voter may vote in person at a polling place in the same manner as an active voter.").

18 The Court explains the relevant balancing under this test in the PI Order (ECF No. 57 at 12–13) and will not recite it here.

End of Document

2020 WL 2817052
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

Thomas CURTIN, et al., Plaintiffs,
v.
VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Case No. 1:20-cv-00546 (RDA/IDD)
|
Signed 05/29/2020

Synopsis
Background: Registered voters brought action against the State Board of Elections and other state officials, alleging defendants' actions in allowing absentee voting by persons without disability or illness pursuant to Governor's executive order, issued in response to the COVID-19 pandemic, infringed upon voter's fundamental right to vote by vote-dilation in violation of § 1983 and the United States Constitution, and voters further sought to enjoin defendants from allowing absentee voting by other than persons who suffered from illness or disability.

Holdings: The District Court, Rossie D. Alston, J., held that:

[1] registered voters were not diligent in challenging COVID-19 guidance issued to local registrars, and thus equitable doctrine of laches barred motion for preliminary injunction, and

[2] registered voters' lack of diligence in challenging COVID-19 guidance issued to local registrars that allowed for persons without disability or illness to vote absentee prejudiced members of Virginia State Board of Elections, and thus, barred motion for preliminary injunction.

Motion denied.

West Headnotes (15)

[1] **Injunction** ⇐ Extraordinary or unusual nature of remedy
Injunction ⇐ Entitlement to Relief
Injunction ⇐ Clear showing or proof
A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. Fed. R. Civ. P. 65.

[2] **Injunction** ⇐ Purpose or function in general
Granting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way. Fed. R. Civ. P. 65.

[3] **Injunction** ⇐ Extraordinary or unusual nature of remedy
Preliminary injunctions are to be granted only sparingly. Fed. R. Civ. P. 65.

[4] **Injunction** ⇐ Grounds in general; multiple factors
To be entitled to relief in the form of a preliminary injunction, plaintiffs must establish that they are likely to succeed on the merits, that irreparable harm would result in the absence of such relief, that the balance of the equities tips in the plaintiffs' favor, and that it is in the public interest to grant such relief. Fed. R. Civ. P. 65.

[5] **Injunction** ⇐ Presumptions and burden of proof
Plaintiffs bear the burden of establishing that each factor supports the granting of a preliminary injunction. Fed. R. Civ. P. 65.

[6] **Injunction** ⇐ Preservation of status quo

Injunction ⇦ Mandatory preliminary injunctions

A preliminary injunction can be categorized as mandatory or prohibitory. Fed. R. Civ. P. 65.

[7] **Injunction** ⇦ Preservation of status quo

Injunction ⇦ Mandatory preliminary injunctions

"Mandatory" preliminary injunctions alter the status quo, whereas "prohibitory" preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending. Fed. R. Civ. P. 65.

[8] **Injunction** ⇦ Categories disfavored or subject to heavier burden

Injunction ⇦ Mandatory preliminary injunctions

Mandatory preliminary injunctions are, in any circumstance, disfavored. Fed. R. Civ. P. 65.

[9] **Federal Courts** ⇦ Injunction

The standard of review for granting a preliminary injunction is even more searching when where the relief requested is mandatory in nature. Fed. R. Civ. P. 65.

[10] **Equity** ⇦ Prejudice from Delay in General

An affirmative defense to claims for equitable relief, laches requires a defendant to prove two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

[11] **Equity** ⇦ Grounds and Essentials of Bar

To prove a lack of diligence, as element of a laches defense, defendants must show that plaintiffs delayed inexcusably or unreasonably in filing suit.

[12] **Equity** ⇦ Prejudice from Delay in General

The second element of a laches defense, prejudice to the defendant, is demonstrated by a disadvantage on the part of the defendants in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct.

[13] **Injunction** ⇦ Laches

Registered voters were not diligent in challenging COVID-19 Guidance issued to local registrars, and thus equitable doctrine of laches barred motion for preliminary injunction to bar defendants from implementing their interpretation of "disability or illness," and from allowing persons without disability or illness to vote absentee; plaintiffs did not file suit until approximately two months after the disputed COVID-19 Guidance was issued to local registrars and made public. Fed. R. Civ. P. 65.

[14] **Equity** ⇦ Equity aids the vigilant, not those who sleep on their rights

Equity ministers to the vigilant, not to those who sleep on their rights.

[15] **Injunction** ⇦ Laches

Registered voters' lack of diligence in challenging COVID-19 Guidance issued to local registrars that allowed for persons without disability or illness to vote absentee prejudiced members of Virginia State Board of Elections, and thus equitable doctrine of laches barred motion for preliminary injunction to prohibit defendants from allowing unlimited absentee voting; granting the relief sought would have been impractical and likely ineffectual given that about 90,000 voters had already applied to vote by absentee ballot, and approximately 13,000 of those applicants had already cast their absentee ballots. Fed. R. Civ. P. 65.

Attorneys and Law Firms

Patrick Cullen Henry, II, Marrs & Henry, Richmond, VA, for Plaintiffs.

Jacqueline Cook Hedblom, Office of the Virginia Attorney General, Michelle Shane Kallen, Hunton Andrews Kurth LLP, Richmond, VA, for Defendants.

ORDER

Rossie D. Alston Jr., United States District Judge

*1 This matter comes before the Court on the Motion for Preliminary Injunction ("Motion"), Dkt. 3, filed by Plaintiffs Thomas Curtin, Donna Curtin, Kelley Pinzon, Tom Cranmer, Carol D. Fox, and Suzanne A. Spikes (collectively "Plaintiffs"). Considering the Complaint, Dkt. 1, the Motion, Dkt. 3, the Memorandum in Support of the Motion, Dkt. 4, Defendants' Memorandum in Opposition, Dkt. 26, Plaintiffs' Reply, Dkt. 31, briefs filed by Amici, Dkt. Nos. 25-2; 33-1, other relevant filings, and oral argument before the Court on May 27, 2020, the Court denies the Motion for the reasons stated below.

I. Background

In Virginia, certain categories of qualified voters may vote by absentee ballot. Pertinent to this case, Va. Code Ann. § 24.2-700(4) provides that "[a]ny duly registered person with a disability, as defined in § 24.2-101, who is unable to go in person to the polls on the day of election because of his disability, illness, or pregnancy" may vote by absentee ballot. Section 24.2-101 provides that "a person with a disability" is "defined by the Virginians with Disabilities Act (§ 51.5-1 et. seq.)." Va. Code Ann. § 24.2-101. As defined by this Act, a "[p]erson with a disability" is more particularly defined as "any person who has a physical or mental impairment that substantially limits one or more of his major life activities or who has a record of such impairment." Va. Code. Ann. § 51.5-40.1. [1]

Additionally, and relevant here, pursuant to Va. Code Ann. § 24.2-603.1, "[i]n the event of a state of emergency declared by the Governor pursuant to Chapter 3.2 (§ 44-146.13 *et seq.*) of Title 44 or declared by the President of the United States ..., the Governor may postpone an election by executive order in areas affected by the emergency." And

> [a]ny person who was duly registered to vote as of the original date of the election, and who has not voted, or who is permitted to recast their ballot due to the emergency, may vote by absentee ballot in accordance with the provisions of Chapter 7 (§ 24.2-700 *et seq.*).

Va. Code Ann. § 24.2-603.1.

On March 12, 2020, Governor Ralph S. Northam declared a state of emergency in the wake of the unprecedented COVID-19 pandemic sweeping the Commonwealth and the nation. Dkt. 1, 7. Governor Northam issued several Executive Orders implementing protective measures in response to these circumstances. *Id.* These measures included, among other things, closing schools, limiting gatherings to no more than 10 individuals, and closing "non-essential businesses." *Id.* (citing Va. Exec. Orders 2020-51 and 2020-53). On March 30, 2020, Governor Northam also issued a "stay at home" order, directing Virginians to remain in their residences as much as possible, noting several exceptions. *Id.* at 7-8 (citing Va. Exec. Order 2020-55). These Executive Orders expire on June 10, 2020. *Id.*

*2 On April 13, 2020, Governor Northam issued Executive Order 2020-56, wherein he postponed the June 9, 2020, primary elections to June 23, 2020. *Id.* at 8 (citing Va. Exec. Order 2020-56). That Executive Order was subsequently amended on April 24, 2020. Va. Exec. Order 2020-56 (Amended). Pursuant to these Executive Orders, the Department of Elections was permitted to "prescribe appropriate procedures to implement the provisions of this section," "prescribe procedures in accordance with the Centers for Disease Control and Prevention and Virginia Department of Health to assist in ensuring the safety and well-being of election officials, officers of election, and voters," and "partner with [other agencies] to train election officials on preventive actions to reduce the risk of exposure to COVID-19." *Id.*

On March 16, 2020, Defendants [2] circulated guidance to local registrars concerning voting by absentee ballot

for the above-referenced primary elections ("COVID-19 Guidance"). Dkt. Nos. 1, 6;16, 1-2. This COVID-19 Guidance was made public on March 17, 2020. *Id.* In the COVID-19 Guidance, voters were advised that they "may choose reason '2A My disability or illness' for absentee voting in the May and June 2020 elections due to COVID-19." *Id.* (quoting Va. Dep't of Elections, Absentee Voting, https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/).

Under Virginia law, absentee ballots are required to be made available 45 days prior to the election. Dkt. 26-3, 3 (containing the Declaration of Christopher E. Piper) (citing Va. Code Ann. § 24.2-612 and 52 U.S.C. § 20301 *et seq.*). Thus, in this matter, absentee ballots were made available on May 8 and May 9, 2020.[3] Dkt. 26, 13 (citing Va. Code Ann. §§ 24.2-603.1 and 612). Voters have until June 16, 2020, to request absentee ballots. *Id.* (citing Va. Code Ann. § 24.2-701(B)(2); Va. Exec. Order No. 2020-56 (Amended)).

Plaintiffs[4] filed this suit as well as the instant Motion on May 13, 2020, against Defendants. Dkt. Nos. 1 and 3. Plaintiffs assert four claims against Defendants. First, Plaintiffs contend that Defendants' actions infringe upon Plaintiffs' fundamental right to vote by direct disenfranchisement in violation of 42 U.S.C. § 1983 as well as the First and Fourteenth Amendments of the United States Constitution. *Id.* at 17. Second, Plaintiffs argue that Defendants' conduct infringes upon Plaintiffs' fundamental right to vote by vote-dilution disenfranchisement in violation of 42 U.S.C. § 1983 as well as the First and Fourteenth Amendments of the United States Constitution. Dkt. 1, 19. Third, Plaintiffs allege that Defendants' conduct runs afoul of Article I, Section 4, Clause 1 of the United States Constitution. *Id.* And fourth, Plaintiffs argue that Defendants' conduct contravenes the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 20. In the instant Motion, Plaintiffs request that this Court grant the following relief:

> (A) prohibit[ ] Defendants from implementing their unlawful interpretation of "disability or illness" and from allowing persons without disability or illness to vote absentee; (B) order[ ] Defendants to issue guidance instructing Virginia voters that they may only vote absentee if they qualify under the statutory categories and definitions; (C) order[ ] Defendants, in coordination with city and county election officials, to conduct a public information campaign informing Virginia voters that they may only check "disability or illness" if they are disabled, ill, or pregnant, as statutorily defined, and (D) order[ ] Defendants, in coordination with city and county election officials, to contact any Virginia voters who claimed a disability or illness (1) for the first time and (2) whose absentee application was submitted after Defendants issued guidance using their unlawful interpretation of "disability or illness," to (i) inquire whether the voter marked the box according to Defendants' unlawful guidance, and (ii) if so, inform the voter may only vote absentee if they qualify under the statutory categories and definitions.

*3 Dkt. 4, 29.

The Court entered an expedited briefing schedule, Dkt. 17, and heard the matter by video conference on May 27, 2020, consistent with this Court's protocols as directed by General Orders 2020-09 and 2020-12 in Case No. 2:20-mc-00007. Dkt. 27.

II. Standard of Review

[1] [2] [3] Federal Rule of Civil Procedure 65 permits district courts to issue preliminary injunctions. "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.' " *Perry v. Judd*, 471 Fed. App'x 219, 223 (4th Cir. 2012) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). "[G]ranting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way." *Hughes Network Sys. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). Therefore, preliminary injunctions are "to be granted only sparingly." *Toolchex, Inc. v. Trainor*, 634 F. Supp. 2d

586, 590–91 (E.D. Va. 2008) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524 (4th Cir. 2003)).

[4] **[5]** To be entitled to such relief, Plaintiffs must establish that they are likely to succeed on the merits, that irreparable harm would result in the absence of such relief, that the balance of the equities tips in the Plaintiffs' favor, and that it is in the public interest to grant such relief. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. Plaintiffs bear the burden of establishing that each factor supports granting the injunction. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010), *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010).

[6] **[7]** **[8]** **[9]** Additionally, relevant here, a preliminary injunction can be categorized as mandatory or prohibitory. *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 235 (4th Cir. 2014). "Mandatory injunctions alter the status quo, [whereas] prohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.' " *Id.* at 236 (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)). Consequently, mandatory injunctions are, "in any circumstance, disfavored." *Id.* (quoting *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994)). Thus, the standard of review for granting a preliminary injunction is "even more searching when" where, as here, the relief requested is mandatory in nature. *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 525.

III. Analysis

In the instant Motion, Plaintiffs assert that Defendants usurped the role of the legislature by issuing the COVID-19 Guidance, and that the Defendants' interpretation of Virginia law set forth therein contravenes the legislature's intent. Dkt. 4, 11-13, 26. Plaintiffs maintain that numerous voters will suffer disenfranchisement as a result of the COVID-19 Guidance. *Id.* at 13. In support of that claim, Plaintiffs contend that issuing the COVID-19 Guidance will cause an exponential increase in requests for absentee ballots that election officials and United States Postal workers are ill-equipped to handle. *Id.* at 13-14. Plaintiffs more specifically argue that disenfranchisement will occur given the strains on those individuals, which will inevitably result in lost or tardy absentee ballots. *Id.* at 15. Plaintiffs also maintain that because of Defendants' illegitimate expansion of those eligible to vote by absentee ballot under reason code 2(A), numerous voters will suffer vote dilution as a result of the COVID-19 Guidance. Plaintiffs elaborate that there will also be an increase in absentee votes made pursuant to the COVID-19 Guidance, which constitute unlawful votes. Thus, unlawful votes will be counted with legal votes, thereby again resulting in vote dilution. *Id.* at 21.

*4 Turing to the arguments presented, it is not without serious question that COVID-19 has presented challenges in many contexts, creating significant questions of both constitutional and humanistic dimension. Thus, in the context of this case, a critical "balance" must be struck, to the extent practicable, to touch each of these components.

Initially, the Court recognizes that prevention of voter fraud has been recognized as a compelling state interest. *See Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 196, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), *affirmed*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *Purcell v. Gonzalez*, 549 U.S. 1, 5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (noting that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" and noting "the State's compelling interest in preventing voter fraud"). While the prevalence of voter fraud is contested by the parties, there have been documented instances of voter fraud in the Commonwealth. Dkt. 4, 6.[5] Earlier this month, in this Court's sister jurisdiction, the enforcement of one protective measure against voter fraud, the witness requirement for absentee voters, was enjoined by consent decree with respect to the June primary elections. *See League of Women Voters v. Va. State Bd. of Elec.*, No. 6:20-cv-00024, —— F.Supp.3d ——, 2020 WL 2158249 (W.D. Va. May 5, 2020).

[10] **[11]** **[12]** Moreover, Defendants assert that, among other arguments, Plaintiffs delayed filing suit with this Court. Dkt. 13, 1-2 (noting that Plaintiffs "s[a]t on their claims for nearly two months); 26, 7 (asserting the same). "[A]n affirmative defense to claims for equitable relief, laches requires a defendant to prove two elements: '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' " *Perry*, 471 Fed App'x at 224. "To prove a lack of diligence, [Defendants] must show that [Plaintiffs] 'delayed inexcusably or unreasonably in filing suit.' " *Id.* (quoting *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990)). "The second element—prejudice to the defendant—is demonstrated by a

disadvantage on the part of the [D]efendant[s] in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the [P]laintiff[s'] conduct." *White*, 909 F.2d at 102.

[13] With respect to the question of lack of diligence, on March 16, 2020, the disputed COVID-19 Guidance was issued to local registrars and made public on March 17, 2020. Nevertheless, Plaintiffs did not file suit until approximately two months later. *See, e.g., Perry*, 471 Fed App'x at 224 (noting that the Movant "was able to bring these constitutional challenges for over four months before the filing deadline of December 22, 2011, [but] waited until the eleventh hour to pursue his claims"). Plaintiffs attempt to explain their delay by noting that a case similar to this one was filed on April 20, 2020, in the Western District of Virginia. *League of Women Voters*, —— F.Supp.3d ——, 2020 WL 2158249. A Motion to Intervene was filed, wherein the intervenors sought to defend the witness requirement and bring a cross-claim for similar claims that are presented in this case. Dkt. 16, 2. As that case was resolved by consent decree, Plaintiffs argue that necessitated the filing of a separate suit. *Id.* Plaintiffs' argument is unavailing because *League of Women Voters*, —— F.Supp.3d ——, 2020 WL 2158249, was filed over a month after the COVID-19 Guidance was issued, the Motion to Intervene was filed on April 23, 2020, and the matter was ultimately resolved by consent decree on May 5, 2020. Dkt. 16, 2.

*5 Plaintiffs also assert that the suit was timely filed because the magnitude of the potential for disenfranchisement and vote dilution did not become apparent until some time had passed. Dkt. 16, 3. Plaintiffs support their position by citing to the elections that occurred in Wisconsin, Idaho, and Ohio. *Id.* at 4. However, the Wisconsin election occurred in early April. *Id.* (The articles cited contain the dates of the elections.). To be sure, concerns about the possibility of disenfranchisement and vote dilution were apparent, at the latest, by that time.

[14] Additionally, Plaintiffs contend that the principles set forth in *Purcell*, 549 U.S. 1, 127 S.Ct. 5 (2006), apply equally well to Defendants. Dkt. 16, 2. According to Plaintiffs, it naturally follows that they should have the opportunity to protect their fundamental right to vote in light of Defendants "mak[ing] sweeping changes to the election code." *Id.* The limited record here supports the conclusion that Plaintiffs had an incentive to file suit as soon as these injuries became apparent in order to rectify the perceived wrong prior to the actual commencement of the absentee ballot period. The disputed COVID-19 Guidance was issued to local registrars on March 16, 2020, and to the public on March 17, 2020, and the absentee ballot period began May 8 or 9, 2020, yet, Plaintiffs did not file suit until May 13, 2020. Ultimately, the Court finds that Plaintiffs failed to demonstrate the requisite diligence. *Perry*, 471 Fed. App'x at 226 (citing *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990)) (citing *Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) ("[A]ny claim against a state electoral procedure must be expressed expeditiously."). "This deliberate delay precludes the possibility of equitable relief. For 'equity ministers to the vigilant, not to those who sleep on their rights.' " *Id.* at 224 (quoting *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995)).

[15] Turning to the issue of prejudice to the Defendants, it is noted that prior to and during the commencement of the absentee ballot period, the COVID-19 Guidance was marketed to Virginians. Defendants represented at oral argument that as of May 26, 2020, about 90,000 have applied to vote by absentee ballot and approximately 13,000 of those applicants have already cast absentee ballots. Plaintiffs request that this Court prohibit Defendants from implementing the COVID-19 Guidance, require Defendants to issue new guidance, mandate that the new guidance be marketed to the public, and direct election officials to determine, on a case by case basis, that those who have cast absentee ballots utilizing reason code 2A did not do so under the interpretation advanced in the COVID-19 Guidance. Stated succinctly, granting the relief Plaintiffs seek has, at this point, become impractical and likely ineffectual in light of the rapidly approaching June 16, 2020, deadline for filing applications to vote by absentee ballot. And any temptation that this Court might have to engineer a solution to this dilemma is the type of constitutional fix often criticized by reviewing courts. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, —— L.Ed.2d —— (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

Considering the volume of those applying to vote by absentee ballot as well as those who are in receipt of their absentee ballots ... offset against the nature of a "verification process" necessary to accomplish Plaintiffs' well-intended suggestion to protect the electoral process supports the proposition that ordering the relief requested would tax the system and may well, in these unprecedented times, breed more chaos. Dkt. 26-3, 6. Significantly, voters are not required to disclose their

phone number or email address in applications to vote by absentee ballot, making the proposed inquiry all the more challenging. *Id.* Moreover, several unknown factors are at play, including how many would be needed to conduct this inquiry, the process of contacting those who applied to vote by absentee ballot using reason code 2A, and what will be said in those interactions. Further, in the event the requested relief is granted, the integrity of the election could be further jeopardized considering that Defendants "are charged with ensuring the uniformity, fairness, accuracy, and integrity of Virginia elections. This is a state interest the Supreme Court has repeatedly credited." *Id.* (citing *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)). Additionally, the public also suffers prejudice, in a sense, as granting the requested relief may result in confusion amongst election officials as well as voters. *See, Purcell*, 549 U.S. at 4-5, 127 S.Ct. 5 ("Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); *Perry*, 471 Fed. App'x 219, at 227 ("[W]here absentee ballots are mailed in accordance with the [ ] deadline and where a federal court subsequently granted the requested relief, officials would have to send a second and different ballot to each voter, which would risk confusion on the part of those voters and increase the cost and difficulty of administering the election."). Further, those who have applied to vote by absentee ballot under reason code 2(A) pursuant to the COVID-19 Guidance relied on that guidance. One example bears out this contention: if individuals are no longer permitted to use reason code 2A as interpreted pursuant to the COVID-19 Guidance, there is a risk that those who did so may not be able to timely resubmit their applications and receive their absentee ballots. [6]

*6 Undermining belief in the purity of the electoral process, whether by inappropriately facilitating the participation of some or by diluting the participation of others, inherently brings us to question the sanctity of the democratic process itself. The bottom-line here is that while the basis of Plaintiffs' Complaint may be well-founded, the Court is constrained at this time from remedying these constitutional grievances.

It is in view of these principles that the Court must deny the Motion.

IV. Conclusion

Accordingly, the Motion is DENIED pursuant to the equitable doctrine of laches. Because the doctrine of laches "operates as an affirmative defense," the Court does not address the merits of Plaintiffs' constitutional challenges at this time. *Perry*, 471 Fed. App'x 219.

It is SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2817052

Footnotes

1 Plaintiffs note that the General Assembly expanded absentee voting categories to allow any registered voter to vote absentee. *Id.* at 5 (citing Virginia's Legislative Information System, 2020 Session, § 24.2-700, available at https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB1ER. Pursuant to Bluebook standards, all websites herein were last visited on May 13, 2020). However, this legislation is effective July 1, 2020.

2 Defendants include the Virginia State Board of Elections as well as Robert H. Brink, in his official capacity as Chairman of the Board, John O'Bannon, in his official capacity as Vice Chair of the Board, Jamilah D. Lecruise, in her official capacity as Secretary of the Board, and Christopher E. Piper, in his official capacity as Commissioner of the Virginia Department of Elections. Dkt. 1, 1.

3 Given that numerous "local general registrars' offices were not open on Saturday, May 9 ([45] days prior to June 23, 2020), those offices began issuing absentee ballots on May 8." Dkt. 26-3, 5.

4 Plaintiffs allege that they are all "eligible and registered voter[s.]" Dkt. 1, 2-4. Additionally, both Plaintiffs Donna Curtin and Tom Cranmer qualify and intend to vote by absentee ballot. *Id.*

5 Even as recently as May 26, 2020, in West Virginia, a mailman has been charged with attempted election fraud. Raby, John, West Virginia Mail Carrier Charged with Altering Absentee Ballot Requests, *Time*, May 27, 2020, https://time.com/5843088/west-virginia-mail-carrier-fraud-absentee-ballots/.

6 The Court also notes that given the approval of the consent decree in *League of Women Voters*, —— F.Supp.3d ——, 2020 WL 2158249, granting the relief requested presents the possibility of inconsistent analyses of the voting process.

End of Document

2010 WL 4723433

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Martha DEAN
v.
George C. JEPSEN, et al.

No. CV106015774.
|
Nov. 3, 2010.

West KeySummary

1 **Declaratory Judgment** ⇐ Subjects of relief in general

A candidate for a state attorney general position did not have standing to pursue a declaratory judgment action in which she sought a ruling that her opponent was not qualified for the position of attorney general. The candidate failed to establish that she was aggrieved because she did not have a right to only run against qualified candidates. There was also a statute which allowed political parties to file quo warranto actions to oust an unqualified office holder but the potential quo warranto action was not justiciable until opponent had actually assumed office. C.G.S.A. § 52–491.

Opinion

AURIGEMMA, J.

*1 On October 26, 2010, the plaintiff, Martha Dean, the Republican candidate for Connecticut attorney general in the November 2, 2010 general election, initiated this action against the defendants, George C. Jepsen, the Democratic and Connecticut Working Family's candidate for attorney general, and Susan Bysiewicz, the secretary of the state. The plaintiff's complaint alleges that Jepsen does not meet the qualifications for the position of attorney general pursuant to General Statutes § 3–124.[1] The complaint seeks the following remedies: (1) A declaratory ruling that Jepsen is not qualified for the position of attorney general; and (2) temporary or injunctive relief ordering the secretary of the state to direct the removal of Jepsen from the ballots for the November 2, 2010 election; or (3) in the alternative, temporary injunctive relief enjoining the secretary of the state from certifying the result of the election until further notice of the court; or (4) in the alternative, temporary injunctive relief enjoining the election for attorney general pending final resolution of the case.

A status conference was held at 12 p.m. on October 27, 2010, at which all the parties were represented. During the status conference, the defendants represented that they intended to challenge the court's subject matter jurisdiction to hear the case, including the plaintiff's standing to seek the requested relief. Given the temporal nature of the relief sought, the court ordered that the parties submit memorandums of law on those issues by 3 p.m. on October 28, 2010, and scheduled a hearing for 10 a.m. on October 29, 2010.

On October 28, 2010, the secretary of the state filed a motion to dismiss, as did Jepsen, for lack of subject matter jurisdiction. Jepsen also filed a motion to strike for failure to join indispensable parties. These matters were heard by the court on October 29, 2010.

"Once the question of subject matter jurisdiction has been raised, cognizance of it must be taken and the matter passed upon before [the court] can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Schaghticoke Tribal Nation v. Harrison,* 264 Conn. 829, 839 n. 6, 826 A.2d 1102 (2003). Therefore, the court must resolve the defendants' motions to dismiss before considering Jepsen's motion to strike or otherwise permitting the case to advance.

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction ... When a ... court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the

allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Cox v. Aiken*, 278 Conn. 204, 210–11, 897 A.2d 71 (2006).

***2** At oral argument and in her memorandum of law in support of her motion to dismiss, Bysiewicz argues that the plaintiff's complaint should be dismissed because: (1) The plaintiff lacks standing to bring her complaint; (2) the plaintiff's claims, as against her, are barred by sovereign immunity; and (3) the plaintiff's claims are nonjusticiable because the court lacks authority to render equitable relief. Similarly, Jepsen argued at oral argument and in his memorandum of law in support of his motion to dismiss that the plaintiff's complaint should be dismissed because: (1) The plaintiff lacks standing to bring her complaint under General Statutes § 9–324; (2) the court lacks jurisdiction to hear the plaintiff's complaint under the common law; (3) the plaintiff's claims against Bysiewicz are barred by sovereign immunity; and (4) the court, for policy reasons, should not exercise its equitable jurisdiction under the circumstances of this case.

I STANDING

The court first considers whether the plaintiff lacks standing to seek a declaratory judgment action requesting a ruling that Jepsen is not qualified for the position of attorney general under § 3–124. Practice Book § 17–54 provides that "[t]he judicial authority will ... render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future." See also General Statutes § 52–29(a).

"One great purpose [of a declaratory judgment action] is to enable the parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling and disturbance of the orderly pursuits of life which are so often the incidents of law suits." (Internal quotation marks omitted.) *Bysiewicz v. Dinardo*, 298 Conn. 748, 6 A.3d 726 (2010). Accordingly, "to carry out the purposes intended to be served by such judgments, it is *sometimes* necessary to determine rights which will arise or become complete only in the contingency of some future happening." (Emphasis added; internal quotation marks omitted.) *Id.*

"[T]he trial court may, in determining the rights of the parties, properly consider equitable principles in rendering its judgment ... This conclusion not only harmonizes the rule that actions in law and equity may be combined in this state ... it is also in accord with our position favoring liberal construction of the declaratory judgment statute in order to effectuate its sound social purpose." (Citations omitted; internal quotation marks omitted.) *Middlebury v. Steinmann*, 189 Conn. 710, 715–16, 458 A.2d 393 (1983).

***3** Nevertheless, "[i]mplicit in these principles is the notion that a declaratory judgment action must rest on some cause of action that would be cognizable in a nondeclaratory suit ... To hold otherwise would convert our declaratory judgment statute and rules into a convenient route for procuring an advisory opinion on moot or abstract questions ... and would mean that the declaratory judgment statute and rules created substantive rights that did not otherwise exist." (Citations omitted.) *Wilson v. Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992).

The defendants argue that the plaintiff lacks standing to bring her declaratory judgment action because, under state election law, the courts do not have the jurisdiction to consider qualifications for office prior to the election. They assert that there is no statutory or common-law authority that confers the right to run for political office only against candidates that are qualified to hold that office. Accordingly, they argue that each political party has the right to place their chosen candidate on the ballot, regardless of that candidate's qualifications to serve, as long as they abide by the election statutes. Thus, they maintain that the plaintiff's only remedy is to bring the action quo warranto, once the election has passed, and the results of such election have been certified.

The plaintiff counters that she has standing to request a declaratory judgment because, as a candidate for the same office as Jepsen, she has an interest in not being opposed by a candidate that is not qualified to hold that office. Therefore, while the plaintiff agrees that she could seek judicial review of Jepsen's qualifications if he is the successful candidate following the election, she asserts that she can also bring a declaratory judgment action prior to the election based on the possibility of a quo warranto action.

In essence, the defendants argue that there is no justiciable controversy until Jepsen has actually been elected; therefore, there is no aggrievement. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Chapman Lumber, Inc. v. Tager,* 288 Conn. 69, 86, 952 A.2d 1 (2008).

The principal controversy here is whether the plaintiff has standing to request declaratory relief prior to the election. "It is a basic principle of our law ... that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment ... Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy ... When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue ... [Because] [s]tanding requires no more than a colorable claim of injury ... a [party] ordinarily establishes ... standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests." (Citation omitted; internal quotation marks omitted.) *Bysiewicz v. Dinardo, supra,* Connecticut Supreme Court, Docket No. SC 18612.

***4** There are two distinct ways in which a party can demonstrate that it has standing to bring an action. "Standing is [either] established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved." (Internal quotation marks omitted.) *Gold v. Rowland,* 296 Conn. 186, 207, 994 A.2d 106 (2010). The plaintiff does not fall under either category.

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Andross v. West Hartford,* 285 Conn. 309, 322, 939 A.2d 1146 (2008).

In this case, there is no statutory authority that authorizes the plaintiff to bring her declaratory action prior to the election. This court has found the following statutes that specifically authorize a court to grant pre-election relief: General Statutes §§ 9–323, 9–328, 9–324, 9–329a and 9–329b. Section 9–323, for election of federal officers, § 9–324, for election of state officers and probate judges, and § 9–328, for municipal officers and justices of the peace, all provide standing to "any elector or candidate" who is "aggrieved by any ruling of an election official in connection with [the election at issue.]" Because the plaintiff does not allege that she has been aggrieved by the ruling of an election official, these statutes are inapplicable.[2] In addition, she does not have standing pursuant to § 9–329a because that statute exclusively governs contests and complaints in connection with any primary.

Similarly, § 9–329b does not provide the plaintiff with a statutory basis for standing in this case. Although the plaintiff alleged in her complaint that § 9–329b permits this court to issue an order removing a candidate from a ballot label if "improperly on the ballot," the plaintiff did not argue at oral argument or in her memorandum that § 9–329b provides her with a statutory basis for standing to bring her complaint. Instead, the plaintiff only referred to § 9–329b in arguing that it creates an exception to the doctrine of sovereign immunity that permits her to maintain her claims as alleged against the secretary of the state. Nevertheless, as more particularly discussed in part II of this decision, the court concludes that § 9–329b only permits the court to order relief for procedural violations of election statutes, and does not grant the court authority to review a candidate's qualifications to serve in office.[3]

In addition, the plaintiff does not have standing under General Statutes § 52–491,[4] which allows a party to file a quo warranto action to oust an unqualified office holder. That statute is inapplicable here because such an action is not ripe until the candidate has been elected to office. See *Bysiweicz v. Dinardo, supra,* Connecticut Supreme Court, Docket No. SC 18612.

***5** Despite the absence of a statute conferring a right of action, the plaintiff asserts that she has standing based on common-law principles because she has been classically aggrieved. Whether a party has been classically aggrieved is examined on a case-by-case basis, and "requires an analysis of the particular facts of the case in order to ascertain whether a party has been aggrieved ..." (Internal quotation marks omitted.) *Goldfisher v. Connecticut Siting Council,* 95 Conn.App. 193, 197, 895 A.2d 286 (2006). "The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the

party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision ... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected." (Internal quotation marks omitted.) *Gold v. Rowland, supra,* 296 Conn. at 207, 994 A.2d 106.

The plaintiff argues that she meets both prongs of the classical aggrievement test. Under the first prong, she maintains that she has an interest in not being opposed by an ineligible candidate. Under the second prong, she argues that there is a concrete, particularized and actual injury that arises when a candidate faces competition on the ballot from an ineligible candidate and, as a result, suffers from a loss of votes. Therefore, she argues that the potential injury she faces confers "competitive standing" to contest Jepsen's qualifications prior to the election.

This court disagrees. As described above, an action for declaratory judgment is based in equity. "A bill in equity [is] not an appropriate remedy" to challenge a person's right to hold public office, which may "only be tried on a writ of quo warranto, or proceedings in the nature of quo warranto." *Hinckley v. Breen,* 55 Conn. 119, 121, 9 A. 31 (1887). As such, absent a challenge brought pursuant to the statutes cited above, there is no authority that allows a candidate to dispute his opponent's qualifications in court until such opponent has actually been elected to office. See, e.g., 29 C.J.S., Elections § 254 (2005) ("[a]t common law there existed no right to contest in the courts the title to the nomination of a political party for office, and none now exists unless specifically provided for by statute"); 26 Am.Jur.2d 202, Elections § 398 (2004) ("[c]ourts do not have inherent authority to hear election cases ... election contests are creatures of statute, and the power or jurisdiction of a trial court to consider such contests exists only to the extent authorized by statute").

***6** The plaintiff relies on *Bysiewicz v. Dinardo, supra* Connecticut Supreme Court, Docket No. SC 18612, for the proposition that she is entitled to challenge Jepsen's qualifications a week before the election. In that case, the plaintiff, Bysiewicz, as a candidate for the Democratic nomination for the office of attorney general, brought an action against the Democratic party prior to this year's primary, seeking a declaratory judgment that she was qualified to serve as attorney general. *Id.* Thereafter, the Republican party was allowed to intervene as a defendant, and subsequently challenged the plaintiff's standing to bring the action, while asserting that her claims were not ripe for adjudication. *Id.* Specifically, it argued that she lacked standing because nothing prevented her from running for attorney general, regardless of her qualifications. It further argued that the plaintiff's claims were not ripe because they were contingent on the results of an election that had not yet occurred. Therefore, the Republican party argued that the action was premature and speculative, representing a mere request for an advisory opinion. *Id.*

Our Supreme Court held otherwise. *Id.* First, it found that the plaintiff satisfied the threshold standing requirement because there was a substantial question regarding whether she met the statutory qualifications to serve as attorney general. Furthermore, it found that, pursuant to the declaratory judgment standard, the relief she sought was available in a "cause of action that would be cognizable in a nondeclaratory suit," because a candidate's qualifications may be challenged in a quo warranto action. *Id.* More importantly, however, it found that she had standing to settle the question of her own qualifications because she had already declared an intention to run for attorney general, and she had a "particular interest in avoiding the great effort and expense of running ... if her qualifications to serve in that office could be successfully challenged upon her election ..." *Id.*

With respect to the action's ripeness, the court recognized that a quo warranto action was not justiciable until a candidate for office had actually assumed that office. Nevertheless, it held that the plaintiff had appropriately brought her action before the election to assess whether she qualified to serve as attorney general because a "great purpose" of a declaratory judgment action is to enable parties to determine their rights so "that they may guide their [future] actions accordingly ..." *Id.* Therefore, in that case, the Supreme Court concluded that its decision would assist the plaintiff in deciding whether to run for office, while also allowing the Democratic party to decide whether it would endorse the plaintiff as its candidate. The court also reasoned that the plaintiff's claims were ripe because of the potential harm to her interest in avoiding the great effort and expense of campaigning if she faced a post-election challenge to her qualifications, combined with the possible injury to "the public's interest in avoiding voter confusion and disruptions in the election process ..." *Id.*

Accordingly, the court concluded that the trial court had correctly concluded that it had subject matter jurisdiction over the plaintiff's action. *Id.*

*7 Essentially, the *Bysiewicz* court articulated that, under certain circumstances, a court has jurisdiction to declare a candidate's qualifications prior to the actual election. The present case, however, does not present such circumstances. As discussed above, in *Bysiewicz,* the court found that the plaintiff had standing to resolve any uncertainty about her own rights because she had an interest in avoiding the great effort and expense of a campaign if her qualifications could, thereafter, be successfully challenged upon her election, and thus, prevent her from serving in office. *Id.* Moreover, implicit in the Supreme Court's decision is that there existed a public interest in resolving the matter early in the election process so as to avoid "confusion and disruptions in the election process ..." *Id.* Therefore, the plaintiff's interests were particularly strong, given that it was sufficiently early in the election process.

In the present case, however, the plaintiff is not asking for a preliminary declaration regarding her own rights so that she may guide her actions accordingly. On the contrary, she is seeking to challenge her *opponent's* qualifications on the eve of the election. As a result, this court cannot protect the interests that the *Bysiewicz* court found so compelling. For instance, both Jepsen and the plaintiff have already expended great amounts of effort and money in their campaigns. The Democratic and the Connecticut Working Family parties have, similarly, spent a great deal of energy in nominating and supporting Jepsen. Unlike in *Bysiewicz,* which was decided prior to the primary, they cannot, at this juncture, endorse another candidate.

Additionally, the plaintiff's request for a declaratory judgment does not protect the public's interest in orderly elections. As of the filing of the plaintiff's complaint, just seven days prior to the election, the election process has already been well under way, and the state has already expended great resources. The secretary of the state argues that thousands of ballots have already been printed, and absentee ballots have already been cast. Equally important, the voters have been exposed to extensive campaigning by both parties. The publicity regarding any type of court order with only a few days left before an election has the potential of casting a cloud of uncertainty on the candidates, which cannot be adequately resolved prior to election day. Thus, by filing her action so close to the election, the plaintiff risks injecting impermissible confusion and disruption in the electoral process. See, e.g., *Purcell v. Gonzalez,* 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) ("[c]ourt orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase"); *Caruso v. Bridgeport,* 285 Conn. 618, 637, 941 A.2d 266 (2008) ("[t]he delicacy of judicial intrusion into the electoral process ... strongly suggests caution in undertaking such an intrusion ... [because] voters have a powerful interest in the stability of [an] election ..." [citation omitted; internal quotation marks omitted]). Such disruption and confusion are precisely what the Court in *Bysiewicz* sought to avoid.

*8 There can be no doubt that, at some point, the public interest in ensuring orderly elections outweighs any personal interests that the candidates may have. For instance, in a factually similar case, *Liddy v. Lamone,* 398 Md. 233, 236, 919 A.2d 1276 (2007), the plaintiff, a candidate for the Maryland office of attorney general, filed an action challenging the constitutional qualifications of his opponent eighteen days before the election. While the court agreed that, pursuant to Maryland law, a candidate must be qualified to run for attorney general; *id.,* at 237, 919 A.2d 1276; it concluded that the plaintiff's action was barred because it was untimely.[5] *Id.,* at 249–50, 919 A.2d 1276. The court reasoned that the plaintiff could have raised his claims long before the general election, thereby avoiding any disruption to the electoral process. *Id.,* at 253, 919 A.2d 1276. However, at that juncture, the voters and the secretary of state were impermissibly prejudiced because the election process was well underway. *Id.* "Allowing challenges to be brought at such a late date would call into question the value and the quality of our entire elections process and would only serve as a catalyst for future challenges. Such delayed challenges go to the core of our democratic system and cannot be tolerated." *Id.,* at 255, 919 A.2d 1276; see also *Butts v. Byziweicz,* 298 Conn. 665, 674 (2010) (discussing the public's interest in ensuring that there is "order, rather than chaos" in the electoral process).

Additionally, the *Bysiweicz* court's reference to *Kneip v. Herseth,* 87 S.D. 642, 649, 214 N.W.2d 93 (1974). supports the conclusion that, at this juncture, the plaintiff's remedy is to file a quo warranto action once the election has passed. In *Kneip* the plaintiff brought a declaratory judgment action, prior to the primary, seeking a declaration that he was qualified to serve as governor of South Dakota. *Id.,* at 646–47, 214 N.W.2d 93. The defendants moved to dismiss the action on the grounds that there was no justiciable controversy until the plaintiff had been nominated or elected. *Id.,* at

647, 214 N.W.2d 93. The court disagreed. It reasoned that it was permissible to bring a declaratory judgment action to determine the plaintiff's present rights, even though they were based upon future events "when the construction of [a voting statute] presents matters involving the public interest in which timely relief is desirable." *Id.*, at 148, 214 N.W.2d 93. Therefore, the court concluded that the plaintiff was entitled to resolve any controversy regarding his candidacy "by determining his status at a *timely* point." (Emphasis added.) *Id.*, at 649, 214 N.W.2d 93. Again, as in *Bysiweicz*, implicit in that court's decision was that a challenge prior to the primary was timely, while, at a later stage in the election process, a similar plaintiff would no longer be entitled to seek such a declaration due to the *untimely* nature of the action.

At oral argument the plaintiff relied on out of state cases to support her position that she has standing to challenge Jepsen's qualifications prior to the election. Those cases, however, provide little guidance in this matter because in each one, the action was in mandamus against an election official or political party. See, e .g., *In re Jones*, 978 S.W.2d 648, 651 (Tex.App.1998) (Texas statute "specifically authorizes the [court] to issue a writ of mandamus to compel the performance of a duty imposed by law in connection with the holding of an election or party convention." Therefore, candidate had standing to file a mandamus action compelling political party to declare opposing candidate ineligible); *Stewart v. Burks*, 384 S.W.2d 316, 317–18 (Ky.1964) (mandamus action to enjoin county clerk from placing a nominee's name on the election ballot).

***9** The plaintiff has not demonstrated that there exists a right not to run against candidates that are unqualified to serve in office and, thus, she has not demonstrated that she has been aggrieved. This court agrees with the defendants that each political party is better suited to determine which candidate to endorse. If the voters ultimately elect a candidate that is statutorily unqualified to serve as attorney general, then such candidate's right to hold office may be challenged after the election, pursuant to § 52–491. Furthermore, given that she filed this action days before the election, the plaintiff has not demonstrated that this court can protect the interests discussed in *Bysiewicz*, namely, the interests in avoiding costly and time consuming campaigns, disruption and confusion, and in ensuring that challenges are brought early in the election process. Therefore, this court concludes that at this juncture, absent any other authority, a challenge to any candidate's qualifications must be adjudicated in a quo warranto action. Accordingly, for all the foregoing reasons, the plaintiff lacks standing to maintain her action against the defendants.

II SOVEREIGN IMMUNITY

Even if the court were to conclude that the plaintiff has standing to maintain her action, her claims against the secretary of the state would be barred by the doctrine of sovereign immunity, and therefore, the court would be unable to grant the injunctive relief the plaintiff seeks.

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss ... A determination regarding a trial court's subject matter jurisdiction is a question of law." (Citation omitted; internal quotation marks omitted.) *Miller v. Egan*, 265 Conn. 301, 313, 828 A.2d 549 (2003). "Sovereign immunity relates to a court's subject matter jurisdiction over a case ... The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law." (Citation omitted; internal quotation marks omitted.) *Gold v. Rowland, supra*, 296 Conn. at 211, 994 A.2d 106.

"While the principle of sovereign immunity is deeply rooted in our common law, it has, nevertheless, been modified and adapted to the American concept of constitutional government where the source of governmental power and authority is not vested by divine right in a ruler but rests in the people themselves who have adopted constitutions creating governments with defined and limited powers and courts to interpret these basic laws. The source of the sovereign power of the state is now the constitution which created it, and it is now recognized that, as Mr. Justice Holmes wrote: A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." (Internal quotation marks omitted .) *Cox v. Aiken, supra*, 278 Conn. at 211–12, 897 A.2d 71.

> ***10** Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state ... Exceptions to [the doctrine of sovereign immunity] are few and narrowly construed under our jurisprudence ...

> [T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity ... (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiffs constitutional rights ... and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority.

(Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc. v. Dept. of Transportation,* 293 Conn. 342, 349, 977 A.2d 636 (2009).

Both the defendants argue that the plaintiff's claims against the secretary of the state are barred by the doctrine of sovereign immunity. The plaintiff contends that she can maintain her action against Bysiewicz pursuant to the first exception to the doctrine of sovereign immunity because the legislature has statutorily waived the state's sovereign immunity under § 9–329b. More specifically, the plaintiff argues that the legislature, by the language of § 9–329b, has at least minimally waived the state's sovereign immunity as to the plaintiff's request that the court order the secretary of the state to direct the removal of Jepsen's name from the ballot for the November 2, 2010 election.

The defendants respond that because the secretary of the state is not empowered by the legislature to evaluate the qualifications of a candidate under § 3–124 prior to placing that candidate's name on the ballot, that the legislature did not intend, in enacting § 9–329b, to empower the court to order such relief under the facts of the complaint at issue, and therefore, has not waived the state's sovereign immunity in this case.

"For a claim made pursuant to the first exception, [the Supreme Court] has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed ... Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *Columbia Air Services, Inc. v. Dept. of Transportation, supra,* 293 Conn. at 349–50, 977 A.2d 636. "When the legislature intends to waive immunity from suit or liability, it expresses that intent by using explicit statutory language." (Internal quotation marks omitted.) *Hicks v. State,* 297 Conn. 798, 802, 1 A.3d 39 (2010).

*11 "[W]hen interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature ... To do so, we first consult the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. General Statutes § 1 –2z ... A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *Butts v. Bysiewicz, supra,* 298 Conn. at 672–73.

Section 9–329b provides: "At any time prior to a primary held pursuant to Sections 9–423, 9–425 and 9–464, or a special act or prior to any election, the Superior Court may issue an order removing a candidate from a ballot label where it is shown that said candidate is improperly on the ballot." In this case, whether § 9–329b waives the state's sovereign immunity depends on the meaning of the phrase "improperly on the ballot."

Only one Connecticut court has previously discussed the meaning of § 9–329b. See *Kirkley–Bey v. Vazquez,* Superior Court, judicial district of Hartford, Docket No. 10 6007952 (March 1, 2010, Peck, J.). In *Kirkley–Bey,* the plaintiffs, a slate of candidates for the primary election for the Hartford democratic town committee, brought suit pursuant to §§ 9–329a and 9–329b against the defendants, several Hartford city officials, seeking an order removing the members of a competing slate of candidates from the primary ballot. *Id.* The plaintiffs alleged that the defendants improperly validated and certified nineteen of the competing slate's petitions for placement on the ballot, in violation of General Statutes § 9–410(c). *Id.* The court ultimately concluded that the defendants had improperly validated and certified the petitions, and that the signatures contained therein were invalid. *Id.* Therefore, because the total amount of valid signatures remaining did not meet the amount required to be placed on the ballot, the court ordered that the competing slate of candidates be removed from the ballot label under § 9–329b. *Id.*

In interpreting the meaning of § 9–329b, the court stated that the statute, as it relates to § 9–329a, "plainly and unambiguously further empowers the Superior Court to act on behalf of aggrieved parties when it is shown that candidates

are improperly on the ballot. Since its purpose is clear, the court is not authorized to look to the legislative history." *Id.* While the court in *Kirkley–Bey* concluded that the purpose of the statute was unambiguous, the court did not explicitly interpret the meaning of "improperly on the ballot." The court appears to have reached that conclusion due in large part to the circumstances of that case, as the complaint contained allegations that candidates were improperly on the ballot because of the failure to meet certain statutory procedural requirements for certification of candidates and placement on the ballot.

***12** While the allegations of this case are similarly alleged to be based on statutory requirements, § 3–124 does not concern procedural requirements for certification to run as a candidate for attorney general, and thus, placement on the ballot, but qualifications to serve as attorney general. The distinction is an important one. Given the context of this case, the phrase "improperly on the ballot" is ambiguous because it is susceptible to either the plaintiff's argued-for interpretation that a candidate is "improperly on the ballot" under § 9–329b if he or she does not meet the statutory qualifications to serve as attorney general, or Bysiewicz's interpretation that a candidate is only "improperly on the ballot" if he or she has not met the statutory procedural requirements for certification to run as a candidate and placement on the ballot.

Because the language of § 9–329b is ambiguous, the court may consider its legislative history. Section 9–329b was enacted pursuant to Public Acts 1978, No. 78–125. Our Supreme Court has previously discussed the legislative history of this public act. See *Gonzalez v. Surgeon,* 284 Conn. 554, 566, 937 A.2d 13 (2007). In *Gonzalez,* our Supreme Court analyzed the legislative history of P.A. 78–125 to explore the purpose of § 9–410(c), statutory language of which is contained in section 3 of that act, while the statutory language of § 9–329b is contained in section 5. The court concluded that "the legislature's focus in enacting P.A. 78–125 was on prohibiting the circulation by any one person of petitions for multiple candidates, on the presumption that the purpose and effect of such conduct is to siphon votes from the strongest rival candidate to one of the circulator's candidates." *Gonzalez v. Surgeon, supra,* at 567, 937 A.2d 13.

Neither *Gonzalez* nor the legislative history of P.A. 78–125 specifically discuss the statutory language of § 9–329b. Section 5, however, was repeatedly grouped with sections 1 through 4 of that act, supporting the inference that section 5 was intended to support the legislative purpose identified in *Gonzalez.* Indeed, one legislator, after summarizing sections 1 through 5, commented that "these changes are designed to eliminate some specific abuses that have occurred and by prohibiting the circulation of petitions for rival candidates, the bill would present, I think, the somewhat unfair tactics of siphoning off the votes of a strong rival to a weaker one, thereby increasing the circulated relative strength." Conn. Joint Standing Committee Hearings, Elections, 1978 Sess., p. 4; see also 21 H.R. Proc., Pt. 4, 1978 Sess., p. 1455–56 (similarly grouping sections 1 through 5 together).

While the legislative history does not explicitly explain the meaning of "improperly on the ballot," the court can draw the inference from the purposes stated above, and the statute's enactment pursuant to that public act, that it was intended to cure *procedural* deficiencies or abuses in the election process that are set forth pursuant to statute. The legislative history contains no reference to the qualifications for attorney general under § 3–124, or the qualifications of any candidate, or an intent to allow a judge to remove a candidate from the ballot because he or she lacked such qualifications.

***13** Moreover, as argued by the defendants, the overall statutory scheme of our election statutes as a whole supports our conclusion that "improperly on the ballot" is intended to refer to candidates that have failed to meet certain procedural requirements to run for a particular office. General Statutes § 9–416 provides that if certain statutorily defined circumstances fail to occur, "the party-endorsed candidate for such office shall be deemed to have been lawfully chosen as the nominee of such party for such office." General Statutes § 9–379 provides, in relevant part: "No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the Secretary of the State ..." These statutes mandatorily require the secretary of the state to place the names of certain candidates for office on the ballot. The plaintiff has cited no statutes that permit the secretary of the state to evaluate the qualifications of a candidate, pursuant to § 3–124, prior to placing the name of a candidate on the ballot.

For the foregoing reasons, the court concludes that the phrase "improperly on the ballot," as contained in § 9–329b, refers to the names of candidates that, for certain statutorily created *procedural* reasons, should not have been placed on the ballot by the secretary of the state.

Therefore, because the plaintiff does not allege or otherwise argue that Jepsen's name is improperly on the ballot for any procedural reasons, § 9–329b is inapplicable to her claims, and cannot provide a basis for waiving Bysiewicz's sovereign immunity.

As for the other two exceptions to sovereign immunity, the plaintiff has not alleged or otherwise argued that Bysiewicz has violated her constitutional rights, wrongfully promoted an illegal purpose, or otherwise acted in excess of her statutory authority.

Further, the doctrine of sovereign immunity bars this claim because our Supreme Court has held that "actions for declaratory and injunctive relief may be brought without the consent of the state *only* when the plaintiff alleges that the state officials had acted in excess of their statutory authority or pursuant to an unconstitutional statute." (Emphasis added.) *Gold v. Rowland, supra,* 296 Conn. at 212, 994 A.2d 106; see also *Horton v. Meskill,* 172 Conn. 615, 624, 376 A.2d 359 (1977) ("where no substantial claim is made that the defendant officer is acting pursuant to an unconstitutional enactment or in excess of his statutory authority, the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction" [internal quotation marks omitted]).

For the reasons stated above, the doctrine of sovereign immunity applies to the plaintiff's claims against the secretary of the state and bars the plaintiff's complaint as alleged against the secretary of the state. Therefore, even if the court had not already concluded that the plaintiff lacks standing to maintain her action, it would be obligated to grant the secretary of the state's motion to dismiss for lack of subject matter jurisdiction on sovereign immunity grounds.

*14 The granting of that motion would leave only Jepsen in the case as a defendant. Three of the four remedies sought by the plaintiff, however, namely, those seeking injunctive relief, could only reasonably be enforced against the secretary of the state. Thus, the court's conclusion that the secretary of the state should be dismissed from this action on sovereign immunity grounds would necessitate the conclusion that the court is unable to grant the injunctive relief the plaintiff seeks against Jepsen. Therefore, even if the plaintiff had standing to maintain her action, the only potentially valid remedy the plaintiff could continue to seek would be a declaratory ruling that Jepsen is not qualified for the position of attorney general.

For the foregoing reasons, the defendants' motions to dismiss the plaintiff's complaint are granted. [6]

All Citations

Not Reported in A.3d, 2010 WL 4723433, 51 Conn. L. Rptr. 111

Footnotes

1 General Statutes § 3–124 provides, in relevant part: "The Attorney General shall be an elector of this state and an attorney at law of at least ten years' active practice at the bar of this state."

2 Although the defendants argue that the plaintiff seeks to establish standing to allege her claims under § 9–324, the allegations of the complaint do not contain any reference to § 9–324, nor did the plaintiff make any argument that she had standing under that statute.

3 The defendants argue that § 9–329b does not statutorily authorize a plaintiff to sue the secretary of the state in an election contest, but only provides the court with the power to order a particular remedy where standing to bring a claim exists under some other statute. Because the plaintiff does not argue that § 9–329b provides any basis for standing, the court need not consider this argument.

4 Section 52–491 provides: "When any person or corporation usurps the exercise of any office, franchise or jurisdiction, the superior court may proceed, on a complaint in the nature of a quo warranto, to punish such person or corporation for such usurpation, according to the course of the common law and may proceed therein and render judgment according to the course of the common law."

5 Under Maryland law, a candidate was required to submit a certificate, under oath, attesting that such candidate is qualified to hold the office. *Liddy v. Lamone, supra,* at 398 Md. 237. Moreover, the law specifically stated that the candidate's name shall remain on the ballot if he is statutorily qualified. *Id.,* at 237 n. 6. Finally, unlike Connecticut, Maryland allowed any interested party to file a pre-election challenge to any act or omission that could illegally affect the outcome of the election. *Id.,* at 238.

6 Because the court grants the defendants' motions to dismiss, it need not resolve Jepsen's motion to strike, although the court notes that it agrees that the parties stated in that motion would necessarily need to be joined in this action in order for it to proceed.

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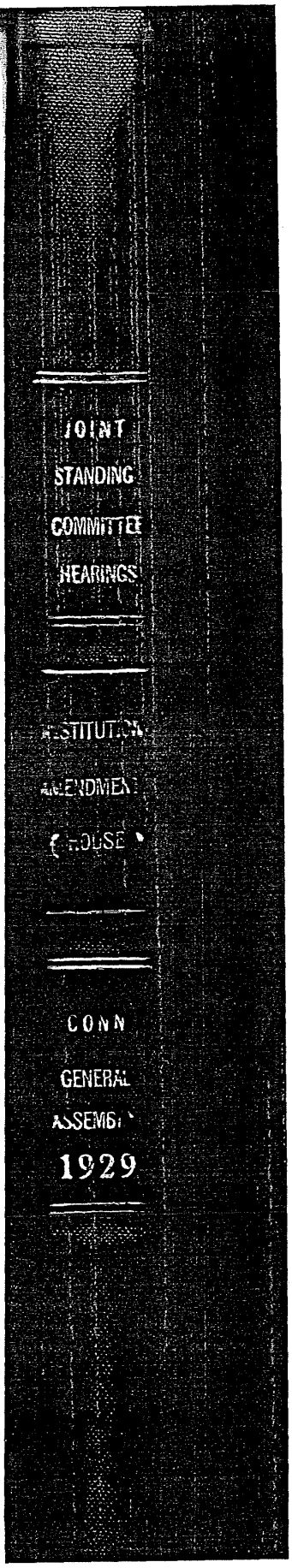
JOINT
STANDING
COMMITTEE
HEARINGS
CONN
GENERAL
1929

Stenographer's Notes

of

PUBLIC HEARINGS

before the

JOINT STANDING COMMITTEE

on

CONSTITUTIONAL AMENDMENTS (HOUSE)

—

COMMITTEE

Chairman - Adrian R. Wadsworth, Farmington

Clerk - Miss Marjory Cheney, Manchester

Messrs. Thomas Martin, Salisbury
William Byers, Thomaston
Allyn H. Vaill, Goshen
Arthur W. Williams, Killingly
Joseph Rankl, Marlborough
James H. Marriott, Sterling
Frederick J. Hough, Canton
V. E. Lucchini, Meriden
Byron D. Houston, Mansfield
J. Harrison Monroe, Guilford
Russell H. Corcoran, New London

General Assembly

State of Connecticut

January Session

1929

BILL INDEX

Indexed

CONSTITUTIONAL AMENDMENT HEARING

ROOM 61, 4th Floor

Feb. 21, 1929

PRESENT:

Senator Wadsworth
Representatives: Cheney, Byers, Vaill, Monroe.

H. R. 26 AMENDMENT TO CONSTITUTION ON ABSENTEE VOTING.

F. A. Scott: Terryville — I drew this proposed amendment to the Constitution and requested Mr. Allen, one of the Representatives from my town to introduce it.

The reason I did so is this - Mr. Willard of Wethersfield requested me to prepare an Act allowing absentee voting. I spent some little time in doing so. However there is a question in my mind as to its constitutionality.

I am very much in favor of the idea of absentee voting, and the reason I had this introduced is this, that in case the Judiciary Committee should pass an unfavorable report on one of the Bills on the grounds that it was unconstitutional then this proposed amendment could be adopted.

I do not wish this to be considered as interfering with the Act before the Judiciary Committee. If this Committee should feel that the Act allowing absentee voting is Constitutional and the Bill should be passed then it would not be necessary for this amendment to be proposed.

I want to state to the members of this Committee that it might be well to withhold a report on this Bill until after the Judiciary Committee has reported on the Bills allowing absentee voting.

I am inclined to think at the present time that the Act would be Constitutional.

(cont.)

F. A.Scott: (cont.) I was not of that opinion when I first began to study the subject, because of the fact that the Supreme Court at the time of the Civil War was asked to give an opinion to the Legislature whether absentee voting for the soldiers of the Civil War was constitutional, and they stated that it was not. However an Amendment to the Constitution was passed at that time for that purpose, allowing the soldiers to vote, but this ceased to operate after the Civil War.

The people in my town are very much in favor of absentee voting. All but four or five States have adopted absentee voting. Massachusetts has absentee voting but before they passed their Act in 1917 they adopted an Amendment to the Constitution allowing absentee voting and then in 1918 passed their Act allowing absentee voting.

In case the Judiciary Committee should pass unfavorably on allowing absentee voting then there would be something in the possession of this Committee that could be used to get this thing started. This should be withheld until the Judiciary Committee have rendered a decision.

r. Willard: ethersfield I would like to state that this has been turned down in the past for one reason or another. The State of Connecticut has always wanted to be sure, and would rather wait a little while to see how a law worked out.

At the present time there are only two States, one other besides Connecticut, who has not this law on its books, and that is California.

We do not want to prejudice the opinion of the Judiciary Committee by bringing in the report of this Committee until after they have had a chance to decide whether it is constitutional or not.

I have canvassed the House and Senate very carefully and I think there is almost a unanimous opinion that this should pass. Everybody seems to be in favor of the Bill. I really think that the real opposition was from the fact that it was one of the newer laws and they wanted to be very careful. The State of Connecticut has always been slow but sure, but the opposition has completely disappeared so far as I have been able to determine.

(cont.)

Mr. Willard: (cont.) I would like to illustrate an instance in my own family - my father is 78 years old and he has always voted, and taken a great deal of interest in voting the Republican ticket. On account of illness he has to go to Florida or California, or some other warm climate. In order to have the privilege of voting he has in the past had to go to a Summer camp in Maine and register there. For the last 10 or 12 years he has voted there.

I also have an Uncle who is Treasurer of the Town of Wethersfield and a short time ago he was seriously ill, and has since died. During the past election he was made seriously ill from the fact that he could not vote. The doctor would not allow him to go to town to vote.

I think there is absolutely no question but that there is a general demand for this Bill.

Representative Chattuck: Granby I think that I should say a word on this Bill before your Committee, in regard to the Amendment. I entered H.B. 613 on absent voting, one of the three Bills before the Judiciary Committee.

For about four years I have been approached by various people in the State with regard to a Bill on absentee voting. I was in the Legislature two years ago but was not prepared at that time to draw a Bill because of the fact that I was not posted sufficiently on Legislative matters.

A number of citizens from my town came to me in the Summer of 1928 and asked for my assurance that I would draw up such a Bill and have it entered before this Legislature.

I have canvassed the Legislature but failed to find any opposition to such a Bill.

I want to give you perhaps a personal idea of the hardship it works on the pocketbooks of the voters, the commercial travelers, students and teachers. They are the ones especially inconvenienced in regard to voting.

I know of a young man going to school in Washington, D. C. who insisted that he come home to Connecticut to vote and it cost his father over $40.00 for that young man's trip. He cast his ballot and returned to Washington.

There is a teacher in our town from Illinois who is now retired and living there. She is around 60 years old. She sent to Illinois for her ballot and it came to her. As a Notary Public she came to me to have it sworn to.

(cont.)

Mr. Shattuck: (cont.) Now her vote went forward and was counted. If it had not been passed for her to vote in that instance it would have cost her over $100.00.

I hope that there will be some consideration given to the Constitutional Amendment if it is necessary to have it.

Senator Dennis: Hartford I happen to be the author of one of the Bills before the Legislature, and I think we are agreed that there is a great need for some provision being made for absentee voting.

We feel that the situation should be remedied by this Legislature and now is the proper time to do it.

There has been some question raised in the past as to the constitutionality of this and I think it would be well if we held our report on this particular matter until after the Judiciary Committee has had a chance to discuss the other three Bills.

I do want to go on record as in favor of absent voting, or some Bill which will take care of it, whether Constitutional Amendment is necessary or not. If it is necessary I want to go on record as favoring this particular petition before your Committee.

Representative Kramer: Wethersfield — In favor of the Bill.

Representative Kettler: East Windsor — In favor of the Bill.

Representative Buckingham: New Milford — In favor of this Bill.

Representative Collins: East Granby — In favor of this Bill.

Representative Lenz: Haddam — In favor of this Bill.

(cont.)

Representative Hanbury: Newington — Favoring this Bill.

Miss Sutliffe: Plymouth — In favor of this measure.

Nobody appeared in opposition.

- - - - -

√H.R. 27. AMENDMENT VERDICT OF A JURY IN CIVIL ACTION MAY BE RENDERED WITH CONCURRENCE OF NOT LESS THAN NINE MEMBERS OF JURY.

Judge Peck: Bristol — I introduced that Bill and it doesn't represent anybody's opinion but my own. It is not backed by an Association of any kind.

There has been during the last number of years a great deal of discussion about this subject, and I think it is pretty generally the concensus of opinion that the unanimity of the jury has been seriously inconvenienced.

I have spoken to several lawyers, and also to members of the House of Representatives, who had been in the habit of serving on juries, and they were unanimously in favor of this Bill.

The Constitution says that the right of jury trial shall be preserved and it is held in quite a number of states that the right of jury trial means the jury trial substantially as a common law. Our own Supreme Court has never passed on that question.

Our Supremem Court of the United States may decide the most vital questions and often do by actual decision.

The necessity of unanimity of the jury as some inconveniences of a minor kind. In the first place if there is, and there very often is on the jury, one or two rather obstinate people of a different opinion from the rest it very often takes a jury five or six hours to agree, when 10 or 11 of them were agreed to begin with and there wasn't much doubt as to what the verdict should be. This obstinate one may prolong the meeting a long time.

(cont.)

General Assembly

Amendment

July Special Session, 2020

LCO No. **3767**

Offered by:
REP. ARESIMOWICZ, 30th Dist.
SEN. LOONEY, 11th Dist.
REP. RITTER M., 1st Dist.
SEN. DUFF, 25th Dist.

To: House Bill No. **6002** File No. Cal. No.

"AN ACT CONCERNING ABSENTEE VOTING AND REPORTING OF RESULTS AT THE 2020 STATE ELECTION AND ELECTION DAY REGISTRATION."

After the last section, add the following and renumber sections and internal references accordingly:

"Sec. 501. (*Effective from passage*) Notwithstanding any provision of the general statutes, any provisions of sections 1 to 5, inclusive, of Executive Order No. 7QQ of Governor Ned Lamont, dated May 20, 2020, that relate to the August 11, 2020, primary, are ratified."

This act shall take effect as follows and shall amend the following sections:		
Sec. 501	*from passage*	New section

Vote for HB-6002 Roll Call Number 19
Taken on 07/23 AS AMENDED

The Speaker ordered the vote be taken by roll call at 6:29 p.m.

The following is the result of the vote:

Total Number Voting	146
Necessary for Passage	74
Those voting Yea	144
Those voting Nay	2
Those absent and not voting	5

The following is the roll call vote:

Y	ABERCROMBIE	Y	LOPES	Y	ZIOGAS	Y	MACLACHLAN
Y	ALLIE-BRENNAN	Y	LUXENBERG			Y	MASTROFRANCESCO
Y	ALTOBELLO	Y	MCCARTHY VAHEY			Y	MCCARTY, K.
Y	ARCONTI	Y	MCGEE	Y	ACKERT	Y	MCGORTY, B.
Y	ARNONE	Y	MESKERS	Y	ARORA	Y	O'DEA
Y	BAKER	Y	MICHEL	N	BETTS	X	O'NEILL
Y	BARRY	Y	MILLER	Y	BOLINSKY	N	PAVALOCK-D'AMATO
Y	BLUMENTHAL	Y	NAPOLI	Y	BUCKBEE	Y	PERILLO
Y	BORER	Y	NOLAN	Y	CANDELORA, V.	Y	PETIT
Y	BOYD	Y	PALM	Y	CARNEY	Y	PISCOPO
Y	COMEY	Y	PAOLILLO	Y	CARPINO	Y	POLLETTA
Y	CONCEPCION	Y	PERONE	Y	CASE	Y	REBIMBAS
Y	CONLEY	Y	PHIPPS	Y	CHEESEMAN	Y	RUTIGLIANO
Y	CURREY	Y	PORTER	Y	CUMMINGS	Y	SIMANSKI
Y	D'AGOSTINO	Y	REYES	Y	D'AMELIO	X	SMITH, R.
Y	DATHAN	Y	RILEY	Y	DAUPHINAIS	Y	SREDZINSKI
Y	DE LA CRUZ	Y	RITTER	Y	DAVIS	Y	VAIL
Y	DEMICCO	Y	ROCHELLE	Y	DELNICKI	Y	WILSON
Y	DILLON	Y	ROJAS	Y	DEVLIN	Y	WOOD, T.
Y	DIMASSA	Y	ROSE	Y	DUBITSKY	Y	YACCARINO
Y	DOUCETTE	Y	ROTELLA	Y	FARNEN	Y	ZAWISTOWSKI
Y	ELLIOTT	Y	SANCHEZ	Y	FERRARO	Y	ZULLO
Y	EXUM	Y	SANTIAGO, H.	Y	FISHBEIN	Y	ZUPKUS
Y	FELIPE	Y	SCANLON	X	FLOREN		
Y	FOX	Y	SERRA	X	FRANCE		
Y	GARIBAY	Y	SIMMONS, C.	Y	FREY		
Y	GENGA	Y	SIMMS, T.	Y	FUSCO	Y	ARESIMOWICZ
Y	GIBSON	Y	SMITH, B.	X	GREEN		
Y	GILCHREST	Y	STAFSTROM	Y	HAINES		
Y	GONZALEZ	Y	STALLWORTH	Y	HALL, C.	Y	GODFREY
Y	GRESKO	Y	STEINBERG	Y	HARDING		
Y	GUCKER	Y	TERCYAK	Y	HAYES		
Y	HADDAD	Y	TURCO	Y	HILL	Y	BUTLER
Y	HALL, J.	Y	VARGAS	Y	KENNEDY	Y	CANDELARIA, J.
Y	HAMPTON	Y	VERRENGIA	Y	KLARIDES	Y	COOK
Y	HORN	Y	WALKER	Y	KLARIDES-DITRIA	Y	HENNESSY
Y	HUGHES	Y	WILSON PHEANIOUS	Y	KOKORUDA	Y	MORIN
Y	JOHNSON	Y	WINKLER	Y	LABRIOLA	Y	MUSHINSKY
Y	LEMAR	Y	WOOD, K.	Y	LANOUE	Y	ROSARIO
Y	LINEHAN	Y	YOUNG	Y	LAVIELLE	Y	RYAN

Vote for HB-6002 Sequence Number 50
Taken on 7/28 PASS

The following is the result of the vote at 3:47 p.m.:

Total Number Voting	36
Necessary for Adoption	19
Those voting Yea	35
Those voting Nay	1
Those absent and not voting	0

The following is the roll call vote:

Y	1	JOHN W. FONFARA	Y	19	CATHERINE A. OSTEN
Y	2	DOUGLAS MCCRORY	Y	20	PAUL M. FORMICA
Y	3	SAUD ANWAR	Y	21	KEVIN KELLY
Y	4	STEVE CASSANO	Y	22	MARILYN MOORE
Y	5	DEREK SLAP	N	23	DENNIS BRADLEY
Y	6	GENNARO BIZZARRO	Y	24	JULIE KUSHNER
Y	7	JOHN A. KISSEL	Y	25	BOB DUFF
Y	8	KEVIN D. WITKOS	Y	26	WILL HASKELL
Y	9	MATTHEW LESSER	Y	27	CARLO LEONE
Y	10	GARY WINFIELD	Y	28	TONY HWANG
Y	11	MARTIN M. LOONEY	Y	29	MAE FLEXER
Y	12	CHRISTINE COHEN	Y	30	CRAIG MINER
Y	13	MARY ABRAMS	Y	31	HENRI MARTIN
Y	14	JAMES MARONEY	Y	32	ERIC BERTHEL
Y	15	JOAN V. HARTLEY	Y	33	NORM NEEDLEMAN
Y	16	ROBERT SAMPSON	Y	34	LEONARD FASANO
Y	17	GEORGE LOGAN	Y	35	DAN CHAMPAGNE
Y	18	HEATHER SOMERS	Y	36	ALEX KASSER