UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF 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 Carolan State Election Commission, and HENRY D. MCMASTER in his official capacity as Governor of South Carolina Defendants.	Case No.: 3:20-cv-01552-JMC **INTERVENOR–DEFENDANT SOUTH CAROLINA REPUBLICAN PARTY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 7.06, DSC, the intervenor–defendant, the South Carolina Republican Party (the Republican Party), submits this response in opposition to the motion for preliminary injunction filed by the plaintiffs, Mary T. Thomas, Nea Richard, Jeremy Rutledge, Trena Walker, Dr. Brenda Williams, and The Family Unit, Inc. For the reasons that follow, the Court should deny the plaintiffs' motion for preliminary injunction. The plaintiffs have not made a clear showing of each element to justify the Court granting such extraordinary relief and fundamentally changing the landscape governing absentee voting in South Carolina on the eve of an election.

BACKGROUND

As the U.S. Supreme Court has recognized, "[i]t is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973). "Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974). This action nevertheless stems from the plaintiffs' desire to erase certain statutory criteria and expand South Carolina's absentee voting privileges on the eve of the June 9, 2020 primary election.

At the outset, everyone agrees COVID-19 is serious. Thousands of South Carolinians have contracted the virus, and over three hundred have died. And it has created a number of challenges for individuals, businesses, and every level and branch of government. Social distancing, face masks, gloves, and hand sanitizer have become the new norm. No doubt, these are challenging times. What is more, everyone agrees that the upcoming June primary must be conducted in a safe manner—consistent with CDC guidelines—to protect poll workers and voters.

To that end, the State Election Commission recently issued a press release detailing the measures it was implementing at polling locations to ensure the safety of all involved. Press Release, S.C. State Election Comm'n, 2020 Statewide Primaries FAQs (Apr. 20, 2020), https://www.scvotes.org/sites/default/files/2020-06-09%20(Primary%20FAQs).pdf. The State Election Commission, for example, said it was providing "special training on sanitizing surfaces and applying social distancing concepts"; equipping poll workers "with masks, face shields and gloves"; providing "sanitizing wipes" to "regularly clean common surfaces throughout the day"; directing poll workers to space "[c]heck-in stations and voting equipment . . . to keep voters and managers at least six feet apart"; providing hand sanitizer for voters and managers; and giving

voters "a cotton swab for making selections on the touchscreen." Id. This week, the General Assembly is set to take up a proposal to appropriate "up to $15 million [to the State Election Commission] to help protect the health of South Carolina voters, poll workers and local election employees." Maayan Schechter, Emergency Orders for Covid-19 Awaiting Votes, SC Lawmakers to Return to Work in May, THE STATE (Apr. 30, 2020), https://www.thestate.com/news/politics-government/article242396931.html#storylink=hpdigest_politics.

Voters who choose not to vote in person, however, are eligible to vote absentee if they meet any of a host of exceptions under South Carolina law. See S.C. Code Ann. § 7-15-320. To be clear, the SCGOP is an ardent proponent of absentee voting. In the SCGOP's view, the General Assembly—as a matter of public policy—has struck the appropriate balance by giving options to voters who are unable to make it to the polls to, instead, cast their votes via absentee ballot, all while ensuring the integrity of our state's elections and not opening the door to voter fraud. See S.C. Code Ann. §§ 7-15-330 & -340.

The South Carolina Constitution, of course, provides that "[t]he General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process." S.C. CONST. art. II, § 10. Pursuant to this delegation of authority, the General Assembly has developed a comprehensive scheme for voters to vote by absentee ballot in South Carolina. See S.C. Code Ann. § 7-15-10, et. seq. Under the law, persons who do not vote in person have eighteen potential categories from which to choose to vote by absentee ballot. See S.C. Code Ann. §§ 7-15-310 & -320. Although Petitioners suggest it is too burdensome to meet these requirements, the statute actually covers a huge swath of voters and is worth a read:

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

(1) students, their spouses, and dependents residing with them;

(2) persons serving with the American Red Cross or with the United Service Organizations (USO) who are attached to and serving with the Armed Forces of the United States, their spouses, and dependents residing with them;

(3) governmental employees, their spouses, and dependents residing with them;

(4) persons on vacation (who by virtue of vacation plans will be absent from their county of residence on election day); or

(5) overseas citizens.

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

(1) physically disabled persons;

(2) persons whose employment obligations require that they be at their place of employment during the hours that the polls are open and present written certification of that obligation to the county board of voter registration and elections;

(3) certified poll watchers, poll managers, county board of voter registration and elections members and staff, county and state election commission members and staff working on election day;

(4) persons attending sick or physically disabled persons;

(5) persons admitted to hospitals as emergency patients on the day of an election or within a four-day period before the election;

> (6) persons with a death or funeral in the family within a three-day period before the election;
>
> (7) persons who will be serving as jurors in a state or federal court on election day;
>
> (8) persons sixty-five years of age or older;
>
> (9) persons confined to a jail or pretrial facility pending disposition of arrest or trial; or
>
> (10) members of the Armed Forces and Merchant Marines of the United States, their spouses, and dependents residing with them.

Id.

If a voter falls into one of these categories, that person then submits an application to the county election and voter registration office. See S.C. Code Ann. § 7-15-210. Upon receipt, the county election and voter registration office returns the ballot to the applicant. The applicant votes and inserts the completed ballot in the envelope provided by the county election and voter registration office. Additionally, the applicant must sign an oath affirming he or she is "duly qualified to vote." S.C. Code Ann. § 7-15-220. The applicant's signature on the oath must be accompanied by a witness's signature. Id. Once the applicant mails the ballot to the county election and voter registration office, that office reviews the application and ballot to ensure all the requirements are met. See S.C. Code Ann. § 7-15-230. The law does not allow an absentee ballot to be counted if the ballot is not signed and witnessed and returned prior to closing of the poll. Id.

The General Assembly crafted this statute to ensure registered voters had ample opportunities to vote via absentee ballot. In doing so, the General Assembly sought to preserve the integrity of elections by developing a scheme that ensured the reliability of our voting system and protected it from fraud. Here, notwithstanding the wide availability of absentee voting detailed above, the plaintiffs are trying to seize on the current global pandemic to change the law through

the courts. At bottom, the plaintiffs want the Court to excise any absentee voter requirements and rewrite the law to say the election may be conducted, in full, via mail-in absentee ballot. They also want the Court to strike the witness requirement from the statute as if it imposes some impossible burden on voters. Respectfully, the plaintiffs are overplaying their hand. The Republican Party certainly agrees the current situation has created new challenges that the State Election Commission must address to safely administer the upcoming election for South Carolina's voters and poll workers in the era of COVID-19. But the constitution and the rule of law cannot fall by the wayside in times of emergency. What inevitably follows is bad law.

In their complaint and motion for preliminary injunction, the plaintiffs ask this Court to enjoin the defendants from enforcing South Carolina law that establishes categories of "persons qualified to vote by absentee ballot" (the excuse requirement) and requires a witness signature on the absentee ballot (the witness requirement). While the plaintiffs use the COVID-19 pandemic as justification to challenge these laws, this is merely a means to an end because they have been on the books for decades. Because their requested relief is so drastic, the plaintiffs bear a heavy burden of demonstrating the facts and law clearly support their position. After all, if successful, this will wreak havoc on the administration of the upcoming June primary that is already underway.

The plaintiffs cannot make a clear showing as to each element required for a mandatory preliminary injunction to issue. Accordingly, the Court should decline their invitation to invoke such a drastic remedy, particularly where, as here, the plaintiffs slept on their rights for so long before trying to use COVID-19 as a vehicle to change our state's election laws.

STANDARD

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" Billups v. City of Charleston, 194 F.

Supp. 3d 452, 459 (D.S.C. 2016) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). A preliminary injunction involves "the exercise of very far-reaching power" and should "be granted only sparingly and in limited circumstances." Microstrategy, Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001).

The party seeking a preliminary injunction must establish all four of the following elements: (1) it "is likely to succeed on the merits"; (2) it "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in its favors"; and (4) an "injunction is in the public interest." The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346-47 (4th Cir. 2009). "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 v. S.C. Dem. Party, CA No. 3:16-cv-00322-CMC, 2016 WL 741317, at *2 (D.S.C. Feb. 25, 2016).

"Preliminary injunctions may be categorized as either prohibitory or mandatory." Billups, 194 F. Supp. 2d at 460. "Prohibitory preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013). "Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances where the exigencies of the situation demand such relief." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980). "A mandatory injunction, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 418 (W.D.S.C. 1962). "Mandatory preliminary injunctive relief in any circumstance is disfavored[] and warranted only in the most extraordinary circumstances." De La Fuente v. S.C. Democratic Party, 164 F. Supp. 3d 794, 798 (D.S.C. 2016).

The Fourth Circuit "has defined the status quo as the 'last uncontested status between the parties which preceded the controversy.'" Pashby, 709 F.3d at 320 (quoting Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 378 (4th Cir. 2012)). Because the General Assembly unambiguously has the authority to regulate absentee voting, and has appropriately exercised that authority by codifying absentee requirements into law, the status quo is enforcing the law that has been on the books for years. Because the plaintiffs ask the Court to prevent the defendants from enforcing that law, they are seeking a mandatory preliminary injunction. A request for a mandatory preliminary injunction is met with even greater scrutiny from the Court. See id. (asserting that "'application of th[e] exacting standard of review [for preliminary injunctions] is even more searching when' the relief requested 'is mandatory rather than prohibitory in nature'" (alterations in original) (quoting Perry v. Judd, 471 F. App'x 219, 223–24 (4th Cir. 2012))).

ARGUMENT

Having set forth the lens through which the Court must analyze the case, the plaintiffs failed to shoulder their heavy burden of demonstrating entitlement to one of the most drastic forms of relief known under the law. The Court should therefore deny their motion for a mandatory preliminary injunction because the plaintiffs cannot make a clear showing that (1) they are likely to succeed on the merits, (2) they will suffer irreparable harm in the absence of a preliminary injunction, (3) the balance of the equities tips in favor of the plaintiffs, or (4) a preliminary injunction is in the public interest.

I. The plaintiffs are not likely to succeed on the merits.

Under the South Carolina Constitution, the General Assembly is vested with the sole authority to regulate absentee voting. See S.C. CONST. art. II, § 10 ("The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide

for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process." (emphasis added)).

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

Against this backdrop, the plaintiffs are complaining about the regulation of a privilege, not the right to vote itself. The Court therefore does not employ strict scrutiny to adjudge the constitutionality of the statutes in question. The U.S. Supreme Court has held that "a careful examination on [its] part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." McDonald, 394 U.S. at 807. As in McDonald, "[s]uch an exacting approach is not necessary here" because (1) "the distinctions made by [South Carolina]'s absentee provisions are not drawn on the basis of wealth or race," and (2) "there is nothing in the record to indicate that the [South Carolina] statutory scheme has an impact on appellants ability to exercise the fundamental right to vote. Id.

To be sure, "the right to vote" is not "at stake here." Id. Instead, the plaintiffs' argument rests on some "claimed right to receive absentee ballots." Id. And "[d]espite [the plaintiffs'] claim

to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [them] the exercise of the franchise." Id. at 807–08.

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

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

A. Neither the excuse requirement nor the witness requirement violates one's fundamental right to vote under the First and Fourteenth Amendments.

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

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Id. In White, the Court upheld that state's use of a notary signature requirement, finding the parties made "little or no effort to demonstrate its impracticability or that it is unusually burdensome." 415 U.S. at 787. So too here. Respectfully, the plaintiffs failed to allege a cognizable burden. Even if the plaintiffs are fully quarantined and have not left the house, they have to eat. The plaintiffs must have either gone to the grocery store themselves or had somebody bring them food. Either situation gives them a quick ability to find a witness. After all, the witness requirement is not as rigid as they let on. Further, the State has a recognized legitimate interest in enforcing the witness requirement to prevent voter fraud by having some accountability mechanisms in place.

As for the excuse requirement, the plaintiffs fare no better. It is worth noting that most of them already qualify to vote absentee under the statute as written. "[C]ourts are bound to give effect to the expressed intent of the [General Assembly]." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting NORMAN J. SINGER, SUTHERLAND STATUTORY INTERPRETATION § 46.03 at 94 (5th ed. 1992)). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

To adopt the plaintiffs' interpretation would render the numerous other criteria surplusage and let the exception swallow the rule. Cf. Senate ex rel. Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (recognizing the Court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (quoting CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011))). If the Court strikes down the excuse requirement, it will eliminate all other criteria of statute. But the excuse requirement does not place a burden on the plaintiffs' right to vote. Instead, it outlines

qualifications to vote absentee. South Carolina law still provides for numerous other ways for voters to exercise the franchise. Thus, the plaintiffs' alleged dilemma is a red herring.

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

Prior to an election, a plaintiff mounting an attack on the constitutionality of an absentee ballot statute that "would invalidate the statute in all its applications" shoulders "a heavy burden of persuasion." Crawford v. Marion Cty Election Bd., 553 U.S. 181, 200 (2008) (plurality opinion). The plaintiffs wholly failed to meet that burden here. Because the plaintiffs failed to make a clear showing they are likely to succeed on the merits of their claim under the First and Fourteenth Amendments to the U.S. Constitution, the Court should deny their drastic request for a mandatory preliminary injunction.

B. The witness requirement does not violate Section 201 of the Voting Rights Act.

The plaintiffs' challenge to the witness requirement under Section 201 of the Voting Rights Act of 1965 likewise fails as a matter of law. A review of the text and procedural requirements is instructive. Section 201 provides as follows:

> (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.
>
> (b) As 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(a)–(b).

Here, the plaintiff's claim fails right out the gate because they failed to affirmatively request a three-judge court, which is the only court capable of addressing their Section 201 claim. See 52 U.S.C. § 10504 (providing that Section 201 claims "shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28"); see also 28 U.S.C. § 2284(b)(3) (stating that a "single judge shall not . . . hear and determine any application for a preliminary or permanent injunction . . . or enter judgment on the merits").

Even on the merits, however, the plaintiffs' argument is manifestly without merit. A review of their claim reveals it is not even tethered to the plight of COVID-19. What is more, these requirements have been on the books for decades and do not amount to a "test or device" as those terms are defined in Section 201. And the General Assembly's purpose in enacting the requirements is hardly new or subject to dispute. As the Supreme Court of South Carolina recognized over forty years ago, the "purpose" of the signature requirement is to ensure "the authenticity of the absentee vote." Gregory v. S.C. Democratic Exec. Comm., 271 S.C. 364, 375, 247 S.E.2d 439, 444 (1978). The plaintiffs admit as much in their motion. But they still try to push forward on a racial discrimination claim. Not even COVID-19 can carry them across the finish line. The law was designed to prevent voter fraud—irrespective of political party or race or gender or any other classification—and reading anything else into the witness requirement flies in the face of any reasonable interpretation of the statute or its legislative history. Contrary to the

plaintiffs' assertions, the witness requirement is not a test. Nor does it force voter to obtain "the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(b)(4).

Because the plaintiffs failed on both procedural and substantive grounds to allege a cognizable Section 201 claim, they are not likely to succeed on the merits and, therefore, are not entitled to a mandatory preliminary injunction under this theory.

II. The plaintiffs cannot make a clear showing of irreparable harm.

"Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the courts'] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a 'clear showing' that the plaintiff is entitled to relief." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017) (quoting Winter, 555 U.S. at 22). "Moreover, the required 'irreparable harm' must be 'neither remote nor speculative, but actual and imminent.'" Direx Isreal, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991) (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)).

The plaintiffs' claim of irreparable harm allegedly caused by the excuse requirement and witness requirement is not only speculative, but it is also completely within their control to avoid. As described earlier, the plaintiffs have a plethora of ways to vote. The plaintiffs simply state they are being denied the right to vote because they (1) allegedly cannot meet one of the eighteen categories to vote absentee; and (2) even if they do possess the qualifications, the plaintiffs allegedly still cannot vote absentee because they cannot obtain a witness's signature. In support of their claims, the plaintiffs contend social distancing and self-quarantining prevent them from meeting the requirements of state law. Respectfully, that much does not follow. If that is not enough, the plaintiffs want the Court to retain jurisdiction to enforce the injunction until a vaccine is discovered or a cure is found—whenever that may be. To date, nobody has any idea when this

will occur. But we do know until that occurs, the plaintiffs will obtain the necessities of life. They will receive food either because someone brings it to them (a potential witness) or because they have ventured out into the world (again other potential witnesses). Either way, the plaintiffs will have access to vote via absentee ballot if they so desire.

As further support of their irreparable harm argument, the plaintiffs also point to the election recently held in Wisconsin. At the outset, Wisconsin experienced a huge voter turnout. And the plaintiffs' conclusory claims that a number of people contracted COVID-19 because they voted in the primary are speculative at best. It would be pure guesswork or conjecture for anyone to argue that individuals were exposed to and contracted COVID-19 while standing in line at a precinct to vote. Those voters could have been exposed in any number of ways. In other words, the plaintiffs' reliance upon the Wisconsin primary to somehow create a false dichotomy under which voters are faced with the impossible choice of staying at home or contracting COVID-19 at the polls is overstated.

Additionally, although COVID-19 is relevant to the irreparable harm factor as a general matter, the plaintiffs' constitutional challenge to the "excuse requirement" has nothing to do with the pandemic. Nor does the witness requirement. While the pandemic is a huge problem for our society today—and will continue to present challenges into the near future, including during this election season—that does not justify rewriting South Carolina's longstanding election laws to suit the plaintiffs' policy preferences. The plaintiffs simply want the criteria thrown out. Regardless, even if the plaintiffs can demonstrate the requisite irreparable harm, a preliminary injunction "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 417 (W.D.S.C.

1962). The plaintiffs still must demonstrate the remaining elements necessary to obtain a preliminary injunction. As demonstrated above and below, they cannot.

III. The balance of the equities and public interest favor upholding the law.

Last, the plaintiffs cannot make a clear showing that the balance of the equities tips in their favor and a permanent injunction would be in the public interest. See Z-Man Fishing Prods., Inc., 790 F. Supp. 2d at 425 (quoting Winter, 555 U.S. at 20).

Principles of federalism and separation of powers certainly counsel against this Court changing the law on the eve of an election. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Maryland v. King, 567 U.S. 1301, ____, 133 S. Ct. 1, 3 (2012) (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977)). Mindful of "the appropriate respect" the Court "owe[s] to States as sovereigns," Justice Thomas once observed that "[t]he equities and public interest likewise generally weigh in favor of enforcing duly enacted state laws" for purposes of the injunction inquiry. Strange v. Searcy, 135 S. Ct. 940, 940 (2015) (mem.) (Thomas, J., dissenting).

Indeed, as one court has observed, "the government's interest is in large part presumed to be the public's interest." United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 440 (7th Cir. 1991). This rings particularly true here given that the South Carolina Constitution has given the General Assembly the authority to regulate the conduct of absentee voting during elections, see S.C. CONST. art. II, § 10, and the General Assembly has, in turn, given the State Election Commission the authority to administer elections.

The State Election Commission is working tirelessly to ensure it administers an orderly political party primary election in June. It is taking steps to protect voters and poll workers during

in-person voting. Also, the State Election Commission is assisting county election and voter registration offices to prepare for an increased number of absentee ballots. Enjoining the absentee ballot process already in place would cause great confusion with the public. That is why 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., 140 S. Ct. 1205, 1207 (2020).

Here, the plaintiffs flouted this sound guidance and lollygagged around in bringing their claims. COVID-19 has spread throughout the country since at least March. Yet the plaintiffs waited until the end of April to bring a lawsuit and then waited almost another week to file the motion for preliminary injunction. Interestingly, Governor McMaster has since lifted the state of emergency and, therefore, their reliance on his prior executive orders is misplaced. Under these circumstances, though, granting the injunction and upsetting the status quo is not in the public interest. The plaintiffs manufactured this emergency and the equitable doctrine of laches should bar their claims, particularly given that the laws under challenge have been in effect for decades.

In sum, the plaintiffs failed to clearly demonstrate the equities tip in their favor or that the public interest would be better served by changing the rules of the game this close to an election. The Court should therefore deny their motion for a mandatory preliminary injunction.

IV. If the Court awards this drastic relief, then it should require a commensurate bond.

Although the plaintiffs skip right over this issue, ignoring the bond requirement in Federal Rule of Civil Procedure 65(c) will not make it go away.

It is well-settled that "[t]he court may issue a preliminary injunction . . . 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." Fed. R. Civ. P. 65(c) (emphasis added).

As the Fourth Circuit has observed, "[t]his rule is mandatory and unambiguous." Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999). And although a "district court has discretion to set the bond amount," the court "is not free to disregard the bond requirement altogether." Id. Indeed, "[i]n view of the clear language of Rule 65(c), failure to require a bond upon issuing injunctive relief is reversible error." Id.

As another court in this district has observed, "[i]n fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order, and "[t]he amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party." Pulliam v. Clark, No. 4:11-cv-03047-RBH, 2012 WL 1835758, at *3 n.3 (D.S.C. May 21, 2012) (quoting 11A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3954, at 292 (2d ed. 1995)).

The plaintiffs should post an injunction bond commensurate to put the State of South Carolina on equal footing should an adverse ruling get reversed on appeal. Indeed, having to open up absentee voting to millions of voters—as opposed to the roughly 60,000 absentee voters who from the last election—will require the State Election Commission to spend much more on this facet of the election than that for which it previously planned. But the Republican Party will leave it to the Court's discretion as to an appropriate amount if the Court reaches this prong. As noted above, however, the plaintiffs are not entitled to a mandatory preliminary injunction.

CONCLUSION

Based upon the foregoing, the Court should deny plaintiffs' motion for preliminary injunction because they failed to make a clear showing of each element required for the Court to

impose such a drastic form of relief at the eleventh hour before South Carolina's June primary.

Respectfully submitted,

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