IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOANN SHERNOFF; DSCC,

Plaintiffs,

v.

MARCI ANDINO, in her official capacity as the Executive Director of the South Carolina State Election Commission; HOWARD M. KNAPP, in his official capacity as Director of Voter Services of the South Carolina State Election Commission; JOHN WELLS, in his official capacity as Chair of the South Carolina State Election Commission; and JOANNE DAY, CLIFFORD J. EDLER, LINDA MCCALL and SCOTT MOSELEY, in their official capacities as members of the South Carolina State Election Commission,

Defendants.

Case No. _____

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. Introduction

Plaintiffs JoAnn Shernoff and DSCC, by and through the undersigned attorneys, bring this motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 to address an immediate threat to the rights of South Carolinians to vote in the November 3, 2020 general election. Namely, the State's election officials can, and do, reject ballots for being unsigned or not "properly signed and witnessed." When this occurs, the voter is *not notified* and cannot act to rectify the situation. Without prompt notice and an opportunity to cure, voters in South Carolina may see their ballots rejected with *no knowledge* of the issue and *no chance* to address these perceived deficiencies. This lack of notice and cure period violates South Carolina voters' procedural due process rights and burdens their right to vote.

South Carolina's election laws require that an absentee voter must sign the ballot return envelope and, even during a socially-distanced pandemic, have another person witness and sign their absentee ballot return envelope for the vote to count (the "Witness Requirement"). S.C. Code Ann. § 7-15-220. The Witness Requirement was challenged in an earlier lawsuit brought in this district and preliminarily enjoined for the June primary and run-off elections. That ruling was not appealed, and ballots submitted without a witness signature in those elections were counted. The Witness Requirement was again challenged for the November election, and the district court again enjoined it. Close to three weeks later, on October 5, 2020, the Supreme Court stayed that injunction pending appeal, but held that the Witness Requirement would not apply to ballots received by election officials on or before October 7, 2020. Many voters received notices with their absentee ballots that the Witness Requirement was not in effect and have never received notice that the Witness Requirement was reinstated. Understandably, many voters continue to believe that the Witness Requirement is not in effect, and many, like Plaintiff JoAnn Shernoff,

have submitted absentee ballots without a witness signature in reliance on news reports about the district court's order and the notices they received from their county clerks.

The problem is simple: South Carolina does not provide an opportunity for voters to address and "cure" perceived issues with the signature on or witnessing of their ballot. Instead, South Carolina rejects the ballot outright with no requirement that election officials even inform voters of that fact. This disenfranchises scores of voters in any election. But the threat of disenfranchisement is particularly grave in the upcoming election given the reintroduction of universal absentee voting and the record number of mailed ballots expected to be cast due to the COVID-19 pandemic.

This harm is not hypothetical; it is real, palpable, and ongoing. South Carolina's Witness Requirement has already likely disenfranchised voters like Ms. Shernoff, who mailed in her ballot without a witness signature thinking it would be counted only to learn too late of the Supreme Court's most recent ruling. Her ballot is likely to be rejected, but she does not know because she has received no notice from the State.

Plaintiffs' requested relief is a narrowly-tailored and straightforward application of the *Anderson-Burdick* framework and the constitutional guarantee of procedural due process: provide voters whose attempted ballots have been rejected because they were are deemed by elections officials to have not been "properly signed and witnessed" notice of the rejection and an opportunity to cure. This motion respectfully requests this Court issue relief to permit voters to address alleged deficiencies in their ballots either on or before Election Day for issues related to the Witness Requirement and up until three days after Election Day for problems related to the Signature Requirement.

II. Factual Background

A. Absentee voting in South Carolina

In March 2020, Governor Henry McMaster issued an executive order addressing South Carolina's elections during the pandemic. The Governor determined that the COVID-19 outbreak posed "an actual or imminent public health emergency for the State of South Carolina." Exec. Order No. 2020-09 at 1 (Mar. 15, 2020). Days later, Defendant Marci Andino, the Executive Director of the South Carolina State Election Commission (the "Commission"), wrote to the State's top elected officials recommending "changes to [the] election process" for elections to be held this year, "to safely and securely conduct elections during and following the coronavirus pandemic." Ex. 1 at 1, 3 (Ltr. From M. Andino to H. McMaster, March 30, 2020). Among other things, Executive Director Andino urged that South Carolina should "[a]llow no excuse absentee voting," which she described as a "relatively simple change," and recommended removing the Witness Requirement. *Id.* at 3, 5.

In the ensuing months, Governor McMaster signed bills into law that had the effect of expanding absentee voting to every qualified voter in the State, first for the June primary and run-off elections, S.B. 635, 123rd Gen. Assemb. (S.C. 2020), and then for the November general election, H.B. 5305, 123rd Gen. Assemb. (S.C. 2020). While the legislation means that far more South Carolinians will be voting by mail this November, the legislation did not remove the Witness Requirement.

B. Casting and processing an absentee ballot

South Carolina requires that the materials sent to absentee voters contain, among other things, instructions for marking and returning the ballot and a return-addressed envelope containing an oath on the back to be signed by the voter and a witness, which the voter must use to return the ballot itself, which is placed in yet another interior ballot envelope, to elections

officials. S.C. Code Ann. § 7-15-370(2)-(5). On the return envelope, there are blanks for the voter to fill in his or her name and address and to sign the oath, which states: "I hereby swear (or affirm) that I am duly qualified to vote at this election according to the Constitution of the State of South Carolina, that I have not voted during this election, that the ballot or ballots contained in this envelope is my ballot and that I have received no assistance in voting my ballot that I would not have been entitled to receive had I voted in person at my voting precinct." *Id.* § 7-15-380. There are also blanks for a witness to fill in her or his address and signature. *Id.* Absentee ballots must be delivered, either by hand-delivery or by mail, by 7 p.m. on November 3 for the 2020 general election.

Under South Carolina law, when an absentee voter's qualifications are challenged by a third party during the tabulation process, the voter must be given reasonable notice of the challenge. S.C. Code Ann. §§ 7-15-420(D), 7-13-830. That absentee ballot is treated as a provisional ballot; county election officials then consider each ballot and decide the merits of the challenge. *Id.* § 7-13-830. If the county officials do not sustain the challenge, the ballot is no longer considered provisional and is counted. *Id.* Voters casting in-person provisional ballots, such as when an in-person voter fails to produce proper identification, have until the next Friday after the election to cure their provisional status. *See id.* § 7-13-710(C)(1).

The State, however, extends none of the same protections to absentee voters whose ballots are flagged for rejection for some reason *other* than a challenge to the voter's qualifications to vote. Instead, South Carolina provides simply that if a ballot is not "properly signed and witnessed," it cannot be counted. *See id.* § 7-15-420(B) [hereinafter "Signature Requirement" and "Witness Requirement," respectively]. As a result, absent a judicial order, South Carolina will not provide otherwise entirely qualified and lawful absentee voters in the November election with

notice that their ballots have been identified for rejection, or an opportunity to cure where their absentee ballots are rejected, where the basis for rejection is that they were not "properly signed and witnessed."

C. Failure to be "properly signed and witnessed" will lead to ballot rejection.

Thousands of lawful voters' ballots were rejected in South Carolina's past three state-wide federal elections for failure to be "properly signed and witnessed." *See* Declaration of Marc Meredith ("Meredith Decl.") at 2.[1] The rejection rate was as high as 0.31% of all mail ballots for a missing voter signature and as high as 1.05% for an unwitnessed ballot. *Id*. These relatively small percentages will correspond to staggeringly high absolute numbers of potentially disenfranchised voters in the upcoming general election given the massive increase in mailed ballots in November 2020 due to the pandemic, the larger turnout of a Presidential election, and the availability of no excuse absentee voting in South Carolina. Assuming a conservative estimate of 1.6 million mailed ballots in South Carolina, nearly 5,000 ballots are likely to be rejected for a signature issue on the voter oath and approximately 17,000 voters may see their ballots rejected for an unwitnessed return envelope. *Id*. at 4. This means that more than 20,000 South Carolina voters *whose qualifications to vote are not in question* will face disenfranchisement in the November general election due to failure of their ballots to be "properly signed and witnessed." Under Defendants' implementation of state election law, these voters *will not know* that their vote did not count and *will not* have an opportunity to address these purported deficiencies in order to have their vote counted in this election; in other words, they will be completely disenfranchised.

[1] Plaintiffs incorporate by reference the Declaration of Marc Meredith as submitted in *League of Women Voters of South Carolina v. Andino*, No. 2:20-cv-03537-RMG (D.S.C. Oct. 16, 2020), ECF No. 43-2.

The number of rejections for ballots being improperly "signed and witnessed" is not borne equally across South Carolina's population. Voters over age 65 were nearly 50% *more likely* to have their ballots rejected for lack of a witness signature in the 2016 general election compared to younger voters. *Id.* at 3. And Black South Carolinians saw much higher rates of ballot rejections compared to white voters: rates of rejection for a signature-related issue on the voter oath for Black voters were *more than 3 times* those of white voters; rates for unwitnessed return envelope rejections were *more than 2.25 times* higher for Black voters compared to white voters. *Id.*

As explained above, South Carolina voters in federal elections this year have already received conflicting instructions as to the Witness Requirement. The Witness Requirement was not in place for the 2020 primary or runoff elections—voters could (and did) submit mail ballots without a witness signature. *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *30 (D.S.C. May 25, 2020). The Witness Requirement went back in effect after the primary and runoff but was then enjoined again for the November 2020 general election. *See Middleton v. Andino*, No. 3:20-CV-01730-JMC, 2020 WL 5591590, at *38 (D.S.C. Sept. 18, 2020). It was not in place at the time absentee ballots were first mailed to voters in early October. S.C. Election Comm'n, *Election Timeline*, attached as Ex. 2 (noting ballots were mailed September 21 to October 5). But for voters whose absentee ballots are received by election officials on or after October 8, 2020, the Witness Requirement *is* now in place. S.C. Election Comm'n, *New Absentee Rules for the 2020 General Election*, attached as Ex. 3. The consequence is that some ballots have already been received without a witness signature and *will count* in the general election, but others will not.

This leads to the following situation within a month of the general election: voters who *mailed* a ballot without a witness signature when the Witness Requirement was *not in force* will

nonetheless be disenfranchised by virtue of when the mail arrived. If such a ballot happened to arrive by October 7, then the vote counts; if not, the voter is disenfranchised. The Commission's website indicates that the public had—at best—*48 hours* to learn about this change in the Witness Requirement. *Id.* (noting that Witness Requirement was reinstated on October 5, but ballots must be received by October 7 in order to be counted without witness signature); *see also* Greenville County FOIA Resp. at 4 (indicating that websites of county election officials were not updated as of October 7 and including a comment from a county elections official directed at the Commission noting "if we're going to be rejecting ballots, at least have your website up to date").[2]

Plaintiff JoAnn Shernoff experienced the effects of the conflicting instructions on the Witness Requirement firsthand. She is a registered voter and attempted to vote by mail in the 2020 general election. Declaration of JoAnn Shernoff ("Shernoff Decl."), attached as Ex. 4, ¶¶ 4–7. The instructions that came with her ballot stated: "At the time your ballot was mailed, a court has ruled you do not need a witness (Step 7, Instructions for Voting Absentee) for your ballot to count. However, it is possible this court ruling could change. The public will be notified of any changes to the witness requirement through the media and at scvotes.gov." She read instructions and followed news developments, and she understood that the public would be notified if the Witness Requirement was reinstated for the November 2020 election. *Id.* ¶ 7. Given a lack of notice regarding the reinstatement of the Witness Requirement, Ms. Shernoff believed it was still not required, and completed and mailed her ballot without obtaining a witness signature. *Id.* ¶ 7. She learned she was likely disenfranchised only *after* she mailed in her ballot, and without an

[2] Plaintiffs incorporate by reference the Declaration of Thomas Tobin as submitted in *League of Women Voters of South Carolina v. Andino*, No. 2:20-cv-03537-RMG (D.S.C. October 16, 2020), ECF No. 43-1.

opportunity to cure, her vote will be rejected and not count. *See id.* ¶¶ 8–9. She intends to remedy any deficiencies in her ballot if given the opportunity to do so. *Id.* ¶ 9.

Unfortunately, Ms. Shernoff's situation is all too common. Even in the "typical" election, scores of voters are disenfranchised with no opportunity to cure the determination that their ballots were not "properly signed and witnessed." Meredith Decl. at 4. In this election, where thousands more will be casting their ballots absentee—most without any prior experience with absentee voting process, and others whose only experience with it was in this year's primary or run-off elections, in which there was no Witness Requirement—the lack of notice and cure that would enable voters to rescue their ballots from rejection will disenfranchise countless more. This Court should act quickly to ensure that is not the case.

III. Argument

Plaintiffs request a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a) enjoining Defendants from rejecting absentee ballots that are not "properly signed and witnessed" without first providing notice to the voter of the alleged deficiency and permitting the voter an opportunity to cure the alleged deficiency.

A. Legal standard

A preliminary injunction is warranted if plaintiffs show: (1) a likelihood of success on the merits, (2) likelihood of suffering irreparable harm, (3) the balance of hardships favor them, and (4) the injunction serves the public interest. *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs "need not establish a 'certainty of success,'" just "make a clear showing" that they are likely to succeed. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017).

B. Plaintiffs are likely to succeed on the merits of their claims.

1. Plaintiffs are likely to succeed on their First and Fourteenth Amendment undue burden claim.

Defendants' rejections of mailed ballots that are deficiently "signed and witnessed," S.C. Code Ann. § 7-15-420(B), without notice and an opportunity to cure, unconstitutionally burdens the fundamental right to vote. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

a. The "*Anderson-Burdick*" balancing test

Courts considering challenges to state election laws based on a claim that they impose an undue burden on the right to vote must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that a plaintiff seeks to vindicate against the justifications put forward by the state for the burdens imposed. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "However slight th[e] burden [on the right to vote] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) (quotation marks omitted). Even "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995).

A court need not accept a state's justifications at face value, particularly where those justifications are "speculative," otherwise it "would convert *Anderson-Burdick's* means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe." *Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018); *see McLaughlin*, 65 F.3d at 1221 n.6. But even if the burden is less than severe, the challenged law

must be justified by state "interest[s] sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288–89 (1992). This analysis considers only "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434.

b. Lack of notice and an opportunity to cure imposes a severe burden on the fundamental right to vote.

Disenfranchisement is the most severe burden possible on the right to vote. It is also the consequence that follows as a direct result of South Carolina's lack of a notice and cure process for every single voter whose ballot is flagged for rejection based on a witness or signature deficiency, unless Plaintiffs' request for relief is granted. *See* Meredith Decl. at 4. Where the burden imposed on voting is significant, the State must show that its "interest [is] sufficiently weighty to justify the limitation." *Norman*, 502 U.S. at 288–89; *see also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (same). Disenfranchisement of a significant number of voters severely burdens the fundamental right to vote. *See Fla. Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."); *Stewart v. Blackwell*, 444 F.3d 843, 871–72 (6th Cir. 2006) (finding "severe" burden where unreliable punch card ballots and optical scan systems resulted in thousands of votes not being counted).

In fact, courts have found a severe burden even where relatively small numbers of votes were not counted. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3% of total votes inflicted "substantial" burden on voters). In the context of voting rights, "the basic truth [is] that even one

disenfranchised voter—let alone several thousand—is too many." *League of Women Voters of N.C. v. North Carolina* ("*LOWV*"), 769 F.3d 224, 244 (4th Cir. 2014); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318, 1321 (11th Cir. 2019) (same). Here, South Carolina's failure to provide notice of rejection and an opportunity to cure ballots submitted by qualified voters that are not "properly signed and witnessed" summarily disenfranchises thousands of lawful voters and should be enjoined.

c. Defendants' interests in failing to provide a notice and cure process cannot justify the burdens imposed on the right to vote.

Because the burden on South Carolina voters' rights is severe, Defendants must advance a corresponding interest in their no-notice and no-cure procedure that is "sufficiently weighty" to justify the burden on the right to vote and show that it is narrowly drawn to further that interest. *Norman*, 502 U.S. at 288–89. As noted above, the Court must consider the state's actual articulated burdens. The State has not articulated an interest in disenfranchising voters without a notice and cure process, but any alleged state interest in failing to provide notice of a rejection and an opportunity to cure could not justify the corresponding burden on voters. South Carolina's existing system operates by generally discarding ballots that election officials determine are "not properly signed and witnessed," without *any* statutorily-mandated notice or opportunity to cure. "[T]he complete lack of statewide curing procedure is constitutionally inadequate." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *54 (M.D.N.C. Aug. 4, 2020).

There is no legitimate state interest in rigidly enforcing technical requirements to effectively disenfranchise voters and affording these voters no notice and no opportunity to cure, particularly during a pandemic.[3] *See Hoblock v. Albany Cty. Bd of Elections*, 341 F. Supp. 2d 169,

[3] The State's top election official, Commission Executive Director Andino recommended "[r]emov[ing] the witness requirement on ballot return envelopes[,]" altogether because it offered

178 (N.D.N.Y. 2004) (observing the right "is too essential to permit a mere technicality to strip innocent citizens of their right to vote"). Voters may have already voted this year during the primary and/or runoff elections when the Witness Requirement was not in effect. Further, voters who send improperly "signed and witnessed" ballots have (i) already completed a successful vote-by-mail application, (ii) received the ballot at the correct address, and (iii) mailed an otherwise valid ballot. A minor technical requirement—easily remedied—is all that stands between these individuals and making their vote count. Ironically, if an absentee ballot is challenged based on the voter's qualifications to vote, the voter *is* afforded notice and an opportunity to cure. Thus, it is only those voters whose *qualifications to vote* are *not* in question whose ballots are summarily rejected without any opportunity to address the defect on the exterior ballot envelope and have their votes counted.

No fraud-prevention interest can justify depriving these legitimate vote-by-mail voters of even an opportunity to cure the issue for which their ballots are flagged for rejection. *See Lee*, 915 F.3d at 1322. In the case of a missing witness signature, a voter could remedy this issue by submitting a new absentee ballot with the required signatures or going to vote on election day or voting in-person absentee. In the case of a missing or purportedly mismatched voter signature, the State already has a cure process for voters who cast provisional ballots, with such voters having until the Friday following a general election to demonstrate their right to vote. S.C. Code Ann. §§ 7-13-830, 7-17-10, 7-17-510; *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339–40 (N.D. Ga.

"no benefit to election officials." Ex. 1 at 3–4. According to Andino, eliminating the Witness Requirement would "remove a barrier [to voting] many voters would likely encounter while in self-isolation" due to the pandemic. *Id.* at 4. While the utility of the Witness Requirement is not at issue in this litigation, certainly the need to permit a cure for missing witness signatures so that voters are not disenfranchised is only underscored by the Executive Director's view that they serve no purpose to begin with.

2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga.*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (finding no reason to prohibit curing procedures for absentee ballots and comparing to procedures already in place for casting a provisional ballot).

Given the State's no-notice and no-cure procedure for absentee ballots that are not "properly signed and witnessed" serves no legitimate state interest, it cannot overcome the severe burden—disenfranchisement—the State's system places on voting. In the final analysis, even assuming some lesser level of scrutiny applies (which it does not), the State's no-notice and no-cure procedure for these thousands of lawful voters would still be unconstitutional. The Court should grant the proposed injunction.

2. Plaintiffs are likely to succeed on their procedural due process claim.

Plaintiffs are also likely to succeed on the merits of their separate and independent procedural due process claim. Each of the relevant factors supports Plaintiffs' request for a preliminary injunction and demonstrates that the applicable process provided to South Carolina voters (or the lack thereof) is constitutionally inadequate.

a. The *Matthews v. Eldridge* test

The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A procedural due process claim under the Due Process Clause requires a showing of a "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate." *Democracy N.C.*, 2020 WL 4484063, at *52 (citing *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019)). When a constitutionally protected interest is at stake, a court must next determine whether that interest is deprived without adequate process. To make that determination, courts use the three-part test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which requires balancing

of: "(1) the private interest affected by the government action; (2) the risk of erroneous deprivation through the procedures used and the probable value, if any, of alternative or additional procedures; and (3) the state's interest, including the function involved and the fiscal and administrative burdens of added safeguards." *Lovelace v. Lee*, 472 F.3d 174, 202 (4th Cir. 2006) (citations omitted).

b. Plaintiffs possess a constitutionally-protected liberty interest.

The first requirement of a procedural due process claim is easily satisfied here where voters are not notified of the signature deficiencies at any stage of the voting process—even after their ballot is rejected—although these disenfranchised voters already successfully completed an absentee ballot application and received and submitted an otherwise valid ballot. "Beyond debate, the right to vote is a constitutionally protected liberty interest." *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-cv-00071, 2020 WL 2951012, at *5–6, *8 (D.N.D. June 3, 2020); *see also id.* at *8 ("[A] state that creates a system for absentee voting must administer it in accordance with the Constitution.") (citation omitted). While some courts have characterized absentee mail voting as "a privilege and a convenience to voters," it is also well established that a state does not have "the latitude to deprive citizens of due process with respect to the exercise of this privilege" once it is extended. *Martin*, 341 F. Supp. 3d at 1338; *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

c. Plaintiffs' private interest is of critical importance.

When Defendants erroneously reject an individual's mail ballot envelope, an eligible South Carolina citizen is denied the most "precious" of all rights: the right to vote in our democracy. *Yick Wo v. Hopkins*, 18 U.S. 356, 370 (1886). For this reason, the interest affected by the State's lack of notice and opportunity to be heard is of paramount importance. *See Martin*, 341 F. Supp. 3d at

1338 ("the private interest at issue" in mail ballot case "implicates the individual's fundamental right to vote and is therefore entitled to significant weight"); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (adequate process required before mail ballot voters are "denied so fundamental a right"). The first *Mathews* factor therefore weighs strongly in Plaintiffs' favor.

d. The risk of erroneous deprivation of Plaintiffs' rights is high and would be significantly decreased by additional procedures.

The risk of erroneous deprivation of voters' rights in South Carolina is not only high, but certain—ballots flagged for rejection based on a signature or witness issue have no chance of being counted, and voters are not notified nor given any opportunity to cure the deficiency so as to avoid disenfranchisement. Providing procedures, *i.e.*, a cure procedure, would substantially reduce that risk.

First, while the State's failure to provide cure procedures will result in the erroneous deprivation of South Carolinians' rights in every election, the risk is particularly palpable in this election. The Witness Requirement was *not applicable* in the 2020 primary or runoff and also was *not applicable* as of the date many of South Carolina's ballots were mailed by elections officials for the November election. Instead, voters like Ms. Shernoff were surprised to learn that the Witness Requirement *applied* but only to ballots *received* by election officials after October 7.

As a result, an absentee ballot that met all requirements when placed in the mailbox may well have transmogrified into an invalid ballot while in transit through an overburdened postal service. Just by happenstance, some in-transit mail ballots without witness signatures would arrive by October 7 and be counted; others mailed around the same time would not arrive on or before October 7. What's more is that voters might *not suspect* they have any issues with their ballots and would have limited (if any) opportunity to discover and address the issue without the relief sought

by this motion. Some voters are unaware that the Witness Requirement has been reinstated due to the multiple conflicting court decisions and the fact that they were sent instructions stating that the Witness Requirement was not in effect and have not received any notice since then that the Witness Requirement was reinstated. Many voters are voting absentee for the first time; they are especially susceptible to confusion.

Second, the risk of disenfranchising lawful voters from the lack of a cure opportunity for voters will manifest in every election. The State has routinely rejected ballots for perceived signature and witness deficiencies and, in this extraordinary year, more than 20,000 South Carolinians are at risk of disenfranchisement given the projections. Meredith Decl. at 4. This risk is substantially heightened for older voters and Black voters. Meredith Decl. at 3. The increase in vote-by-mail due to the pandemic will only exacerbate the disproportionate impact these rejection rates have on older and Black voters in South Carolina. "Even one disenfranchised voter … is too many," *LOWV*, 769 F.3d at 244, and a cure process could mitigate the disproportionate effect of mail ballot rejections within certain segments of the State's population.

Third, existing procedural safeguards are minimal at best, and are clearly insufficient to protect against erroneous deprivation. There is no requirement that election officials give voters an opportunity to respond to or challenge the decision to reject their ballot because of a signature-related discrepancy or to correct the alleged discrepancy. Nor is there any requirement that a voter receive notice that his or her ballot has been rejected—either before or even after the election.

Providing voters with notice and an opportunity to cure technical deficiencies with their returned absentee ballot reduces the risk of disenfranchisement. "While the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection." *Raetzel*, 762 F. Supp. at 1358. Numerous states

offer such cure periods, recognizing that "[i]t is *not uncommon* for an absentee/mailed ballot to be returned in an envelope that has a problem, such as a missing signature or a signature that doesn't match records." National Conference of State Legislatures, *States that permit voters to correct signature discrepancies* (Sept. 21, 2020), attached as Ex. 5.

Where state legislatures have failed to voluntarily implement adequate procedural protections for absentee voters, courts have not hesitated to ensure that they do. Courts across the country, including in the neighboring states of Georgia and North Carolina, have found that an absentee voting scheme that does not afford adequate process to a voter whose ballot is rejected violates the Fourteenth Amendment's due process clause. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020); *Jaeger*, 2020 WL 2951012; *Martin*, 341 F. Supp. 3d at 1326; *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, (N.D. Ill. Mar. 13, 2006). The Court should find the same here.

C. Plaintiffs will suffer irreparable injury without an injunction.

For the reasons set forth above, Defendants' failure to give voters notice and the opportunity to cure ballots that are purportedly not "properly signed and witnessed" violates the First and Fourteenth Amendments. The second preliminary injunction factor, irreparable harm, is clearly met. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *LOWV*, 769 F.3d at 247; *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520–21 (4th Cir. 2002) (finding threat of the "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury").

Courts have long recognized that disenfranchisement constitutes irreparable injury. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). "[O]nce the election occurs, there can be no

do-over and no redress" to those voters that were improperly disenfranchised. *LOWV*, 769 F.3d at 247; *see also Touchston v. McDermott*, 234 F.3d 1133, 1158–59 (11th Cir. 2000) ("[B]y finding an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of the right to vote is "irreparable harm"). Thousands of voters like Ms. Shernoff will be disenfranchised, as their ballots will be summarily discarded for issues that, had they been notified, they could have addressed. The government taking the fundamental right away from its citizens represents irreparable injury and militates strongly in favor of this Court granting the relief requested by this Motion.

D. The balance of equities and the public interest favor an injunction

As a general matter, "[t]he public interest and the balance of equities favor prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (quotation omitted). This is particularly so where voting rights are at issue because "[t]he public has a 'strong interest in exercising the fundamental political right to vote,'" *LOWV*, 769 F.3d at 248 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)), and in "permitting as many qualified voters to vote as possible," *id.* at 247 (quoting *Husted*, 697 F.3d at 247).

Here, the substantial risk that thousands of qualified South Carolina voters will be disenfranchised substantially outweighs any administrative burden that an injunction might impose. The State's top election official has acknowledged that the Witness Requirement offers *no* administrative benefit, but instead erects a barrier against increased voter participation during the pandemic. Ex. 1 at 4. Plaintiffs' requested remedy will not change the deadlines, requirements, or process for submitting an absentee ballot; it will impose no change at all on the rules governing how voters initially cast their ballot. The requested relief would simply mandate that the State inform voters of their ballot's rejection and provide them with a reasonable opportunity to cure the

deficiency. In other words, it allows voters to submit a vote *that actually counts* rather than keeping a technicality from allowing them to exercise their right to the franchise. *See Hoblock*, 341 F. Supp. 2d at 178 (observing the right "is too essential to permit a mere technicality to strip innocent citizens of their right to vote").

IV. Conclusion

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

a) Declare that failure to provide voters notice and an opportunity to cure alleged signature-related deficiencies related to the Signature Requirement imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments to the Constitution of the United States;

b) Declare that failure to provide voters notice and an opportunity to cure alleged deficiencies related to the Witness Requirement imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments to the Constitution of the United States;

c) Declare that the failure to provide voters notice and an opportunity to cure alleged deficiencies related to the Signature and Witness Requirements deprives Plaintiffs of procedural due process in violation of the Fourteenth Amendment to the Constitution of the United States by disenfranchising absentee voters without providing them with notice of the rejection of their absentee ballot and an opportunity to be heard;

d) Issue preliminary and permanent injunctions enjoining the Defendants from failing to provide absentee voters with notice and an opportunity to cure the rejection of their absentee ballots for deficiencies related to the Signature and Witness Requirements. Plaintiffs seek an injunction further requiring that Defendants direct county election officials to:

1) promptly review absentee ballot envelopes for disqualifying deficiencies (e.g., a missing voter or witness signature) on a rolling basis as they are received;

2) notify voters of deficiencies within two business days of the identification of the deficiency by phone and e-mail if that information is available and by mail if neither phone nor e-mail is available;

3) create and make available a list of voters (including name, mailing address, and date of birth) who have submitted absentee ballots that do not comply with the Witness or Signature Requirement on a daily basis through November 3, 2020 so that organizations such as DSCC may notify voters that their absentee ballots are defective and help those voters avoid disenfranchisement;

4) permit voters who have submitted an absentee ballot that is rejected because of the Signature Requirement to cure their ballot by submitting an affidavit by mail or e-mail (either themselves or via a third party, such as a state party) to their county, affirming their identity, up until the Friday following the election; and

5) clarify that voters who submitted an absentee ballot without fulfilling the Witness Requirement are permitted to cure that deficiency by voting absentee or in person absentee or on Election Day;

e) Award reasonable attorneys' fees and costs to Plaintiffs under 42 U.S.C. § 1988; and

f) Grant any additional or alternative relief the Court may deem appropriate under the circumstances.

Dated: October 18, 2020

By: /s/ Thomas J. Tobin

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