
In The Supreme Court of the United States

MARCI ANDINO, ET AL.,

Applicants,

v.

KYLON MIDDLETON, ET AL.,

Respondents

ON EMERGENCY APPLICATION FOR STAY

To The Honorable John G. Roberts, Jr., Chief Justice of
the United States and Circuit Justice, Fourth Circuit

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE, MOTION FOR LEAVE TO
FILE ON 8 ½ BY 11 INCH FORMAT, BRIEF OF
AARP AND AARP FOUNDATION AS AMICI
CURIAE OPPOSING EMERGENCY
APPLICATION FOR STAY AND SUPPORTING
RESPONDENTS**

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ON EMERGENCY APPLICATION FOR STAY

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE BRIEF**

AARP and AARP Foundation respectfully move for leave of Court to file the accompanying Brief of Amici Curiae opposing the application for stay and supporting respondents.

The respondents consent to the filing of the brief. Applicants do not object; they take no position on the Motion for Leave.

While applicants note, as proposed amici acknowledge, that this Court “strongly discourage[s]” amicus briefing “in connection with emergency applications,” proposed amici respectfully seek leave to file for the following urgent reasons:

The stakes in this case for older voters in South Carolina—who are medically vulnerable to coronavirus infection, and whose risk of contracting the virus if forced to secure a witness to vote absentee would significantly increase—are literally life-threatening. On the other side of the coin, lack of access to safe means of voting for vulnerable older voters puts in jeopardy their fundamental right to vote. These older voters include hundreds of thousands of AARP members and others similarly situated, to whose needs amici are dedicated to giving voice. The proposed brief presents data documenting

these high stakes in terms of the health risks posed for medically vulnerable voters and the especially high levels of electoral participation among older voters likely to be deterred by granting a stay.

The circumstances of this case, amidst a once-in-a-century public health emergency, are unique. Thus, receiving the brief of amici will not undermine the Court's policies and preferences. Nor will doing so delay the expedited consideration of this matter.

Wherefore, AARP and AARP Foundation urge the Court to grant their Motion for Leave to File.

Respectfully submitted this 3rd day of October 2020.

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ON EMERGENCY APPLICATION FOR STAY

**MOTION FOR LEAVE TO FILE ON 8 1/2 BY 11
INCH FORMAT**

AARP and AARP Foundation respectfully move for leave of Court to file their amicus brief in opposition to Applicants' Emergency Application for Stay on 8½ by 11-inch paper rather than in booklet form.

In support of their motion, amici assert that the Emergency Application for Stay filed by Applicants in this matter was filed on Thursday, October 1, 2020. The expedited filing of the application and the

resulting compressed deadline for any response prevented amici from being able to get this brief prepared for printing and filing in booklet form. Nonetheless, amici desire to be heard on the application and request that the Court grant this motion and accept the paper filing.

Wherefore, AARP and AARP Foundation urge the Court to grant their Motion for Leave to File on 8 1/2 BY 11 Inch Format.

Respectfully submitted this 3rd day of October 2020.

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ON EMERGENCY APPLICATION FOR STAY

**BRIEF OF AARP AND AARP FOUNDATION AS
AMICI CURIAE OPPOSING EMERGENCY
APPLICATION FOR STAY**

STATEMENT OF INTEREST OF AMICI¹

AARP is the nation’s largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, including (as of June 2020) over 608,000 members in South Carolina, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP’s charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation (“Amici”) litigate and file amicus briefs on issues that impact these and other concerns of older adults, including laws affecting their right to vote. This work has included representation of older voters in federal and state courts.² Amici also have previously filed amicus briefs contesting voting barriers affecting older (and younger) persons.³

¹ Amici state that this brief was not authored in whole or in part by any party or their counsel, and no person other than amici, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

² See, e.g., *Common Cause Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

³ See, e.g., *Weinschenk v. State*, 203 S.W. 3d 201 (Mo. 2016) (affirming decision striking down a state photo ID law); *Arizona*

Amici are alarmed by South Carolina officials' failure to ease the Witness Requirement for absentee voting in the November general election as in the August primary. The State law at issue poses grave risks to all older voters and to persons with serious medical conditions and/or disabilities—disproportionately older adults—who must leave social isolation to secure a witness to their absentee ballot. Moreover, South Carolina law needlessly puts at great risk the health of medically vulnerable individuals—whether voters or not—who live with others who risk coronavirus infection by voting in-person or absentee subject to the Witness Requirement.

Amici support plaintiffs' motion to continue the setting aside of the Witness Requirement for the upcoming November general election, just as it was set aside for the August primary. This relief is critical to preserving the health, safety, and voting rights of millions of medically vulnerable older South Carolinians.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that the consequences for those who become infected with COVID-19, especially those with serious medical conditions, are severe, even life threatening. Indeed, that is the premise of the prior district court order enjoining the Witness

v. Inter-Tribal Council of Ariz., Inc., 570 U.S. 1 (2013) (affirming decision striking down state law requiring proof of citizenship to register to vote).

Requirement for the primary election that South Carolina public officials declined to appeal. And available evidence indicates that public health risks due to COVID-19 also will be great come November, if not worse.⁴ Thus, similar steps are required consistent with the needs of the electorate and, indeed, the State's interest in public health and safety.

Two key aspects of this dire public health situation not fully addressed by the parties, however, is its' grossly disproportionate impact on the most reliable segment of the voting population—older voters, and the fact that there is potential medical risk of COVID-19 infection for well over half of all voters in South Carolina. For the general election, as for the primary, the constitutional balancing of risk and benefit, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992), cannot plausibly be struck by so endangering such a large share of the electorate and, in particular, virtually all older voters, the State's most reliable and committed election participants.

⁴ See, e.g., Len Strazewski, *Harvard Epidemiologist: Beware COVID-19's Second Wave This Fall*, AM. MED. ASS'N: PUB. HEALTH (May 8, 2020), <https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall>.

ARGUMENT

- I. To Assure that Older South Carolinians Can Vote Safely, the State Must Limit High-Risk, Interpersonal Contact in the November Election.**
- A. For Medically Vulnerable Older Voters, Risk of COVID-19 Infection for the General Election Would Be Unacceptably High If the Witness Requirement Is Enforced and Absentee Voting Thereby Requires Close Contact with Persons Whose Compliance with Anti-Virus Measures Is Unknown.**

The Centers for Disease Control and Prevention (the “CDC”) has laid out basic principles for minimizing the risk of contracting COVID-19 illness. These stress that the COVID-19 virus is spread “[b]etween people who are in close contact with one another (within about [six] feet),” “[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks,” because “these droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.”⁵ The CDC adds that: “some people without symptoms may be able to spread [the] virus”; “[k]eeping distance from others is especially important for people who are at higher risk

⁵ *Protect Yourself*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

of getting very sick”; and a “cloth face cover [presumably, whether worn by oneself or by another] is not a substitute for social distancing.”⁶

Based on these and other related precepts, the CDC has developed guidance for the conduct of elections.⁷ The agency endorses “a wide variety of . . . options” beyond just in-person voting and extensive measures to render in-person voting safe.⁸ In summary, the CDC states:

Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times. Lower risk election polling settings include those with: . . . any other feasible options for reducing the number of voters who congregate indoors in polling locations at the same time.⁹

⁶ *Id.* (“Avoid close contact” and “Cover your mouth and nose with a cloth face cover when around others”) (emphasis in original).

⁷ *See Considerations for Election Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. The CDC observes that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.” *Id.*

⁸ *Id.* (specifying “Guiding principles to keep in mind”) and (“Recommendations for Election Officials and Poll Workers,” and “Maintaining healthy environments”).

⁹ *Id.* (emphasis in original).

In effect, the agency acknowledges that a voter's risks in voting in-person are heavily dependent on the actions taken by many strangers, including i.e., other voters, election officials, and poll workers. It follows that voters generally will have little or no idea how safe it will be to vote in person, before deciding whether to do so.

Hence, it is unsurprising that the CDC advises individual voters to

Consider voting alternatives available in your jurisdiction that minimize contact [since] [v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.¹⁰

In short, the agency suggests weighing the option of *not* voting in-person, if it exists. Yet, in South Carolina, if the Witness Requirement is enforced, many medically vulnerable voters will face great risk due to the need for close contact with persons whose compliance with anti-virus measures is quite uncertain whether they vote in-person or absentee.

For these reasons, among others, the district court has twice enjoined the Witness Requirement. The underlying facts of the dangers of coronavirus

¹⁰ *Considerations for Election Polling Locations and Voters*, *supra* note 9 (“Recommendations for voters”) (emphasis in original).

have not changed and, indeed, the risks of life-threatening interpersonal contact loom greater for medically vulnerable older voters in the general election than they did in the primary.

The district court and plaintiffs have identified several groups facing acute dangers due to inadequate alternatives to in-person voting.¹¹ These include a large share of the electorate, living alone, with one or more serious medical conditions that create a high risk of serious injury (or death) if they contract COVID-19 due to close interpersonal contact in the course of voting absentee or in-person. Ironically, such persons would have to violate social distancing norms to comply with the Witness Requirement, just as they would to vote in-person. Medically vulnerable older persons—whether voters or not—also would be subject to potentially life-threatening risk if other persons in their household are required to comply with the Witness Requirement, as would be the case if their co-residents were to vote in-person. Equally troubling is the likelihood that in the face of these risks, many medically vulnerable voters, and still other voters cohabiting with medically vulnerable persons, will simply decide not to vote because they cannot be sure of doing so safely.

¹¹ *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590, *10-11, 13, 21, 28-30 (D. S.C. Sept. 18, 2020).

B. Risks of Serious Harm, Including Death, Due to COVID-19 Are Especially High for Older South Carolinians.

The CDC states plainly that “the risk for severe illness from COVID-19 increases with age, with older adults at highest risk.”¹² This means that older adults with COVID-19 are more likely to “require hospitalization, intensive care, or a ventilator to help them breathe, or [to] die.”¹³ The reasons for this phenomenon include the increasing incidence of underlying medical conditions as people age, as noted below. But they also include weakening of the immune system as adults age¹⁴ and the fact that “[a]dults 65 & over are at higher risk for flu complications,” which can exacerbate illness related to COVID-19.¹⁵

The CDC also lists a daunting variety of “underlying medical conditions” for which significant

¹² *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>. [hereinafter *Older Adults*]. *See id.* (“people in their 50s are at higher risk for severe illness than people in their 40s . . . people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.”).

¹³ *Id.*

¹⁴ *See, e.g.,* Veronique Greenwood, “*How the Aging Immune System Makes Older People Vulnerable to COVID-19*”, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/health/covid-aging-immune-system.html>.

¹⁵ *Older Adults*, *supra* n. 12.

data indicate that “[p]eople of any age . . . **are at increased risk** for severe illness from COVID-19” (emphasis in original).¹⁶ The CDC also has set forth nearly as troubling a list of conditions for which more limited data indicate that people of any age “**might be at an increased risk** for severe illness from COVID-19[.]”¹⁷

Yet, another serious possibility is long-term dysfunction and/or disability for those who recover from coronavirus illness.¹⁸ Such effects may include

¹⁶ *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Aug. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. [hereinafter Underlying Medical Conditions].

¹⁷ *Id.* (emphasis in original).

¹⁸ See, e.g., Mark W. Tenforde, et al., *Symptom Duration and Risk Factors for Delayed Return to Usual Health for Outpatients with COVID-19 in a Multistate Health Care Systems Network – United States, March–June 2020*, 69 CDC Morbidity and Mortality Weekly Report 5 (July 24, 2020), (finding “[o]lder age and presence of multiple chronic medical conditions have previously been associated with illness severity among adults hospitalized with COVID-19 (8,9); in this study, both were also associated with prolonged illness in an outpatient population.”) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6930e1.htm>; Joseph Guzman, *90 percent of coronavirus patients experience side effects after recovery, study finds* (Sept. 29, 2020), <https://thehill.com/changing-america/well-being/longevity/518751-90-percent-of-coronavirus-patients-experience-side>. (“An online survey of 965 recovered COVID-19 patients conducted by the Korea Disease Control and Prevention Agency (KDCA) found more than 90 percent of respondents reported experiencing side effects associated with the disease, such as fatigue, loss of sense of taste and smell and psychological effects.”).

“damage [to] the lungs, heart and brain, which increases the risk of long-term health problems[,]” especially for “older people and people with many serious medical conditions.”¹⁹

Myriad data show that older persons constitute a disproportionate share of individuals who experience most of the high-risk conditions identified by the CDC.²⁰ This applies to CDC high-risk conditions such as cancer,²¹ chronic kidney disease,²²

¹⁹ Mayo Clinic Staff, *COVID-19 (coronavirus): Long-term effects*, MAYO CLINIC (Aug. 18, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>.

²⁰ The CDC also emphasizes that disproportionate numbers of COVID-19-related deaths occur among older persons. “8 out of 10 COVID-19 deaths in the United States have been in adults over the age of 65.” CDC, *Older Adults*, *supra* n. 12.

²¹ The estimated nationwide incidence of “invasive” cancers (2017, all ages, including children 0-17) is between 1.4 and 1.7%. *United States Cancer Statistics, Data Visualizations*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 2020) <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (go to “Prevalence”, scroll to “All Types of Cancer, Estimated Prevalence Percentages, by Age, Race, and Sex, 5-year Limited Duration, United States, Invasive Cancers only, on January 1, 2017”). The incidence exceeds 1% for all groups age 40 and above and is much less than 1% for age groups 20-29 (0.1712%) and 30-39 (0.4347%). *Id.*

²² *Chronic Kidney Disease (CKD) Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited October 2, 2020), <https://nccd.cdc.gov/CKD/FactorsOfInterest.aspx?type=Age>. After the age of 40, kidney filtration begins to fall by approximately 1% per year. In addition to the natural aging of the kidneys, many conditions that damage the kidneys are more

COPD (chronic obstructive pulmonary disease),²³ obesity (i.e., body mass index (“BMI”) of 30 or higher),²⁴ “serious heart conditions, such as heart failure, coronary artery disease, or

common in older people including diabetes, high blood pressure, and heart disease.”).

²³ “Chronic obstructive pulmonary disease, or COPD, refers to a group of diseases that cause airflow blockage and breathing-related problems. It includes emphysema and chronic bronchitis.” *Chronic Obstructive Pulmonary Disease (COPD)*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited October 2, 2020), <https://www.cdc.gov/copd/index.html> (click on menu, click on “Basics About COPD,” scroll down to “What is COPD?”). “People aged 65 to 74 years and ≥ 75 years” were “more likely to report COPD in 2013.” *Id.* (click on menu, click on “Basics About COPD,” scroll down to “Who has COPD?”). COPD is more common in South Carolina than nationally: 5.7%-6.4% of the population at or over age 18. *Id.* fig. 3 (click on menu, click on “Data and Statistics,” scroll down to “COPD Prevalence in the United States”).

²⁴ As of 2019, the CDC reports, the incidence of self-reported obesity among South Carolinians age 18 or over was an estimated 35.4%, a figure greater than for all but 10 states. *Overweight and Obesity/Data & Statistics/Data, Trends and Maps/Adult Obesity Prevalence Maps*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last visited Oct. 2, 2020) <https://www.cdc.gov/obesity/data/prevalence-maps.html>.

cardiomyopathies,”²⁵ and Type 2 diabetes mellitus.²⁶ The same is true of entries on the list of conditions due to which people of any age “might be at an increased risk of severe illness“ due to COVID-19.²⁷ These conditions include hypertension/high blood

²⁵ Underlying Medical Conditions, *supra* note 16. CDC data from 2015-17 show that 16.2% of South Carolinians at or over age 45 had coronary heart disease (“CHD”) or had had a stroke, or both. *Coronary Heart Disease, Myocardial Infarction, and Stroke –A Public Health Issue*, CTRS. FOR DISEASE CONTROL AND PREVENTION, at 5 (July 30, 2019), <https://www.cdc.gov/aging/agingdata/docs/Coronary-Stroke-Brief-508.pdf>. Significantly, over 30% of such individuals reported living alone. *Id.* at 5. Only about 3% of Coronary artery disease (CAD) cases occur in individuals under age 40. Lloyd W. Klein & Sandeep Nathan, *Coronary Artery Disease in Young Adults*, 41 J. AM. C. CARDIOLOGY 529, 529 (2003).

²⁶ An estimated 10.5% of the population of South Carolina has either “Type 2” or “Type 1” diabetes. *National and State Diabetes Trends*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 10, 2019), <https://www.cdc.gov/diabetes/library/reports/reportcard/incidence-2017.html>. (scroll down to Table 1, “Percentage of US Adults Aged 18 or Older with Diagnosed Diabetes, by State, 2015”). Ninety-to ninety five percent of these individuals are Type 2. See *National Diabetes Statistics Report*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2020), <https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf>. The incidence of diabetes nationwide (diagnosed and undiagnosed, combined) varies by age from 26.8% for those at or over age 65, to 17.5% for those between ages 45-64 and 4.2% for those ages 18-44. *Id.* at 2 tbl. 1a.

²⁷ Underlying Medical Conditions, *supra* note 16.

pressure and neurologic conditions, such as dementia.²⁸

The prevalence of the two other high-risk factors²⁹ is less clear. Being in an “immunocompromised state” encompasses many conditions with diverse features and affected populations.³⁰ “[S]ickle disease,” while relatively rare, afflicts a very high proportion of African Americans: 1 in 365.³¹

All told, as much as (or more than) one-half of the South Carolina electorate is affected by the conditions the CDC has identified as posing high-risk of severe illness or even death for those who contract COVID-19: these include, principally, obesity (35.4% of South Carolina adults), diabetes (10.5%), heart disease/stroke 16.2% of those >45), and lung

²⁸ *Id.* Of these conditions, hypertension is especially common: “During 2015–2016, the prevalence of hypertension was 29.0% and increased with age: age group 18–39, 7.5%; 40–59, 33.2%; and 60 and over, 63.1%.” Cheryl D. Fryar, et al, *Hypertension Prevalence and Control Among Adults in the United States, 2015–2016*, NAT’L CENTER FOR HEALTH STAT. DATA BR. 289, at 1 (October 2017) <https://www.cdc.gov/nchs/data/databriefs/db289.pdf>.

²⁹ Underlying Medical Conditions, *supra* note 16.

³⁰ *Id.*

³¹ *Sickle Cell Disease (SCD)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last accessed October 2, 2020), <https://www.cdc.gov/ncbddd/sicklecell/data.html>. Navigate to Data & Statistics on Sickle Cell Disease,” “In the United States”).

disease/COPD (at least 5.7%). The share of older voters at still greater risk because they are affected by more than one of these scourges is significant. Considering the CDC's list of conditions that "may" portend at least some degree of elevated health risk, the share of the electorate affected overall exceeds 50%, and the share of AARP-member-age voters (50+) likely reaches well over a majority.

The health risks facing older (and other medically vulnerable) South Carolina voters due to COVID-19 are stunningly high. The uncertainty inherent in, and potential adverse health consequences of in-person voting and absentee voting, with the Witness Requirement in place, demand further steps to assure true access to safe "voting alternatives," such as absentee voting without the Witness Requirement.

**C. The COVID-19 Crisis—and Dangers
Related to Enforcement of the Witness
Requirement—Will Still Be Present in
November.**

Dangers posed by the COVID-19 pandemic have not changed appreciably since South Carolina conducted its primary election without enforcing the Witness Requirement, and they show no signs of abating. Rather, there is strong evidence that the virus still will be a serious threat in South Carolina between now and November 3. Thus, the possibility that setting aside the Witness Requirement for the general election will be an inconsequential public safety and health measure is vanishingly low. It would

be irresponsible to plan on conducting the general election safely without preserving the district court injunction against the Witness Requirement.

In May 2020, “nationally renowned University of Minnesota epidemiologist Michael Osterholm and a team of researchers” concluded that “[t]he growing COVID-19 pandemic could last up to two years, with a potential second wave in the fall[.]”³² Indeed, there is broad agreement that such a “second wave” of COVID-19 infection is may coincide with—and be exacerbated by—the annual flu season.³³ One major academic research center recently announced results including troubling data regarding the status of COVID-19 in the nation generally and South Carolina in particular: in the U.S., “around 40,000 [new] cases a day, essentially staying flat since the fourth week of August”; and that

³² Glen Howatt, *COVID-19 Cases Could Surge in Fall, Last Two Years, University of Minnesota Report Says*, MINNEAPOLIS STAR-TRIB. (May 3, 2020), <https://www.startribune.com/covid-19-cases-could-surge-in-fall-last-2-years-u-report-predicts/570130602/>; see also Strazewski, *supra*.

³³ See, e.g., Cory Stieg, *What A ‘Second Wave’ of COVID-19 Could Look Like and How to Prevent It*, CNBC (updated June 29, 2020), <https://www.cnbc.com/2020/06/28/what-second-wave-of-covid-19-means-and-how-to-prevent-it.html> (quoting Dr. Anthony Fauci, as well as experts at Harvard, Emory, and Columbia Universities, and the Mayo Clinic); Christopher Brito, *CDC Director Says Potentially Worse Second Wave of Coronavirus Could Come Along With Flu Season*, CBS NEWS (April 23, 2020), <https://www.cbsnews.com/news/coronavirus-second-wave-cdc-director-robert-redfield-warning-flu-season/>.

South Carolina is only one of seven states in which “[d]eath rates over 4 per million are now seen[.]”³⁴

The CDC’s “COVID Data Tracker” shows South Carolina ranked 18th among all states in the number of new coronavirus cases (6,256) in the past seven days.³⁵ In contrast, South Carolina ranks 23rd in overall state population; this disparity is concerning to Amici as the State is ranked 10th in the share of its population in the age category most at-risk for contracting COVID-19: age 65 and over.³⁶

Amici submit that these data also strongly support a ruling responsive to the need to preserve the fundamental right to vote as well as the health of the medically vulnerable.

³⁴ Inst. for Health Metrics & Evaluation, Univ. of Wash., *United States, Model Updates for September 23, 2020*, IHME (Sept. 23, 2020), https://www.healthdata.org/sites/default/files/files/Projects/COVID/briefing_US_092320.pdf.

³⁵ *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#casesinlast7days (as of Oct 2, 2020).

³⁶ See Ellen Kershner, *The 50 US States Ranked by Population* (June 12, 2020), <https://www.worldatlas.com/articles/us-states-by-population.html>, and Christine L. Himes, et al., *Which U.S. States Have the Oldest Populations?*, Population Reference Bureau (March 16, 2019), <https://www.prb.org/which-us-states-are-the-oldest/#:~:text=States%20Ranked%20by%20Percent%20of%20Population%20Age%2065,%20%2019.4%20%2046%20more%20rows%20>.

**D. Enforcing the Witness Requirement
Would Be Especially Perverse Given
the Higher Levels of Electoral
Participation of Older Voters Who Are
Most at Risk from COVID-19.**

Older voters cast ballots at rates out of proportion to their share of the electorate, amplifying the adverse impact of rules putting that population at risk. For instance, a survey of “validated” 2016 voters nationwide showed that voters age 50 and above constituted 57% of the electorate in the immediate prior Presidential Election year, while the same age group represented a much smaller portion (33%) of non-voters; in contrast, voters age 18-49 represented 43% of voters nationwide and 66% of non-voters.³⁷

South Carolina voting data show the same pattern. In 2016, 62.1% of U.S. citizens in South Carolina voted.³⁸ This group included a higher percentage of those over age 45—69.5%—compared to 44.0% of those age 18-24, 49.2% of those 25-34, and 59.0% of those age 35-44.³⁹ In 2018, these disparities

³⁷ *An Examination of the 2016 Electorate, Based on Validated Voters*, PEW RESEARCH CTR. (2018), <https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/>.

³⁸ U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, CENSUS.GOV (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>, ((Table 4c “Reported Voting and Registration by Age, for States: November 2016”).

³⁹ *Id.*

were also marked for the oldest voters. South Carolina citizens ages 65+ voted at a rate of 64.1% compared to 24.1% of those between ages 18-24, 31.7% of those 25-34, 53.0% of those 35-44, and 52.5% of those 45-64.⁴⁰

Other nationwide data strongly suggest that South Carolina absentee voting rules are especially likely to harm the voting rights of older persons by disadvantaging people with disabilities, who are generally more prone to serious harm from COVID-19 infection. Roughly 20% of Americans have “severe” disabilities.⁴¹ Of these individuals, a greater than average share are over age 55—41.6% of those age 65+ and 26.1% of those 55-64, while fewer than average are age 18-54—7.7% of those age 18-24, 8.4% of those age 25-34, 12.4% of those 35-44, and 18.6 % of those 45-54.⁴² Recent data for South Carolina show a voting age population of people with disabilities of approximately 669,000 persons.⁴³ Of this cohort, close

⁴⁰ U.S. Census Bureau, *Voting and Registration in the Election of November 2018*, CENSUS.GOV (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> (Table 4c “Reported Voting and Registration, for States: November 2016”).

⁴¹ Danielle M. Taylor, *Americans with Disabilities: 2014*, U.S. CENSUS BUREAU (2018) <https://www.census.gov/library/publications/2018/demo/p70-152.html>.

⁴² *Id.*

⁴³ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY tbl. S1810, (2018), https://data.census.gov/cedsci/table?q=S1810&g=0400000US27&tid=ACSS1Y2018.S1810&hidePreview=false&vintage=2015&layer=VT_2015_040_00_PP_D1&cid=S1810_C01_001E, (“Disability Characteristics”).

to half (an estimated 302,789 or ~45%) were age 65 or above; and far greater shares of South Carolinians age 65-74 (26.3%) and 75+ (47.4%) are in the group with disabilities, compared to those between ages 35-64 (15.2%) or 18-34 (7.0%).⁴⁴

II. The Witness Requirement as Applied to the November General Election in South Carolina Violates the U.S. Constitution by Creating an Undue Risk of Serious Injury or Death for Medically Vulnerable Voters, Most of Whom Are Older.

Amici concur with the district court's cogent analysis and application of the standards imposed by the U.S. Constitution and this Court's decisions on potential infringements of the "fundamental matter" of voting rights. *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590, *24 (D. S.C. Sept. 18, 2020) (citing *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)); *see also id.* at *26-33 (discussing the "flexible" test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, U.S. 428 (1992)). The district properly observed that "while vindicating individual constitutional rights," courts must "carefully balance," *id.* at *26, what *Anderson* called "the state's important regulatory interests" in election supervision, and, hence, courts must generally defer to election officials when "those interests make it necessary to burden the plaintiff's rights." *Id.* (quoting *Anderson*, 460 U.S. at 789). In its lengthy opinion, the

⁴⁴ *Id.*

district court fulfilled its duty of care. In an instance of considerable understatement, it concluded that given the “unusual fact pattern” presented by the COVID-19 crisis, *id.* at *27, the Witness Requirement is not “necessary to burden medically vulnerable voters’ rights. It said, again, exhibiting an abundance of caution, that the Witness Requirement would “inflict” such “burdens at least of sufficient magnitude to warrant [an] injunction.” *Id.* at *28.

The district court was correct. And the en banc Court of Appeals’ 9-5 vote to vacate a stay and reinstate the district court’s injunction was as well.

The Witness Requirement presents many South Carolinians with an impossible choice in November: foregoing the opportunity to vote or subjecting themselves to unacceptable risk of COVID-19 infection. As plaintiffs-respondents demonstrated below, and as the district court recognized, many eligible voters are medically vulnerable, live alone, and lack a trusted person with whom they can safely interact to witness their absentee ballot. 2020 WL 551590 at *28-29. Leaving isolation to find a witness (e.g., at a neighbor’s residence, or a local store, or the county library), creates other—and likely greater—risks of interpersonal contact and, thus, exposure to possible COVID-19 carriers. Moreover, the number of persons who may be disenfranchised or endangered by the Witness Requirement in November is likely to far

outstrip the number of those who were at risk in the State's June primary.⁴⁵

Enjoining enforcement of the Witness Requirement would allow many thousands of older, medically vulnerable South Carolinians to vote safely via absentee ballot in the general election, just as in the June primary. If the Witness Requirement is now restored to life, they would have to *modify* their isolation regime to vote and thereby compromise their efforts to minimize risks of contracting the coronavirus in ways they did not have to just months before. This confirms that a stay would disturb, not reinstate, the status quo. *See Middleton v. Andino*, No. 20-2022 (4th Cir. Sept. 20, 2020), Slip. Op. at 3 (King, J., concurring in denial of a stay pending appeal: “to stay the injunction so close to the election would engender mass voter confusion and other problems that the Supreme Court warned against in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).”). Older medically vulnerable South Carolinians should have to undertake such risks to exercise their fundamental right to vote.

The Witness Requirement threatens to deny opportunity to vote safely for many with no apparent benefit of consequence to election officials or to the electorate, whether in guarding against the imagined specter of voter fraud or otherwise. At least for this

⁴⁵ See, e.g., Morgan Newell, *Record-breaking absentee ballot request[s] cause concern with S.C. voters, election officials ease them*, 3WBTW (Sept. 30, 2020), <https://www.wbtv.com/2020/09/30/record-breaking-absentee-ballot-request-cause-concern-with-sc-voters-election-officials-ease-them/>.

November, a severe barrier to safe voting such as the Witness Requirement is not “necessary.” *See Middleton v. Andino*, No. 20-2022, Slip. Op. at 3, note (King, J. concurring) (“the dissent urges unquestioning acceptance of the State’s dubious justification for the witness requirement, along with essentially unfettered power of the state government to make voting harder in the name of ‘preventing voter fraud.’”).

The Witness Requirement’s harms are out of proportion to its supposed benefits. It is dangerous and discriminatory. In contrast, the en banc court’s order vacating the stay granted by the panel promises a welcome margin of safety for older (and younger) medically vulnerable voters. The stay application should be denied.

CONCLUSION

For the reasons set forth above, Amici urge the Court to deny the emergency application for a stay.

Respectfully submitted,

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